Capital Controls as Migrant Controls

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The disparate treatment of capital and labor reflects one of globalization's central asymmetries: the law often allows financial capital, but not people, to move freely across borders. Yet scholars have largely neglected the intersection of these two regimes, the legal restrictions on migrants' capital, particularly when the migrants themselves are deemed illegal. These restrictions on migrants' capital abound even while migratory capital generally faces few such restrictions. As such, capital controls may operate as migrant controls.

This Article canvasses established and emerging examples of capital controls as migrant controls and the pressing legal questions these controls raise. Capital is guarded when remittances are taxed, particularly when the taxation is explicitly conditioned on immigration status. Capital is expelled when capital receipts, such as Social Security benefits, are made contingent on departure and non-residency. And capital is marginalized when financial laws require particular identity and immigration documents on penalty of exclusion from key financial services.

As I describe, such taxation, receipt contingencies, and identity requirements often distinguish on the basis of immigration status and implicate core questions in constitutional and immigration law. These questions include the scope of traditional state powers such as taxation; how such controls create unconstitutional choices and conditions; and how statutory and administrative ambiguities in banking law may marginalize migrants. More generally, these controls contribute to our understanding of who—Congress, federal agencies, municipalities and states, or social movements outside the law—controls, and who may legally control, American migration.

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INTRODUCTION

Sovereign borders are of two minds: welcoming to capital but often hostile to humanity.[1] Capital markets reflect globalization more fully than labor

1. Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1575 (2000) ("In the current age of globalization, capital is much more mobile than labor."); Patricia Fernández-Kelly & Douglas S. Massey, *Borders for Whom? The Role of NAFTA in Mexico-U.S. Migration*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 108 (2007) ("Under NAFTA, the United States has moved forcefully to fuse all markets save one—that for labor . . . ."); LANT PRITCHETT, LET THEIR PEOPLE COME: BREAKING THE GRIDLOCK ON INTERNATIONAL LABOR MOBILITY, at xi (2006) ("In an increasingly integrated and liberalized economy, with more open capital and goods and services markets, the highly restricted and heavily regulated markets for global labor are an oddity."); Christian Dustmann & Ian P. Preston, *Free Movement, Open Borders, and the Global Gains from Labor Mobility*, 11 ANN. REV. ECON. 783, 804 (2019) (carefully explaining the theoretical economic grounding for global labor mobility while acknowledging that "[t]he principal objections to free mobility from receiving countries are probably cultural, not economic"); *see also* Lucia Zedner, *The Hostile Border: Crimmigration, Counter-Terrorism, or Crossing the Line on Rights?*, 22 NEW CRIM. L. REV. 318, 320 (2019) (examining "the creation of a hostile border," particularly the "equipping of [border] police and immigration officers with tough powers"); Emily Ryo, *Understanding Immigration Detention: Causes, Conditions, and Consequences*, 15 ANN. REV. L. & SOC. SCI. 97, 99 (2019) (noting "the practical similarities between immigration detention and criminal incarceration"); Emily Ryo & Ian Peacock, *Jailing Immigrant Detainees: A National Study of County Participation in Immigration Detention, 1983–2013*, 54 LAW & SOC'Y REV. 66 (2020).

markets.[2] Even when separating allies, friendly nations, and trading partners, borders are still heavily militarized.[3] Due in part to these movement restrictions, only a small percentage of the world's population appears to live in countries where they were not born.[4] The hindered mobility of people contributes to significant income and other economic inequalities.[5]

In the twenty-first century, capital, particularly in the form of currency and liquid assets, moves more freely, if not completely unrestrained, across borders.[6] Limits that exist on the movement of funds are generally called capital controls.[7] Often focused on international movements of funds, these controls include taxes

2. The dictionary definition of globalization is "the development of an increasingly integrated global economy marked especially by . . . free flow of capital, and the tapping of cheaper foreign labor markets." *Globalization*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/globalization [https://perma.cc/UV3T-2D4P]; AMARTYA SEN, THE ARGUMENTATIVE INDIAN 347 (2005) ("Globalization is neither new, nor in general a folly. Through persistent movement of goods, people, techniques and ideas, it has shaped the history of the world."); ROLAND ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE 8 (1992) (defining globalization as "the compression of the world and the intensification of consciousness of the world as a whole").

3. Bill Ong Hing, *Immigration Policy: Thinking Outside the (Big) Box*, 39 CONN. L. REV. 1401, 1441 (2007); Grace Chang, *Precious Cargo*, 52 U.C. DAVIS L. REV. 81, 97 (2018) (arguing that militarized borders "are aimed at preventing people from migrating, not preventing harms to migrant people").

4. *See, e.g.*, Branko Milanovic, *Global Inequality of Opportunity: How Much of Our Income Is Determined by Where We Live?*, 97 REV. ECON. & STAT. 452, 452 (2015) ("Assignment to country is fate, decided at birth, for approximately 97% of the people in the world: less than 3 [percent] of the world's population lives in countries where they were not born."); Beth A. Simmons, *Border Rules*, 21 INT'L STUD. REV. 256, 257 (2019) (noting that "almost 25 percent of the world's population—some 1.87 billion human beings—live[d] within one hundred kilometers of an international land border" in 2016).

5. Milanovic, *supra* note 4, at 458 (describing the locational premium by explaining that "compared to living in the poorest country in the world ([The Democratic Republic of the] Congo), a person gains more than 350% if she lives in the United States, more than 160% if she lives in Brazil, but only 32% if she lives in Yemen"); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2093–94 (2008) (remarking that "in the global economy, immigration is a mediating factor in an age of great wealth and great poverty").

6. Avi-Yonah, *supra* note 1, at 1617–18 (explaining that "the present age of globalization can be distinguished from the preceding one (dating from 1870 to 1914) by the fact that capital is much more mobile than labor," in part because "developed and many developing countries relaxed their capital controls, reducing significant barriers to capital mobility"); Esteban Ortiz-Ospina & Diana Beltekian, *Trade and Globalization*, OUR WORLD IN DATA (Oct. 2018), https://ourworldindata.org/trade-and-globalization [https://perma.cc/UHK3-7ASR] ("This [data] reveals that, despite the great variation between countries, there is a common trend: Over the last couple of decades trade openness has gone up in most countries."); Philip R. Lane & Gian Maria Milesi-Ferretti, *The External Wealth of Nations Mark II: Revised and Extended Estimates of Foreign Assets and Liabilities, 1970–2004*, 73 J. INT'L ECON. 223, 223 (2007) ("The dramatic increase in international financial integration has been one of the salient global economic developments in recent years. Countries have accumulated substantial cross-border holdings, and there have been sizable shifts in the composition of asset and liability positions . . . ."). The authors acknowledge heterogeneity in financial integration, noting as of 2004, "the developing world has lagged behind the industrial countries in terms of the scale of cross-border asset trade (especially in the debt category)." *Id.* at 248.

7. Paul Krugman, Opinion, *The IMF and Capital Controls*, N.Y. TIMES (Dec. 4, 2012), https://krugman.blogs.nytimes.com/2012/12/04/the-imf-and-capital-controls/ [https://perma.cc/HR9M-W7YB].

on remittances and taxes on capital inflows and outflows, as well as direct regulation or full-fledged prohibition of funds' transfer.[8] For many years, the financial regulation literature focused on how the removal of capital controls—or "financial liberalization"—may spur development.[9] The discourse diversified amidst the financial crises of the late twentieth and early twenty-first centuries.[10] Prominent economists argue for stronger financial borders, even citing John Maynard Keynes.[11] Such economists argue that whatever the domestic financial sector's problems are, the flows of capital from abroad may worsen the problem.[12] Others use "national security" concerns to justify some contemporary

8. Sebastian Edwards, *How Effective Are Capital Controls?*, 13 J. ECON. PERSPS. 65, 68 (1999) (describing how "[c]ontrols on capital outflows have been advocated as a way of dealing with a financial and currency crisis" and may include "taxes on funds remitted abroad . . . and outright prohibition of funds' transfers"); *id.* at 71–72 (describing Chile's experience with restrictions on capital inflows, whereby "foreigners wishing to move funds into Chile were required to make noninterest bearing deposits at the Central Bank"—the analytic equivalent to a tax on capital inflows).

9. Theory suggests that financial liberalization can lead to financial development if, for example, removing capital controls allows domestic and foreign investors to diversify their portfolios and change the cost of borrowing. *See generally* Menzie D. Chinn & Hiro Ito, *What Matters for Financial Development? Capital Controls, Institutions, and Interactions*, 81 J. DEV. ECON. 163, 164 (2006) (summarizing theoretical connections between financial liberalization and financial development). But financial liberalization also comes with costs. *See* Dani Rodrik, *Populism and the Economics of Globalization*, 1 J. INT'L BUS. POL'Y 12, 20 (2018) ("[O]pportunistic behavior by governments and low-quality domestic institutions make foreign finance subject to periodic debt crises."). Thus, even as economists recognize the (admittedly unequal) gains from trade liberalization, they are less sanguine about the gains of financial liberalization. "The presumption of the gains from trade—the aggregate efficiency gains from eliminating barriers on cross-border commerce—remains strong . . . . Nevertheless, economists' views on capital mobility have been more ambiguous and prone to cycles." *Id.* at 19. Generally, for a country to benefit from more cross-border financial transactions, financial systems may need to be equipped with reasonable legal and institutional infrastructure.

10. Dani Rodrik, *What Do Trade Agreements Really Do?*, 32 J. ECON. PERSPS. 73, 77 (2018) (noting how the IMF, "once at the vanguard of the push for capital-account liberalization, has officially revised its stance on capital controls").

11. *See, e.g.*, Dani Rodrik & Arvind Subramanian, *We Must Curb International Flows of Capital*, FIN. TIMES (Feb. 25, 2008), https://www.ft.com/content/bee0b4b2-e3a5-11dc-8799-0000779fd2ac [https://perma.cc/4SSP-PBVX] (arguing that "the celebrated phenomenon of financial globali[z]ation—seems to spell trouble"); Barry Eichengreen & Andrew Rose, *Capital Controls in the 21st Century*, VOX (June 5, 2014), https://voxeu.org/article/capital-controls-21st-century [https://perma.cc/C56R-5PP7] (explaining that "[s]ince the global financial crisis of 2008–2009, opposition to the use of capital controls has weakened, and some economists have advocated their use as a macroprudential policy instrument"). *See generally* Andrés Fernández, Alessandro Rebucci, & Martín Uribe, *Are Capital Controls Countercyclical?*, 76 J. MONETARY ECON. 1, 1 (2015) (describing how "[c]apital controls have gone from villains to heroes with little transition" by tracing a history from the 1990s to the first decade of the 2000s, when "severe financial or exchange-rate crises or both (Southeast Asia and Russia in the late 1990s, South America in the early 2000s, and peripheral Europe in the late 2000s) . . . persuaded many to look at capital controls with more benign eyes").

12. *See, e.g.*, Rodrik & Subramanian, *supra* note 11 (arguing that even if "the roots of the subprime crisis lie in domestic finance, international capital flows magnified its scale"); Nicolás E. Magud, Carmen M. Reinhart, & Kenneth S. Rogoff, *Capital Controls: Myth and Reality*, 19 ANNALS ECON. & FIN. 1, 5–6 (2018) (explaining how policymakers in emerging economies may be concerned about "the sheer volume of [capital] flows," which "can fuel asset price bubbles and encourage excessive risk-taking by cash-rich domestic intermediaries" and catalyze a policy "recourse to taxation").

American controls.[13] These scholars have moved beyond asking *if* capital controls should be used, to *how* capital controls are and should be used.[14]

Protectionist impulses notwithstanding, capital controls have broadly receded over the preceding decades, leading scholars to criticize the asymmetry between human and capital movement. For example, Nobel Laureate Gary Becker argued for liberalized immigration so that "the legal movement of human capital across borders would begin to resemble more the movements of goods, services and physical and financial capital."[15] Legal scholars and political scientists have echoed the call to relax migration restrictions.[16]

Research on capital controls often overlooks how controls target particular communities.[17] "Capital controls" usually refers to broad-based measures

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13. *See, e.g.*, *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius [https://perma.cc/C5P4-VDJB] (describing CFIUS as "an interagency committee authorized to review certain [investment] transactions . . . to determine the effect of such transactions on the national security of the United States"); Foreign Investment Risk Review Modernization Act (FIRRMA) of 2018, Pub. L. No. 115-232, tit. XVII, subtit. A, § 1703, 132 Stat. 2174, 2177–78 (expanding the definition of "covered [investment] transactions"). *See generally* Jeffrey N. Gordon & Curtis J. Milhaupt, *China as a "National Strategic Buyer": Toward a Multilateral Regime for Cross-Border M&A*, 2019 COLUM. BUS. L. REV. 192, 226–33 (2019) (outlining the evolution of CFIUS).

14. *See, e.g.*, Fernández et al., *supra* note 11, at 7 (noting evidence suggesting "that more volatile economies are more likely to benefit from countercyclical capital-control policy"). *But see* Edwards, *supra* note 8, at 72 ("In particular, large firms typically have access to international finance, and thus have the connections and ability to reconfigure their assets in a way that will circumvent controls on capital inflows or outflows.").

15. Gary S. Becker, *The Wise Way to Stem Illegal Immigration*, BLOOMBERG BUSISNESSWEEK (Apr. 25, 2004), https://www.bloomberg.com/news/articles/2004-04-25/the-wise-way-to-stem-illegal-immigration [https://perma.cc/U5CF-KG97]; *see also* GARY S. BECKER, THE CHALLENGE OF IMMIGRATION: A RADICAL SOLUTION 23–27 (2011) (reconciling "the substantial pressure of people wanting to come to the richer countries," the "strong opposition in richer countries to unlimited immigration," and the modern welfare state by selling the right to immigrate).

16. *See, e.g.*, Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 200 (2003) ("In an era of globalization, why not allow labor to cross national borders, considering that capital and goods are permitted and encouraged to do so?"); Howard F. Chang, *The Immigration Paradox: Poverty, Distributive Justice, and Liberal Egalitarianism*, 52 DEPAUL L. REV. 759, 772–74 (2003) (describing how the "cosmopolitan perspective" requires more open borders but noting the lack of purchase with the American electorate); E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1524–31 (2019) (critiquing sovereignty doctrine and justifications for the right to exclude); Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 270 (1987) ("Free migration may not be immediately achievable, but it is a goal toward which we should strive."); *see also* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 395 (2006) (describing a transition between "the archetype of the undocumented immigrant as a hard-working individual drawn to enter the United States clandestinely with the hope of rising economic prospects" to one of a "criminal[], likely to commit future criminal acts because of their history of entering the country unlawfully"). *But see* Kit Johnson, *The Mythology of Sanctuary Cities*, 28 S. CAL. INTERDISC. L.J. 589, 611–12 (2019) (debunking the "myth" "that sanctuary cities are part of a movement toward open borders," which Johnson characterizes as "a purely hypothetical issue, largely discussed in academic circles").

17. One prominent and recent exception to this oversight comes from banking literature. *See generally* MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP (2017). However, unlike Baradaran, who focuses on the historical realities of black banking, and

centered on asset classes and time periods, particularly surrounding economic crises.[18] But ordinary people crossing borders also accumulate capital, whether that crossing occurs lawfully or unlawfully. Immigration scholars have examined how law distinguishes between migrants with and without capital through admission and public benefits restrictions, but they have somewhat neglected the law's disparate treatment of migrant wealth and the institutions responsible for creating and enforcing such laws.[19] This critique joins those of other consumer scholars who have noted the unique importance of poor and marginalized communities' financial activities, which often differ from those used by wealthier people.[20] While individual immigrants' remittances, bank accounts, and Social Security entitlements may seem modest, collectively, immigrants have substantial financial activity.[21]

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explicitly contrasts it with immigrants' financial experiences in the twentieth century, *id.* at 5–6, I focus on multiple capital controls and begin with the contemporary immigrant experience.

18. *See, e.g.*, Andrés Fernández, Michael W. Klein, Alessandro Rebucci, Martin Schindler & Martín Uribe, *Capital Control Measures: A New Dataset* 8–9 (Nat'l Bureau of Econ. Rsch., Working Paper No. 20970, 2015) (quantifying capital controls pertaining to ten different asset classes, including money market instruments, bonds, and securities); Michael B. Devereux, Eric R. Young & Changhua Yu, *Capital Controls and Monetary Policy in Sudden-Stop Economies*, 103 J. MONETARY ECON. 52, 52–53 (2019) (discussing the scholarly support for the use of capital controls, including capital flow taxes, as a supplement to monetary policy during financial crises in emerging economies); JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002) (arguing that capital account liberalization played a significant causal role in the East Asian financial crises).

19. *See, e.g.*, GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 43 (1996) (describing how the early federal government often referenced state regulations against poor Europeans and foreign countries' "'dumping' of paupers and convicts"); Stella Burch Elias, *Testing Citizenship*, 96 B.U. L. REV. 2093, 2115 (2016) ("[T]he new more stringent prerequisites for naturalization, including the more sophisticated civics and language requirements, are deterring low-income, non-English speaking immigrants in the United States from applying for naturalization."); Andrew Hammond, *The Immigration-Welfare Nexus in a New Era?*, 22 LEWIS & CLARK L. REV. 501, 517 (2018) (describing both the legal and non-legal barriers impeding immigrant access to public benefits); *see also* Leticia M. Saucedo, *Mexicans, Immigrants, Cultural Narratives, and National Origin*, 44 ARIZ. STATE L.J. 305, 307 (2012) (arguing that twentieth-century "American writers, journalists, anthropologists, and others described Mexicans as a backward, unambitious, uncivilized lot, needing to be saved from their poverty and misery"). As a general matter, "scholars have found the lens of capital a useful way of examining particular phenomena." Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2173 (2013) (mentioning not only Karl Marx's discussion of capital, but also Theodore Schultz's analysis of human capital and Catherine Hakim's analysis of erotic capital). Here, I largely use "capital" flows conventionally, to denote literal flows of cash, or fiat money.

20. *See, e.g.*, Mehrsa Baradaran, *How the Poor Got Cut Out of Banking*, 62 EMORY L.J. 483, 495–96 (2013) (describing the unique financial landscape confronting the poor); *see also* Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1099 (2019) (questioning how credit came "to enjoy such seemingly universal support as a source of meaningful social provision for the working poor").

21. *See, e.g.*, *infra* notes 39–49 and accompanying text (discussing the scope of global remittances); *see also* Heather Hughes, *Understanding the Securitization of Worker Remittances* 9 (American University, WCL Research Paper No. 2008-39, 2011), https://ssrn.com/abstract=1096700 [https://perma.cc/8YGK-BNZA] (describing the history of remittance securitization and arguing that it may better "enable developing nation borrowers to access foreign capital even in times of turmoil"). *See generally* ANNA PAULSON, AUDREY SINGER, ROBIN NEWBERGER & JEREMY SMITH, FED. RES. BANK

This Article furthers a new perspective on capital controls: rather than operating orthogonally to migrant controls, capital controls often operate as migrant controls. What might it look like for capital controls to be migrant controls, and what are the legal consequences? This Article answers both questions by canvasing various examples and then explaining the legal issues that arise.

This Article focuses on three particular capital controls that may act as migrant controls. First, remittance taxation guards capital. State legislatures and the federal government have taxed or are proposing to tax wire transfers, based in part on cross-border destinations and the immigration status of the sender. Second, the government's refusal to pay Social Security benefits to entitled, but undocumented, immigrants in the United States expels capital.[22] Since otherwise entitled immigrants must leave the United States (without necessarily having to, or being capable of, returning to countries of origin) to collect their earned Social Security benefits, the law expels this capital, making the immigrants' receipt contingent on departure. Third, and lastly, immigrants lacking particular forms of lawful status have their capital marginalized from the formal financial system. Federal law increasingly compels institutions—most significantly, insured depository institutions—to "identify" their customers, while leaving the parameters of identification intentionally vague. Bank practices diverge, and while municipalities have asked federal regulators to declare certain identifications legally sufficient, regulators have resisted these entreaties and emphasized how banks must make holistic determinations.

Thus, as immigration authorities seek to guard against, expel, and marginalize various migrants, private and public authorities subject migrants' capital to similar treatment. The significance of these capital controls varies—from the arguably incidental effects of remittance taxes to the fundamental requirement that migrants leave the United States to receive the Social Security benefits to which they are lawfully entitled.[23]

If capital controls are migrant controls, this Article explores how they implicate the constitutional law pertaining to immigration and foreign affairs, including federalism, separation of powers, and various deference doctrines.[24]

OF CHI., FINANCIAL ACCESS FOR IMMIGRANTS: LESSONS FROM DIVERSE PERSPECTIVES 6 (2006) (quantifying aggregate financial activities for immigrant communities in the United States).

22. Here, I make a somewhat nontraditional choice to treat Social Security entitlement as a form of capital accumulation. As detailed below, *infra* Part III, Social Security is administered on a pay-as-you-go basis, meaning that a beneficiary's receipt of fund does not reflect a direct return on previously invested funds. However, as experienced by beneficiaries, the Social Security benefit resembles an annuity or pension fund that would be more traditionally understood as capital.

23. The dichotomy between "immigrant-selecting" and "immigrant-regulating" rules has been roundly criticized since all such regulation shapes incentives. Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 343–50 (2008).

24. Scholars who have recently argued for remittance taxation's potential have focused on its design rather than its doctrinal contours. *See, e.g.*, Ariel Stevenson, *Recovering Lost Tax Revenue Through Taxation of Transnational Households*, 34 BERKELEY J. INT'L L. 100, 100 (2016) (focusing

Aside from constitutional concerns, immigration statutes may also restrict the administration of capital controls. More generally, scrutinizing these capital controls contributes to understanding who—Congress, federal agencies, municipalities and states, or social movements outside the law—controls and who may legally control migration.[25]

I begin by briefly situating my attention to capital controls and their relationship to migrant controls in Part I. I then describe each capital control in turn: in Part II, the guarding of capital through remittance taxation; in Part III, the expulsion of capital through overlooked Social Security entitlement and payment provisions; and finally, in Part IV, the marginalization of migrants' capital through the nexus of two antiterrorism statutes—the PATRIOT and REAL ID Acts. I then raise and address the significant legal questions raised by each of these capital and migrant controls in Part V.

I.
WHY "CAPITAL CONTROLS"? WHY "MIGRANT CONTROLS"?

This Article consciously uses the labels "capital controls" and "migrant controls" to identify the ways that migrants—and their migration—can be controlled by regulating a migrant's access to their own money. These labels are necessarily imprecise, but that imprecision illustrates the interlocking nature of the policies described below. By distinguishing noncitizens' money, the law instructs them that they "may be members of a relevant community they share with citizens . . . [b]ut there are different levels of membership."[26] Noncitizens, and their money, often occupy a less-favored tier.

First, to address the use of "capital controls." Some of the regulations that I describe as capital controls, such as restrictions on remittances, are widely recognized as such. Restricting transfer of one's money—including when based on immigration status—seems to be a quintessential capital control. Other examples, such as limitations on Social Security payments, may be more disputed. The line between capital controls and restrictions on economic benefits is hardly neat. One might think of the question of eligibility as one of access to

on "push[ing] back against common anti-remittance-taxation arguments based on both normative and practical considerations, with a focus on improving and updating the taxation of families separated by national borders" rather than on American legal constraints).

25. This Article thus joins efforts to identify where immigration deference doctrines meet other deference doctrines, including penal powers and state taxation, and shift our understanding of American immigration law's intersections. *See, e.g.*, Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1431 (2019) (explaining how "[a]ll-foreign prisons sit at the crosshairs of these deference doctrines . . . [including] the penal power doctrine and . . . the plenary power doctrine [in immigration law]"); Shayak Sarkar, *Financial Immigration Federalism*, 107 GEO. L.J. 1561, 1600 (2019) (explaining how the extension of state Earned Income Tax Credits to undocumented immigrants is where "state tax power deference meets immigration's plenary power deference, [and] the two might neutralize one another and courts may reinstate a more robust presumption against preemption").

26. David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 89.

an economic benefit, yet payment limitations are a different issue. Once someone is eligible for a stream of payments, restrictions on those payments are better understood as capital controls. Payment limitations can be seen as diminishing the economic substance of the benefit. For example, a Social Security benefit that has complicated restrictions on payment is worse than a benefit *without* such restrictions. My language of choice, however, is "capital controls."

What of "migrant controls?" Why not "migration" controls? This label acknowledges how the expansion of enforcement and surveillance has led to the "detachment of migration borders from territorial borders."[27] The controls described below affect the actions of migrants—sometimes but not always leading to migration, whether international or even interstate.[28] As such, this Article builds on the literature recognizing the ways that limitations on immigrants' economic and social lives, including employment, education, and financial activities, can affect what overstretched border patrol officers may not.[29] As one incisive commentator has articulated, the term "self-deportation" is an "oxymoron[]," reflecting "a variety of state-sponsored coercive removal that assigns some agency to individuals in their own departure," and one with a long history of controlling the "undesired."[30] Regulations on migrants' capital may help states "screen out undesired types so that only desired types will be" welcome and comfortable.[31] This Article questions the extent to which the law allows the screening of capital's desirability to reflect the desirability of the migrant behind that capital.

To this end, I seek to be descriptive rather than normative in my contribution. First, immigration federalism means American states and municipalities divergently choose a menu of local laws that define "desirable" differently.[32] Within these local laws and their federal interface, this Article moves the conversation of desirability towards capital. Even if American "powerholders [are not] content to receive anyone who want[s] to immigrate," capital controls may answer the question of whom they wish to receive by asking

27. Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 60 (2014).

28. K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1884 n.20 (2019) (using "'migration' interchangeably with 'immigration' and 'emigration,' since self-deportation policies cause interstate migration" but refraining from elaborating on the idea of contemporary interstate migration by international migrants).

29. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 74 (2014) (describing "self-deportation" as "the strategy of reducing the unauthorized population by attrition" and as underlying policies "taking aim at housing and employment"); *id.* at 75 (adding that "[a]ccess to driver's licenses and other identification documents can be another area for indirect enforcement").

30. Park, *supra* note 28, at 1884.

31. Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 819 (2007).

32. Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 705–06 (2013) (articulating an ongoing role for "state and local engagement in immigration regulation" and explaining that this "'new immigration federalism' . . . will be grounded in immigrant-inclusionary rulemaking, which has the potential to complement (as well as occasionally contradict) federal efforts at comprehensive immigration reform").

whose money they wish to receive.[33] Yet states' ability to use capital controls may be limited by federal law. This Article synthesizes capital controls to expose how, and which, migrants are deemed "desirable." It does so by digging deep into the technicalities of various state and federal remittance taxation proposals and the attendant foreign affairs preemption and Commerce Clause issues. It also looks at how federal law addresses localities' attempts to facilitate private banking access through the issuance of local identification.

Second, an accounting of federal law and local efforts in capital controls allows us to think about their connection, intended and practical, to migrants' economic lives, since the strength of the connection informs their legality. In response to the account that "immigration controls have helped to create a large undocumented labor force subject to economic exploitation,"[34] this Article intervenes by adding another dimension to the shaping of migrants' economic lives, beyond oft-discussed public benefits. It points to three forms of capital control that affect (not only) the undocumented, chronicles how those controls operate differently across time and space, and analyzes whether they operate legally. The extent to which capital controls are migrant controls—and this Article will explore the spectrum—informs the legal analysis itself. Many of these capital controls operate more subtly than better-studied employment and housing restrictions. Yet, as I hope to show, they are substantial in their own right.

II.
GUARDING CAPITAL: REMITTANCE TAXATION

American remittances have long built global financial bridges.[35] This Part historicizes these remittances and their regulation before honing in on emerging state and federal remittance taxation. These laws and proposals vary in four notable ways: (1) the types of capital flows they cover, particularly in terms of destination restrictions; (2) the ability for individuals to recover the remittance tax through credits; (3) the types of individual taxed and eligible for such credits; and (4) what the remittance taxes fund. As remittance taxes attempt to distinguish capital based on a sender's immigration status or an international destination, they control the capital of immigrants—including potentially migrant citizens—distinctly from non-migrant citizens who may have little reason to send money abroad. A remittance tax guards capital by taxing the flow of capital from the United States to other countries.

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33. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1901 (1993) (emphasis omitted).

34. Johnson, *supra* note 16, at 230.

35. *See* WORLD BANK GROUP, MIGRATION AND REMITTANCES DATA: BILATERAL REMITTANCE MATRIX 2017, https://www.worldbank.org/en/topic/migrationremittancesdiasporaissues/brief/migration-remittances-data [https://perma.cc/Y3M4-FJWJ] (disaggregating remittance flows by country dyad).

A. The Remittance Market

The history of remittances has long involved migrants sending back financial support. Centuries ago, remittances fueled the United Kingdom's colonial project, as inbound remittances from America and beyond strengthened the British crown.[36] American colonial remittances evolved from supporting British imperialism to supporting the downtrodden in other parts of the United Kingdom, namely Ireland's impoverished in the wake of the Great Famine.[37] These pre-World War I capital flows were necessarily primitive, often arriving as "pocket" and "envelope" transfers.[38] European nations relied on these capital inflows, predating the many poor, non-European countries now reliant on them.[39]

Remittances are individually small-scale financial flows but collectively constitute ties that bind the world.[40] The United States currently generates the most outward remittance flows of any country, amounting to tens of billions of dollars annually.[41] Remittances act as insurance, potentially "smooth[ing] the incomes of families and shield[ing] policy makers from the vagaries of the global

36. Gary B. Magee & Andrew S. Thompson, *The Global and Local: Explaining Migrant Remittance Flows in the English-Speaking World, 1880–1914*, 66 J. ECON. HIST. 177 (2006). An early twentieth-century money order system facilitated cross-empire transactions, but money orders from the colonies to the United Kingdom far exceeded the amount sent from the United Kingdom to the colonies. Specifically, a study of money orders from 1901 to 1910 found that the United Kingdom transferred 6.6 million pounds to its colonies during that period, while its colonies, particularly the United States, sent the United Kingdom nearly four times that amount. Gary B. Magee & Andrew S. Thompson, *'Lines of Credit, Debts of Obligation': Migrant Remittances to Britain, c.1875–1913*, 59 ECON. HIST. REV. 539, 545 (2006) ("The US was by far the biggest sender of foreign money orders no doubt owing to there being in that country a large body of emigrants from the UK and to the fact that very many of these emigrants sent over money to their relatives at home to enable them to pay their passage across the Atlantic.") (internal quotation marks and citation omitted).

37. *See generally* ARNOLD SCHRIER, IRELAND AND THE AMERICAN EMIGRATION 1850–1900 (1958).

38. Magee & Thompson, *Lines of Credit*, *supra* note 36, at 546. For a list of remittance products at the beginning of the twenty-first century, *see* Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121, 196 (2004) (describing various products offered by commercially chartered banks and nonbanks).

39. WORLD BANK GROUP, MIGRATION AND REMITTANCES FACTBOOK 2016, at vii (3d ed. 2016) ("Migrants are now sending earnings back to their families in developing countries at levels above US$441 billion, a figure three times the volume of official aid flows.").

40. Stephen Lee has described remittances as "economic expressions of affinity." Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2324 (2019). *See also* Ezra Rosser, *Immigrant Remittances*, 41 CONN. L. REV. 1, 56 (2008) (characterizing remittances as "the most tangible expression of the connection between migrants and their home country").

41. WORLD BANK GROUP, MIGRATION AND REMITTANCES DATA: ANNUAL REMITTANCES DATA, OUTFLOWS (2020), https://www.worldbank.org/en/topic/migrationremittancesdiasporaissues/brief/migration-remittances-data [https://perma.cc/Y3M4-FJWJ]. While this absolute value surpasses that of every other country, as a share of GDP, American remittances are unremarkable, paling in comparison to the heavy role that remittances play in channeling Middle Eastern countries' productivity to other countries. Consider the values of "remittances as a share of GDP" (the final column of the spreadsheet) for the United Arab Emirates (10.7%), Oman (12.6%), Qatar (6.0%), Saudi Arabia (4.3%), compared to the United States (.3%). *Id.*

economy."[42] In countries including Haiti, El Salvador, and Honduras, incoming remittances are substantial when measured as a share of GDP.[43] In light of the substantial role of remittances in emerging economies, the United Nations has taken the position that reducing the transaction costs of migrant remittances by 3 percent globally will help with the United Nations Sustainable Development goal for 2030.[44] The international community has thus argued for strengthening the financial ties of remittances by decreasing their costs.

Those costs arise in a powerful industry dedicated to moving money, largely composed of money transmitter organizations (MTOs) that are not insured depository institutions.[45] MTOs are disproportionately used by those who, like immigrants, might be marginalized from traditional, insured depository institutions like banks and credit unions.[46] At the front of the modern MTO crowd stands Western Union. Once a nineteenth-century telegraph behemoth, Western Union's modern "vision is to be a global leader in cross-currency, cross-border money movement."[47] As one periodical put it: "emigrés, expatriates, immigrants, and refugees—the uprooted—are Western Union's people, and right

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42. David Andrew Singer, *Migrant Remittances and Exchange Rate Regimes in the Developing World*, 104 AM. POL. SCI. REV. 307, 307 (2010).

43. WORLD BANK GROUP, MIGRATION AND REMITTANCES DATA: ANNUAL REMITTANCES DATA, INFLOWS (2020), https://www.worldbank.org/en/topic/migrationremittancesdiasporaissues/brief/migration-remittances-data [https://perma.cc/Y3M4-FJWJ].

44. *See generally Sustainable Development Goal 10: Target 10.c*, UNITED NATIONS DEP'T OF ECON. & SOC. AFFS., https://sdgs.un.org/goals/goal10 [https://perma.cc/ZT8Y-ZKH7]. However, for both banks and non-bank MTOs, the average rates still broadly exceed the United Nations' goal. WORLD BANK GROUP, REMITTANCE PRICES WORLDWIDE 11 (2019), https://remittanceprices.worldbank.org/sites/default/files/rpw_report_june_2019.pdf [https://perma.cc/2M3Y-3RV2] (finding that international money transfer organizations (MTOs), including Western Union and MoneyGram, have been cheaper remitters than banks for at least the last decade). For earlier evidence, see Manuel Orozco, Inter-Am. Dev. Bank, Worker Remittances in an International Scope 7 (March 2003) (unpublished manuscript), https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.630.3824&rep=rep1&type=pdf [https://perma.cc/U347-QYJ4] (noting that "[t]he mean value of sending through banks was 7 percent, compared to 12 percent for businesses like Thomas Cook or Western Union" and describing heterogeneity based on destination country).

45. *See* BUREAU OF CONSUMER FIN. PROTECTION, REMITTANCE RULE ASSESSMENT REPORT 4, 54 (2018); *see also* 31 C.F.R. § 1010.100(ff)(8) (2020) (defining MTOs). Money transmission services means "the acceptance of currency, funds, or other value that substitutes for currency from one person and . . . transmission . . . to another location or person by any means." 31 C.F.R. § 1010.100(ff)(5)(i)(A) (2020).

46. *See* Joyce M. Northwood & Sherrie L.W. Rhine, *Use of Bank and Nonbank Financial Services: Financial Decision Making by Immigrants and Native Born*, 52 J. CONSUMER AFFS. 317, 317–18 (2018) (providing data on both the relative underbanking, as well as overuse on nonbank financial services like money transmitters, by immigrant households); *see also infra* Part IV.

47. *Our Vision*, W. UNION, http://web.archive.org/web/20201126192231/https://corporate.westernunion.com/our-vision.html; *see also* GREGORY J. DOWNEY, TELEGRAPH MESSENGER BOYS: LABOR, TECHNOLOGY, AND GEOGRAPHY, 1850–1950 2 (2002) (describing how post-Civil War tales "recounted the telegraph's effects on commerce and government, and the profit-making potential of the network as evidenced by the rise of Western Union to 'natural monopoly' power").

now we're living in Western Union's world."[48] This characterization offers a financial spin on Edward Said's 1984 declaration of "the age of the refugee, the displaced person, [and] mass immigration."[49] Through MTOs, the remittance industry intermediates migrants' financial lives, particularly noncitizens.[50]

MTOs are regulated at both the federal and state level, with federal regulation expanding since the financial crisis.[51] The Dodd-Frank Wall Street Reform and Consumer Protection Act (hereinafter Dodd-Frank) changed American consumer finance law, including for remittance transfers.[52] Dodd-Frank granted the Consumer Financial Protection Bureau (CFPB) authority to regulate "remittance transfers,"[53] which include electronic transfers of funds[54] abroad initiated by American consumers "primarily for personal, family, or household purposes."[55] Pursuant to its Dodd-Frank authority, the CFPB issued new regulations governing remittance transfers[56] requiring disclosures of fees,

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48. Drake Bennett & Lauren Etter, *Give Us Your Tired, Your Poor, Your Huddled Masses Yearning to Send Cash*, BLOOMBERG BUSINESSWEEK (June 16, 2017), https://www.bloomberg.com/news/features/2017-06-16/for-western-union-refugees-and-immigrants-are-the-ultimate-market [https://perma.cc/J7GV-A8NN]. As the Article further characterized the situation: "Today's receivers are tomorrow's senders, and once installed in homes, they'd be sending money to those coming behind them. 'One million Syrian customers,' he says. 'Do you think they will ever forget Western Union? Never.' The world's attention to refugees waxes and wanes, but Western Union's is unflagging. For years the company has been tracing the movements of 'double belongers' and the remittances they send home." *Id.*; *see also* CHARANYA KRISHNASWAMI, ARIEL STEVENSON & CELSO PEREZ CARBALLO, SUPPORTING TRANSNATIONAL FAMILIES: IMPROVING REMITTANCE AND BANKING SERVICES FOR IMMIGRANTS IN NEW HAVEN 16–17 (2012), http://web.archive.org/web/20201110224101/https://www.juntainc.org/images/supporting%20transnational%20famlies-ylsremittances%20report.pdf (arguing that, based on focus groups and individual interviews in New Haven's immigrant community, choice of remittance service provider "tended to center around national companies," including Western Union).

49. Edward Said, *Reflections on Exile*, *in* 13 GRANTA 157, 159, (William Buford, ed., 1984).

50. *See* discussion *infra* Part IV (describing how federal law limits traditional bank engagement with the capital of noncitizens, particularly the undocumented).

51. While the federal government plays a partial role in regulating money transmitters, MTOs must also comply with state laws. *See, e.g.*, Kevin V. Tu, *Regulating the New Cashless World*, 65 ALA. L. REV. 77, 86–95 (2013) (describing the state regulation of money transmission); Kevin V. Tu, *Perfecting Bitcoin*, 52 GA. L. REV. 505, 525–26 (2018) (arguing that the goals of the Bank Secrecy Act (BSA), "the detection and prevention of money laundering and other criminal activity" contrast with those of state money transmitter laws, which focus on "protecting consumers from monetary loss"); W. UNION FIN. SERVS., INC., REGULATING ENTITY AND TYPE OF LICENSE BY STATE (2018), https://www.westernunion.com/content/dam/wu/us/en/Regulating_Entity_and_Type_of_License_by_State_08.2018.pdf [https://perma.cc/KN4J-WCYX].

52. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1073, 124 Stat 1376, 2060–67 (2010) (codified as amended in scattered sections of Titles 12 and 15 of the United States Code).

53. Dodd-Frank amended the Electronic Fund Transfer Act and created the Consumer Financial Protection Bureau (CFPB). *Id.*; 15 U.S.C. § 1693b(c).

54. 12 C.F.R. § 1005.30(e)(1) (2020). A remittance need not be an "electronic fund transfer" (EFT), *id.*, which, for example, excludes telephone-initiated transfers. 12 C.F.R. § 1005.3(c)(6) (2020).

55. 12 C.F.R. § 1005.30(g) (2020). While the CFPB's operating definition of "remittance transfer" largely tracks intuition, the term "remittance" is defined differently across legal arenas.

56. Electronic Fund Transfers (Regulation E), 78 Fed. Reg. 30,662, 30,662–66 (May 22, 2013) (codified at 12 C.F.R. § 1005) (overviewing the sequence of rulemakings in 2012 and 2013).

the relevant exchange rate, and the date of availability for the remitted funds.[57] The CFPB's remittance rule assessment report highlighted Western Union's "immense global scope and large market share."[58]

Remittances have persisted for centuries but have also evolved, as evidenced by fledgling blockchain-based remittance services.[59] While popular payment applications like Venmo require U.S. presence, blockchain-based remittance services often do not.[60] End-to-end payment systems like Western Union also face challenges from competitors who directly match buyers and sellers of different currencies without relying on third-party bank currency exchangers.[61] Remittance taxation may influence the demand for particular remittance facilitators, but it is unlikely to significantly ebb the demand for remittances.[62]

57. *Id.* at 30,663–64.

58. BUREAU OF CONSUMER FIN. PROTECTION, *supra* note 45, at 54.

59. See BRIDGE21, https://bridge21.com/ [https://perma.cc/XZ6T-278Y] and STELLAR, https://www.stellar.org/ [https://perma.cc/8N67-TKP6] for an example of an open source decentralized payment system using blockchain technology; *see also* Ashish Prajapati, *A Brief View on Stellar in Remittance*, MEDIUM (Nov. 19, 2018), https://medium.com/@ashisherc/a-brief-view-on-stellar-in-remittance-b6e87a5ab948 [https://perma.cc/K3XY-F95K]. *See generally* WORLD BANK GROUP, MIGRATION AND REMITTANCES: RECENT DEVELOPMENTS AND OUTLOOK 8–9 (2018), https://www.knomad.org/sites/default/files/2018-04/Migration%20and%20Development%20Brief%2029.pdf [https://perma.cc/T8YE-TBYG] (describing the nascent role of cryptocurrencies and blockchain-based technology in the remittance market); Avi-Yonah, *supra* note 1, at 1618 ("[T]echnological changes, from the development of electronic banking to the rise of the Internet, have made instantaneous, worldwide funds transfer possible.").

60. *Customer Identification*, VENMO, https://help.venmo.com/hc/en-us/articles/360000743827-Customer-Identification [https://perma.cc/Y9GD-76SD] (listing American documentation requirements); *Requirements*, VENMO, https://help.venmo.com/hc/en-us/articles/209690188-Requirements [https://perma.cc/KR9Z-WR8V] (describing two requirements for using Venmo as being "physically located in the United States" and "hav[ing] a U.S. cell phone that can send/receive text messages from short codes"); *see also The Battle for the Remittances Market*, ECONOMIST (May 4, 2018), https://www.economist.com/special-report/2018/05/04/the-battle-for-the-remittances-market [https://perma.cc/N5BJ-994A] (noting that "Ravi Menon, managing director of Singapore's central bank, argued that one of the strongest possible uses for blockchain technology is to 'facilitate cross-border settlements'").

61. Matthew W. Swinehart, *Modeling Payments Regulation and Financial Change*, 67 U. KAN. L. REV. 83, 110, 147 (2018).

62. *See, e.g.*, Billy Bambrough, *A Trump Policy Could Push People Toward Bitcoin*, FORBES (Apr. 16, 2019), https://www.forbes.com/sites/billybambrough/2019/04/16/trump-could-push-people-towards-bitcoin/#6fd17a7a704e [https://perma.cc/MZ4D-9XJH] ("Government sanctions on remittances could though prove to be the trigger that pushes people towards bitcoin and cryptocurrencies, as capital controls have done in other parts of the world."); Igor Makarov & Antoinette Schoar, *Trading and Arbitrage in Cryptocurrency Markets*, 135 J. FIN. ECON. 293, 294 (2020) (suggesting that "[t]he marginal investor in a country with . . . tighter capital controls might be willing to pay more for bitcoin"); Zareh Asatryan, Benjamin Bittschi & Philipp Doerrenberg, *Remittances and Public Finances: Evidence from Oil-Price Shocks*, 155 J. PUB. ECON. 122, 131 (2017) (marshalling empirical evidence to argue that "remittances are difficult to tax through income taxation, but can be captured through their effect on consumption").

B. Remittance Taxation

Congress and state legislators have considered taxing remittances, though Oklahoma is the first and currently only state with a so-called "remittance" tax.[63] Accordingly, Oklahoma's law serves as a useful comparator for other proposals. Since 2009, Oklahoma has required that a state-licensed money transmitter collect from the sender a five-dollar fee for any transaction up to $500, and 1 percent of the amount in excess of $500.[64] Banks and credit unions are not state-licensed money transmitters and are therefore exempt from the remittance tax law.[65]

There are four notable features of Oklahoma's tax. First, the law applies to even those financial flows that do not cross international borders.[66] Second, Oklahoma allows for potential recovery of the remittance tax through the state income tax filing process. While the MTO must collect the tax, the Oklahoma law allows for senders who are state tax filers to claim an income tax credit equal to the remittance tax paid.[67] Third, since the credit is available to filers with either a Social Security Number (SSN) *or* an Individual Tax Identification (ITIN), it does not facially discriminate based on immigration status.[68] However, very few people appear to claim the offsetting tax credit,[69] allowing Oklahoma to raise

63. OKLA. STAT. ANN. tit. 63, § 2-503.1j(A) (West 2020) ("Any licensee of a money transmission, transmitter or wire transmitter business pursuant to the Oklahoma Financial Transaction Reporting Act and their delegates shall collect a fee of Five Dollars ($5.00) for each transaction not in excess of Five Hundred Dollars ($500.00) and in addition to such fee an amount equal to one percent (1%) of the amount in excess of Five Hundred Dollars ($500.00).").

64. *Id.* Some have also incorrectly characterized this remittance tax as always representing "1%" of the underlying value. *See, e.g.*, David North, *The Remittance Fee in Oklahoma, Georgia, and in the U.S. Congress*, CTR. FOR IMMIGR. STUD. (Jan. 3, 2018), https://cis.org/North/Remittance-Fee-Oklahoma-Georgia-and-US-Congress/ [https://perma.cc/FM8K-7BBD] (incorrectly stating that "Oklahoma has a 1 percent fee"). In fact, a full-time minimum wage worker who remits 20 percent of her pretax wages on a weekly basis will face an effective tax rate of 9 percent. Assuming forty hours of paid work at $7.25 per hour, the worker earns $290 per week. If the worker then sends 20 percent of that amount, $58, weekly, over four weeks, the worker will pay $20 to remit $232, or $5 for each weekly payment of $58. Even if the household optimally minimizes fees by sending a single, monthly $232 payment, the $5 fee would still reflect a 2 percent remittance tax. Industry data, showing average remittances to Mexico hovering close to $300, also corroborate the 2 percent figure. MANUEL OROZCO, LAURA PORRAS & JULIA YANSURA, THE CONTINUED GROWTH OF FAMILY REMITTANCES TO LATIN AMERICA AND THE CARIBBEAN IN 2015 7, Graphic 4 (2016), http://www.thedialogue.org/wp-content/uploads/2016/02/2015-Remittances-to-LAC-2122016.pdf [https://perma.cc/WKK2-DB92].

65. OKLA. STAT. tit. 6, § 1512(6) (2016). In defining "money service businesses," the section excludes "'bank' as that term is defined in Title 31, Code of Federal Regulations, Chapter X." *Id.* Those regulations define "bank" as including a credit union. 31 C.F.R. § 1010.100(d)(6) (2020).

66. OKLA. STAT. ANN. tit. 63, § 2-503.1j(A) (West 2020).

67. OKLA. STAT. ANN. tit. 63, § 2-503.1j(D) (West 2020).

68. ITINs are available for certain categories of immigrants, including undocumented immigrants. *Individual Taxpayer Identification Number*, INTERNAL REVENUE SERV. (Jan. 8, 2021), https://www.irs.gov/individuals/individual-taxpayer-identification-number [https://perma.cc/AFL8-7FWL].

69. Jason Beaubien, *A Proposed New Tax, Mainly on Latinos, to Pay for Trump's Border Wall*, NPR (May 25, 2017), https://www.npr.org/sections/goatsandsoda/2017/05/25/529507199/a-proposed-

over $13 million annually.[70] Fourth, and finally, this revenue is allocated for a Drug Money Laundering and Wire Transmitter Revolving Fund, nominally distinct from immigration enforcement.[71]

Nonetheless, industry lobbyists and foreign sovereigns have looked beyond Oklahoma's remittance tax as a purported anti-money laundering (AML) capital control and perceived it as a migrant control. The drafter of the Oklahoma tax defended the law by explaining that it "burdens mostly illegal immigrants and drug traffickers from Mexico who wire illegal proceeds back to their home country,"[72] even as American citizens appear to have accrued the majority of federal convictions for drug trafficking.[73] Accordingly, the National Money Transmitters Association publicly wrote that "the Oklahoma government is using us to further their (anti-) immigration agenda."[74] Ildefonso Guajardo Villarreal, who served as Mexico's *Secretario de Economia* (Secretary of the Economy), called the Oklahoma remittance tax "discriminatory and immoral."[75]

More stringent state proposals have percolated in Oklahoma and beyond. While Oklahoma's current remittance tax does not explicitly discriminate based on immigration status, a state senate bill was introduced to amend Oklahoma law by imposing an additional tax on "international wire transaction[s] for persons that do not present valid personal identification,"[76] with such "valid" identification seemingly restricted to immigrants with lawful presence.[77] The North Carolina legislature introduced the "Tax on Illegal Immigrant Wire

new-tax-mainly-on-latinos-to-pay-for-trumps-border-wall [https://perma.cc/TM33-QEJA] (noting that "hardly anyone claims a refund" under the Oklahoma law).

70. OKLA. TAX COMM'N, ANNUAL REPORT 14 (2018), https://www.ok.gov/tax/documents/AR2018.pdf [https://perma.cc/8VNE-MRLB].

71. OKLA. STAT. ANN. tit. 63, § 2-503.1j(C) (West 2020).

72. Sean Murphy, *Oklahoma Lawmaker Defends Wire Money Transfer Tax*, SALON (April 13, 2010) https://www.salon.com/2010/04/12/ok_mexico_trade_flap/ [https://perma.cc/C8W4-8KMH] (quoting Oklahoma Rep. Randy Terrill).

73. David J. Bier, *77% of Drug Traffickers Are U.S. Citizens, Not Illegal Immigrants*, CATO INST.: AT LIBERTY (July 3, 2019), https://www.cato.org/blog/77-drug-traffickers-are-us-citizens-not-illegal-immigrants [https://perma.cc/66UW-33ZR].

74. DAVID LANDSMAN, NAT'L MONEY TRANSMITTERS ASS'N, REPORT ON THE NEW MONEY TRANSMITTER FEE IN OKLAHOMA 2 (2009); *see also id.* at 3 (concluding that "this fee is aimed mainly at undocumented [immigrants]"). For an overview of special interests' mechanisms for influence on local taxation—here, arguably, the National Money Transmitters Association and anti-immigrant advocacy groups—see generally Ariel Jurow Kleiman, *Tax Limits and the Future of Local Democracy*, 133 HARV. L. REV. 1884, 1934–37 (2020), which focuses on tax limits but provides more general insights for local taxation.

75. Murphy, *supra* note 72. *See generally* Ryan Baasch & Saikrishna Bangalore Prakash, *Congress and the Reconstruction of Foreign Affairs Federalism*, 115 MICH. L. REV. 47, 52 (2016) ("[S]tate and local actors are ignorant [and] are prone to offend and embarrass foreign nations, including valued allies.").

76. S. 547, 56th Leg., 1st Sess. (Okla. 2017), https://legiscan.com/OK/text/SB547/id/1670932 [https://perma.cc/6DXM-NB6K].

77. *Id.* ("For purposes of this section, 'valid personal identification' means an unexpired state-issued driver license, permit or temporary permit or identification card issued by the Department of Public Safety, or any unexpired federally-issued document from the United States Customs and Immigration Service authorizing a lawful presence.").

Transfer," which would impose a 5 percent tax on any wire transfers—not simply out-of-country remittances—made by "unauthorized aliens" as defined in federal law.[78] A year later, the Mississippi Senate introduced the "Illegal Immigrant Fee Act," which also would charge a 5 percent tax on any wire transmission unless the sender could provide "adequate proof that the customer is legally present in the United States."[79]

Some state proposals have focused on international transmissions. In 2014, Mississippi tried again by mirroring an earlier Arizona proposal, and both proposals combined the offsetting income tax credit from Oklahoma law with a focus on international remittances.[80] Texas went one step further beyond a cross-border transmission focus—it conditioned the eligibility of the tax offset on lawful presence.[81] Under these proposals, taxing the cross-border flow of unlawful migrants' capital is intended to control the cross-border flow of people.[82]

Even "sanctuary" states like California have proposed capital flow taxes levied exclusively against undocumented immigrants, but to unique ends.[83] A California Senate Bill proposed a 3 percent "fee" on "transmission money received from a customer who is unable to provide documentation of lawful

78. Tax on Illegal Immigrant Wire Transfers, H.R. 2560, 2005–2006 Gen. Assemb., 2005 Sess. (N.C. 2006), https://www.ncleg.net/Sessions/2005/Bills/House/HTML/H2560v1.html [https://perma.cc/Q8D8-76H2].

79. Illegal Immigrant Fee Act, S. 2736, 2007 Leg., Reg. Sess. (Miss. 2007), http://billstatus.ls.state.ms.us/documents/2007/pdf/SB/2700-2799/SB2736IN.pdf [https://perma.cc/EZR6-K6WG].

80. H.R. 2677, 50th Leg., Reg. Sess. (Ariz. 2011), https://www.azleg.gov/legtext/50leg/1R/bills/hb2677p.pdf [https://perma.cc/XE42-2PRN]; H.R. 924, 2014 Leg., Reg. Sess. (Miss. 2014), http://billstatus.ls.state.ms.us/documents/2014/pdf/HB/0900-0999/HB0924IN.pdf [https://perma.cc/587K-4TXG].

81. S. 268, 80th Leg. Reg. Sess. (Tex. 2007), https://capitol.texas.gov/tlodocs/80R/billtext/pdf/SB00268I.pdf [https://perma.cc/F9LT-UFV3].

82. Various motives underlie remittances, including altruism, payment for receipt of services, investment, and insurance. Hillel Rapoport & Frédéric Docquier, *The Economics of Migrants' Remittances*, *in* 2 HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY, 1135, 1136–98 (Serge-Christophe. Kolm & Jean Mercier Ythier eds., 2006). Research suggests certain surveyed migrant groups—Salvadorans in Washington D.C. and the Senegalese in Spain—remit more than a third of their income, respectively exceeding $5,000 and $3,000 annually. Dean Yang, *Migrant Remittances*, 25 J. ECON. PERSPS. 129, 133–34 (2011). Beyond individuals' migration decisions responding to potential remittances, entire countries and international institutions shape policies around migration and remittances. *Id.* at 131.

83. *See, e.g.*, United States v. California, 921 F.3d 865, 879–88 (9th Cir. 2019) (analyzing several pro-immigrant statutes passed by California to review the denial of a preliminary injunction). *See generally* Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125, 129 (2019) (empirically arguing that "the most visible manifestation of the Trump Effect was the sharp growth of subfederal immigration regulation in 2017, regulation that was overwhelmingly pro-immigrant in nature"); Trevor George Gardner, *Immigrant Sanctuary as the "Old Normal": A Brief History of Police Federalism*, 119 COLUM. L. REV. 1 (2019) (drawing upon the long history of police federalism to understand immigration sanctuary).

presence in the United States."[84] Yet, California's proceeds from the fee would not go towards fence building but rather towards emergency medical care for undocumented immigrants.[85] Unlike other states, California's undocumented young adults may qualify for the state Medicaid program if otherwise eligible.[86] As such, California envisions a type of fiscal citizenship for those without legal citizenship.[87] Remittance taxes here would have acted as a targeted consumption tax to partly fund health benefits for the taxed community.[88] Accordingly, the remittance tax might comport with "sanctuary" policies and deepen conflicts with federal efforts to disincentivizepublic health care benefits for immigrants.[89]

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84. S. 92, 2009 Leg., 2009 Sess. (Cal. 2009), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200920100SB92 [https://perma.cc/S67C-94DD].

85. *Id.*

86. *Medi-Cal Eligibility and Covered California – Frequently Asked Questions*, CAL. DEP'T OF HEALTH CARE SERVS., https://www.dhcs.ca.gov/services/medi-cal/eligibility/Pages/Medi-CalFAQs2014b.aspx [https://perma.cc/EXR3-P6UK] ("You do not have to be a citizen or have satisfactory immigration status to qualify for Medi-Cal . . . . Immigrants who have a satisfactory immigration status and meet all eligibility requirements can qualify for full Medi-Cal coverage."); *see, e.g.*, Associated Press, *California Considers Health Care for Undocumented Immigrants*, NBC NEWS (May 21, 2019), https://www.nbcnews.com/news/latino/california-considers-health-care-undocumented-immigrants-n1008201 [https://perma.cc/6B4P-A3CC] (describing a proposal for California to provide broader health care benefits to undocumented immigrants beyond Medi-Cal, perhaps "prompt[ing] yet another collision with the Trump administration, which has proposed a rule that could hinder immigrants' residency applications if they rely on public assistance programs such as Medicaid"). California ultimately signed expansive legislation. *See* CAL. HEALTH & SAFETY CODE §§ 1000–1003 (West 2019); CAL. WELF. & INSTS. CODE §§ 14005.18, 14005.40, 14007.8, 14301.1, 17600.50, 17612.1, 17612.2, 17613.1, 17613.2 (West 2019). *See generally* Medha D. Makhlouf, *Laboratories of Exclusion: Medicaid, Federalism & Immigrants*, 95 N.Y.U. L. REV 1680 (2020) (providing a detailed description and timeline of Medicaid federalism vis-a-vis various immigration statuses).

87. *See generally* Richard A. Musgrave, *Clarifying Tax Reform*, 70 TAX NOTES 731, 732 (1996) (providing an early use of the term "fiscal citizenship"); Ajay K. Mehrotra, *Reviving Fiscal Citizenship*, 113 MICH. L. REV. 943, 946, 951 (2015) (reviewing LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040 (2013)) (describing scholars for whom "taxation is a fundamental part of the social contract between the state and its citizens—a contract that helps us understand the meaning of 'fiscal citizenship,'" and describing how "paying taxes is a ceremony of fiscal citizenship").

88. In a prior essay, I considered the implications of a state effort that went even further to directly subsidize the immigration process. *See* Shayak Sarkar, *Crediting Migrants*, 71 STAN. L. REV. ONLINE 281, 289–90 (2019). *But see* Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 593–94 (2008) (describing how "[o]bvious fiscal concerns, fueled by the perception that unlawful immigrants overly burden state and local institutions, such as hospitals and schools, without paying taxes" may be at play in local, but non-tax, immigration regulation).

89. *See* Associated Press, *supra* note 86; 8 C.F.R. § 212.21(b)(2), (b)(5) (2019) (defining "public benefits" for which use could render a migrant a "public charge" to include Supplemental Nutrition Assistance Program (SNAP) and certain Medicaid benefits); *see also* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,295 (proposed Aug 14, 2019) (to be codified at 8 C.F.R. pts 103, 212–14, 245, 248) (explaining the expansion of the public-charge definition to include these programs). *See generally* HAMUTAL BERNSTEIN, DULCE GONZALES, MICHAEL KARPMAN & STEPHEN ZUCKERMAN, URB. INST., ONE IN SEVEN ADULTS IN IMMIGRANT FAMILIES REPORTED AVOIDING PUBLIC BENEFIT PROGRAMS IN 2018 (2019) (suggesting that adults in immigrant families may not participate in public benefit programs like Medicaid because they feared losing their legal status under a proposed Trump administration rule penalizing legal immigrants for using those programs); Jennifer

Federal remittance taxation proposals have also surfaced, including proposals that condition remittance taxes on immigration status. None of the federal proposals I mention include a federal tax offset that would mirror Oklahoma's. The 2015 Remittance Status Verification Act (RSVA) proposed amending the Electronic Fund Transfers Act, a significant federal money transfer law, and instituting a fine of 7 percent for remittance senders who failed to present acceptable documentation of immigration status.[90] The RSVA would have delegated authority to the Consumer Financial Protection Bureau to identify what documentation would suffice to avoid the fine.[91] The *matricula consular*, a sovereign-issued consular document common among the Mexican diaspora, was singled out for potential exclusion.[92] While the RSVA never passed, it exposed Congressional efforts to restrict the remittance services available to Mexican nationals by disempowering Mexican identification.[93] More generally, the RSVA tax would have imposed taxes on the capital flows of undocumented immigrants.[94]

Sponsors have explicitly characterized federal proposals with destination-contingent remittance taxes as immigration enforcement tools. While President Trump proposed requiring "lawful presence" to send remittances,[95] Republican members of Congress introduced the Border Wall Funding Act of 2017 (BWFA). This act requires a remittance transfer provider to collect a "remittance fee" equal to 2 percent of the value of the remittance if the remittance's designated recipient is located in certain countries, including Mexico and many Central American

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M. Chacón, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1383 (2019) (describing "the extent to which sanctuary carveouts have ensured the continuation of state-federal cooperation around immigration enforcement despite the state's 'sanctuary' label").

90. Remittance Status Verification Act of 2015, S. 79,114th Cong. § 2(2).

91. *Id.*.

92. *Id.* The *matricula consular* is issued by Mexico to Mexican nationals residing outside Mexico, regardless of American immigration status. *Matricula consular* usually refers to the Mexican Matrícula Consular de Alta Seguridad. *See also* ANDORRA BRUNO & K. LARRY STORRS, CONG. RSCH. SERV., CONSULAR IDENTIFICATION CARDS: DOMESTIC AND FOREIGN POLICY IMPLICATIONS, THE MEXICAN CASE, AND RELATED LEGISLATION 1 (2005) (noting that while Mexico has been issuing consular identification cards since 1871, Guatemala, Ecuador, and Brazil also offer them, and other countries are considering offering them); *Matrícula Consular*, GOBIERNO DE MÉXICO, https://consulmex.sre.gob.mx/chicago/index.php/preguntas?id=55 [https://perma.cc/9JVE-S6KM]; *infra* notes 335–338 and accompanying text.

93. *See also* John Coyle, *The Legality of Banking the Undocumented*, 22 GEO. IMMIGR. L.J. 21, 53 (2007) (referencing other proposed legislation to exclude the *matricula consular* and arguing that "[i]f the goal was to make life more difficult for Mexican citizens living in the United States . . . then it was perfectly crafted to accomplish this end").

94. *Compare id.*, *with supra* note 84 and accompanying text (capturing how both the federal RSVA as well as the proposed California tax targeted undocumented immigrants).

95. Emily Stewart, *Let's Look Back at Trump's Actual Plan for Making Mexico Pay for the Wall*, VOX (Jan. 10, 2019), https://www.vox.com/policy-and-politics/2019/1/10/18177058/trump-mexico-wall-pay-shutdown-mcallen [https://perma.cc/VMM4-M26X]; Pay for the Wall, https://assets.donaldjtrump.com/Pay_for_the_Wall.pdf [https://perma.cc/V8B6-6J3U].

countries.[96] Mexico receives the greatest value of American remittances, but the destination country list excluded India, China, and Vietnam, which collectively receive more money than Mexico.[97] A few years after the BWFA, Republican members introduced the Fund and Complete the Border Wall Act, which revived the remittance fee but made two critical changes: it raised the fee to 5 percent and extended the fee to *any* country.[98] These federal proposals focus on international transactions and lack Oklahoma's offsetting income tax credit, furthering the sense of immigration enforcement. The state and federal proposals and laws are summarized in Table 1.

Reactions to remittance taxation echo sentiments about immigration enforcement. Proponents of heightened immigration enforcement have commended the "symmetry in having illegal immigrants underwrite part of the enforcement to prevent illegal immigration."[99] To be clear, this "symmetry" could be said not only of remittance taxes that explicitly target immigrants but also those that disproportionately affect undocumented migrants despite formal neutrality.

Others have characterized remittance taxes broadly as a "crude and regressive"[100] consumption tax or "overtaxation," punishing migrants who choose to support loved ones abroad rather than local businesses.[101] The taxes

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96. Border Wall Funding Act of 2017, H.R. 1813, 115th Cong. § 2(2). The entire list included Mexico, Guatemala, Belize, Cuba, the Cayman Islands, Haiti, the Dominican Republic, the Bahamas, Turks and Caicos, Jamaica, El Salvador, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Aruba, Curacao, the British Virgin Islands, Anguilla, Antigua and Barbuda, Saint Kitts and Nevis, Montserrat, Guadeloupe, Dominica, Martinique, Saint Lucia, Saint Vincent and the Grenadines, Barbados, Grenada, Guyana, Suriname, French Guiana, Ecuador, Peru, Brazil, Bolivia, Chile, Paraguay, Uruguay, or Argentina. *Id.*

97. *See* WORLD BANK GROUP, *supra* note 35.

98. Fund and Complete the Border Wall Act, H.R. 85, 116th Cong. § 4 (2019). Regardless of geographic scope, these proposals quickly elicited the opposition of the American Bankers Association. Letter from Am. Bankers Ass'n, Consumer Bankers Ass'n, Elec. Transactions Ass'n, Bank Pol'y Inst., Indep. Cmty. Bankers of Am., Money Servs. Bus. Ass'n, Money Servs. Round Table & Nat'l Money Transmitters Ass'n, to Members of the U.S. House of Representatives *Re: Opposition to H.R. 85, Fund and Complete the Border Wall Act*, (Feb. 28, 2019), https://www.aba.com/-/media/documents/letters-to-congress-and-regulators/joint-trade-opposition-letter-hr85.pdf?rev=fdfc612e9f81428bbda9fcc48cae7a2c [https://perma.cc/PF4F-H4HZ] (describing the proposal as "an ill-advised consumer tax on a legal and [already] heavily regulated financial product").

99. Beaubien, *supra* note 69 (quoting Mark Krikorian, executive director of the Center for Immigration Studies, "a D.C. think tank that advocates for stronger limits on migration to the U.S.").

100. Rosser, *supra* note 40, at 39 (using the framework of "sin taxes" and concluding both that "remittance taxation would be crude and regressive, diminishing the ability of migrants to help provide support for family members left behind" and that "anti-immigrant sentiment probably explains taxing proposals more than supposed fairness grounds for remittance consumption taxes"). *But see* Hunt Alcott, Benjamin B. Lockwood & Dmitry Taubinsky, *Regressive Sin Taxes, with an Application to the Optimal Soda Tax,* 134 Q.J. ECON. 1557, 1559 (2019) (discussing how seemingly regressive sin taxes can, through "revenue recycling," nonetheless fund "programs that benefit the poor").

101. Ariel Stevenson, *Improving the U.S. Guest Worker System Through Tax and Social Welfare Reform*, 17 HARV. LATINO L. REV. 147, 165 (2014) (exploring how the overtaxation of migrant workers weakens ties to their "home community" and pushes savings goals "far into the future"); *see also* Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without*

Table 1: Remittance Taxation *Proposals* and **Laws**

	No Immigration Status Requirement		Immigration Status Requirement	
	No State Income Tax Credit	State Income Tax Credit	No State Income Tax Credit	State Income Tax Credit
General Monetary Transmissions		**Oklahoma**[102]	*Proposed California*[103] *Proposed North Carolina*[104] *Proposed Mississippi*[105]	
Cross-Border Monetary Transmissions	*Border Wall Funding Act of 2017*[106] *Fund and Complete the Border Wall Act of 2019*	*(Second) Proposed Mississippi*[107] *Proposed Arizona*[108]	*Proposed Oklahoma*[109]	*Proposed Texas*[110]

act to keep migrants' funds within the domestic community where the funds are accumulated. Other tax-related efforts connecting capital and human flight include revoking citizens' passports for federal tax debts and punishing noncitizen tax evasion through deportation.[111]

Representation, 9 HARV. LATINO L. REV. 1, 8 (2006) (analyzing the "separate, unequal, and unrepresented federal taxation of undocumented immigrants").

102. *See* OKLA. STAT. ANN. tit. 63, § 2-503.1j(A) (West 2020).

103. *See* S. 92 § 12, 2009 Leg., 2009 Sess. (Cal. 2009), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200920100SB92 [https://perma.cc/S67C-94DD].

104. *See* Tax on Illegal Immigrant Wire Transfers, H.R. 2560, 2005–2006 Gen. Assemb., 2005 Sess. (N.C. 2006), https://www.ncleg.net/Sessions/2005/Bills/House/HTML/H2560v1.html [https://perma.cc/Q8D8-76H2].

105. *See* Illegal Immigrant Fee Act, S. 2736, 2007 Leg., Reg. Sess. (Miss. 2007), http://billstatus.ls.state.ms.us/documents/2007/pdf/SB/2700-2799/SB2736IN.pdf [https://perma.cc/EZR6-K6WG].

106. *See* Border Wall Funding Act of 2017, H.R. 1813, 115th Cong.

107. *See* H.R. 924, 2014 Leg., Reg. Sess. (Miss. 2014), http://billstatus.ls.state.ms.us/documents/2014/pdf/HB/0900-0999/HB0924IN.pdf [https://perma.cc/587K-4TXG].

108. *See* H.R. 2677, 50th Leg., Reg. Sess. (Ariz. 2011), https://www.azleg.gov/legtext/50leg/1R/bills/hb2677p.pdf [https://perma.cc/XE42-2PRN].

109. *See* S. 547, 56th Leg., 1st Sess. (Okla. 2017), https://legiscan.com/OK/text/SB547/id/1670932 [https://perma.cc/6DXM-NB6K].

110. *See* S. 268, 80th Leg. Reg. Sess. (Tex. 2007), https://capitol.texas.gov/tlodocs/80R/billtext/pdf/SB00268I.pdf [https://perma.cc/F9LT-UFV3].

111. Pursuant to a 2015 law, if a taxpayer's debt exceeds $50,000, and the taxpayer has failed to enter into a payment agreement with the IRS, the IRS may share information with the Department of State, leading to passport nonrenewal or revocation. 26 U.S.C. § 7345(a), (b). For noncitizens, tax

Remittance taxation and attendant anti-immigrant sentiments are not uniquely American.[112] Gulf countries,[113] including Oman, the United Arab Emirates, and Bahrain, have proposed remittance taxes.[114] Kuwait's parliamentary financial committee approved a remittance tax, making it the Gulf country that went furthest towards enacting one.[115] The sole female member of Kuwait's parliament, Safa Al-Hashem, is a major advocate of the tax.[116] Al-Hashem famously wished to tax immigrants "for everything [including] the air they breathe here"[117] in response to a perceived "invasion."[118] She has promoted the tax as part of her efforts to reduce what she describes as Kuwait's "demographic imbalance,"[119] the fact that full Kuwaiti citizens comprise a

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evasion is defined as an "aggravated felony" giving rise to deportability under the Immigration and Nationality Act. 8 U.S.C. § 1101(a)(43)(M)(ii). *See, e.g.*, Kawashima v. Holder, 565 U.S. 478, 480 (2012) (upholding removability of legal permanent residents convicted of "willfully making and subscribing a false tax return" and "aiding and assisting in the preparation of a false tax return" in respective violations of 26 U.S.C. § 7206(1) and 26 U.S.C. § 7206(2)).

112. *See* Dilip Ratha, Supriyo De, Eung Ju Kim, Sonia Plaza, Ganesh Seshan & Nadege Desiree Yameogo, *Data Release: Remittances to Low- and Middle-Income Countries on Track to Reach $551 Billion in 2019 and $597 Billion by 2021*, WORLD BANK GROUP: PEOPLE MOVE BLOG (Oct. 16, 2019), https://blogs.worldbank.org/peoplemove/data-release-remittances-low-and-middle-income-countries-track-reach-551-billion-2019 [https://perma.cc/RT2J-K9PJ] (noting the risk of "anti-immigration sentiment in almost all large host countries for migrants, including the United States, Europe, Russia, and South Africa" and tying this to policy stances that "impose taxes or other restrictions on outward remittances").

113. I use "Gulf" countries to refer to the Gulf Cooperation Council, comprised of the six monarchies of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates.

114. FROILAN MALIT, JR. & GEORGE NAUFAL, GULF LABOUR MARKETS AND MIGRATION, TAXING REMITTANCES: CONSEQUENCES FOR MIGRANT LABOUR POPULATIONS IN THE GCC COUNTRIES 7 (2016), https://gulfmigration.org/media/pubs/exno/GLMM_EN_2016_01.pdf [https://perma.cc/VLA6-ZFA8] (noting efforts in Oman); *see also* Tom Carnegie, *Bahrain Rejects Expat Remittance Tax*, INT'L ADVISER (May 11, 2018), https://international-adviser.com/bahrain-rejects-expat-tax/ [https://perma.cc/VKV5-HWJB] (describing how law that "would have taxed all funds expats transferred out of the jurisdiction" was voted down in legislature after the Bahrain Parliament Financial and Economic Committee labelled the proposed tax unconstitutional).

115. *Kuwait Edges Closer to Introducing Remittance Tax*, ARAB WKLY. (Apr. 22, 2018), https://thearabweekly.com/kuwait-edges-closer-introducing-remittance-tax [https://perma.cc/M7K6-H54X] (explaining how Kuwait's Parliamentary Financial and Economic Affairs Committee (PFEAC) approved a bill that would tax overseas remittances).

116. *Kuwaiti MP Calls for Expelling Close to 2 million Expats, Urges Remittance Tax*, GULF BUS. (June 11, 2019), https://gulfbusiness.com/kuwaiti-mp-calls-expelling-close-2-million-expats-urges-remittance-tax/ [https://perma.cc/2HP8-97VX].

117. B Izzak, *MP Urges Govt to Tax Expats for the 'Air They Breathe,'* KUWAIT TIMES, Oct. 28, 2018, at 1.

118. *Kuwait MP: 'Expats Must Pay Even for Air They Breathe,'* MIDDLE E. MONITOR (Sept. 16, 2019), https://www.middleeastmonitor.com/20190916-kuwaiti-mp-expats-must-pay-even-for-air-they-breathe/ [https://perma.cc/DUT3-8D6E].

119. *Kuwaiti MP Calls for Expelling Close to 2 Million Expats, Urges Remittance Tax*, *supra* note 116; *see also* Hussain Al-Qatari, *In Kuwait, 'Too Many Foreigners' Becomes a Frequent Refrain*, SEATTLE TIMES (Feb. 20, 2017), https://www.seattletimes.com/business/in-kuwait-too-many-foreigners-becomes-a-frequent-refrain/ [https://perma.cc/W32X-DSB9] ("Several lawmakers demanded the government deport 100,000 expats annually to balance the country's demographics.").

minority of the population.[120] Remittance taxes in Al-Hashem's imagination are a means to make migrants pay for their unwelcome presence.

When governments tax remittances, they throttle the historic flow of migrants' earnings to their countries of origin. This restriction interferes with migrants' provision of economic support to those they left behind. If sufficiently high, a migration tax may discourage such economic migration—potentially reflecting the intent of that tax and echoing the purpose to which the revenue is devoted.

III.
EXPELLING CAPITAL: SOCIAL SECURITY

While remittance taxation guards capital—keeping the proceeds of migrants' economic activity within a country and reducing the incentive to migrate—states can also expel capital and, correspondingly, migrants behind that capital.

This Part considers the complicated structure of Social Security. I parse the technical history of Social Security benefits to uncover how, despite common refrains suggesting otherwise, undocumented immigrants' unauthorized work may earn Social Security benefits.[121] And yet, conditions on lawful status limit where immigrants may be when *receiving* benefits, as distinct from where they were when they *earned* benefits. As such, even entitled immigrants may be compelled to leave the country for Social Security benefits. Capital expulsion, here conditioned on American immigration status, advances migrant expulsion.

First, a brief introduction on social security generally. Social Security benefits (paid as annuities) are estimated to comprise the majority of income for tens of millions of beneficiaries.[122] At any point in time, those benefits are largely funded by payroll taxes on current workers' wages, nominally divided between

120. *Kuwaiti MP Calls for Expelling Close to 2 Million Expats, Urges Remittance Tax*, *supra* note 116 ("Al-Hashem, the country's only female member of parliament, said that it was essential to have Kuwaitis number more than 50 per cent of the country's population.").

121. As applied to migrant workers, the normal requirement of forty quarters of coverage (QCs), or ten years, *see* 20 C.F.R. § 404.115(a) (2020) (requiring forty quarters for coverage for those born after Jan. 1, 1929), has been subject to critique. *See, e.g.*, Stevenson, *supra* note 101, at 181 (suggesting relaxation of the QC requirement, which is a "significant barrier for cyclical migrant workers").

122. *See* Adam Bee & Joshua Mitchell, *Do Older Americans Have More Income Than We Think?* 23, 60 (Soc., Econ. & Hous. Stat. Div., Working Paper No. 2017-39, 2017) (noting how 50 percent of aged units derive at least half of their incomes from Social Security). The Federal Old Age, Survivors, and Disability Insurance (OASDI) Program provides support to American workers in old age through what are colloquially called Social Security benefits. 42 U.S.C. § 402(a); *see also* THE BD. OF TRS., FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TR. FUNDS, THE 2020 ANNUAL REPORT 2 (2020) (noting OASDI benefits to "48 million retired workers and dependents of retired workers").

workers and employers.[123] This is described as a "pay-as-you-go" system.[124] Since the 1980s, the Social Security Administration (SSA) has collected more in taxes and other income each year than it pays out in benefits.[125] The Social Security Trust Funds, one for old-age benefits and one for disability, account for excess receipts and invest this income in Treasury securities.[126] However, benefits are soon expected to outstrip incoming taxes, requiring the SSA to draw on the Trust Funds. Over time, demographic changes are expected to wear down the Trust Funds, leaving them fully depleted in a few decades, if not sooner.[127] The Social Security Trust Funds can be understood as substantial public capital that can temporarily, but not in perpetuity, fund individual benefits.[128]

In analyzing how the capital controls embedded in the Social Security system may exile migrants, I turn first to the entitlement restrictions—which

123. *See generally Topic No. 751 Social Security and Medicare Withholding Rates*, INTERNAL REVENUE SERV., https://www.irs.gov/taxtopics/tc751 [https://perma.cc/JF7P-JDCT] (noting the current tax rates for social security for both employer and employee).

124. Martin Feldstein, *The Future of Social Security Pensions in Europe* 13 (Nat'l Bureau of Econ. Rsch., Working Paper No. 8487, 2001) (noting "the current pay-as-you-go U.S. Social Security law"). The "pay-as-you-go" moniker is an oversimplification. While it is true that Social Security accounts are not individually and privately invested, that does not mean that Social Security benefits do not represent a return on invested capital. Rather, investment in Treasury securities provides a return. 42 U.S.C. § 401; THE BD. OF TRS., FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TR. FUNDS, *supra* note 122, at 25–39 (describing the Trust Funds' financial operations and updates).

125. *Policy Basics: Understanding the Social Security Trust Funds*, CTR. ON BUDGET & POL'Y PRIORITIES (May 14, 2020), https://www.cbpp.org/research/social-security/policy-basics-understanding-the-social-security-trust-funds [https://perma.cc/6EEB-ZBPU]. *But see* THE BD. OF TRS., FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TR. FUNDS, *supra* note 124, at 3 ("Under the Trustees' intermediate assumptions, OASDI cost is projected to exceed total income starting in 2021, and the dollar level of the hypothetical combined trust fund reserves declines until reserves become depleted in 2035.").

126. *Trust Fund FAQs*, SOC. SEC. ADMIN., https://www.ssa.gov/oact/progdata/fundFAQ.html [https://perma.cc/R2AG-94MF]; *see* CONG. RSCH. SERV., SOCIAL SECURITY: THE TRUST FUNDS 3, (2019) (overviewing the Federal Old-Age and Survivors Insurance (OASI) Trust Fund and the Federal Disability Insurance (DI) Trust Fund); *see also* Yesha Yadav, *The Failed Regulation of U.S. Treasury Markets*, 121 COLUM. L. REV. (forthcoming 2021) (noting the important connection between the Treasury market and paying for public programs like Social Security).

127. THE BD. OF TRS., FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TR. FUNDS, THE 2019 ANNUAL REPORT 13–16 (2019); Alexander M. Gelber, Adam Isen & Jae Song, Goldman Sch. of Pub. Pol'y, *The Effect of Pension Income on Elderly Earnings: Evidence from Social Security and Full Population Data* 33 (May 17, 2016) (unpublished manuscript) (on file with the California Law Review) (noting the "projected 2034 exhaustion of the OASDI Trust Fund"); CONG. RSCH. SERV., SOCIAL SECURITY: THE TRUST FUNDS, *supra* note 126 (noting projections "that the asset reserves held by the OASI fund will be depleted in 2034, whereas the asset reserves held by the DI fund will be depleted in 2065"); *see also* Konstantin Kashin, Gary King & Samir Soneji, *Systematic Bias and Nontransparency in US Social Security Administration Forecasts*, 29 J. ECON. PERSPS. 239, 240 (2015) (expressing concerns about the SSA's forecasting estimation procedures); Drew Desilver, *5 Facts About Social Security*, PEW RSCH. CTR.: FACT TANK (Aug. 18, 2015), https://www.pewresearch.org/fact-tank/2015/08/18/5-facts-about-social-security/ [https://perma.cc/G7JP-VRY8].

128. Benefits are tailored to individual work histories, but many beneficiaries mistakenly believe that individualized Social Security statements reflect returns on personally invested capital. Desilver, *supra* note 127; *see also Nominal Interest Rates on Special Issues*, SOC. SEC. ADMIN., https://www.ssa.gov/oact/progdata/newIssueRates.html [https://perma.cc/PM85-QUGZ] (showing a decrease and eventually an end to interest rates on new investments between 2000 and 2029).

limit eligibility for benefits—before turning to payment restrictions,which limit payment for otherwise eligible individuals.

A. Entitlement Restrictions

Contrary to common belief, undocumented immigrants can become entitled to Social Security benefits, with more recent immigrants admittedly facing greater hurdles.[129] Noncitizens historically faced few barriers to entitlement—the Social Security Administration (SSA) began limiting its issuance of SSNs primarily to individuals authorized for employment in the United States only in 1995.[130] Even after immigrants without work authorization lost the ability to obtain a Social Security Number, they could still accrue covered quarters of earnings.[131] In 2004, however, Congress limited eligibility with the Social Security Act of 2004,[132] which requires claimants to have had a work authorized-Social Security number at *some time* to gain benefits entitlement based on covered earnings.[133]

The current regime creates a tripartite taxonomy, leaving recent immigrants who are neither citizens nor legal permanent residents adrift.[134] First, immigrants

129. Ironically, this mistake is saliently found at factcheck.org. Justin Blank, *Social Security for Illegal Immigrants?*, FACTCHECK.ORG (Mar. 1, 2009), https://www.factcheck.org/2009/03/social-security-for-illegal-immigrants/ [https://perma.cc/BVH8-JTNZ] ("To repeat: Illegal immigrants cannot legally receive Social Security benefits."). These benefits are distinct from Supplemental Security Income (SSI), a means-tested benefit with more stringent eligibility criteria. ALISON SISKIN, CONG. RSCH. SERV., NONCITIZEN ELIGIBILITY FOR FEDERAL PUBLIC ASSISTANCE: POLICY OVERVIEW 8–10, 16 (2016) (describing the "qualified alien" definition in relationship to major federal programs, including SSI).

130. Taxpayer Identifying Numbers (TIN), Prop. Treas. Reg. § 301.6109-1, 60 Fed. Reg. 30,212 (June 8, 1995) (to be codified at 26 C.F.R. § 301.6109). *But see Social Security Numbers for Noncitizens*, SOC. SEC. ADMIN., Mar. 2018, at 1, 2 ("If you aren't authorized by DHS to work in the United States, you can get a Social Security number only if you can prove you need it for a valid non-work reason. That might happen, for example, if a state or federal law requires you to have a Social Security number to get benefits to which you have already established entitlement.").

131. *See* 42 U.S.C. § 414(a)(2) (defining a "fully insured individual" as having forty quarters of coverage).

132. Social Security Protection Act of 2004, Pub. L. No. 108–203, § 211, 118 Stat. 493, 518 (codified as amended at 42 U.S.C. § 414(c).

133. Most earnings are covered earnings insofar as they are subject to Social Security taxes. For the exclusions, see 42 U.S.C.§ 410(a). *See generally* Lipman, *supra* note 101, at 25 (explaining how with the achievement of "lawful status, work authorization and a valid SSN, [immigrants] may then apply for Social Security benefits based on all Social Security-covered earnings regardless of their work status during the earning period").

134. Certain categories of migrant workers, including temporary agricultural workers on H2-A visas, are exempt from social security taxes and therefore ineligible. *See Alien Liability for Social Security and Medicare Taxes of Foreign Teachers, Foreign Researchers, and Other Foreign Professionals*, INTERNAL REVENUE SERV. (Oct. 2, 2020), https://www.irs.gov/individuals/international-taxpayers/alien-liability-for-social-security-and-medicare-taxes-of-foreign-teachers-foreign-researchers-and-other-foreign-professionals#:~:text=Resident%20aliens%2C%20in%20general%2C%20have,Security%2FMedicare%20Taxes%20as%20U.S.&text=Nonresident%20aliens%2C%20in%20general%2C%20are,based%20on%20their%20nonimmigrant%20status [https://perma.cc/72UH-XANH] (listing social security tax exemptions); *see also* Stevenson, *supra* note 101, at 155 (discussing these particular exemptions but

who received Social Security numbers prior to 2004 and never possessed valid work authorization may still gain entitlement for *all* covered earnings.[135] Similarly, individuals who received SSNs in or after 2004 and had work authorization for *some* earnings will gain entitlement based on *all* earnings.[136] Thus, undocumented immigrants who arrived to the United States early enough, or who possessed work authorization at some point, may become entitled.[137]

Yet the third group, recent arrivals who never hold work authorization, cannot count their earnings towards entitlement.[138] Individuals in this final group, when using Social Security numbers that do not match their name, have their "wages" placed in an Earnings Suspense File (ESF) by the Social Security Administration.[139] The SSA's Office of the Chief Actuary estimates that each year, millions of foreign national workers without work authorization use Social Security numbers that are not personally valid, generating billions of dollars annually in payroll taxes that *may* never be claimed.[140] Such "scrambled" wages can be unscrambled—the SSA "[a]dvise[s] the [undocumented immigrant] that if he should be lawfully admitted to the U.S. with permission to work to recontact SSA for . . . credit of his/her prior earnings."[141] The three groups created by the current Social Security system are summarized by Table 2 at the end of this section.

The conditional language—that Social Security *may* never be claimed by those having no Social Security number—reflects not only the need to unscramble or "reconcile" but also the ongoing uncertainty over Social Security's place in immigration reform.[142] Consider the Border Security,

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noting that "the systemic default is that temporary workers pay Social Security and Medicare taxes equal to U.S. citizens" since "[l]iability [for Social Security taxes] is not conditioned on future eligibility for benefits").

135. Most earnings are covered earnings insofar as they are subject to Social Security taxes. For the exclusions, see 42 U.S.C.§ 410(a).

136. Dawn Nuschler & Alison Siskin, Cong. Rsch. Serv., Social Security Benefits for Noncitizens: Current Policy and Legislation 3–4 (2016).

137. 42 U.S.C. § 414(c) (describing entitlement criteria for an "individual, if not a United States citizen or national").

138. Nuschler & Siskin, *supra* note 136, at 4.

139. Soc. Sec. Admin., Status of the Social Security Administration's Earnings Suspense File 3 (2015) (explaining how "of the 39 million suspended W-2s, 95 percent reported names and/or SSNs did not match SSA's records"); *id.* at 1 (describing how the ESF now contains over a trillion dollars in earnings). Mismatches in the ESF could also reflect earnings reported under ITINs, *id.* at 3, including for self-employment. *Id.* at 1 n.3.

140. Stephen Goss, Alice Wade, J. Patrick Skirvin, Michael Morris, K. Mark Bye & Danielle Huston, *Effects of Unauthorized Immigration on the Actuarial Status of the Social Security Trust Funds*, Soc. Sec. Admin. Actuarial Note, April 2013, at 1, 2–3 (2013) (estimating "that there are about 3.1 million unauthorized immigrants working and paying Social Security taxes").

141. *RM 03870.048. A Development of Scrambled Wages*, SOC. SEC. ADMIN.: PROGRAM OPERATIONS MANUAL SYS. (POMS) (July 11, 2012), https://secure.ssa.gov/poms.nsf/lnx/0103870048 [https://perma.cc/N9XN-UVF2].

142. Luz Arévalo, Michael Dunn & Robert W. Alcorn, *Who Said Your Immigrant Client Cannot Get Credit for Social Security Payments?*, 19 BENDER'S IMMIGR. BULL. 1181, 1181–82, 1182 n.12 (2014) (describing the broader reconciliation process for practitioners).

Economic Opportunity, and Immigration Modernization Act of 2013 (BSEOIMA) introduced and passed in the Senate before ultimately dying in the House.[143] That Act would have granted "registered provisional immigrant" (RPI) status,[144] which includes work authorization,[145] while nonetheless ending RPI recipients' ability to count unauthorized work prior to obtaining RPI toward Social Security quarters of coverage.[146] This would be an exception to the general rule for SSNs issued since 2004—BSEOIMA would disallow the eventual counting of past, covered quarters. Such a disallowance has also been proposed for those who already have Social Security numbers. For instance, the "No Social Security Numbers and Benefits for Illegal Aliens Act of 2015" would have prevented Deferred Action for Childhood Arrivals (DACA) recipients from ever becoming entitled to Social Security.[147]

To summarize, while undocumented immigrants may become and have become entitled to Social Security benefits, recent cohorts face more stringent requirements. Contemporary Congressional proposals have tried to further limit Social Security entitlement, viewing these capital flows as sites of immigration enforcement.

Table 2: Social Security Insured Status by Year of Social Security Number Assignment

	Coverage
Social Security Number Assigned **Before** 2004	All covered earnings may count towards Social Security insured status, regardless of work authorization
Social Security Number Assigned **In**/**After** 2004	All covered earnings may count towards Social Security insured status, as long as work authorization existed for *some* covered earnings
No Personally Valid Social Security Number	No covered earnings may count towards Social Security insured status

143. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

144. *Id.* § 2101.

145. *Id.* § 2101(a) (describing how "registered provisional immigrant status" "shall indicate that the [noncitizen] is authorized to work in the United States for up to 3 years").

146. *Id.* § 2107(d) (proposing to amend Social Security Act and adding new subsection entitled "Insured Status").

147. *See* No Social Security Numbers and Benefits for Illegal Aliens Act of 2015, H.R. 1996, 114th Cong. §§ 2–3 (2015).

B. Payment Restrictions

Beyond entitlement restrictions, payment restrictions pose a distinct barrier to Social Security receipt. The Social Security Administration will not pay entitled noncitizens if they are not lawfully present in the United States, a policy effected by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[148] If noncitizens do not obtain lawful status, they may have to leave the country in order to receive their benefits. In other words, an undocumented worker of Brazilian nationality who returns to Brazil may be paid their benefits upon departure from the United States, but not before.[149]

Even after leaving the United States, noncitizens may not be able to receive payments to which they are entitled. Under the statutory default rule, a noncitizen may receive benefits for only six months after leaving the United States.[150] However, this default rule is subject to a number of exceptions that allow payments to the citizens of specific countries around the world—albeit to varying degrees.[151] This variation is particularly stark for survivors and dependents. Brazilian national survivors and dependents can be paid regardless of their tenure inside or outside the United States.[152] But while Mexican, Guatemalan, and Salvadorian nationals collecting on their own Social Security records are treated similarly,[153] their survivors and dependents must have lived in the United States for a minimum period of time or face payment cutoff.[154]

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148. Such noncitizens may refer to people whose eligibility accrued pursuant to the first two rows of Table 2 but who do not currently have lawful status. *See RS 00204.010.B.1 Lawful Presence Payment Provisions*, SOC. SEC. ADMIN.: PROGRAM OPERATIONS MANUAL SYS. (POMS) (Jan. 4, 2017), https://secure.ssa.gov/poms.nsf/links/0300204010 [https://perma.cc/QJF4-A6ZS]; 42 U.S.C. § 402(y); Goss et al., *supra* note 140, at 5 ("Effective December 1, 1996, the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* prohibits SSA from paying monthly Title II benefits to noncitizens who are in the United States for any month during which they are not lawfully authorized to be in the country.").

149. *See RS 00204.010 Lawful Presence Payment Provisions*, *supra* note 148 ("We may begin paying R. benefits again if his alien status changes or he leaves the U.S. subject to the alien non-payment provisions."). *See generally* Mark J. Warshawsky & Katherine N. Bent, SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN 5.104 (2019) (quantifying number of retirement beneficiaries in foreign countries, including Brazil). Since the Supplement does not disaggregate by citizenship, these Brazil-based beneficiaries, in theory, could all be American citizens without Brazilian nativity or even ties.

150. 42 U.S.C. § 402(t)(1)(A).

151. *Id.* § 402(t)(2).

152. *Your Payments While You Are Outside the United States: Country List 1*, SOC. SEC. ADMIN.: INT'L PROGRAMS, https://www.ssa.gov/international/countrylist1.htm [https://perma.cc/SE2N-29CM].

153. *Your Payments While You Are Outside the United States: Country List 2*, SOC. SEC. ADMIN.: INT'L PROGRAMS, https://www.ssa.gov/international/countrylist2.htm [https://perma.cc/VMC4-6Z59].

154. Soc. Sec. Admin., Your Payments While You Are Outside the United States 6, 9–10 (2020), https://www.ssa.gov/pubs/EN-05-10137.pdf [https://perma.cc/LNE8-B3TS] (discussing residency requirements for dependents and survivors). Indian nationals face an even more restrictive regime. *Id.* at 7 (noting that survivor and dependent benefits, in addition to meeting residency requirements, require certain minimum quarters of coverage for the underlying workers). Such coverage requirements may not otherwise apply in cases of disability. *See* Nuschler & Siskin, *supra* note 136, at 10 n.36 (noting that while "insured status" usually requires forty quarters of coverage, significantly fewer may suffice for a disability benefit); *Your Payments While You Are Outside the United States: Country List 4*, SOC. SEC.

Beyond restricting payments based on the citizenship of the beneficiary, the Treasury restricts the payment of government benefits to blacklisted countries—currently Cuba and North Korea.[155] Moreover, no beneficiary, whether or not they are a U.S. citizen, may receive benefits while residing in certain former republics of the Soviet Union unless the agency makes an individualized exception.[156] As such, a Moldovan citizen who moved to the United States and became entitled could not return to Moldova without giving up their Social Security benefits, and nor could her Mexican spouse or U.S. citizen child.[157]

Unlawfully present noncitizens may thus accumulate rights to capital (Social Security benefits), but the benefits will not be paid until after departure. This set of policies thus expels capital, perhaps as a means to expel migrants themselves.[158] These byzantine payment restrictions create a Faustian bargain: relinquish your adopted homeland or relinquish your capital. These restrictions complement Congress's continued entertainment of proposals limiting Social Security entitlements for once work-authorized immigrants—including DACA recipients. Thus, nationality-based Social Security entitlement and payment controls act as migrant controls.

IV.
MARGINALIZING CAPITAL: PERSONAL ACCOUNTS

The previous two Parts addressed how tax and public benefit laws can operate to guard or expel capital. This Part considers how the American financial system marginalizes migrants' capital.[159] The marginalization of migrants'

ADMIN.: INT'L PROGRAMS, https://www.ssa.gov/international/countrylist4.htm [https://perma.cc/R24T-SSRM].

155. *RS 02650.001 Treasury Department Restrictions*, SOC. SEC. ADMIN.: PROGRAM OPERATIONS MANUAL SYS. (POMS) (Mar. 7, 2018), https://secure.ssa.gov/apps10/poms.nsf/lnx/0302650001 [https://perma.cc/GM6E-SEBP].

156. *RS 02650.020 SSA Restrictions on Payments to the Former Republics of the Soviet Union*, SOC. SEC. ADMIN.: PROGRAM OPERATIONS MANUAL SYS. (POMS) (Mar. 7, 2018), https://secure.ssa.gov/apps10/poms.nsf/lnx/0302650020 [https://perma.cc/9NLF-URZ5].

157. *See id.*; *RS 02650.040 Special Payment Policy and Procedure for SSA Restricted Countries*, SOC. SEC. ADMIN.: PROGRAM OPERATIONS MANUAL SYS. (POMS) (Feb. 9, 2019), https://secure.ssa.gov/apps10/poms.nsf/lnx/0302650040 [https://perma.cc/UET3-85CH].

158. Despite this claim's intuitive appeal, empirical evidence is sparse. One arguably informative study of a policy lowering Social Security benefits did not find evidence of reduced benefits leading Latin American beneficiaries to return migrate (which normally happened at around a 10 percent rate). Alma Vega, *The Impact of Social Security on Return Migration Among Latin American Elderly in the US*, 34 POPULATION RSCH. & POL'Y REV. 307 (2014). Yet the author emphasized that close to half of the beneficiaries were naturalized citizens (with likely many green card holders among the rest), *id.* at 315, and expressly acknowledged the analysis "does not provide information on return migration among undocumented immigrants" because of their unique circumstances. *Id.* at 322–25. Even more importantly, a refusal to pay any benefit, as here, will have a far more drastic impact than the loss studied, estimated at $110. *Id.* at 309.

159. *See, e.g.*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018, at 25 (defining "fully banked" as meaning that respondents have "have a bank account and rely on traditional banks or credit unions to meet their banking needs" and therefore do not use alternative financial services such as payday loans and check cashing services).

capital marginalizes the migrants themselves, altering behavior without expressly controlling entry and exit.

The admittedly sparse empirical research suggests that undocumented immigrants have relatively limited engagement with the traditional banking system.[160] In one study utilizing a snowball sample of undocumented debtors in New York and New Mexico, only a minority of respondents appeared to have a bank account.[161] This lies in contrast to the general population, of whom the Federal Reserve estimated that a majority are "fully banked."[162] Data from the Mexican Migration Project similarly reveals that undocumented immigrants in the sample are less likely to have bank accounts than their documented counterparts.[163]

This Part examines the role of customer identification requirements in marginalizing migrant capital. The governing statutes are the Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act and REAL ID Act, early twenty-first century laws emerging from the post-September 11, 2001 "war on terror" that address banking and identity verification.[164] Social movements responded to these exclusionary federal laws by demanding subnational innovation, through the creation of municipal IDs, as well as financial institution acceptance of identification provided by other countries.[165] Nonetheless, financial institutions continue to be uncertain and inconsistent in their treatment of migrants' capital.

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160. Nathalie Martin, *Giving Credit Where Credit Is Due: What We Can Learn from the Banking and Credit Habits of Undocumented Immigrants*, 2015 MICH. ST. L. REV. 989, 1019 (2015) ("Only persons without a social security number or a legal right to be in the United States could participate in the survey.").

161. *See generally id.* ("[R]elatively few survey participants reported actually using checking accounts and savings accounts, with 44% and 32% respectively."); Leo A. Goodman, *Snowball Sampling*, 32 ANNALS MATHEMATICAL STAT. 148 (1961) (defining statistical usefulness of snowball sampling).

162. *Supra* note 159. *But see* Fed. Deposit Ins. Corp., FDIC SUPERVISORY INSIGHTS, Winter 2004, at 17, 18, https://www.fdic.gov/regulations/examinations/supervisory/insights/siwin04/siwinter04-article2.pdf [https://perma.cc/LG65-WDX9] (describing how early in the twenty-first century, the FDIC noted that "[f]or many Latin American immigrants, legal status and a lack of traditional identification are the principal reasons for not having an account . . . [and relying on] high-cost wire transfer companies").

163. Catalina Amuedo-Dorantes & Cynthia Bansak, *Money Transfers Among Banked and Unbanked Mexican Immigrants*, 73 S. ECON. J. 374, 386–87 (2006). That data is somewhat older and cannot be as easily explained away by how migrants subject to current and increased immigration enforcement respond to such enforcement, in part by remitting the contents of their accounts to family members in other countries for safekeeping. Morgan Baskin, *Facing Deportation, Immigrants Reconsider Financial Options*, PAC. STANDARD (Mar. 21, 2017), https://psmag.com/news/facing-deportation-immigrants-reconsider-financial-options [https://perma.cc/NFS4-THSW].

164. David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1361–65 (2007) (describing the REAL ID Act and the PATRIOT Act as underlying the "administrative war on terror"); Lee, *supra* note 40, at 2360–61 ("[S]ome of the broadest delegations of authority to the Treasury Secretary in the anti-money laundering context stem from the Patriot Act. Across contexts, concerns with terrorism animate policies governing the interior, the border, and our banks.").

165. *See, e.g.*, JESSICA LINDQUIST, ANDREA LUQUETTA-KERN & NEHAMA ROGOZEN, CAL. REINVESTMENT COAL., BUILDING IMMIGRANT FINANCIAL SECURITY: A GUIDE FOR BANKS 7–8

A. Identifying Capital and Customers

Modern American banking compels identity disclosure.[166] Anti-money laundering (AML) laws, beginning with the Bank Secrecy Act, have sought to curb the flow of illicit money by requiring financial institutions to verify customer identities.[167] The requirements to identify and maintain customer records became increasingly strict during the "War on Drugs."[168] Then, after the terrorist attacks on September 11, 2001, further anti-money laundering efforts surfaced in the "war on terror."[169] The PATRIOT Act amended the Bank Secrecy Act and tasked the Treasury with creating a regulatory framework for financial institutions' customer identification, including "reasonable procedures" for both "verifying the identity of any person seeking to open an account" and maintaining customer identity records.[170] The regulations govern "accounts," a statutory term that includes formal banking relationships but notably excludes one-off services including wire transfers.[171] U.S. law has introduced multiple capital controls to respond to perceived social threats, whether drug traffickers, terrorists, or migrants.

(2018), http://calreinvest.org/wp-content/uploads/2018/08/Building-Immigrant-Financial-Security-A-Guide-for-Banks.compressed.pdf [https://perma.cc/A8SU-6LU4] (advocating for banks to accept a range of "nontraditional" forms of identification).

166. Adam Candeub, *Privacy and Common Law Names: Sand in the Gears of Identification*, 68 FLA. L. REV. 467, 500 (2016).

167. Money laundering is a capacious term. *See What is Money Laundering*, FIN. ACTION TASK FORCE, https://www.fatf-gafi.org/faq/moneylaundering/ [https://perma.cc/46TJ-DZNV] ("Money laundering is the processing of these criminal proceeds to disguise their illegal origin."); *see also* 31 C.F.R. § 1022.210 (2020) (mandating and outlining anti-money laundering programs for money services businesses); *Bank Secrecy Act (BSA) & Related Regulations*, OFF. OF THE COMPTROLLER OF THE CURRENCY, https://www.occ.treas.gov/topics/compliance-bsa/bsa/bsa-regulations/index-bsa-regulations.html [https://perma.cc/TXB2-27HV] (characterizing the Bank Secrecy Act (BSA) as "the primary U.S. anti-money laundering (AML) law" and noting that the BSA has been "amended to include certain provisions . . . of the USA PATRIOT Act to detect, deter and disrupt terrorist financing networks"); Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1417 (2004) ("[I]n 1987, Congress amended 31 U.S.C. § 5312(a)(2) to expand the definition of 'financial institution' beyond businesses that engage in conventional banking services."); Aimee Chin, Léonie Karkoviata & Nathaniel Wilcox, *Impact of Bank Accounts on Migrant Savings and Remittances: Evidence from a Field Experiment* 6 (April 2015) (unpublished manuscript) (on file with the *California Law Review*) ("Prior to the Act, banks had relied on passports, driver's licenses, social security numbers, and green cards to establish identity (though no Federal law required this at that time), and undocumented migrants generally lacked these forms of ID.").

168. *See* Money Laundering Control Act of 1986, Pub. L. No. 99-570, tit. I, subtit. H, 100 Stat. 3207–18 (codified as amended in scattered sections of Titles 12, 18, and 31 of the United States Code); *see also* Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, tit. XV, 106 Stat. 4044, 4061 (1992) (describing laws "essential to prevent narcotics-related money laundering" which include "requir[ing] banks and other financial institutions to know and record the identity of customers engaging in significant transactions").

169. *See supra* note 164 and accompanying text; Shima Baradaran, Michael Findley, Daniel Nielson & Jason Sharman, *Funding Terror*, 162 U. PA. L. REV. 477, 499–502 (2014).

170. 31 U.S.C. § 5318(l).

171. 31 C.F.R. § 1020.100(a) (2020).

The regulations afford significant discretion to financial institutions to verify accountholder identity. Financial institutions include banks, MTOs, and even casinos.[172] The multiagency regulations mandate that customer identification programs (CIPs)[173] require dates of birth and "identification numbers" for accounts.[174] The identification number requirement explicitly allows noncitizens to provide Individual Taxpayer Identification Numbers (ITINs) from the U.S. government, foreign passports, or "any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard."[175] Nonetheless, a healthy minority of immigrants appear to incorrectly believe that Social Security numbers are required by banks to open accounts.[176] Consumers are thus unsure about which identification will satisfy banks, who in turn face uncertainty regarding what will satisfy financial regulators.

Non-account holders who nonetheless seek ad hoc services are also subject to identity verification. Financial institutions are obligated to verify identification documents for non-"established" customer transfers over $3,000 or make "a notation in the record of the lack [of identification] thereof."[177] These requirements apply to a wide range of institutions, including banks and MTOs like Western Union, whether or not the wire transmission crosses a border.[178] The Financial Crimes Enforcement Network (FinCEN), a bureau of the Department of the Treasury, proposed lowering the threshold and imposing

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172. 31 U.S.C. § 5312(a)(2); 31 C.F.R. § 1010.100(t) (2020) (defining "financial institution" broadly as including banks and money services businesses); *see* Customer Identification Programs for Banks, Savings Associations, Credit Unions and Certain Non-Federally Regulated Banks, 68 Fed. Reg. 25,090 (May 9, 2003) (promulgating the PATRIOT Act consumer identification program regulations).

173. 31 U.S.C. § 5318(l); 31 C.F.R. §§ 1010.100, 1020.220 (2020).

174. 31 C.F.R. § 1020.220(a)(2)(i)(A)(4)(ii) (2020); *see also* Barr, *supra* note 38, at 184 ("An IRS-issued individual taxpayer identification number or a social security card is needed for interest-bearing accounts."); *Topic No. 403 Interest Received*, INTERNAL REVENUE SERV. (Mar. 5, 2021), https://www.irs.gov/taxtopics/tc403 [https://perma.cc/2ZN6-QZQB] (overviewing taxable as well as nontaxable or excludable interest).

175. 31 C.F.R. § 1020.220(a)(2)(i)(A)(4)(ii) (2020). Banks may also use nondocumentary methods as part of their CIPs, including "contacting a customer; . . . verifying the customer's identity through the comparison of information provided by the customer with information obtained from a consumer reporting agency, public database, or other source; checking references with other financial institutions; and obtaining a financial statement." 31 C.F.R. § 1020.220(a)(2)(ii)(B)(1) (2020).

176. PAULSON ET AL., *supra* note 21, at 20 (finding that 25 percent of Latin American immigrants living in the United States believed opening an account required a Social Security Number or driver's license).

177. 31 C.F.R. § 1020.410(a)(2)–(3) (2020) (for banks utilized by "originators other than established customers" and "beneficiaries other than established customers"); 31 C.F.R. § 1010.410(e) (2020) (for non-bank financial institutions, whether acting as "transmittor's financial institution" or "recipient's financial institution").

178. 31 C.F.R. § 1010.100(ff)(5) (2020); 31 C.F.R. § 1010.410(e) (2020) (for non-bank financial institutions, whether acting as "transmittor's financial institution" or "recipient's financial institution"). Stephen Lee argues that that "the regulatory structure surrounding remittance channels" "can foment slow death in immigrant communities." Lee, *supra* note 40, at 2359.

further recording requirements for cross-border transactions, but has not yet done so.[179]

As banks have left behind those customers perceived as risky under these "know your customer" standards, money transfer businesses like Western Union have offered their services.[180] Yet with this new openness has come new liabilities. Western Union has been subject to hundreds of millions of dollars in fines for violations of federal financial law pursuant to the identification and transaction requirements that also cover MTOs.[181]

These twenty-first century financial identification requirements bear resemblance to twentieth century immigration law's introduction of employee identification requirements through the I-9.[182] FinCEN notably made this immigration analogy in a recent rulemaking.[183] These rules—part of broader transnational efforts to prevent the misuse of the corporate form by "illicit actors"[184] and more generally to "safeguard the financial system against illicit

179. Financial Crimes Enforcement Network; Cross-Border Electronic Transmittals of Funds, 75 Fed. Reg. 60,377, 60,384 (proposed Sept. 30, 2010) (to be codified at 31 C.F.R. pt. 103) (proposing "that banks report on all CBETFs and that money transmitters report on all CBETFs at or above $1,000."); *id.* ("As such, FinCEN is proposing that banks report on all CBETFs and that money transmitters report on all CBETFs at or above $1,000.").

180. Bennett & Etter, *supra* note 48; *see also* WORLD BANK GROUP, MIGRATION AND REMITTANCES: RECENT DEVELOPMENTS AND OUTLOOK, *supra* note 59, at 6–8 ("Banks still perceive the remittance sector as high risk. The risk factors of remittance service providers (RSPs) include that the majority of operations are cash transactions; destinations include high-risk jurisdictions (where there is violent conflict, including terrorism, and/or government oversight is weak or lacking); and operations are conducted through agents (which makes it difficult to implement the [Patriot Act's] 'know your customer' norms)."). Some have used the term "know your customer" to refer both to the PATRIOT Act's explicit CIP requirements as well as general customer due diligence (CDD) requirements. *See, e.g.*, Barr, *supra* note 38, at 184 ("[R]egulators' 'know your customer' rules . . . have gained heightened significance in the wake of the USA PATRIOT Act.").

181. Press Release, U.S. Dep't of Justice, *Western Union Admits Anti-Money Laundering and Consumer Fraud Violations, Forfeits $586 Million in Settlement with Justice Department and Federal Trade Commission* (Jan. 19, 2017), https://www.justice.gov/opa/pr/western-union-admits-anti-money-laundering-and-consumer-fraud-violations-forfeits-586-million [https://perma.cc/BF2A-E6SA].

182. 8 U.S.C. § 1324a; *Complete and Correct Form I-9*, U.S. CITIZENSHIP & IMMIGR. SERV. (July 21, 2020), https://www.uscis.gov/i-9-central/complete-correct-form-i-9/who-needs-form-i-9 [https://perma.cc/U77K-WB9R].

183. The final rule required financial institutions to take stronger measures to identify individuals who own or control customers that are corporations or other legal entities—the "beneficial owners" of those entities. *Customer Due Diligence Requirements for Financial Institutions*, 81 Fed. Reg. 29,398, 29,429–30 (May 11, 2016) (codified at 31 C.F.R. pt. 1010, 1020, 1023–24, 1026) ("[I]rrespective of one's views on the disclosure of personal information in business relationships, such information is routinely required for a variety of commercial interactions, such as obtaining an insurance policy, or verifying eligibility for employment in the United States via U.S. Customs and Immigration Services Form I–9.").

184. *Id.* at 29,401–02 (describing how the final rule "advances Treasury's ongoing work with the Group of Twenty Finance Ministers and Central Bank Governors (G–20), the Financial Action Task Force (FATF), the Global Forum on Transparency and Exchange of Information for Tax Purposes, and other global partners, who have emphasized the importance of improving CDD practices and requiring the disclosure of beneficial ownership information at the time of company formation or transfer" as well as the "United States' Group of Eight (G–8) commitment as set forth in the United States G–8 Action Plan for Transparency of Company Ownership and Control").

use"[185]—justify identity verification by pointing to immigration law's use of identity verification in employment.[186] Controls combatting "illicit" capital draw inspiration from controls combatting illicit migration.

B. Identifying People

While uncontested elsewhere, the legal sufficiency of certain identification for financial institutions remains ambiguous. Consider the driver's license. Oft-considered a "talismanic pass to life," the driver's license affords not only legal permission to drive but also often access to health care and a range of public utilities and benefits.[187] If that license is not compliant with the REAL ID Act, however, it may be unable to secure financial access. Similarly, individuals may currently use their *matricula consular* at some, but not all, financial institutions.[188]

The REAL ID Act of 2005 (REAL ID) changed the availability and meaning of both the American driver's license and the *matricula consular*. Passed one year after the PATRIOT Act, REAL ID precludes a Federal agency from accepting, for any official purpose, a state driver's license or identification card unless the issuing process meets certain requirements.[189] Those requirements include "valid documentary evidence" that the person possesses lawful immigration status. Lawful immigration status for this purpose includes pending applications for either asylum or temporary protected status, as well as approved deferred action status.[190] Since the *matricula consular*, issued by Mexico and other countries, does not speak to one's immigration status in the United States, it is not REAL ID-compliant.

After over a decade of delayed implementation, DHS announced that by October 1, 2021, travelers must present a REAL ID-compliant driver's license

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185. *Id.* at 29,399.

186. *Id.* at 29,429–30.

187. MEREDITH CASTILE, DRIVER'S LICENSE 1 (2015); *see, e.g.*, Morgan M. Philbin, Morgan Flake, Mark L. Hatzenbuehler & Jennifer S. Hirsch, *State-Level Immigration and Immigrant-Focused Policies as Drivers of Latino Health Disparities in the United States*, 199 SOC. SCI. & MED. 29, 35 (overviewing mechanisms of how driver's licenses may affect Latino immigrant health); Alana M. W. LeBrón, William D. Lopez, Keta Cowan, Nicole L. Novak, Olivia Temrowski, Maria Ibarra-Frayre & Jorge Delva, *Restrictive ID Policies: Implications for Health Equity*, 20 J. IMMIGR. & MINORITY HEALTH 255, 256 (2018) ("[F]ederal policies requiring identity verification spill over to impede access to health care and other health-promoting resources such as nutritional assistance and clean water."). *But see* Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 220 (2004) (marshalling sources, including American Association of Motor Vehicle Administrators Manual, to argue that "[t]he justification for licensing schemes [should be] to ensure that only safe drivers are on the roads").

188. The practice of *matricula consular* usage surfaced in litigation regarding one bank's unauthorized opening of accounts in the names of Latino immigrants. *See* Jeff Green, Laura J. Keller & Kartikay Mehrotra, *For Wells Fargo, Angry Questions About Profiling Latinos*, CHI. TRIB. (Oct. 19, 2016), https://www.chicagotribune.com/business/ct-wells-fargo-fake-accounts-latinos-20161019-story.html [https://perma.cc/RD4L-THSW].

189. REAL ID Act of 2005, Pub. L. No. 109-13, div. B, tit. II § 202(a)(1), 119 Stat. 302, 312.

190. *Id.* § 202(c)(2)(B).

or identification card to fly within the United States.[191] Ominously, over a decade ago, the ACLU warned of REAL ID's potential to transform our lives, including access to banking: "The law places no limits on potential required uses for REAL IDs. In time, REAL IDs could be required to . . . open a bank account [or] go to an Orioles [baseball] game . . . ."[192] REAL ID began with our roads and skies but could move far beyond in the future.

The REAL ID-compliant driver's license thus may offer keys to many areas of life, but the three primary identifications available to undocumented or interstitial immigrants may provide limited mileage. First, consider non-REAL ID compliant licenses.[193] At the time of publication, sixteen states, Puerto Rico, and the District of Columbia offer some form of driver's license without regard to immigration status.[194] REAL ID excludes such driver's licenses and denies them federal privileges. A second form, the municipal ID, contains the ID holder's name and photograph and is often offered by cosmopolitan cities.[195] Due to the attached cultural and social benefits in places like New York, San Francisco, and Philadelphia, many citizens also possess municipal IDs.[196]

Beyond the non-REAL ID compliant licenses and municipal IDs, the aforementioned *matricula consular* rounds out the three primary forms of identification. While government officials and scholars alike have associated the *matricula consular* with "illegal aliens,"[197] its identification power has evolved

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191. *Real ID*, DEP'T HOMELAND SEC. (Sept. 11, 2020), https://www.dhs.gov/real-id [https://perma.cc/8K7X-GEGZ].

192. Press Release, ACLU of Md., *Group Calls on State to Reject Unfunded, Unworkable Federal Mandate* (Jan. 15, 2008), https://www.aclu.org/press-releases/aclu-maryland-blasts-new-real-id-regulations?redirect=cpredirect/33952 [https://perma.cc/53HR-HV2R].

193. *See, e.g.*, *ID Cards*, CAL. DEP'T MOTOR VEHICLES, https://www.dmv.ca.gov/portal/dmv/detail/idinfo/idcard [https://perma.cc/5H43-FAU4] (providing non-REAL ID and REAL ID-compliant options for state identification, which is distinct from a driver's license).

194. *See* Nat'l Immigration Law Center, *State Laws Providing Access to Driver's Licenses or Cards, Regardless of Immigration Status* (April 2020), https://www.nilc.org/wp-content/uploads/2015/11/drivers-license-access-table.pdf [https://perma.cc/H5XX-NT3N].

195. *See, e.g.*, Heather Knight, *Hundreds Wait for Hours to Buy S.F. ID Card*, S.F. CHRON. (Jan. 16, 2009), https://www.sfchronicle.com/politics/article/Hundreds-wait-for-hours-to-buy-S-F-ID-card-3176276.php [https://perma.cc/KB7P-E3Z9] ("Hundreds of people stood in line for hours at San Francisco City Hall on Thursday to be among the first in the nation to receive municipal identification cards regardless of their immigration status.").

196. *See, e.g.*, *About IDNYC*, N.Y.C., https://www1.nyc.gov/site/idnyc/about/about.page [https://perma.cc/4GCF-QJS4] (explaining that NYCID "is an accepted form of identification for opening a banking account at select financial institutions"); *IDNYC Benefits*, N.Y.C., https://www1.nyc.gov/site/idnyc/benefits/benefits.page [https://perma.cc/7S69-WWT7] (listing benefits and discounts, including at the Chelsea Film Festival); *SF City ID Card*, CITY OF S.F., https://sfgov.org/countyclerk/sf-city-id-card-how-get-card [https://perma.cc/X5ZL-C77T]; *PHL City ID*, CITY OF PHILA., https://www.phila.gov/programs/phl-city-id/ [https://perma.cc/NM2S-TF52] (listing cultural and entertainment benefits). *See generally* Jennifer J. Lee, *Redefining the Legality of Undocumented Work*, 106 CALIF. L. REV. 1617, 1633 (2018) (discussing uses of municipal IDs).

197. Steven C. McCraw, Assistant Director, Off. of Intel., FBI, *Testimony Before the House Judiciary Subcommittee on Immigration, Border Security, and Claims on Consular ID Cards* (June 26, 2003), https://archives.fbi.gov/archives/news/testimony/consular-id-cards-in-a-post-9-11-world

since the PATRIOT Act's passage through additional security measures in issuance and fraud prevention.[198] The current requirements include (i) proof of Mexican nationality, (ii) an official proof of identity (Mexican or American), and (iii) a proof of address within the corresponding American consular district.[199] Additionally, a criminal record or contemporaneous prosecution may be disqualifying.[200] Some cities and states accept the *matricula consular* for purposes of obtaining a non-REAL ID compliant license or a municipal ID,[201] and a foreign national may use an American state-issued license for purposes of obtaining a *matricula consular*.[202] However, other states have been more restrictive in their recognition of the *matricula*.[203]

Beyond potentially being insufficient for financial institutions, non-REAL ID licenses also come with their own separate risks. In response to state concerns about DMV data, an ICE spokeswoman said that the "agency doesn't generally use state motor-vehicle data to 'identify immigration enforcement targets,'" but could try to use such data in support of ongoing "criminal investigations."[204]

[https://perma.cc/3RSV-AHN8] ("It is believed that consular ID cards are primarily being utilized by illegal aliens in the United States."); Douglas S. Massey, Jacob S. Rugh & Karen A. Pren, *The Geography of Undocumented Mexican Migration*, 26 MEX. STUD. 129, 132 (2010) ("[W]e may safely assume Matrícula registrants are undocumented . . . .").

198. Secretaria de Relaciones Exteriores, *Mexico's New Consular ID Card: Improving the Secure and Reliable Identification for Mexicans Abroad* (2014), https://mex-eua.sre.gob.mx/images/stories/PDF/MatriculaConsularMexicanaingnueva.pdf [https://perma.cc/7AB3-JLAN] (describing the new Consular ID Card introduced in 2014 as "one of the most secure documents issued by the Government of Mexico" and explaining that "[t]he graphic design incorporates several features using state of the art software to increase security such as *Guilloché*, linear images, encryption data, among others"); *id.* (noting the "[p]earlescent ink," "[s]ecurity laminated film with special features," "[e]mbedded identity data," and microtext).

199. *Id.*

200. *Id.*

201. Maria Esther Caballero, Brian C. Cadena & Brian K. Kovak, *Measuring Geographic Migration Patterns Using* Matrículas Consulares, 55 DEMOGRAPHY 1119, 1123 (2018) (noting how the Mexican *matricula consular* can be used to obtain a driver's license and access basic government services); *PHL City ID*, *supra* note 196; *see also States Offering Driver's Licenses to Immigrants*, NAT'L CONF. OF STATE LEG. (Feb. 8, 2021), http://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx [https://perma.cc/WD5B-PP9J] (noting how states may accept consular cards as documentation for purposes of a driver's license).

202. *See, e.g.*, *Consular Identification*, SECRETARIA DE RELACIONES EXTERIORES, http://web.archive.org/web/20200929005253/https://www.consulmexny.org/eng/consular_id.htm (explaining that for first-time consular ID applicants at the Mexican Consulate in New York, driver's licenses from the States of New York or Connecticut are acceptable for purposes).

203. For example, Texas began accepting a parent's *matricula consular* as valid identification to obtain a birth certificate only in response to litigation. Alexa Ura, *Texas Agrees to Resolve Birth Certificate Case with Undocumented Families*, TEX. TRIB. (July 25, 2016), https://www.texastribune.org/2016/07/25/texas-agrees-to-resolve-birth-certificate-case/ [https://perma.cc/4L2X-DHMG]; *see also* Serna v. Texas Dep't of State Health Servs., Vital Stat. Unit, No. 1-15-CV-446, 2015 WL 6118623, at *1–3 (W.D. Tex. Oct. 16, 2015) (initially denying a preliminary injunction in the case, to allow further factual development).

204. Frank Main, *Could Trump Seek Undocumented Immigrants' Driver's Licenses Here?*, CHI. SUN-TIMES (Mar. 31, 2017), https://chicago.suntimes.com/2017/3/31/18343574/could-trump-seek-undocumented-immigrants-driver-s-licenses-here [https://perma.cc/8V7L-QZJL]. ICE might use such

Opponents of unlawful immigration have unsuccessfully tried to use FOIA laws to reveal the addresses and names of municipal ID holders.[205] These risks notwithstanding, localities, banking groups, and immigrant rights nonprofits alike have supported undocumented immigrants' use of these IDs in pursuit of inclusionary banking.[206]

In sum, identification requirements in American finance operate as capital controls. Even relatively privileged immigrants and consumers perceived to be immigrants have found their accounts suspended due to their bank's uncertainty about proper identification.[207] These rejections marginalize migrant capital and foreshadow conflict, particularly as American immigration opponents continue to call for boycotts of banks that accept immigrants' non-American identification like the *matricula consular*.[208] Such boycotts attest to a collective understanding that these capital controls operate as migrant controls.

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data in ongoing "identity theft investigations—or to aid in locating individuals who pose a national security risk or public safety threat, to include immigration violators such as fugitives." *Id.*

205. Powell v. Mayor of New Haven, No. FIC 2007-498 (Conn. FOIA Commission July 9, 2008), https://www.state.ct.us/foi/2008FD/20080711/FIC2007-498.htm [https://perma.cc/GQT9-ES92]; Gold v. Mayor & Cmty. Servs. Adm'r of New Haven, No. FIC 2007-605(Conn. FOIA Commission July 9, 2008), https://www.state.ct.us/foi/2008FD/20080711/FIC2007-605.htm [https://perma.cc/8TGZ-58VL]. *See generally* Els de Graauw, *Municipal ID Cards for Undocumented Immigrants: Local Bureaucratic Membership in a Federal System*, 42 POL. & SOC'Y 309, 321 (2014) (describing FOIA litigation strategy for "the anti-immigrant Community Watchdog Project").

206. *See, e.g.*, Gregg McQueen, *Which Banks Honor IDNYC?*, VOICES OF N.Y. (May 5, 2016), http://web.archive.org/web/20200928025839/http://voicesofny.org/2016/05/will-more-big-banks-honor-idnyc/ (quoting City Comptroller Scott Stringer as "urg[ing] all banks to seriously consider accepting IDNYC to make it easier for unbanked New Yorkers to save for their futures"); Jon Prior, *Banking from the Shadows: Does the Texas Banking Industry Discourage Undocumented Customers? The Answer Might Surprise You*, DALL. BUS. J. (Dec. 7, 2016), https://www.bizjournals.com/dallas/news/2016/12/07/banking-from-the-shadows-does-the-texas-banking.html [https://perma.cc/9A4P-WBK9] (discussing Dallas-based nonprofit Transformance, which helps undocumented immigrants open banking accounts); CTR. FOR POPULAR DEMOCRACY, WHO WE ARE: MUNICIPAL ID CARDS AS A LOCAL STRATEGY TO PROMOTE BELONGING AND SHARED COMMUNITY IDENTITY 7 (2013) (noting improving access to financial services and bank accounts among goals of Municipal ID Card Programs).

207. *See, e.g.*, Rick Montgomery, *Why Bank of America Asked Kansas Man for Proof of Citizenship—and May Ask You, Too*, KAN. CITY STAR (July 27, 2018), https://www.kansascity.com/news/business/article215688615.html [https://perma.cc/QT9V-5ZY4] (describing account freezing of long-time account holders who also happened to be citizens); Aris Folley, *Bank of America Freezing Accounts of Suspected Undocumented Immigrants*, HILL (Aug. 31, 2018), https://thehill.com/blogs/blog-briefing-room/news/404523-bank-of-america-freezing-accounts-of-those-suspected-of-being [https://perma.cc/F8KB-68PR] ("Dan Hernandez, a TV writer of Cuban heritage based in Los Angeles, told the Herald the bank suspended his business account in December 2016 under suspicion he had been doing business with Cuba.").

208. *See, e.g.*, BANK OF AMERICA BOYCOTT, http://www.bankofamericaboycott.com/banklist/ [https://perma.cc/ENB6-4S49] (attempting to spotlight and boycott banks that accept *matricula consular* cards from Mexican as sufficient identification). *See generally* Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057 (2018) (describing the importance of economic and labor boycotts in First Amendment doctrine and in civil rights movements, including the immigrants' rights movement).

V. CONSTITUTIONAL AND LEGAL CONSTRAINTS

In this Part, I explore the constitutional and other legal issues that arise from the three aforementioned capital controls of remittance taxation, social security, and personal accounts. I focus on "dormant" foreign affairs preemption, Commerce Clause concerns, and immigration federalism principles arising from state remittance taxation's design; the unconstitutional choices and conditions arising from Social Security's design; and the financial power of non-REAL IDs—non-REAL ID licenses, municipal IDs, and *matricula* cards—in light of the PATRIOT Act. I explain how each of these capital controls interact with constitutional law and immigration law.

A. Remittance Taxation

I consider three theories that bear on the constitutionality of state remittance regulation[209]: dormant foreign affairs preemption, the dormant Commerce Clause,[210] and immigration federalism. Dormancy refers to the fact that state action may be impermissible even "when the federal government is silent[]" or dormant.[211] Scholars often distinguish these dormant theories from other Supremacy Clause-based preemption arguments.[212] Dormant preemption preserves the federal government's ability to speak with "no voice" or a "quiet voice."[213] For example, the federal voice is loud and clear in the context of regulating employment of undocumented immigrants, in contrast to relative federal silence regarding those same immigrants' remittances.[214] These theories

209. *See generally* Rosser, *supra* note 40, at 61 (noting how "remittances potentially impact many areas of law").

210. At one point, immigration was "equated with the commerce power, due in part to the fact that many early immigrants to the United States came as indentured workers and slaves." Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 99 (2002).

211. Jean Galbraith, *Cooperative and Uncooperative Foreign Affairs Federalism*, 130 HARV. L. REV. 2131, 2139 (2017) (reviewing MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY (2016)).

212. *See, e.g.*, Matthew Schaefer, *Constraints on State-Level Foreign Policy: (Re) Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 SETON HALL L. REV. 201, 204 (2011) ("Constraints on state-level foreign policy flow from the Supremacy Clause (in the form of the preemption doctrine), the Foreign Commerce Clause (in the form of the dormant Foreign Commerce Clause), and the amalgam of clauses allocating foreign affairs powers to federal actors and denying them to the states (in the form of the dormant foreign affairs doctrine).").

213. Schaefer, *supra* note 212, at 270. Scholars have contrasted the way that the dormant foreign relations power limits state immigration activity, while the Foreign Commerce Clause empowers federal immigration authority. Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 167 (1994) (discussing "the dormant foreign relations power," from which "state incapacity on immigration [is] ultimately derived"). *See, e.g.*, Toll v. Moreno, 458 U.S. 1, 10 (1982) (describing how "[f]ederal authority to regulate the status of aliens derives from various sources," including the power "[t]o regulate Commerce with foreign Nations" (quoting U.S. CONST. art. I, § 8, cl. 3)).

214. Congress has occupied the field of immigrant employment through IRCA's amendments to the INA.

help explain that some state proposals to tax remittances are on more tenuous doctrinal ground.

1. *Foreign Affairs Preemption: Courts' Interpretation and a Framework for Analysis*

Federal courts have defined rough limits on local and state activities related to foreign affairs grounded in several constitutional provisions.[215] The foreign-affairs preemption doctrine finds inspiration in the Federalist Papers, where James Madison explained "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations."[216] However, some state activity touching upon foreign affairs is inevitable and constitutionally permissible.[217] The Supreme Court addressed the issue in *Zschernig v. Miller*[218] and *Am. Ins. Ass'n v. Garamendi,*[219] and those cases and intervening lower-court decisions outline the foreign affairs preemption doctrine.

In *Zschernig,* the "quintessential" dormant foreign affairs preemption case,[220] the Supreme Court struck down an Oregon statute governing intestate succession laws for a "nonresident alien."[221] The statute required, in part, for the noncitizen to establish that she might inherit disputed property "without confiscation" by foreign governments.[222] The Supreme Court expressed grave concern that state probate courts were sitting in judgment of foreign nations to identify "any element of confiscation" "in the particular foreign system of

215. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 49 (1st Cir. 1999) (canvassing constitutional provisions), *aff'd sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000); *see also* United States v. Pink, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); Hines v. Davidowitz, 312 U.S. 52, 62 (1941) (noting that "the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution"); Zschernig v. Miller, 389 U.S. 429, 432 (1968) (reiterating that the "Constitution entrusts" the "field of foreign affairs . . . to the President and the Congress").

216. THE FEDERALIST No. 42, at 306 (James Madison) (The Floating Press 2011).

217. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 162 (2d ed. 1996) (stating that Congress can permit the states to "regulate commerce in [some] ways").

218. *Zschernig*, 389 U.S. at 431.

219. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 402 (2003). *Zschernig* distinguished *Clark v. Allen*, 331 U.S. 503 (1947), which twenty years earlier upheld a parallel California probate law. "We do not accept the invitation to re-examine our ruling in Clark v. Allen. For we conclude that the history and operation of this Oregon statute make clear that [it] is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Zschernig*, 389 U.S. at 432.

220. Joseph B. Crace, Jr., Note, Gara-*Mending the Doctrine of Foreign Affairs Preemption*, 90 CORNELL L. REV. 203, 211 (2004).

221. *Zschernig*, 389 U.S. at 429.

222. *Id.* at 431 (citing ORE. REV. STAT. § 111.070 (1957)).

law."[223] Thus, the Court concluded that the state statute unconstitutionally intruded into the field of foreign affairs.[224]

Zschernig has been characterized as comprising "the general dormant foreign-affairs doctrine."[225] It was also "unique"[226]: the government's amicus brief made clear to the court that it did not believe that the Oregon statute "unduly interferes with the United States' conduct of foreign relations."[227] And yet, the Supreme Court found the Oregon statute preempted.

The Supreme Court's second and later foreign affairs preemption decision, *American Insurance v. Garamendi*, drew upon *Zschernig* to strike down a California statute permitting redress for historic "taxes" collected upon those fleeing Nazi genocide.[228] As the Supreme Court explained, Jewish people "who tried to emigrate from [Nazi] Germany were forced to liquidate insurance policies to pay the steep 'flight taxes' and other levies imposed by the Third Reich to keep Jewish assets from leaving the country."[229] California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA) required insurers doing business in California to disclose information about the historical totality of its European business.[230]

As others have noted, both the majority and dissent declined to provide a dormant Foreign Commerce Clause analysis.[231] The Court found that HVIRA unconstitutionally interfered with the federal government's role in foreign relations because it interfered with executive foreign policy, namely agreements forged with Germany, Austria, and France to settle insurance-based claims.[232] Thus, some commentators have painted *Garamendi* as concerning preemption by bilateral agreements rather than dormant preemption.[233]

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223. *Id.* at 433–34. *See generally* Zachary D. Clopton, *Judging Foreign States*, 94 WASH. U. L. REV. 1, 9–10, 9 n.45, 10 n.47 (2016) (discussing other cases drawing upon *Zschernig* foreign affairs preemption, namely Munaf v. Geren, 553 U.S. 674, 702 (2008) and Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring)).

224. *Zschernig*, 389 U.S. at 432, 442.

225. Garrick B. Pursley, *Dormancy*, 100 GEO. L.J. 497, 552 (2012).

226. Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 825–26 (1989).

227. *Zschernig*, 389 U.S. at 434. *See generally* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1629 (1997) (discussing government's brief).

228. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 409–10 (2003) (discussing changes to California civil procedure to extend the statute of limitations for Holocaust-related insurance cases).

229. *Id.* at 402.

230. *Id.* at 401.

231. *See, e.g.*, Leanne M. Wilson, Note, *The Fate of the Dormant Foreign Commerce Clause After* Garamendi *and* Crosby, 107 COLUM. L. REV. 746, 765–66 (2007) ("Neither the majority nor the dissent in *Garamendi* addressed the dormant Foreign Commerce Clause . . . .").

232. *Garamendi*, 539 U.S. at 408 (noting how "[t]he German Foundation pact has served as a model for similar agreements with Austria and France"); *id.* at 424 (explaining how letters from the Deputy Secretary of Treasury "to California officials show well enough how the portent of further litigation and sanctions has in fact placed the Government at a disadvantage in" advancing its own scheme).

233. Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1242 & n.45 (2007). *But see* Pursley, *supra* note 225, at 554–55 ("The [*Garamendi*] Court did not

While both dormant foreign affairs preemption cases limit state activity, *Zschernig* and *Garamendi* also differ. In her *Garamendi* dissent, Justice Ginsburg argued for limiting *Zschernig*'s "dormant foreign affairs preemption" closer to *Zschernig*'s facts, where a state sat in judgment of a foreign sovereign.[234] One commentator contrasted *Zschernig* and *Garamendi* as reflecting, respectively, dormant foreign affairs preemption and executive preemption.[235]

Most importantly, the pair of opinions raised but left unanswered the permissible scope of state remittance taxation.[236] *Garamendi* suggested that if a state acts within "its 'traditional competence,' but in a way that affects foreign relations,"[237] a court might require a minimum significance for the conflict to require preemption. The minimum would vary "with the strength or the traditional importance of the state concern asserted."[238] Such a rubric suggests that the state's authority in health, safety, and taxation, which is "recognized as central to state sovereignty,"[239] may be particularly robust against foreign affairs preemption.[240]

Lower courts have filled in doctrinal gaps that the Supreme Court left in foreign affairs preemption. Between *Zschernig* and *Garamendi,* the federal courts applied a five-factor test to determine preemption of a Massachusetts law that limited state procurement from firms doing business in Burma.[241] In *National Foreign Trade Council v. Natsios*, the First Circuit found that the Massachusetts Burma law violated the foreign affairs power, as well as the dormant Foreign Commerce Clause.[242] While acknowledging *Zschernig*'s

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specify whether its ground for decision was dormancy or preemption," so viewing *Garamendi* as a dormancy decision, rather than a preemption decision, promotes conservatism in our descriptive account of constitutional practice.).

234. *Garamendi*, 539 U.S. at 439 (Ginsburg, J., dissenting).

235. Daniel Abebe, *One Voice or Many? The Political Question Doctrine and Acoustic Dissonance in Foreign Affairs*, 2012 SUP. CT. REV. 233, 242 & nn.25–26.

236. Others more generally view both decisions as wrongly decided. *See, e.g.*, MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY 120–40 (2016); Galbraith, *supra* note 211, at 2140 (reviewing GLENNON & SLOANE and explaining that "[f]or Glennon and Sloane, both *Zschernig* and *Garamendi* were wrongly decided").

237. *Garamendi*, 539 U.S. at 419 n.11 (quoting Zschernig v. Miller, 389 U.S. 429, 459 (1968)).

238. *Id.*

239. Dep't of Revenue v. ACF Indus., Inc., 510 U.S. 332, 345 (1994).

240. Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 719 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern.").

241. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 45, 53 (1st Cir. 1999), *aff'd sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000). The state legislator and chief sponsor of the Massachusetts Burma Law, contrasted what it purportedly could not do: "[f]oreign policy" including "cutting a deal with some country," with what it purportedly could do: "use our sovereignty and our capacity to raise and spend money to influence the foreign policy of this country." Terrence Guay, *Local Government and Global Politics: The Implications of Massachusetts' "Burma Law,"* 115 POL. SCI. Q. 353, 365 (2000) (quoting interview with Byron Rushing). Some scholars concurred. *See, e.g.*, Perry S. Bechky, *Darfur, Divestment, and Dialogue*, 30 U. PA. J. INT'L L. 823, 848–50 (2009) (discussing how scholars including Richard Bilder and Richard Posner corroborate Rushing's views).

242. *Natsios*, 181 F.3d at 45.

boundaries as "unclear,"[243] the First Circuit paralleled Massachusetts's scrutiny of firms' business in Burma with Oregon probate courts' scrutiny of sovereigns in *Zschernig*. The First Circuit then characterized the Burma law as having more than an incidental effect on foreign relations.[244] In particular, the First Circuit noted five persuasive factors: [1] "the design and intent of the law [as] to affect the affairs of a foreign country," [2] economic power to effectuate that design and intent, [3] the possibility of being a "bellwether" for other states, [4] foreign protests, and [5] divergence from federal law.[245] When the Supreme Court reviewed the *Natsios* decision in *Crosby v. National Foreign Trade Council*, it avoided addressing both the foreign affairs and Foreign Commerce preemption issues and affirmed instead on conflict preemption grounds.[246] Federal and state courts have continued to cite to *Natsios*'s five factors to determine whether a state law encroaches upon the federal foreign affairs power.

Foreign affairs preemption concerns might then arise for state remittance taxation, particularly when taxation targets specific destination countries (unlike the extant Oklahoma law). In *Zschernig*, the Supreme Court took issue with a statutory construction yielding "unavoidable judicial criticism" aimed specifically at "nations established on a more authoritarian basis than our own."[247] Federal courts post-*Zschernig* have interestingly contrasted the state statute in *Zschernig,* which "generally applied only against residents of a narrow set of countries," with the statute in *Garamendi*, which "applied to insurers from any country."[248] While *Garamendi* ultimately found the state statute preempted, it did so with reference to express foreign policies in executive agreements with European countries.[249] As such, targeted countries might suggest that the state "intended the statute to send an explicit foreign relations message, rather than simply to address some local concern."[250] That targeting of countries, and underlying intent to send a targeted foreign relations message, weighs in favor of foreign affairs preemption.

243. *Id.* at 51–52.
244. *Id.* at 50–55.
245. *Id.* at 53.
246. *Crosby*, 530 U.S. at 374 n.8.
247. Zschernig v. Miller, 389 U.S. 429, 440 (1968).
248. *In re* World War II Era Japanese Forced Lab. Litig., 164 F. Supp. 2d 1160, 1174 (N.D. Cal. 2001), *aff'd sub nom.* Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003), *amended by* 324 F.3d 692 (9th Cir. 2003). In *Trojan Technologies, Inc. v. Pennsylvania.*, a post-*Zschernig* but pre-*Garamendi* case, the Third Circuit rejected foreign affairs preemption and distinguished from *Zschernig* in challenge to the Pennsylvania Steel Products Procurement Act, [73 PA. STAT. AND CONS. STAT. ANN. § 1884 (West 2020),] which "require[d] suppliers contracting with a public agency in connection with a public works project to provide products whose steel is American-made." 916 F.2d 903, 904 (3d Cir. 1990). "On its face the statute applies to steel from any foreign source, without respect to whether the source country might be considered friend or foe. Nor is there any indication from the record that the statute has been selectively applied according to the foreign policy attitudes of Commonwealth courts or the Commonwealth's Attorney General." *Id.* at 913.
249. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 441–42 (2003).
250. *In re World War II Era Japanese Forced Lab. Litig.*, 164 F. Supp. 2d at 1174.

The Oklahoma remittance tax facially targets all cross-border flows, which may redeem it against arguments that it sends a targeted foreign relations message and is thus preempted. The state law's design is universalist, as compared to subsequent federal proposals like the Border Wall Funding Act of 2017 (BWFA). The BWFA targeted remittances if the designated recipient belonged to certain countries, including Mexico and Central American countries.[251] However, the universality of the design may be undermined by the intent of the Oklahoma tax's drafter, who defended the law by arguing that it "burdens mostly illegal immigrants and drug traffickers from Mexico who wire illegal proceeds back to their home country."[252] Foreign counterparts interpreted the tax as fundamentally concerning immigration, even if the sponsor's statement nominally concerned crime.[253] Threats of foreign retaliation and the professed intent are both factors to be considered under the *Natsios* test.[254] Beyond its universal design, Oklahoma's tax has limited economic power, does not appear to be a bellwether quite yet, and does not explicitly diverge from current federal policy. Thus, although the Oklahoma law catalyzed foreign protest, in part due to design and intent, it is likely on firm constitutional ground under the holistic *Natsios* analysis.

In contrast to the Oklahoma remittance tax, the designs of the proposed California law and proposed amendment to Oklahoma's law—each of which condition remittance taxation on the immigration status of the sender—raise more significant foreign affairs preemption concerns. While targeting undocumented immigrants through remittance taxes is facially nationality neutral, it may distinctly affect Mexican nationals given demographic estimates of Oklahoma's undocumented population.[255] Despite the Oklahoma and California proposals' similarities, their differences may also be legally significant. Oklahoma's proposed amendment would add an additional tax on

251. *Supra* note 96 and accompanying text.

252. Murphy, *supra* note 72 (quoting Oklahoma Rep. Randy Terrill).

253. *See, e.g.*, Press Release, Members of Mexican Congress, Mexican Congress Approves Resolution Denouncing U.S. States Imposing Remittance Taxes (Apr. 8, 2010) (describing how Mexican legislators consider Oklahoma's remittance tax to be an "immoral, abusive and harmful act against immigrants' rights"); *see also* Meredith Cipriano, *The Illegal Immigrant Tax: Evaluating State Remittance Taxes Under the Dormant Commerce Clause and the Equal Protection Clause*, 43 U. BALT. L. REV. 255, 264 n.70 (2014) (noting a Mexican Congress press release advocating for a boycott of states who implement remittance taxes as an example of how slight discrimination can affect national solidarity).

254. Retaliation may also be a ground for permissible exercises of executive power over foreign entry. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2413 (2018) ("Presidents have repeatedly suspended entry not because the covered nationals themselves engaged in harmful acts but instead to *retaliate* for conduct by their governments that conflicted with U.S. foreign policy interests.") (emphasis added).

255. *Profile of the Unauthorized Population: California*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/CA [https://perma.cc/6ZKA-E8R4] (noting that the majority of the "unauthorized" population is from Mexico); *Profile of the Unauthorized Population: Oklahoma*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/OK [https://perma.cc/SV6M-G6TW] (same).

international transmissions from senders who could not provide proof of immigration status, practically connecting Oklahoma's design and intent to the field of foreign affairs.

California's proposed tax differs because it taxes all transmissions—including those to domestic destinations—by undocumented immigrants. The proposed tax would also "pay for emergency medical care" "to persons without documentation of legal residence in the United States."[256] This is in contrast to Oklahoma's revenues, which largely benefit the state's "Drug Money Laundering and Wire Transmitter Revolving Fund."[257] Given California's ongoing efforts to include undocumented immigrants in its Medi-Cal system, and the traditional state interest in health and safety, California's tax design of focusing on undocumented immigrants might, for some, minimize the intent or foreign protest concerns that Oklahoma's tax might raise.[258]

In sum, if not for the sponsor's statement explicitly singling out Mexico and the related foreign protest, Oklahoma's facially nondiscriminatory remittance tax—covering all money transmissions regardless of destination or sender immigration status—might avoid foreign affairs preemption. Evidence of intent and foreign protest moves the tax into less-comfortable constitutional territory but may not be fatal. However, the proposed amendment, which explicitly targets undocumented immigrants, the majority of which are Mexican in Oklahoma, may be. In contrast, California's similarly proposed design may be on firmer ground because its design and intent, to benefit healthcare for the targeted population, may insulate it from foreign protest. As more remittance tax proposals with new permutations surface, so may dormant foreign affairs preemption concerns.[259]

2. *The Commerce Clause: Court Guidance and the "One Voice" Principle*

Even if state remittance taxation may survive foreign affairs preemption, it may falter under the Commerce Clause.[260] The Constitution affords Congress the

256. *See* S. 92 § 12, 2009 Leg., 2009 Sess. § 12 (Cal. 2009), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200920100SB92 [https://perma.cc/DPM7-TFQA].

257. OKLA. STAT. ANN. tit. 63, § 2-503.1j(C) (West 2020).

258. Sammy Caiola, *Young Undocumented Californians Cheer Promise of Health Benefits*, NPR (July 11, 2019), https://www.npr.org/sections/health-shots/2019/07/11/739536305/young-undocumented-californians-cheer-promise-of-health-benefits [https://perma.cc/WZK4-WAD3].

259. *See supra* Table 1.

260. *See, e.g.*, U.S. CONST. art. I, § 10, cl. 3 (prohibiting states "without the Consent of Congress" from entering into "any Agreement or Compact . . . with a foreign Power"). *But see* RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 201 n.9 (AM. L. INST. 1986) (discussing possibilities as well as limitations on state compacts without congressional authorization); Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 802 (2010) (noting an early federal objection to a trade-promotion agreement between Florida and Cuba but arguing that "[s]uch objections [to foreign-state arguments], however, remain exceptional, and rarely now turn on suggestions of prohibited state treaty making").

authority "[t]o regulate Commerce with foreign Nations, and among the several States . . . ."[261] This authority is "understood to have a 'negative' aspect."[262] Even as scholars and Supreme Court justices question the doctrine's legitimacy,[263] the dormant Commerce Clause may render state actions unconstitutional based on their effect on interstate or international commerce.[264] Some scholars have revived the significance of the Commerce Clause's authority for immigration power, with particular focus on the Foreign Commerce Clause.[265] While I focus on Foreign Commerce Clause challenges, remittance taxes such as the current Oklahoma law also implicate interstate commerce when non-international capital flows nonetheless cross state borders.[266]

While "the Supreme Court has had few occasions to offer guidance,"[267] the Foreign Commerce Clause is generally understood to build upon the more regularly invoked Interstate Commerce Clause framework. Courts consider two animating principles to address Commerce Clause challenges to state laws: nondiscrimination between local and nonlocal economic actors and prevention of undue burdens for nonlocal actors.[268] The prohibition on undue burdens means

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261. U.S. CONST. art. I, § 8, cl. 3.

262. Oregon Waste Sys. v. Dep't of Env't Quality, 511 U.S. 93, 98 (1994).

263. *See* Lisa Heinzerling, *The Commercial Constitution*, 1995 SUP. CT. REV. 217, 219 (arguing that "[t]he widespread endorsement of a judicially enforceable rule that state and local governments may not discriminate against interstate commerce appears, instead" of arising from the "common tools of constitutional interpretation," "to arise from the widespread perception that this rule is a very good idea"); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 80 (1993) (Scalia, J., concurring) ("As with the Interstate Commerce Clause, however, *stare decisis* cannot bind me to a completely indeterminate test such as the 'four-factored test plus two' found in *Japan Line* . . . ."); James M. McGoldrick, Jr., *Why Does Justice Thomas Hate the Commerce Clause?*, 65 LOY. L. REV. 329 (exploring Justice Thomas's distaste for modern interpretations of the Commerce Clause).

264. *See, e.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018); Gibbons v. Ogden, 22 U.S. 1 (1824).

265. *See generally* Jennifer Gordon, *Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution*, 93 IND. L.J. 653, 654 (2018) ("[I]mmigration to the United States is and has long been principally economic in its purpose and impact and thus in many cases is properly considered a function of both the Foreign and Interstate Commerce Clauses."). While the "Commerce Clause plays almost no role in immigration jurisprudence," there exists an "extensive early history of the Foreign Commerce Clause as the presumed source of the immigration power." *Id.* at 656.

266. The Supreme Court updated "limitations on interstate collections of sales and use taxes" for the "Internet revolution." *Wayfair*, 138 S. Ct. at 2089, 2097. In doing so, the Supreme Court explained that "'[i]t has long been settled' that the sale of goods or services 'has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State.'" *Id.* at 2092 (quoting Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 184 (1995)). Because the sale is consummated in a single location, the risk of multiple taxation is minimized. Where the transmitter is licensed by the taxing state, the services appear "fairly related to the [State's] services." *Id.* at 2091 (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)); *see also* Wardair Canada, Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 9 (1986) ("[T]here is no threat of multiple international taxation in this case, since the tax is imposed only upon the sale of fuel, a discrete transaction which occurs within one national jurisdiction only.").

267. Antilles Cement Corp. v. Fortuno, 670 F.3d 310, 327 (1st Cir. 2012).

268. *Wayfair*, 138 S. Ct. at 2090–91 (outlining that for interstate commerce, the Supreme Court has dictated two principles: state regulations may not discriminate against interstate commerce, and states may not impose "undue burdens" on interstate commerce).

that even laws designed "even-handedly to effectuate a legitimate local public interest" may be struck down if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[269] For state taxation of interstate commerce, *Complete Auto Transit, Inc. v. Brady* explains that a tax may survive a Commerce Clause challenge if it "[i] is applied to an activity with a substantial nexus with the taxing State, [ii] is fairly apportioned, [iii] does not discriminate against interstate commerce, and [iv] is fairly related to the services provided by the State."[270]

Japan Line, Ltd. v. County of Los Angeles expands on *Complete Auto* to lay out the doctrinal test for a Foreign Commerce Clause challenge to a state tax.[271] Under *Japan Line*, when a state seeks to tax foreign commerce, two additional considerations beyond *Complete Auto*'s interstate commerce factors surface: "First, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'"[272] This final criteria of preserving "one voice" in the regulation of foreign commercial relationships bears resemblance to the dormant foreign affairs preemption analysis.[273] The Supreme Court has

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269. *Id.* at 2091 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). In striking down Arizona's prohibition on interstate bulk cantaloupe shipment, the Supreme Court described "the State's tenuous interest in having the company's cantaloupes identified as originating in Arizona." *Pike*, 397 U.S. at 145.

270. *Complete Auto Transit*, 430 U.S. at 279.

271. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) (holding that California's ad valorem tax on Japanese shipping containers resulted in multiple taxation and precluded the federal government from speaking with one voice and was therefore unconstitutional under the Commerce clause); *see also* Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1226 (1999) (discussing *Japan Line* as representative of "the dormant foreign commerce power"). In terms of what comprises "commerce," "it presumably has the same meaning whether that commerce takes place 'among the states' or occurs 'with foreign nations.'" Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1149 (2003); *see* United States v. Lopez, 514 U.S. 549, 558–59 (1995) (enumerating "three broad categories of activity that Congress may regulate under its commerce power," including [1] "the channels of interstate commerce," [2] "the instrumentalities of interstate commerce;" and [3] "those activities having a substantial relation to interstate commerce"); Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 985–86 (2010) (explaining how these three categories might translate into the *foreign* commerce context).

272. *Japan Line*, 441 U.S. at 451 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)); *see also* David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 1007 (2014) ("Moreover, the Court has recognized that *Congress* is the one voice in certain subject areas, including foreign commerce.") (emphasis added).

273. *See* Sarah H. Cleveland, Crosby *and the "One-Voice" Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 982–84 (2001).

tried to keep the doctrines separate,[274] but federal courts continue to remark on their fundamental similarity.[275]

Barclays Bank PLC v. Franchise Tax Board, a significant Foreign Commerce Clause challenge, grappled with the "one voice" criterion.[276] The Supreme Court upheld California's use of "worldwide combined reporting" for corporate income tax.[277] *Barclays'*s "most energetically presented" question was whether California's taxation scheme impaired federal uniformity by preventing the nation from "'speaking with one voice' in international trade."[278] The Court answered this question in the negative.[279] Despite executive branch protest against California's policy, Congress had on multiple occasions rejected legislation that would have outlawed California's reporting system.[280] Given such congressional "tolerance" for worldwide combined reporting, the Court concluded that U.S. foreign policy was not so seriously threatened as to prevent states from "tax[ing] as they please."[281]

274. *See, e.g.*, Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 59 (1st Cir. 1999), *aff'd sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (explaining how the Supreme Court kept "separate the analyses that apply when examining laws under the Foreign Commerce Clause and under the foreign affairs power"); Wilson, *supra* note 231, at 760 (emphasizing their doctrinal distinctness).

275. *See, e.g.*, Portland Pipe Line Corp. v. City of S. Portland, 332 F. Supp. 3d 264, 314 (D. Me.), *amended by* No. 15-cv-00054, 2018 WL 4901162 (D. Me. Oct. 9, 2018) (describing the doctrines as "opaque," but arguing that "if there is any significant space between [them], it is a narrow divergence and this case does not fit within it"); *id.* (concluding that "the Ordinance does not interfere with the federal government's ability to 'speak with one voice' in regulating foreign commerce . . . . for many of the same reasons [it is] not preempted by federal foreign affairs powers").

276. Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994).

277. *Id.* at 302. California's scheme attributed a portion of the worldwide income based on the proportions of worldwide payroll, property, and sales located in the United States. *Id.*

278. *Id.* at 320. The Court found no notable or novel concerns pertaining to the risk of multiple taxation, while nonetheless acknowledging the difficulty of "dispositively lessen[ing]" such risks. *Id.* at 319. *See generally* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 185–86 (1983) (explaining how the fair apportionment standard, while perhaps useful in the domestic context, falters "when one of the taxing entities is a foreign sovereign").

279. *Barclays*, 512 U.S. at 324–26.

280. *See id.* at 329 (describing an instance where "the Executive Branch proposed legislation to outlaw a state taxation practice, but encountered an unreceptive Congress"); *see also* Itel Containers Int'l v. Huddleston, 507 U.S. 60, 81 (1993) (Scalia, J., concurring) ("I certainly agree that [the President] is better able to decide than we are which state regulatory interests should currently be subordinated to our national interest in foreign commerce. Under the Constitution, however, neither he nor we were to make that decision, but only Congress.").

281. *Barclays*, 512 U.S. at 327–28 (quoting Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983)). The Court upheld the law even while noting "the battalion of foreign governments that has marched to Barclays's aid, deploring worldwide combined reporting in diplomatic notes, *amicus* briefs, and even retaliatory legislation." *Id.* at 320. Despite upholding the challenged California tax law, *Barclays* has surfaced in later, lower court decisions for the proposition that the states must not interfere with the federal government's ability to "speak with one voice when regulating commercial relations with foreign governments." *See, e.g.*, Portland Pipe Line Corp. v. City of S. Portland, 332 F. Supp. 3d 264, 313–14 (D. Me.), *amended by* No. 15-cv-00054, 2018 WL 4901162 (D. Me. Oct. 9, 2018)

Even as scholars criticize it, the "one voice" question hovers over any foreign commerce challenge to state remittance taxes.[282] Per *Barclays*, executive protest alone may be unlikely to constrain state authority.[283] Rather, the question becomes one of congressional tolerance, where foreign affairs and commerce concerns are unlikely to outlaw state actions that Congress considered and refused to outlaw itself.

Somewhat analogously, Congress's refusal to pass multiple remittance tax proposals, including those targeting specific countries, may weigh against parallel state efforts. The unsuccessful Border Wall Funding Act of 2017 designated specific destination countries, including Mexico, for remittance taxation, and subsequent federal remittance tax proposals taxing all international remittances have also failed.[284] Congress's refusal to institute such taxes is unlikely to be construed as yielding the floor to others, particularly in the context of destination-country-specific taxation. Rather, Congress appears to be using its voice to preserve a freer flow of remittances. Thus, in light of *Barclays* and Congress's consideration of, but refusal to, tax international remittances, similarly structured state proposals may violate the "one voice" expectation in foreign commercial relations.[285]

3. *Immigration Federalism: Does Intent Matter?*

Finally, if we do consider remittance taxes to constitute a form of migration control, that suggests that immigration federalism principles may limit state and local governments' efforts.[286] Courts have regularly struggled to determine the extent to which federal law preempts state and local immigration-related policies.[287] But courts have also rejected states' attempts to regulate individuals

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282. *See, e.g.*, Cleveland, *supra* note 273, at 975 (arguing that "[t]he 'one-voice' doctrine is a myth"); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 445–46 (1998) (arguing that despite "strong intuitive appeal," "the one-voice metaphor has never been very accurate").

283. *Barclays*, 512 U.S. at 328–29.

284. *Supra* notes 96–97 and accompanying text.

285. *See supra* Table 1 for various state proposals.

286. *See generally* PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM (2015) (characterizing the emergence of subnational immigration regulation as a product of political polarization); Rodríguez, *supra* note 88, at 610 (arguing that immigration federalism must "facilitate power sharing by the various levels of government and tolerate tension between federal objectives and state and local interests"); Hiroshi Motomura, *Arguing About Sanctuary*, 52 U.C. DAVIS L. REV. 435, 459 (2018) ("It is difficult to explain how the U.S. Constitution limits federal authority without discussing state and local prerogatives and especially how sanctuary measures preserve some state and local decision-making authority."); Pham & Van, *supra* note 83.

287. *See, e.g.*, Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*, 90 NOTRE DAME L. REV. 691, 693 n.8 (2014) (using the DACA program as an example of where "courts struggle to determine whether the [federal] program preempts state efforts to deny benefits to DACA recipients"); Sarkar, *supra* note 25, at 1585–98 (discussing various immigration-federalism doctrines and accompanying circuit splits); Cristina Rodríguez, *Enforcement, Integration, and the Future of Immigration Federalism*, 5 J. ON MIGRATION & HUM. SEC., 509, 509–10 (2017) (dividing

based on their "authorization" to be in the United States, as those nuanced determinations are best left to federal authorities.[288] Apart from that distinction, however, courts are notably deferential to state tax policies, even if those tax policies have an immigration-related effect.[289] Although some have argued that an immigration-related intent should be considered as part of the immigration-federalism analysis, courts have largely declined to adopt that approach.[290] As a result, even uncontested legislative intent to affect immigration flows may not sink Oklahoma's status-neutral law.[291] In short, immigration federalism is unlikely to limit the remittance taxes described in this Article.

To conclude, the taxation of remittances can take on multiple forms, each with distinct constitutional considerations. Capital controls that might seemingly reflect permissible use of state tax authority raise constitutional issues if, by design and intent, they become migrant controls targeting undocumented immigrants and particular remittance-destination (or migrant-sending) countries.

B. Social Security

Beyond remitting capital abroad, migrants may wish to collect upon capital earned in the United States and to spend it here as well. Social Security provides one significant example of this desire, but the law raises a number of hurdles for noncitizen beneficiaries. While Social Security denies payments of benefits to those who are not "lawfully present in the United States," administrative regulations clarify the qualifying immigration statuses.[292] The current regulations include three categories of migrants—recipients of Temporary Protected Status, asylum applicants, and those in deferred action status—as "lawfully present" for the purposes of Social Security benefits.[293] Accordingly, Social Security benefits comprise an underappreciated ground of immigration administration and raise questions about the reach of an agency's powers.

A new administration could work to change the meaning of lawful presence for Social Security purposes to exclude these three non-statutorily enumerated categories. This could serve as a powerful form of migrant control. Elderly asylum applicants who face a particularly long determination may accrue the ten years of credit required for benefits prior to their ultimate asylum determination.

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immigration federalism into "enforcement federalism" and "integration federalism" and expressing skepticism of "claims that a certain intergovernmental relation is required by law").

288. Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 536–37 (5th Cir. 2013). *But see* Keller v. City of Fremont, 719 F.3d 931, 945 (8th Cir. 2013) (disavowing this concern).

289. *See* Sarkar, *supra* note 25, at 1598–1601.

290. *Id.* at 1601.

291. *See id.* (finding that under "prevailing immigration preemption case law," legislative intent is largely ignored by the Supreme Court).

292. By statute, Social Security payments are prohibited to those "not lawfully present in the United States as determined by the [Secretary of Homeland Security]." 42 U.S.C. § 402(y); Taylor v. Barnhart, 399 F.3d 891, 895 n.2 (8th Cir. 2005) (explaining how "reference to the Attorney General in 42 U.S.C. § 402(y) is now deemed to refer to the Secretary of Homeland Security").

293. 8 C.F.R. § 1.3(a)(4), (5) (2020).

Applicants would either have to leave the country or give up their rights to Social Security during the pendency of their asylum determination.[294] Similarly, a Haitian national who arrived in the United States in 2010 at age sixty and availed themselves of Temporary Protected Status (TPS) work authorization would find themselves facing a difficult choice.[295] Finally, if DACA recipients approach old age without adjustment of status, they too will rely on administrative grace to remain in the United States while collecting their earned Social Security.

Such policies might disproportionately expel poorer immigrants from particular racial and national backgrounds.[296] These nominal capital controls therefore become controls on poor migrants.

Administrative changes to limit Social Security payment would raise the specter of both "unconstitutional conditions" and "unconstitutional choice" doctrines. Mention of both of these doctrines has surfaced in the broader TPS termination context as well.[297] The "unconstitutional conditions" doctrine precludes compelled choices between discretionary benefits and a constitutional right.[298] The related "unconstitutional choice" doctrine precludes compelled choices between constitutional rights.[299] These doctrines are closely intertwined in judicial decision-making. For example, the Sixth Circuit invoked an unconstitutional *conditions* holding to strike down, on unconstitutional *choice* grounds, a regulation that "compels the conscientious objector either to engage in military training contrary to his religious beliefs, or to give up his public education."[300]

Both doctrines place limits on how capital controls might be used as migrant controls. To understand why this is so, consider an administrative rescission eliminating Temporary Protected Status's eligibility for Social Security benefits.[301] Because TPS was extended to El Salvador in 2001, a

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294. Asylum applicants with work authorization would still need to secure advance approval before traveling abroad or face the inability to re-enter. *See Travel Documents*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 27, 2020), https://www.uscis.gov/green-card/green-card-processes-and-procedures/travel-documents [https://perma.cc/U77K-WB9R] (stating an asylum applicant may be unable to re-enter the United States without securing certain documents).

295. These concerns are distinct from the litigation surrounding the Trump administration's efforts to remove Haiti from the TPS list. *See, e.g.*, Saget v. Trump, 375 F. Supp. 3d 280, 378 (E.D.N.Y. 2019) (enjoining "the termination of Haiti's TPS on a nationwide basis").

296. *See generally* Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575, 578 (2019) (arguing that while "some of [the Trump Administration's] policies do not explicitly exclude or expel immigrants on the basis of race or national origin," "both in terms of goals and effects, the policies (as adopted or proposed) have reduced or are certain to decrease the racial and national-origin diversity of the immigrant population of the United States").

297. *See, e.g.*, Ramos v. Nielsen, 321 F. Supp. 3d 1083, 1119 n.30 (N.D. Cal. 2018).

298. *Infra* notes 303–306 and accompanying text.

299. *See, e.g.*, Simmons v. United States, 390 U.S. 377, 394 (1968) ("[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another.").

300. Spence v. Bailey, 465 F.2d 797, 799 (6th Cir. 1972).

301. *See generally* Robert Warren & Donald Kerwin, Center for Migration Studies, *A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador,*

hypothetical sixty-five-year-old Salvadoran woman with a citizen child was able to work for a decade and earn Social Security eligibility.[302] And yet the administrative rescission would mean that, despite the Salvadorian woman's eligibility for benefits, her receipt of those benefits is conditioned on her expulsion from the United States.

First, she could challenge the rescission in her own capacity under the "unconstitutional conditions" doctrine, which limits the conditions that may attach to otherwise discretionary government benefits when those conditions burden a constitutional right.[303] For example, in *Sherbert v. Verner*, the Supreme Court invalidated a South Carolina law denying unemployment benefits to religious claimants who refused employment that would require them to work on Saturday, thus burdening their First Amendment rights.[304] The "unconstitutional conditions" doctrine aims to "vindicate[] the Constitution's enumerated rights by preventing the government from coercing people into giving them up."[305] In practice, however, distinguishing between impermissible coercion and permissible contingencies remains difficult.[306]

Honduras, and Haiti, 5 J. ON MIGRATION & HUM. SEC. 577 (2017) (providing an empirical overview of TPS beneficiaries). The authors estimate that the beneficiaries have a very high labor force participation rate, above 80 percent, and have hundreds of thousands of U.S. citizen children. *Id.* at 588.

302. *See, e.g.*, E. Tammy Kim, *The Fight Against Trump's Other Family Separation Policy*, N.Y. REV. BOOKS (Aug. 14, 2019), https://www.nybooks.com/daily/2019/08/14/the-fight-against-trumps-other-family-separation-policy/ [https://perma.cc/76QY-Q5Z5] (describing Angela Hernandez as "a fifty-four-year-old Salvadoran who's lived and worked with TPS in Texas for nearly twenty years" and how "two of her children are citizens"); TOM K. WONG, ANNA COLEMAN, PABITRA KHATI BENJAMIN, AAKRITI KHANAL & SILVA MATHEMA, CTR. AM. PROGRESS, NEPALI TPS HOLDERS MAKE SIGNIFICANT CONTRIBUTIONS TO AMERICA 3, 5 (2020), https://www.americanprogress.org/issues/immigration/reports/2020/10/19/491812/nepali-tps-holders-make-significant-contributions-america/ [https://perma.cc/X5J8-EANK] (describing a survey of Nepali TPS holders and finding that (i) the majority of those between the ages of twenty-five and sixty-five were employed and (ii) the majority of respondents were parents, 40 percent of whom, due to TPS uncertainty, reported thinking about family separation once a day or more).

303. Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (explaining that the "unconstitutional conditions" doctrine means that "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit"); Doyle v. Cont'l Ins. Co., 94 U.S. 535, 543 (1876), *overruled in part by* Terral v. Burke Constr. Co., 257 U.S. 529 (1922) (explaining how "[t]hough a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so"). *See generally* Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 374 (1995) (canvassing examples and asking, "To be permissible, must such denials meet heightened scrutiny since they adversely affect rights? Or do they survive if any rational reason can be advanced, since there is no 'right' to any benefit?").

304. Sherbert v. Verner, 374 U.S. 398, 406 (1963).

305. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604 (2013).

306. *See* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 734 (2003) ("[T]he Court's opinions fail to establish a clear, defensible demarcation between legitimate incentives and illegitimate coercion."); *see also* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1861–62, 1861 n.311 (2008) (discussing the maxim that refrain from providing the benefit includes the lesser power to impose conditions on the offered benefit).

Our hypothetical beneficiary of Temporary Protected Status has a statutory but qualified right to remain in the United States, giving rise to substantive due process interests.[307] Substantive due process captures how the Constitution bars "certain government actions regardless of the fairness of the procedures" in order "to prevent governmental power from 'being used for purposes of oppression.'"[308] While a TPS beneficiary is not among the "most favored category" of undocumented immigrants, a categorization reserved for lawful permanent residents, Congress explicitly created TPS and granted its beneficiaries legal legitimacy.[309] The beneficiary's statutory, though qualified, right to remain in the United States during the TPS period thus creates constitutional interests.

If Homeland Security excluded TPS from the list of "lawfully present" statuses, however, her ability to receive Social Security benefits would be conditioned on her departure.[310] This troubling, and I argue unconstitutional, condition would arise even though she has not been accused of or detained for the type of immigration or criminal violations for which the Supreme Court has found substantive due process arguments uncompelling.[311] Thus, while the "broad power over naturalization and immigration" means that Congress can and does "regularly make[] rules that would be unacceptable if applied to citizens," the administrative termination of Social Security receipt for TPS recipients may nonetheless be unconstitutional.[312] Administratively conditioning a statutorily lawfully present migrant's entitlement receipt on a "self-deportation" raises concerns about unconstitutional conditions.[313]

307. 8 U.S.C. § 1254a. *See generally* Harisiades v. Shaughnessy, 342 U.S. 580, 586 (1952) ("[T]he alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen.").

308. Daniels v. Williams, 474 U.S. 327, 331 (1986) (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856)).

309. Demore v. Kim, 538 U.S. 510, 515 (2003) (repeating the Ninth Circuit's assertion that "permanent resident[s] constitute the most favored category of [noncitizens] and that they have the right to reside permanently in the United States, to work here, and to apply for citizenship"); Landon v. Plasencia, 459 U.S. 21, 34 (1982) (explaining that permanent resident plaintiff's "interest here is, without question, a weighty one [as] [s]he stands to lose the right 'to stay and live and work in this land of freedom' [and] the right to rejoin her immediate family, a right that ranks high among the interests of the individual" (quoting Bridges v. Wixon, 326 U.S. 135, 154 (1945))).

310. *See supra* Part III (discussing how even entitled individuals may face barriers to payment, which depends on the claimant's nationality and the nationality of the entitled individual, upon whose record the claim is being made).

311. *See, e.g.*, *Demore*, 538 U.S. at 515–16 (reversing Ninth Circuit's decision that statutory mandatory detention provision "violates substantive due process as applied to respondent because he is a permanent resident alien"); *see also* Jennings v. Rodriguez, 138 S. Ct. 830, 837 (2018) ("Even once inside the United States, aliens do not have an absolute right to remain here . . . [including] aliens who were inadmissible at the time of entry or who have been convicted of certain criminal offenses since admission.").

312. Mathews v. Diaz, 426 U.S. 67, 79–80 (1976).

313. Park, *supra* note 28, at 1939 (noting "the idea that people can be made to remove themselves by attacking different aspects of people's everyday lives").

Second, beyond the parent, consider the "unconstitutional choice" faced by her citizen child. If TPS is no longer considered "lawfully present," the mother would need to leave the United States to receive the Social Security benefits that provide her financial security. Again, this departure would be compelled even though the mother is lawfully present under Congress's passage of the TPS statute. The mother's departure would force her child into a troubling choice, either to depart the country for her mother's homeland, an unfamiliar place, or to live without her.

Fundamental substantive due process rights have long attached to the family and a child's right to live with their parents.[314] Incursions on such "fundamental" rights are often subject to strict scrutiny.[315] Yet, as the Ninth Circuit explained to an immigrant plaintiff with a criminal conviction for certain offenses against a child, "the generic right to live with family is far removed from the specific right to reside in the United States with noncitizen family members."[316] The federal courts of appeals have consistently rejected children's family-based constitutional arguments and upheld the removal of undocumented parents.[317]

While a federal court recently avoided deciding whether terminating multiple countries' TPS status might unconstitutionally infringe U.S. citizen children's substantive due process rights in *Ramos*,[318] the court's preliminary analysis is instructive. In *Ramos*, the court acknowledged that the government's interest in enforcing immigration laws through parental deportation often trumps

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314. Albright v. Oliver, 510 U.S. 266, 272 (1994) (explaining that the "protections of substantive due process have for the most part been accorded to matters relating to marriage, family"); *see also* Moore v. City of E. Cleveland, 431 U.S. 494, 503–04 (1977) (explaining how "the Constitution protects the sanctity of the family").

315. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997); *see, e.g.*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1283 (2007) (describing *Roe v. Wade* as "the first Supreme Court majority opinion to apply strict scrutiny in a substantive due process case"); Roe v. Wade, 410 U.S. 113, 152–53 (1973), *modified*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (defining "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'" to have some extension "to activities relating to marriage; procreation; contraception; family relationships; and child rearing and education") (citations omitted). *See generally* Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 311–313 (2015) (arguing that substantive due process covers both fundamental and non-fundamental liberties, despite commentators often focusing only on the former).

316. Gebhardt v. Nielsen, 879 F.3d 980, 988 (9th Cir. 2018). *But see* Memije v. Gonzales, 481 F.3d 1163, 1164 (9th Cir. 2007) (Pregerson, J., dissenting) ("Our government's refusal to grant the children's undocumented parents cancellation of removal tramples on the children's substantive due process rights—rights our government routinely ignores. By denying undocumented parents cancellation of removal, our government effectively deports their United States citizen children and denies those children their birthrights.").

317. *See* Lori A. Nessel, *Deporting America's Children: The Demise of Discretion and Family Values in Immigration Law*, 61 ARIZ. L. REV. 605, 623 (2019) (explaining how federal appellate courts "have consistently held that deporting a parent of a U.S.-citizen child does not violate the citizen child's constitutional right to family, to live in the child's country of citizenship, or to travel").

318. The district court instead focused on the termination's APA and other constitutional violations. Ramos v. Nielsen, 321 F. Supp. 3d 1083, 1120 (N.D. Cal. 2018).

the substantive due process interest in family unity.[319] However, the court in *Ramos* faced a different situation, and interest, than our hypothetical migrant. Put simply, the termination of TPS is distinct from the rescission of TPS-based receipt of Social Security benefits. While TPS exists, Congress has explicitly decided not to remove these parents — they are permitted to stay, yet they, likely with their children, would need to leave to receive their earned capital after an administrative rescission. Therefore, while TPS exists, a child may legally challenge the latter administrative rescission as an "unconstitutional choice," even though TPS's legitimate termination could render the administrative question of Social Security receipt moot.

While immigration law's enforcement is not usually held to violate substantive due process, Congress has allowed these migrants to remain and therefore constrained administrative action. Even if "the evenhanded enforcement of the immigration laws, in and of itself, cannot conceivably be held to violate substantive due process," termination of TPS-based receipt of Social Security benefits is distinct from enforcement of the immigration laws. This is partly because an agency has interfered in Congress's establishment of at least temporary immigration relief.[320] The "unconstitutional choice" doctrine should apply here to prevent the government from denying Social Security benefits; otherwise, the TPS beneficiary's exercise of constitutionally protected "freedoms would in effect be penalized and inhibited."[321]

Traditionally, plenary power doctrine extends to Congress's choices, and here Congress has made the choice to allow the individual to benefit from prosecutorial discretion and work authorization.[322] Thus, plenary power doctrine may not rescue agency action to create domestic Social Security receipt ineligibility for interstitial immigrants, even as it has recently supported administrative and executive actions. More theoretically, plenary power cannot rescue the administrative creation of unconstitutional choices and conditions. When such capital controls are transformed administratively into stricter migrant

319. *See id.* at 1119–20 (explaining that while "due process interest[s] [were] recognized in [other] cases, it was not sufficient to overcome the government's interests").

320. Aguilar v. U.S. Immigr. & Customs Enf't Div. of Dep't of Homeland Sec., 510 F.3d 1, 22 (1st Cir. 2007).

321. Perry v. Sindermann, 408 U.S. 593, 597 (1972); *see also* Shapiro v. Thompson, 394 U.S. 618, 631 (1969), *abrogated by* Edelman v. Jordan, 415 U.S. 651 (1974) ("If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." (quoting United States v. Jackson, 390 U.S. 570, 581 (1986)).

322. *But see* Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 490 (2018) ("Under [plenary power] doctrine, federal courts have given wide berth to Congress's—*and to some extent, the executive branch's*—choices with respect to immigration law even where constitutional issues may be directly implicated.") (emphasis added); *see* Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 447 (2012) (arguing that the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001) shows how "plenary power doctrine does *not* foreclose all substantive due process challenges" in immigration law).

controls, the "famous" immigration deference doctrines that attach may not suffice to save them.[323]

C. Personal Accounts

When migrants are unable to obtain identification that allows access to formal financial institutions, they and their capital are marginalized. This Section considers the intersection of the PATRIOT Act and REAL ID Act to establish how statutory and administrative ambiguity leads to the marginalization of migrant identity and migrant capital. As mentioned above, while REAL IDs likely suffice for the PATRIOT Act, non-REAL IDs may not. The sufficiency of non-REAL IDs—non-REAL ID compliant driver's licenses, municipal IDs, and the *matricula consular*—bears directly on migrants' ability to engage with the financial system and indirectly on the perception of these documents' validity more generally.[324]

Nothing in the law deems a non-REAL ID compliant license sufficient to verify a bank customer's identity or requires a bank to accept one. The anti-money-laundering regulations express that banks "may" use documents including "*government-issued identification* evidencing nationality or residence and bearing a photograph or similar safeguards, such as a driver's license or passport."[325] Yet scholars have already suggested that in areas including banking, "government-issued identification" likely means an identification card compliant with the REAL ID Act.[326] Thus, while REAL ID-compliant driver's licenses are likely to be sufficient, as a matter of law, for post-PATRIOT Act financial services, the state driver's licenses and municipal IDs granted without attention to lawful immigration status may not be.

Because the anti-money laundering regulations afford financial institutions discretion in verifying customer identities, institutional practices diverge.[327] The history of municipal IDs illustrates this dynamic. Issuing municipalities unsuccessfully requested that prudential financial regulators assert that these IDs, while not REAL ID compliant, are nonetheless PATRIOT Act compliant.[328]

323. Cox, *supra* note 23, at 346 (characterizing plenary power as "the most famous jurisprudential piece of American constitutional immigration law").

324. *See, e.g.*, Cathy Liu, Note, *An Assault on the Fundamental Right to Parenthood and Birthright Citizenship: An Equal Protection Analysis of the Recent Ban of the* Matrícula Consular *in Texas's Birth Certificate Application Policy*, 50 COLUM. J.L. & SOC. PROBS. 619, 650–51 (2017) (invoking the *matricula consular's* continued acceptance by banks to argue for its reliability in other sectors, including for birth certificates).

325. 31 C.F.R. § 1020.220(a)(2)(ii) (2020).

326. Candeub, *supra* note 166, at 494.

327. LeBrón et al., *supra* note 187 (noting generally that "the effects of [the PATRIOT Act] are compounded by many financial institutions' exclusionary interpretation of the identity verification measures mandated by the PATRIOT Act").

328. Two separate letters were sent, one from the Federal Reserve, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation. The second was from the National Credit Union Administration. Both letters, however, contained similar analyses. Letter from Michael Gibson, Dir. of Banking Supervision & Regul., Bd. of Governors of the Fed. Rsrv. Sys., et al., to

Sidestepping the request, the regulators explained instead that the banks *may* consider such IDs compliant, in accordance with the existing holistic regulations. The CIP rule "neither endorses nor prohibits a bank from accepting particular types of government identification cards"—rather, "risk-based" rules mean that the card must allow the bank to form a reasonable belief of the "true identity of the customer."[329] Although Treasury officials have espoused a desire to "have as many people as possible active in the U.S. banking system,"[330] the private discretion afforded by indeterminate PATRIOT Act regulation leaves financial access uncertain.[331] Banks' prior rejection of the much-touted municipal IDs as insufficient may now transform into a rejection of non-REAL ID licenses.[332]

A similar ambiguity surrounds the *matricula consular*, with federal authorities' sheepish and inconsistent analysis of its legal sufficiency. The Treasury has expressed ambivalence about the *matricula*.[333] Agencies such as the FBI and DHS remain divided.[334] That may, in part, reflect collective familiarity with driver's licenses but not with the legal underpinnings of the *matricula consular*. Yet international legal stakes weigh in favor of legitimizing these international identifications. The *matricula consular* is a form of consular identification contemplated by the Vienna Convention and America's

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Comm'r Julie Menin, N.Y.C. Dep't of Consumer Affs., Comm'r Nisha Agarwal, N.Y.C. Mayor's Off. of Immigr. Affs. & President Michael P. Smith, N.Y. Bankers Ass'n (Apr. 30, 2015) (on file with author); Letter from Michael J. McKenna, Gen. Couns., Nat'l Credit Union Admin., to Cathleen A. Mahon, President & CEO, Nat'l Fed'n of Cmty. Dev. Credit Unions et al., (Nov. 24, 2014) (explaining that "even non-government-issued identification nay be used, as long as it can enable the financial institution to 'form a reasonable belief that it knows the true identity of the customer'" (quoting 31 C.F.R. § 1020.220(a)(2))).

329. Letter from Michael Gibson et al., *supra* note 328; *see also* Letter from Michael J. McKenna to Cathleen A. Mahon et al., *supra* note 328.

330. U.S. GOV'T ACCOUNTABILITY OFF., BORDER SECURITY: CONSULAR IDENTIFICATION CARDS ACCEPTED WITHIN UNITED STATES, BUT CONSISTENT FEDERAL GUIDANCE NEEDED 7 (2004).

331. By some accounts, financial institutions are oddly placed to deploy discretionary capital controls premised on national security threats. Laura K. Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime*, 43 WAKE FOREST L. REV. 643, 657 (2008) ("Bank managers do not hold security clearances—nor are they privy to a range of information otherwise available to the intelligence agencies. As a result, financial institutions began filing reports based on political sensitivities—and using crude ethnic, age, and religious distinctions to determine which transactions to report.").

332. *See, e.g.*, McQueen, *supra* note 206 (noting how after one year, "only [twelve] financial institutions in the city accept IDNYC as a primary form of identification for starting an account").

333. *See, e.g.*, U.S. DEP'T OF THE TREASURY, A REPORT TO CONGRESS IN ACCORDANCE WITH § 326(B) OF THE USA PATRIOT ACT OF 2001 16 n.17 (2002) ("Thus, the proposed regulations do not discourage bank acceptance of the 'matricula consular' identity card that is being issued by the Mexican government to immigrants."). Treasury has not affirmatively weighed in on the validity of this standardized, sovereign-issued document.

334. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 330 at 3–4 (describing disagreements among Treasury, a Federal Bureau of Investigation (FBI) official, and State Department officials on the wisdom of accepting the *matricula consular* as a source of identification); McCraw, *supra* note 197 (describing how "[t]he U.S. Government has done an extensive amount of research on the Matricula Consular, to assess its viability as a reliable means of identification" and explaining that "[t]he Department of Justice and the FBI have concluded that the Matricula Consular is not a reliable form of identification").

international law obligations.[335] The Department of State has accordingly expressed concern that American unwillingness to accept the *matricula consular* or other consular identification could lead to reciprocal rejection of Americans who might need to utilize American consular identification during an emergency.[336]

At the PATRIOT Act's outset, questions arose about the *matricula consular*'s validity as a "government-issued document evidencing nationality or residence." Those debates were never resolved.[337] Much has been made of a footnote in a Treasury report to Congress clarifying that the proposed regulations "do not discourage bank acceptance of the 'matricula consular' identity card that is being issued by the Mexican government to immigrants."[338] And yet, Treasury and the financial regulators emphasized that the "rule neither endorses nor prohibits bank acceptance of information from particular types of identification documents issued by foreign governments."[339] The agencies also explained in the final rule that for a passport, "the bank will not be required to take steps to determine whether the document has been validly issued" absent "obvious indication of fraud."[340] No such express consideration extended to any other document issued by a foreign government.[341] The agencies' regulatory clarification has long-established neutrality, allowing for, but not advocating for, the *matricula consular*'s place in the financial system.

The PATRIOT Act therefore leaves considerable discretion to Treasury on the acceptability of non-REAL IDs.[342] In particular, the PATRIOT Act requires

335. Vienna Convention on Consular Relations art. 5, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("Consular functions consist in: . . . (d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State"); *see also* Marcela Celorio, *The Role of the Consulate General of Mexico in San Diego: Exercising an Effective Consular Diplomacy*, 53 CAL. W. L. REV. 131 (2017). Celorio was Consul General of Mexico in San Diego and explained how the "[i]dentity of the undocumented Mexican community has always been a concern and it is linked to the subject of consular protection," which includes issuances of consular identification document under Article 5 of the VCCR. *Id.* at 131, 141.

336. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 330 at 23 ("The State Department may occasionally issue nonpassport identity cards or travel documents to U.S. citizens abroad in times of emergency and under other special circumstances. . . . It would be difficult to ask these nations to accept such a form of identification if the United States refused to accept CID cards, the official said.").

337. 31 C.F.R. § 1020.220(a)(2)(i)(A)(4)(ii) (2020).

338. BRUNO & STORRS, supra note 92, at 3 (quoting U.S. DEP'T OF THE TREASURY, *supra* note 333, at 16 n.17).

339. Customer Identification Programs for Banks, Savings Associations, Credit Unions and Certain Non-Federally Regulated Banks, 68 Fed. Reg. 25,090, 25,098 (May 9, 2003).

340. *Id.* at 25,099.

341. *See also id.* (describing how commenters "asked that Treasury and the Agencies . . . [further] discuss appropriate types of documentary identification in the final rule . . . [including] whether . . . a foreign identification card, such as a foreign voter registration card or driver's license, would be acceptable"). Treasury and the agencies responded that "[t]he rule gives examples of types of documents that are considered reliable." *Id.*

342. 31 U.S.C. § 5318(l) (requiring the Secretary of the Treasury to "prescribe regulations setting forth the minimum standards for financial institutions and their customers regarding the identity of the customer that shall apply in connection with the opening of an account at a financial institution" and

that the regulatory customer identification programs (CIPs) verify "the identity of any person seeking to open an account *to the extent reasonable and practicable*."[343] As noted above, the *matricula consular* of two decades ago, at the PATRIOT Act's passage, appears distinct from the *matricula consular* of today, which contains its own identity verification requirements.[344]

While immigrant-rights advocates are pressing for broader acceptance of the *matricula*, others have attempted to limit banks' use of the document. In *Howe v. Bank of America*, a California case addressing the *matricula consular* in banking, the citizen plaintiffs viewed the absence of capital controls as a failure to control illegal immigration. The *Howe* plaintiffs were citizens who unsuccessfully sued private banks for allegedly discriminatory customer identity verification policies that *did* recognize *matriculas*.[345] These citizens argued that requiring Social Security numbers of citizens but not of certain foreign nationals, who could produce the *matricula* instead, violated state civil rights law.[346] The plaintiffs painted the bank's capital controls as necessary migration controls in the face of an "inept" government.[347]

Bank of America prevailed, and the court made clear in dicta that a bank's *excessive* capital controls, via stringent identification criteria, could lead to litigation risk. The appellate court easily rejected the citizens' argument, reiterating that the PATRIOT Act and Treasury's attendant regulations required citizens to produce a Social Security Number and thus, "as a matter of law, [the bank] did not act arbitrarily [or discriminatorily] in requiring Social Security numbers" from only citizens.[348] The federal law here saved the plaintiffs, since "a public policy expressed by statute generally constitutes a reasonable basis for drawing distinctions on the basis of classifications otherwise protected."[349] The court further explained that even if it accepted the plaintiff's argument "[f]or Bank of America to depart from those [federally] required minimums by imposing stricter requirements on foreign nationals, but not on U.S. citizens, [that] might itself appear discriminatory in the context of the regulatory scheme."[350]

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explaining that these regulations shall establish "reasonable procedures for . . . verifying the identity of any person seeking to open an account to the extent reasonable and practicable").

343. *Id.* § 5318 (l)(2)(A) (emphasis added).

344. *See supra* note 198 and accompanying text.

345. Howe v. Bank of Am. N.A., 102 Cal. Rptr. 3d 506, 507–08 (Cal. Ct. App. 2009), *modified*, (Dec. 8, 2009).

346. *Id.*

347. *Id.* at 509 (arguing that "Bank of America's current policy amounted to 'laughing at the Government,' because '[t]he U.S. government is inept at controlling illegal immigration'").

348. *Id.* at 512. The court explained that "the Unruh Act does not entirely prohibit businesses from drawing distinctions on the basis of the protected classifications or personal characteristics; rather, '[t]he objective of the Act is to prohibit businesses from engaging in *unreasonable, arbitrary or invidious discrimination*.'" *Id.* at 510–11 (citation omitted).

349. *Id.* at 511.

350. *Id.* at 513. Like the court below, it signaled, but refrained from exploring deeply, the viability of such litigation. *Id*. Since plaintiffs also included Mexican nationals who became naturalized American

One relevant idea absent from the court's opinion is how the discretion contemplated under the PATRIOT Act may differ across contexts. In the final rule, the agencies not only refused to endorse or prohibit non-passport foreign identification, but they also explained that the risk-analysis and discretion expected of banks' identity verification may incorporate "the bank's size, location, and customer base."[351] Thus, the sufficiency of the *matricula consular* for purposes of the PATRIOT Act may be different in California, where *Howe* was litigated, than in rural Vermont.[352]

Such heterogeneity may also be necessary in light of federal inclusionary banking mandates. The Community Reinvestment Act (CRA) expressly requires federal regulators to determine whether financial institutions "assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution."[353] Financial regulators currently look to a number of services in evaluating CRA compliance—these include the availability of low-cost deposit accounts and check cashing services as well as "reasonably priced international remittance services."[354] Thus, financial institutions who must marginalize capital pursuant to the PATRIOT Act must nonetheless comply with antidiscrimination and inclusionary credit mandates.[355] The meaning of these mandates will depend on a financial institution's surrounding community.

Financial institutions thus face competing demands with regard to non-REAL IDs. Although financial institutions must satisfy consumer-identification requirements under the PATRIOT Act, there is no clear guidance regarding the status of non-REAL ID driver's licenses, municipal IDs, and the *matricula consular*. As courts have recognized, complying with the PATRIOT Act requires banks to employ marginalizing criteria while also vindicating independent antidiscrimination and inclusionary mandates. As such, a financial institution

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citizens, the appellate court "assume[d], without deciding, that citizenship status would qualify as the type of 'personal characteristic' which falls within the protection of the Unruh Act." *Id.* at 510 n.2. Additionally, because of the primary arguments advanced by plaintiffs pertaining to the bank's acceptance non-SSNs, no preemption concerns needed to be addressed.

351. Customer Identification Programs for Banks, Savings Associations, Credit Unions and Certain Non-Federally Regulated Banks, 68 Fed. Reg. 25,090, 25,098 (May 9, 2003).

352. This heterogeneity mirrors, in some ways, how the economic power of a particular state could render an otherwise constitutional state remittance tax an incursion into foreign affairs. *Supra* note 245 and accompanying text (listing "economic power" as one of the *Natsios* factors).

353. 12 U.S.C. § 2903(a)(1)–(2).

354. FED. DEPOSIT INS. CORP., CONSUMER COMPLIANCE EXAMINATION MANUAL § XI-12.1, at 12–23 (2016), https://www.fdic.gov/regulations/compliance/manual/11/xi-12.1.pdf [https://perma.cc/GDW7-LUD6]; *see also* FDIC SUPERVISORY INSIGHTS, *supra* note 162, at 19–20 (arguing that "bank regulatory agencies clarifi[cation] that financial institutions offering low cost international remittance services would receive credit under the Community Reinvestment Act (CRA)" reflected "an effort to encourage more banks to enter the remittance market and improve access to the U.S. banking system among recent Latin American immigrants").

355. Howe v. Bank of Am. N.A., 102 Cal. Rptr. 3d 506, 507–08 (Cal. Ct. App. 2009), *modified*, (Dec. 8, 2009).

must abide by federally prescribed capital marginalization while avoiding unnecessary and illegally discriminatory migrant marginalization.

CONCLUSION

The discussion of the purportedly free movement of capital rarely acknowledges the distinct treatment of migrants' capital. Migrants' capital confronts rejection from traditional financial institutions operating under federal law's ever-more-stringent identification criteria. Alternative financial services including money transmitters may charge additional taxes for remittance services based on immigration status. And after many years of work, even if migrants become entitled to Social Security payments, the actual payment is often prohibited, forcing them to leave or forgo economic security.

The treatment of migrant capital as a proxy for the migrant seems historically familiar. Capital regulation and migrant regulation have often bowed to similar winds. Economic protectionism leads to restrictions on foreign investment and migration from afar.[356] The "War on Drugs" created both the modern criminal law of money laundering and many of the harsh immigration restrictions of the 1980s and 90s.[357] Purported national security concerns led to the PATRIOT Act, alongside the Trump administration's travel bans and "extreme vetting."[358] In light of these longstanding relationships, it should be no surprise that legislators and regulators have sought to use migrants' capital as a means to regulate their movement.

356. *Supra* notes 8–15 and accompanying text; *see also* David S. Rubenstein, *Immigration Blame*, 87 FORDHAM L. REV. 125, 135 (2018) (arguing that one of "the most common tropes of migrant-related harm" is the effect of migrants on the economy, even if empirical evidence suggests otherwise); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 23 (1998) (using the Chinese Exclusion Act as an example of how claims of economic protectionism in opposing migration were convenient pretexts for racial animus); New Energy Co. v. Limbach, 486 U.S. 269, 273–74 (1988) (explaining how the "'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors").

357. *Supra* note 168 and accompanying text; *see also* Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059, 1064–65 (2002) (outlining the relationship between drug offenses and the "War on Drugs" to immigration enforcement); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014) (describing the relationship between the "War on Drugs" and the harsh conditions of immigration detention).

358. Ali Vitali, *Donald Trump Shifts on Muslim Ban, Calls for 'Extreme Vetting,'* NBC NEWS (July 17, 2016), http://www.nbcnews.com/politics/2016-election/donald-trump-shifts-muslim-ban-calls-extreme-vetting-n611276 [https://perma.cc/6G7C-9LYQ] (explaining how President Trump called "for 'extreme vetting' of persons from 'territories' with a history of terror"). *See generally* Susan N. Herman, *The USA PATRIOT Act and the Submajoritarian Fourth Amendment*, 41 HARV. C.R.-C.L. L. REV. 67 (2006) (describing the national security rationales of the PATRIOT Act and corresponding incursions on civil liberties); Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475 (2018) (declaring that "[t]he use of national security language to create and defend immigration law and policy is historic").

This Article has explored how legal actors use capital controls as migrant controls. Simple contrasts between the relatively free movement of capital and limited movement of people will no longer suffice.