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Abstract: Tax law punishes poor foreigners. Although the Supreme Court struck down nineteenth-century state laws taxing migrants upon entry, the tax system determines who deserves a place, and what sort of place, within our borders. The tax system's emergency relief programs may deprive otherwise needy noncitizens, giving migrants a lesser place. This Article sheds light on this phenomenon—"tax law's migration"—engaging two connections between immigration and tax law. First, this Article uses the term to explain the tax system's long tradition of policing migrants. From colonial tax incentives for selective migration to joint tax-immigration worksite enforcement, tax law crystallizes financial welcome for some and hostility for others. Immigration status-based inequalities give rise to constitutional litigation that constrains, but does not extinguish, tax law's policing of migrants. Second, this Article describes how migration and mobility rights are used to police tax compliance. Tax law fashions penalties through the revocation of driver's licenses and passports. A striking contrast emerges from comparing (often-affluent) citizen tax noncompliers with noncitizens. Remaining in the country becomes the penalty for those who may take it for granted. Yet, remaining is also the very privilege denied to noncitizens who may seek little else. Reckoning with tax law's migration requires tracing the bureaucratization of ethnic and racial disregard and the abandonment of economically vulnerable migrants during emergencies. This Article argues that rather than reflexively approving tax law's migration, we should scrutinize it.

INTRODUCTION

In the mid-nineteenth century, the U.S. Supreme Court warned that state tax laws interfered with migration. New York, for example, raised a tax on oceanic migrants for "hospital moneys,"[1] and Massachusetts supplemented its

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[1] Passenger Cases, 48 U.S. (7 How.) 283, 403 (1849) (opinion of McLean, J.). "Hospital moneys" is funding for marine hospitals. *Id.* To clarify this Article's use of the words "migrant" and "immigrant," the latter is often used to imply permanence. *See, e.g.*, JORGE G. CASTAÑEDA, EX MEX: FROM MIGRANTS TO IMMIGRANTS 37 (2007) (describing the "metamorphosis from seasonal [Mexican] migrants

foreign passenger tax by requiring a bond for any "lunatic, idiot, maimed, aged, or infirm person."[2] In the famous *Passenger Cases* challenging these laws, the Supreme Court struck down the taxes.[3] Distinguishing the impermissible passenger taxes from more permissible state health policies, the Court worried of "the unfortunate immigrant, before he arrives at his destined home, be[ing] made a pauper by oppressive duties on his transit."[4]

Nearly two hundred years later, as pressing public health concerns surface anew, tax law retains its power over migration. That connection goes beyond the Supreme Court's pithy reminder in *Graham v. Richardson* that noncitizens pay taxes just as citizens do, and enjoy constitutional protections in the tax system and beyond.[5]

Yet, the connection between tax and immigration receives rather short shrift, despite the attention paid to these early cases' constitutional import. Scholars peripherally note tax law's role in the American immigration system, but the connection rarely occupies the center of academic pursuit.[6] When inquiries do center the connection, they are narrowly focused. For example, some focus on how some of the world's wealthiest people denaturalize to pro-

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to permanent settlers, or immigrants"). Legally, the American immigration system contains both immigrant and nonimmigrant visas, the latter often being short-term. *See* 8 U.S.C. § 1101(a)(15)–(16), (26) (distinguishing between immigrant and nonimmigrant visas, as well as between immigrant and nonimmigrant noncitizens). Despite a connotation of permanence, however, immigrants may not be as distinct from nonimmigrant migrants as statutes might suggest. Dandamudi v. Tisch, 686 F.3d 66, 70 (2d Cir. 2012) ("[A]lthough plaintiffs had to indicate that they did not intend to stay here permanently to obtain their visas, the truth is that many (if not all) actually harbor a hope (a dual intention) that some day they will acquire the right to stay here permanently. The BIA and the State Department both recognize this doctrine of dual intent . . . .").

[2] *Passenger Cases*, 48 U.S. (7 How.) at 456 (opinion of Grier, J.).

[3] *Id.* at 572–73.

[4] *Id.* at 461 (opinion of Grier, J.).

[5] 403 U.S. 365, 376 (1971) (holding "that a state statute that denies welfare benefits to [lawful foreign nationals] and one that denies them to [foreign nationals] who have not resided in the United States for a specified number of years violate [sic] the Equal Protection Clause"). In that 1971 case, the Court struck down a state welfare statute foisting a discriminatory residency requirement upon legally residing foreign nationals. *Id.* (describing how noncitizens "'may live within a state for many years, work in the state and contribute to the economic growth of the state'" (quoting Leger v. Sailer, 321 F. Supp. 250, 253 (E.D. Pa. 1970))).

[6] *See, e.g.*, Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 667 (2005) (characterizing the *Passenger Cases* as concerning "head taxes" and about foreign commerce rather than immigration per se). While chronicling a number of early tax laws, Abrams ultimately focuses on unearthing the underappreciated significance of the Page Law that challenged the immigration of Chinese women. *Id.* at 643; *see also* Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 378 n.13 (2004) (noting that the *Passenger Cases* were about tax statutes but focusing instead on their role in establishing plenary power); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 621 (2008) (noting only in passing the presence of taxes in various Supreme Court decisions and how perceptions of immigrant tax contributions may be shaping sub-federal regulation).

tect their wealth from the broad scope of U.S. taxation.[7] Others analyze Supreme Court cases that address how tax felonies can lead to deportation of even legal permanent residents.[8] Even as scholars generally observe that the government taxes undocumented immigrants, despite excluding them from many public benefits,[9] they tend to overlook the intricate connections between tax and immigration law.

Federal tax law's treatment of race contrasts with its treatment of immigration status. Since the ratification of the Sixteenth Amendment in 1913, the predecessor to the Internal Revenue Service (IRS) has long refused to ask about a taxpayer's race.[10] Early local and state taxes intentionally discriminated against racial minorities, leading to lawsuits as late as the end of the twentieth century.[11] Scholars acknowledge that formal colorblindness has replaced this system, even as disparate and discriminatory impacts persist.[12] Yet tax law need not be, nor

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[7] *See, e.g.*, Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 169, 170–71 (2016) (discussing the high-profile departure of Facebook co-founder Eduardo Saverin). *See generally* 26 U.S.C. § 911(d)(1) (defining a "qualified individual" under federal tax law); Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1292 (2011) (assessing citizenship-based taxation).

[8] *See* Kawashima v. Holder, 565 U.S. 478, 480 (2012); Joshua D. Blank, *Collateral Compliance*, 162 U. PA. L. REV. 719, 724 (2014) (noting how "[i]t may appear unusual to tax practitioners and tax scholars that the Kawashimas' additional, nonmonetary sanction for tax noncompliance was levied by an agency other than the IRS"); Tessa Davis, *The Tax-Immigration Nexus*, 94 DENV. L. REV. 195, 197 (2017) (using citizenship theory to question *Kawashima*'s assumptions and to analyze its implications).

[9] Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 27–29 (2006) (providing a hypothetical of an unauthorized worker's tax liability); Shayak Sarkar, *Capital Controls as Migrant Controls*, 109 CALIF. L. REV. 799, 801–02 (2021) (discussing how migrants confront Social Security entitlement and payment restrictions).

[10] U.S. CONST. amend. XVI; *Form 1040*, INTERNAL REVENUE BUREAU (1913), http://www.taxhistory.org/thp/1040forms.nsf/WebByYear/1913/$file/1040_1913.pdf [https://perma.cc/4RXT-R3RC]; *Form 1040*, DEP'T OF THE TREASURY–INTERNAL REVENUE SERV. (2020), https://www.irs.gov/pub/irs-pdf/f1040.pdf [https://perma.cc/NK8B-KRB8]. *See generally* Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1 (2019) (chronicling and problematizing this historical practice).

[11] *See, e.g.*, Williams v. City of Dothan, 745 F.2d 1406, 1408, 1414–15 (11th Cir. 1984) (reversing a grant of summary judgment against minority residents challenging tax assessments in Dothan, Alabama "to pay for a street paving and sewer improvement project in their neighborhood" on an equal protection theory). The plaintiff viably argued that the city contributed a lower percentage of municipal funds to this project than past, comparable projects located in predominantly white areas. *Id.* at 1415; *see also* Bland v. McHann, 463 F.2d 21, 23 (5th Cir. 1972) (holding that the Tax Injunction Act and the availability of a plain, speedy, and efficient remedy precluded availability of § 1983 relief to Black property owners, who alleged that the 1966 increases in their property tax assessments were the sole result of racially discriminatory retaliation for the taxpayers' prior demonstrations).

[12] *See, e.g.*, Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 799 (2007) (arguing that support for the Earned Income Tax Credit (EITC) is conditional on it being "'properly' raced"); Leo P. Martinez, *Latinos and the Internal Revenue Code: A Tax Policy Primer for the New Administration*, 20 HARV. LATINX L. REV. 101, 111–14 (2017) (discussing how tax poli-

is it, blind to immigration status, however correlated with ethnic and racial identity.[13]

The subjects of immigration and tax enforcement also reflect a study in contrasts. The IRS's sights often lie on lucrative, high-income citizens, as it plans face-to-face visits with delinquent taxpayers.[14] In contrast with the IRS's professed concerns about the high-earners atop America's economic pyramid,[15] Immigration and Customs Enforcement (ICE) focuses on noncitizens, particularly those without lawful immigration status.[16] These noncitizens struggle in

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cy interacts with the Latinx community); *see also* Bernadette Atuahene, *Predatory Cities,* 108 CALIF. L. REV. 107, 178–79 (2020) (discussing evidence of racially discriminatory property taxes throughout American cities); Shayak Sarkar & Josh Rosenthal, *Exclusionary Taxation*, 53 HARV. C.R.-C.L. L. REV. 619, 631 (2018) (describing how property tax limitations, like California's Proposition 13, can result in racially disparate impacts in violation of the Fair Housing Act).

[13] Martinez, *supra* note 12, at 111–14 (observing how conversations about tax policy for those without lawful status often unfortunately drive conversations about tax policy for the much broader Latinx community); *see infra* Sections I.A–B, II.B.

[14] Alan K. Ota, *IRS Division Head Sets Sights on High-Income Nonfilers*, LAW360 TAX AUTH. (Feb. 11, 2020), https://www.law360.com/tax-authority/articles/1242936/irs-division-head-sets-sights-on-high-income-nonfilers [https://perma.cc/92X7-RRB2] (interviewing Eric Hylton, IRS Commissioner); Press Release, Internal Revenue Serv., IRS Increases Visits to High-Income Taxpayers Who Haven't Filed Tax Returns (Feb. 19, 2020), https://www.irs.gov/newsroom/irs-increases-visits-to-high-income-taxpayers-who-havent-filed-tax-returns [https://perma.cc/K8EZ-PMLG]. To be clear, high-income taxpayers are distinct from the ultrawealthy taxpayers, often billionaires. *See* Jesse Eisinger & Paul Kiel, *The IRS Tried to Take on the Ultrawealthy. It Didn't Go Well.*, PRO-PUBLICA (Apr. 5, 2019), https://www.propublica.org/article/ultrawealthy-taxes-irs-internal-revenue-service-global-high-wealth-audits [https://perma.cc/ZC3L-4G8C] (narrating how lobbyists and Republicans in Congress undercut the IRS's emerging "approach to taking on the superwealthy").

[15] Some attention has also been given to the distinct phenomenon of how the IRS unfairly polices poorer taxpayers, including EITC and Child Tax Credit claimants. *See, e.g.*, NAT'L TAXPAYER ADVOC., 2020 PURPLE BOOK 12 (2019) (noting how "[t]he IRS does not provide sufficient time for taxpayers to resubmit rejected returns" and how "[t]axpayers in vulnerable populations that use free tax return preparation services, such as the Volunteer Income Tax Assistance and Tax Counseling for the Elderly programs, may face delays in scheduling a time to return for assistance" (emphasis omitted)); *see also* Darla Mercado, *The IRS Delayed Refunds for 275,000 Taxpayers Last Year. Here's Why*, CNBC (Jan. 15, 2020), https://www.cnbc.com/2020/01/15/the-irs-delayed-refunds-for-275000-taxpayers-last-year-heres-why.html [https://perma.cc/6NCD-9YF8] ("'If refunds for lower-income people are being held up as an enforcement matter, that's not even where the revenue savings are . . . .'" (quoting Steve Wamhoff, Director of Federal Tax Policy at the Institute on Taxation and Policy)).

[16] *See* U.S. IMMIGR. & CUSTOMS ENF'T, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 7 fig.5 (2019) (noting the increased number of people in detention from 2017–2019). A recent U.S. Citizenship and Immigration Services (USCIS) Director declared that ICE is "ready to just perform their mission which is to go and find and detain and then deport . . . ." Matthew Rozsa, *Ken Cuccinelli Says Donald Trump Is Ready to Deport 1 Million Undocumented Immigrants*, SALON (July 7, 2019), https://www.salon.com/2019/07/07/ken-cuccinelli-says-donald-trump-is-ready-to-deport-1-million-undocumented-immigrants/ [https://perma.cc/C3MK-XQTJ] (quoting Ken Cuccinelli, acting USCIS Director, from an interview on *Face the Nation*).

the pyramid's shadows.[17] Immigrants who live without lawful status describe beliefs about the immigration system's illegitimacy motivating their covert migrations and self-understanding.[18] Yet, when migrants violate American immigration law, many still take pains to comply with the law generally, with millions filing income taxes.[19]

This Article analyzes how tax law and immigration law leverage one another to shape people's economic and spatial freedoms. I use the term "tax law's migration" to describe two facets of their interplay. First, the tax system has long operated in service of migration control, a connection that litigation is unlikely to sever. Centuries ago, tax law reflected America's long-held bipolar attitudes towards migration. On one hand, it reflected the migration concerns underlying the state statutes struck down by the *Passenger Cases*. On the other hand, these laws reflected the desire for new economic revenue through creative schemes to tax those deemed "foreign."[20]

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[17] *See generally* Sherrie A. Kossoudji & Deborah A. Cobb-Clark, *Coming Out of the Shadows: Learning About Legal Status and Wages from the Legalized Population*, 20 J. LAB. ECON. 598, 623 (2002) (arguing that legislation providing legal status for formerly undocumented workers brought them "out of the shadows" and higher economic returns to their education); George J. Borjas, *The Earnings of Undocumented Immigrants* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23236, 2017), http://www.nber.org/papers/w23236 [https://perma.cc/H685-UNQ7] (noting that the "age-earnings profiles of undocumented workers lies far below that of legal immigrants and of native workers").

[18] Emily Ryo, *Through the Back Door: Applying Theories of Legal Compliance to Illegal Immigration During the Chinese Exclusion Era*, 31 LAW & SOC. INQUIRY 109, 127 (2006) (arguing that "widespread belief among the Chinese that the exclusion laws lacked social and moral legitimacy likely facilitated their willingness to violate the exclusion laws").

[19] *See generally* MARGOT L. CRANDALL-HOLLICK & ABIGAIL F. KOLKER, CONG. RSCH. SERV., IN11376, NONCITIZENS AND ELIGIBILITY FOR THE 2020 RECOVERY REBATES 3 (2020) (describing the nearly four million Form 1040 tax returns filed in 2017 that included at least one individual taxpayer identification number (ITIN)—a social security number substitute used by certain noncitizens—and collectively contained 7.5 million ITINs); Mae M. Ngai, *No Human Being Is Illegal*, 34 WOMEN'S STUD. Q. 291, 291 (2006) (arguing that, according to some social surveys, immigrants are generally more law-abiding than the U.S.-born population); Emily Ryo, *Legal Attitudes of Immigrant Detainees*, 51 LAW & SOC'Y REV. 99, 109, 115 (2017) (describing an in-person survey of immigrant detainees in Southern California where, whereas only a minority "of the detainees believe that people should accept the decisions of U.S. immigration authorities," a majority "believe that people should obey the law even if they disagreed with the law"); Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 628–29 (2015) (describing how "beliefs about the lack of system legitimacy form a powerful normative account that might enable otherwise law-abiding individuals to violate U.S. immigration laws").

[20] Public survey polls conducted in 1965 with the passage of the Immigration and Nationality Act (INA) revealed a country divided on the issue of immigration while nonetheless agreeing that it was not "the most important problem facing the nation." Andrew Kohut, *From the Archives: In '60s, Americans Gave Thumbs-Up to Immigration Law That Changed the Nation*, PEW RSCH. CTR. (Sept. 20, 2019), https://www.pewresearch.org/fact-tank/2019/09/20/in-1965-majority-of-americans-favored-immigration-and-nationality-act-2/ [https://perma.cc/HP8B-N58R]. Currently, a much larger percent-

Tax law's migration includes a second facet: the employment of migration controls, both local and transnational, for tax enforcement.[21] Simply put, a taxpayer's right to move freely is conditioned on tax compliance.[22] Limits on movement range from driver's license revocations and passport denials all the way to removal from the United States.[23] Even as tax enforcement's penalties differentiate between citizens and noncitizens, they generally seek compliance by threatening the right to move freely.[24]

This second facet of tax law's migration leads to a striking consequence. High-income, tax-delinquent citizens face national confinement, precluding their ability to journey beyond our borders.[25] In contrast, poor, tax-delinquent noncitizens may be banished beyond those very borders, unable to remain within them legally.[26] Remaining becomes both the penalty for those who may take it for granted as well as the privilege denied to those who might dream of little else.[27] Tax noncompliance leaves both citizens and noncitizens with less ability to steer their lives in the directions they desire.

This Article proceeds as follows. In Part I, I explain the historical role of taxation in policing migration from colonization to modern day. The taxation

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age of Americans support "legal" immigration than did at the time of the INA's passage. *Id.*; *see also infra* Part I (describing political and social tensions arising from migration to America centuries ago).

[21] For one set of perspectives on how migration and mobility may be distinct, see generally MOBILITY AND MIGRATION CHOICES: THRESHOLDS TO CROSSING BORDERS (Martin van der Velde & Ton van Naerssen eds., 2015). The European Union has entered into mobility partnerships with some countries avoiding the language of migration. *See* Migration & Home Affs., *Mobility Partnerships, Visa Facilitation and Readmission Agreements*, EUROPEAN COMM'N, https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/eastern-partnership/mobility-partnerships-visa-facilitation-and-readmission-agreements_en [https://perma.cc/S84L-WSQX].

[22] Joshua Blank provides discussion of the mobility restrictions but examines "collateral consequences" in tax law more generally, as distinct from "traditional monetary tax penalties." Blank, *supra* note 8, at 725. Blank's analysis also predates the 2015 law allowing for passport revocation and refers to the idea as only a nascent "proposal." *Id.* at 736; *see infra* notes 230–234 and accompanying text (discussing a federal passport revocation law that applies to delinquent taxpayers).

[23] *See infra* Section III.A (describing penalties for taxpayer noncompliance, disaggregated by citizenship).

[24] *See infra* Section III.A.

[25] *See infra* Section III.A. At times, "[s]tate and federal tax authorities have . . . extended [amnesty] to taxpayers who voluntarily disclose violations and pay penalties." Miriam H. Baer, *Reconceptualizing the Whistleblower's Dilemma*, 50 U.C. DAVIS L. REV. 2215, 2273 (2017). The penalties, however, can be considerable. In *United States v. Gabella*, the taxpayer paid penalties that were an order of magnitude larger than the restitution. No. 14-CR-207, 2014 WL 7338797, at *2 (E.D.N.Y. Dec. 22, 2014) (noting how "Gabella has paid a civil penalty fine of $3,140,346.35 and $239,012 in restitution").

[26] *See infra* Part III.

[27] *See generally* JOSEPH H. CARENS, IMMIGRANTS AND THE RIGHT TO STAY 17 (2010) ("Experiences accumulate: birthdays and braces, tones of voice and senses of humor, public parks and corner stores, the shape of the streets and the way the sun shines through the leaves, the smell of flowers and the sounds of local accents, the look of the stars and the taste of the air—all that gives life its purpose and texture. We sink deep roots . . . .").

of migrant-settlers and natives raised questions of who should bear tax burdens, and more broadly, who should belong. This history anticipates tax law's continued interactions with immigration law.

Accordingly, in Part II, I analyze tax law's policing of poor migrants in two modern case studies: the tax system's emergency relief during an economic crisis and joint enforcement between tax and immigration authorities. The initial pandemic relief bill sidelined mixed immigration status families, penalizing households for a single member's immigration actions, no matter how perfect their tax compliance.[28] Lawfully present family members raised constitutional challenges that remain unresolved, even as subsequent rounds of pandemic relief narrowed the exclusion.[29] Beyond pandemic relief, I document the express joining of the IRS and the Department of Homeland Security in immigration enforcement, including unconstitutional excesses.[30] Even if constitutional lawsuits surrounding the relief exclusions and workplace "raids" constrain tax law's migration at the edges, they will not dismantle its core.

I then proceed in Part III to discuss migration penalties for taxpayer noncompliance, first for noncitizens and then for citizens and taxpayers generally, before turning to the migration benefits of tax compliance. Driver's licenses have long been denied to those in state arrears, and federal law recently bridged the Department of Treasury's power to collect tax debts with the Department of State's power to issue and revoke passports. Beyond grounding high-flying tax delinquents, tax compliance may affect the less affluent, including through comprehensive immigration reform proposals that condition legalization on tax payments.[31]

In Part IV, I explain normatively why we should be concerned about tax law's migration, particularly tax law's policing of poor migrants. Excluding broad classes of migrants from emergency economic relief is costly, legally anomalous, and unnecessarily restrictive. Additionally, conscripting tax authorities to police migrants undermines taxation's focus on revenue.

I. Historic Taxation to Shape Migration and Migrants

People move in search of better lives—and more favorable tax laws.[32] American tax law has long encouraged *some* types of migration—namely Eu-

[28] *See infra* Section II.A.

[29] *See infra* Section II.A.

[30] *See infra* Section II.B.

[31] *Infra* note 269 and accompanying text.

[32] *Cf.* JOAN YOUNGMAN, A GOOD TAX 211 (2016) (describing how property tax laws that limit assessment increases may attract homeowners but also lock them in and create unintended mobility disincentives); Scott R. Baker, Stephanie Johnson & Lorenz Kueng, *Shopping for Lower Sales Tax Rates*, 13 AM. ECON. J.: MACROECONOMICS 209 (2021) (analyzing high-frequency retail scanner data

ropean—but not others, including migration by (even wealthy) Latin Americans and Chinese nationals. In modern times, tax law has receded from expressly distinguishing potential immigrants by ethnicity and national origin.[33] Although foreign businessmen, and their "peons" or "serfs" were once perceived to threaten American interests,[34] America now offers a "golden visa" (EB-5) for the wealthy in exchange for bringing capital and producing domestic jobs.[35] Even in administrations uniquely focused on immigration enforcement, investors in these golden visa programs are excepted from enforcement.[36] This Part traces the historic intersections of migration and taxation, beginning in Section A with a discussion of tax laws in the early American colonies.[37] Then, in Section B, it traces tax laws in the early territories, specifically California.[38] Finally, in Section C, it considers current tax regimes.[39]

A. Colonies of Migrant Taxation

Tax exemptions and eliminations were initially designed to encourage the migration of European settlers. In the seventeenth century, the Massachusetts Bay Colony Charter exempted settlers from English import customs, subsidies, and royal taxes for twenty-one years.[40] The Dutch West India (DWI) Company, which managed the New Netherland colony after 1645, was also concerned

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to show cross-border shopping responses to sales tax rates). *See generally* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) ("The consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods.").

[33] *But see supra* note 12 and accompanying text.

[34] STACEY L. SMITH, FREEDOM'S FRONTIER: CALIFORNIA AND THE STRUGGLE OVER UNFREE LABOR, EMANCIPATION, AND RECONSTRUCTION 88–89 (2013).

[35] Immigration Act of 1990 § 121(a), 8 U.S.C. § 1153(b)(5); Adab v. U.S. Citizenship & Immigr. Servs., No. 15-248, 2017 WL 4358686, at *1 (D.D.C. Sept. 29, 2017) (providing a historical overview of EB-5 visas).

[36] *See, e.g.*, Proclamation No. 10014, 85 Fed. Reg. 23,441, 23,442 (Apr. 22, 2020) ("The suspension and limitation on entry pursuant to section 1 of this proclamation shall not apply to . . . any alien applying for a visa to enter the United States pursuant to the EB-5 Immigrant Investor Program . . . ."); Sarah Pierce, Jessica Bolter & Andrew Selee, *U.S. Immigration Policy Under Trump: Deep Changes and Lasting Impacts*, MIGRATION POL'Y INST. 15 (July 2018), https://www.migrationpolicy.org/sites/default/files/publications/TCMTrumpSpring2018-FINAL.pdf [https://perma.cc/9XGP-RW52] (arguing that "[n]o administration in modern U.S. history has placed such a high priority on immigration policy or had an almost exclusive focus on restricting immigration flows" as the Trump Administration).

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

[38] *See infra* notes 51–78 and accompanying text.

[39] *See infra* notes 79–100 and accompanying text.

[40] ISRAEL MAUDUIT, A SHORT VIEW OF THE HISTORY OF THE COLONY OF MASSACHUSETTS BAY, WITH RESPECT TO THEIR CHARTERS AND CONSTITUTION 81–82 (London, J. Wilkie 1774).

about the effect of taxation on migration.[41] The Amsterdam Department of that company feared that a proposed tax on beaver pelts "would cause a [settler] depopulation of the country and deprive us of the means to bring emigrants over."[42] For that reason, the Department overturned the tax.[43] Such migration policies were portrayed in simple terms: "the expectation of gain is the greatest spur to induce people to go thither."[44] Beaver pelts became an unlikely source of broader migrant settler-taxation challenges.[45]

The logistics of, and disinterest in, paying also made colonial taxation challenging. Accounts formally maintained in pound sterling ignored the reality that few British coins or precious metals circulated in the British American colonies.[46] Colonial legislatures permitted people to pay taxes in animal skins, barley, and even pails of milk, though wily taxpayers often submitted low-grade or spoiled commodities, leading to reforms in what could satisfy tax obligations.[47] Even as colonies like New Netherland attempted to minimize tax burdens, settlers still "reluctantly paid taxes, and rarely in full."[48] Ultimately, tax frustrations helped forge a new solidarity among British emigrants in the Thirteen Colonies, as the disputes over the Stamp Act and other tax measures fueled the American Revolutionary War.[49] Revolting over taxation, migrants forged a country out of colonies.[50]

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[41] For a translation of the charter of the Dutch West India Company under which New Netherland was founded and administered, see VAN RENSSELAER BOWIER MANUSCRIPTS 86–115 (A.J.F. van Laer ed. & trans., 1908).

[42] Harold C. Syrett, *Private Enterprise in New Amsterdam*, 11 WM. & MARY Q. 536, 544 (1954) (quoting XIV DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 194 (E.B. O'Callaghan ed., Albany1853–1887)).

[43] *Id.* (noting how the power-sharing partner in the Council of Nineteen imposed and withdrew taxes).

[44] *Id.* (quoting LAWS AND ORDINANCES OF NEW NETHERLAND, I638–1674, at 149–50 (E.B. O'Callaghan ed., Albany1868)).

[45] JAAP JACOBS, THE COLONY OF NEW NETHERLAND: A DUTCH SETTLEMENT IN SEVENTEENTH-CENTURY AMERICA 11–12 (2009). Although seemingly obscure by modern standards, the significance of taxation in the fur trade, including but not limited to beavers, persisted well into the nineteenth century. *See generally* James L. Clayton, *The Growth and Economic Significance of the American Fur Trade, 1790–1890*, 40 MINN. HIST. 210, 218 (1966) ("All told, almost $40,000,000 was added to the United States economy by the fur seal industry during these two decades, [1870–1891] . . . .").

[46] ALVIN RABUSHKA, TAXATION IN COLONIAL AMERICA 157 (2008) (discussing the use of wampum in the fur trade); Justin duRivage & Claire Priest, *The Stamp Act and the Political Origins of American Legal and Economic Institutions*, 88 S. CAL. L. REV. 875, 898 (2015) (describing how "North Americans were perpetually short on currency, particularly the hard and sterling currency necessary to pay . . . duties").

[47] RABUSHKA, *supra* note 46, at 158.

[48] *Id.* at 206.

[49] JILL LEPORE, THESE TRUTHS: A HISTORY OF THE UNITED STATES 82–87, 90 (2018).

[50] duRivage & Priest, *supra* note 46, at 875–76 (describing how scholarly chronicling of the American Revolution focuses on "ideological and constitutional objections to 'taxation without repre-

B. Taxation and Migration Beyond the Colonies

The colonies evolved into the United States, but tax continued to shape migration and migrants within American territory. The early need for state tax revenue tempered anti-migrant sentiment and also reflected migrant distinctions based on nationality.

California's foreign miners' tax reflects the often-ambivalent reception of migrant workers: resentful of their presence and solicitous of their money.[51] In the nineteenth century, Thomas Jefferson Green, a state legislator who sponsored the bill that created the University of California, argued that foreign mining interests, described by another as "'men of ease and urbanity' from Chile, Mexico, and Peru," with their "imported '"*peons*"' or "'*serfs*,'"" threatened American interests.[52] Green introduced the foreign miners' tax to preserve mining wealth for Californians, the purportedly "rightful owners" of the mines.[53]

Green prevailed in establishing a twenty-dollar monthly capitation tax (in other words, per individual) upon all foreign miners.[54] The original tax risked bloodshed between armed U.S. citizens and a mélange of French and Latin-American miners, with the foreigners paying the taxes or facing violence.[55] Green's racist goal through the foreign miners' tax was to "exploit" noncitizens, "rather than expel them."[56] Ultimately, thousands of French and Latin Americans departed the mining town of Sonora, demonstrating how tax policy (and its violent enforcement) could undo migration.[57]

After the migrant exodus, California's fiscal exigencies once again demanded migration to support commerce and tax revenue, leading the new state

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sentation'" but arguing that much of that scholarship "has largely overlooked . . . [the] particular kinds of colonial activities" taxed).

[51] *See, e.g.*, THOMAS J. GREEN, REPORT FROM THE COMMITTEE ON FINANCE, ON AN "ACT FOR THE BETTER REGULATION OF THE MINES, AND THE GOVERNMENT OF FOREIGN MINERS" 3–4 (1850) (describing frustrations against foreign miners).

[52] SMITH, *supra* note 34, at 88–90 (referencing a quote from U.S. Consul Thomas O. Larkin).

[53] *Id.* at 90. The Californians had themselves come to control the mines through conquest. As one Chilean industrialist bluntly put it, these mines were "bought from Mexico with Yankee blood." *Id.* at 91; *see* SUCHENG CHAN, THIS BITTERSWEET SOIL: THE CHINESE IN CALIFORNIA AGRICULTURE, 1860–1910, at 63–66 (1986) (arguing that the foreign miner's tax may have been invoked to justify violence against miners).

[54] SUSAN LEE JOHNSON, ROARING CAMP: THE SOCIAL WORLD OF THE CALIFORNIA GOLD RUSH 322 (2000).

[55] Sucheng Chan, *A People of Exceptional Character: Ethnic Diversity, Nativism, and Racism in the California Gold Rush*, 79 CAL. HIST. 44, 63–64 (2000).

[56] Leonard Pitt, *The Beginnings of Nativism in California*, 30 PAC. HIST. REV. 23, 28 (1961) (quoting THOMAS J. GREEN, JOURNAL OF THE TEXIAN EXPEDITION AGAINST MIER 269 (New York, Harper & Bros. 1845)) ("Green . . . had once written that he could 'maintain a better stomach at the killing of a Mexican than at the killing' of a louse.").

[57] Chan, *supra* note 55, at 65.

to lower its incredibly high original rate.[58] The mass noncitizen departures tanked the profits of American citizen entrepreneurs, from local landowners to those selling crowbars to the miners, leading them to organize a campaign to "secure a policy of 'fair play' for foreigners."[59] After the repeal of the original 1850 twenty-dollar monthly capitation tax, the legislature introduced an 1852 tax at one-seventh of the rate—a mere three dollars monthly.[60] The specters of violence and mass emigration led to a careful recalibration of the tax rates.

Even as the need for tax revenue weighed against migrant expulsion, tax law began to distinguish among migrants, targeting Chinese people.[61] California tax law, for example, identified Chinese migrants indirectly, leveraging a nineteenth-century distinction that disallowed individuals of Chinese ancestry from obtaining citizenship.[62] Governor Leland Stanford advocated for migration restrictions rooted in his racist distaste for Chinese migrants, whom he referred to as the "dregs of [Asia's] population."[63] Yet, the Joint Select Committee of the California Legislature opposed migration restrictions and emphasized Chinese tax contributions.[64] In rejecting Governor Stanford's xenophobic position, the Committee argued that "instead of driving them out of the State, bounties might be offered them."[65] Dividing the racist Governor from the fi-

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[58] *See California Admission Day September 9, 1850*, CAL. DEP'T OF PARKS & RECREATION, https://www.parks.ca.gov/?page_id=23856 [https://perma.cc/8CAR-MGPA] (noting that "California became the 31st state on September 9, 1850"); *see also* Mark Kanazawa, *Immigration, Exclusion, and Taxation: Anti-Chinese Legislation in Gold Rush California*, 65 J. ECON. HIST. 779, 786 & fig.1 (2005) (analyzing foreign miners' tax revenue as a fraction of state GDP, and noting how it hovered around, and often exceeded, ten percent).

[59] Pitt, *supra* note 56, at 30.

[60] "In 1853 [this tax was] raised . . . to "four dollars per month" for all foreign miners. Kanazawa, *supra* note 58, at 784–85 (first citing Foreign Miners' Tax Act of 1850, ch. 97, 1850 Cal. Stat. 221, 221–23 (repealed 1851); then citing Act of Mar. 14, 1851, ch. 108, 1851 Cal. Stat. 424, 424; then citing Foreign Miners' Tax Act of 1852, ch. 37, 1852 Cal. Stat. 84, 85 (repealed 1853); and then citing Act of Mar. 30, 1853, ch. 44, 1853 Cal. Stat. 62, 63 (amended 1855)).

[61] Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. 101, 119 (2016) (describing how in the mid-nineteenth century, "the policies of several states stood in as immigration policy for a nation that had few federal immigration laws" and how "[o]n the West Coast, those regulations took on a strident anti-immigrant, anti-Chinese tone").

[62] Act of Apr. 30, 1855, ch. 174, 1855 Cal. Stat. 216, 216–217 (repealed 1856).

[63] ELMER CLARENCE SANDMEYER, THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 43–44 (1991) ("Asia, with her numberless millions, sends to our shores the dregs of her population. . . . There can be no doubt but that the presence among us of numbers of degraded and distinct people must exercise a deleterious influence upon the superior race, and to a certain extent, repel desirable immigration." (quoting Leland Stanford, Governor of Cal., Inaugural Address (Jan. 10, 1862), *in* S. JOURNAL, 13th Sess. 98–102 (Cal. 1862)).

[64] *Id.* at 44 (citing generally to the Appendix to the Journals of the State and Assembly (1862)).

[65] *Id.* (citing generally to the Appendix to the Journals of the State and Assembly (1862)).

nancially-motivated Legislature, tax law debates captured how Chinese immigration splintered California's political branches.[66]

Localities also invoked tax revenue realities to defend the presence of Chinese migrants in California. As one nineteenth-century San Francisco newspaper put it: "Were it not for the taxes paid by the Chinese, the credit of nearly every mining county would now be verging on bankruptcy."[67] An inland California newspaper similarly noted how "the taxes at present derived from [Chinese migrant workers] are a necessity to the state."[68] The necessity of tax revenue led to a defense of Chinese migrants' presence but did not eliminate defenders' racist beliefs.[69]

Chinese migrants faced other special taxes, though the California Supreme Court would later strike them down on constitutional grounds.[70] In *Lin Sing v. Washburn*, the California Supreme Court wrote that the Chinese cannot "be set apart as special subjects of taxation."[71] The *Lin Sing* court connected the taxation of Chinese migrants to banishment, as the act in question was "a measure of special and extreme hostility to the Chinese."[72] The California Supreme Court explicitly drew upon the U.S. Supreme Court's decision in the *Passenger Cases*, preventing states from taxing migrants *ad infinitum.*[73]

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[66] For a scholarly argument as to why Chinese migration to California's gold mines reflected "voluntary" labor as opposed to "coerced labor and debt peonage," see Mae M. Ngai, *Chinese Gold Miners and the "Chinese Question" in Nineteenth-Century California and Victoria*, 101 J. AM. HIST. 1082, 1083, 1097 n.30. (2015). (discussing the common trope of credit-financed migration and the specific *huiguan* system for Chinese migrants to America).

[67] Kanazawa, *supra* note 58, at 788 (quoting *Are the Chinese Injuring the State?*, DAILY ALTA CAL., Nov. 5, 1855, at 2, CAL. DIGIT. NEWSPAPER COLLECTION, CTR. FOR BIBLIOGRAPHIC STUD. & RSCH., U.C. RIVERSIDE).

[68] *Id.* at 788 (quoting an excerpt from an 1859 article appearing in the Auburn Herald) (citing DAILY ALTA CAL., Feb. 23, 1859, at 1, CAL. DIGIT. NEWSPAPER COLLECTION, CTR. FOR BIBLIOGRAPHIC STUD. & RSCH., U.C. RIVERSIDE).

[69] Those who "declared that the Chinese were necessary for the advancement of the economy . . . even invented new arguments: the Chinese were more docile than the Hispanos . . . ." Pitt, *supra* note 56, at 36.

[70] Sarah H. Cleveland describes how even after the Supreme Court struck down head taxes in the *Passenger Cases*, states continued to try to create state-level immigration restrictions. 48 U.S. (7 How.) 283 (1849); 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, 103–07 (2002). In particular, California unsuccessfully tried to "satisfy the elusive constitutional strictures of" the *Passenger Cases* through failed attempts to tax Chinese migrants. Cleveland, *supra*, at 107 & n.728; *see* People v. Downer, 7 Cal. 169, 171 (1857) (Murray, J., concurring) ("We, therefore, decide that the Act of this State, laying a tax of fifty dollars each on Chinese passengers, is invalid and void.").

[71] 20 Cal. 534, 578 (1862).

[72] *Id.* at 577.

[73] *Id.* at 576. The early states were not unique in their desire to tax migrants *ad infinitum*. *See, e.g.*, B Izzak, *MP Urges Govt to Tax Expats for the 'Air They Breathe,'* KUWAIT TIMES, Oct. 28, 2018, https://news.kuwaittimes.net/website/mp-urges-govt-to-tax-expats-for-the-air-they-breathe/

Anti-Chinese discrimination also transcended tax law.[74] The judicial voiding of California's Chinese-targeted taxes did not deter Congress from eventually passing the Chinese Exclusion Act.[75] It even took the Supreme Court to affirm that the guarantee of birthright citizenship in the Fourteenth Amendment applied to Chinese-Americans.[76] Labor unions protested the migration of Asian labor, and municipal ordinances even waged a war against Chinese restaurants.[77] Amidst these various barriers, taxation of the Chinese reflected the financial exercise of state power to disproportionately burden some foreign nationals.[78]

[https://perma.cc/8EDZ-NWAB] (quoting the sole female member of Kuwait's parliament, Safa Al-Hashem, as desiring to tax migrants "for everything, . . . [including] the air they breathe here").

[74] *See* D. Carolina Núñez, *Dark Matter in the Law*, 62 B.C. L. REV. 1555, 1559 (2021) (arguing that the Supreme Court's unanimous upholding of the Chinese Exclusion Act "lives on . . . [and] is the existing foundation of over a century of immigration plenary power decisions and an institutional expression of xenophobia that seems inimical to basic constitutional ideals today").

[75] Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, *repealed by* Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600; IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 32 (rev. & updated 10th anniversary ed. 2006) (describing the Act as "the only U.S. law ever to exclude by name a particular nationality from citizenship"); Julian Lim, *Immigration, Asylum, and Citizenship: A More Holistic Approach*, 101 CALIF. L. REV. 1013, 1028 (2013) (describing the late-nineteenth century "[l]egislated exclusion" against the Chinese). For a discussion of the repeal of the Chinese Exclusion Act and the addition of the eligibility to naturalize in 1943, see Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL'Y 1, 31 n.125 (2013).

[76] United States v. Wong Kim Ark, 169 U.S. 649, 694 (1898).

[77] By the beginning of the twentieth century, American unions also "opposed Asian immigration in general and Chinese restaurants in particular," extending the legacy further. Gabriel J. Chin & John Ormonde, *The War Against Chinese Restaurants*, 67 DUKE L.J. 681, 689, 717–19 (2018) (describing municipal ordinances); *cf.* Krystyn R. Moon, *On a Temporary Basis: Immigration, Labor Unions, and the American Entertainment Industry, 1880s–1930s*, 99 J. AM. HIST. 771, 774–75 (2012) ("By the time of the Exclusion Act's passage in 1882, opera and acrobatic troupes from China had been popular in the United States for thirty years . . . . [Nonetheless,] Chinese performers were denied admittance for the first time under the 1888 amendment."); *id.* at 783 (describing how many unions—the American Federation of Labor, the American Federation of Musicians, and Actors' Equity Association—supported these restrictions).

[78] Globally, discriminatory taxation often advanced racial segregation, consolidating local European settler identity and power against Black and Brown natives. Settler-colonists challenged direct taxation by seeking exemptions for themselves and, as a counterbalance, amplifying taxation of native subjects. *See generally* PHILIP J. HAVIK, ALEXANDER KEESE & MACIEL SANTOS, ADMINISTRATION AND TAXATION IN FORMER PORTUGUESE AFRICA: 1900–1945, at 83–84 (2015) (analyzing twentieth-century Lusophone (Portuguese-speaking) Africa). Taxation of native subjects could compel financially stressed subjects to participate in the labor market and serve settler agriculture or mining. *Id.* When confronted with the taxation, the non-migrant African subjects "reacted and fled, they resisted or simply paid." *Id.* at 82. Taxation thus served as an instrument to distill and privilege settler-colonial identity while foisting difficult choices upon long-standing African people. *See* Evelyn Nakano Glenn, *Settler Colonialism as Structure: A Framework for Comparative Studies of U.S. Race and Gender Formation*, 1 SOCIO. RACE & ETHNICITY 54, 57, 61 (2015) (noting historical instances of taxation as part of the settler-colonial structure).

The history and litigation of taxing migrants is thus contingent both on the nationality and ethnicity of those migrants as well as the identity of the "natives." Taxation manifests hostility or welcome to individuals, in terms of both their money and their identities. When motivated by a desire for tax revenue, permitting migrants to pay should not be confused with welcoming them.

C. Modern Migration and the Public Fisc

Over the nineteenth and twentieth centuries, the current American tax and migration regimes began to take shape.[79] In both state and federal tax codes, legislators balanced revenue-raising with migration concerns, echoing the debates among Californians regarding the public-finance benefits of Chinese immigration.[80]

One strain of these debates concerns who should "pay" for immigrants—towns, states, the federal government, or the immigrants themselves.[81] These longstanding debates preceded the migration cost-benefit discussion that arose in the *Passenger Cases*.[82] In more modern times, these debates often presume

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[79] The colonies became united "states" via constitutional ratification. Because ratification required nine "states," New Hampshire's ratification on June 21, 1788 arguably served "to bring the Constitution into effect" and transform the thirteen colonies into the United States. Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 1 (2001); *see also* U.S. CONST. art. VII.

[80] State income taxation took hold in industrial New England largely in response to the fiscal exigencies of the Great Depression. W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA: A HISTORY 86 (3d ed. 2016). Hawaii actually enacted the first "state tax" in 1901, prior to the federal Tax Revenue Act, but was not granted statehood until 1959. Scott Drenkard & Richard Borean, *When Did Your State Adopt Its Income Tax?*, TAX FOUND. (June 10, 2014), https://taxfoundation.org/when-did-your-state-adopt-its-income-tax/ [https://perma.cc/4KPL-AK73]. Defenders of the wealthy initially tolerated a federal income tax as a way to "help take the wind out of the sails of more radical tax measures at the state and local levels." BROWNLEE, *supra*, at 86. In modern day, state income and property tax rates vary considerably. *See generally Tax Policies*, NAT'L CONF. OF STATE LEGISLATURES https://www.ncsl.org/research/fiscal-policy/tax-policy.aspx [https://perma.cc/7KP3-LGRN] (providing resources on both personal income taxes and property taxes). Despite subnational taxation's percolation and the hopes of the wealthy, the Sixteenth Amendment ushered in the foundational federal income tax law in 1913 that funded immigration infrastructure, among other priorities. U.S. CONST. amend. XVI; Charles J. Cooper, Michael A. Carvin & Vincent J. Colatriano, *The Legal Authority of the Department of the Treasury to Promulgate a Regulation Providing for Indexation of Capital Gains*, 12 VA. TAX REV. 631, 663–65 (1993) (discussing the Income Tax Law of 1913, Pub. L. No. 63-16, 38 Stat. 114).

[81] The unsuccessful plaintiffs in *Padavan v. United States*, for example, "claim[ed] that, in 1993, the cost to New York State and its subdivisions of providing services to legal and illegal immigrants amounted to $5.6 billion." 82 F.3d 23, 26 (2d Cir. 1996). *See generally* Shayak Sarkar, *Financial Immigration Federalism*, 107 GEO. L.J. 1561 (2019) (analyzing the extent of permissible state activity in shaping immigrants' access to various financial benefits and markets).

[82] *See* Passenger Cases, 48 U.S. (7 How.) 283, 385 (1849) ("If these two States have the burdens of foreign pauperism, so have they also the benefits of foreign commerce. The sails of their ships

that immigrants will impose a net tax burden despite empirical research to the contrary.[83] Tax historians have noted how income tax revenue funded the expansion of the federal government in not only defense, education, and infrastructure, but also in immigration regulation and enforcement.[84] And yet at the end of the twentieth century, the State of New York sued, arguing that the federal power over immigration required it "to reimburse New York State for any costs . . . incurred as a consequence of the federal government's immigration policy."[85] Although unsuccessful, the lawsuit nonetheless captured a persistent state sentiment: that the federal government needed to pay the states for their acceptance of immigrants.[86]

These debates also addressed the tax treatment, and potential fiscal impact, of third parties in the migration process. For example, the federal tax code privileges immigrant-aid organizations, yet localities desire the jobs and tax revenue raised from immigrant detention centers.[87] In nineteenth-century America, voluntary associations helped immigrants acclimate to a new country, rejecting more formal assistance and evoking colonial "hostility to centralized authority and to a spirit of individualism."[88] Under the federal tax code, these organiza-

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whiten every sea, while the internal States, shut out from the ocean, have no such benefits in the same degree."); *supra* Sections I.A–B (describing earlier debates around migrant costs and benefits).

[83] *See, e.g.*, Gianmarco I.P. Ottaviano, Giovanni Peri & Greg C. Wright, *Immigration, Trade and Productivity in Services: Evidence from U.K. Firms*, 112 J. INT. ECON. 88 (2018) (finding that migrant flows in the United Kingdom led to firms increasing productivity and reducing offshoring, due to a reallocation of tasks to immigrants); Giovanni Peri & Vasil Yasenov, *The Labor Market Effects of a Refugee Wave: Synthetic Control Method Meets the Mariel Boatlift*, 54 J. HUM. RES. 267 (2019) (finding no significant changes to the wages of non-Cuban high school dropouts in Miami, based on control groups in cities with similar labor market conditions).

[84] *See, e.g.*, BROWNLEE, *supra* note 80, at 115.

[85] *Padavan*, 82 F.3d at 26. The Second Circuit's decision affirmed the district court's dismissal of the complaint for failure to state a claim. *Id.* at 30.

[86] A similar sentiment is now rearing its head, twenty-five years later, as border states pursue litigation against lax federal enforcement and try to establish their legal standing to do so. Complaint at 3, Texas v. United States, Case 21-cv-00003 (S.D. Tex. Jan. 22, 2021) ("When DHS fails to remove illegal aliens in compliance with federal law, Texas faces significant costs. A higher number of illegal aliens in Texas leads to budgetary harms, including higher education and healthcare costs."); *see also* United States v. Texas, 136 S. Ct. 2271 (2016) (affirming, by an equally divided court, Texas's cost-based standing to challenge the Deferred Action for Parents of Americans (DAPA) program).

[87] These are specific examples of federal tax treatment shaping and attracting migrants. For a comprehensive discussion of how localities and states are fashioning non-tax policies to attract migrants, often against federal priorities, see generally Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209 (2019).

[88] Anthony C. Infanti, *Spontaneous Tax Coordination: On Adopting a Comparative Approach to Reforming the U.S. International Tax Regime*, 35 VAND. J. TRANSNAT'L L. 1105, 1160 (2002) (noting how "[v]oluntary associations met the colonists' needs by providing them 'a way to confront common problems while still retaining a significant measure of individual initiative'" (quoting Lester M. Salamon, *The United States*, *in* DEFINING THE NONPROFIT SECTOR: A CROSS-NATIONAL ANALYSIS 280, 282 (1997)). *See generally* Shayak Sarkar, *Crediting Migrants*, 71 STAN. L. REV. ONLINE 281 (2019),

tions evolved into the U.S. nonprofit sector thanks to statutory tax exemptions.[89] The modern-day immigrants rights' movement includes robust nonprofits, whose federal tax status may also exempt them from state and local property and income taxes.[90] At the same time, California municipalities have openly acknowledged that immigration detention facilities produce tax revenue and jobs for local denizens.[91] Tax law reflects costs and benefits not only to the migrants, but also to third parties, whether benevolent organizations or the "immigration-industrial complex."[92]

Finally, as in the colonial and early American context, modern emigration raises concerns of a shrinking tax base.[93] State and local tax policies are not

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https://www.stanfordlawreview.org/online/crediting-migrants/ [https://perma.cc/6FHN-QDCP] (discussing the history and contemporary debates surrounding the public charge rule in immigration).

[89] STAFF OF THE JOINT COMM. ON TAX'N, 109TH CONG., HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS 46–47 (Comm. Print 2005) (tracing the evolution of tax exemption of charitable organizations from the end of the nineteenth century to the end of the twentieth century, finishing with the 1996 Taxpayer Bill of Rights' "imposed excise taxes on 'excess benefit transactions' between a charitable organization and an insider of the organization"). For a modern take on the charitable exemption, see David S. Miller, *Reforming the Taxation of Exempt Organizations and Their Patrons*, 67 TAX LAW. S-451, S-451 (2014) (noting how the federal income tax exemption has grown from charities and fraternal benefit societies to dozens of "different types of tax-exempt entities in section 501(c) alone and by some counts more than 70 in all[,]" begging re-examination of the exemptions' policy bases).

[90] ELS DE GRAAUW, MAKING IMMIGRANT RIGHTS REAL: NONPROFITS AND THE POLITICS OF INTEGRATION IN SAN FRANCISCO 47 (2016).

[91] *See, e.g.*, Farida Jhabvala Romero, *ICE Signs New For-Profit Detention Contracts Days Before California's Ban Begins*, KQED (Dec. 19, 2019), https://www.kqed.org/news/11792302/ice-poised-to-sign-new-for-profit-detention-contracts-before-californias-ban-begins [https://perma.cc/7FRR-V7VJ]. Nonetheless, the California state legislature passed a law banning for-profit prisons and detention centers. Assemb. B. 32, 2019–20 Leg., Reg. Sess. (Cal. 2019).

[92] Karen Manges Douglas & Rogelio Sáenz, *The Criminalization of Immigrants & the Immigration-Industrial Complex*, 142 DAEDALUS 199, 210, 212 (2013) (discussing the complex's major features as including "powerful interests," such as the "variety of corporations [that] have contracts with ICE to house immigrant detainees"). *See generally* César Cuauhtémoc García Hernández, *Criminalizing Migration*, 150 DAEDALUS 106, 108–09 (2021) (describing the escalation of criminal law's connection to American immigration law in the late-twentieth century); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 382–86 (2006) (same).

[93] *See, e.g.*, David R. Agrawal & Dirk Foremny, *Relocation of the Rich: Migration in Response to Top Tax Rate Changes from Spanish Reforms*, 101 REV. ECON. & STAT. 214, 231–32 (2019) (empirically finding increased mobility in response to tax rate differentials across regions, though the higher tax rates appear to offset outflows). Income tax rates are only one factor in emigration from particular areas. For a rich discussion of how economists theorize interstate migration and the usefulness of place-based tax policies to revive struggling regions, see generally Benjamin Austin, Edward Glaeser & Lawrence Summers, *Jobs for the Heartland: Place-Based Policies in 21st-Century America*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2018, at 151, 156–69, 215–17; Gilles Duranton & Robert E. Hall, *Comments and Discussion*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2018, at 233, 245.

immune to interstate migration by high-earners.[94] After the Great Recession, states, including California, raised both sales tax rates and the income tax rates of the highest income earners to fund education.[95] The tax increases reaped smaller financial gains than hoped, due partly to top-earner outmigration to low-tax states.[96] High-tax states go to great lengths to monitor outmigration through residency audits and investigations.[97] The crossing of even local and state borders can catalyze tax revenue concerns.

This outmigration phenomenon also consumes the national stage. Previous presidential candidates' wealth tax proposals, for example, have addressed the possibility of outmigration to other countries by imposing more significant "exit taxes"[98] than in existing tax law.[99] Scholars view the exit tax as permit-

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[94] David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 87 & n.24 (2017) (discussing the "sparse" legal literature on interstate migration while pushing the issue of "interstate mobility to the forefront"). Schleicher also makes a connection between international and interstate migrants by arguing that "international migra[tion] may help reduce some of the costs imposed by limits on interstate migration . . . ." *Id.* at 86 n.22. *See generally* Tiebout, *supra* note 32.

[95] California's changes were passed by voters in a 2012 ballot initiative, Proposition 30, and then again four years later in another ballot initiative, extending the increase into the next decade. *See, e.g.*, *Proposition 30: Temporary Taxes to Fund Education. Guaranteed Local Public Safety Funding. Initiative Constitutional Amendment*, LEGIS. ANALYST'S OFF. (July 18, 2012), https://lao.ca.gov/ballot/2012/30_11_2012.aspx [https://perma.cc/L28F-B6AK] (raising top-income bracket tax rates by one to three percentage points); *Track Prop 30/Prop 55*, CAL. STATE CONTROLLER'S OFF., https://trackprop55.sco.ca.gov/ [https://perma.cc/B7Y8-GRLS]; *see also* Assemb. B. 1253, 2019–20 Leg., Reg. Sess. (Cal. 2020) (proposing, in anticipation of pandemic-related revenue losses, further increases to the personal income tax rates for the highest earners).

[96] Empirical evidence now suggests that California tax increases fell short of revenue projections because of outmigration, a term I use to connote movement from one state to another. Joshua Rauh & Ryan J. Shyu, *Behavioral Responses to State Income Taxation of High Earners: Evidence from California* 31–32 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26349, 2019) (using administrative data to show concentrated top-income bracket outmigration in response to the 2012 passage of Proposition 30).

[97] *See* Scott R. Thomas, *Domicile in Multistate Personal Income Tax Residency Matters: Enter the Swamp at Your Own Peril*, 39 PACE L. REV. 875, 882–83 (2019) (describing residency audits of Florida retirees among others). In fact, one such residency investigation was so intrusive that it generated litigation that reached the Supreme Court three times. *See generally* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485 (2019); Franchise Tax Bd. v. Hyatt, 136 S. Ct. 1277 (2016); Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 494 (2003).

[98] *Issues: Tax on Extreme Wealth*, BERNIE, https://berniesanders.com/issues/tax-extreme-wealth/ [https://perma.cc/K4T4-DXNT] (noting that Bernie Sanders' proposed "wealth tax includes a 40 percent exit tax on the net value of all assets under $1 billion and 60 percent over $1 billion for all wealthy individuals seeking to expatriate to avoid the tax"); *Ultra-Millionaire Tax*, WARREN DEMOCRATS, https://elizabethwarren.com/plans/ultra-millionaire-tax [https://perma.cc/G54G-SETF] (noting that Elizabeth Warren's proposed wealth tax imposes "a 40% 'exit tax' on the net worth above $50 million of any U.S. citizen who renounces their citizenship").

[99] *See* 26 U.S.C §§ 877, 877(a)(1)–(3) (noting relevant individuals to whom the exit tax applies); Emmanuel Saez & Gabriel Zucman, *How Would a Progressive Wealth Tax Work? Evidence from the Economics Literature*, GABRIEL ZUCMAN 7 (Feb. 5, 2019), http://gabriel-zucman.eu/files/saez-

ting source countries to benefit from migrants' post-departure income.[100] In this way, tax law grapples with human mobility, focusing on people for the money they bring or take away.

II. Contemporary Instances of Tax Law's Migration

Beyond generalized intersections, tax law explicitly polices migration. This Part analyzes examples of how tax law does so, as exemplified by two contemporary case studies. Section A discusses pandemic relief. Although it is an almost universal congressional scheme that distributes extraordinary amounts of money to people in dire circumstances, it may leave millions of taxpaying migrants behind.[101] Section B then details the joint-enforcement actions of the IRS and Department of Homeland Security that target particular places and taxpayers.[102] In the process, the federal government may sharpen its enforcement teeth on the backs of vulnerable migrants, including lawful residents. Courts possess limited ability to constrain the migrant-policing aspect of tax law's migration.

A. Pandemic Relief

Consider the newest site of tax law's policing of migrants—emergency economic relief amidst what the United Nations (UN) Secretary-General called "the greatest test that we have faced" since the UN's formation: the COVID-19 pandemic.[103] The American tax system has long confronted acute emergencies, with wildfire victims exempted from ordinary filing deadlines and personal casualty loss limits in 2020.[104] Earthquake victims have received similar dis-

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zucman-wealthtaxobjections.pdf [https://perma.cc/U4U7-P9YT] (noting how the proposals "build[] on the existing exit tax"); *see also* Mason, *supra* note 7, at 172 n.12 (distinguishing the unique American citizenship tax from the oft-cited Eritrean citizenship tax).

[100] *See, e.g.*, Anu Bradford, *Sharing the Risks and Rewards of Economic Migration*, 80 U. Chi. L. Rev. 29, 39 (2013); *see also* Jagdish N. Bhagwati, *Taxing the Brain Drain*, 19 Challenge 34, 35 (1976) (proposing a "brain drain tax" (i) "to be paid by the migrant as a supplement to his normal income tax in the country of immigration," (ii) "to be levied on his income after emigration," and (iii) to be allocated "for developmental spending in the L[ess] D[eveloped] C[ountries]").

[101] *See infra* notes 103–159, and accompanying text.

[102] *See infra* notes 160–214, and accompanying text.

[103] *Coronavirus: Greatest Test Since World War Two, Says UN Chief*, BBC News (Apr. 1, 2020), https://www.bbc.com/news/world-52114829 [https://perma.cc/3FUV-DF9P].

[104] Michele Landis Dauber, The Sympathetic State: Disaster Relief and the Origins of the American Welfare State 17–18 (2013) (describing how "early tax remissions quickly gave way to direct federal relief"); *Tax Help for California Wildfire Victims*, Internal Revenue Serv., https://www.irs.gov/newsroom/tax-help-for-california-wildfire-victims (Mar. 17, 2021) [https://perma.cc/YE8R-TKXR].

pensations.[105] Beyond extensions and expanded deductions, Congress employed the tax system to distribute emergency relief for the COVID-19 pandemic, starting with the CARES Act.[106]

One of the CARES Act's most notable provisions is its stimulus payments, structured as refundable "credit against the tax imposed."[107] The relief leveraged the tax system to make cash payments totaling hundreds of billions of dollars to American families in distinct rounds.[108] Yet the relief initially excluded many immigrants, from citizen children to undocumented adults.[109]

1. Round One of Pandemic Relief and Constitutional Challenges to Immigrant Restrictions

In the first round of relief, Congress excluded many immigrant adults and children through two tax identification number requirements.[110] Although federal tax law requires people without Social Security Numbers to file taxes using an ITIN,[111] the CARES Act prioritized Social Security Numbers.[112] First, because of Social Security Number requirements for filing adults, undocumented adults

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[105] *See, e.g.*, *IRS Announces Tax Relief for Utah Earthquake Victims*, INTERNAL REVENUE SERV. (July 24, 2020), https://www.irs.gov/newsroom/irs-announces-tax-relief-for-utah-earthquake-victims [https://perma.cc/37XC-B6LQ]. *See generally* Treas. Reg. § 301.7508A-1 (as amended in 2021) (providing rules for "[p]ostponement of certain tax-related deadlines by reasons of a federally declared disaster").

[106] CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020). Section 1102 of the Act, for example, establishes the Paycheck Protection Program through the Small Business Administration.

[107] *Id.* § 2201(a) (codified at 26 U.S.C. § 6428(a)).

[108] Letter from Congr. Budget Off. to Hon. Mike Enzi, Chairman, Comm. on the Budget, U.S. Senate 12–13 (Apr. 27, 2020), https://www.cbo.gov/system/files/2020-04/hr748.pdf [https://perma.cc/8LH3-VU4E]; Chuck Marr, Kris Cox, Kathleen Bryant, Stacy Dean, Roxy Caines & Arloc Sherman, *Aggressive State Outreach Can Help Reach the 12 Million Non-Filers Eligible for Stimulus Payments*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/research/federal-tax/aggressive-state-outreach-can-help-reach-the-12-million-non-filers-eligible-for (Oct. 14, 2020) [https://perma.cc/RME9-E734] ("To deliver these payments to the nation's roughly 300 million eligible people, policymakers chose the IRS, which has contact with a large share of the population.").

[109] *See infra* notes 113–115 and accompanying text. Although the definition of "undocumented" varies in relation to statutes and government programs, I use the term here to indicate a lack of a Social Security Number that some noncitizens possess. *See generally* Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1126–46 (2015) (discussing the types of, and synonyms for, "nonstatus" and "no status" in American immigration law).

[110] Julia Gelatt, Randy Capps & Michael Fix, *Nearly 3 Million U.S. Citizens and Legal Immigrants Initially Excluded Under the CARES Act Are Covered Under the December 2020 COVID-19 Stimulus*, MIGRATION POL'Y INST., (Jan. 2021), https://www.migrationpolicy.org/news/cares-act-excluded-citizens-immigrants-now-covered [https://perma.cc/SJ2P-M6CL].

[111] *Individual Taxpayer Identification Number*, INTERNAL REVENUE SERV., https://www.irs.gov/individuals/individual-taxpayer-identification-number (Aug. 6, 2021) [https://perma.cc/3RWC-MJNY].

[112] *See generally* Lipman, *supra* note 9 at 20–26 (discussing the taxation of undocumented immigrants); Gelatt et al., *supra* note 110.

were ineligible for the $1,200 payments ($2,400 for couples).[113] Military service was the rare credential rescuing a couple's eligibility from immigration restrictions.[114] Second, undocumented children were ineligible for the $500 payments otherwise intended for minors.[115]

The first adult-focused restriction collaterally excluded even documented children. For families, the bill's narrow definition of "valid identification number" meant that citizen children faced exclusion based on undocumented parents, even if those parents were tax-compliant.[116] In one Congressman's words, this denial of relief to citizens based on their household members "punishe[d] mixed-status households and denie[d] some American citizens benefits they deserve[d]."[117] As millions of Americans without Social Security Numbers live in these mixed-status families, the initial exclusion had a broad impact.[118]

Constitutional challenges arose against the migrant-exclusionary payments. In *R.V. v. Mnuchin*, citizen plaintiffs[119] alleged that the CARES Act tax benefits violated equal protection, arguing that by treating those with undocumented parents worse than similarly-situated citizen children whose parents possess Social Security Numbers, it penalized children for their parents' immigration status.[120] The plaintiffs asserted that rendering such children "second-class" through the denial of payments serves no important government interest, undermines the goal of providing immediate cash assistance to Americans and the economy, and is not substantially related to any potential government inter-

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[113] CARES Act § 2201(a), 26 U.S.C. § 6428(a)(1).

[114] *Id*. § 6428(g)(3). An early version of the Senate bill actually excluded all joint-filers where a single spouse lacked a Social Security Number, though the final legislation made an exception for couples where a spouse was a member of the Armed Forces.

[115] *Id.* § 6428(a)(2).

[116] *Id.* § 6428(a), (g)(1).

[117] 166 CONG. REC. H1841 (daily ed. Mar. 27, 2020) (statement of Rep. Cox); *see also* Ariel Jurow Kleiman, *Impoverishment by Taxation*, 170 U. PENN. L. REV. (forthcoming 2021) (manuscript at 41) (San Diego Legal Studies Paper No. 20-480), http://ssrn.com/abstract=3775246 [https://perma.cc/FE7N-E8PP] (arguing that the group most vulnerable to impoverishment by taxation "is working families with children who cannot claim refundable tax credits," namely "[f]amilies in which one parent lacks a work-eligible social security number," as "[t]hese families will almost surely face positive federal income taxes in addition to regressive state and local taxes").

[118] Paul Taylor, Mark Hugo Lopez, Jeffrey S. Passel & Seth Motel, *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*, PEW RSCH. CTR. (Dec. 1, 2011), https://www.pewresearch.org/hispanic/2011/12/01/unauthorized-immigrants-length-of-residency-patterns-of-parenthood/ [https://perma.cc/UY6E-NRX4].

[119] Although the plaintiffs were in fact all citizens, and sought to certify a class of citizen children, noncitizen children with Social Security Numbers were still eligible for the payments, though they would be relatively few in number. R.V. v. Mnuchin, No. 20-cv-1148, 2020 WL 3402300, at *1 (D. Md. June 19, 2020).

[120] Class Action Complaint ¶ 72, R.V. *ex rel.* N.R. v. Mnuchin, No. 20-cv-1148, 2020 WL 2126964 (D. Md. May 5, 2020).

est in denying assistance to their relatives.[121] The court's ruling on the motion to dismiss was perfunctory. It established that the plaintiffs adequately pled the possibility that the CARES Act discriminates against the citizen children plaintiffs, but reserved the substantive analysis, including whether heightened scrutiny or rational basis applied.[122]

Spouses of excluded adults also sued, with technical tax statuses underlying the constitutional claims. In *Amador v. Mnuchin*, adult plaintiffs argued that the denial of payments based on their spouses' undocumented status violated their marriage-based due process and equal protection rights, as well as their First Amendment speech and associational rights.[123] In adjudicating the government's motion to dismiss, the court explained that although it was true that the jointly-filing spouses may file separately to obtain at least the $1,200 payment (one half of the $2,400 payment to couples), "a federal joint tax return is a fixture in the 'constellation of benefits' . . . 'linked to marriage.'"[124] In other words, the ability for married couples to file separately does not eliminate the key constitutional concern about the rights to marriage, and the strict scrutiny that attaches. Financially penalizing spouses who choose to marry the undocumented "demeans the couple, whose moral and sexual choices the Constitution protects . . . ."[125]

Amador directly connects the denial of the married person's right to file jointly with the IRS to the married person's right to the IRS's payment. The denial of the payment diminishes more than the joint-filer's bank account. Echoing constitutional litigation around same-sex marriage that similarly focused on the tax code, the *Amador* court found support for the plaintiffs' intimate association claims.[126] The inability to file jointly diminishes the marital

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[121] *Id.* ¶¶ 72–74.

[122] *R.V.*, 2020 WL 3402300, at *8.

[123] Class Action Complaint for Declaratory and Injunctive Relief ¶¶ 62–75, Amador v. Mnuchin, No. 20-cv-01102, 2020 WL 2063750 (D. Md. Apr. 28, 2020).

[124] Amador v. Mnuchin, 476 F. Supp. 3d 125, 152 (D. Md. 2020) (quoting Obergefell v. Hodges, 576 U.S. 644, 670 (2015)).

[125] *Id.* (quoting United States v. Windsor, 570 U.S. 744, 772 (2013)).

[126] *Id.* at 157 ("[F]or the same reasons that plaintiffs have stated a Fifth Amendment claim, they have also alleged a viable violation of their First Amendment right to intimate association."). *See generally* Shayak Sarkar, *Intimate Employment*, 39 HARV. J.L. & GENDER 429, 444–51 (2016) (tracing the origins and evolution of "intimate association"). Notably, the court expressed skepticism of, but avoided ruling on, the First Amendment freedom of speech claim, stating that it "need not decide whether a truthful tax return falls within the First Amendment's ambit" in light of the other claims. *Amador*, 476 F. Supp. 3d at 157. The court was more sanguine, however, about the plaintiffs' prospects on rational-basis review, characterizing the joint-filing limitation as an "unnecessary prophylactic" in Congress's prioritization of the work-authorized. *Id.* at 153. "Unnecessary" is reconcilable with surviving rational basis review. Maria Ponomarenko, *Administrative Rationality Review*, 104 VA. L. REV. 1399, 1423 (2018) (arguing that "the constitutional rationality of legislative choices often boil[s]

relationship that the Constitution and the State have long "sought to dignify."[127] *Amador*'s linkage of tax-filing status to intimate association lies in tension with scholarly concerns about promoting such familial values through the joint return.[128] Nonetheless, by implicating the fundamental right to marry in joint-filing, plaintiffs challenged a form of tax-based immigration enforcement.

Although these challenges to migrant restrictions initially prevailed, they face substantial doctrinal headwinds. Constitutional theories of association and family integrity, often raised in immigration challenges, face a mixed reception.[129] In *Kerry v. Din*, the Supreme Court pithily responded to a plaintiff suing for the denial of her Afghan husband's immigrant visa as infringing on her right to live stateside with her spouse.[130] The Court retorted that "[t]here is no such constitutional right."[131] Even for the Trump administration's family separations at the border, an infamous affront to familial integrity, one scholar drew on *Din*, explaining that "longstanding doctrines of deference continue to permit family separation even for the most favored status of migrant, namely the spouses of U.S. citizens."[132] Others studying family separation look beyond the American Constitution to highlight international law's protections, which nonetheless present hurdles to securing a remedy.[133]

As such, these constitutional challenges' ongoing viability should not be mistaken for ultimate success. The power of litigation's early-stage survival can also be measured by subsequent legislative responses.[134] That response

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down to claims that the measures are unnecessary" and that "[f]or the most part, these choices are for legislatures, not courts, to make").

[127] *Amador*, 476 F. Supp. 3d at 152 (quoting *Windsor*, 570 U.S. at 772).

[128] *See, e.g.*, Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 64 (1993) ("Many people believe that the joint return is necessary because it promotes family values. To the extent that the return does so, it does so poorly.").

[129] *Compare* Aguilar v. U.S. Immigr. & Customs Enf't, 510 F.3d 1, 22 (1st Cir. 2007) ("So long as the detention is lawful, that so-called deprivation of the right to family integrity does not violate the Constitution."), *with* Ms. L. v. U.S. Immigr. & Customs Enf't, 302 F. Supp. 3d 1149, 1162, 1168 (S.D. Cal. 2018) (recognizing substantive due process to familial integrity against "the Government's separation of migrant parents and their minor children when both are held in immigration detention and when there has been no showing the parent is unfit or poses a danger to the child").

[130] 576 U.S. 86, 88 (2015).

[131] *Id.*

[132] Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2340 (2019).

[133] Carrie F. Cordero, Heidi Li Feldman, & Chimène I. Keitner, *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 430, 476–77, 502–03 (2020).

[134] *See, e.g.*, Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 WIS. L. REV. 441, 450 (describing "progressive legal campaigns a[s] backward-looking" and noting "the limits of litigation and courts in producing sustained change over time").

marginally expanded eligibility but still left immigrant rights advocates dissatisfied.[135]

2. Subsequent Rounds of Pandemic Relief and the Future

Neither *Amador* nor *R.V.* reached a final resolution before Congress approved subsequent rounds of pandemic relief that only slightly narrowed the immigrant exclusion.[136] Advocacy groups' non-litigation efforts may have helped broaden relief.[137] The second-round payments included $600 for eligible individuals ($1,200 for couples) and for each eligible dependent.[138] For joint-filers where one spouse possessed a Social Security Number but the other did not, the eligible spouse would still receive $600, ending the financial punishment to the eligible spouse while continuing to differentiate mixed-status couples.[139] Additionally, the second round maintained the requirement for a qualifying child's parent to have a Social Security Number to be eligible for the $600 dependent payment.[140]

The American Rescue Plan's third round of payments was the most inclusive, allowing dependent credits for documented children even where no filing parent had a valid Social Security Number.[141] The third round was also the

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[135] *See, e.g.*, Press Release, Nat'l Immigr. L. Ctr., National Immigration. Law Center. (NILC) Statement Regarding $900 Billion COVID Relief Package (Dec. 21, 2020), https://www.nilc.org/2020/12/21/nilc-statement-regarding-900-billion-covid-relief-package/ [https://perma.cc/6XWM-MNWJ] (bemoaning how "Congress unconscionably continues to exclude" undocumented immigrants from relief) (quoting Marielena Hincapié, Executive Director of the National Immigration Law Center).

[136] Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020).

[137] *See, e.g.*, Letter from Hum. Rts. Watch to Hon. Nancy Pelosi, Speaker, U.S. House of Reps, and Hon. Charles Schumer, Minority Leader, U.S. Senate (Mar. 20, 2020), https://www.hrw.org/news/2020/03/20/rights-groups-urge-inclusion-immigrant-families-coronavirus-relief-bill [https://perma.cc/UZ5X-83DR] (addressing the tax rebate proposal as well as healthcare access for undocumented immigrants, particularly free COVID-19 testing); Rafael Bernal, *Hispanic Advocacy Organization Launches Campaign to Include Immigrants in Pandemic Relief*, THE HILL (Apr. 14, 2020), https://thehill.com/latino/492709-hispanic-advocacy-organization-launches-campaign-to-include-immigrants-in-pandemic?rl=1 [https://perma.cc/9M6T-XJK8] (describing the UnidosUS Action Fund's campaign as specifically targeting congressional leaders); *#ImmigrantsAreEssential*, UNIDOS US ACTION FUND, https://www.unidosusaf.org/immigrantsareessential [https://perma.cc/5GSQ-U7FM] (capturing a multimedia strategy to combat Congress's CARES Act exclusions); *see also* Press Release, Nat'l Immigr. L. Ctr., *supra* note 135 (praising "the inclusion of 3.5 million people in mixed-status families in the new payments") (quoting Marielena Hincapié, Executive Director of the National Immigration Law Center).

[138] 26 U.S.C. § 6428A(a). The new law also allows for retroactive payments for those originally excluded but newly included. *Id.*

[139] *Id.* § 6428A(g)(2)(A).

[140] *Id.* § 6428A(g)(3)–(4).

[141] *Id.* § 6428B.

most generous, providing $1,400 for each eligible individual and dependent.[142] Yet, many undocumented immigrants, including those without eligible documented children, remained without relief.[143] The constitutional litigation and advocacy groups may have nudged Congress towards inclusion, but the subsequent rounds of relief still embrace tax law's migration, specifically using tax law to distinguish and disadvantage migrants in emergency circumstances.

This persistent exclusion does not necessarily comport with the public's targeted economic sympathy. Even as some Americans approve of severe border restrictions, they also favor immigrant-inclusive economic relief.[144] In a poll conducted by National Public Radio, more of those polled supported extending pandemic payments to "immigrants who pay U.S. taxes" than opposed.[145] The question did not define "U.S. taxes" but presumably included personal income tax, as the *Amador* plaintiffs emphasized, not merely sales taxes.[146] At the same time, the vast majority of those polled supported not only temporarily closing the U.S. border but also banning the entry of asylum seekers, foreign workers, and relatives of legal immigrants.[147] This support for targeted emergency relief comports with a preference for at least minimum economic and social support for migrants, whether "providing safe and sanitary conditions for asylum seekers"[148] or "medical care to undocumented immigrants who are ill

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[142] *Id.* § 6428B(b).

[143] *See generally* MOLLY F. SHERLOCK, JANE G. GRAVELLE & MARGOT L. CRANDALL-HOLLICK, CONG. RSCH. SERV., R46680, THE AMERICAN RESCUE PLAN ACT OF 2021 (ARPA; H.R. 1319): TITLE IX, SUBTITLE G—TAX PROVISIONS RELATED TO PROMOTING ECONOMIC SECURITY 4–6 (2021) (summarizing how "[e]ligible individuals and dependents generally need to have a Social Security Number (SSN) to receive the payment").

[144] *Public Poll Findings and Methodology: Most Americans Support Single, National Strategy to Combat COVID-19*, IPSOS 1, 11–12 (Aug. 4, 2020), https://www.ipsos.com/sites/default/files/ct/news/documents/2020-08/topline_npr_covid_and_immigration_080420.pdf [https://perma.cc/DJ3U-MRMJ] (finding 49% in support vs. 43% opposed).

[145] *Id.* at 12. The NPR Poll is somewhat unique insofar as it (i) specifies undocumented *taxpayers* and (ii) compares various immigration-related and other strategies to address COVID-19. *Id.* at 11–12. In contrast, the similarly timed results from a Pew Research Center poll found more limited support for "economic help to undocumented immigrants who have lost their job due to the outbreak" (regardless of taxpaying status), but significantly more support for "medical care to undocumented immigrants who are ill with the coronavirus." Jens Manuel Krogstad & Mark Hugo Lopez, *Americans Favor Medical Care but Not Economic Aid for Undocumented Immigrants Affected by COVID-19*, PEW RSCH. CTR. (May 20, 2020), https://www.pewresearch.org/fact-tank/2020/05/20/americans-favor-medical-care-but-not-economic-aid-for-undocumented-immigrants-affected-by-covid-19/ [https://perma.cc/QP73-AK9U].

[146] IPSOS, *supra* note 144, at 11–12.

[147] *Id.* at 10.

[148] *Most Americans Are Critical of Government's Handling of Situation at U.S.-Mexico Border*, PEW RSCH. CTR. (May 3, 2021), https://www.pewresearch.org/politics/2021/05/03/most-americans-are-critical-of-governments-handling-of-situation-at-u-s-mexico-border/ [https://perma.cc/J6TC-TWQF]. Nonetheless, support for such conditions coincides with broad support for reducing the number of

with the coronavirus."[149] Despite Congress's stinginess, Americans' attitudes toward the undocumented appears financially solicitous when dire circumstances arise, even while towing a stricter line on border controls. Tax law reflects an unpopular way to exclude poor and vulnerable immigrants.[150]

Not all localities and states have followed the federal model of tying financial relief to immigration status. Seeking to cover workers excluded from federal aid, New York allocated billions of dollars to workers for COVID-19-related income losses without concern for immigration status.[151] California also announced an effort to provide cash relief to undocumented immigrants ineligible for federal relief, utilizing a mix of taxpayer funds and private philanthropy.[152] Counties and municipalities followed with their own gap-filling programs, building upon responses to past natural disasters.[153] Unlike the federal relief, however, some of these programs did not create an entitlement, be-

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people seeking asylum and for "mak[ing] it harder for asylum seekers to be granted legal status in the U.S." *Id.*

[149] Krogstad & Lopez, *supra* note 145.

[150] *See id.*; *Immigration*, GALLUP, https://news.gallup.com/poll/1660/immigration.aspx [https://perma.cc/A756-VBE5] (documenting how, since 2006, a majority of survey respondents have said that it is either "extremely important" or "very important" that "the government takes steps this year to . . . [c]ontrol[] U.S. borders to halt the flow of illegal immigrants into the U.S."). Other countries' tax systems and emergency relief also distinguish migrants. In one Korean province, economic relief initially only extended to citizens, but within a month, the province extended payments to permanent residents. Kim Bo-gyung, *Marriage Immigrants, Permanent Residents in Gyeonggi to Receive Disaster Relief Aid*, KOREA HERALD (Apr. 20, 2020), http://www.koreaherald.com/view.php?ud=20200420000604 [https://perma.cc/KT97-HGJU]. The province's governor approved this shift towards an "inclusive approach" while nonetheless remarking that "disbursing aid to . . . illegal immigrants . . . would be going too far." *Id.*; *see also Update: COVID-19 Pandemic Unemployment Payment for Undocumented People*, MIGRANT RTS. CTR. IR., (Nov. 4, 2020), https://www.mrci.ie/2020/11/04/update-covid-19-pandemic-unemployment-payment-for-undocumented-people/ [https://perma.cc/4Q4N-3HF7] (discussing taxpaying requirements for Ireland's Pandemic Unemployment Payment and undocumented eligibility for Exceptional Needs and Urgent Needs Payment).

[151] *Excluded Workers Fund*, N.Y. STATE DEP'T OF LAB., https://dol.ny.gov/excluded-workers-fund [https://perma.cc/2SSJ-4DSZ].

[152] *Coronavirus (COVID-19) Disaster Relief Assistance for Immigrants*, CAL. DEP'T OF SOC. SERVS., https://www.cdss.ca.gov/inforesources/immigration/covid-19-drai [https://perma.cc/4PGD-LG5Z] [hereinafter *California COVID-19 Relief*]; *see also* Roberto Suro & Hannah Findling, *State and Local Aid for Immigrants During the COVID-19 Pandemic: Innovating Inclusion*, CTR. FOR MIGRATION STUD. (July 8, 2020), https://cmsny.org/publications/state-local-aid-immigrants-covid-19-pandemic-innovating-inclusion/ [https://perma.cc/6XSG-MZ6V] (cataloguing "[s]tate and local jurisdictions extending Coronavirus economic relief measures to unauthorized migrants").

[153] *See, e.g.*, Susan Augusty, *COVID-19: Emergency Assistance Relief Payment (EARP)*, INFO MONTGOMERY (Apr. 28, 2020), https://www.infomontgomery.org/covid-19-emergency-assistance-relief-payment-earp/ [https://perma.cc/83XV-WDB4] (not listing a Social Security Number as a requisite for eligibility); *About*, UNDOCUFUNDSF, https://www.undocufund-sf.org/en/about-us/ [https://perma.cc/4VCS-RPTP].

cause funds were limited and could only reach a fraction of otherwise eligible immigrants.[154]

Despite their limited scope, the more inclusive subnational programs also spurred legal challenges, distinct from the lawsuits against the federal restrictions.[155] Litigation against allegedly overly-inclusive local and state programs implicates "financial immigration federalism."[156] The boundary between local authority over economic aid to migrants and federal enforcement priorities remains contested.[157] States are nonetheless forging ahead, including by expanding certain tax credits to undocumented immigrants, which the federal government has denied for decades.[158]

In sum, relief restrictions reflect the tax system's policing of our borders, one facet of tax law's migration. The initial round of federal relief punished not only ineligible, undocumented individuals but also otherwise eligible members of mixed-status households. The subsequent rounds expanded relief, including for citizen children with no documented guardians. Yet, the broader exclusion of undocumented adults and children remains. In a once-in-a-century pandemic,[159] tax law remains a tool to exclude migrants, which constitutional litigation alone has not been able to override.

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[154] *Compare California COVID-19 Relief*, *supra* note 152 (noting how "state funding is expected to reach about 150,000 undocumented adults"), *with* Joseph Hayes & Laura Hill, *Undocumented Immigrants in California*, PUB. POL'Y INST. OF CAL. (Mar. 2017), https://www.ppic.org/publication/undocumented-immigrants-in-california/ [https://perma.cc/PCX5-VXLX] (estimating millions of undocumented adults in California).

[155] *See, e.g.*, Emergency Petition for Writ of Mandate or Other Extraordinary or Immediate Relief, Benitez v. Newsom, 2020 Cal. LEXIS 3141 (Cal. May 6, 2020) (No. S261804), 2020 WL 2094222. The petition argued that the Governor's program violated federal law in providing a public benefit to those lacking lawful status without the state enactment of an affirmative law as required by 8 U.S.C. § 1621. *Id.* at 1. The petition also argued that the governor's program violated state law by making a "gift to a nonprofit" that "cannot be deemed for a valid public purpose . . . ." *Id.* at 2. The petition was denied. *Benitez*, 2020 Cal. LEXIS 3141, at *1.

[156] *See generally* Sarkar, *supra* note 81, at 1569 (describing "financial arenas in which . . . state [and local] immigration-status restrictions are either less or more restrictive than parallel federal restrictions").

[157] *Id.* at 1598–1602 (acknowledging federal tax credits' immigration-based restrictions and discussing how they may preempt state tax credits, an analysis straddling doctrines of tax preemption and immigration preemption).

[158] *See infra* notes 265–266 and accompanying text.

[159] Donald G. McNeil Jr., *Fauci on What Working for Trump Was Really Like*, N.Y. TIMES (Feb. 13, 2021), https://www.nytimes.com/2021/01/24/health/fauci-trump-covid.html [https://perma.cc/7RXY-TRUN] (statement of Dr. Anthony S. Fauci, Director of the National Institute of Allergy and Infectious Diseases) ("We are living through a historic pandemic, the likes of which we haven't seen in 102 years.").

B. Joint Immigration-Tax Enforcement

Beyond tax laws policing poor migrants through financial deprivation, tax and immigration enforcement officers may literally collaborate. Although guardrails on information sharing and constitutional constraints impede joint immigration-tax enforcement, joint enforcement's viability looks troublingly bright.[160] Such joint enforcement continues a bipartisan tradition of workplace enforcement.[161] New examples of joint enforcement decentralize ICE's role in immigration enforcement by illuminating tax authorities' role.

Courts have scrutinized inter-agency information sharing for immigration enforcement. In 2007, the Department of Homeland Security (DHS) promulgated a rule pertaining to "no-match" letters that are sent to employers when the name and Social Security Number on a W-2 do not match the Social Security Administration (SSA) database.[162] A "no-match" would occur if, for example, an undocumented immigrant submitted another individual's tax identification number to their employer.[163] Prior to 2006, the implication of a no-match for immigration status was insignificant, but the 2007 rule attempted to tie the "no-match letter" to an employer's liability for knowingly employing an unauthorized worker.[164] A California district court enjoined the rule, expressed serious concerns as to whether it was arbitrary and capricious, and sided with the union plaintiffs on the balance of hardships, particularly the many lawful workers who would not be able to resolve a no-match by the new rule's deadline.[165] Regulatory efforts to leverage tax identification documents for immigration enforcement *en masse* have thus been policed by the courts, though new efforts have emerged.[166]

Taxpayer privacy reflects one specific limitation on inter-agency information sharing. The IRS faces specific federal statutory privacy mandates to protect tax return information.[167] The body of information subject to privacy

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[160] *See infra* notes 202–214 and accompanying text.

[161] *See, e.g.*, Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303, 307 (2010) (arguing that "worksite enforcement . . . has become a regular part of immigration enforcement activity").

[162] Am. Fed'n of Lab. v. Chertoff, 552 F. Supp. 2d 999, 1001–02 (N.D. Cal. 2007) (describing and enjoining this rule).

[163] *Id.* at 1002.

[164] *Id.* at 1010; *see* 8 U.S.C. § 1324a(a)(2).

[165] *Am. Fed'n of Lab.*, 552 F. Supp. 2d at 1006–07.

[166] The Trump administration tried to revive the practice. *See, e.g.*, Maria Ines Zamudio, *Chicago Immigrants Losing Jobs Due to No-Match Letters*, NPR (Aug. 5, 2019), https://www.npr.org/local/309/2019/08/05/747621735/chicago-immigrants-losing-jobs-due-to-no-match-letters [https://perma.cc/6SB5-UZVJ].

[167] 26 U.S.C. § 6103(b)(2)(A) (defining "return information" to include "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets,

protection is construed broadly.[168] In one significant lawsuit with immigration implications, a foundation sued the SSA after it denied the foundation's Freedom of Information Request for a list of the one hundred employers that generated the most "no-matches."[169] The D.C. Circuit ultimately sided with the SSA, reasoning that, insofar as federal law protects the confidentiality of tax return data, "[a]n employer's identity is 'data.'"[170] By defining the taxpayer data subject to privacy protection broadly, that case places guardrails on the intersection of tax and immigration enforcement.[171]

Even when the IRS brokers information-sharing agreements, those agreements are narrowly construed.[172] An agency's information-sharing agreement with the IRS cannot be extended to a third agency such as the DHS. For example, if the SSA properly received information from the IRS, federal law precludes it from further sharing the information with DHS.[173]

Despite legal constraints on bureaucratic information sharing, joint enforcement persists. One of the largest immigration workplace raids in the past decade, referred to as "the opening bell" of the Trump administration, gave rise

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liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments"); *see also* MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA 45 (2020) (arguing that the IRS "has historically taken privacy very seriously for immigrants and other tax filers").

[168] *See* George K. Yin, *Reforming (and Saving) the IRS by Respecting the Public's Right to Know*, 100 VA. L. REV. 1115, 1124–33 (2014) (chronicling the history of taxpayer return privacy protections, from "Civil War income tax laws [that] generally gave the public access to tax return information" to the robust protections that emerged at the end of the twentieth century after Nixon administration abuses). Yin argues for balancing these protections against meaningful transparency of the government's tax decisions, which requires transparency of the affected taxpayers' return information. *Id.* at 1118.

[169] Jud. Watch, Inc. v. Soc. Sec. Admin., 701 F.3d 379, 380 (D.C. Cir. 2012) ("The Social Security Administration processes Forms W-2 for the IRS. On occasion, the employee's name and Social Security number as listed on a Form W-2 do not match the SSA's database. When that happens to a sufficient number of employees, the SSA sends the employer a 'no-match' letter.").

[170] *Id.*

[171] The case appears absent from scholarly commentary, as Westlaw produced no law review articles that cite to the case.

[172] *IRS Information Sharing Programs*, INTERNAL REVENUE SERV., https://www.irs.gov/government-entities/governmental-liaisons/irs-information-sharing-programs (Nov. 4, 2020) [https://perma.cc/WS5N-AEM3] (noting federal, state, and local information-sharing programs).

[173] *See* 26 U.S.C. § 6103(k) (permitting "[d]isclosure of certain returns and return information for tax administration purposes"); *id.* § 6103(l) (permitting "[d]isclosure of returns and return information for purposes *other than* tax administration" (emphasis added)); *see also* Verity Winship, *Enforcement Networks*, 37 YALE J. ON REGUL. 274, 290 (2020) (citing 26 U.S.C. § 6103 and discussing how the statute might preclude SEC/IRS information sharing). Federal law notwithstanding, the ACLU has warned that such information sharing may have occurred during the Trump administration. *See, e.g.*, Letter from Jennifer Chang Newell, ACLU Immigrs.' Rts. Project, to Monica Chyn, Pub. FOIA Liaison, Soc. Sec. Admin Off. of Priv. & Disclosure, (Apr. 20, 2018) ACLU, https://www.aclu.org/letter/foia-request-ssa [https://perma.cc/9BET-2LNL] [hereinafter ACLU Letter] (requesting records concerning information sharing with the DHS).

to the ongoing litigation in *Zelaya v. Hammer*.[174] A joint IRS-DHS enforcement action targeted a meatpacking plant, an industry brimming with immigrant workers.[175] The IRS had procured a search warrant for tax crimes committed by the plant owner, who had openly described withdrawing hundreds of thousands of dollars in cash to pay "undocumented Latino" workers.[176] Yet, in effectuating the IRS warrant, the tax authorities brought along officers from ICE as well as Customs and Border Protection (CBP).[177] The "opening bell" undergirding *Zelaya* thus reflected ICE's own words from a Democratic administration decades earlier: "[a]rresting and removing illegal workers must be part of a strategy to deter unlawful employment" and immigration.[178]

As dozens of armed officers stormed the plant, purportedly to enforce the IRS's warrant, they allegedly engaged in disturbing constitutional violations.[179] The complaint described officers indiscriminately arresting about one hundred Latinx workers, with some workers' earnest efforts to provide their work authorization documents allegedly rebuffed with handcuffs and racial slurs.[180] White workers, by contrast, were left alone but witnessed the events.[181] Officers allegedly went as far as striking Latinx workers in the face with their fists and yelling "selfie" while taking a picture of a van filled with detained and frightened immigrant workers.[182]

Federal authorities punished the owner under tax law and the workers under immigration law. Beyond pleading guilty to tax evasion and knowing employment of undocumented immigrants, the owner entered into a consent decree with the federal Department of Labor, agreeing to pay damages to dozens

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[174] *See* 516 F. Supp. 3d 778 (E.D. Tenn. 2021); Zoe Carpenter, *When ICE Comes to Town*, ROLLING STONE (Dec. 17, 2018), https://www.rollingstone.com/politics/politics-features/ice-raid-tennessee-769293/ [https://perma.cc/9TWQ-8C5N].

[175] *See* Angela Stuesse & Nathan T. Dollar, *Who Are America's Meat and Poultry Workers?*, ECON. POL'Y INST. (Sept. 24, 2020), https://www.epi.org/blog/meat-and-poultry-worker-demographics/ [https://perma.cc/ZLL3-RMUT] (providing statistics about the meat and poultry workforce and noting that immigrants represent a significant proportion of workers).

[176] Robert Moore, *Southeastern Provision Owner Sentenced to 18 Months*, CITIZEN TRIB. (Aug. 1, 2019), https://www.citizentribune.com/news/local/southeastern-provision-owner-sentenced-to-months/article_b35cf000-b3c4-11e9-8be5-f72523389472.html [https://perma.cc/33QV-XBM3].

[177] Third Amended Complaint ¶ 1, *Zelaya*, 516 F. Supp. 3d 778 (No. 19-cv-00062), 2019 WL 5883130 [hereinafter *Zelaya*, Third Amended Complaint].

[178] Memorandum from Marcy M. Forman, Dir., Off. of Investigations, U.S. Immigr. & Customs Enf't to Assistant Dir., Deputy Assistant Dirs. & Special Agents in Charge 1 (Apr. 30, 2009) https://www.ice.gov/doclib/foia/dro_policy_memos/worksite_enforcement_strategy4_30_2009.pdf [https://perma.cc/JST9-JUVC]; *see* Carpenter, *supra* note 174.

[179] *Zelaya*, Third Amended Complaint, *supra* note 177, ¶ 1.

[180] *Id.* ¶¶ 3, 143, 162.

[181] *Id.* ¶ 147.

[182] *Id.* ¶¶ 189, 211.

of workers for violations of wage and hour protections.[183] Some undocumented workers were federally convicted of illegal re-entry and deported,[184] an example of how criminalizing immigration-related offenses provides federal prosecutors "leverage to seek convictions in cases arising out of worksite raids."[185] *Zelaya* is a uniquely tax-based instance of a broader phenomenon of workplace immigration enforcement leading to worker convictions.[186]

The workers, unmentioned in the IRS warrant but targeted under immigration law, sued for violations of their constitutional rights. As the court explained, although "the affidavit referenced the suspected presence of undocumented immigrants at the [p]lant, it did not discuss—and the warrant did not authorize—the seizure, detention, or arrest of any individual, undocumented or otherwise."[187]

Zelaya's claims include violations of the workers' Fourth Amendment rights prohibiting unreasonable search and seizure[188] and Fifth Amendment equal protection rights.[189] The case remains in the federal court system, after years of litigation. Some plaintiffs remain lawfully present, while others were deported.[190]

The Government's lackluster arguments in its motion to dismiss ignore migrants' rights. For example, the Government argues that a plaintiff who lacks lawful status "ha[s] no right not to be detained."[191] At its most basic level, the very case that the Government cites predicates that assertion on the absence of

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[183] Scalia v. Se. Provision, LLC, No. 19-cv-00150, at *2–3 (E.D. Tenn. July 6, 2020) (Bloomberg Law).

[184] Moore, *supra* note 176.

[185] *See generally* Saucedo, *supra* note 161, at 308 (discussing ICE's role in workplace immigration enforcement).

[186] 516 F. Supp. 3d 778 (E.D. Tenn. 2021); Angela D. Morrison, *Executive Estoppel, Equitable Enforcement, and Exploited Immigrant Workers*, 11 HARV. L. & POL'Y REV. 295, 299, 320 n.174 (2017).

[187] *Zelaya*, 516 F. Supp. 3d at 787; Class Action Jury Demand Exhibit 1: IRS Search Warrant, *Zelaya*, 516 F. Supp. 3d 778 (No. 19-cv-00062).

[188] *Zelaya*, Third Amended Complaint, *supra* note 177, ¶¶ 225–233.

[189] *Id.* ¶¶ 217–224.

[190] Travis Dorman, *Bean Station Slaughterhouse Raided by ICE Ordered to Pay Workers $610,000*, KNOXVILLE NEWS SENTINEL (July 9, 2020), https://www.knoxnews.com/story/news/local/2020/07/09/bean-station-slaughterhouse-raided-ice-must-pay-workers-610000/5399508002/ [https://perma.cc/F6QM-UEX5].

[191] DHS Defendants' Memorandum of Law in Support of Their Joint Motion for Partial Dismissal at 11, *Zelaya*, 516 F. Supp. 3d 778 (No. 19-cv-62), 2019 WL 5883131 (quoting De La Paz v. Coy, 786 F.3d 367, 379 (5th Cir. 2015)); *see also* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1315–16 (2010) (criticizing government arguments "that it may stop, detain, and interrogate without individualized suspicion in the context of worksite enforcement").

"unconstitutional physical abuse,"[192] allegations that are at the very heart of plaintiffs' allegations.[193] Second, the statement grossly misstates existing doctrine by implying that the lack of lawful status means that an individual can be subject to detention, or even arrested, at any time, without any concern for the method or subject.[194] As the Ninth Circuit wrote in 2019, in *Perez Cruz v. Barr*, ICE agents may not "carry out preplanned mass detentions, interrogations, and arrests at the factory, without individualized reasonable suspicion."[195] In both *Zelaya* and *Perez Cruz*, ICE appears to have "intended from the outset to turn the execution of these warrants into quite a different operation than a search for employment [or tax] records."[196] Although uncommitted to migrants' constitutional rights, the government appears committed to conscripting tax authorities to police them.

Zelaya and other judicial decisions are unlikely to preclude joint immigration-tax enforcement, even as they potentially limit unconstitutional extremes. United States law prohibits Fourth Amendment violations of undocumented immigrants' rights during ICE officers' enforcement activities.[197] *Zelaya* tries

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[192] *De La Paz*, 786 F.3d at 379. The district court explained that *De La Paz* supports the viability of claims against "'immigration officers who deploy unconstitutionally excessive force . . . .'" *Zelaya*, 516 F. Supp. 3d at 808 (citing to and quoting *De La Paz*, 786 F.3d at 374).

[193] *See supra* note 182 and accompanying text (discussing allegations of physical abuse).

[194] Zadvydas v. Davis, 533 U.S. 678, 718 (2001) (Kennedy, J., dissenting) ("[Noncitizens] are entitled to the protection of the Due Process Clause. Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention."); *see also* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1036–39 (2002) (discussing these protections and how they may differ for noncitizens stopped at the border versus those who reside in the interior).

[195] 926 F.3d 1128, 1133 (9th Cir. 2019). Two notable similarities unite *Perez Cruz* and *Zelaya*. First, both cases begin with government authorities procuring relatively narrow warrants focused on employer records and a few named individuals. *Compare id.* (describing warrants for "employment-related documents" and a few named individuals), *with* Class Action Jury Demand Exhibit 1: IRS Search Warrant, *supra* note 187, at 5–6 (describing documents and items to be seized), *and* Class Action Jury Demand Exhibit 2: Affidavit in Support of a Search Warrant at 6, *Zelaya*, 516 F. Supp. 3d 778 (No. 19-cv-00062) (naming James Brantley, Pamela Brantley, Kelsey Brantley, and Priscilla Keck). Second, despite these narrow warrants, the raids in both cases arguably manifest an underlying purpose for mass detention of hundreds of workers. The purposes are apparent from officers' preparation, including arranging transportation and instrumentalities of detention, whether through officer quantity or physical restraints. *Compare Perez Cruz*, 926 F.3d at 1133 (describing the preparation as including "'2 buses and 5 vans' ready to transport potential detainees"), *with supra* notes 179–182 and accompanying text (describing the force used by immigration officials).

[196] *Perez Cruz*, 926 F.3d at 1133.

[197] *See* Cotzojay v. Holder, 725 F.3d 172, 183 (2d Cir. 2013) ("[A]ssuming that ICE officers did not secure voluntary consent to enter the home—thereby effecting the basic Fourth Amendment violation that must underlie any egregious violation—certain aspects of the raid as alleged . . . transform the constitutional transgression depicted here into an egregious Fourth Amendment violation."). *But see* Immigr. & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1034 (1984) (holding that "the exclusionary rule need not be applied" to "an admission of unlawful presence in this country made subsequent to an allegedly unlawful arrest" in a civil deportation hearing).

to affirm these rights, preserving a plaintiff's excessive force-Fourth Amendment claim based on being "allegedly punched . . . in the face without provocation" and holding that dismissal on qualified immunity grounds was "unwarranted."[198] Even as the court preserved some of the plaintiffs' claims against government authorities, it found that the plaintiffs failed to plead a constitutional violation in the IRS agents' efforts to obtain the search warrant.[199] The court affirmed that, where there is probable cause of federal tax violations, no cause of action lay against the IRS and its agents "just because another agency allegedly exploited the warrant to conduct its own search and seizure."[200] *Zelaya* thus protects the tax authorities' participation in immigration enforcement, while guarding against unconstitutional abuses by the immigration agencies and officers.[201]

Despite the government's failures in *Zelaya*, appropriately specific warrants preserve the possibility of joint immigration-tax enforcement.[202] For example, a warrant could facilitate ICE detention of immigrants so long as individualized reasonable suspicion of unlawful presence exists (or for arrest, probable cause).[203] The warrant needs only to be "reasonably specific," not

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[198] *Zelaya*, 516 F. Supp. 3d at 807–10 (preserving Plaintiff Guerrero's excessive force claim under the Fourth Amendment claim based on being "allegedly punched . . . in the face without provocation"). The court also declined to dismiss the false arrest claims under the Federal Tort Claims Act, reserving the question of whether immigration authorities' use of the IRS warrant to detain the plaintiffs was lawful. *Id.* at 811–13 ("[S]tate-law elements of false arrest are unrelated to the availability of a *Bivens* remedy. Neither party cites Tennessee case law addressing false arrest of undocumented aliens, and the Court's independent research has not identified any.").

[199] *Id.* at 802.

[200] *Id.* at 801.

[201] The *Zelaya* court also apologetically explained that it "c[ould] not extend a *Bivens* remedy to Plaintiffs' equal-protection claim under the Fifth Amendment" for the ICE officers allegedly detaining all Latinx workers and exempting white workers. *Id.* at 795–96. The court explained how a number of twenty-first century Supreme Court decisions militate towards limiting *Bivens*. *Id.* at 795 (first citing Hernandez v. Mesa, 140 S. Ct. 735 (2020); and then citing Ziglar v. Abbasi, 137 S. Ct. 1843 (2017)).

[202] *Cf.* Payton v. New York, 445 U.S. 573, 583 (1980) ("[I]ndiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment.").

[203] *See, e.g.*, 8 C.F.R. § 287.8(b) (2021) (permitting "[i]nterrogation and detention not amounting to arrest . . . (2) [i]f the immigration officer has a reasonable suspicion"); *id.* § 287.8(c)(2)(i) ("An arrest shall be made only when the designated immigration officer has reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United States."); *see also* Morales v. Chadbourne, 793 F.3d 208, 216 (1st Cir. 2015) ("Courts have consistently held that the 'reason to believe' phrase . . . 'must be read in light of constitutional standards, so that "reason to believe" must be considered the equivalent of probable cause.'" (quoting Au Yi Lau v. U.S. Immigr. & Naturalization Serv., 445 F.2d 217, 222 (D.C. Cir. 1971)). To be clear, simply accepting employment without work authorization, so long as it is done without fraud, should not give rise to reasonable suspicion of violating immigration law, much less criminal law. This is particularly true in *Zelaya*, where the workers were paid in cash, suggesting the employer evaded the W-2 and may not have even asked for work authorization. *See* 516 F. Supp. 3d at 788. On the other

"elaborately detailed,"[204] but suspicions cannot be discriminatorily extended to neighbors based on proximity alone.[205] Thus, future warrants can facilitate joint enforcement, particularly assuming more competent officers than appeared in *Zelaya*.[206] Because employers' tax-reporting obligations rely on employees' Social Security Numbers (or lack thereof), an employer suspected of hiring unauthorized workers will often generate corresponding suspicions of tax non-compliance. Judicial review of the scope of a warrant prevents "a general, exploratory rummaging"[207] and unfounded, mass migrant detentions, often of Latinx migrants.[208] It does not, however, prevent joint immigration-tax enforcement *writ large*.

The cooperation of tax authorities in workplace immigration enforcement may increase. In the late-twentieth century, Congress authorized officers from multiple agencies to audit employers' retention of employment eligibility verification forms (the I-9).[209] DHS has reported on the annual rise in "worksite enforcement operations," with the actual number of enforcement-related actions tripling to over 6,000 in recent years, from an average of less than 2,000 in Fiscal Years 2016 and 2017.[210] Despite the purported focus on employer

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hand, if there is independent reason to believe that the immigrant presented false documents for procuring employment, that could provide reasonable grounds for detention. *Id.*

[204] United States v. Brock, 667 F.2d 1311, 1322 (9th Cir.1982).

[205] *See, e.g.*, Ybarra v. Illinois, 444 U.S. 85, 86, 91 (1979) ("[A] person's mere propinquity to others independently suspected . . . does not, without more, give rise to probable cause . . . ."). "Although the search warrant, issued upon probable cause, gave the officers authority to search the premises and to search [the proprietor,] it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers." *Id.* at 92; *see also* Kati L. Griffith, *Discovering "Immployment" Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389, 444 (2011) (emphasizing "Congress's extensive consideration of employment-discrimination policy as part of immigration reform," both through antidiscrimination protections in the Immigration and Reform Control Act of 1986 (IRCA) and preexisting protections in Title VII).

[206] 516 F. Supp. 3d at 789–90. "The Fourth Amendment [only] requires that a search warrant 'particularly describ[e] the place to be searched, and the persons or things to be seized.'" United States v. Bridges, 344 F.3d 1010, 1015–16 (9th Cir. 2003) (quoting U.S. CONST. amend. IV).

[207] Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971).

[208] Raquel Aldana, *Of Katz and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1089–91 (2008) (arguing against "dragnet" enforcement and how "[j]udicial preapproval becomes a mere procedural formality when warrants do not require particularized suspicion"); Kevin R. Johnson, *Trump's Latinx Repatriation*, 66 UCLA L. REV. 1444, 1451 (2019) (describing how raids "target employers known to rely on low-wage undocumented Latinx immigrants").

[209] 8 U.S.C. § 1324a(b)(3)–(6); 8 C.F.R. § 274a.2 (2021) (describing and establishing the I-9); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 194 (characterizing IRCA as marking "the first time in our nation's history [that] employment of undocumented immigrants [was made] unlawful").

[210] DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT BUDGET OVERVIEW FISCAL YEAR 2021 CONGRESSIONAL JUSTIFICATION 7 (2021) [hereinafter ICE BUDGET OVERVIEW FY 2021]; *see also* Tal Kopan, *ICE Chief Pledges Quadrupling or More of Workplace Crack-*

compliance, including through the criminal arrest of employers,[211] ICE has increasingly revealed that it disproportionately focuses its workplace enforcement arrests on employees, not employers.[212] In arresting immigrant employees to "promote [a] culture of employer compliance," ICE intends to "cooperate more closely with external partners, including . . . [the] IRS."[213] In coordination with tax authorities, immigration audits and raids may increasingly punish workers, not just employers.[214]

In short, whether through technical statutory exclusions or armed collaborations between tax authorities and DHS, tax law continues to police migrants. Courts confront constitutional litigation challenging this phenomenon in its varied forms. Even if they curb outlying "raids" and attendant violations of constitutional rights, courts cannot eliminate tax law's policing of migrants.

III. MIGRATION AND MOBILITY CONSEQUENCES OF TAX COMPLIANCE

Just as tax law polices migrants, so do mobility and migration laws enable tax enforcement. This Part explores the ways in which tax compliance impacts the mobility of both citizens and noncitizens. After reviewing mobility-related

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downs, CNN (Oct. 17, 2017), https://www.cnn.com/2017/10/17/politics/ice-crackdown-workplaces/index.html [https://perma.cc/F3UH-SD4G].

[211] ICE BUDGET OVERVIEW FY 2021, *supra* note 210, at 7; DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT OPERATIONS AND SUPPORT FISCAL YEAR 2021 CONGRESSIONAL SUBMISSION 96 (2021) [hereinafter OPERATIONS AND SUPPORT FY 2021]; U.S. IMMIGR. & CUSTOMS ENF'T, WORKSITE ENFORCEMENT: GUIDE TO ADMINISTRATIVE FORM I-9 INSPECTIONS AND CIVIL MONETARY PENALTIES 2 (2008) ("[C]riminal prosecutions, seizure of assets, and the imposition of meaningful civil penalties upon those *employers and businesses* that utilize and profit from the labor of unauthorized [noncitizens] is the most effective deterrent." (emphasis added)). Recently, the DHS Inspector General made the strident argument that "the I-9 Guide has not been updated to address risks and challenges," including that "ICE officials cannot ensure that these unapprehended individuals do not have criminal records and the [unauthorized noncitizen workers] are free to seek employment elsewhere." OFF. OF INSPECTOR GEN., OIG-21-15, ICE GUIDANCE NEEDS IMPROVEMENT TO DETER ILLEGAL EMPLOYMENT 5 (2021).

[212] OPERATIONS AND SUPPORT FY 2021, *supra* note 211, at 96 (describing how the "worksite enforcement strategy" uses "criminal arrests of employers and administrative arrest of employees," and in fiscal year 2019, the strategy resulted in "2,048 administrative arrests and 627 criminal arrests"); *see also* OFF. OF INSPECTOR GEN., OIG-14-33, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S WORKSITE ENFORCEMENT ADMINISTRATIVE INSPECTION PROCESS 3–4 (2014) ("Of the more than 6,000 WSE-related arrests made in 2008 under the previous strategy, only 135 were arrests of employers.").

[213] OPERATIONS AND SUPPORT FY 2021, *supra* note 211, at 97

[214] In fact, ICE ramped up its workplace enforcement by envisioning a world where "the integrity of [employers'] employment records is just as important to the federal government as the integrity of their tax files . . . ." U.S. Immigr. & Customs Enf't, *ICE Delivers More Than 5,200 I-9 Audit Notices to Businesses Across the US in 2-Phase Nationwide Operation* (July 24, 2018), https://www.ice.gov/news/releases/ice-delivers-more-5200-i-9-audit-notices-businesses-across-us-2-phase-nationwide [https://perma.cc/N3AY-JC59].

penalties for tax noncompliance in Section A,[215] I describe the ways that the prospect of immigration benefits incentivizes noncitizens' tax compliance in Section B.[216]

A. Penalties for Noncompliance

For noncitizens, including permanent residents, tax noncompliance may lead to deportation. A criminal conviction for the willful attempt to evade a tax by filing a false return can constitute an "aggravated felony" for the purposes of the INA and lead to deportation.[217] In *Kawashima v. Holder*, the U.S. Supreme Court articulated an even broader view of the types of tax offenses that could render a foreign national subject to deportation.[218] Although the Kawashimas' conviction stemmed from falsifying a tax return, the Court explained that "a taxpayer who files a truthful tax return, but who also takes affirmative steps to evade payment by moving his assets beyond the reach of the [IRS]" would also be at risk of deportation for such a conviction.[219] Through *Kawashima,* the Court strengthened the "tax-immigration nexus" from the twentieth century and confirmed a broad class of tax-based "aggravated felonies" for the twenty-first century.[220] These significant civil collateral consequences for a noncitizen's criminal tax evasion mean that undocumented delinquent taxpayers may be forced to leave the country.

For citizens, the federal tax code now shapes the mobility of tax evaders through U.S. passport controls.[221] U.S. passports are generally made available only to U.S. citizens.[222] After a government report documented the leisurely travels of tax evaders, the seeds were sown for tax-based restrictions on pass-

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[215] *See infra* notes 217–260 and accompanying text.

[216] *See infra* notes 261–271 and accompanying text.

[217] 26 U.S.C. § 7201 (defining a tax felony); 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)). *See generally* 8 U.S.C. § 1101(a)(43)(M) (providing that certain tax evasion offenses constitute an "aggravated felony" for purposes of noncitizen removal).

[218] 565 U.S. at 488 (concluding "that the specific inclusion of tax evasion . . . does not implicitly remove all other tax offenses from the scope of [8 U.S.C. § 1101(a)(43)(M)(i)'s] plain language").

[219] *Id.* at 480, 488.

[220] Davis, *supra* note 8, at 206. One constraint on the tax crimes is the statutory requirement that the "loss to the government" must exceed a certain amount. 8 U.S.C. § 1101(a)(43)(M)(ii).

[221] 26 U.S.C. § 7345. Passports are available to U.S. citizens and noncitizen American nationals. *Id.*

[222] American nationals, who some have called "interstitial citizens," may also be eligible. Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673, 1676 n.11, 1678 (2017) (discussing access to passports for American nationals). American nationals do not usually have federal filing obligations.

port issuance.[223] The U.S. Government Accountability Office (GAO) found that over one percent of passport applicants in a given year owed tax debts, collectively totaling billions of dollars.[224] Additionally, in carefully reviewing a sample of twenty-five of the most "egregious" cases,[225] the GAO found thirteen individuals with unpaid federal taxes exceeding a million dollars each.[226] The IRS had already filed tax liens against all thirteen delinquent individuals' personal property, and many of them—a group that included lawyers and CEOs—regularly traveled outside the country.[227] The IRS exposed a not-so-noble tax-dodging nobility—American citizens living jet set cross-border lives with apparently little interest in settling their tax debts.[228]

The unsettling picture led Congress to search for new enforcement mechanisms, building a bridge between tax and migration. In 2015, Congress devised an enforcement bridge, spanning the Department of Treasury ("Treasury") and the Department of State.[229] If a taxpayer's debt exceeds fifty thousand dollars, and the taxpayer has failed to enter into a payment agreement with the IRS,[230] the IRS may, through Treasury, share that information with the Department of State, leading to passport nonrenewal or revocation.[231] Treasury's certification of a seriously delinquent tax debt leaves the Department of State with little discretion to issue passports that enable these taxpayers to leave the country, even temporarily.[232] Absent "emergency circumstances or humanitarian reasons," the delinquent taxpayer is confined stateside.[233] Although in some ways

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[223] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-272, FEDERAL TAX COLLECTION: POTENTIAL FOR USING PASSPORT ISSUANCE TO INCREASE COLLECTION OF UNPAID TAXES (2011) [hereinafter GAO REPORT].

[224] *Id.* at 4.

[225] *Id.* at 18.

[226] *Id.* at 11–14, 21–22.

[227] *Id.* at 11–13, 21–22.

[228] *See* Betty Behrens, *Nobles, Privileges and Taxes in France at the End of the Ancien Régime*, 15 ECON. HIST. REV. 451, 453 (1963) (describing "exemption from the servile obligations of the *taille*" for eighteenth-century French nobility).

[229] Maehr v. U.S. Dep't of State, 5 F.4th 1100, 1104–05 (10th Cir. 2021) (describing the provision's legislative history and upholding it against constitutional challenge).

[230] 26 U.S.C. § 7345(b). The amount is adjusted regularly for inflation. *Id.* § 7345(f).

[231] *Id.* § 7345(a). To be clear, although the scheme "use[s] the threat of passport revocation as an incentive for tax compliance[,] [n]o direct connection between tax delinquency and international travel, such as evidence the delinquent taxpayer is secreting assets overseas, is required to effect a passport revocation." *Maehr*, 5 F.4th at 1105 (citing Michael S. Kirsch, *Conditioning Citizenship Benefits on Satisfying Citizenship Obligations*, 2019 U. ILL. L. REV. 1701, 1712).

[232] 22 C.F.R. § 51.60(h) (2021) (noting that the Department of State "*may not* issue a passport . . . in any [such] case" (emphasis added)).

[233] *Id.* Because of an American passport's identification and mobility power, even citizens already abroad and with little interest in returning to the United States may find it difficult to function without one. Kirsch, *supra* note 231, at 1715–16.

novel, this tax debt-based restriction on international mobility builds upon earlier consequences for tax debts.[234]

Restricting U.S. citizens' movement based on outstanding debts is not wholly new. The Department of State has long possessed authority to reject passport applications for outstanding child support obligations.[235] In that context, however, state agencies provide the certificate, given the family law context, whereas the Treasury does so here, for serious federal tax delinquency.[236] Additionally, partly because the child support provision dates back to the late-twentieth century, the attendant procedural rights have been judicially clarified. A federal hearing prior to a child support-based passport revocation is not necessary.[237] The tax-based passport revocation's relatively recent introduction suggests future procedural clarification will occur, as audits and recommendations arise.[238]

Taxpayer privacy does not impede passport revocation. Although federal law precludes IRS officials from disclosing taxpayer return information,[239] the 2015 law authorized a new information transfer to the Department of State and new consequences for delinquent taxpayers.[240] This necessarily discreet federal certification differs from California's public shaming-driver's license suspension combination discussed below.[241]

The scope of the mobility control of delinquent taxpayers is nontrivial. The IRS estimated that 362,000 people would be affected by the new law,

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[234] *See generally* Eric Lopresti, *What's Wrong with Strict Liability and Nonmonetary Penalties? The Case for Reasonable Fault-Based Civil Tax Penalties and Procedural Protections*, 72 TAX LAW. 589, 606 n.64 (2019) (canvassing state statutes with licensing and other consequences for failure to comply with tax laws).

[235] 42 U.S.C. § 652(k).

[236] *Id.* §§ 652(k), 654(31).

[237] Weinstein v. Albright, 261 F.3d 127, 131 (2d Cir. 2001) (affirming the decision of the district court because the "right to pre-deprivation notice and an opportunity to contest the arrears determination before the relevant state agency is adequate to protect plaintiff's liberty interest in having a passport and traveling internationally"); *see also* GAO REPORT, *supra* note 223, at 1 (noting how "[s]ince the program was initiated in 1998 [through the report date in 2011], about $200 million ha[d] been collected on child support obligations").

[238] *See generally* TREASURY INSPECTOR GEN. FOR TAX ADMIN., 2019-30-068, IMPLEMENTATION OF THE PASSPORT PROVISIONS OF THE FAST ACT WAS GENERALLY SUCCESSFUL, AND THE INTERNAL REVENUE SERVICE IS WORKING ON OBJECTIVE CRITERIA FOR PASSPORT REVOCATIONS (2019) (providing an audit of over 300,000 certified taxpayers and making recommendations for the evaluation process when selecting cases for sending to the State Department for passport revocation).

[239] 26 U.S.C. § 6103. This binds both the IRS and agencies, like the SSA, that may have a valid reason to obtain, but not share, the IRS data. *Id.*

[240] *See id.* § 7345(a).

[241] *See infra* notes 256–257 and accompanying text. *See generally* Blank, *supra* note 8, at 772 ("A potential drawback of collateral tax sanctions is that they could cause individuals to fear that government agencies and officials other than the taxing authority will gain access to their personal tax return information.").

shortly after its enforcement began in 2018.[242] The total amount recovered from taxpayers who the IRS certified to the State Department as being seriously delinquent exceeds one billion dollars, with the average length of delinquency for certified taxpayers approaching seven years.[243] Although the data at this point remains preliminary, the IRS has found taxpayers settle their debts to avoid passport interference.[244]

Lastly, for citizens, consider the striking ways that tax law can actually promote permanent emigration. Mobility taken to its end means not only long-term migration, but also irreversible renunciation of citizenship, which tax policy can make either appealing or difficult.[245] Although immigration law often views citizenship as a significant privilege, tax law exposes how people can become encumbered by their citizenship.[246] The Foreign Account Tax Compliance Act (FATCA) has increased compliance monitoring of U.S. citizens, who, because they are taxed on their worldwide income, have attendant filing requirements.[247] The IRS publishes a list of individuals who expatriate and renounce their citizenship quarterly, as required by federal law.[248] In this way,

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[242] Laura Saunders, *Thousands of Americans Will Be Denied a Passport Because of Unpaid Taxes*, WALL ST. J. (July 6, 2018), https://www.wsj.com/articles/thousands-of-americans-will-be-denied-a-passport-because-of-unpaid-taxes-1530869401 [https://perma.cc/T62G-X2QV].

[243] *Update on Passport Certifications and Taxpayer Advocate Service*, INTERNAL REVENUE SERV. (Oct. 16, 2019), https://www.irs.gov/newsroom/update-on-passport-certifications-and-taxpayer-advocate-service [https://perma.cc/53FX-MNDA].

[244] *See, e.g.*, Daniel McCarthy, *State Department Begins to Deny Passports to Tax Debtors*, TRAVEL MKT. REP., https://www.travelmarketreport.com/articles/State-Department-Begins-to-Deny-Passports-to-Tax-Debtors [https://perma.cc/ZEE9-MWGY] (discussing "recent reports" of passport denials and revocations).

[245] The Reed Amendment to the INA makes that renunciation of citizenship permanent by rendering the tax-motivated renounce inadmissible under immigration law. 8 U.S.C. § 1182(a)(10)(E) ("Any alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation by the United States is inadmissible."); *see also* Michael S. Kirsch, *Alternative Sanctions and the Federal Tax Law: Symbols, Shaming, and Social Norm Management as a Substitute for Effective Tax Policy*, 89 IOWA L. REV. 863, 891–92 (2004) (describing the history of the Reed Amendment).

[246] *See, e.g.*, *In re* Miegel, 272 F. 688, 690 (E.D. Mich. 1921) (noting "the coveted goal of citizenship"); Stephen H. Legomsky, *Why Citizenship?*, 35 VA. J. INT'L L. 279, 282–85 (1994) (commenting on Gerald Neuman's work on citizenship and entertaining various models of citizenship and citizenship law to ask, more fundamentally, "[w]hat is accomplished by having a citizenship concept at all?").

[247] Hiring Incentives to Restore Employment (HIRE) Act, Pub. L. No. 111–147, §§ 501–531, 124 Stat. 71, 97–113 (2010) (codified in various sections of the Internal Revenue Code); *see also* Kirsch, *supra* note 231, at 1716–17 (summarizing FATCA's reporting obligations and attendant penalties); Noam Noked, *FATCA, CRS, and the Wrong Choice of Who to Regulate*, 22 FLA. TAX REV. 77, 79 (2018) (describing the first federal prosecution for a conspiracy to avoid FATCA reporting).

[248] *See, e.g.*, Quarterly Publication of Individuals, Who Have Chosen to Expatriate, as Required by Section 6039G, 84 Fed. Reg. 61,137 (Nov. 12, 2019). This list also includes long-term residents, defined in Internal Revenue Code 877(e), who end their United States resident status for federal tax

tax law has determined that formally disappearing from the United States' tax rolls and political community requires public notice of one's exit.

Tax-based restrictions on wealthy citizens elicit little sympathy, but restrictions can burden those in already challenging circumstances. In one notable case, a man with disabilities born to U.S. citizens living in Canada was unable to renounce his citizenship.[249] His ongoing U.S. citizenship led to concerns that U.S. taxation would erode accounts that his parents established for his long-term care and that were free from Canadian taxation.[250] The tax quandary stems from U.S. citizenship law's limiting of renunciation to those able to form the requisite legal "intent."[251] One tax scholar characterized the case as "an inescapable result of permanently tying taxation to citizenship," reflective of the underappreciated "interplay of immigration rules with taxation."[252] The odd interactions of U.S. citizenship and immigration laws with its tax system turned the "dream" of citizenship into one family's nightmare.[253]

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purposes. 26 U.S.C. § 877(e). Some countries also publish the reverse—lists of newly-naturalized citizens. *See* Dimitry Kochenov, Oskar J. Gstrein & Jacquelyn D. Veraldi, *The Naturalization-Privacy Interface: Publication of Personal Data of New European Union Citizens Versus European Privacy Standards*, 42 HOUS. J. INT'L L. 237, 253–57 (2020) (arguing that "more and more countries view the publication of the newly-naturalized citizens' private data as a problem" and describing how European countries in particular have amended their laws accordingly). For an unsurprising glimpse, "the Cypriot lists contained plenty of interesting names, including powerful oligarchs from the former Soviet Union, Chinese tycoons, and scions of prominent dictatorial families from all around the world." *Id.* at 243.

[249] Amber Hildebrandt, *U.S. FATCA Tax Law Catches Unsuspecting Canadians in Its Crosshairs*, CBC NEWS (Jan. 13, 2014), https://www.cbc.ca/news/canada/u-s-fatca-tax-law-catches-unsuspecting-canadians-in-its-crosshairs-1.2493864 [https://perma.cc/B4RL-246E].

[250] *Id.*

[251] U.S. DEP'T OF STATE, *Minors, Incompetents, Prisoners, Plea Bargains, Cults and Other Special Circumstances*, *in* 7 FOREIGN AFFAIRS MANUAL §§ 1290–1298 (explaining that "[b]ecause loss of U.S. nationality occurs only when a would-be renunciant or person signing a statement of voluntary relinquishment has the legal capacity to form the specific intent necessary to lose U.S. nationality, cases involving persons with established or possible mental incapacity require careful review [including] mental disability, mental illness, developmental impairment, Alzheimer's disease, and similar conditions [and possibly] substance abuse"). To the detriment of those situated like the Canadian man described by Hildebrandt, the manual also declares that "[a] formal finding of mental incompetency by a court of competent jurisdiction, whether in the United States or abroad, precludes a finding that an individual has the requisite intent." *Id.* § 1293.

[252] Allison Christians, *A Global Perspective on Citizenship-Based Taxation*, 38 MICH. J. INT'L L. 193, 214 (2017).

[253] *See* Hildebrandt, *supra* note 249; *see, e.g.*, American Dream and Promise Act of 2019, H.R. 6, 116th Cong. (2019) (providing for a pathway to citizenship to Deferred Action for Childhood Arrivals (DACA) recipients); Villazor & Gulasekaram, *supra* note 87, at 1227 (foregrounding the discussion of sanctuary with an explanation of the presidential rescission of DACA and the affected "DREAMers").

Tax delinquents may also find themselves unable to take the driver's seat based on their *state* tax delinquency.[254] In many states, including California, driver's licenses are available without regard to immigration status.[255] States differ in how they calculate, publicize, and penalize delinquent taxpayers. California, for example, posts a list of the top five hundred greatest past-due balances on the Franchise Tax Board's website, and those listed may have their driver's licenses suspended.[256] The most recent minimum amount to make the top five hundred was over $150,000.[257] In contrast, Louisiana and New York set absolute, rather than relative, minimum thresholds of only $1,000 and $10,000 for driver's license suspensions, respectively.[258] Louisiana's suspension is premised only on income tax, while New York's is broader and includes delinquent property taxes.[259] Due to the differing bases for calculating delinquency, a mere $1,000 tax debt can deprive a Louisianan of the ability to take the open road, while for Californians, a $100,000 debt would not. These express tax delinquency thresholds place a price on what taxpayers can get away with and still be able to get away.

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[254] Blank, *supra* note 8, at 740 (noting that "[t]he collateral tax sanction of revoking driver's licenses from tax-delinquent individuals has flourished because states have found that it is effective" and providing a New York press release from Governor Cuomo as evidence).

[255] *See generally* Ann Morse, Susan Frederick & Ben Husch, *State Driver's Licenses and Immigrants*, NAT'L CONF. STATE LEGISLATURES (Feb. 14, 2020), https://www.ncsl.org/blog/2020/02/14/state-drivers-licenses-and-immigrants.aspx [https://perma.cc/5JLW-JPZT]; Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 41 n.145 (2008) (arguing for a connection between constitutional equal protection principles and the protections that long-term noncitizens should be offered, including access to driver's licenses).

[256] CAL. BUS. & PROF. CODE § 494.5(b)(1) (West 2021) (explaining that "'Certified list' means either the list provided by the State Board of Equalization or the list provided by the Franchise Tax Board of persons whose names appear on the lists of the 500 largest tax delinquencies"); CAL. VEH. CODE § 34623.1 (West 2020); *Top 500 Past Due Balances*, CAL. FRANCHISE TAX BD., https://www.ftb.ca.gov/about-ftb/newsroom/top-500-past-due-balances/index.html (July 15, 2020) [https://perma.cc/3BTZ-BM5D].

[257] *Personal Income Tax List: Top 500 Tax Delinquencies*, CAL. FRANCHISE TAX BD., https://www.ftb.ca.gov/about-ftb/newsroom/top-500-past-due-balances/personal-income-tax-list.html (Aug. 19, 2021) [https://perma.cc/U2KW-QAUA].

[258] LA. STAT. ANN. § 47:296.2(A) (2005) ("A suspension and renewal of a driver's license shall be denied if the Department of Revenue has an assessment or judgment against an individual that has become final and nonappealable if the amount of the final assessment or final judgment is in excess of one thousand dollars of *individual income tax* . . . ." (emphasis added)); N.Y. TAX LAW § 171-v(1) (McKinney 2019) (allowing for "the suspension of drivers' licenses of taxpayers with past-due tax liabilities equal to or in excess of ten thousand dollars"). The New York Governor unsuccessfully tried to lower the threshold to five thousand dollars. *Governor Cuomo Announces Additional Measures to Crack Down on Tax Scofflaws Included in Budget*, N.Y. STATE (Feb. 9, 2015), https://www.governor.ny.gov/news/governor-cuomo-announces-additional-measures-crack-down-tax-scofflaws-included-budget [https://perma.cc/4AFW-Z9W3].

[259] *Supra* note 258 and accompanying text.

Denials and revocations of federally-issued passports and state-issued licenses illustrate how migration and mobility rights are now attached to tax compliance. Migration restrictions appear in tax enforcement's arsenal, but migration status is also a basis for determining which restriction to use. Against the portraits of wealthy taxpayers, whether renouncing American citizenship for tax havens or ignoring their tax obligations, lie the undocumented taxpayers who hope their compliance will earn them the right to lawful status.[260]

B. Benefits of Tax Compliance

The prospective migration benefits of tax compliance manifest in dual ways: through both immediate tax credit relief and longer-term possibilities of regularization. Both are premised on the fact that undocumented taxpayers have federal and state taxpayer obligations to the United States and their respective state government based on their residence, even if that residence is unlawful.[261] As a reminder, pandemic relief was denied to undocumented immigrants for consecutive rounds at the federal level.[262] Nonetheless, undocumented taxpayers' compliance may reap both a short-term financial benefit and a long-term immigration benefit: adjustment of status.

The potential short-term benefit for tax compliance lies with state Earned Income Tax Credits (EITC). The federal EITC was available to undocumented immigrants prior to 1996, but that is no longer the case.[263] California recently

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[260] Although such tax compliance responds to legal incentives and punishments, it may also reflect a more basic desire to avoid being perceived as "one of the immigrants . . . who's described as a burden on the system." *See, e.g.*, Joey Palacios, *Immigrants Working Illegally in the U.S. File Tax Returns Without the Fear of Deportation*, TEX. PUB. RADIO (Apr. 17, 2015), https://www.tpr.org/border-immigration/2015-04-17/immigrants-working-illegally-in-the-u-s-file-tax-returns-without-the-fear-of-deportation [https://perma.cc/6U4U-RWET] (quoting a woman identified by the pseudonym "Claudia" who arrived from Mexico and overstayed her tourist visa).

[261] *See, e.g.*, Lipman, *supra* note 9 (detailing these obligations); *Introduction to Residency Under U.S. Tax Law*, INTERNAL REVENUE SERV., https://www.irs.gov/individuals/international-taxpayers/introduction-to-residency-under-us-tax-law (Aug. 5, 2021) [https://perma.cc/ZN3F-TBMJ] (explaining how tax law uses the IRS's definition of "residency," as opposed to citizenship, to determine federal tax obligations). For a trenchant discussion of how terms like "unlawful," "undocumented," and "unauthorized" can confuse the spectrum of immigration statuses, and their specific privileges, see Heeren, *supra* note 109, at 1126.

[262] *See supra* Section II.A.

[263] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 451, 26 U.S.C. § 32(c)(1)(E), (c)(3)(D), (m); *see also* Francine J. Lipman, *Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of "Undeserving" Poor*, 7 NEV. L.J. 736, 746–51 (2007) (describing how Congress limited EITC relief for authorized work and characterizing the policy as "irrational tax treatment of hard-working poor undocumented immigrant families").

expanded its state-refundable EITC to undocumented immigrants,[264] with other states on its heels.[265] The design of these state expansions are not without complicated legal questions, including whether a state can offer a tax-based financial incentive for employment deemed illegal by federal statute.[266] The contours of that preemption analysis have not yet been defined.[267] Assuming the credits are found legal, state EITC availability would allow low-income undocumented taxpayers, particularly those with children, to file their state taxes, and potentially receive state refunds.

Citizenship remains the long-term benefit. Naturalization requires "good moral character," a determination often influenced by tax compliance.[268] Immigration reform proposals in Congress often explicitly premise the ability for undocumented immigrants to obtain a green card on evidence of tax compliance.[269] Thus, undocumented immigrants may choose to comply with tax law in expectation that any prospective reform will require retrospective tax compliance.

In both cases, intense immigration enforcement coupled with attendant allegations of illegal information sharing may deter compliance by privacy-

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[264] Assemb. B. 1876 § 1(p)(2), 2020–21 Leg., Reg. Sess. (Cal. 2020) (replacing "social security number" requirement language with "*federal individual taxpayer identification number* or a social security number" (emphasis added)); Adam Ashton, *Tax Break for Undocumented Immigrants Pushed by California Democrats*, SACRAMENTO BEE (June 8, 2018), https://www.sacbee.com/news/politics-government/capitol-alert/article212753674.html [https://perma.cc/RF27-7ZKM].

[265] *See, e.g.*, MD. CODE ANN., TAX-GEN. § 10-704 (West 2021) (employing an expansive definition of taxpayer for state EITC law); Danielle E. Gaines, *Earned Income Tax Credit Expansion Quietly Becomes Law*, MD. MATTERS (Mar. 9, 2021), https://www.marylandmatters.org/blog/earned-income-tax-credit-expansion-quietly-becomes-law/ [https://perma.cc/P24H-BVPN]. *See generally* Aidan Davis, *State-Level EITC Victories in 2021*, INST. ON TAX'N & ECON. POL'Y: JUST TAXES BLOG (June 28, 2021), https://itep.org/state-level-eitc-victories-in-2021/ [https://perma.cc/D69U-24RK] (discussing other state proposals to extend their EITCs to taxpayers with ITINs).

[266] Sarkar, *supra* note 81, at 1570–75.

[267] *Id.*

[268] 8 U.S.C. § 1101(f) (describing categories for which "[n]o person shall be regarded as, or found to be, a person of good moral character"); Nancy E. Shurtz, *Seeking Citizenship in the Shadow of Domestic Violence: The Double Bind of Proving "Good Moral Character*," 62 ST. LOUIS U. L.J. 237, 239 (2017) (arguing that "one of the most conspicuous manifestations of [good moral character] is compliance with tax laws"); *cf.* Jimenez v. Gonzales, 158 F. App'x 7, 8 (9th Cir. 2005) (finding that an immigrant who, in order to work and pay taxes, made up a social security number until he secured one, is not precluded from possessing good moral character for purposes of cancellation of removal).

[269] Cynthia Blum, *Rethinking Tax Compliance of Unauthorized Workers After Immigration Reform*, 21 GEO. IMMIGR. L.J. 595, 603–04 (2007) (describing how undocumented workers' taxes have influenced the immigration reform debate); *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System*, WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/ [https://perma.cc/Z6FW-XCZZ] (describing a proposed bill that provides a roadmap to legal status and eventually citizenship for undocumented individuals "if they pass criminal and national security background checks and *pay their taxes*" (emphasis added)).

concerned taxpayers otherwise interested in paying.[270] Specifically, migrants may fear that tax returns with sensitive information will fall into the hands of immigration enforcement, despite statutory provisions that should protect taxpayer information.[271] In other words, tax compliance benefits may be discounted by present-day worries about privacy, information sharing, and subsequent immigration consequences.

Tax compliance, although unable to secure emergency relief, may still allow undocumented migrants other benefits, including the ability to remain lawfully in the United States. The prospective gains of a pathway to permanent residency and citizenship are both more valuable and less certain than access to unfolding local benefits. Remaining in the United States, an outcome that acts as a cage for the wealthy, ironically reflects the very freedom that undocumented taxpayers seek.

IV. THE CONCERNS ABOUT TAX LAW'S MIGRATION

Tax law's migration raises concerns, particularly insofar as tax law polices immigration violations. This Part illuminates two significant concerns. First, excluding broad classes of migrants from emergency economic relief for which they are otherwise ineligible is costly, legally anomalous, and unnecessarily restrictive. Second, conscripting federal and state tax authorities to police migrants undermines their primary focus on revenue, which is furthered by immigrant tax compliance (as distinct from immigration compliance).

A number of arguments militate broad immigrant inclusion in emergency economic relief. First, because emergency relief is inherently *ad hoc* and unforeseeable, the arguments usually levied against enrollment in safety net programs are less persuasive.[272] Although many scholars extol these programs' individual and social economic payoffs, concerns about "dependency" and

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[270] *See, e.g.*, ACLU Letter, *supra* note 173, at 1 (noting how "[t]his request reflects recent proposals, reported on in the media, to promote the sharing of information between the Social Security Administration (SSA), the Internal Revenue Service (IRS), and the Department of Homeland Security (DHS)").

[271] *See supra* notes 167–170 and accompanying text. *See generally* Sarah Lamdan, *When Westlaw Fuels ICE Surveillance: Legal Ethics in the Era of Big Data Policing*, 43 N.Y.U. REV. L. & SOC. CHANGE 255, 292–93 (2019) (describing the contracts, industrial interests, and initiatives in ICE's information-sharing and procurement efforts).

[272] By "emergency economic relief," I mean isolated payments made in emergency circumstances, as distinct from regular enrollment in "safety net" programs. *See* Marianne Bitler, *The EITC and the Social Safety Net in the Great Recession*, 70 TAX L. REV. 533, 538 (2017) (discussing a range of safety net programs, all means-tested, including the Aid to Families with Dependent Children (AFDC), EITC, Head Start, Supplemental Nutrition Assistance Programs (SNAP), Temporary Assistance for Needy Families (TANF), and Medicaid).

"perverse incentives" inevitably arise.[273] Whether or not undocumented immigrants remain ineligible for many safety net programs,[274] because emergency relief is *ad hoc*, it is not seriously compromised by these dependency and perverse incentive arguments.

Second, emergency assistance often reaches broadly, looking past immigration status. For example, despite exclusion from health programs like Medicaid, undocumented immigrants are entitled to emergency medical care under federal law,[275] for which federal agencies may even encourage uptake.[276] Similarly, the Federal Emergency Management Agency (FEMA) provides crisis counseling, disaster legal services, and non-cash aid, regardless of immigration status.[277] For those unconvinced of emergency relief for *all* undocumented immigrants, one compromise may be the current status quo, allowing citizen children to render their households eligible.[278] This compromise would still be more inclusive than the initial rounds of pandemic relief, where a citizen child could not establish a household's eligibility.[279] The tax system's distribution of

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[273] Manasi Deshpande, *Does Welfare Inhibit Success? The Long-Term Effects of Removing Low-Income Youth from the Disability Rolls*, 106 AM. ECON. REV. 3300, 3300 (2016); *cf.* David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 675 (2004) (describing how particular methods of distributing public benefits may "create a host of perverse behavioral incentives"). Thus, beyond general portrayals of public benefits as a "'hammock' for lazy recipients," the second-order rules of distributing them are also often described in terms of creating perverse incentives. Super, *supra*, at 646 n.54.

[274] *See generally* Andrew Hammond, *The Immigration-Welfare Nexus in a New Era?*, 22 LEWIS & CLARK L. REV. 501 (2018) (discussing noncitizen exclusions for Medicaid, SNAP, TANF, and Supplemental Security Income (SSI)); Super, *supra* note 273, at 720 (describing how the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 made many immigrants ineligible for several, public entitlement programs).

[275] Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd.

[276] *See Public Charge Resources*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/public-charge-resources (Aug. 19, 2021) [https://perma.cc/MG2H-YHZV] (declaring that pandemic-related uptake of health services will not negatively affect noncitizens as part of future Public Charge analysis).

[277] 8 U.S.C. § 1611(b)(1)(B); *FAQ: Citizenship Status and Eligibility for Disaster Assistance*, FEMA, https://www.fema.gov/press-release/20201016/faq-citizenship-status-and-eligibility-disaster-assistance (Mar. 18, 2021) [https://perma.cc/RM8F-4K5Z] [hereinafter FAQ].

[278] This includes, for example, the Child Tax Credit. 26 U.S.C. § 24(c)(2), (h)(7) ("No credit shall be allowed under this section to a taxpayer with respect to any qualifying child unless the taxpayer includes the social security number of such child on the return of tax for the taxable year."). *But see id.* § 24(h)(4)(A)–(C) (providing a more limited five hundred-dollar dependent benefit for a non-"qualifying child," i.e. one without a Social Security Number). Another example is FEMA cash assistance. *FAQ*, *supra* note 277 ("You can apply on behalf of your minor child (under 18 years of age) for FEMA cash assistance (Individuals and Households Program Assistance) if you live together.").

[279] Thus, the first two rounds were more restrictive than the Child Tax Credit. 26 U.S.C. § 24(h)(7) (establishing eligibility based on a child's Social Security Number).

emergency relief should supplement rather than contradict the inclusive aspects of our *ad hoc* health and disaster-relief systems.[280]

Relief could plausibly be limited to migrants who previously met their tax obligations. This, however, creates similar efficiency tradeoffs in an emergency. Simpler eligibility criteria allow for speedy transmission of funds to meet acute needs quickly.[281] Administrative complexity, including by having individuals submit historic tax returns and demonstrate compliance for some period, makes the process more challenging and expensive.[282] Of course, if tax compliance conditions accelerate the political possibility of distributing relief more broadly to migrants, that may be a price decision-makers are willing to pay.

Immigrant exclusion is no better justified by fraud concerns.[283] Rather, state agencies and the Federal Trade Commission focus on fraudulent schemes whereby otherwise eligible people "pay" to receive emergency payments or reveal personal information to third-parties who fraudulently and preemptively steal their payment.[284] Fraud concerns are best addressed through inclusive consumer protection efforts, not migrant exclusion.

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[280] *See* Kathleen R. Page, Maya Venkataramani, Chris Beyrer & Sarah Polk, *Undocumented U.S. Immigrants and Covid-19*, 382 NEW ENG. J. MED. PERSP. e62 (Supp. 2020) (describing how the lack of primary care doctors for undocumented immigrants and their economic precarity, shaped by their ineligibility for various public benefits, renders emergency departments particularly important for public health).

[281] *See, e.g.*, Roger G. Noll, *The Complex Politics of Catastrophe Economics*, 12 J. RISK & UNCERTAINTY 141, 142 (1996) (describing how a "speedy response required eliminating standard government safeguards against profiteering by contractors or cheating by the beneficiaries of relief"); *cf.* Jerry L. Mashaw, *Recovering American Administrative Law: Federalism Foundations*, 1787–1801, 115 YALE L.J. 1256, 1338 (2006) (arguing that "disaster relief responded to moral premises"); David Strömberg, *Natural Disasters, Economic Development, and Humanitarian Aid*, 21 J. ECON. PERSPS. 199, 212 (2007) (discussing the United States' central role in international disaster relief).

[282] Administrative waste is a concern of the Pandemic Response Accountability Committee (PRAC) that monitors the small business and unemployment funds as well as the IRS's direct payments. *See* PANDEMIC OVERSIGHT BETA, https://www.pandemicoversight.gov [https://perma.cc/6GYP-EBDT] (including the detection of "fraud [and] waste" as part of the mission statement). PRAC includes nearly two dozen inspectors general from across the federal government. *PRAC Members*, PANDEMIC OVERSIGHT BETA, https://www.pandemicoversight.gov/our-mission/prac-members [https://perma.cc/M35N-6ZW3].

[283] *See, e.g.*, Carolyn Said, *California EDD's Fraud Failures Could Saddle Innocent with Taxes, Penalties*, S.F. CHRON. (Jan. 28, 2021), https://www.sfchronicle.com/business/article/California-EDD-created-fertile-ground-for-30-15905622.php [https://perma.cc/Q8T9-7STM] (discussing tens of billions of dollars of fraudulent payments made through Pandemic Unemployment Assistance, a federal program).

[284] Jennifer Leach, *Scams in Between Stimulus Packages*, FED. TRADE COMM'N CONSUMER INFO. (Aug. 11, 2020), https://www.consumer.ftc.gov/blog/2020/08/scams-between-stimulus-packages [https://perma.cc/DUK2-SM6X]; Said, *supra* note 283.

Beyond the problems with denying emergency economic relief, tax authorities' literal policing of migrants undermines their revenue focus.[285] Maximizing revenue means cultivating migrant tax compliance,[286] because the primary goal of the IRS and its state analogs is to collect tax revenue.[287] Canonical tax cases establish that one has an independent obligation to pay taxes on illegally-derived income, and the failure to do so comprises a distinct legal violation from the violation generating the taxable income.[288] Partnerships between the IRS and DHS may undermine taxpayer trust and undocumented immigrants' willingness to pay for fear of information sharing.[289] Tax agencies' revenue focus renders them unfit conscripts in immigration enforcement endeavors.

Enforcing tax and immigration law by focusing on individual income taxpayers or individual migrants is neither the only nor the best option. The Treasury Inspector General suggested a more "focused strategy" on employers and payroll service providers.[290] The Supreme Court similarly emphasized how the governing immigration statutes reflect Congress's intent to focus enforcement on employers rather than individual immigrant employees.[291] To the ex-

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[285] *See* Kristin E. Hickman, *Pursuing a Single Mission (or Something Closer to It) for the IRS*, 7 COLUM. J. TAX. L. 169, 172 (2016) (arguing that "the IRS has moved far beyond its original and primary mission as the nation's tax collector" and criticizing this drift). Hickman also expressly contemplates how "eligibility for social welfare payments" could be separately administered. *Id.* at 173–74.

[286] *See generally* Lipman, *supra* note 9, at 25 (describing motivations for compliance); *supra* notes 268–269 and accompanying text (discussing the impact of tax compliance on the naturalization process).

[287] Erin N. Collins, *National Taxpayer Advocate's Introductory Remarks*, *Preface* to NAT'L TAXPAYER ADVOC., FISCAL YEAR 2021 OBJECTIVES REPORT TO CONGRESS, 1, 3 (2020), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC21_Preface.pdf [https://perma.cc/XV44-ZGDG] (describing how each year, "more Americans interact with the IRS than with any other federal agency" and as a result, "[t]he IRS collects more than $3.5 trillion in taxes and distributes hundreds of billions of dollars in benefits each year").

[288] United States v. Constantine, 296 U.S. 287, 293 (1935).

[289] *See* Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration's Past Can Tell Us About Its Present and Its Future*, 104 CALIF. L. REV. 149, 164–70 (2016) (tracing "[t]he [e]volution of [i]nformation [s]haring in [i]nterior [i]mmigration [e]nforcement"); Marcella Alsan & Crystal Yang, *Fear and the Safety Net: Evidence from Secure Communities* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24731, 2019), http://www.nber.org/papers/24731 [https://perma.cc/XH8K-85U4] (analyzing how fear of immigration enforcement and information sharing can negatively affect uptake of public benefits, including by citizens in mixed-immigration status households); *supra* note 270 and accompanying text.

[290] TREASURY INSPECTOR GEN. FOR TAX ADMIN., 2017-IE-R004, A MORE FOCUSED STRATEGY IS NEEDED TO EFFECTIVELY ADDRESS EGREGIOUS EMPLOYMENT TAX CRIMES 2 (2017) (remarking on the pervasiveness of employment tax noncompliance, and how "[n]oncompliant employers or payroll service providers are subject to civil and criminal sanctions for willfully failing to remit employment taxes").

[291] Arizona v. United States, 567 U.S. 387, 406 (2012) (concluding that "[t]he correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment"); Kati L.

tent that tax authorities intersect with immigration, their resources may be most effectively deployed on employers' nonpayment of employment taxes, rather than expulsion of their undocumented workers.[292] The IRS's efforts in *Zelaya* began appropriately by focusing on institutional violators, but somehow permitted an unwise and ultimately unconstitutional instance of mission drift. [293] If this is a sign of things to come, we should be concerned.

Despite these issues, tax law's migration is not wholly flawed. I take a more agnostic approach to the second facet of the phenomenon. Migration and mobility rights are used to police often affluent citizens' tax compliance, though the less well-heeled and more sympathetic are occasionally caught in the crosshairs.[294] This second facet of tax law's migration may ultimately create problems of its own through the marketplaces for citizenship and residency, but it is less normatively troubling.[295] Nor does the consideration of migrants' tax compliance—a common part of comprehensive immigration reforms—raise similar concerns.[296] Tax compliance as a basis for eligibility for lawful residency is more sensible than the familiarly worded but questionably capricious "criminal" exclusions.[297] In sum, even if attaching migration and mobili-

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Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMPAR. LAB. L. & POL'Y J. 125, 140 (2009) (arguing that "IRCA's workplace-based immigration enforcement scheme, viewed comprehensively, largely focuses on employer restrictions"). *But see* Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 780 (2008) (arguing that employer sanctions comprise an ineffective immigration policy, including by fostering discrimination).

[292] Brendan S. Maher, *Regulating Employment-Based Anything*, 100 MINN. L. REV. 1257, 1288 (2016) (characterizing "employers as quasi-administrators" that "can handle more complicated compliance obligations than, say, individuals"); *accord* Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1107 (2009); *see also* Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695, 697–99 (2007) (describing how "withholding taxes are effective largely because they essentially make a third party [employer] responsible for paying the [worker's] taxes"); *cf.* Wishnie, *supra* note 209, at 216 (expressing concern that a "law-breaking employer may invoke the formidable powers of the government's law enforcement apparatus to terrorize its workers and suppress worker dissent under threat of deportation").

[293] *See supra* notes 174–190 and accompanying text (describing the IRS's involvement in Zelaya v. Hammer, 516 F. Supp. 3d 778 (E.D. Tenn. 2021)).

[294] *See supra* notes 249–252 and accompanying text.

[295] *See* Kit Johnson, *A Citizenship Market*, 2018 U. ILL. L. REV. 969, 993 (proposing a citizenship market to address the reality that "individuals regularly renounce their citizenship for tax reasons"); *supra* note 32 and accompanying text. *See generally* Mason, *supra* note 7.

[296] *See supra* note 269 and accompanying text; *see also* Calderon v. Sessions, 330 F. Supp. 3d 944, 950 (S.D.N.Y. 2018) (granting the petition of habeas corpus for an immigrant after discussing how petitioner "has paid his taxes" and "has worked diligently to provide for his family"); United States v. Murguia-Marquez, 700 F. Supp. 2d 1248, 1251 (S.D. Cal. 2010) (describing how, "after reviewing Defendant's lengthy criminal record and failure to pay taxes," the immigration court denied the application for cancellation of removal).

[297] *See* Hernández, *supra* note 92, at 108–12; Stumpf, *supra* note 92, at 382–86.

ty consequences to tax compliance raises issues, they should not distract from the more severe concerns arising from using tax law to police poor migrants.

CONCLUSION

Tax law's migration persists. Nineteenth-century cases force us to confront instances of this intersection, but the longer arc, predating the *Passenger Cases* and reaching to the current moment, remains underappreciated. From that inadequate appreciation comes a lack of concern for tax law's policing of poor migrants, whether via an absence of tax-based relief or via armed officers.

Tax law regulates the mobility of wealthy, tax-cheating citizens, who remain precious to the American community. Tax law also removes and punishes the undocumented, focusing on their immigration law noncompliance above any tax law compliance. Distinct circumstances give rise to varying restrictions, forbidding some delinquent taxpayers from leaving temporarily, while banishing others permanently.[298]

We should remain vigilant of how tax law's migration blurs the boundaries between the debts we nominally owe and the rights we hold fundamental. In particular, we should not allow poor migrants, who too often feel indebted, to believe that their minimal inclusion is unaffordable.

[298] Saskia Sassen, *What Data Can't See: Saskia Sassen on Invisibility and the World's Expulsed*, FRIEZE (Oct. 25, 2019), https://www.frieze.com/article/what-data-cant-see-saskia-sassen-invisibility-and-worlds-expulsed [https://perma.cc/77WH-LHGG] ("Regardless of genesis, the system has gone in the direction of expelling increasing numbers of people from their life-space. At ground level, the expelled are out. Indeed, they become invisible to the eyes of the system.").