

Financial Immigration Federalism

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Federal preemption doctrine constrains state power over undocumented immigrants. As courts and commentators focus on disputes over policing and removal, led by sanctuary cities and states, they overlook what I call “financial immigration federalism.”

This Article uncovers emerging forms of financial immigration federalism while also reconsidering familiar forms. Federal tax legislation explicitly eliminated certain tax credits to undocumented immigrants, but states continue to explore expanding them—including by incentivizing employment that is considered illegal under federal law. State entities have supported long-term, owner-occupancy mortgages to undocumented immigrants, which the traditional government-sponsored enterprises do not purchase. And undocumented immigrants, including those with legal work authorization, have long been excluded from federal lending markets for higher education, a vacuum that states have filled with divergent policies. In each of these markets, states and localities act to both expand and limit financial options to undocumented immigrants, a form of immigration federalism.

To analyze tensions between preemption and state sovereignty at the heart of financial immigration federalism, this Article uncovers the legal questions arising from states extending financial benefits to undocumented immigrants, particularly when conditioned on employment and long-term residency. I argue that competing deference regimes, including to state and local tax policy, should play a role in resolving the constitutionality of subnational financial sanctuary (or purgatory). I also consider the case for incorporating subnational intent, as opposed to just congressional or federal intent, in analyzing financial immigration federalism.

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INTRODUCTION

After six years of U.S. residency, and with two children for whom they “wanted something better,” Jorge Sanchez and his wife Minerva Abrajan embarked upon homeownership.¹ Because they lacked Social Security numbers, Sanchez and Abrajan had difficulty obtaining financing; however, they happened to live in Wisconsin while the state was experimenting with a new program.² Wisconsin’s Housing and Economic Development Authority was piloting a program to underwrite conventional mortgages to borrowers who lacked Social

1. Dan Simmons, *From Home Ownership to Foreclosure: Latinos Hit Hard by Mortgage Crisis*, WIS. ST. J. (May 22, 2011), https://madison.com/wsj/news/local/from-home-ownership-to-foreclosure-latinos-hit-hard-by-mortgage/article_78d9f7e6-82d3-11e0-be22-001cc4c002e0.html [<https://perma.cc/PZL4-GPE3>].

2. See *infra* notes 114–21 and accompanying text; see also Suzy Khimm, *The American Dream, Undocumented*, MSNBC (Aug. 28, 2014, 3:42 PM), <http://www.msnbc.com/msnbc/american-dream-undocumented> [<https://perma.cc/PM53-NYD5>] (describing how Wisconsin’s and Illinois’s efforts may have led to larger lenders like Citigroup and Wells Fargo entering the fray).

Security numbers and lawful status.³ A *state*-initiated program thus financed long-term residence in the United States for people whose presence the *federal* government deemed unlawful. In contrast, the federal government-sponsored enterprises Fannie Mae and Freddie Mac are primary mortgage purchasers in the American residential mortgage market, but they only purchase mortgages for which the borrower possesses lawful status.⁴

Homeownership is one of the ways in which states may financially integrate their undocumented⁵ residents. This integration may be motivated both by the states' own economic interests as well as by the immigrant borrowers' interests. Consider state tax policy. For decades, the federal Earned Income Tax Credit (federal EITC)—one of the nation's largest antipoverty and work-incentive programs⁶—has required a Social Security number and work authorization.⁷ Until the recent tax reform through the Tax Cuts and Jobs Act,⁸ undocumented taxpayers could at least claim the federal Child Tax Credit (federal CTC) regardless of their children's immigration status.⁹ The tax reform largely eliminated eligibility for filers whose children lacked Social Security numbers, although it made the federal CTC more generous for many other American residents.¹⁰ Yet California legislators recently proposed a bill to allow unauthorized workers to claim state-level EITCs.¹¹ Some have drawn a line from the federal CTC's exclusion of undocumented immigrants to the California EITC's (CalEITC) proposed inclusion.¹² Such inclusion of unauthorized workers would create a dissonance—states would provide tax benefits for employment that is considered illegal under federal law.¹³

3. See *infra* notes 114–21 and accompanying text.

4. See *infra* note 105 and accompanying text.

5. The Supreme Court has used both “undocumented” and “illegal” to refer to aliens without lawful status. Compare *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 103–04 (2009) (using the term “undocumented immigrants”), with *Arizona v. United States*, 567 U.S. 387, 397, 404 (2012) (using the term “illegal aliens”) (first quoting U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2010, at 2 (2011); and then quoting *Hoffman Plastic Compounds, Inc., v. NLRB*, 535 U.S. 137, 147 (2002)).

6. See generally Hilary Williamson Hoynes, *The Earned Income Tax Credit, Welfare Reform, and the Employment of Low-Skilled Single Mothers*, in STRATEGIES FOR IMPROVING ECONOMIC MOBILITY OF WORKERS: BRIDGING RESEARCH AND PRACTICE 65, 66–76 (Maude Toussaint-Comeau & Bruce D. Meyer eds., 2009) (providing a comparative perspective on the scope of the EITC).

7. See *infra* note 59 and accompanying text.

8. Pub. L. No. 115-97, 131 Stat. 2054 (2017).

9. See *infra* Section I.A.

10. See *infra* Section I.A.

11. A.B. 2066, 2017–18 Leg., Reg. Sess. (Cal. 2018) (describing the importance of the CalEITC to “working households living in poverty” and “low-income working Californians”).

12. See Sara Kimberlin, *Proposed Legislation Would Extend CalEITC to Include Young Adults and Seniors as Well as Immigrant Workers Filing with ITINs*, CAL. BUDGET & POL’Y CTR. (May 7, 2018), <https://calbudgetcenter.org/blog/proposed-legislation-would-extend-caleitc-to-include-young-adults-and-seniors-as-well-as-immigrant-workers-filing-with-itins/> [<https://perma.cc/B525-F97K>] (“Extending eligibility for the CalEITC to these families would help mitigate the negative effects of this federal [repeal of the CTC for families whose children have ITINs rather than Social Security numbers] on low-income immigrant families in California.”).

13. See *infra* Section I.A.

Federal law also prohibits undocumented students from accessing loans and grants under the Higher Education Act, a cornerstone of American higher-education finance. The majority of American parents and students plan to borrow for higher education, but for undocumented students, public borrowing and grant options are based on their state of residence.¹⁴

Undocumented immigrants' financial lives are shaped by these tax, housing finance, and higher education policies.¹⁵ Yet immigration scholars have often focused their attention on other arenas, primarily policing¹⁶ and labor law.¹⁷ The

14. SALLIE MAE, HOW AMERICA PAYS FOR COLLEGE 23 (2018), <https://www.salliemae.com/assets/research/HAP/HowAmericaPaysforCollege2018.pdf>

15. These are certainly not the only markets in which financial immigration federalism occurs, but they are significant.

16. The majority of federal criminal prosecutions continue to be for immigration violations. See Miriam Jordan, *Swift Frontier Justice for Migrants Brought to Federal Courts*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/us/border-immigration-courts.html> [<https://perma.cc/2CXY-6Q68>] (“Nearly 60 percent of all federal criminal prosecutions in April were for immigration violations. . . .”); TRAC, IMMIGRATION NOW 52 PERCENT OF ALL FEDERAL CRIMINAL PROSECUTIONS (2016), <http://trac.syr.edu/tracreports/crim/446/> [<https://perma.cc/ZKK4-L95W>]. For a sampling of themes in “crimmigration” scholarship, see Eleanor Marie Lawrence Brown, *Outsourcing Criminal Deportees*, 80 U. CHI. L. REV. 59, 60–63 (2013) (discussing the flaws in the U.S. system of criminal deportation); Margaret Hu, *Crimmigration-Counterterrorism*, 2017 WIS. L. REV. 955, 997 (discussing theoretical paradigms “to better understand the discriminatory aspects of modern vetting and screening systems promulgated by crimmigration-counterterrorism policies that are heavily cyber- and big data-reliant”); and Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 396–418 (2006) (discussing how membership theory as it relates to “crimmigration” and the social contract between the government and immigrants who have committed crimes).

“Sanctuary” has attracted similar attention. See, e.g., Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13, 43 (2016) (offering an “in-depth look at states and localities rewriting immigration enforcement policy by declining to cooperate with federal detainer requests”); Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 253–55 (2011) (critiquing the “mirror-image theory,” which proposes that “states can help carry out federal immigration policy by enacting and enforcing state laws that mirror federal statutes”); Christopher N. Lasch et al., *Understanding “Sanctuary Cities”*, 59 B.C. L. REV. 1703, 1706 (2018) (focusing on “sanctuary policies that seek to disentangle federal immigration enforcement from local criminal justice systems”); Rose Cuison Villazor, *What is a “Sanctuary?”*, 61 SMU L. REV. 133, 148 (2008) (providing a definition of sanctuary as “those laws or policies that limit government employees, particularly local police officers, from inquiring or disseminating information about the immigration status of immigrants whom they encounter”).

Although this Article focuses on state activity and federal preemption, localities also possess immigration-related authority and face state and federal preemption challenges. See *City of El Cenizo v. Texas*, 890 F.3d 164, 173 (5th Cir. 2018) (reversing district court’s preliminary injunction of Senate Bill 4, a “Texas law that forbids ‘sanctuary city’ policies throughout the state”); Ken Paxton, *Providing Sanctuary to the Rule of Law: Sanctuary Policies, Lawlessness, and Texas’s Senate Bill 4*, 55 HARV. J. ON LEGIS. 237, 245–47 (2018) (recounting conflicts in Texas over sanctuary policies).

17. See, e.g., Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1006–07 (describing the dual perceptions of undocumented workers as “border violators inappropriately treated as community members, and as community participants wrongly excluded from the protections of membership” and explaining IRCA’s entrenchment of such duality); Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1106–10 (2009) (describing the role of private employers in immigration enforcement and arguing for restrictions on employers’ ability to use immigration law as an escape valve from

literature on undocumented immigrants' financial lives has been limited and narrow,¹⁸ often focused on particular facets such as higher education,¹⁹ professional licensing,²⁰ private humanitarian aid,²¹ or what are often referred to as “welfare benefits.”²²

The literature has thus largely left unexplored the constitutional constraints on extant and emerging financial immigration federalism.²³ In the twentieth century, the Supreme Court described the federal government as having “exclusive” or

employment- and labor-law-related obligations); Leticia M. Saucedo & Maria Cristina Morales, *Masculinities Narratives and Latino Immigrant Workers: A Case Study of the Las Vegas Residential Construction Trades*, 33 HARV. J. L. & GENDER 625, 648–50 (2010) (describing how undocumented male workers may perceive their perseverance through workplace abuses as an affirmation of their masculinity).

18. In particular, two articles utilize surveys to uncover interesting habits and perceptions of undocumented immigrants, but neither explains the potential legal and constitutional constraints on public actors. See Nathalie Martin, *Giving Credit Where Credit Is Due: What We Can Learn from the Banking and Credit Habits of Undocumented Immigrants*, 2015 MICH. ST. L. REV. 989 (discussing credit and banking habits of undocumented immigrants); Chrystin Ondersma, *Undocumented Debtors*, 45 U. MICH. J. L. REFORM 517 (2012) (discussing the results of a survey of bankruptcy filings and interviews with clerks). More generally, Francine Lipman has written about the taxation of undocumented immigrants in detail. See, e.g., Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1 (2006).

19. See, e.g., Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 743–48 (2013) (analyzing higher education access efforts and policies).

20. See, e.g., Michael A. Olivas, *Within You Without You: Undocumented Lawyers, DACA, and Occupational Licensing*, 52 VAL. U. L. REV. 65 (2017) (describing how complicated federal immigration categories intersect with state licensing regimes).

21. See Shalini Bhargava Ray, *Saving Lives*, 58 B.C. L. REV. 1225, 1266–68 (2017) (arguing for reforms to narrow the criminal prohibition of federal anti-smuggling law based on legislative history, comparative law, and a balance of state anti-smuggling and private humanitarian interests). The primary federal criminal statutory provisions pertaining to private humanitarian aid are 8 U.S.C. § 1324(a)(1)(A)–(B) (2012), which create criminal consequences for an individual who “conceals, harbors, or shields from detection . . . [an] alien in any place, including any building or any means of transportation” or “encourages or induces an alien to come to, enter, or reside in the United States” in “knowing or [] reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law.”

22. As Stephen Legomsky summarized decades ago, “undocumented immigrants are generally ineligible for federal and state benefit programs” except for “emergency services, those services the denial of which would endanger the general public, and any services that have been held to be constitutionally required.” Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453, 1460 (1995) (footnote omitted). Some important examples are “emergency Medicaid, immunization programs, and, at least for the moment, public education.” *Id.* (footnote omitted).

8 U.S.C. § 1621(d) (2012) says that any “state or local public benefit,” defined broadly in § 1621(c), requires an “enactment of a State law . . . which affirmatively provides for such eligibility.” In comparing the EITC with traditional welfare programs, Lawrence Zelenak essentially defines welfare as “nontax antipoverty transfer programs.” Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867, 1867 (2005) (emphasis added). This Article demonstrates that beyond the narrow debates surrounding 8 U.S.C. § 1621(d), other sources of federal law, whether the tax code’s harmonization with IRCA or the INA’s removal provisions, may limit state financial benefits to those without lawful status.

23. For an academic perspective regarding “immigration federalism,” see Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1361 (1999) (defining immigration federalism as “states and localities play[ing a role] in making and implementing law and policy relating to immigration and immigrants”). See also Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 66–67 (using “immigration

“sole” authority to establish and enforce immigration law.²⁴ Although states once exercised immigration powers,²⁵ their role partly receded following the Civil War.²⁶ Today, federal immigration law, as a statutory matter, primarily refers to the Immigration and Nationality Act (INA)²⁷ and its amendments, including the 1986 Immigration Reform and Control Act (IRCA)²⁸ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).²⁹ The Supreme Court has described the INA as a “‘*comprehensive* federal statutory scheme for regulation of immigration and naturalization” that sets “‘the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.’”³⁰ Clare Huntington has labeled the primary content of these statutes “pure immigration law—the narrow category of rules governing the

federalism” to connote “arrangements . . . in which the states operate under, and are obliged to respect, federal immigration policies and supervision”).

24. “[T]he authority to control immigration is not only vested solely in the Federal Government, rather than the States, but also that the power over aliens is of a political character and therefore subject only to narrow judicial review.” *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (citations omitted); see also Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) (“The plenary power doctrine’s contours have changed over the years, but in general the doctrine declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions.”); Deborah M. Weissman et al., *The Politics of Immigrant Rights: Between Political Geography and Transnational Interventions*, 2018 MICH. ST. L. REV. 117, 125–26 (noting that “[t]he authority to regulate the admission, exclusion, and removal of noncitizens, however, has been vested exclusively with the federal government,” but also that “[t]he federal government has relinquished its claim to exclusive jurisdictional authority through statutory and regulatory programs ‘deputizing’ states and localities to act in immigration enforcement”).

25. See, e.g., Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841–84 (1993) (exploring state regulation of five categories of immigration policy: “regulation of the movement of criminals; public health regulation; regulation of the movement of the poor; regulation of slavery; and [regulation of] other policies of racial subordination”). See generally HIDETAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* (2017) (documenting how Massachusetts and New York regulated immigration in the nineteenth century).

26. See, e.g., *Chy Lung v. Freeman*, 92 U.S. 275, 277 (1875) (striking down a California statute that would have allowed state officers to exclude immigrants arriving by sea if they were perceived to be “lunatic, idiotic, deaf, dumb, blind, crippled, or infirm” or “a lewd or debauched woman”).

27. See, e.g., *Ruston v. U.S. Dep’t of State*, 29 F. Supp. 2d 518, 520 (E.D. Ark. 1998) (noting that the INA as amended throughout history, “remains the United States’ primary immigration law”). The INA is codified at 8 U.S.C. § 1101 et seq. The Immigration and Nationality Act of 1965 amended the earlier statute and shifted the immigration system from a national quotas system, privileging Europeans whose nationalities were already represented in the United States, to a system that increased the number of immigrants from developing countries. See Kevin R. Johnson, *Fear of an “Alien Nation”: Race, Immigration, and Immigrants*, 7 STAN. L. & POL’Y REV. 111, 112 (1996); see also Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT’L L. 319, 327 (1993).

28. Pub. L. No. 99-603, § 274A, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).

29. Pub. L. No. 104-208, § 303(a), 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.).

30. *Chamber of Commerce v. Whiting*, 563 U.S. 582, 587 (2011) (emphasis added) (quoting *De Canas v. Bica*, 424 U.S. 351, 353 (1976)).

admission and removal of non-citizens.”³¹

Although the federal government’s power over “the subject of immigration and the status of aliens” derives from a number of constitutional provisions,³² states retain several powers of subnational sovereignty primarily protected by the Tenth Amendment.³³ These sovereign powers include police powers, eminent domain, taxation, and the state’s engagement in proprietary activities.³⁴ Federal “exclusivity” can thus be disrupted by exercises of state powers,³⁵ including in financial domains.³⁶ Huntington recognized this tension, which challenges an earlier consensus of federal exclusivity and structural preemption, and argued instead for an understanding of immigration where “both the federal and state governments possess initial authority over this subject.”³⁷

31. Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 807 (2008).

32. “This authority rests, in part, on the National Government’s constitutional power to ‘establish a uniform Rule of Naturalization,’ [U.S. CONST. art. I, § 8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations.” *Arizona v. United States*, 567 U.S. 387, 394–95 (2012) (citation omitted).

33. “This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.” *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978) (quoting *Manigault v. Springs*, 199 U.S. 473, 480 (1905)); see also Rick Su, *The Promise and Peril of Cities and Immigration Policy*, 7 HARV. L. & POL’Y REV. 299, 301 (2013) (discussing the “political dynamic” and feedback loop between the federal government’s interior enforcement efforts and priorities, on the one hand, and local authority and power on the other).

34. See *Reeves, Inc v. Stake*, 447 U.S. 429, 438–39 (1980) (discussing the role of proprietary activities in state sovereignty); American Bar Association Section of Taxation, *Comments on the Definition of Political Subdivision for Tax-Exempt Bonds and Other Tax-Advantaged Bonds*, 69 TAX LAW. 313, 314 (2016) (noting caselaw holding “that there are three elements of sovereign power (the power of eminent domain, the power to tax, and the police power) [but] requir[ing] that only part or a portion of those powers be present to conclude that an entity created under state law for a governmental purpose is a political subdivision”).

35. See, e.g., Huntington, *supra* note 31, at 799–807 (discussing “state and local involvement in immigration-related matters” as it relates to federal immigration power); Leticia M. Saucedo, *States of Desire: How Immigration Law Allows States to Attract Desired Immigrants*, 52 U.C. DAVIS L. REV. 471, 480 (2018) (“Nowhere is this form of federalism more evident than in immigration regulation, where, despite widespread perception that the plenary power doctrine renders federal authority exclusive, states define important terms for immigration law.”). See generally Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (providing an account of subfederal regulation of immigration to combat the “exclusivity lie”).

36. Robert Shiller has defined finance broadly as “the science of goal architecture—of the structuring of the economic arrangements necessary to achieve a set of goals and of the stewardship of the assets needed for that achievement.” ROBERT J. SHILLER, *FINANCE AND THE GOOD SOCIETY* 6 (2012).

37. Huntington, *supra* note 31, at 811; see also Matthew J. Lindsay, *Disaggregating “Immigration Law”*, 68 FLA. L. REV. 179, 185–86 (2016) (arguing against “the notion that laws and regulations governing the rights of noncitizens to enter and remain within the United States comprise a discrete body of immigration laws . . . presumed to be part and parcel of foreign affairs and national security” and suggesting instead that the Supreme Court should “disaggregate immigration law for the purpose of constitutional review and recognize both federal and state regulation of noncitizens for what it is: a variegated conglomeration of laws and enforcement actions that concern labor, crime, public health and welfare, and, sometimes, foreign affairs and national security”).

I hope to move the proverbial needle by exploring preemption and the competing canons implicated in financial markets. These markets are increasingly the site of what Huntington might call “impure” immigration law. Where such an exercise of state power intersects with immigration law, I label it financial immigration federalism. The finance-focused regulation³⁸ of immigrants’ lives can include the tax credits described above, as well as privileged financing made available (or unavailable) to undocumented immigrants in the markets for housing or higher education.³⁹

Because scholars have somewhat neglected the regulation of immigrants’ financial lives and how such subnational regulation might be preempted,⁴⁰ the extent to which federal immigration authority displaces a state’s regulation of immigrants’ financial lives remains unclear.⁴¹ Despite a presumption against preemption in immigration,⁴² “the ‘federal interest’ in the field . . . may be ‘so dominant’ that federal law ‘will be assumed to preclude enforcement of state laws on

38. This Article describes how the finance-focused regulation of immigrants’ lives, as in the case of homeownership and higher education markets, may focus on immigration goals rather than solely on conventional financial regulation goals—whether institutional safety-and-soundness or consumer protection. And, by combining these two markets with a third case study focused on the financial benefits of tax credits, I illuminate the idea of financial immigration federalism. For a discussion of conventional financial regulation goals, see generally JOHN ARMOUR ET AL., *PRINCIPLES OF FINANCIAL REGULATION* (2016); Robin Greenwood et al., *The Financial Regulatory Reform Agenda in 2017* (Harv. Bus. Sch., Working Paper No. 2017-09, 2017), <https://www.hbs.edu/faculty/Pages/item.aspx?num=52327> [<https://perma.cc/V64N-L9EF>]. Legal scholars such as Adam Levitin have distinguished the goals of consumer financial regulation in the United States from those of prudential financial regulation. See Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 *REV. BANKING & FIN. L.* 321, 330 (2013) (distinguishing “[c]onsumer financial protection” from prudential regulators’ “primary mission [of] bank safety-and-soundness”).

39. My definition of financial immigration federalism touches upon the literature concerned with the financial effects of immigration on natives. See, e.g., Howard F. Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 *UCLA J. INT’L L. & FOREIGN AFF.* 371, 390–91 (1998) (“A country of immigration may implement a positive tariff on immigration not only through a tax on immigrants but also through restrictions on immigrant access to public entitlement programs . . . for example, by denying immigrants access to transfers, such as the earned income tax credit. . . .”). To augment this economic theory lens (and its simplifying assumption of a uniform national policy), I examine how the Constitution and federal preemption may place legal constraints on such financial policies.

40. As Viet Dinh has noted, “proper preemption analysis requires careful application of different interpretive assumptions and substantive principles in specific contexts to determine whether state laws are displaced—in many cases by congressional enactments, but in others by judicial doctrines absent any affirmative action by Congress.” Viet D. Dinh, *Reassessing the Law of Preemption*, 88 *GEO. L.J.* 2085, 2087 (2000).

41. See Caleb Nelson, *Preemption*, 86 *VA. L. REV.* 225, 225 (2000) (“The powers of the federal government and the powers of the states overlap enormously. Although the Constitution makes a few of the federal government’s powers exclusive, the states retain concurrent authority over most of the areas in which the federal government can act. As a result, nearly every federal statute addresses an area in which the states also have authority to legislate (or would have such authority if not for federal statutes.)” (footnotes omitted)).

42. See *Wyeth v. Levine*, 555 U.S. 555, 565 & n.3 (2009) (noting the presumption against preemption); see also Kati L. Griffith, *Discovering “Immigration” Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 *YALE L. & POL’Y REV.* 389, 413 (2011) (same).

the same subject.”⁴³ That is, the traditional presumption against preemption may be overpowered by countervailing forces.⁴⁴

To explore what I call financial immigration federalism, this Article begins by describing three particular financial arenas in which mismatched federal and state restrictions exist; in other words, arenas in which state immigration-status restrictions are either less or more restrictive than parallel federal restrictions. Those arenas are tax policy (child tax credits and earned income tax credits), residential mortgages, and higher education. In Part II, I briefly review relevant immigration preemption doctrine, drawing upon the many scholars who have written in this area. Finally, in Part III, I draw upon preemption doctrine, as well as other doctrines, to examine when the policies described in Part I may give rise to preemption concerns. In exploring financial immigration federalism, this Article makes three primary points about its constitutional structure. First, states must acknowledge a physical place for undocumented immigrants in society, but when states explicitly condition benefits on long-term residence or employment, preemption issues may arise. Second, as the case studies illustrate, legal canons such as the canon of deference to state and local tax policy may be as powerful, and perhaps more powerful, than deference to federal immigration policy. As a normative matter, this could translate, in part, to a more robust presumption against preemption in arenas outside the “pure” regulation of admission, residency, and removal of noncitizens. Third, although congressional intent plays a primary role in immigration preemption doctrine, the acknowledgment and analysis of subnational intent has been limited. After examining the difficulties that have led courts to disfavor consideration of state intent, I note that the immigration preemption analysis is already holistic and technical. Thus, consideration of state intent may ease the difficult task of distinguishing between permissible state regulation and preempted immigration regulation.

I. FINANCIAL IMMIGRATION FEDERALISM IN THREE ARENAS

In this Part, I explore how state and federal law in three financial arenas operates according to immigration status. I begin with tax policy, focusing on refundable tax credits, particularly the federal EITC and federal CTC. I then discuss residential mortgage and higher education finance, recognizing that issues related to higher education access have seemingly received extensive judicial and scholarly attention. In these areas, I examine how past, existing, and proposed regulation affects undocumented immigrants—a form of financial sanctuary or purgatory, depending on the topic area and jurisdiction.

43. Nelson, *supra* note 41, at 227 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also* *United States v. South Carolina*, 720 F.3d 518, 529 (4th Cir. 2013) (“We note that the presumption against preemption does not apply here because immigration is an area traditionally regulated by the federal government.”).

44. *See* Griffith, *supra* note 42, at 414 n.139 (discussing the rebuttable presumption against preemption and how it may be overcome).

America's unauthorized immigrants are numerous and increasingly diverse. According to the Pew Research Center, the over ten million unauthorized immigrants in the United States are concentrated in just six states: California, Texas, Florida, New York, New Jersey, and Illinois.⁴⁵ As compared to the early part of the century, the unauthorized immigrant population looks more diverse—a mere decade ago, a substantial majority claimed Mexican origin, but that majority has been in decline.⁴⁶ The policies profiled in this Article generally affect undocumented immigrants, and yet, they may affect different subgroups of the undocumented community differently.

A. TAX CREDITS

The federal EITC and federal CTC are among the most commonly received credits.⁴⁷ In noting their significance as antipoverty measures, scholars have characterized entitlement to these tax measures as “the new welfare rights”⁴⁸ and as playing a “prominent role in the *financial* lives of low-income families.”⁴⁹ Researchers analyzing the impacts of these credits have suggested that each dollar of tax credit increases educational achievement and long-term earnings for affected children by more than one dollar, attracting the interest of

45. See JEFFREY S. PASSELL & D'VERA COHN, PEW RES. CTR., OVERALL NUMBER OF U.S. UNAUTHORIZED IMMIGRANTS HOLDS STEADY SINCE 2009, at 18 (2016), http://assets.pewresearch.org/wp-content/uploads/sites/7/2016/09/31170303/PH_2016.09.20_Unauthorized_FINAL.pdf; see also BRYAN BAKER, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2014, at 5–6 (2017), https://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%20January%202014_1.pdf (noting a population of unauthorized immigrants over ten million from 2007–2014 and a decline in the share of unauthorized migrants of Mexican origin, from 59% in 2007 to 55% in 2014). *But see* Mohammad M. Fazel-Zarandi, Jonathan S. Feinstein & Edward H. Kaplan, *The Number of Undocumented Immigrants in the United States: Estimates Based on Demographic Modeling with Data from 1990 to 2016*, 13 PLOS ONE 1 (2018), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0201193> [<https://perma.cc/62UK-H7PD>] (arguing that the undocumented population may be over twenty million).

46. See PASSELL & COHN, *supra* note 45, at 5.

47. ELAINE MAAG, TAX POLICY CTR., REFUNDABLE CREDITS: THE EARNED INCOME TAX CREDIT AND THE CHILD TAX CREDIT 1 (2017), https://www.taxpolicycenter.org/sites/default/files/publication/139841/2001197-refundable-credits-the-earned-income-tax-credit-and-the-child-tax-credit_0.pdf. The federal CTC is usually described as “partially refundable.” See *id.* Pippa Browde has noted that the expansion of these credits has transformed “a government determined eligibility to a private, market driven industry, which acts as the intermediary to assist taxpayers to claim eligibility.” Pippa Browde, *A Consumer Protection Rationale for Regulation of Tax Return Preparers*, 101 MARQ. L. REV. 527, 538 (2017) (footnote omitted).

48. Susannah Camic Tahk, *The New Welfare Rights*, 83 BROOK. L. REV. 875, 877–78 (2018).

49. Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515, 520 (2013) (emphasis added). Ariel Jurow Kleiman has nonetheless described how the federal EITC and federal CTC demonstrate qualities of “low-end regressivity,” potentially leading to greater inequality among the poorest quintile of households. See Ariel Jurow Kleiman, *Low-End Regressivity*, 72 TAX L. REV. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=%203163618## [<https://perma.cc/YSF2-ETFS>].

cost–benefit-minded policymakers.⁵⁰

Although both the federal EITC and federal CTC originally determined eligibility independent of immigration status, they are now more restrictive.⁵¹ Though many states have copied the tax-credit structures, some are questioning the immigration-status restrictions.⁵² In this section, I trace the arcs of the federal EITC and federal CTC vis-à-vis immigration status.

1. Earned Income Tax Credits

Enacted in 1975,⁵³ the federal EITC provides financial assistance to low-income working families in hopes of “reducing the unemployment rate and reducing the welfare rolls.”⁵⁴ The financial assistance is scaled as a subsidy to income earned through work, whether wage- or self-employment.⁵⁵ Prior to significant welfare reform in 1996, immigrants encountered few barriers to claiming the federal EITC,⁵⁶ in part because the Social Security Administration handed out Social Security numbers (SSNs) freely.⁵⁷ In 1996, in light of changes by the Social Security Administration that limited access to SSNs for immigrants without work authorization, the IRS promulgated regulations to create Individual Tax Identification Numbers (ITINs) as a means for aliens without SSNs to pay their taxes.⁵⁸

50. See Raj Chetty, John N. Friedman & Jonah Rockoff, *New Evidence on the Long-Term Impacts of Tax Credits*, NAT'L TAX ASS'N 116, 116 (2011), <https://www.ntanet.org/wp-content/uploads/proceedings/2011/018-chetty-new-evidence-longterm-2011-nta-proceedings.pdf>.

51. See *infra* notes 56–65 and accompanying text.

52. See, e.g., Kim S. Rueben et al., *Upward Mobility and State-Level EITCs: Evaluating California's Earned Income Tax Credit*, 70 TAX L. REV. 477, 479 (2017) (discussing relationships between various states' EITC structures and federal structures); *infra* notes 75–78, 85–87 and accompanying text.

53. Tax Reduction Act of 1975, Pub. L. No. 94-12, § 204, 89 Stat. 26, 30–32 (codified as amended at 26 U.S.C. § 32).

54. S. COMM. ON FINANCE, TAX REDUCTION ACT OF 1975, S. Rep. No. 94-36, at 33 (1975). One scholar has argued that the early relationship to welfare created an existentially damaging racial taint for the EITC, which could be undone by empirically demonstrating that the vast majority of benefits accrue to white Americans. See Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 819–23 (2007).

55. See CTR. ON BUDGET AND POLICY PRIORITIES, THE EARNED INCOME TAX CREDIT 1 (2018), <https://www.cbpp.org/sites/default/files/atoms/files/policybasics-eitc.pdf>.

56. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 451, 110 Stat. 2105, 2107 (codified as amended at 26 U.S.C. § 32(c) (2018)) (“Earned income credit denied to individuals not authorized to be employed in the United States.”).

57. See Wayne S. Long, *Social Security Numbers Issued: A 20-Year Review*, SOC. SEC. BULL., 83, 84–85 (1993) (explaining that prior to 1996, under the agreement between the Social Security Administration and the Immigration and Naturalization Service (INS), “INS employees accepted applications for SSN’s in the course of interviewing legalization applicants. Many aliens were not able to submit the proper identity documents, such as a birth certificate. In these cases, SSA accepted INS documents as an alternative proof of identity.”); Paula N. Singer & Linda Dodd-Major, *Identification Numbers and U.S. Government Compliance Initiatives*, 104 TAX NOTES 1429, 1430–32 (2004) (tracing the origins of “the SSN” from the 1935 Social Security Act to the introduction of the ITIN in 1995).

58. See Taxpayer Identifying Numbers (TINs), 61 Fed. Reg. 26,788 (May 29, 1996) (codified at 26 C.F.R. § 301.6109) (“The first change is the introduction of a new IRS-issued TIN, called an IRS individual taxpayer identification number (ITIN), for use by alien individuals, whether resident or nonresident, who currently do not have, and are not eligible to obtain, social security numbers. The

Congress also passed welfare reform in 1996, which required filers seeking the federal EITC to possess a work-eligible SSN.⁵⁹ The Government Accountability Office (GAO) had argued that because “illegal aliens cannot be employed lawfully in the United States” and “the [EITC] is intended in part to encourage employment, [the EITC] works at cross purposes with the prohibition on employment of illegal aliens.”⁶⁰ Thus, in the words of the Joint Committee on Taxation, “Congress did not believe that individuals who are not authorized to work in the United States should be able to claim the credit.”⁶¹ This is, however, a slight misreading of the purpose of the contemporary federal EITC, which allows for income earned from self-employment and independent contracting,⁶² in addition to income earned from employment.⁶³ Such self-employment and independent contracting is less stringently regulated under federal immigration law.⁶⁴ The stated immigration-harmonizing purposes notwithstanding, scholars have suggested that the real motivation was simple cost cutting.⁶⁵

More recently, however, immigration restrictionists explicitly tied tax-credit eligibility to immigration policy: during the latest government shutdown, Senators proposed a statutory program to protect immigrant youth who had been granted temporary status under the Deferred Action for Childhood Arrivals

Social Security Administration generally limits its assignment of social security numbers to individuals who are U.S. citizens and alien individuals legally admitted to the United States for permanent residence or under other immigration categories which authorize U.S. employment.”).

59. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 451, 110 Stat. at 2107; 26 U.S.C. § 32(c)(1)(E)–(F), (c)(3)(D), (m) (2018) (noting that both adults and at least one qualifying child must report their Social Security numbers). Recipients of Deferred Action for Childhood Arrivals and others whose immigration status provides them access to a Social Security number and work authorization are therefore eligible.

60. U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO/GGD-95-136, EARNED INCOME CREDIT: TARGETING TO THE WORKING POOR 6 (1995) (emphasis added), <https://www.gao.gov/assets/110/105953.pdf>.

61. STAFF OF J. COMM. ON TAXATION, 104TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 104TH CONGRESS 394 (Comm. Print 1996).

62. See § 32(c)(2)(a)(ii) (including self-employment income in the definition of “earned income”); § 1402(a) (defining “net earnings from self-employment” as “the gross income derived by an individual from any trade or business carried on by such individual . . .”). For the purposes of the IRS, if you are an independent contractor, you are self-employed. See *Independent Contractor Defined*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined> [<https://perma.cc/3JX2-2RY4>] (last updated Apr. 24, 2018).

63. § 32(c)(2)(A)(i) (defining “earned income” to include income earned from employment); see also *1099-Misc Income Treatment Scenarios*, IRS, <https://www.etc.irs.gov/tax-preparer-toolkit/schedule-c-and-record-reconstruction-training/1099-misc-income-treatment> [<https://perma.cc/6435-8AY8>] (last updated July 19, 2017).

64. See 8 U.S.C. § 1324a(a)(1)(A) (2018); 8 C.F.R. § 274a.1(f) (2018) (excluding “independent contractors” from the definition of “employee[s],” who are subject to an employer’s verification of work authorization). Nonetheless, it is still illegal to “contract . . . to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien.” 8 U.S.C. § 1324a(1)(A), (4). See also Griffith, *supra* note 42, at 392 (noting the “potential conflict between FLSA’s and Title VII’s inclusiveness of a broad class of workers, including undocumented workers, and the exclusiveness of subfederal laws prohibiting the employment of undocumented workers entirely”).

65. See Lipman, *supra* note 18, at 40.

program.⁶⁶ However, eligibility would have been contingent on reimbursement of any refundable tax credits that applicants received on the basis of their lawfully authorized work.⁶⁷

The majority of states now have their own state EITCs as complements to the federal program, though they vary in their details.⁶⁸ The standard approach is simply to calculate the state EITC as a percentage of the federal EITC.⁶⁹ If states calculate state EITC as a percentage of federal EITC, undocumented immigrants in these states are ineligible for EITC benefits.

Because California is consistently estimated to be the state with the largest immigrant population and the largest undocumented immigrant population, its program—the CalEITC—is particularly relevant for understanding financial immigration federalism.⁷⁰ The CalEITC targets the lowest income earners.⁷¹ The CalEITC also did not originally include self-employment income but began doing so recently—a relevant change that will be analyzed in Part III.⁷² For the 2016 tax year, the calculated-income ceiling for households with two or more qualifying children was \$14,161; for 2017, after some significant changes, it was just over \$22,000.⁷³ In contrast, the federal ceiling approached \$50,000.⁷⁴

In 2018, spurred by a budget surplus, California legislators introduced a bill to expand the CalEITC with the goal of reaching more low-income Californians,

66. See Vulnerable Immigrants Protection and Security Act, S. Amdt. 5 to H.R. 268, 116th Cong. § 102 (2019).

67. *Id.* (requiring that an applicant for immigration protection “has paid to the Treasury of the United States, in addition to any amounts owed, an amount equal to the aggregate value of any disbursements received by such alien for refunds described in section 1324(b)(2) of title 31, United States Code”). Section 1324(b)(2) provides for refundable tax credits. 31 U.S.C. § 1324(b)(2) (2012).

68. See Rueben et al., *supra* note 52, at 489–93.

69. See *id.* at 479.

70. See BAKER, *supra* note 45, at 4–5; Gustavo López et al., *Key Findings About U.S. Immigrants*, PEW RES. CTR. (Nov. 30, 2018), <http://www.pewresearch.org/fact-tank/2018/11/30/key-findings-about-u-s-immigrants/> [<https://perma.cc/6NXA-Q5HT>] (noting that California has the largest immigrant population of any state, regardless of immigration status).

71. See Rueben et al., *supra* note 52, at 493. Of note, claims continue to lag behind estimates of the eligible population. See *The 2018–19 Budget: California Earned Income Tax Credit Education and Outreach*, CAL. LEGIS. ANALYST’S OFFICE (May 8, 2018), <http://www.lao.ca.gov/Publications/Report/3826/> [<https://perma.cc/2G8L-6Z6C>].

72. CAL. S. COMM. ON BUDGET & FISCAL REVIEW, BILL ANALYSIS, S.B. 106, 2017–18 Sess. (Cal. 2017), <https://www.ftb.ca.gov/law/legis/17-18bills/sb106-FINAL.pdf> (explaining that the purpose of the bill is to allow more Californians, including those who are self-employed, to claim the CalEITC); *California Earned Income Tax Credit (CalEITC)*, ST. OF CAL. FRANCHISE TAX BD., <https://www.ftb.ca.gov/individuals/faq/net/900.shtml> [<https://perma.cc/JU4W-G7VZ>] (last updated Jan. 23, 2019) (explaining that “families earning wages or self-employment income up to \$24,950 may qualify for CalEITC” for tax year 2018).

73. *California Earned Income Tax Credit (CalEITC)*, *supra* note 72.

74. See, e.g., *2017 EITC Income Limits, Maximum Credit Amounts and Tax Law Updates*, IRS, <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/eitc-income-limits-maximum-credit-amounts-1-year> [<https://perma.cc/8PU7-ASSZ>] (last updated July 24, 2018); *2016 EITC Income Limits, Maximum Credit Amounts and Tax Law Updates*, IRS, <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/eitc-income-limits-maximum-credit-amounts-2-years> [<https://perma.cc/6PBY-DCSE>] (last updated Aug. 23, 2018).

including undocumented immigrants.⁷⁵ The proposed expansion targeted formerly ineligible groups, including individuals without children who are between the ages of eighteen and twenty-five, as well as those over age sixty-five.⁷⁶ However, California did not ultimately extend the CalEITC to undocumented immigrants.

Nonetheless, the legislators' effort was influential and substantive. A rather broad coalition of advocacy organizations supported California's proposal, which was estimated to expand eligibility to over 100,000 immigrant working families, marking a notable precedent for future action in California or beyond.⁷⁷ After California's bill, the Oregon legislature is considering an expansion of its own EITC to provide a credit for undocumented immigrants' earnings.⁷⁸

2. Child Tax Credits

As with the federal EITC, undocumented immigrants were once able to claim the federal CTC for undocumented immigrant children.⁷⁹ However, the 2017 Tax Cuts and Jobs Act effectively ended the practice, requiring undocumented immigrants to list the Social Security number (SSN) of each child in order to claim the full credit.⁸⁰ In passing the reformed federal CTC, Congress chose a less restrictive alternative than a House version that would have excluded any parent without a SSN from claiming the credit.⁸¹ Even as the federal CTC became more generous on both the intensive and extensive (higher income) margins,⁸² it largely terminated eligibility for filers whose children lacked SSNs.⁸³

Some state tax credits and exemptions de facto changed, even in the absence of state legislative action. California's "dependent exemption" is calculated

75. A.B. 2066, 2017–18 Leg., Reg. Sess. (Cal. 2018); *see also* Adam Ashton, *Tax Break for Undocumented Immigrants Pushed by California Democrats*, SACRAMENTO BEE (June 7, 2018, 12:47 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article212753674.html> [<https://perma.cc/K7K5-H9QH>].

76. *See The 2018–19 Budget: The May Revision: State Earned Income Tax Credit Expansion*, CAL. LEGIS. ANALYST'S OFFICE (May 14, 2018), <http://www.lao.ca.gov/Publications/Report/3835> [<https://perma.cc/72TE-5TEU>].

77. *See* Letter from Michele Stillwell-Parvensky, Children's Def. Fund – Cal., et al., to Kevin de León et al., Legis. & Budget Comm. Leaders (Feb. 14, 2018), <https://wclp.org/wp-content/uploads/2018/02/Coalition-CalEITC-Priorities-Budget-Letter-2.14.pdf>.

78. H.B. 3028, 80th Legis. Assemb., Reg. Sess. § 1 (Or. 2019).

79. *See* Lipman, *supra* note 18, at 44.

80. *See, e.g.*, 26 U.S.C. § 24(c)(2), (h)(7) (2018) ("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) (allowing a limited \$500 dependent benefit without the Social Security number required for a "qualifying child").

81. H.R. 1, 115th Cong. § 1103(a)(1) (2017).

82. The per-qualifying-child credit for the federal CTC temporarily increased from \$1,000 to \$2,000. *See* 26 U.S.C. § 24(h)(2); *see also id.* § 24(h)(6) (lowering earned-income threshold to \$2,500 from \$3,000). The phase-out threshold also increased from \$110,000 to \$400,000 for joint-filers. *Id.* § 24(h)(3). Lastly, the earned income minimum for refundability decreased from \$3,000 to \$2,500. *Id.* § 24(h)(6).

83. *See supra* note 80.

independently of the federal tax credit,⁸⁴ but New York’s Empire State Child Credit was anchored to federal eligibility.⁸⁵ In other words, to be entitled to the refundable credit, New York filers needed to have a child who qualified for the *federal* child tax credit.⁸⁶ Unless New York state law severed this contemporaneous tie between the federal and state definitions of “qualifying child,” the federal elimination of tax credits for undocumented children would result in their ineligibility for New York’s child tax credit as well. New York, accordingly, severed the contemporaneous tie, choosing instead to tie state eligibility to federal eligibility as it existed prior to the Tax Cuts and Jobs Act.⁸⁷

In sum, although immigrants without lawful status could once claim the federal EITC and federal CTC, statutory amendments have severely restricted, if not extinguished, eligibility. At the same time, states that have their own EITCs and CTCs have used varying criteria to determine eligibility and have diverged from federal practice.⁸⁸ States continue to actively consider expanding eligibility to immigrants without lawful status, even as the federal government moves in a more restrictive direction.⁸⁹

B. RESIDENTIAL MORTGAGES

In this section, I focus on the mechanisms of mortgage lending for undocumented immigrants and related federal and state involvement.⁹⁰ Undocumented immigrants may purchase and occupy real property in the United States, rendering them U.S. homeowners.⁹¹ Homeownership is often looked upon favorably by

84. See *2017 California Tax Rates and Exemptions*, ST. OF CAL. FRANCHISE TAX BD., <https://www.ftb.ca.gov/forms/2017-California-Tax-Rates-and-Exemptions.shtml#ec> [<https://perma.cc/5BJ5-RQ6E>] (last updated Aug. 01, 2018) (noting a dependent exemption amount of \$353).

85. N.Y. TAX LAW § 606(c-1) (McKinney 2018).

86. See *id.* (“For the purposes of this subsection, a qualifying child shall be a child who meets the definition of qualified child under section 24(c) of the internal revenue code and is at least four years of age.”).

87. See *id.* (“For purposes of this subsection, any reference to section 24 of the Internal Revenue Code shall be a reference to such section as it existed immediately prior to the enactment of Public Law 115-97.”).

88. The first of these credits, adopted by Maryland in 1987, “followed an approach that has since become standard” among states, “which is to specify the amount of the state credit as a simple percentage of the federal credit.” Rueben et al., *supra* note 52, at 479. New Jersey based its refundable EITC on a statutorily specified percentage that fluctuates based on budget circumstances. See N.J. STAT. ANN. § 54A:4-7 (West 2018). Maine’s EITC recipients receive an amount equal to five percent of the federal credit. See ME. STAT. tit. 36, § 5219-S (2015). In contrast, California has one of the most unique EITC designs, utilizing a more targeted program that significantly departs from the federal credit. See CAL. REV. & TAX. CODE § 17052 (West 2018); STATE OF CAL. FRANCHISE TAX BD., CALIFORNIA 540: 2015 PERSONAL INCOME TAX BOOKLET 67–70 (2015), https://www.ftb.ca.gov/forms/2015/15_540bk.pdf.

89. See *supra* notes 59–65 and accompanying text.

90. Only a small minority of residential sales in the United States are all-cash, rendering financing important. NAT’L ASS’N OF REALTORS RES. GROUP, HOME BUYERS AND SELLERS GENERATIONAL TRENDS REPORT 9 (2019), <https://www.nar.realtor/sites/default/files/documents/2019-home-buyer-and-seller-generational-trends-04-03-2019.pdf> [<https://perma.cc/6PJ5-H7CK>].

91. Noncitizen landownership restrictions vary from state to state, though as one scholar has asserted, “they are enforced infrequently.” Kit Johnson, *Buying the American Dream: Using Immigration Law to*

immigration judges in removal proceedings,⁹² and federal law contemplates that undocumented immigrants may remain in the country for some time.⁹³ Indeed, longer durations of unlawful presence may render an immigrant eligible for cancellation of removal under certain circumstances.⁹⁴ In some cases, judges have even asked petitioners to submit residential deeds.⁹⁵

Congress chartered Fannie Mae and Freddie Mac in 1938 and 1970, respectively, to encourage long-term homeownership throughout the country.⁹⁶ Fannie Mae and Freddie Mac are government-sponsored enterprises (GSEs)⁹⁷ and not

Bolster the Housing Market, 81 TENN. L. REV. 829, 868 (2014). Interestingly, at the federal level, the Department of Agriculture imposes special reporting requirements for noncitizens who have acquired agricultural land. See 7 U.S.C. § 3501 (2012).

92. See, e.g., *Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 749–50 (9th Cir. 2007) (Pregerson, J., dissenting) (noting that petitioner and his brother own a house together just before noting petitioner’s “upstanding” background); *Matter of M-A-P- Motion on Administrative Appeals Office Decision Application: Form I-601. Application for Waiver of Grounds of Inadmissibility*, 2016 WL 3055441, at *4 (Dep’t of Homeland Sec. May 10, 2016) (“Here, the favorable factors [include] . . . his past residence in the United States for over 25 years, . . . the Applicant’s homeownership in the United States, [and] his payment of taxes. . . . The unfavorable factors [include] . . . his unauthorized stay and employment in the United States.”). *But see* *Perez-Fuentes v. Lynch*, 842 F.3d 506, 509 (7th Cir. 2016) (noting how an immigrant’s all-cash purchase of a home in light of minimally reported income precluded a finding of good moral character).

The value of homeownership is distinct from community ties alone during immigration proceedings. In explaining the role of discretion in immigration court and the equities of a particular case, the *Arizona v. United States* majority at the Supreme Court also noted, “long ties to the community” as a factor. 567 U.S. 387, 396 (2012).

93. See *id.* (“Removal is a civil, not criminal, matter. A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. . . . [A]liens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal [including asylum, cancellation of removal, and voluntary departure].” (citations omitted)); *Plyler v. Doe*, 457 U.S. 202, 226 (1982) (noting how some unlawfully present children have “inchoate federal permission to remain”).

94. See *Pereira v. Sessions*, 138 S. Ct. 2105, 2110 (2018) (“[T]he Attorney General of the United States has discretion to ‘cancel removal’ and adjust the status of certain nonpermanent residents . . . [that] have ‘been physically present in the United States for a continuous period of not less than ten years. . . .’” (citing 8 U.S.C. § 1229b(b) (2012))).

95. See Margot K. Mendelson, Note, *Constructing America: Mythmaking in U.S. Immigration Courts*, 119 YALE L.J. 1012, 1049 (2010) (“To own real estate is a great virtue, and immigrants are encouraged to include copies of housing deeds along with their vital documents submitted to court. Again and again, judges remark approvingly about home ownership.” (emphasis added)).

96. See *About Fannie Mae & Freddie Mac*, FED. HOUS. FIN. AGENCY, <https://www.fhfa.gov/SupervisionRegulation/FannieMaeandFreddieMac/Pages/About-Fannie-Mae—Freddie-Mac.aspx> [<https://perma.cc/E5BF-5L3U>] (last visited Apr. 22, 2019); see also Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283, 1298 (2014) (describing Fannie Mae as an “institution[] that would play a major part in aiding the poor and middle class in buying homes”). *But see* A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership is Not Always a Good Thing*, 84 IND. L.J. 189, 209 (2009) (arguing that certain mortgage products, including those with adjustable rates, “do not encourage long-term homeownership”).

97. See 2 U.S.C. § 622(8)(A)(i) (2018) (defining the term “government-sponsored enterprise” to include “a corporate entity created by a law of the United States that . . . has a Federal charter authorized by law”).

agencies per se.⁹⁸ Since 2008, they have remained under the conservatorship of the Federal Housing Finance Agency (FHFA)—an agency⁹⁹ created by the Housing and Economic Recovery Act (HERA), which mandates that the enterprises meet certain minimum capital levels.¹⁰⁰ The GSEs purchase mortgages from lenders and then package them into mortgage-backed securities.¹⁰¹ Through this packaging and the guarantee of the borrower repayment, GSEs attract investors to the secondary-mortgage market and expand the capital pool for housing.¹⁰² Pursuant to HERA’s “extraordinary breadth,”¹⁰³ FHFA supervises and regulates the GSEs by appointing itself conservator and promulgating rules to update the GSEs’ capital requirements.¹⁰⁴

Since even before FHFA conservatorship, both Freddie Mac and Fannie Mae have conditioned mortgage purchases on the lender’s representation that a non-U.S. citizen borrower possesses lawful immigration status.¹⁰⁵ The Federal Housing Administration (FHA), a component of the Department of Housing and Urban Development that ensures mortgages to higher risk or first-time borrowers, has similar eligibility rules for its financing programs.¹⁰⁶

98. Before 2008, the Congressional Budget Office described a GSE as “exempt from most, if not all, laws and regulations applicable to federal agencies, officers, and employees.” CONG. BUDGET OFFICE, CONTROLLING THE RISKS OF GOVERNMENT-SPONSORED ENTERPRISES 2 (1991), <https://www.cbo.gov/sites/default/files/102nd-congress-1991-1992/reports/04-1991-gsesrev2.pdf>.

99. See 12 U.S.C. § 4511(a) (2012).

100. See 12 U.S.C. §§ 4611(a)(1), 4612 (2012); *FHFA At-A-Glance*, FED. HOUS. FIN. AGENCY, <https://www.fhfa.gov/AboutUs> [<https://perma.cc/4SZE-XXA2>] (last updated Sept. 25, 2018).

101. See Kathryn Judge, *Fragmentation Nodes: A Study in Financial Innovation, Complexity, and Systemic Risk*, 64 STAN. L. REV. 657, 670–77 (2012) (describing the roles of Fannie Mae, Freddie Mac, and Ginnie Mae in creation of mortgage-backed securities, as well as the growth of private-label, mortgage-backed securities built upon mortgages not backed by GSEs).

The status of Fannie Mae and Freddie Mac is further complicated because conservatorship was a predicate to a deal made by the U.S. government, in which it provided \$200 billion of capital to each enterprise in exchange for becoming a senior, preferred stockholder; the U.S. government remains as such today. See David Min, *How Government Guarantees Promote Housing Finance Stability*, 50 HARV. J. ON LEGIS. 437, 440–41 (2013).

102. See *About Fannie Mae & Freddie Mac*, *supra* note 96.

103. See *Perry Capital v. Lew*, 70 F. Supp. 3d 208, 225 (D.D.C. 2014), *aff’d in part, remanded in part sub nom. Perry Capital v. Mnuchin*, 848 F.3d 1072 (D.C. Cir. 2017), *superseded by*, 864 F.3d 591 (D.C. Cir. 2017).

104. See 12 U.S.C. § 4611(a)(1); Enterprise Capital Requirements, 83 Fed. Reg. 33,312, 33,315 (proposed July 17, 2018).

105. See *Non-U.S. Citizen Borrower Eligibility Requirements*, FANNIE MAE (Dec. 4, 2018), <https://www.fanniemae.com/content/guide/selling/b2/2/02.html> [<https://perma.cc/YY6T-GWSX>] (“By delivering the mortgage to Fannie Mae, the lender represents and warrants that the non-U.S. citizen borrower is legally present in this country.”); FREDDIE MAC, SINGLE-FAMILY SELLER/SERVICER GUIDE, at 5103-1 (Apr. 10, 2019), <http://www.freddiemac.com/singlefamily/pdf/guide.pdf> (“A non-U.S. citizen who is lawfully residing in the U.S. as a permanent or nonpermanent resident alien is eligible for a Mortgage on the same terms as a U.S. citizen. A Mortgage to a non-U.S. citizen who has no lawful residency status in the United States is not eligible for sale to Freddie Mac.”).

106. A non-permanent resident alien must have a SSN and employment authorization. See U.S. DEP’T OF HOUS. & URBAN DEV., *FHA SINGLE FAMILY HOUSING POLICY HANDBOOK* 134 (2016). Although “U.S. citizenship is not required for Mortgage eligibility . . . [i]n no case is a Social Security card sufficient to prove immigration or work status.” *Id.* at 133. FHA also requires that borrowers have “lawful residency,” although that term is not defined. *Id.* at 134. The ambiguous nature of these

Thus, despite their central role in the U.S.-citizen and lawful-permanent-resident mortgage markets, the federal government and its usual guarantees are not available to borrowers without lawful status.¹⁰⁷

A number of private banks and financial institutions¹⁰⁸ have nonetheless experimented with financing mortgages for applicants who do not possess lawful immigration status.¹⁰⁹ Borrowers without SSNs¹¹⁰ possess ITINs issued by the IRS for income tax purposes, and their mortgages are therefore often called ITIN mortgages. According to a report from the U.S. Treasury, “[b]y 2007, ITIN lending was occurring in roughly 40 states, and by 2008, immigrants had borrowed between \$1 and \$2 billion in ITIN mortgages.”¹¹¹ ITIN mortgages generally appear to require twenty percent down payments, owner-occupancy, and higher

requirements as to certain immigrant populations has recently attracted attention in the context of DACA recipients, who are eligible for both SSNs and employment. See Nidhi Prakash, *The Trump Administration is Quietly Denying Federal Housing Loans to DACA Recipients*, BUZZFEED NEWS (Dec. 14, 2018, 11:46 AM), <https://www.buzzfeednews.com/article/nidhiprakash/daca-trump-denied-federal-housing-loans> [<https://perma.cc/KBK7-9ZCU>].

107. See Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1273–74 (2002) (discussing GSE securitization and its relationship to capital provision in the housing market). There are more limited, private options—for example, some investors will repurchase ITIN loans. See MARTHA ARGELIA MARTINEZ, UNIV. OF NOTRE DAME, INST. FOR LATINO STUDIES, PROMOTING AND MAINTAINING HOUSEHOLD OWNERSHIP AMONG LATINO IMMIGRANTS 13 (2007), https://www.researchgate.net/profile/Martha_Martinez3/publication/260144809_Promoting_and_Maintaining_Household_Ownership_among_Latino_Immigrants/links/0deec52fbdb1782286000000/Promoting-and-Maintaining-Household-Ownership-among-Latino-Immigrants.pdf (describing how small and medium banks that do offer ITIN loans require higher capitalization, and also noting an emerging secondary market for investor purchases). Further, Martinez explains:

Although the fact that these companies are buying loans from banks will somewhat increase the affordability of mortgage loans for Latino immigrants, they represent a secondary market that is only just emerging . . . [and] do not create a highly competitive market that would translate into the smallest possible interest rates and fees for Latino borrowers. The interest rates offered by these institutions are 1 and 2 percent more expensive than the traditional compliance loans in the prime market. . . .

Id.

108. I use banks and financial institutions to include both depository institution lenders, like First National Bank of America, and non-depository institution lenders, like Alterra Home Loans.

109. See Robin Sidel, *Big Banks’ Loan Push: Illegal Immigrants*, WALL ST. J. (May 3, 2007, 12:01 AM), <https://www.wsj.com/articles/SB117815439999290317> [<https://perma.cc/4WQC-Q6G3>].

110. Just as it would be inaccurate to suggest that an immigrant without an SSN cannot possess lawful status, see *infra* note 114, it would be inaccurate to strictly equate ITIN borrowers with “noncitizen borrowers.” Although all citizens are entitled to SSNs, some do not possess SSNs due to religious objections. *But see* Miller v. Comm’r, 114 T.C. 511, 512 (2000) (holding that requirement to provide SSNs of dependent children to claim dependency deductions does not violate petitioners’ right to free exercise of religion).

111. OFFICE OF INSPECTOR GEN., DEP’T OF TREASURY, SAFETY AND SOUNDNESS: IN-DEPTH REVIEW OF SECOND FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO 4 (2013) (citing DEYANIRA DEL RIO, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY OF THE OHIO STATE UNIV., MORTGAGE LENDING AND FORECLOSURES IN IMMIGRANT COMMUNITIES: EXPANDING FAIR HOUSING AND FAIR LENDING OPPORTUNITY AMONG LOW INCOME AND UNDOCUMENTED IMMIGRANTS 8 (2010)). This is just a small proportion of the approximately \$10 trillion in mortgage extended for one to four family homes from 2000–2008. See *id.* at 4 n.8.

interest rates relative to those rates available to otherwise similar but lawfully present borrowers eligible for purchase by the GSEs.¹¹² Despite the twenty percent down payment gold standard, which results in an eighty percent Loan to Value (LTV) ratio, nearly thirty percent of GSE-purchased mortgages as well as the majority of recent owner-occupancy originations—GSE purchased or not—have LTVs of over eighty percent.¹¹³ (Of course, even if these aggregated anecdotes and statistics suggest that ITIN mortgages possess stricter terms than non-ITIN mortgages, the ITIN and non-ITIN mortgage-borrower characteristics may differ above and beyond immigration status.)

Beyond private actors, states have also supported residential-mortgage finance for immigrants without SSNs, including undocumented immigrants.¹¹⁴ Consider

In terms of standards, in the 2015 version of the Comptroller’s Handbook on Residential Real Estate Lending, the OCC wrote:

Lending to ITIN borrowers should be effectively managed because it may be difficult to conduct a traditional credit review for ITIN loan applicants due to a number of factors, including the borrower’s immigration status. When evaluating ITIN loan applications, institutions may have to rely on a variety of sources to verify credit history, employment status, and income. Risk management programs for ITIN lending may include (1) a comprehensive credit review function to mitigate risk when unable to conduct traditional credit assessment; (2) a determination of the true identity of the borrower; (3) an assessment of the borrower’s job stability; and (4) consideration of the risk posed by the borrower’s immigration status and ties to the community.

OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER’S HANDBOOK: RESIDENTIAL REAL ESTATE LENDING 4 (2015), <https://www.occ.treas.gov/publications/publications-by-type/comptrollers-handbook/residential-real-estate-lending/pub-ch-residential-real-estate.pdf> (footnote omitted).

112. See, e.g., *I-TIN Products*, ALTERRA HOME LOANS, <https://goalterra.com/our-products/itin-products/> [<https://perma.cc/7HBP-NBXA>] (last visited Apr. 23, 2019) (noting eligibility requirements such as sufficient financial history, minimum twenty percent down payment, higher interest rates, and owner occupancy); *ITIN Purchase or Rate and Term Refinance*, UNITED MORTG. CORP. OF AM., <http://www.united4loans.com/loan-options/itin-first-time-homebuyer/> [<https://perma.cc/JGD5-JD9L>] (last visited Apr. 23, 2019) (noting the same eligibility requirements, but offering ITIN loans with only ten percent minimum down payment); see also FIRST NAT’L BANK OF AM., *ITIN MORTGAGES* (2018), https://www.fnba.com/wp-content/uploads/2018/04/ITIN_042618.pdf (not requiring owner occupancy, but quantifying interest-rate penalty for non-owner occupancy); *ITIN Loans*, PATRON MORTG., <http://www.spcloans.com/ITINLoans> [<https://perma.cc/EPJ9-MQN6>] (last visited Apr. 23, 2019) (not requiring owner occupancy, but requiring minimum twenty percent down payment and sufficient financial history).

Related to down payments, see, for example, Ryan Bubb & Prasad Krishnamurthy, *Regulating Against Bubbles: How Mortgage Regulation Can Keep Main Street and Wall Street Safe—From Themselves*, 163 U. PA. L. REV. 1539, 1548 (2015) (arguing for “an ex ante limit on mortgage leverage” because “[r]equiring substantial down payments would limit the incidence and magnitude of debt-fueled housing bubbles”).

113. See FED. HOUS. FIN. AGENCY, ANNUAL HOUSING REPORT 2017, at 30 tbl.B2 (2017), <https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/2017-Annual-Housing-Report-October-30-2017.pdf> (showing that 26.46% of GSE-purchased mortgages had an LTV ratio over 80% in 2016); HOUS. FIN. POLICY CTR., *HOUSING FINANCE AT A GLANCE: A MONTHLY CHARTBOOK 17* (2018), https://www.urban.org/sites/default/files/publication/98669/housing_finance_at_a_glance_a_monthly_chartbook_june_2018_0.pdf (showing that the mean LTV was eighty-eight percent in 2018).

114. Immigrants who possess lawful status may be ineligible for SSNs or work authorization. Consider spouses of H1-A visa holders who hold H-4 visas themselves and who were, until recently,

the Wisconsin Housing and Economic Development Authority (WHEDA), an independent authority that utilizes tax-exempt bonding authority to finance its affordable-housing operations.¹¹⁵ WHEDA can operate relatively independently from the state because the debts it incurs are its own, not Wisconsin's.¹¹⁶ WHEDA supports residential housing by purchasing and servicing loans from participating lenders as a "wholesale" lender, although it does not offer mortgage loans directly.¹¹⁷ WHEDA thus parallels the GSEs' structure in some respects.

In 2004, WHEDA began accepting ITIN numbers for its mortgages to first-time homebuyers "in an effort to provide loans to undocumented immigrants and borrowers with little or no traditional credit histories."¹¹⁸ At the ITIN program's inception, a WHEDA spokesperson responded to criticism by suggesting that the authority was not concerned with borrowers' immigration status and that all state residents, regardless of status, might possess a "right to homeownership."¹¹⁹ He explained, "We're not the INS so we're only interested in whether they have the financial capacity to qualify for a loan. . . . If Congress in its wisdom wants to deal with immigration issues, let it. . . . We just want to take care of housing needs."¹²⁰ The president of a participating bank lender commented: "[o]ur portfolio is evidence that the undocumented are model customers."¹²¹

Municipalities have followed in the state's footsteps. For example, the Madison City Council granted homeowners with ITIN loans eligibility for municipal down payment and housing rehabilitation assistance.¹²²

However, unsupportive state legislators introduced a bill to ban ITIN loans.¹²³ Although the Wisconsin Bankers Association supported ITIN mortgages,¹²⁴ the

eligible for work authorization. For a more comprehensive list, see *Program Operations Manual System (POMS)*, SOC. SEC. ADMIN., <https://secure.ssa.gov/poms.nsf/lnx/0110211420> [<https://perma.cc/V77L-FPF6>] (last updated Aug. 17, 2018).

115. See RORY TIKALSKY, WIS. LEGISLATIVE FISCAL BUREAU, WISCONSIN HOUSING AND ECONOMIC DEVELOPMENT AUTHORITY: INFORMATIONAL PAPER 88, at 2 (2019), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2019/0088_wisconsin_housing_and_economic_development_authority_informational_paper_88.pdf. The WHEDA rarely accepts state appropriations. *See id.* at 4.

116. *See State ex rel. Warren v. Nusbaum*, 208 N.W.2d 780, 804 (Wis. 1973) ("No enforceable legal obligation is created on the part of the state to subsidize the debts of [WHEDA] even though good judgment may dictate that it do so voluntarily. No state debt can be created where payment of state funds is to be made solely at the state's option.").

117. *See Mortgage Lending*, WHEDA, <https://www.wheda.com/Mortgage-Lending/> [<https://perma.cc/6PNT-7TJT>] (last visited Apr. 23, 2019).

118. *See Wisconsin, Illinois Accept Alternative Documentation to Underwrite Mortgage Loans*, HDR CURRENT DEV., Aug. 1, 2005, available at 33 NO. CD-16 HDR Current Developments 10. Although WHEDA's ITIN acceptance began as a pilot program in 2004, it expanded to more than two dozen banks by 2005. *Id.*

119. *Id.*

120. *Id.*

121. Miriam Jordan, *Mortgage Lenders Court Illegal Aliens*, PITTSBURGH POST-GAZETTE (July 8, 2005, 12:00 AM), <https://www.post-gazette.com/business/businessnews/2005/07/08/Mortgage-lenders-court-illegal-aliens/stories/200507080183> [<https://perma.cc/M92Q-AJGU>] (quoting Jeff Bowman, president of Mitchell Bank).

122. *See Simmons*, *supra* note 1.

123. *See* A.B. No. 593, 97th Leg., Reg. Sess. § 23d (Wis. 2005) (enacted).

124. *See Simmons*, *supra* note 1.

prohibition ultimately passed and ended the WHEDA program.¹²⁵ But the seeds were planted—Illinois introduced a similar program to Wisconsin¹²⁶ and echoed Wisconsin’s point that the federal government’s immigration efforts were distinct from the state’s intent to promote homeownership.¹²⁷ (Illinois’s program also appears to be defunct.)¹²⁸

Not all states dedicate funds to support long-term homeownership regardless of immigration status. California, despite its recently developed reputation for pro-immigrant sanctuary policies,¹²⁹ has not necessarily offered financial sanctuary. California’s Housing Finance Agency (CalHFA), chartered as “the state’s affordable housing lender,” offers down payment assistance and generous mortgage financing with minimal lender fees to low- and moderate-income, owner–occupant borrowers.¹³⁰ However, borrowers must

125. See WIS. STAT. ANN. § 234.59(2)(d) (West 2018) (“[WHEDA] may not make, buy, or assume a home ownership mortgage loan for an individual who does not have a social security number.”).

126. See Press Release, Office of the Governor, Gov. Blagojevich Launches Program to Help Working Families in Immigrant and Minority Communities Buy Homes (Dec. 11, 2005), <https://www2.illinois.gov/Pages/news-item.aspx?ReleaseID=4531> [<https://perma.cc/B2YD-G6P7>]. As the governor’s office explained:

This program [*Opportunity I-Loan*] will make Illinois only the second state in the nation to provide affordable, 30-year fixed rate mortgage loans for qualifying individuals and families that live and work and pay taxes but have either no credit history or social Security numbers. The program will also offer further protections from predatory home loans

...

Opportunity I-Loans have a below market interest rate . . . for a 30-year fixed-rate mortgage. The interest rate varies depending on market interest rates but is always at least half of a percentage point below market interest rates. Through the program, homebuyers are eligible for \$1,000 down payment assistance for a slightly higher interest rate.

Id.

127. ILL. HOUS. DEV. AUTH., OPPORTUNITY I-LOAN FREQUENTLY ASKED QUESTIONS 2 [<https://perma.cc/RSY9-D78Q>] (“IHDA does not have the resources of the FBI or the INS or the Department of Homeland Security. We trust these federal agencies to do their job, and we will do our job.”). According to Illinois, these legal immigrants without SSNs might include “spouses of citizens, dependents of citizens, political refugees and others who use ITINs.” *Id.* at 2. The Illinois I-Loan utilized private banks to offer the fixed-rate loan that did not rely on “tax dollars,” with IHDA raising its own funds through bond offerings. See Marilyn Kennedy Melia, *Immigrant Loans Already Reformed*, CHI. TRIB. (May 14, 2006), <https://www.chicagotribune.com/news/ct-xpm-2006-05-14-0605140406-story.html> [<https://perma.cc/MU7U-4FGJ>].

128. See ILL. HOUS. DEV. AUTH., ALL PROGRAMS MATRIX - JANUARY 2019 (2019), <https://www.ihda.org/wp-content/uploads/2015/07/New-Matrix-1.2019.pdf> (listing current mortgage programs, without including I-LOAN).

129. California’s statute concerning law enforcement data sharing exemplifies this reputation. See CAL. GOV’T CODE § 7284.6(a)(1) (West 2018) (prohibiting state and local law enforcement agencies from using “money[] or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes”).

130. *About Us*, CAL. HOUSING FIN. AGENCY, <http://www.calhfa.ca.gov/about/index.htm> [<https://perma.cc/8MVT-PGF8>] (last visited Apr. 26, 2019) (“The Agency’s Multifamily Division finances affordable rental housing through partnerships with jurisdictions, developers and more, while its Single Family Division provides first mortgage loans and down payment assistance to first-time homebuyers.”).

prove lawful immigration status to be eligible for the programs.¹³¹

As reflected by Wisconsin's eventual termination of WHEDA's program, ITIN mortgages have attracted the ire of those strongly opposed to the extension of state benefits to undocumented immigrants. Executives of ITIN mortgage lenders publicly reported receiving death threats.¹³² Some non-bank lenders work with their mortgage-holding banks as "silent partners," who choose to avoid public exposure because of the risk of political controversy.¹³³ Those risks may deter banks from participating in ITIN mortgage markets, thus limiting the capital available for such lending.¹³⁴

Several members of Congress have introduced legislation to ban such loans, including through the Stop Loans Offered to Illegal Aliens Now (Stop LOAN) Act, which would prohibit federal agencies from extending "credit" to immigrants without lawful presence and an SSN.¹³⁵ Former Representative John Doolittle introduced a more wide-ranging bill.¹³⁶ The Doolittle Bill proposed to amend the Truth in Lending Act to essentially prohibit mortgage lending to consumers without SSNs where the property "[would] be used as the principal residence of such consumer."¹³⁷ Whereas the Stop LOAN Act targeted credit based solely on the status of the borrower, the Doolittle Bill targeted credit based on the credit transaction's underlying activity—to purchase and to remain in an American home for some extended period of time. The Doolittle Bill proposed to constrain such activity by expressly limiting private and state actors' ability to lend to borrowers without Social Security numbers.¹³⁸

Thus, certain undocumented borrowers have long participated in the mortgage lending markets to pursue homeownership. But even those with strong credit and financial histories have been unable to participate in the preferential lending scheme supported by the GSEs, currently under conservatorship of the Dodd-Frank-created FHFA, and the FHA. States have also created their own schemes

131. CAL. HOUS. FIN. AGENCY, CALHFA CONVENTIONAL LOAN PROGRAM 1 (2019) (explaining that a borrower must "[b]e either a citizen or other National of the United States, or a 'Qualified Alien' as defined at 8 U.S.C. § 1641").

132. See Khimm, *supra* note 2.

133. *Id.*; see also Miriam Jordan, *Unlikely Mortgage Winner*, WALL ST. J. (Oct. 9, 2007, 12:01 AM), <https://www.wsj.com/articles/SB119188674981652816> [<https://perma.cc/JD5E-H55N>] ("Concern over the controversy that can erupt over serving the illegal-immigrant community is widely regarded as preventing big banks interested in the Hispanic market from joining the fray.")

134. See, e.g., Jordan, *supra* note 133 (noting that "[d]espite the high-yield potential of ITIN mortgages, the majority of players in the ITIN-mortgage segment are small banks rather than large national institutions").

135. H.R. 4580, 109th Cong. (2005) (proposing to "prohibit loans by Federal agencies to aliens who are unlawfully present in the United States"). The bill cross-referenced the definition of "credit" in the Truth in Lending Act, which is broadly defined as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." 15 U.S.C. § 1602(f) (2012). As discussed above, it is not clear whether Freddie Mac and Fannie Mae are agencies, although the FHFA is an agency. See *supra* notes 98–99 and accompanying text.

136. See H.R. 480, 110th Cong. (2007).

137. *Id.* § 140.

138. *Id.* Such a prohibition would obviate state facilitation through the purchasing and capital provision of such lending.

and excluded undocumented borrowers. And throughout, federal politicians have proposed bills to categorically prohibit residential mortgage lending to borrowers without SSNs, though these bills have yet to pass.

C. HIGHER EDUCATION

Alongside homeownership, higher education remains a professed pillar of the American Dream.¹³⁹ In 1982, the Supreme Court decided *Plyler v. Doe*, ruling that a child's immigration status could not bear on her right to primary and secondary education.¹⁴⁰ Despite its firm and inclusive stance on public-education access, rooted in the Equal Protection Clause, the Court left the question of higher education untouched.¹⁴¹ Accordingly, the federal government allows states to determine whether, and on what terms, undocumented students are eligible for enrollment in public institutions of higher education.

In contrast to the free and universal provision of primary and secondary education, consumer finance plays an important role in American higher education. College tuition fees have grown much more rapidly than inflation over the past several decades.¹⁴² Loans have filled in much of the gap between student and parental resources and higher education's cost; student loan debt now exceeds \$1.4 trillion.¹⁴³

Under the Higher Education Act, the federal government does not extend eligibility for conventional loans and grants—namely Direct Subsidized and Unsubsidized Loans and Pell Grants—to undocumented immigrants.¹⁴⁴ States, on the other hand, have addressed education finance for such immigrants in nearly every possible way. The treatment of immigrants in higher education can be grouped into four general tiers.¹⁴⁵ The most immigrant-friendly states, including

139. See, e.g., Hannah Fingerhut, *Republicans Skeptical of Colleges' Impact on U.S., but Most See Benefits for Workforce Preparation*, PEW RES. CTR. (July 20, 2017), <http://www.pewresearch.org/fact-tank/2017/07/20/republicans-skeptical-of-colleges-impact-on-u-s-but-most-see-benefits-for-workforce-preparation/> [<https://perma.cc/CN7Y-U3Z9>] (quantifying partisan divide in perceptions of impact of colleges on the country but noting bipartisan agreement on higher education's personal value for students). See generally STEVEN BRINT & JEROME KARABEL, *THE DIVERTED DREAM: COMMUNITY COLLEGES AND THE PROMISE OF EDUCATIONAL OPPORTUNITY IN AMERICA, 1900–1985*, at v–vi (1989) (charting the trajectory of “the conviction that America's colleges and universities [are] central to the contemporary pursuit of the American dream”).

140. 457 U.S. 202, 227–30 (1982).

141. See *id.* at 223; Kevin R. Johnson, *Bias in the Legal System? An Essay on the Eligibility of Undocumented Immigrants to Practice Law*, 46 U.C. DAVIS L. REV. 1655, 1664–65 (2013) (noting that “[t]he Texas law at issue in *Plyler v. Doe* did not address access to post-secondary education” and “[t]he U.S. government instead has generally left it to the states to determine whether undocumented students are eligible for enrollment (and under what terms) in public colleges and universities”).

142. See DEREK BOK, *HIGHER EDUCATION IN AMERICA* 93 (rev. ed. 2015).

143. See Press Release, Fed. Reserve Bank of N.Y., Total Household Debt Rises for 17th Straight Quarter (Nov. 16, 2018), <https://www.newyorkfed.org/newsevents/news/research/2018/rp181116> [<https://perma.cc/KC7Y-ZSLB>].

144. See 20 U.S.C. § 1091(a)(4)–(5) (2012) (requiring prospective financial aid recipients to have an SSN and to be a citizen, lawful resident, or resident with permission from INS to remain); see also 8 U.S.C. § 1611(a) (2012) (stating that non-qualified aliens are ineligible for federal public benefits).

145. These tiers are not static because states continue to grapple with undocumented students' higher education access. For example, New Jersey recently expanded state financial-aid access to undocumented students, for whom postsecondary education benefits were formerly limited to in-state

California, afford in-state tuition as well as state aid to otherwise-eligible undocumented students.¹⁴⁶ The second tier is composed of those states, including Connecticut, that offer in-state tuition at their public universities to undocumented students but do not allow undocumented students to access certain state financial aid programs.¹⁴⁷ The third tier, including Arizona and Georgia, is composed of states that allow undocumented students to attend state institutions but not necessarily at in-state rates.¹⁴⁸ The fourth tier, which includes Alabama and South Carolina, prohibits attendance at public universities for students lacking lawful presence.¹⁴⁹ Under such a system, an undocumented teenager who arrived at age one, spent her entire life in a state and graduated from that state's public school system may be *barred* from the state's public university system—regardless of the student's willingness to pay.¹⁵⁰

This evolving heterogeneity of state approaches has engendered litigation from all angles: immigrant rights advocates have challenged restrictive regimes, while their opponents have sued to end inclusive state laws. A key statutory provision undergirding these lawsuits, 8 U.S.C. § 1623, precludes states from extending postsecondary benefits to undocumented immigrants unless an out-of-state U.S. citizen or national is also eligible.¹⁵¹

Based on Section 1623, nonresident plaintiffs paying out-of-state tuition challenged California's extension of in-state tuition to some immigrants without lawful presence in *Martinez v. Regents of the University of California*.¹⁵² The Supreme Court of California upheld the state's policy, finding that because eligible students needed to have attended high school in California for at least three years, *any* student, regardless of state residency, could avail herself of in-state

tuition. S.B. 699, 218th Leg. (N.J. 2018). New York likewise expanded financial aid access to undocumented students and also enabled such students to open tax-privileged savings account (commonly known as "529 accounts" for their federal tax law analogue) for educational expenses. S.B. 1250, 2019 Leg., Reg. Sess. (N.Y. 2019).

146. See, e.g., CAL. EDUC. CODE § 68130.5 (West 2019).

147. See, e.g., CONN. GEN. STAT. ANN. § 10a-29(9) (West 2019).

148. See, e.g., ARIZ. REV. STAT. ANN. § 15-1803(B) (2019); GA. CODE ANN. § 20-3-66(d) (West 2019).

149. See, e.g., ALA. CODE § 31-13-8 (2019); S.C. CODE ANN. § 59-101-430(A) (2019). For an overview of the state bans, see Danielle Holley-Walker, *Searching for Equality: Equal Protection Clause Challenges to Bans on the Admission of Undocumented Immigrant Students to Public Universities*, 2011 MICH. ST. L. REV. 357, 357–59.

150. In contrast, a non-U.S. citizen with a valid visa who has never travelled to the United States will be permitted to pay to attend.

151. See 8 U.S.C. § 1623(a) (2012) (prohibiting states from extending "any postsecondary education benefit" to aliens unlawfully present in the United States "unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident"); see also 8 U.S.C. § 1101 (2012)(a)(22) ("The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."); 8 U.S.C. § 1408(1) (2012) (defining nationals to include "person[s] born in an outlying possession of the United States on or after the date of formal acquisition of such possession").

152. 241 P.3d 855 (Cal. 2010). The then-Governor's concern about Section 1623 had actually prompted a veto of an earlier version of the bill, as well as a clarifying uncodified statute and opinion from the California Legislative Counsel. *Id.* at 862–63.

tuition if she had similarly attended a California high school.¹⁵³ In other words, the benefit was available to out-of-state residents as long as they met the graduation requirement and therefore complied with Section 1623.

In contrast, the Supreme Court of Arizona rejected an immigrant plaintiffs' arguments in favor of state colleges' ability to extend in-state tuition to students who benefitted from the Deferred Action for Childhood Arrivals (DACA) program,¹⁵⁴ who are also excluded from the Higher Education Act's primary loans and grants. (Scholars have characterized prosecutorial discretion benefits, including DACA, as "nonstatus," an intermediate category between having lawful status and being at risk of deportation.¹⁵⁵) Because Arizona had not made in-state tuition available to all U.S. citizens and nationals without regard to state residency, the court held that Section 1623 precluded Arizona from extending in-state tuition to DACA recipients and others who are not lawfully present as defined by the statutory scheme.¹⁵⁶

Thus, even for those with federally granted prosecutorial discretion, federal and state higher education exclusion persists as does litigation surrounding those exclusions. The contours of this exclusion differ from state to state, and both growing student debt and recent litigation illuminates the real financial stakes of this exclusion.

II. THEORIES OF IMMIGRATION PREEMPTION

To situate the aforementioned policies, I first address the contemporary theories and doctrine regarding permissible state and local activities as they relate to immigrants. State immigrant-restrictive legislation spurred new adjudication on immigration-preemption issues, with two cases from Arizona reaching the Supreme Court in the past decade.¹⁵⁷ More recently, pro-immigrant states and localities have sought to protect and support their undocumented residents,

153. In particular, the court mentioned three ways:

First, some students who live in an adjoining state or country are permitted to attend high school in California in some circumstances, even though they are not California residents. Second, the children of parents who live outside of California but who attend boarding schools in California might attend California high schools for three years, yet not be California residents. Third, those who attended high school in California for three years but then moved out of the state and lost their residency status would apparently be eligible for the exemption if they decided to attend a public college or university in California.

Id. at 864 (citations omitted).

154. *See Arizona ex rel. Brnovich v. Maricopa Cty. Cmty. Coll. Dist. Bd.*, 416 P.3d 803, 807 (Ariz. 2018).

155. Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1119 (2015).

156. *Maricopa Cty. Cmty. Coll. Dist. Bd.*, 416 P.3d at 807. The Supreme Court of Arizona made only passing reference to *Martinez v. Regents of the University of California* in its decision. *Id.* at 805.

157. *See Arizona v. United States*, 567 U.S. 387 (2012); *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011).

spurring preemption challenges from a restrictionist federal government.¹⁵⁸ These developments in immigration preemption occur with a general presumption against preemption of state action as a backdrop, particularly when a state exercises its police powers.¹⁵⁹ Therefore, it will be important to determine how these relatively new immigration-specific preemption doctrines—or doctrinal clarifications—affect state actions that address immigration only incidentally, including some actions that affect immigrants’ financial lives.

These judicial challenges have invigorated academic interest in the subject of immigration federalism. In the last decade, scholars have articulated various theories of immigration federalism and related preemption. They have investigated, for example, the scope of administrative preemption, “plenary power preemption,” and the “new immigration federalism.”¹⁶⁰

First, scholars have noted the emergence of administrative preemption, whereby the Supreme Court has allowed the policies and enforcement priorities of Executive Branch officials to have preemptive effect.¹⁶¹ Although this

158. See, e.g., *United States v. California*, 314 F. Supp. 3d 1077, 1100–02 (E.D. Cal. 2018) (describing the federal government’s challenge to state sanctuary statutes).

159. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (instructing courts, when considering a regulation in an area of traditional state power, to “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”). But see *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 862 (Cal. 2010) (“[Although] [i]n the past, the high court has indicated that a general presumption against preemption applies even in the context of immigration law . . . more recent high court authority suggests that no particular presumption applies.”) (citations omitted); Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 343 (“In *Whiting*, for example, it was hardly edifying to see the conservative Justices who so frequently vote for preemption switching places with the nationalists who most often oppose it, to all appearances simply because both sides have more specific preferences about immigration policy.”).

160. See, e.g., Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601 (2013); Barbara E. Armacost, “*Sanctuary*” *Laws: The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197; Patrick J. Charles, *Recentering Foreign Affairs Preemption in Arizona v. United States: Federal Plenary Power, the Spheres of Government, and the Constitutionality of S.B. 1070*, 60 CLEV. ST. L. REV. 133 (2012); Elias, *supra* note 19; Kit Johnson, *Theories of Immigration Law*, 46 ARIZ. ST. L.J. 1211 (2014); Eytan Meyers, *Theories of International Immigration Policy – A Comparative Analysis*, 34 INT’L MIGRATION REV. 1245 (2000). Some have critiqued the shift to “purposive” statutory interpretation in politically salient preemption cases, including those like *Arizona* that concern state laws targeting immigrants. See Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 10–11 (2013). This criticism argues that “obstacle preemption” in particular becomes an ad hoc instrument rather than a trans-substantive principle. *Id.* at 35–43 (noting Justice Thomas’s stance against obstacle preemption and non-textualist statutory interpretation); see also David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 621 (2017); David S. Rubenstein, *Black-Box Immigration Federalism*, 114 MICH. L. REV. 983, 1006 (2016) (noting the existence of “Equal Preemption”).

161. *Arizona*, 567 U.S. at 408, 410 (describing how the lack of input from the federal government on state’s involvement in alien removal might cause states to craft their “own immigration policy” and noting that “no coherent understanding of the [statutory] term [cooperation] would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government”). Adam Cox has argued that “the practical consequence of the Court’s approach in *Arizona* is to elevate prosecutorial decisions by executive branch officials to the status of law for purposes of preemption analysis.” Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 54.

allowance mirrors broader trends of the preemptive power of administrative agencies,¹⁶² the extent to which less formal administrative actions have preemptive effect outside the immigration context remains unclear.

Scholars have also identified a trend of “plenary power preemption,” whereby courts import plenary power doctrine, which leads courts to accord deference to Congress and the federal executive on immigration matters, into preemption analysis.¹⁶³ The theory of “plenary power preemption” highlights the role of the Court’s broad rhetoric about federal sovereignty in tipping the scale towards preemption in immigration cases.¹⁶⁴ Yet this theory offers little guidance in contexts where other powerful legal canons intersect with immigration law.

Finally, recent immigration preemption cases have been characterized as charting a “new immigration federalism,” limiting subnational jurisdictions’ immigrant-exclusionary lawmaking but preserving those jurisdictions’ ability to develop immigrant-inclusive laws.¹⁶⁵ The purportedly asymmetric scrutiny between exclusionary and inclusionary ordinances comports with what one scholar calls “Equal Pro-emption,” an equality-infused immigration federalism that facilitates subnational integration of undocumented immigrants.¹⁶⁶

With these theories as a backdrop, I briefly review several significant immigration preemption cases, both historical and recent. These cases illustrate the main doctrinal approaches to whether a particular immigrant-affecting policy will be preempted: federal exclusivity of “immigration regulation,” field preemption, and conflict preemption.¹⁶⁷ I close by arguing that we should revive a forgotten approach to understanding preemption which the district courts used in early immigration cases and the Supreme Court adopted in non-immigration contexts: attention to the state or local immigration-related intent in enacting a policy.

A. THE FEDERAL GOVERNMENT’S EXCLUSIVE “REGULATION OF IMMIGRATION”

Subnational immigration regulation can be unconstitutional even absent federal action. In *De Canas v. Bica*, the Supreme Court framed the “regulation of immigration” and preemption analyses as distinct, though the content of regulation

162. David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1126 (2012) (“The Supreme Court has long held that federal agencies may preempt state law in much the same way as Congress: either by issuing binding administrative rules that conflict with state law or by asserting exclusive federal control over a regulatory domain.”). *But see* Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1591 (2008) (disagreeing).

163. *See* Abrams, *supra* note 160, at 602–03; Catherine Y. Kim, *Immigration Separation of Powers and the President’s Power to Preempt*, 90 NOTRE DAME L. REV. 691, 705 n.74 (2014) (favorably describing the theory of “plenary power preemption” to explain the Court’s reasoning in *Arizona*).

164. *See, e.g., Arizona* 567 U.S. at 394 (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.” (citation omitted)).

165. *See* Elias, *supra* note 19, at 707. *But see* Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 597 (2012) (arguing that “the situation [of immigration federalism] has changed substantially, but this change has come as a result of shifting enforcement policies, and not as an edict of the Supreme Court”).

166. Rubenstein, *Black-Box Immigration Federalism*, *supra* note 160, at 1006.

167. Because none of the state and local policies addressed in this Article would be expressly preempted, I do not address this preemption doctrine.

of immigration remains in dispute.¹⁶⁸ The *De Canas* Court did not consider a California labor provision prohibiting employers from knowingly employing an unlawfully resident worker—based on adverse effects on lawfully resident workers—to constitute regulation of immigration.¹⁶⁹ The Court explained that “the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”¹⁷⁰ Even if California’s prohibition “has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration. . . .”¹⁷¹ The Court went on to assert, before turning to its preemption analysis, that “absent congressional action,” California’s policy was valid as an exercise of state police power.¹⁷²

This holding leaves the content of regulation of immigration ambiguous, particularly regarding what constitutes “the conditions under which a legal entrant may remain.”¹⁷³ Some commentators have represented regulation of immigration as being limited to “a determination of admission and removal” by narrowly reading the “conditions” clause.¹⁷⁴

In the context of significant state and local restrictions on rental residency by certain categories of noncitizens, some courts have found such restrictions covered by the conditions clause. A federal court considered the city of Hazleton, Pennsylvania’s regulation of rental housing that made “legal immigration status a

168. 424 U.S. 351, 353 (1976) (explaining that a provision would be held unconstitutional if it “is an attempt to regulate immigration and naturalization” or “it is pre-empted . . . by the Immigration and Nationality Act (INA)” (citations omitted)); see also Pratheepan Gulasekaram & Rose Cuisson Villazor, *Sanctuary Policies & Immigration Federalism: A Dialectic Analysis*, 55 WAYNE L. REV. 1683, 1698–99 (2009) (explaining that *De Canas* employed a three-part test for determining whether a state or local law is preempted: “First, a court would analyze whether the law is attempting to regulate immigration law. Second, even if the law does not constitute an impermissible immigration regulation, it might otherwise still be regarded as preempted by implication if it regulates a field occupied by Congress. Third, a state or local law is preempted if it conflicts with federal law. The first two parts of the *De Canas* test are unique to immigration law or have had different application in the immigration field. . . . The second part of the test is not unique to the immigration field, but because aspects of immigration are considered exclusively federal, field preemption appears to operate more expansively in immigration law than it does in other legislative areas, such as criminal law, where co-regulation between federal and state authorities has long-been acknowledged.”).

169. *De Canas*, 424 U.S. at 355.

170. *Id.*

171. *Id.* at 355–56.

172. *Id.* at 356.

173. *Id.* at 355. The classification also matters outside of the state-federal dynamic. For example, Matthew J. Lindsay describes how when a “court determines that a federal law or enforcement action qualifies as a regulation of immigration per se . . . it triggers a constitutionally exceptional authority, the exercise of which lies largely beyond the scope of constitutional review” and profoundly limits the constitutional rights of noncitizens. Lindsay, *supra* note 37, at 184.

174. Ryan Terrance Chin, Note, *Moving Toward Subfederal Involvement in Federal Immigration Law*, 58 UCLA L. REV. 1859, 1866 (2011). Given *De Canas*’s bifurcation, and its failure to expand upon the “conditions under which a legal entrant may remain,” which comprised part of its regulation-of-immigration language, it is perhaps unsurprising that the language’s scope remains unclear. *But see id.* (noting that courts have largely adopted a constrained interpretation of the conditions clause).

condition precedent to entering into a valid lease.”¹⁷⁵ Landlords were required to obtain a municipal-occupancy permit from each prospective tenant; the city issued permits only to those with proof of lawful residency.¹⁷⁶ This registration system operated in conjunction with a broader set of “anti-harboring” provisions, punishing landlords for renting residences to undocumented individuals.¹⁷⁷ The Third Circuit wrote that the provision “attempts to regulate residence based solely on immigration status,” effectively “[d]eciding which aliens may live in [a city of] the United States.”¹⁷⁸ The court accordingly invalidated the Hazleton registration system.¹⁷⁹ *Hazleton* thus stood for the proposition that significant barriers to local residency could comprise “the conditions under which a legal entrant may remain” and therefore be an unconstitutional regulation of immigration, even aside from preemption analysis.¹⁸⁰

But the Eighth and Fifth Circuits have not understood similar ordinances to be regulation of immigration. The Eighth Circuit in *Keller v. City of Fremont* explicitly rejected the categorization of residency restrictions as immigration restrictions: “Laws designed to deter, or even prohibit, unlawfully present aliens from residing within a *particular locality* are not tantamount to immigration laws establishing who may enter or remain in the country.”¹⁸¹ The Fifth Circuit, considering a similar statute en banc, hardly acknowledged the concept of regulation of immigration as distinct from field preemption, notwithstanding that the district court had found the ordinance to be an arrogation of federal power.¹⁸² In fact, between several concurring and dissenting opinions, judges mentioned the regulation of immigration doctrine solely to rule against it.¹⁸³

The content of *De Canas*’ regulation of immigration remains disputed, with the aforementioned courts disagreeing as to whether a locality’s stringent regulation of an undocumented immigrant’s physical residence falls within the phrase’s purview.

175. *Lozano v. City of Hazleton*, 724 F.3d 297, 301 (3d Cir. 2013).

176. *Id.*

177. *Lozano*, 724 F.3d at 314 (citing Illegal Immigration Relief Act Ordinance, § 5A(1)). The anti-harboring provisions are, in some ways, an extension of the federal prohibition in 8 U.S.C. § 1324(a)(1) (A) (2012). But the federal statute has never explicitly defined harboring, and judicial construction has broadened over time from the narrow purview of “clandestine concealment” to “anything which substantially facilitates unauthorized presence.” Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 GEO. IMMIGR. L.J. 147, 166 (2010). In trying to balance state interests in this field with private humanitarian interests, Shalini Bhargava Ray has suggested remedying the lack of exception for humanitarian smuggling by “redefining [harboring and inducement] offenses to require proof of ‘financial . . . or material benefit.’” Shalini Bhargava Ray, *Saving Lives*, 58 B.C. L. REV. 1225, 1266–68 (2017) (citations omitted).

178. *Lozano v. City of Hazleton*, 620 F.3d 170, 220 (3d Cir. 2010).

179. *Id.* at 224.

180. *Id.* at 220 (quoting *De Canas v. Bica*, 424 U.S. 351, 355 (1976)).

181. 719 F.3d 931, 941 (8th Cir. 2013).

182. *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 527–28 (5th Cir. 2013) (en banc).

183. See *id.* at 549–50 (Owen, J., concurring in part and dissenting in part); *id.* at 567–69 (Jones, Elrod, Jolly, Smith & Clement, JJ., dissenting).

B. FIELD PREEMPTION

Implied preemption doctrines—namely field preemption and conflict preemption—have also played a significant role in defining the proper scope of subnational activity regarding immigration. The first implied preemption doctrine, field preemption, overlaps with the constitutional exclusivity described above. Field preemption doctrine holds that “the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.”¹⁸⁴ The Supreme Court has placed “‘purpose of Congress [a]s the ultimate touchstone’ in every pre-emption case,”¹⁸⁵ requiring an analysis of whether Congress intended to occupy the entire field.¹⁸⁶ Because the Supreme Court has recognized the INA as a “comprehensive federal statutory scheme for regulation of immigration,”¹⁸⁷ state and local policies that meet the definition of regulation of immigration have been field preempted by the INA as well.¹⁸⁸

The INA does occupy other immigration-related fields that may not constitute regulation of immigration, however. For example, in *Hines v. Davidowitz*, an early immigration federalism case, the Supreme Court explained that Congress had occupied the field of “alien registration” by passing the Alien Registration Act.¹⁸⁹ Despite language in *Hines* suggesting a far-reaching preemptive force of the INA,¹⁹⁰ the Supreme Court clarified then, and on multiple occasions thereafter, that not all immigrant-affecting regulations would be field preempted.¹⁹¹ In *De Canas v. Bica*, the Court held that a statute regulating immigrant farmworkers did not preempt state regulation of immigrant employment.¹⁹² The Court noted that the farmworker statute, in neither its breadth nor depth, seemed to displace the regulation of unauthorized employment¹⁹³—“Congress ha[d not] unmistakably so ordained” the state provision preempted.¹⁹⁴ In fact, the

184. *Arizona v. United States*, 567 U.S. 387, 399 (2012).

185. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

186. Note, *Preemption As Purposivism’s Last Refuge*, 126 HARV. L. REV. 1056, 1057–58 (2013).

187. *Chamber of Commerce v. Whiting*, 563 U.S. 582, 587 (2011) (quoting *De Canas v. Bica*, 424 U.S. 351, 353 (1976)).

188. See *Lozano v. City of Hazleton*, 620 F.3d 170, 219–21 (3d Cir. 2010) (describing the relationship between the field preemption and conflict preemption doctrines).

189. 312 U.S. 52, 60 (1941); see Alien Registration Act, Pub. L. No. 670, ch. 439, 54 Stat. 670 (1940) (codified as amended at 8 U.S.C. § 451 (2012)). Notably, Congress did not pass the Alien Registration Act until after the challenged Pennsylvania statute had been passed.

190. See 312 U.S. at 63 (“The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.”); *id.* at 65–66 (“Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens . . . thus bears an inseparable relationship to the welfare and tranquillity of all the states, and not merely to the welfare and tranquillity of one.”).

191. See *id.* at 65–68; see, e.g., *Whiting*, 563 U.S. at 594–600 (upholding Arizona’s employer sanctions).

192. 424 U.S. 351, 361–62 (1976).

193. *Id.* at 357, 359.

194. *Id.* at 356 (quoting *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)).

farmworker statute had contemplated disuniformity, undermining field preemption arguments.¹⁹⁵

The INA's impact on rental housing restrictions targeting undocumented immigrants has been an area of particularly active and divergent field preemption analyses. The Third Circuit in *Hazleton* determined that the rental housing restrictions were field preempted under the INA for largely the same reasons that it found the restrictions to be an inappropriate state regulation of immigration.¹⁹⁶ The Fifth Circuit, sitting en banc in *Farmers Branch*, was split. In two separate opinions, several judges writing in *Farmers Branch* contended that rental housing regulations were field preempted because the restrictions effectively acted in the field of "removal of aliens."¹⁹⁷ However, several other judges rejected this approach, as did the Eighth Circuit in its consideration of the rental housing prohibition in *Keller*.¹⁹⁸ The Eighth Circuit majority noted that "there is no record evidence that aliens denied occupancy licenses in the City will likely leave the country, as opposed to obtaining other housing in the City, renting outside the City, or relocating to other parts of the country."¹⁹⁹ Thus, although there is significant overlap between the "regulation of immigration" doctrine and INA's field preemptive effect, they require separate and careful analysis.

C. CONFLICT PREEMPTION

Conflict preemption occurs when a state or local law conflicts with established federal law, either because compliance with both sets of law would be physically impossible or when the policy "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."²⁰⁰ In two Supreme Court cases, *Chamber of Commerce v. Whiting* and *Arizona v. United States*, and in multiple court of appeals decisions, the federal courts have explored how conflict preemption forges the boundaries of state control over immigrants' lives.

195. *Id.* at 262. The farm labor statute also contemplated disuniformity in the regulation of unauthorized immigrant employment via state action. *Id.* Moreover, beyond field preemption, the Court reserved the question of conflict preemption that the lower court had not given due consideration. As the Court explained, the California provision required "that to be employed an alien must be 'entitled to lawful residence.'" *Id.* at 364. Though it was conceded that, on its face, the statute would unconstitutionally conflict with federal law by punishing employment of aliens with work authorization but without lawful residence, the Court reserved judgment on the *possibility* of conflict preemption. *Id.*

Congress subsequently passed extensive employment regulations in IRCA—it also made its preemptive intent more explicit with an express preemption provision (itself cabined by a small savings clause). *See* 8 U.S.C. § 1324a(h)(2) (2012).

196. *See supra* notes 175–83 and accompanying text.

197. *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 541, 543 (5th Cir. 2013) (Reavley & Graves, JJ., concurring in the judgment); *id.* at 544 (Dennis, Reavley, Prado & Graves, JJ., concurring).

198. *Id.* at 550 (Owen, J., concurring and dissenting); *id.* at 560 (Higginson, J., concurring); *Keller v. City of Fremont*, 719 F.3d 931, 941–42 (8th Cir. 2013).

199. *Keller*, 719 F.3d at 941.

200. *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

In *Chamber of Commerce v. Whiting*, the Supreme Court initially found that an early immigrant-restrictive Arizona statute was not conflict preempted because the state statute “track[ed] IRCA’s [employment] provisions in all material respects.”²⁰¹ The state statute differed by imposing starker consequences on the activities that violated the federal law, but the Court determined that those consequences were expressly permitted by IRCA’s savings clause.²⁰² In *Arizona v. United States*, the Supreme Court was confronted with a subsequent statute that, in relation to employment, went beyond IRCA’s prohibitions to criminalize undocumented immigrants for searching for and engaging in work.²⁰³ The Arizona statute authorized state and local law enforcement “to arrest without a warrant a person ‘the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States.’”²⁰⁴ It also mandated “that officers who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person’s immigration status with the Federal Government.”²⁰⁵ The Court accepted the government’s position that the employment provision “upsets the balance” struck by IRCA, which only criminalized an employer’s actions; the employee criminalization was therefore preempted as “an obstacle to the federal plan of regulation and control.”²⁰⁶ The Court also recognized that federal immigration law is complex and that immigration agencies’ implementation of the law makes it even more so. As a result, states are poorly suited to draw distinctions on the basis of federal immigration status. Deferring to federal immigration law’s reliance on administrative prosecutorial discretion, the Court found that the arrest provision would lead to “unnecessary harassment of some aliens . . . who federal officials determine should not be

201. 563 U.S. 582, 601 (2011). This section of the opinion was joined by only four Justices; Justice Thomas concurred in the judgment on this portion without writing separately. *See id.* at 585.

202. *Id.* at 594–600 (discussing the statutory savings clause that preserves state “licensing and similar laws” from 8 U.S.C. § 1324a(h)(2) (2012)).

203. 567 U.S. 387, 393–94 (2012).

204. *Id.* at 394 (quoting ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2011)).

205. *Id.* (citing ARIZ. REV. STAT. ANN. § 11-1051(B) (2012)).

206. *Id.* at 403. Although the *Arizona* Court described IRCA as a “comprehensive framework for ‘combatting the employment of illegal aliens,’” it did not address whether IRCA field preempted state laws regarding immigrant employment that fell outside the statutory savings clause. *Id.* at 404–05 (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002)).

The “upsets the balance” language from *Arizona* suggests an easier standard to preempt than “the clear and manifest purpose” language employed in *De Canas*. The *Arizona* majority distinguished *De Canas* on the basis that the federal regime before at issue had become much more detailed due to the intervening passage of IRCA. *Id.* at 404. Justice Alito, dissenting on the preemption of the work provision, argued that the *De Canas* court standard of “clear and manifest” congressional intent should govern in areas, such as employment, where states possess broad authority. *Id.* at 451 (Alito, J., concurring in part and dissenting in part). Alito noted that the majority seemed to abandon a generalized presumption against preemption, a point immigration scholars have also made. *Id.* at 448 (“Without more, such an inference is too weak to overcome our presumption against pre-emption where traditional state police powers are at stake.”); *see also* Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States*, 9 STAN. J. C.R. & C.L. 1, 13 (2013) (“While not directly adopting a presumption *in favor of* (in contrast to the general presumption against) preemption, *Arizona* rejects a claim of a freewheeling state immigration enforcement or sanctioning power.”).

removed.”²⁰⁷ The arrest provision thus presented an obstacle to congressional objectives and was conflict preempted.²⁰⁸ In contrast, the Court held that the verification provision was not necessarily preempted, so long as it did not lead to additional or prolonged detention of individuals who would not otherwise be subject to government seizure.²⁰⁹

In the housing context, the Fifth Circuit in *Farmers Branch* held that aspects of the municipal residency regulations were conflict preempted.²¹⁰ The court found that a provision criminalizing renting to undocumented immigrants presented an obstacle to federal immigration enforcement, noting that federal law contemplates that immigrants subject to removal will maintain a “reliable” address within the United States.²¹¹ The *Farmers Branch* court, like the *Arizona* Court, noted that the complex nature of federal immigration classifications makes state and local governments ill-equipped to determine whether an individual is an “unauthorized alien.”²¹² The court distinguished immigration status from work authorization, which the Supreme Court had permitted Arizona to use for state-law purposes.²¹³ Unlike work authorization, which is clearly defined by the federal government, the question of whether someone is “authorized” to be in the United States, and to what extent, is more subtle. For states to make that determination would tread on federal authority.²¹⁴

In the Eighth Circuit’s decision in *Keller v. City of Fremont*, the challenged ordinance prohibited providing housing to individuals “who [are] not lawfully present in the United States, according to the [INA]” if confirmed by a federal official.²¹⁵ This deference to federal determinations saved the ordinance from one ground of potential conflict preemption, although the court acknowledged that difficulty in ascertaining lawful presence could nullify the ordinance.²¹⁶ For this reason, the Eighth Circuit also declined to invalidate the ordinance on a pre-enforcement basis, leaving open the possibility that it could be found to present an obstacle to federal objectives as applied.²¹⁷

Conflict preemption strikes down subnational obstacles to “the full purposes and objectives of Congress” in immigration. But in the context of the apparent

207. *Arizona*, 567 U.S. at 408.

208. *Id.* at 410.

209. *Id.* at 413–15.

210. The conflict preemption holding is notable because the Fifth Circuit was unable to find an en banc majority for the position that residency regulations were field preempted. *See supra* notes 197–98 and accompanying text.

211. *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 530 (5th Cir. 2013).

212. *Id.* at 532–34.

213. *Id.* at 537.

214. *Id.* at 536–37. DACA recipients possess work authorization and protection against deportation, but not lawful status on par with, for example, spouses of H1-A visa holders who hold H-4 visas themselves. *See supra* note 114.

215. 719 F.3d 931, 938 (8th Cir. 2013).

216. *Id.* at 945 (“It seems obvious that, if the federal government will be unable to definitively report that an alien is ‘unlawfully present,’ then the rental provisions are simply ineffectual.”).

217. *Id.*

Keller–Farmer’s Branch split, there remains an opportunity for the Supreme Court to clarify where, and under what terms, an undocumented immigrant may build a life for herself free of local interference. That life may begin with a “reliable” residence but also may, under the Constitution, require more.

D. A POTENTIAL ROLE FOR STATE INTENT

Alongside these established approaches to preemption doctrine, I suggest that attention to the intent of state and local officials may be relevant to whether their policies should be preempted.²¹⁸ To do so, I begin by exploring the history of local intent in immigration federalism before acknowledging how, currently, state intent has been a disfavored factor in preemption analysis. I conclude by arguing that such disfavor is misplaced.

My approach would resurrect an early abandoned approach to preemption—considering the legislation’s purpose. The three-judge district court in *Davidowitz v. Hines*, the alien registration case, notably addressed Pennsylvania’s purpose: “It is not an unreasonable conclusion that the primary purpose of the Act was to force aliens in the State to become naturalized” and “[a] further purpose of the Legislature may well have been to cause aliens to leave Pennsylvania and enter states where they are not compelled to register or subjected to a registration fee.”²¹⁹ The lower court concluded by summarizing that “[t]he control of aliens and the conditions of their habitation in the states . . . must remain in the Federal government.”²²⁰ One commentator has suggested that preemption doctrine “involves a conflict between Congress’s *intent* to displace state reg[u]lation in a

218. Debates over the value and methods of divining intent abound. John F. Manning explained that “classical intentionalism” has been the rule of thumb for federal judges in divining legislative intent for the purposes of federal statutory interpretation. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419 (2005). In contrast to the modern textualism associated with the now-departed Justice Scalia, classical intentionalism prioritized the bill’s internal legislative history. That is, federal courts took a sponsor or committee’s expressed understanding of a bill as “probative evidence of the text’s meaning,” and “semantic detail, however clear, must yield when it conflicts sharply with the apparent spirit or purpose that inspired its enactment.” *Id.* (footnote omitted). Abbe R. Gluck & Lisa Schultz Bressman’s empirical survey of Congressional staffers involved in statutory drafting sheds light on the perspective of those on the inside, as opposed to judges on the outside. The vast majority of staffers responded that legislative history is both “a useful tool in the drafting process” and “a useful tool for courts to consider if the judge’s goal is to determine legislative intent.” Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 975 (2013) (footnotes omitted).

On the role of intent in preemption analysis, Thomas Merrill has argued that the Court’s preemption doctrine “systematically exaggerates the role of congressional intent, attributing to Congress judgments that are in fact grounded in judicial perceptions about the desirability of displacing state law in any given area.” Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 741 (2008).

219. 30 F. Supp. 470, 477 (M.D. Pa. 1939), *aff’d*, 312 U.S. 52 (1941). The lower court had found the Pennsylvania Act “unconstitutional because it purports to operate in a field in which the individual states of the United States are without authority to legislate [and] may not be justified as an exercise of the police power of the State of Pennsylvania.” *Id.* at 476.

220. *Id.* at 477.

given area, and the intent of the state or states to regulate that same area,”²²¹ which should be resolved in favor of Congress.

As the doctrine has moved away from considering state and local intent,²²² however, some states have become more explicitly intentional. For example, the statute at issue in *Arizona* proclaimed that its purpose was to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States” and pursue the goal of “attrition through enforcement.”²²³ Contemporary courts have not systematically considered such state intent in their preemption analysis.²²⁴

The Supreme Court addressed the issue of state intent in field preemption analysis in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission* (hereinafter *P. G. & E.*), a nuclear power safety case.²²⁵ Congress passed the Atomic Energy Act to address nuclear power safety, but states have historic authority in the generation and sale of electricity.²²⁶ Accordingly, California passed state legislation that predicated “the construction of nuclear plants on findings by the State Energy Resources Conservation and Development Commission that adequate storage facilities and means of disposal are available for nuclear waste. . . .”²²⁷

In finding that the California law was not field preempted by the federally occupied field of nuclear safety regulation, the Court accepted the rationale of “economic problems, not radiation hazards.”²²⁸ It emphasized the safety motivations of the federal law, and acknowledged that a state prohibition based on *safety* reasons would be preempted.²²⁹ In relying on California’s professed non-safety intent, the Court did not wish to “become embroiled in attempting to ascertain California’s *true* motive.”²³⁰ Rather, it emphasized that divining state legislative intent is “often an unsatisfactory venture,” particularly in areas where the states have retained some authority—fields in which the presumption against preemption is stronger.²³¹

221. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 769 (1994).

222. See, e.g., *Martinez v. Regents of Univ. of Cal.*, 241 P.3d 855, 863 (Cal. 2010) (“But whether a statute *is* valid is a legal determination for the courts, not the Legislature, to make. In deciding whether a federal statute expressly preempts a state statute, it is *Congress’s* purpose that matters, not the state Legislature’s.” (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484–85 (1996))).

223. 2010 Ariz. Legis. Serv. 113 (West).

224. One recent example of judicial analysis of state intent comes from outside the immigration context. See *Lewis v. Governor*, 896 F.3d 1282, 1287 (11th Cir. 2018) (reversing the dismissal of plaintiffs’ claim that a state law preempting local minimum wage laws violated the Equal Protection Clause).

225. 461 U.S. 190 (1983).

226. *Id.* at 194–95.

227. *Id.* at 194.

228. *Id.* at 213, 216.

229. *Id.* at 214.

230. *Id.* at 216 (emphasis added).

231. *Id.* at 216. Alternatively, Michael Coenen has argued that *P. G. & E.* shows how, “by defining the respective fields of each law narrowly, the Court was able to reach the conclusion that the fields did

However, the context of financial immigration regulation differs in two significant ways from the nuclear energy regulations at issue in *P. G. & E.* First, because of the federal power in immigration, there may be reasons to weaken the presumption against preemption in immigration as compared to general regulation of commerce, such as nuclear energy safety.²³² Second, although California was able to cite to non-safety reasons despite evidence of additional safety reasons,²³³ recent events suggest that in immigration, authorities may neither disavow nor even obfuscate legally tenuous motives.²³⁴ Thus, just as the California law in *P. G. & E.* might have been preempted if the state avowed a primary, safety-related intent, states openly acknowledging a primary intent to regulate immigration through their financial policies might find themselves on dubious ground.

One factor favoring federal preemption should be whether the state's primary intent is to regulate immigration. That is, absent express preemption, courts might consider, for example, whether a state crafted its mortgage subsidies to include undocumented immigrants²³⁵ primarily for fiscal- or revenue-producing reasons or, hypothetically, to create sanctuary for those not only lacking lawful immigration status but with final removal orders.

As *P. G. & E.* illustrates, such intent queries are familiar to courts,²³⁶ but they have nonetheless attracted derision. In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, the Supreme Court declined to use state legislative intent to resolve a different state–federal conflict, in part because of the methodological challenges presented by inaccessible or incomplete state legislative history.²³⁷ The Court noted the general challenges of divining the subjective

not in fact overlap.” Michael Coenen, *Characterizing Constitutional Inputs*, 67 DUKE L.J. 743, 783 (2018).

232. See, e.g., *supra* notes 159–60 and accompanying text.

233. *P. G. & E.* had noted, for example, that “Proposition 15, the initiative out of which [the state law] arose, and companion provisions in California’s so-called nuclear laws, are more clearly written with safety purposes in mind. It is suggested that [the state law] shares a common heritage with these laws and should be presumed to have been enacted for the same purposes.” 461 U.S. at 215–16.

234. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2435, 2439 (2018) (Sotomayor, J., dissenting) (painting a “harrowing picture” of a legally tenuous “unrelenting attack on the Muslim religion and its followers” that the President failed to correct); see also Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 844 (2007) (noting that *ex post* constitutional constraints on discriminatory deportation mean that “the government may bias admission procedures against Muslims or reduce the national origin quotas from Muslim countries”).

235. As noted earlier, states such as Illinois predicated their ITIN mortgages in part on an assertion that many lawful immigrants utilize ITINs. See *supra* notes 126–27 and accompanying text. Such an assertion could bear on the intent factor (against preemption) in a court’s analysis.

236. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (“Congress’ intent, of course, primarily is discerned from the language of the pre-emption statute and the ‘statutory framework’ surrounding it. Also relevant, however, is the ‘structure and purpose of the statute as a whole,’ as revealed not only in the text, but through the reviewing court’s reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.” (citations omitted)). Although the focus here is on state rather than Congressional intent, a similar framework can be used, acknowledging the often-thin paper trails with regard to state legislative history. See José R. Torres & Steve Windsor, *State Legislative Histories: A Select, Annotated Bibliography*, 85 L. LIBR. J. 545, 547 (1993).

237. 559 U.S. 393 (2010).

intentions of a state legislature, “an enterprise destined to produce ‘confusion worse confounded.’”²³⁸ The dissent’s approach acknowledges limitations but suggests that state intent may be discernable and helpful.²³⁹

The utility of a state intent inquiry has not made inroads into the immigration preemption landscape. One reason may be the concern that states passing similar laws may, based on their divined intents, not fare similarly under judicial review.²⁴⁰ Intent-oriented inquiries have the analytically unsettling result of potentially reaching different conclusions on similar laws based on dissimilar state intents. However, this conundrum is not new.²⁴¹

One way to conceptualize intent and effect is to think of them as orthogonal axes. Powerful intent and powerful effect would raise the easy example: consider a local ordinance strongly limiting residency options for undocumented immigrants where well-documented municipal legislative history consisted entirely of statements like “[i]t’s the illegals we don’t want” and “[t]he wall can’t be big enough.”²⁴² Such an ordinance would seem to beg preemption given the clear subnational intent to exclude immigrants and clear effective interference with federal policy. If a different state passed a child tax credit that was available to undocumented immigrant parents and their undocumented children, it would have limited effect on federal immigration policy. In such a circumstance, the intent behind the statute may be more useful to a court’s preemption analysis. If the inclusion of undocumented immigrants was purely incidental as a result of a statutory definition that does not refer to federal tax law, preemption would be inappropriate. If, however, there was a clear legislative proclamation that the tax-credit-offering state or municipality offered the credits as part of an effort to be welcoming of all, regardless of immigration status, that might more clearly reflect immigration-related intent, notwithstanding the limited effect. If a court takes intent into account, these two tax credits may be treated differently, despite their similar practical effect. This approach, if adopted, would discourage states from attempting to use financial and tax policy to engage in immigration policy.

When states and localities openly wage war in a federally occupied field, they challenge federal supremacy, even as courts struggle to draw clear lines around

238. *Id.* at 404 (citation omitted).

239. *Id.* at 447 n.6 (Ginsburg, J., dissenting) (“Legislative history confirms this objective, but is not essential to revealing it.”).

240. *See, e.g., id.* at 404 (“It would mean, to begin with, that one State’s statute could survive preemption (and accordingly affect the procedures in federal court) while another State’s identical law would not, merely because its authors had different aspirations.”).

241. *See, e.g., id.* at 403. In *Cotton v. Fordice*, the Fifth Circuit upheld a reenacted and slightly amended Mississippi felon disenfranchisement law that had earlier been struck down for its discriminatory intent. 157 F.3d 388, 391–92 (5th Cir. 1988). In *Johnson v. Governor of State of Florida*, the Eleventh Circuit similarly held that by reenacting a felon disenfranchisement law that had been admittedly initially drafted for racially discriminatory reasons, Florida removed any “taint” of discriminatory intent. 405 F.3d 1214, 1224 (11th Cir. 2005) (en banc).

242. Jeff Cox, *In Pennsylvania Swing Town, Immigration is All the Talk for Voters*, CNBC (Nov. 8, 2016, 5:18 PM), <https://www.cnbc.com/2016/11/08/in-pennsylvania-swing-town-hazleton-immigration-is-all-the-talk-for-voters.html> [<https://perma.cc/P3JT-QHWC>].

fields.²⁴³ It would also challenge supremacy to permit clever financial work-arounds that undermine federal policies. This Article advances the seemingly modest but nonetheless controversial argument that state legislative intent can aid in immigration preemption analysis, a technical and holistic endeavor. To better understand the import of my position, we now turn to these analyses.

III. PREEMPTION AND FINANCIAL IMMIGRATION FEDERALISM

Preemption doctrine illuminates different constraints and possibilities in each aforementioned financial context: tax credits, residential mortgages, and higher education. Competing deference regimes, the ambiguous status of both federal and state actors, and multiple explanations for state policies raise provocative questions about financial immigration federalism's contours.

A. TAX CREDITS

The preemptive effect that immigration-based restrictions in federal tax credits might have on state tax credits straddles both immigration preemption and tax preemption doctrines. The Supreme Court has rarely found state taxes impliedly preempted by federal law.²⁴⁴ Although there are certain narrow areas in which Congress has expressly preempted state taxation²⁴⁵ with Supreme Court approval,²⁴⁶ scholars have questioned the constitutionality of such federal statutes.²⁴⁷ There is a general deference, however, to states' rights to control their

243. See Coenen, *supra* note 231, at 782–84.

244. See Ruth Mason, *Federalism and the Taxing Power*, 99 CALIF. L. REV. 975, 1012 n.194 (2011). More generally, Kirk Stark has summarized the state–federal relationship in taxation as such:

“[U]nder current law, the federal government generally favors the adoption of state *individual and corporate income taxes* (by virtue of both the administrative benefits associated with base conformity and the price effects associated with federal income tax deductibility) and to a lesser degree *property taxes* (where there are no base conformity benefits but there is a positive price effect due to deductibility). Additionally, federal law currently *disfavors* the adoption of *general sales taxes* (by virtue of the lack of any base conformity benefits and the usual lack of any price effects from deductibility).”

Kirk J. Stark, *The Federal Role in State Tax Reform*, 30 VA. TAX REV. 407, 431 (2010).

245. See, e.g., 7 U.S.C. § 2013(a) (2012) (“[A] State may not participate in the supplemental nutrition assistance program if the Secretary determines that State or local sales taxes are collected within that State on purchases of food made with benefits issued under this chapter.”); 4 U.S.C. § 114 (2012) (limiting the state taxation of pension income for out-of-state residents, even if the income was earned within the state).

246. For example, in *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, the Court held that the Airport Development Acceleration Act preempted “a Hawaii statute that impose[d] a [state] tax on the gross income of airlines operating within the State.” 464 U.S. 7, 8 (1983).

247. See, e.g., Michael T. Fatale, *Common Sense: Implicit Constitutional Limitations on Congressional Preemptions of State Tax*, 2012 MICH. ST. L. REV. 41, 42 (“It cannot be the case that the U.S. Congress has unfettered authority to preempt state taxes pursuant to the U.S. Constitution’s Commerce Clause.”); David Gamage & Darien Shanske, *The Federal Government’s Power to Restrict State Taxation*, 81 ST. TAX NOTES 547, 548–549 (2016) (summarizing early twenty-first century debates about the scope of Congress’s constitutional authority to regulate commerce as a basis for interfering in

own systems of public finance.²⁴⁸

An exception to this deference occurs where state taxation would interfere with foreign trade.²⁴⁹ In *Xerox Corp. v. County of Harris*, the Supreme Court held that “state property taxes on goods stored under bond in a customs warehouse are preempted by Congress’s comprehensive regulation of customs duties.”²⁵⁰ Justice Powell, in dissent, noted that the federal warehousing system allows the government to monitor the goods and ensure duties are paid and the state’s tax does not “impair this function.”²⁵¹ He argued that “the ‘pervasive’ regulation . . . is simply immaterial to the validity of state taxation of those goods.”²⁵²

Although nothing in federal law expressly preempts state earned income or child tax credits for undocumented immigrants, implied preemption analysis is less straightforward.

First, as mentioned above, Congress explained that its restriction of immigrant access to the EITC was to harmonize it with restrictions on the ability to work.²⁵³ In this sense, Congress arguably established a “comprehensive” statutory scheme that could preempt state efforts to encourage employment by those immigrants—at least where that encouragement does not fall within IRCA’s savings clause.

Because tax obligations are independent of other legal obligations,²⁵⁴ an undocumented immigrant might have income from an employment relationship that

state taxation); see also David Gamage & Darien Shanske, *Tax Cannibalization and Fiscal Federalism in the United States*, 111 NW. U. L. REV. 295, 315 (2017) (discussing the phenomenon of tax cannibalization in fiscal federalism as “the aggregate revenue loss to other governments per dollar of tax revenue raised by an acting state government from its [corporate, income, or other] tax rate”). The authors note that one constraint on the federal government addressing the cannibalization issue is that “as a matter of constitutional doctrine, the Supreme Court has repeatedly, and reasonably, insisted that there is something special about the state revenue function that deserves protection.” *Id.* at 356 (footnote omitted).

248. This is particularly striking in the context of the Takings Clause. See, e.g., Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2183 (2004) (“One of the abiding puzzles of the Supreme Court’s Takings Clause jurisprudence is the obvious tension between the rigor with which the Court scrutinizes regulations of property under the Takings Clause and the enormous deference it displays toward the state’s exercise of its power to tax. On the few occasions when scholars have paid attention to the issue, most have sought to resolve the tension by drawing upon their own normative theories of takings to define the proper scope of taxation.”).

249. Separately, the Supreme Court has struck down nondiscriminatory state taxation of international commercial instrumentalities, cargo containers, under the Commerce Clause. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 444–46, 448–449 (1979) (describing how such incursion onto foreign commerce is governed by supplementing the traditional four factors from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)—substantial nexus with the state, “fair apportionment, nondiscrimination against interstate commerce, and relation to state services—with two additional factors, “enhanced risk of multiple taxation” and “uniformity,” “that ‘the Federal Government must speak with one voice when regulating commercial relationships with foreign governments’” (citations omitted)).

250. 459 U.S. 145, 154 (1982). Because the *Xerox* Court found statutory preemption, it was “unnecessary for [the Court] to consider whether, absent congressional regulation, the taxes here would pass muster under the Import-Export Clause or the Commerce Clause.” *Id.*

251. *Id.* at 155 (Powell, J., dissenting).

252. *Id.*

253. See *supra* notes 60–61 and accompanying text.

254. See *United States v. Sullivan*, 274 U.S. 259, 263 (1927) (holding that income is taxable, regardless of the legality of the source); see also *Taxation of U.S. Resident Aliens*, IRS, <https://www.irs.gov>.

could otherwise qualify them for the EITC. As the Court acknowledged, employees may face civil consequences for accepting illegal employment—namely the inability to adjust their status to lawful permanent residents.²⁵⁵ Thus, tax benefits for illegal employment might be inconsistent with such an employee-side civil penalty for the employment, and California’s efforts to fully extend EITC benefits, including for illegal employment, might raise preemption concerns.

Xerox similarly provides supportive authority for the idea that Congress’s desire to subsidize work for only particular groups might preempt non-tailored state EITCs. Just as “state taxation . . . would frustrate the congressional purpose of encouraging foreign trade,”²⁵⁶ employment-based state tax benefits here would frustrate the congressional purpose of discouraging their employment. This would seem particularly compelling in California—a state whose EITC is refundable, as opposed to simply being a limited offset of tax liability. If California extended the state EITC to unauthorized immigrants for employment-based wages, it would be in the unsettling position of potentially providing payment for illegal employment notwithstanding IRCA’s “comprehensive framework for ‘combating the employment of illegal aliens.’”²⁵⁷

On the other hand, the state’s power of taxation, including on sales of goods, property, and income, ordinarily elicits judicial deference, even amidst constitutional litigation. This suggests that where state tax power deference meets immigration’s plenary power deference, the two might neutralize one another and courts may reinstate a more robust presumption against preemption.

In contrast to the EITC, the federal CTC explicitly focuses on children²⁵⁸ (even if adults are nominally the filing beneficiaries) and the Tax Cuts and Jobs Act preserved a limited benefit for non-citizens. The equal protection holding of *Plyler* recognized the unique plight of undocumented minors, granting them particular constitutional respect.²⁵⁹ Undocumented children may be ineligible for certain direct financial benefits, such as Supplemental Nutrition Assistance Program (SNAP) benefits and the full federal CTC,²⁶⁰ but they retain eligibility for a significantly reduced federal CTC as well as select in-kind benefits.²⁶¹ Unlike

[gov/individuals/international-taxpayers/taxation-of-resident-aliens](https://www.irs.gov/individuals/international-taxpayers/taxation-of-resident-aliens) [<https://perma.cc/UQ4M-RFW5>] (last updated Mar. 18, 2019) (reflecting that resident status for tax purposes is distinct from immigration status).

255. See *Arizona v. United States*, 567 U.S. 387, 404–05 (2012); see also 8 U.S.C. § 1255(a), (c) (2012).

256. *Xerox*, 459 U.S. at 156 (Powell, J., dissenting).

257. *Arizona*, 567 U.S. at 404 (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002)).

258. Even after adjusting for household size, the EITC provides much larger benefits to low-income households with children as opposed to those without, but it still provides *some* benefits to low-income households without children. For a discussion of this phenomenon and its consequences, see Kleiman, *supra* note 49.

259. *Plyler v. Doe*, 457 U.S. 202, 219–20 (1982).

260. See Lipman, *supra* note 18, at 44.

261. For example, the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) provides federal funds to states for mothers and their young children. See 42 U.S.C. § 1786

Congress's regulation of unauthorized immigrant employment, the regulation of undocumented children's receipt of public benefits is hardly an occupied field.

New York, which anchors its state child tax credit to federal CTC eligibility,²⁶² might have changed its state child tax credit policy in two different ways. It could define "qualifying child" independent of the current federal definition—and without reference to immigration status—thereby eliminating the connection between federal and state eligibility (essentially reviving the relevant definition from before the 2018 reforms). In doing so, the state legislature might express concern for the welfare of children and include the child tax credit in an omnibus bill. This is, in fact, what New York recently did.²⁶³

Alternatively, the New York legislature could have passed a resolution condemning the federal government's tax policy changes, acknowledging that the inclusion of the more stringent federal CTC eligibility criteria was clearly an effort by Congress and the President to deter and regulate immigration. New York might, pursuant to this resolution, design an oppositional state law compensating for the federal benefit decreases with state increases.

Although the latter intent may not affect the policy's constitutionality under *P. G. & E.*, the policy's relationship to federal immigration power distinguishes it from *P. G. & E.*²⁶⁴ Under prevailing immigration preemption case law, both motivations would be treated the same and raise little constitutional concern, just as Arizona's endorsement of "attrition through enforcement"²⁶⁵ had no effect on the Supreme Court's preemption analysis. Yet an approach that engaged with state intent could distinguish between traditionally legitimate state interests and a naked intent to challenge and usurp federal authority.

The role of intent in this context may be premature, not only because of what actually transpired, but also in light of both the seeming lack of field occupation, the historical deference to state tax policy, and the persistence of at least a limited federal CTC. However, the increasing attention paid to immigrant children suggests that the landscape might be changing, rendering the role of intent more significant if federal law surrounding undocumented children becomes more comprehensive and states' opposition becomes more explicit.²⁶⁶

(2012). States may choose to determine eligibility without regard to immigration status. *See* 7 C.F.R. § 246.7(c)(3) (2018).

262. *See* N.Y. TAX LAW § 606(c-1) (McKinney 2018).

263. *See id.*

264. Poor New York legal aliens who are not eligible for the higher state child tax credit because they already receive the federal CTC cannot plausibly claim alienage discrimination. It is also difficult to envision the sort of equal protection-based discrimination claims a poor New York citizen might make to garner anything more scrutinizing than rational basis review. Of course, even under rational basis review, the question of whether New York's policy to offset federal CTC losses for unauthorized immigrants is "a legitimate state interest" brings the individual constitutional rights question back to, in part, the structural question of federal preemption. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (articulating the standard for rational basis review).

265. 2010 Ariz. Legis. Serv. 113 (West).

266. Much of the attention has focused on *unaccompanied* minors whose nonresident parents are unlikely to be filing and who are therefore unaffected by the federal CTC. However, the general

B. RESIDENTIAL MORTGAGES

State-facilitated ITIN mortgages likewise raise preemption questions. Owner-occupancy requirements raise parallel questions to the rental housing restrictions that divided the federal Courts of Appeals.²⁶⁷ The structure of state and federal actors, “authorities,” and “enterprises” may introduce additional complications to a preemption analysis.²⁶⁸

If a state offers residential financing to undocumented immigrants—whether through securitization, warehousing, or indirectly, as in Madison’s down payment assistance—such financing may require the borrower to reside in a property. These financing programs thus require the undocumented immigrant to certify that she intends to continue their unlawful presence for a long horizon. Although the INA does not materially regulate the ability of foreign nationals to purchase property,²⁶⁹ it is an entirely different matter for a state or locality to encourage or financially incentivize unlawful presence in—beyond purchase of—residential property within the United States.²⁷⁰

Consider the Third Circuit’s assertion that severe municipal infringements on the ability of individuals to live in a part of the United States impinges on the federal government’s exclusive power to regulate immigration (and is field preempted by the INA).²⁷¹ Arguably, state inducements (as some might call it) to live in a part of the United States might tread on the same forbidden territory. Although rental housing might be both temporary and affordable (as compared to

executive hostility to children of noncitizen parents is notable, whether those children are being challenged for their birthright citizenship or for being unaccompanied minors. *See, e.g.,* Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L. L. REV. 1, 6 (2017) (describing resistance to guaranteed representation of unaccompanied minors under prior presidential administrations, albeit accompanied by limited funding programs); Jennifer Schuessler, *The History Behind the Birthright Citizenship Battle*, N.Y. TIMES (July 19, 2018), <https://www.nytimes.com/2018/07/19/arts/the-history-behind-the-birthright-citizenship-battle.html> [<https://perma.cc/V65A-5NPJ>] (discussing recent controversies regarding the legitimacy of birthright citizenship).

267. *See supra* notes 175–83, 210–17 and accompanying text.

268. *See supra* notes 97–100, 114–15 and accompanying text.

269. Rather, the INA provides a particular mechanism by which investments, including in real estate, can provide investors a path to lawful permanent residency. *EB-5 Immigrant Investor Program*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/eb-5> [<https://perma.cc/ZM3Y-34N8>] (last visited Apr. 28, 2019). *See generally* Debbie A. Klis, *Alternative Financing for Commercial Real Estate: A Primer on Adding EB-5 Capital and Tax Credits to the Capital Stack*, 30 PROB. & PROP. 49 (2016) (explaining the utilization of the EB-5 program as an alternative source of real estate financing).

270. The current administration has invoked the prospect of attempting to prosecute state and municipal officials under the criminal prohibition of unlawfully present immigrant inducing and harboring. *See* Jeffrey Vagle, *Does the Oakland Mayor Face Legal Liability for Warning About ICE Raids?*, JUST SECURITY (Mar. 15, 2018), <https://www.justsecurity.org/53856/oakland-mayor-face-legal-liability-warning-ice-raids/> [<https://perma.cc/XWM4-KD5C>] (“Homan, the ICE deputy director who is not a fan of [Oakland Mayor Libby] Schaaf’s public announcement of impending ICE raids, has in the past also floated the idea that mayors and other government officials in ‘sanctuary cities’ should be held liable under 8 U.S.C.A. § 1324, the statute that addresses the ‘bringing in and harboring of certain aliens.’”).

271. *See* *Lozano v. City of Hazleton*, 724 F.3d 297, 317 (3d Cir. 2013).

short-term lodging²⁷²), long-term amortized residential mortgages conditioned on owner occupancy require a commitment to unlawful residence. Admittedly, the owner-occupancy requirements are embedded in a voluntary financial transaction between the immigrant and the lender—but once the immigrant has entered into a transaction, she is legally bound by the contract, including its exit provisions.²⁷³

The exclusion of undocumented immigrants by the FHA and GSEs complicates matters further: “a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation,”²⁷⁴ but the statuses of Fannie Mae and Freddie Mac have been complicated since they entered conservatorship.²⁷⁵ Insofar as ITIN mortgages are found to be relatively safe investments that could improve the GSEs capital position, the FHFA could mandate that the GSEs end the current policy of requiring lawful status for mortgage purchase. It might do so by regulation, subject to notice and comment, but it might also do so as a “directive [that does] not constitute rulemaking but [is] simply an exercise of its business judgment as a ‘conservator’ of Fannie Mae and Freddie Mac.”²⁷⁶ Because the FHFA cannot simply “evade judicial scrutiny by merely labeling its actions with a conservator stamp,”²⁷⁷ the FHFA cannot tread on immigration policy in the absence of legitimate conservatorship interests. The FHFA may very well take Fannie Mae and Freddie Mac outside conservatorship, which raises

272. The Eighth Circuit explicitly noted that, under the ordinance in Fremont, Nebraska, “[t]emporary guests need not obtain a license.” *Keller v. City of Fremont*, 719 F.3d 931, 938 (8th Cir. 2013). Yet, a review of the relevant municipal code (effective 2014) does not make it obvious that “temporary” commercial guests are exempted from the code’s requirements, and, even if so, what temporary means. *See* FREMONT, NEB., ORDINANCE NO. 5165 (2014).

273. Although my analysis has focused on the legal tensions between financial regulation and immigration enforcement, financial tensions also exist. In some small areas where housing authorities extended credit to ITIN borrowers, Latino borrowers were overrepresented in the post-2008 foreclosure filings, and the majority of those Latino borrowers filing for foreclosure may have received ITIN mortgages. *See* Eileen Diaz McConnell & Enrico A. Marcelli, *Buying into the American Dream? Mexican Immigrants, Legal Status, and Homeownership in Los Angeles County*, 88 SOC. SCI. Q. 199 (2007) (explaining reasons why there are fewer barriers to homeownership for Mexican immigrants in Los Angeles); Simmons, *supra* note 1 (“Ellen Bernards, a foreclosure prevention counselor for Greenpath Debt Solutions and co-chair of the Dane County Foreclosure Prevention Task Force, said at least three-quarters of her Latino clients facing foreclosure had taken out ITIN loans and that many, like Sanchez, were issued subprime mortgages with adjustable rates by private lenders.”). Admittedly, more systematic evidence on ITIN borrowers specifically is unavailable, so such anecdotes and studies of limited scope should not be deemed empirically representative.

Of note, the state programs in Illinois and Wisconsin incorporated a requirement of homebuyer pre-purchase counseling. ILL. HOUSING DEV. AUTH., OPPORTUNITY I-LOAN FREQUENTLY ASKED QUESTIONS 2 (on file with author). Also, concerns have arisen that the tightening market for borrowers may raise concerns for minority wealth. *See* Patricia A. McCoy, *Foreword: Has the Mortgage Pendulum Swung Too Far? Reviving Access to Mortgage Credit*, 37 B.C. J.L. & SOC. JUST. 213, 214 (2017) (“Nevertheless, lenders are still too risk averse and millions of lower-income and minority households who would normally qualify are unable to get mortgages.”).

274. *City of New York v. FCC*, 486 U.S. 57, 63–64 (1988) (quoting *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 369 (1986)).

275. *See supra* notes 96–104 and accompanying text.

276. *Leon County v. Fed. Hous. Fin. Agency*, 700 F.3d 1273, 1275–76 (11th Cir. 2012).

277. *Id.* at 1278.

questions about the scope of its future authority, because the FHFA has been the conservator since HERA's passage.²⁷⁸

The statuses of the state housing authorities are similarly complicated—the authorities may possess some conventional state powers but not others.²⁷⁹ As one state court aptly put it, “[l]abeling an entity as a ‘state agency’ in one context does not compel treatment of that entity as a ‘state agency’ in all contexts.”²⁸⁰ Thus, the preemptive effect of FHFA/GSE action is as context-specific as the extent to which a state housing authority's action may even *be* preempted.

The constitutional analysis might also hinge on the contours of the state financial assistance. After the foreclosure crisis, Illinois extended housing relief funds from the federal Toxic Asset Relief Program to distressed homeowners with ITINs.²⁸¹ The program's mortgage assistance required that the mortgaged property be the primary and only residence of the borrower.²⁸² Even when conditioned on owner occupancy, the emergency, one-time nature of the financial assistance to borrowers and the authorization by the federal government might blunt preemption concerns, though no such challenge appears to have been litigated in Illinois.²⁸³

Finally, the housing context presents an arena where intent could be particularly useful for preemption analysis. Residential-mortgage financing to ITIN borrowers—at least when marked by relatively low default rates—may reflect the state's compelling, non-immigration regulation intent of generating economic development. However, where subnational entities explicitly contrast their policies with the demands of immigration law, as WHEDA leadership did, that may threaten judicial willingness to allow conflict between federal immigration prerogatives and the state's housing supports.²⁸⁴ A long-term housing program that

278. David Min, *How Government Guarantees Promote Housing Finance Stability*, 50 HARV. J. ON LEGIS. 437, 441 & n.19 (2013) (noting “the high costs of the GSEs’ conservatorship” and the bipartisan consensus that the GSEs should be “wound down and major reforms of the housing finance system implemented”).

279. See *supra* notes 115–17, 126–34 and accompanying text. See generally Alex E. Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243 (1992) (discussing the hybrid nature of quasi-state entities like housing finance agencies).

280. *Lynch v. S.F. Hous. Auth.*, 65 Cal. Rptr. 2d 620, 623 (Cal. Ct. App. 1997).

281. See ILL. HOUS. DEV. AUTH., HARDEST HIT FUND PROGRAM GUIDE 3 (2013). See generally Frank S. Alexander et al., *Legislative Responses to the Foreclosure Crisis in Nonjudicial Foreclosure States*, 31 REV. BANKING & FIN. L. 341, 356–57 (2011–2012) (describing the Housing Finance Agency Innovation Fund for the Hardest Hit Housing Markets, or the “Hardest Hit Fund”).

282. ILL. HOUS. DEV. AUTH., *supra* note 285, at 7.

283. There is no mention of the immigration status of borrowers for such federally funded programs. See Katherine Lehe, *Congress Tackles Foreclosure Relief and GSE Reform*, 38 HOUSING L. BULL. 109, 116 (2008), http://www.nhlp.org/files/04%20NHLP%20Bull%20Jun08_Cong%20tackles%20foreclosure.pdf (“Significantly, there is no provision in the Senate bill that would prohibit the use of [Housing Trust Fund] funds for activities benefiting undocumented immigrants.”).

284. See *supra* notes 118–20 and accompanying text. Although *P. G. & E* addresses intent largely for field preemption purposes, intent may also be a factor for conflict preemption. Thus, intent could be relevant to this inquiry even if a court adopted Judge Higginson's perspective from the *Farmers Branch* litigation, that housing regulation was not field preempted but may be conflict preempted.

is explicitly aimed to facilitate long-term housing to undocumented immigrants could be discussed as an explicit endorsement of their presence within a state—and a rebuke to federal immigration enforcement. Precisely for that reason, that explicit premise may generate greater judicial scrutiny than an asserted rationale of state economic interests, just as a nuclear safety rationale for plant regulations generated greater judicial scrutiny than an economic one.²⁸⁵

C. HIGHER EDUCATION

Higher education preemption has been studied more extensively in light of the *Martinez* litigation. *Martinez* preserved California’s egalitarian higher education finance—including as it is applied to undocumented graduates of California high schools.²⁸⁶ As discussed below, the constitutional architecture of higher education financing should allow for both a federal floor and state heterogeneity due to the unique nature of public education as noted in *Plyler*.²⁸⁷

Scholars have suggested that *Plyler*’s emphasis on education and integration should be extended to adults, whether through the courts or federal legislation.²⁸⁸ But what this means remains unsettled. As the four aforementioned tiers of access suggest, *Plyler*’s integrationist mandate could stand for the basic right of undocumented immigrants to attend in-state school at (no more than) out-of-state tuition rates, with the determination of the particular terms of attendance left to state constitutions, legislatures, and Boards of Regents. It could also stand for parity, in

285. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 213 (1983).

286. See *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010).

287. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“The American people have always regarded education and the acquisition of knowledge as matters of supreme importance. We have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests. As pointed out early in our history, some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.” (internal alterations, citations, and quotation marks omitted)).

288. See, e.g., Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2073 (2008) (noting that “proposals [such as the Development, Relief, and Education for Alien Minors (DREAM) Act] granting access to higher education by conferring lawful immigration status on undocumented students have come close to congressional approval”). Further, “[a]n essential role for states and cities in fostering or resisting the integration of unauthorized migrants . . . involves public education. . . . This role starts with basic access (or not) to elementary and secondary education, but also includes . . . most importantly, *higher education*.” *Id.* at 2077 (emphasis added). Peter Markowitz distinguishes in-state public benefits laws, including those concerned with higher education, as alienage laws that do not regulate immigration and advances an inclusive “state citizenship” scheme. Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 894–897 (2015). This scheme leverages inclusive state legislation and policies to purportedly avoid preemption doctrine concerns, though even Markowitz admits “the line between alienage and immigration laws” is “elusive” and that alienage laws would not shield immigrants from deportation. *Id.* at 897; see also Motomura, *supra* note 24, at 547 (using the term “immigration law” to refer to “the body of law governing the admission and expulsion of aliens. . . . [as] distinguished from the more general law of aliens’ rights and obligations, which includes, for example, their tax status, military obligations, and eligibility for government benefits and certain types of employment”).

which lawful status has little bearing on aid eligibility, as is arguably the case in California.

A floor guaranteeing education and integration would be most doctrinally faithful.²⁸⁹ Such a floor would mean states like South Carolina, which prohibits undocumented students' attendance at public universities, would need to amend their laws and, at a minimum, allow undocumented students to attend public universities at out-of-state tuition rates. Federal law would thus place a *Plyler*-reliant floor on higher education, an acknowledgment that access to, if not funding for, postsecondary education is a facet of minimal integration. In 1975, when Texas passed the law struck down in *Plyler*, the United States Census Bureau estimated that about sixty-three percent of adults had completed high school and about fourteen percent had completed four or more years of college.²⁹⁰ Forty years later, the parallel statistics are about eighty-eight percent and about thirty-three percent.²⁹¹ Strikingly, a majority of American residents over the age of twenty-five now have attended, if not completed, some higher education.²⁹² In light of the changing education and labor markets,²⁹³ equal access to, if not equal financial subsidies for, public higher education naturally extends *Plyler*.²⁹⁴ Such nominally equal access still leaves the question of financing to the states.

This theory of equal access to public higher education has been tested, but not repudiated, by the federal courts. The Eleventh Circuit upheld the constitutionality of Georgia's higher education ban preventing those without lawful status, which Georgia defined to include DACA recipients, from attending the state's three most selective public institutions of higher education.²⁹⁵ The Eleventh Circuit rejected all of plaintiffs' challenges, finding that the policy was not: (1) an

289. In arguing against bans on the admission of undocumented immigrant students to public universities, Danielle Holley-Walker has also noted the relevance of language from *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) concerning the importance of higher education. Holley-Walker, *supra* note 149, at 363.

290. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 156 tbl. 238 (2012), <https://www2.census.gov/library/publications/2011/compendia/statab/131ed/2012-statab.pdf>.

291. U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2015, at 2 tbl. 1 (2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p20-578.pdf>.

292. *Id.*

293. By "changing educational and labor markets" I mean to acknowledge the growth in the college wage premium between *Plyler* to modern day. See Claudia Goldin & Lawrence F. Katz, *The Future of Inequality, The Future of Inequality: The Other Reason Education Matters So Much*, MILKEN INST. REV. 26, 32–33 (2009) (describing the growth in the college wage premium from the 1980s through the twenty-first century).

294. Although I assume the continued validity of *Plyler* for the purposes of this Article, commentators have suggested that the changing Supreme Court could overrule it. See, e.g., Aaron Tang, *Kennedy's Retirement Also Jeopardizes Public Education for Undocumented Children*, SLATE (July 5, 2018, 11:35 AM), <https://slate.com/news-and-politics/2018/07/kennedys-retirement-jeopardizes-public-education-for-undocumented-children-too.html> [<https://perma.cc/YW6T-4WRU>].

295. *Estrada v. Becker*, No. 17-12668, 2019 WL 1050886, at *1 (11th Cir. Mar. 6, 2019). State courts in Georgia have also recently decided the issue of in-state tuition for DACA recipients. See *Alford v. Hernandez*, 807 S.E.2d 84, 91–92 (Ga. Ct. App. 2017), *cert. denied* (May 7, 2018) (reversing favorable decision to DACA student plaintiffs who had sought, and been granted by lower court, recognition of their right to in-state tuition at Georgia's public universities).

unconstitutional regulation of immigration, (2) field preempted, (3) conflict preempted, or (4) a violation of the Equal Protection Clause.²⁹⁶ The court's decision should be tied to the particular case before it, which addresses exclusion only from the state's most selective institutions rather than a universal exclusion.

As opposed to the residential mortgage context, there should be little concern that general higher education finance, whether provided through state loans or grants or through no state aid at all, will run afoul of federal law. Higher education access and aid, absent residential or employment contingencies, do not raise concerns of interference with the federal immigration scheme. However, although states may wish for students to complete their degrees and channel their postgraduate productivity locally, they may not condition financial support on an undocumented immigrant's long-term residence.

Certain states including Arkansas and West Virginia have programs that provide higher education financial support contingent on postgraduate residency, respectively, of two and three years.²⁹⁷ The extension of such contingent benefits to undocumented immigrant students may not raise conflict preemption issues when the residency requirement is of limited duration.²⁹⁸ However, increasing residency requirements or introducing employment requirements would create parallels to ITIN mortgages and employment-based EITCs. For example, consider that federal higher education loan forgiveness programs, both public

296. *Estrada*, 2019 WL 1050886, at *3–8.

297. *See, e.g.*, S.B. 284, 2018 Leg., Reg. Sess. (W. Va. 2018), http://www.wvlegislature.gov/Bill_Text_HTML/2018_SESSIONS/RS/bills/SB284%20SUB2.pdf (requiring two years of postgraduate residence in West Virginia in exchange for a WV Invests Grant towards “the cost of tuition charged to all students for coursework leading to completion of the chosen associate degree or certificate, less all other state and federal scholarships and grants for which the student is eligible”); *Arkansas Future Grant (ArFuture)*, ARK. DEP’T OF HIGHER EDUC., <https://scholarships.adhe.edu/scholarships/detail/arfuture> [<https://perma.cc/K4TL-MYMV>] (last visited Apr. 28, 2019) (providing similar higher education grant with the condition that the recipients “[r]eside in this state for three (3) consecutive years”).

298. For a recognition of duration in immigration preemption analysis, consider also the Eleventh Circuit's decision in *United States v. Alabama*, striking down a section of a state law “prohibit[ing] Alabama courts from enforcing or recognizing contracts between a party and an unlawfully present alien, provided the party knew or constructively knew that the alien was in the United States unlawfully.” 691 F.3d 1269, 1292 (11th Cir. 2012) (citation omitted). The law made narrow exceptions, including for contracts that could “reasonably be completed within 24 hours of formation” or that provided “overnight lodging.” *Id.* at 1293. Because the exception was so narrow, the court described the law as “practically prohibit[ing] undocumented aliens] from enforcing contracts for basic necessities.” *Id.* As the court summarized:

To say that section 27 is extraordinary and unprecedented would be an understatement, as it imposes a statutory disability typically reserved for those who are so incapable as to render their contracts void or voidable. Essentially, the ability to maintain even a minimal existence is no longer an option for unlawfully present aliens in Alabama. . . . [A] state's decision to impose “distinct, unusual and extraordinary burdens and obligations upon aliens” may constitute an impermissible intrusion into the federal domain. We believe that the blanket prohibition of the right to enforce nearly any contract easily qualifies as an extraordinary burden.

Id. (quoting *Hines v. Davidowitz*, 312 U.S. 52, 65–66 (1941))

service-based and income-driven, have employment duration requirements of ten to twenty-five years.²⁹⁹

If states passed parallel loan forgiveness programs for undocumented students, based on either long-term residency or employment, such programs could give rise to similar preemption concerns. For employment at a foreign not-for-profit organization that is not a 501(c)(3) to count towards Public Service Loan Forgiveness (PSLF) credit, the Department of Education requires the organization to “operate” in the United States.³⁰⁰ So a form of state loan forgiveness that would explicitly, or perhaps effectively, require an undocumented immigrant to remain in the United States might give rise to preemption concerns, whereas a program that unconditionally allowed for the forgiveness-qualifying work to be conducted outside the United States would seem uncontroversial. Similarly, PLSF requires “employment certification.”³⁰¹

On the other hand, the federal income-driven repayment programs consider “all taxable income”—which includes both self-employment income and external employment income—and do not require “employment certification” as such.³⁰² This model might create opportunities for states to leverage IRCA’s accommodation of independent contracting.³⁰³

State intent can also be useful to understand recent higher education laws responding to DACA’s termination. Consider that a version of the Washington Dream Act recently passed after failing in earlier legislative sessions.³⁰⁴ The Act extends higher education benefits to undocumented immigrants (including those once possessing DACA) who otherwise meet residency and graduation requirements.³⁰⁵ As the Democratic sponsor who reintroduced the bill in 2018 explained, the state “can’t guard against everything the [federal government] might do in relation to undocumented students, but [it] can protect them from losing their

299. 34 C.F.R. § 682.215 (2018) (noting loan forgiveness duration of twenty-five years); *Income-Driven Plans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven> [<https://perma.cc/3GFD-8XV5>] (last visited Apr. 28, 2019) (describing when twenty- versus twenty-five-year-long plans apply); *Public Service Loan Forgiveness*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service> [<https://perma.cc/L897-PSNV>] (last visited Apr. 28, 2019) (forgiving federal loans of student borrowers who work for a public service organization after ten years of qualifying monthly payments).

300. *Public Service Loan Forgiveness Questions and Answers*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service/questions> [<https://perma.cc/ZGB6-GKNL>] (last visited Apr. 28, 2019).

301. *See, e.g.*, DEP’T OF EDUC., PUBLIC SERVICE LOAN FORGIVENESS (PSLF): EMPLOYMENT CERTIFICATION FORM, <https://studentaid.ed.gov/sa/sites/default/files/public-service-employment-certification-form.pdf> (last visited Apr. 28 2019).

302. *Compare id.*, with DEP’T OF EDUC., INCOME-DRIVEN REPAYMENT (IDR) PLAN REQUEST, <https://static.studentloans.gov/images/idrPreview.pdf> (last visited Apr. 28, 2019).

303. *See supra* notes 63–64 and accompanying text.

304. H.B. 1488 (Engrossed Third Substitute), 2018 Leg., Reg. Sess. (Wash. 2018), <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/House/1488-S3.SL.pdf#page=1>.

305. *Id.* § 1 (codified at WASH. REV. CODE ANN. § 28B.118.010(4)(b)(i) (West 2018)); *id.* § 2 (codified as amended at WASH. REV. CODE ANN. § 28B.145.030(2)(h) (West 2018)).

financial aid and help them stay in college.”³⁰⁶ Such statements acknowledge the existing space for state higher education legislation, bound in generosity by a ceiling defined by 8 U.S.C. § 1623 as tentatively interpreted by *Martinez*.³⁰⁷ That space should also be bound by a floor—undocumented immigrants’ attendance at out-of-state tuition rates—based on *Plyler* and changing higher education empirics.³⁰⁸ The state of Washington’s intent is to maximize accessibility within established law, not to create such financially generous policies conditioned on long-term residency or employment as to usurp federal immigration power.

IV. THE STRUCTURE OF FINANCIAL IMMIGRATION FEDERALISM

The three markets discussed above illustrate two significant facets of financial immigration federalism: first, financial immigration federalism has significant practical effects on the lives of immigrants in different parts of the United States, as state and local policy choices accumulate across domains of life; second, because financial immigration federalism implicates state and local government exercise of taxation, proprietary, and distributive authorities, those governments may be able to enact a wider range of immigrant-related policies than in areas more traditionally covered by “immigration federalism.” That is not to say, however, that immigration federalism does not limit exercises of financial immigration federalism.

An example illuminates the significant practical effect of financial immigration federalism. Consider two undocumented children, Michele and Even, who at age twelve enter the country with their families, respectively into California and South Carolina. Despite living in households below the poverty line, both successfully graduate from high school. In California, Michele will be eligible to attend any of the University of California campuses for free due to Cal Grant eligibility, which may include a living stipend. Upon graduating, Michele may then attend law school and be admitted to the California bar. If California eventually passes an immigrant-inclusive EITC and the California housing authority changes its policy, it is possible that Michele may claim the EITC for her work as a low-bono lawyer (as an independent contractor). Michele may perhaps even avail herself of the state housing programs to live amongst citizen professionals.

In contrast, Even’s residency in South Carolina poses significant hurdles. Higher education would be quite expensive, either at a private institution or at an out-of-state public institution. The state may not provide tax relief or homeowner-ship assistance. And Even’s professional aspirations may be limited by immigration restrictions in state licensing.

The cumulative effect of multiple state policy choices results in a striking inequality for people who share a common origin and federal status. For an

306. Sydney Brownstone, *WA Legislators Re-Introduce Bill to Protect DREAMers from Losing Financial Aid*, STRANGER (Jan. 12, 2018, 11:11 AM), <https://www.thestranger.com/slog/2018/01/12/25707751/wa-legislators-re-introduce-bill-to-protect-dreamers-from-losing-financial-aid> [<https://perma.cc/YKH9-QNV9>].

307. See *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855 (Cal. 2010).

308. See *supra* notes 290–98 and accompanying text.

immigrant youth, choices regarding higher education finance create an inflection point. For some, public education changes from offering inclusion outside the law to becoming the site of exclusion under the law.³⁰⁹ Through a combination of such policy choices, states effectively craft disparate societies of undocumented immigrants. In doing so, they might appear to be regulating immigration by providing large incentives for legal immigration or by penalizing the undocumented so severely as to preclude them from pursuing housing, education, and perhaps consequently, non-employment income. Yet, as stark as these cumulative distinctions become, it is unlikely that a doctrine could acknowledge the aggregate effects of individually non-preempted state actions. It would be impractical to set a threshold after which certain financial investments in undocumented immigrants infringe on federal authority, and it would be even more difficult for a court to fix the hypothetical set of state policies that transgress through their generosity.

This limitation illuminates the relationship of financial immigration federalism to immigration federalism more generally. Financial immigration federalism implicates a range of doctrinal preemption frameworks, including those often overlooked in the immigration context. This hybrid nature allows states wide leeway to differ among themselves and even to neutralize the effects of federal policy. For example, judicial deference to state tax authority would seem to allow states to offset every federal limitation on undocumented immigrants' eligibility for tax credits. Willing and financially capable states could purchase their way out of federal financial exclusion of certain residents. Although attention to state intent could align financial immigration federalism with more general immigration federalism principles, contemporary courts have shown no interest in that approach.

Although formal doctrine is unlikely to significantly limit financial immigration federalism, financial constraints (or lack thereof) may drive state variation as strongly as political constraints. Wealthy states can fund and fill gaps that the federal government intentionally does not fill. If California officials would like to set aside tens of thousands of dollars per year per student to provide access to its marquee institutions or to provide independent contractors with monetary work incentives, they may do so, assuming, nontrivially, that intrastate politics allow such generosity. Less wealthy states may not be able to make similar choices.

Nonetheless, traditional immigration federalism principles do limit state choices, even in these "financial" arenas. When the state imposes conditions on its financing that create specific financial incentives for undocumented immigrants to remain long-term or to reward them for violating federal law, financial immigration federalism collapses to the usual boundaries of immigration federalism. Federal supremacy in immigration will not permit such a direct "obstacle to

309. See, e.g., Roberto G. Gonzales, *Learning to Be Illegal: Undocumented Youth and Shifting Legal Contexts in the Transition to Adulthood*, 76 AM. SOC. REV. 602, 608–11 (2011).

the federal plan of regulation and control.”³¹⁰ California’s money knows few bounds, but a few bounds remain.

CONCLUSION

Although it may be true that regulating “the lives of immigrants in areas which the States have traditionally occupied . . . [has] not generally been viewed as an obstacle to federal immigration law,”³¹¹ financial immigration federalism disturbs this understanding and foreshadows difficult preemption challenges that courts may be called upon to resolve. States and state entities are creatively testing the meaning and limits of federal immigration law and exposing tensions that scholars have thus far neglected. As this Article shows, careful attention to financial immigration federalism can shed light on several more general issues in immigration law—particularly questions about immigration federalism more broadly.

310. *Arizona v. United States*, 567 U.S. 387, 403 (2012).

311. Markowitz, *supra* note 292, at 900 (internal quotation marks omitted).