Capital Migration

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If capital and corporations are purportedly "borderless," what renders capital and entities legally "foreign"? To help answer that question, this Article first unpacks foreign capital's migration through its intersection with, and similarities to, human migration.

Beginning with structural parallels, the citizenship binary is insufficient to understand the "foreign" in both human and capital migration. Nor do various levels of American government align in their approach to foreignness. Just as immigration tax federalism permits nonuniformity, so does capital and corporate tax federalism under the (Foreign) Commerce Clause and after the Supreme Court's recent decision in National Pork Producers Council v. Ross.

Beyond theoretical foundations, this Article refutes the separation of capital migration and human migration by examining where they meet: human migration regimes that attract capital. "Capital-purchase migration" in universal or treaty investor visas allows foreign capital to pave our streets and then the contributor's path to permanent residency. "Capital-facilitating migration" permits the temporary workers necessary for an investment to flourish.

Third and finally, a fear of the foreign governs both capital and human migration. For capital, that fear does not manifest only in the much-discussed Committee on Foreign Investment in the United States. As this Article explains, capital migration drives the aesthetic "intrusion" of newcomers'

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residential investments and the controversial commercial investments catering to these newcomers. Communities, including longer-settled but fellow migrants, police this foreign capital and the people behind it using municipal codes. This Article reorients our understanding of capital migration as interwoven with human migration, from the ivory tower to the neighborhood streetscape.

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INTRODUCTION

"Borderless capital" and "borderless corporations" are apparently on the rise.[1] And yet, borders themselves are rising.[2] Where migrants face force and fences, capital and corporations seem to float above.[3]

America relies on foreign capital.[4] We have arguably become the world's largest debtor.[5] For private corporations, tax policies facilitate

[1] *See, e.g.*, William H. Lash, III, *The Decline of the Nation State in International Trade and Investment*, 18 CARDOZO L. REV. 1011, 1016 (1996) ("The borderless corporation, free to source and manufacture anywhere, moves billions of dollars worth of capital and goods daily."); Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 488-89 (2009) (describing the significance of "mobile capital" for local governments); Yesha Yadav, Assistant Professor, Vanderbilt L. Sch., Remarks at Opting Against International Law in International Financial Regulation Panel, Annual Meeting for American Society of International Law (Mar. 30, 2012), *in* 106 AM. SOC'Y INT'L L. PROC., 2012, at 317-18 (discussing the late twentieth century concern with "governance of borderless capital flows"); Anupam Chander, M. Todd Henderson & Rosalind Dixon, Responding to the Financial Crisis, Address Before the University of Chicago Law School Federalist Society (Oct. 10, 2008), *in* 10 ENGAGE, July 2009, at 10 (describing the regulatory challenges of "[b]orderless capital").

[2] David B. Carter & Paul Poast, *Why Do States Build Walls? Political Economy, Security, and Border Stability*, 61 J. CONFLICT RESOL. 239, 248-50 (2017) (describing accelerated "border wall" construction in the late twentieth and early twenty-first century); Beth A. Simmons & Michael R. Kenwick, *Border Orientation in a Globalizing World*, 66 AM. J. POL. SCI. 853, 858 (2022) (describing U.S. investments in its border crossings with Mexico, including "inspection stations, barriers, and buildings").

[3] Ayelet Shachar, *Bordering Migration/Migrating Borders*, 37 BERKELEY J. INT'L L. 93, 95 (2019) (describing border walls throughout the world); *see also* Ming H. Chen & Zachary New, *Silence and the Second Wall*, 28 S. CAL. INTERDISC. L.J. 549, 558-71 (2019) (describing the Trump administration's challenges to legal migration as a "second wall").

[4] *See, e.g.*, BUREAU FISCAL SERV., U.S. DEP'T OF TREASURY, TREASURY BULLETIN 48-50 (Sept. 2023), https://fiscal.treasury.gov/reports-statements/treasury-bulletin/current.html [https://perma.cc/7ALL-54KA] (charting foreign and international ownership of U.S. Treasury securities vis-à-vis total public debt). While the foreign share of public debt has actually decreased in recent years, it remains significant. *Id.*

[5] Michael J. Graetz, Professor, Columbia L. Sch., The Fifth David R. Tillinghast Lecture at New York University School of Law: Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies (Oct. 26, 2000), *in* 54 TAX L. REV. 261, 264 (2001) (describing how "the United States has changed from being the world's largest creditor to being one of its largest debtor nations"). *But see* Gabriel Zucman, *The Missing Wealth of Nations: Are Europe and the U.S. Net Debtors or Net*

foreign capital flows.[6] These American experiences echo throughout the financially globalized world.[7]

Yet unease lurks amid America's hunger for money. From its Founding, America wrestled with foreign capital's "danger," reliance on which coincided with concerns about foreign influence, if not "domination."[8] The fear persists but takes on new faces. While foreign ownership of U.S. corporate shares has grown,[9] Americans — like residents of many countries — express skepticism of the foreign purchase of "domestically-owned companies."[10] Foreign real estate

Creditors?, 128 Q.J. ECON. 1321, 1322-24 (2013) (previewing a more nuanced empirical analysis).

[6] 26 U.S.C. § 871(h) (establishing the portfolio interest exemption for nonresident individuals); *id.* § 881(c) (same for foreign corporations). The sections reflect exemptions from the general rule subjecting U.S. source "fixed or determinable annual or periodical gains, profits, and income," including interest, to a 30% withholding tax. *Id.* § 871(a); *see also* Yoram Keinan, *The Case for Residency-Based Taxation of Financial Transactions in Developing Countries*, 9 FLA. TAX REV. 1, 29 (2008) (arguing that the portfolio interest exemption triggered a global "race to the bottom" "for fear of losing mobile capital flows to the United States").

[7] *See, e.g.*, Yesha Yadav, *The Failed Regulation of U.S. Treasury Markets*, 121 COLUM. L. REV. 1173, 1186 (2021) (describing how U.S. Treasury bonds anchor global markets).

[8] *See, e.g.*, Ganesh Sitaraman, *The Regulation of Foreign Platforms*, 74 STAN. L. REV. 1073, 1106-07 (2022) (arguing that "the newly independent United States needed capital from rich countries in Europe, even as many believed foreign capital was 'dangerous'") (quoting MIRA WILKINS, THE HISTORY OF FOREIGN INVESTMENT IN THE UNITED STATES TO 1914, at 48 (1989)); Detlev F. Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise*, 74 HARV. L. REV. 1489, 1508-09 (1961) (describing how Alexander Hamilton was "forced to defend Federalist policy against the charge that the tolerance afforded alien capital would lead to foreign domination").

[9] Leonard E. Burman, Kimberly A. Clausing & Lydia Austin, *Is U.S. Corporate Income Double-Taxed?*, 70 NAT'L TAX J. 675, 683 (2017) ("In 1965, households held the vast majority of U.S. corporate equity — more than 80% — in taxable accounts, subject to tax on capital gains and dividends. . . . By 2015, the pattern was completely different. . . . Retirement accounts, including IRAs and defined contribution retirement plans, which were almost non-existent in 1965, now account for 37% of corporate equity. The other big shift is in foreign ownership, which now accounts for one-quarter of corporate equity.").

[10] PEW GLOB. ATTITUDES PROJECT, PEW RSCH. CTR., GLOBAL ECONOMIC GLOOM – CHINA AND INDIA NOTABLE EXCEPTIONS ch. 1 (June 12, 2008), https://www.pewresearch.org/global/2008/06/12/chapter-1-views-on-economic-issues/ [https://perma.cc/V3GY-GLBP] ("Half or more in 18 of the 24 countries surveyed say that it is bad when foreigners buy domestically-owned companies. . . . [T]his negative sentiment is particularly pervasive

investment fuels global ire[11] — including through state restrictions on foreign property ownership and capital investments.[12] The country both needs and fears foreign capital.

Fear of the foreign person exists in the border's force and fences, but how does it manifest for noncorporeal capital and corporations?[13] More precisely, how are immigration law and its human subjects actually

[in] Germany[,] Turkey[,] Argentina[,] and Egypt . . . ."); Mariana Pargendler, *The Grip of Nationalism on Corporate Law*, 95 IND. L.J. 533, 570 (2020) (describing "nationalist hostility towards foreign ownership" in the United States and beyond).

[11] Andrew T. Hayashi & Richard M. Hynes, *Protectionist Property Taxes*, 106 IOWA L. REV. 1091, 1093-94 (2021) (describing protectionist property tax regimes and noting that while we "do not generally observe restrictions on foreign ownership of personal property," "real estate has unique features that make it a natural focus of local protectionist efforts"); Dallas Rogers, Alexandra Wong & Jacqueline Nelson, *Public Perceptions of Foreign and Chinese Real Estate Investment: Intercultural Relations in Global Sydney*, 48 AUSTL. GEOGRAPHER 437, 447 (2017) (surveying 900 Sydney residents on their perceptions of foreign and direct investment); *see also* Kevin Fox Gotham, *The Secondary Circuit of Capital Reconsidered: Globalization and the U.S. Real Estate Sector*, 112 AM. J. SOCIO. 231, 264-68 (discussing the role of securitization, secondary mortgage markets, and Real Estate Investment Trusts ("REITs") in connecting global finance to local real estate).

[12] *See, e.g.*, Gregory S. Schneider, *Youngkin Says He Blocked Ford Battery Plant on China Concerns*, WASH. POST (Jan. 13, 2023, 3:36 PM EST), https://www.washingtonpost.com/dc-md-va/2023/01/13/youngkin-virginia-ford-battery-china/ [https://perma.cc/K3ZC-Q8H7] (describing how the Virginia governor may have "remov[ed] Virginia from consideration" for "construction of a battery plant in partnership with Chinese company Contemporary Amperex Technology"). The governor asked Virginians to "be wary of Chinese communist intrusion into Virginia's economy" and asked the General Assembly for "a bill to prohibit dangerous foreign entities tied to the CCP from purchasing Virginia's farmland." *Id.* The governor of Florida has acted similarly. Press Release, Exec. Off. of the Governor of Fla., Governor Ron DeSantis Takes Action Against Communist China and Woke Corporations (Dec. 20, 2021), https://www.flgov.com/2021/12/20/governor-ron-desantis-takes-action-against-communist-china-and-woke-corporations/ [https://perma.cc/X83B-AKFF] (highlighting the governor's efforts to limit Chinese investment in Florida).

[13] KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 2 (2019) (describing capital as combining "an asset, and the legal code" where asset "denote[s] any object, claim, skill, or idea, . . . a piece of dirt, a building, a promise to receive payment at a future date, an idea for a new drug, or a string of digital code").

similar to the normally contrasted laws governing capital and corporate migration?[14]

These questions are of practical importance. Whether in passive portfolio investment or in active foreign direct investment, the United States welcomes trillions of dollars of foreign capital.[15] America leads a new era of "uphill" capital migration — from poorer to richer countries — amid the decline of the so-called "Washington Consensus" that encouraged some poorer countries' "unalloyed reliance on foreign capital."[16] Moreover, distinguishing true capital migration from mere paper profits-migration, or income shifting, remains an empirical puzzle.[17] This Article intervenes in these significant debates about modern capitalism and finance by better defining capital migration and its constraints under American law. In the process, I uncover intersections and parallels, rather than only contrasts, to human migration.

Before proceeding further, I acknowledge my conjoined discussion of foreign capital and foreign corporations.[18] As others have documented, globalization requires and enables corporations — their capital and, as this Article documents, their workers — to constantly cross borders.[19]

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[14] *Cf.* Shayak Sarkar, *Capital Controls as Migrant Controls*, 109 CALIF. L. REV. 799, 801 (2021) (describing the capital-human migration asymmetry).

[15] *See, e.g.*, Press Release, U.S. Dep't of the Treasury, Preliminary Report on Foreign Holdings of U.S. Securities at End-June 2022 (Feb. 28, 2023), https://home.treasury.gov/news/press-releases/jy1311 [https://perma.cc/WX6N-FARN] (disaggregating foreign holdings of U.S. securities by type and country).

[16] Nancy Birdsall & Francis Fukuyama, *The Post-Washington Consensus: Development After the Crisis*, 90 FOREIGN AFFS. 45, 46 (2011).

[17] Thomas Tørsløv, Ludvig Wier & Gabriel Zucman, *The Missing Profits of Nations*, 89 REV. ECON. STUD. 1, 8-14 (2022); *see, e.g.*, Zucman, *supra* note 5, at 1324 (discussing how "households own a large amount of mutual fund shares through unrecorded accounts in tax havens," complicating our understanding of national asset positions).

[18] Robert B. Reich, *Who Is Us?*, HARV. BUS. REV., Jan.–Feb. 1990, https://hbr.org/1990/01/who-is-us [https://perma.cc/VKE5-UFUH] (describing how both "[t]he old trend of overseas capital investment is accelerating" through "U.S. companies increased foreign capital spending" as well as the "dramatic" "arrival of foreign corporations in the United States at a rapidly increasing pace" at the end of the twentieth century).

[19] *See, e.g.*, Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CALIF. L. REV. 401, 409 (2002) (describing the challenge of assigning national labels when "products and technology, capital and corporations

Consider two concrete examples I discuss further below. Kia, a historically Korean and Seoul-headquartered enterprise, invests capital in the United States to build manufacturing facilities in Georgia as part of its global supply chain. In a leading case governing international commerce and tax federalism, a Japanese corporation that owned shipping containers — globalization's building blocks — contended with a California county about tax obligations resulting from its local activities. These sample and simplified transactions explain why scholars and international institutions have for centuries discussed foreign corporations and capital flows together.[20]

By approaching "capital migration" and the underlying meaning of "foreign" capital from multiple legal domains, I more fully define "capital migration" and its connections to immigration. While other scholarly treatments correctly complicate the purported asymmetry between immigration and capital flows, these treatments usually take three unsatisfying forms: strained analogies between the treatment of corporations and capital and that of human migrants; a narrow understanding of the capital-migration intersection as confined to the universal investor visa; and a somewhat exclusive reliance on federal action and national security to explain foreign capital fears.

cross national boundaries"); *id.* at 403, 432-33 (describing large corporations as "denationalized," with the global supply chain unmooring international trade from clear product origins or nationalities); Linda A. Mabry, *Multinational Corporations and the U.S. Technology Policy: Rethinking the Concept of Corporate Nationality*, 87 GEO. L.J. 565, 568-69 (1999) (describing the "globalization of corporate national identity").

Some corporate forms can of course be used creatively not by large multinational businesses, but rather by individual workers. Manoj Viswanathan, *Lower-Income Tax Planning*, 2020 U. ILL. L. REV. 195, 220 (2020) (discussing how rideshare drivers can beneficially use the S-corporation, which is not subject to entity-level taxation, with sufficient nonwage income allocation).

[20] *See, e.g.*, PISTOR, *supra* note 13, at 49-53 (arguing that the transnational corporate form is intertwined with "the code of capital"); Edward C. Moore, Jr., *Corporate Taxation*, 18 AM. L. REV. 749, 753 (1884) (describing how, in the context of federalism, exercises of the state tax power "may practically drive foreign corporations and capital out of the State"); *see also* Stefan Avdjiev, Michael Chui & Hyun Song Shin, *Non-Financial Corporations from Emerging Market Economies and Capital Flows*, BANK INT'L SETTLEMENTS Q. REV., 2014 at 67, 68 (discussing the history of German industrial companies using Swiss and Dutch subsidiaries to issue debt securities and create capital flows for repatriation back to Germany).

For the first, scholars struggle to make analogies between capital and corporations on one hand, and immigration on the other. Some use the term "corporate migration" as nearly synonymous with corporate inversions for tax benefits.[21] Beyond inversions, one observer analogized the "seat theory" of corporate residence to natural persons by suggesting that persons may obtain temporary status with a visa, but for longer durations must seek permanent residency, if not eventually citizenship.[22] In fact, the range of immigration statuses includes non-visa possibilities — asylum, cancellation of removal, temporary protected status — with no real corporate parallels, despite the oddly common refrain of "tax refugees."[23] Financial and tax scholars have used immigration law clumsily, if at all, to understand capital migration.

The second strain of literature focuses on investor visas as the legal collision of capital and immigration. Like other countries, the United States offers investors the privilege of permanent residency when they bring employment-generating capital into the country, including through oft-mentioned universal investor visas.[24] Yet scholarly attention neglects other significant capital-immigration intersections.[25]

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[21] *See, e.g.*, Cathy Hwang, *The New Corporate Migration: Tax Diversion Through Inversion*, 80 BROOK. L. REV. 807, 807 (2015) (highlighting the close analogy in the Article's title); Mohanad Salaimi, *Corporate Inversions: Evolutionary Process and Key Policy Considerations*, 41 VA. TAX REV. 203, 205 (2022) (describing the "corporate migration driven by inversion transactions").

Within-country movement relies on state domestication statutes, also known as corporate continuance or "corporate migration statutes," that allow an entity to transfer its place of incorporation without having to incorporate a new legal entity. *See* Pub. Impact, LLC v. Bos. Consulting Grp., Inc., 117 F.Supp.3d 732, 738 (M.D.N.C. 2015) (discussing the extent to which compliance with "state domestication statutes" through a "business certificate and [an] appointed agent" can support general jurisdiction under due process principles); I.R.S. Notice 88-55, 1988-1 C.B. 535 (Guidance Concerning Reorganization Transactions Effected Through the Use of State Domestication Statutes).

[22] PISTOR, *supra* note 13, at 69-70.

[23] *See infra* note 48 and accompanying text (providing sources for analogies).

[24] *See infra* notes 171–180 and accompanying text (discussing EB-5 program).

[25] *See, e.g.*, Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 605 (2012) (focusing on the EB-5 visa as the "legal, permanent immigration open to foreign nationals who are willing to invest in the United States"); Kit Johnson, *A Citizenship Market*, 2018 U. ILL. L. REV. 969, 982 (2018) (highlighting EB-5 visas as "a fast-track path to citizenship for investors"); Note, *Proposing A Locally Driven*

I provide a more complete picture — the underappreciated treaty investor visas (and their more modest capital requirements), multinationals' blanket petitioning for worker transfers, and the way petitioners claim capitalist persecution (usually but not always unsuccessfully) for humanitarian relief. Capital and immigration intersect in richer ways than the literature suggests.

Finally, corporate and immigration scholars highlight national security tropes, though international tax scholars less so, in explaining resistance to capital migration.[26] This Article connects the role of national security in these high-level legal arenas to Main Street's resistance to foreign capital. The Federal Committee on Foreign Investment in the United States' ("CFIUS's") uniquely broad definition of foreign control cannot be explained by the broad nature of national security itself; equally unmoored are the localized foreign capital fears of (even upscale) Main Street.

In sum, a full understanding of capital and corporate migration requires carefully considering them alongside and at the intersection with human migration. I proceed accordingly in three parts, each contributing to capital migration's multifaceted definition.

In Part I, I analyze capital migration through parallels to immigration law. I explain what makes capital and corporations "foreign" beyond the simple idea of foreign incorporation. The first parallel is that the citizen-noncitizen divide works about as poorly for corporate "citizens" as it does for humans. This observation should not be wholly surprising. Immigration scholars recognize the range of statuses beyond citizenship, and their piecemeal privileges and obligations, as does tax law. I consider the treatment and measurement of corporate inversions and controlled foreign corporations to limit strategic elections of "foreignness," as well as emerging rules in the taxation of foreign investment in real property.

The second parallel is the doctrinal muddle of federalism — the reality of state, not solely federal, tax power governing both natural and

Entrepreneur Visa, 126 HARV. L. REV. 2403, 2407 (2013) (arguing for a new investment visa category with the EB-5 visa as a springboard).

[26] Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1569 (2016) (arguing that, in light of Congressional and judicial deference, "national security agencies write their own rules in the absence of binding, external law").

nonnatural persons. States possess contested tax powers and responsibilities over human migrants as well as over capital and corporations. Some (Foreign) Commerce Clause cases may need to be reconsidered in the twenty-first century, including the Supreme Court's most recent Commerce Clause analysis in *National Pork Producers Council v. Ross* (hereinafter *National Pork*).[27] Globalization requires a federalism that does not sacrifice state power in the vain pursuit of national uniformity or markets.

In Part II, I move beyond these theoretical capital migration-immigration parallels to analyze human migration that attracts capital. Immigration's expansive intersection with capital and corporate migration reveals a helpful taxonomy: foreign capital-purchase, foreign capital-facilitating, and foreign capital-orthogonal migration. Specifically, I discuss capital-purchase migration through not only the classic, universal ("EB-5") investor visa program but also the treaty investor visa and its more modest capital contributions. These programs and their global counterparts attract entrepreneurial and employment-generating capital by offering permanent residency and, in the United States, a path to citizenship. They lie in sharp relief to "public charge" provisions, which exclude particularly poor immigrants unable to secure economic sponsorship.[28]

In contrast to capital-purchase migration, capital-facilitating migration reflects how multinational, "borderless" capital and corporations require people to cross borders, if only temporarily. Unlike domestic employers petitioning for H-1B visas for employees with skills purportedly absent from the United States labor market, the L-1 program facilitates shorter-term intracompany transferees, including in bulk. I also discuss how the short-term business visitor visa provides a parallel for foreign entrepreneurs. Capital flows require, rather than diverge from, people flows. At Part II's end, I discuss humanitarian relief as a form of capital-orthogonal migration, particularly through asylum and withholding of removal.

Finally, Part III recognizes hostile reactions to foreign capital migration in unexpected places. This hostility often invokes concerns of

[27] Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023).

[28] *See infra* notes 197–200.

national security to police foreign capital and corporations. I dissect but also move beyond CFIUS. Foreign control by vote or value can shape American federal and state tax authority, but these tax thresholds exceed the minor foreign interests triggering CFIUS's scrutiny. Rationalizing this distinction based on "national security" is unsatisfying not simply because of the term's breadth but also because of its ubiquity, from immigration to international tax.

Foreign capital fears resonate beyond abstract capital markets all the way to Main Street. I describe Main Street's fear of foreign capital as a reaction to both wealthy foreign neighbors' capital-intensive, aesthetic choices as well as foreign commercial interests catering to that wealth. These fears appear in the legal world's lowest registers: municipal laws. Even similarly affluent but more-settled immigrants invoke national or neighborhood security to mask a base fear of "foreignness" and newcomers.

In sum, a full understanding of capital migration requires uncovering its theoretical parallels and express interactions with immigration law, its overlooked everyday occurrences, and the social anxieties it confronts. This understanding informs a number of policy recommendations, from preservation of state and local tax distinctiveness to scrutiny of potential xenophobia in local aesthetic regulation.

I. FOREIGN CAPITAL AND CORPORATIONS

In the early days of globalization, multinational firms could increase their operations while still maintaining their "national identity" — maintaining their critical managers and headquarters in their home countries.[29] But in the twenty-first century, that gravity has waned as national identities shift with the economic and tax winds.[30] In fact, the very growth of foreign income and profits can be hard to measure precisely because of the modern corporation's fluidity — if profit is shifted among affiliated entities, a leading U.S. government data series

[29] Mihir A. Desai, *The Decentering of the Global Firm*, 32 WORLD ECON. 1271, 1271 (2009).

[30] *Id.*

acknowledges endemic double counting and related caveats.[31] The post-pandemic landscape is no different.[32]

So what exactly makes capital, or a corporation relying on such capital, *foreign*?[33] Foreign incorporation does not always dictate a business entity's treatment, which may mirror domestically incorporated counterparts. Similarly, foreign citizenship does not always dictate how people are treated.

This Part canvasses American law to understand what renders corporations and capital "foreign" — including how indicia of domestic or foreign control attract legal scrutiny.[34] In exploring legal tests and proxies, I discuss corporate inversions and how tax law questions

[31] Harry Grubert, *Foreign Taxes and the Growing Share of U.S. Multinational Company Income Abroad: Profits, Not Sales, Are Being Globalized*, 65 NAT'L TAX J. 241, 248 (2012) (analyzing the "dramatic change in the foreign share of worldwide MNC income"); *How Are BEA's Statistics on the Activities of U.S. Multinational Enterprises (MNEs) Affected by the Complex Corporate Structures of MNEs*?, BUREAU ECON. ANALYSIS (Jan. 23, 2020), https://www.bea.gov/help/faq/1402 [https://perma.cc/UV9Z-UDYH] (providing an example of double counting through a hypothetical "U.S. parent company that owns a holding-company affiliate in the Netherlands, which in turn owns a German manufacturing affiliate"). *See generally* Kimberly A. Clausing, *Profit Shifting Before and After the Tax Cuts and Jobs Act*, 73 NAT'L TAX J. 1233 (2020) (analyzing profit shifting and providing lost tax revenue estimates of approximately $100 billion per year).

[32] The steady flow of transnational capital ebbed during the early pandemic. OECD, COVID-19 AND GLOBAL CAPITAL FLOWS 3-6 (2020), https://read.oecd-ilibrary.org/view/?ref=134_134881-twep75dnkt&title=COVID-19-and-global-capital-flows [https://perma.cc/G278-LSHQ]. But foreign investment has rebounded, exceeding pre-pandemic levels, even as some emerging markets remain fragile. U.N. CONF. ON TRADE & DEV., INVESTMENT TRENDS MONITOR 1, 3 (Jan. 2022), https://unctad.org/system/files/official-document/diaeiainf2021d3_en.pdf [https://perma.cc/3M3F-5LFE] (discussing the rebound of global foreign direct investment).

[33] Semantically, the American "corporation" is fundamentally a foreign term, manifesting legal ideas from other countries and millennia. Reuven S. Avi-Yonah, *Corporate Taxation and Corporate Social Responsibility*, 11 N.Y.U. J.L. & BUS. 1, 14 (2014) (providing a brief history of the corporation); *see also* JOSEPH ISENBERGH & BRET WELLS, INTERNATIONAL TAXATION 35 (4th ed. 2019) (explaining that, while "the U.S. tax system [provides] no characteristic of associations or entities (partnerships, corporations, and trusts) that corresponds exactly to the 'nationality' or 'residence' of individuals[, the] place — or at least a distinct legal environment — that establishes their existence and identity . . . is the place of incorporation (or 'charter')").

[34] I largely draw upon federal legislation, doctrinal analysis, and model treaties rather than the substance of country-specific treaties.

foreign incorporation. I follow with the related inquiry of when nominally foreign corporations are in fact "controlled foreign corporations" — quantitative control thresholds again determine whether the foreignness is thick enough to earn the privilege of tax deferral. Finally, these ideas are corroborated by emerging Treasury regulations concerning the taxation of foreign capital in the U.S. property market. Just as immigrants span a broad array of classifications, obligations, and privileges beyond the citizenship binary, so do capital and corporations.

Second, federalism shapes the meaning of foreign capital and corporations, including through state-tax confrontations with the Foreign Commerce Clause. Whether foreign corporations challenge state taxation of instrumentalities of commerce, or domestic corporations challenge the tax treatment of dividends from foreign subsidiaries, constitutional law reflects the tensions inherent in globalized corporations and capital. I argue for deference to state taxing power in light of twenty-first century realities and modern caselaw like *National Pork* — a non-tax case with tax implications. Where federal voice concerns are minimal, shallow calls to protect "foreign commerce" should not preclude state taxation in an anachronistic quest for uniformity. Courts recognize state powers over migrants and resulting national nonuniformity. States should possess similar latitude over foreign capital and corporations.

A. Beyond Citizenship/Incorporation

Foreign corporations are not defined consistently across bodies of law. As corporations seek shifting determinations of foreignness by multiple authorities, tax law does not defer to corporate law's formalism.[35] This Section proceeds from a primer on foreign corporations and delves into the technicalities of inversions, controlled foreign corporations, and real-property investment vehicles. Just as evolving human migration spawns new congressional and presidential

[35] *See, e.g.*, Omri Marian, *The State Administration of International Tax Avoidance*, 7 HARV. BUS. L. REV. 201, 207 (2017) [hereinafter *The State Administration*] (defining "international tax arbitrage" as the ability of multinational corporations "to exploit differences (that is, the lack of legal convergence or 'harmonisation') between the tax laws of jurisdictions involved in a cross-border transaction").

initiatives, so too has foreign incorporation's inadequacy spawned legal responses. The stakes of tax law's interrogation of foreignness are high — economists estimate that over $100 billion of profits are shifted out of the United States annually.[36]

1. Foreign Corporations and Inversions

Generally, the U.S. legal definition of corporate residence is "purely formal."[37] While a corporation with a state charter from the United States is often deemed "American," this American identity is not dispositive — the chartering nation defines the charter, but it does not define the corporation.[38] Nor does corporate residence address all questions of national identity. For general jurisdiction in civil procedure, terms like "place of incorporation," "principal place of business," and "domicile" (from the Latin *domus*, meaning home) anchor corporations.[39] For diversity jurisdiction under federal law, either the place of incorporation *or* the principal place of business may

[36] *See* Fatih Guvenen, Raymond J. Mataloni Jr., Dylan G. Rassier & Kim J. Ruhl, *Offshore Profit Shifting and Aggregate Measurement: Balance of Payments, Foreign Investment, Productivity, and the Labor Share*, 112 AM. ECON. REV. 1848, 1849, 1861 (2022).

[37] Julie A. Roin, *Inversions, Related Party Expenditures, and Source Taxation: Changing the Paradigm for the Taxation of Foreign and Foreign-Owned Businesses*, 2016 BYU L. REV. 1837, 1852 (2017).

[38] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 213 (AM. L. INST. 1987) ("The traditional rule . . . treats every corporation as a national of the state under the laws of which it was created."); David G. Yosifon, *Is Corporate Patriotism a Virtue?*, 14 SANTA CLARA J. INT'L L. 265, 268 (2016). States may also treat "the *siège social*, or principal place of management . . . as creating an equivalent connection" to nationality. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 213 cmt. c.

[39] Lea Brilmayer, Jennifer Haverkamp, Buck Logan, Loretta Lynch, Steve Neuwirth & Jim O'Brien, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 729-34 (1988) (explaining how the terms both may reflect different places and be used differently across jurisdictions); *Domicile,* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/domicile (last visited Sept. 16, 2023) [https://perma.cc/5U5E-2GP9]; *see also* Mitchell A. Kane & Edward B. Rock, *Corporate Taxation and International Charter Competition*, 106 MICH. L. REV. 1229, 1235-37 (distinguishing between "place of incorporation" and "real seat" locational rules across jurisdictions, and how these inform the meaning of corporate migration within a jurisdiction — i.e., across Canadian provinces or U.S. states).

suffice for domicile.[40] The Supreme Court has looked into whether a foreign-incorporated subsidiary of a U.S. parent corporation was "at home" in a state to determine the state's ability to exercise the "coercive power" of general jurisdiction.[41] Places of incorporation, sites of business, and general contacts and activities all help determine the authority to which an entity is subject.[42]

A corporation's national designation for tax purposes has substantial consequences. As a general, if now-complicated, rule, a United States corporation has historically been subject to taxation on all worldwide income.[43] Under the Federal Internal Revenue Code, "foreign" "means a corporation or partnership which is not . . . created or organized in the United States or under the law of the United States or of any State."[44] Corporations seek foreign designation both to strategically reallocate income and reduce tax burdens, including by interest stripping.[45]

[40] Brilmayer et al., *supra* note 39, at 733; *see* 28 U.S.C. § 1332(c)(1) (defining, for the purpose of diversity jurisdiction, corporate citizenship as "every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business").

[41] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 918-19 (2011) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

[42] *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 213 ("[S]tates may treat as analogous to nationality the fact (i) that the shares of a corporation are substantially owned by nationals of that state; (ii) that the corporation is managed from an office within the state, or (iii) that the corporation has a principal place of business in that state.").

[43] ISENBERGH & WELLS, *supra* note 33, at 279. In the Tax Cuts and Jobs Act of 2017 ("TCJA"), Congress allowed certain domestic corporations tax deductions for foreign source dividends from foreign corporations if the domestic corporation is a significant shareholder. 26 U.S.C. § 245A; *see also* BRET WELLS, INTERNATIONAL TAXATION 17 (5th ed. 2022) (describing this provision as moving towards a "hybrid of worldwide and territorial taxation").

[44] 26 U.S.C. § 7701(a)(4)-(5).

[45] *Id.* § 7701(a)(1), (30) (defining "corporation" and "United States person" for the purpose of income tax provisions); Roin, *supra* note 37, at 1877 (noting interest-stripping transactions and analogous transfers from high-tax jurisdictions like the United States to low- or no-tax foreign jurisdictions, where the payments are deductible in the U.S. and then claimed as income in the foreign jurisdiction).

But foreign incorporation may be insufficient to resist tax law's reach.[46] The statutory term "inversion" (or expatriation) recognizes existing U.S. firms' reorganization through the chartering of an acquiring parent corporation in a foreign territory.[47] After an inversion, the U.S. firm aims to characterize its primary operations as foreign, with resulting tax and other benefits. Many have compared inverting companies to emigrating persons, whether sympathetically as "refugees" or unsympathetically as "deserters."[48] One observer contrasted "legal" corporate inversion to the illegality of "marrying to

[46] *See, e.g.*, J. Clifton Fleming, Jr., Robert J. Peroni & Stephen E. Shay, *Formulary Apportionment in the U.S. International Income Tax System: Putting Lipstick on A Pig?*, 36 MICH. J. INT'L L. 1, 23-24 (2014) (describing both the ways tax law has, and should, expand its methods to determine corporate tax residence).

[47] 26 U.S.C. § 7874(a); DONALD J. MARPLES & JANE G. GRAVELLE, CONG. RSCH. SERV., R43568, CORPORATE EXPATRIATION, INVERSIONS, AND MERGERS: TAX ISSUES 2 (2021).

Even as scholars highlight the industry-specific and shareholder-related considerations that complicate inversion's appeal. Omri Marian, *Home-Country Effects of Corporate Inversions*, 90 WASH. L. REV. 1, 4 (2015) [hereinafter *Home-Country Effects*] (arguing that "even if corporate tax-residence is based on the location of meaningful economic attributes (for example, by determining tax-residence based on the place of management or assets), there is no reason to assume that MNCs will dislocate such attributes en masse in order to change their tax-residence"); Hwang, *supra* note 21, at 819-837 (chronicling four generations of corporate inversions).

[48] American presidents have described corporations availing themselves of inversion as "economic deserters," invoking the trope of (tax) battlefield loyalty. Brian Faler, *Obama Blasts "Corporate Deserters*," POLITICO (July 24, 2014, 6:29 PM EDT), https://www.politico.com/story/2014/07/obama-corporate-deserters-taxes-109357 [https://perma.cc/KE6T-KK6Z]. Others sympathetically render them "tax refugees," stretching plausible parallels to immigration law. *See* Eric Pichet, *The Economic Consequences of the French Wealth Tax* (*ISF*), LA REVUE DE DROIT FISCAL, no. 14, 2007, at 1, 16 (noting the emigration of France's "celebrity tax refugees"); Kevin D. Williamson, *The Penal Colony*, NAT'L REV. (Apr. 6, 2016, 6:00 PM), https://www.nationalreview.com/2016/04/corporate-inversion-renouncing-us-citizenship-america-builds-walls-around-itself/ [https://perma.cc/W73R-VU23] (characterizing a "corporate inversion" as "what happens when the government makes tax refugees out of businesses").

The term "refugee" suggests that corporate income tax burdens are persecution based on group identity, requiring businesses to literally seek tax haven from the persecuting country's financial controls. This analogy is tenuous, not least because immigration law has approached business-based persecution skeptically. *See infra* notes 231–238 and accompanying text. Moreover, "refugees" are resettled in particular states at the direction of the government, whereas the choice of corporate migration lies fully with the corporation itself.

obtain a green card even when there is little love lost between the two parties."[49]

The green-card analogy distorts both tax and immigration law. Tax law scrutinizes corporate inversions, limiting the tax benefits of the legal inversion, and therefore any purported parallel to the right to permanent residency.[50] Absent changes in substance or control, such inversions are deemed "naked"[51] and increasingly curbed.[52] As such, corporate law does not overrule tax law — rather, Congress recognized the problem of allowing "a *minimal* presence in a foreign country of incorporation" to provide "a means of avoiding U.S. tax."[53] Unexpectedly, this parallels the tax treatment of an undocumented immigrant, who may be treated as a "United States person"[54] based on their presence and activities in the country, despite a lack of federal status or access to federal tax benefits.[55]

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[49] PISTOR, *supra* note 13, at 72.

[50] To that end, and on a granular level unfamiliar to most financial and tax scholars, a green card may provide a pathway to citizenship, but may not itself protect its holder from deportation for tax evasion. See generally 8 U.S.C. § 1101(a)(43)(M) (providing that certain tax evasion offenses constitute an "aggravated felony" for purposes of noncitizen removal).

[51] Marian, *Home Country Effects*, *supra* note 47, at 7.

[52] *Id.* at 7-9 (describing how the American Jobs Creation Act of 2004 clamped down on naked inversions); *see* 26 U.S.C. § 7874.

The belief that corporations can freely become foreign misses the mark — inversions are hardly free. Whatever the tax benefits, there are costs, particularly to shareholders. Tax-exempt investors, whether foreign sovereign wealth funds or domestic nonprofits, have different tax liabilities and therefore preferences pertaining to deals, though managers may often favor the preferences of tax-exempt investors. Danielle A. Chaim, *The Agency Tax Costs of Mutual Funds*, 25 FLA. TAX REV. 53, 58-60 (2021).

[53] Additional Rules Regarding Inversions and Related Transactions, I.R.S. Notice 2015-79, 2015-49 I.R.B. 775 (emphasis added) (citing S. REP. NO. 192 (2003)); *see also* Marian, *The State Administration*, *supra* note 35, at 202 (analyzing leaked advanced tax agreements to recognize how countries like Luxembourg can assist "multinational taxpayers to erode the tax base in jurisdictions *other than Luxembourg*" in exchange for "fees for tax-avoidance services").

[54] 26 U.S.C. § 7701(a)(30).

[55] Shayak Sarkar, *Tax Law's Migration*, 62 B.C. L. REV. 2209, 2250 (2021) [hereinafter *Tax Law's Migration*].

Tax law quantifies corporate control to probe an entity's foreignness and scrutinize inversions.[56] Under section 7874, if sixty percent of the foreign parent corporation stock — by vote or value — is owned by the former shareholders of the domestic corporation, the new foreign entity is unfavorably deemed a "surrogate," and receives correspondingly unfavorable tax treatment for asset sales.[57] At eighty percent, tax law rejects the foreign inversion and treats the firm as a domestic corporation.[58] Through tiered consequences, tax law scrutinizes a spectrum of foreignness.

Despite these quantitative benchmarks, substantial economic activities or assets in the foreign country may resurrect favorable treatment.[59] By regulation, the "substantial business activities" threshold requires that twenty-five percent of the firm/group's employees, employee compensation, group assets, and group income be attributable to the foreign country, where the acquiring corporation must be a tax resident so long as there is a corporate tax there.[60] The gradient of corporate foreignness resembles the "liminal legalities" experienced by many migrants to the United States, such as the recipient of Deferred Action for Childhood Arrivals or the asylum seeker waiting for her adjudication.[61] These individuals' presence and

[56] In the landscape of inversions, foreign "domicile of commercial entities is a form of private contract aimed at opting out of a bundle of rules imposed by one legal regime in favor of another," often divorced from economic substance. William J. Moon, *Regulating Offshore Finance*, 72 VAND. L. REV. 1, 8 (2019).

[57] 26 U.S.C. § 7874(a)(2)(B). But this unfavorable treatment is for a period of 10 years and focused on the "inversion gain." *Id.* § 7874(d)(1)-(2), which may not be a particularly salient factor depending on whether there are expected gains from the inverting corporation's disposition of assets during the time period. Marian, *Home-Country Effects*, *supra* note 47, at 8.

[58] 26 U.S.C. § 7874(b) (inverted corporations treated as "domestic" corporations).

[59] *See* 26 U.S.C. § 7874(a)(2)(B)(iii).

[60] 26 C.F.R. § 1.7874-3(b) (2023).

[61] *See* Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 733-34 (2015); Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1119-20 (2015). *See generally* MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA (2020) (drawing upon interviews with immigrants across a range of immigration statuses to unpack the meaning of citizenship).

participation in American society belie any simple dichotomy between the foreign and non-foreign, the lawful and the illegal.[62]

Foreign corporations embrace multiple identities, foreign under one jurisdiction's law but not under another's. The check-the-box regulations afford business entities — both domestic and foreign — a choice between partnership and corporate tax treatment under federal law.[63] The foreign status of business entities may differ among the laws of multiple countries.[64]

Federal law thus looks past a simple foreign/non-foreign binary. Tax law investigates the actual structure and numerical business figures to determine foreignness. As such, incorporation, like citizenship, is an incomplete model of understanding foreignness, and federal law accordingly looks deeper.

2. Controlled Foreign Corporations

Beyond inversions, significant domestic control may undermine foreignness. Generally, an American business does not pay tax on the income of an affiliated foreign-incorporated entity until a realization

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[62] *Cf.* Shayak Sarkar, *The New Legal World of Domestic Work*, 32 YALE J.L. & FEMINISM 1, 11-13 (2020) (analyzing the meaning and perceptions of "foreignness" for migrant domestic workers).

[63] The regulations responded to earlier, multifactor tests and the *de facto* ability of multinational enterprises ("MNE") to elect even absent Treasury permission, but the IRS still polices elections, including through the substance-over-form doctrine. Paul Dau & Rod Donnelly, *Globalization of Intangibles-Based Businesses: Tax Aspects*, 9 STAN. J.L. BUS. & FIN. 1, 34-35 (2003) (describing IRS efforts to prevent corporations from using the check-the-box regulations to violate other Code sections or tax treaties).

[64] With business entities also being given different tax residencies under different country's laws, many characterize check-the-box as "defanging" other domestic tax laws. Jonathan H. Choi, *Beyond Purposivism in Tax Law*, 107 IOWA L. REV. 1439, 1455-57 (2022) (describing how check-the-box regulations caused "consternation among international tax practitioners for facilitating 'hybrid' entities (which have different tax classifications under U.S. and foreign law)" and arguing that the regulations "[do] not follow from statutory purpose"); Graetz, *supra* note 5, at 264 ("The use of the check-the-box rules for entity classification by hybrid foreign entities may serve as Exhibit 1 for this point" [that] "new domestic law often produces aftershocks abroad.").

event, such as a foreign dividend payment.[65] However, the current Subpart F regime limits deferral by subjecting certain income of controlled foreign corporations ("CFCs") to current taxation, including the recently-added treatment of Global Intangible Low-Taxed Income ("GILTI").[66] Subpart F limits the strategic outmigration of income while also respecting "legitimate" foreign business activities.[67] Even absent a capital flow from the foreign affiliate back to the United States, tax law may reach to the foreign corporation.

The primary inquiry becomes determining the scope of foreign control.[68] In the United States, CFC as a statutory term means any foreign corporation where U.S. shareholders own more than fifty percent of either the combined voting power of all classes of stock or the total value of the stock.[69] For a CFC, a U.S. shareholder means a United States person[70] — whether a natural or a domestic corporation

[65] WELLS, *supra* note 43, at 369-72 (discussing the interaction of CFCs with 26 U.S.C. § 245A); Ashley Deeks & Andrew Hayashi, *Tax Law As Foreign Policy*, 170 U. PA. L. REV. 275, 311-12 (2022) (noting the antideferral role of CFCs).

[66] 26 U.S.C. §§ 951-965 (Subpart F); *id.* § 952 (defining Subpart F income). The GILTI provisions are in 26 U.S.C. § 951A and involved complicated calculations to include in the U.S. shareholder's gross income returns in excess of a threshold of 10%. *Id.* § 951A(a)-(b). *See generally* Reuven S. Avi-Yonah, *A Positive Dialectic: BEPS and the United States*, 114 AM. J. INT'L L. UNBOUND 255, 257 (2020) (arguing that the TCJA "significantly strengthened Subpart F" through 951A which "now currently taxes U.S. parents of controlled foreign corporations on their GILTI, at a 10.5 percent rate").

While I focus on controlled foreign corporations, passive foreign investment companies ("PFICs") are also subject to an anti-deferral regime. But the PFIC regime hinges on definitions of passive income rather than ownership thresholds. 26 U.S.C. § 1297.

[67] Brian J. Arnold, *A Comparative Perspective on the U.S. Controlled Foreign Corporation Rules*, 65 TAX L. REV. 473, 475 (2012); *see* Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT'L L. 353, 378 (2020) (characterizing CFC rules as "fiscal fail-safes").

[68] Arnold, *supra* note 67, at 475 (identifying "the fundamental structural aspects of CFC rules that determine the scope of the rules — namely, the definition of a CFC, the level of foreign tax on the income of the CFC, and the nature of that income").

[69] 26 U.S.C. § 957.

[70] *Id.* § 7701 ("The term 'United States person' means

(A) a citizen or resident of the United States,

(B) a domestic partnership,

— who owns ten percent or more of the corporation's voting power or share value.[71] That ten percent threshold mirrors Congress's definition of "direct investment" in its survey of international investment, as well as the threshold for preventing substantial equity investors from qualifying for the portfolio interest exemption meant to promote passive investment.[72] Thus, the CFC laws look past foreign incorporation and accelerate taxation by focusing on significant American investors.

Subpart F's 1962 legislation reflected significant negotiation and responded to strategic foreignness, particularly multinational enterprises' tax-avoidant use of European incorporation.[73] Corporate consultants' opposition included a chart entitled "How the Major Developed Countries of Free World Tax Foreign Income" to argue that taxing the foreign subsidiaries of a country's own corporations was unwise and unprecedented.[74] Some supportive Treasury officials wanted to eliminate deferral altogether within the Controlled Foreign Corporation and tax a greater share of income.[75] The modern Subpart F

(C) a domestic corporation,

(D) any estate (other than a foreign estate, within the meaning of paragraph (31)), and

(E) any trust if . . .").

[71] *Id.* § 951(b). Ownership here can mean owning stock directly, through a foreign corporation, or through constructive ownership. *Id.* § 958; *see also* Koehring Co. v. United States, 583 F.2d 313, 319 (7th Cir. 1978) (finding a controlled foreign corporation where the "purpose was allegedly accomplished by an informal side agreement").

[72] 22 U.S.C. § 3102(10)-(11) (defining "direct investment" as "the ownership or control, directly or indirectly, by one person of 10 per centum or more of the voting securities of an incorporated business enterprise or an equivalent interest in an unincorporated business enterprise" in contrast to portfolio investment); 26 U.S.C. § 871(h)(3) (excluding 10% shareholders from portfolio interest exemption); *id.* § 881(c)(3) (same for foreign corporations).

[73] *See* Revenue Act of 1962, Pub. L. No. 87-834, § 12, 76 Stat. 960, 1006.

[74] Revenue Act of 1964: Hearings on H.R. 10650 Before the S. Comm. on Finance, 87th Cong. 2823-31 (1962) (testimony of Eldridge Haynes, president of Business International Corp.) (chart on p. 2829).

[75] Nir Fishbien, *From Switzerland With Love: Surrey's Papers and the Original Intent(s) of Subpart-F*, 38 VA. TAX REV. 1, 32-34 (2018) (discussing the proposal of tax law professor and then-Assistant Secretary of Treasury Stanley S. Surrey).

limits tax law's reach, focusing on income that might otherwise escape taxation, even as some scholars support increasing Subpart F's reach and adopting the early Treasury officials' proposal.[76]

Controlled foreign corporations appear in the newest international tax agreement — the two-pillar Organization for Economic Cooperation and Development ("OECD") solution.[77] Pillar two addresses base erosion, including through controlled foreign corporations, and a global minimum tax of fifteen percent for large multinational enterprises.[78] Even if imperfect, the CFC laws limit "foreign" corporations' tax-avoidance utility, including to acquire and then sell domestic corporations.[79]

3. Emerging Rules in the Taxation of Foreign Capital in the U.S. Property Market

The determination of a corporation's foreignness continues to occupy the IRS in emerging Treasury rules. Concerned about increasing foreign

[76] *See* 26 U.S.C. § 951(a)(1)(A); *id.* § 952(a). One part of the income is the "foreign base company income", comprised of the foreign personal holding company income, foreign base company sales income, and foreign base company services income. *Id.* § 954(a); Fishbien, *supra* note 75, at 61 (arguing that "Congress was mistaken in limiting the original proposal to eliminate tax deferral," "the result of relying on overly-emphasized and exaggerated competitive concerns, instead of on concrete tax and sound fiscal policies").

[77] *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD (Oct. 8, 2021), https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm [https://perma.cc/G4X5-LALH] (noting agreement of 139 member jurisdictions as of June 9, 2023).

[78] OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, TAX CHALLENGES ARISING FROM THE DIGITALISATION OF THE ECONOMY – GLOBAL ANTI-BASE EROSION MODEL RULES (PILLAR TWO): INCLUSIVE FRAMEWORK ON BEPS 7-8, 24, 60 (2021), https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two.pdf [https://perma.cc/Z34Z-QPZA]; Mason, *supra* note 67, at 386-87 (describing the role of CFCs in the BEPS Project).

[79] *See, e.g.*, Noam Noked, *A Cut of the Tiktok Sale: U.S. Taxation of Inbound Foreign Direct Investments*, 41 VA. TAX REV. 1, 32, 32 n.198 (2021) (explicitly mentioning the CFC regime when describing how "selling a foreign company holding the domestic corporation" may "not be attractive for U.S. purchasers" since tax rules "discourage U.S. owners from holding a U.S. business through a foreign corporation").

capital in the United States real estate market during the 1970s, Congress passed the Foreign Investment in Real Property Tax Act ("FIRPTA").[80] The statutory sections treat the disposition of a United States real property interest as "effectively connected with United States trade or business" and subject to tax liability and withholding.[81] Some have long characterized the tax law as "xenophobic."[82]

Predictably, American concerns about foreign capital conflicted with desire for capital, and the law evolved. In 2015, Congress amended the tax by exempting property interests held by certain foreign parties.[83] At the end of 2022, Treasury introduced new regulations concerning the scope of FIRPTA exemptions for qualified investment entities.[84]

The proposed regulations clarify the scope and meaning of "domestically controlled" for entities exempt from FIRPTA's tax burdens. Under FIRPTA, the sale of stock in a "domestically controlled qualified investment entity" is not taxed,[85] and a real estate investment trust ("REIT") constitutes a qualified investment entity.[86] Thus, the question of whether a REIT is domestically controlled has significant tax consequences. By earlier regulations, a domestically controlled REIT "is one in which less than 50 percent of the fair market value of the

[80] Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, §§ 1121-1125, 94 Stat. 2599, 2682-91 (codified at 26 U.S.C. § 897(a)(1)); *see also* Victor Fleischer, *A Theory of Taxing Sovereign Wealth*, 84 N.Y.U. L. REV. 440, 491 (2009) (describing the perceived possibility of "'Japan, Inc.' taking over the commercial real estate market" in the 1970s).

[81] 26 U.S.C. § 897(a)(1); *id.* § 1445(a) (imposing 15% tax withholding on foreign person's real property disposition).

[82] Richard L. Kaplan, *Creeping Xenophobia and the Taxation of Foreign-Owned Real Estate*, 71 GEO. L.J. 1091, 1091 (1983); *cf.* Hayashi & Hynes, *supra* note 11, at 1106 ("Restrictions on foreign real estate ownership have a long and sometimes dishonorable pedigree.").

[83] The Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114-113, § 323, 129 Stat. 2242, 3102 (amending 26 U.S.C. § 897) (exempting interests held by "qualified foreign pension fund[s]").

[84] Exception for Interests Held by Foreign Pension Funds, 87 Fed. Reg. 80042 (Dec. 29, 2022) (to be codified at 26 C.F.R. pt. 1) (final regulations); Guidance on the Foreign Government Income Exemption and the Definition of Domestically Controlled Qualified Investment Entities, 87 Fed. Reg. 80097 (Dec. 29, 2022) (to be codified at 26 C.F.R. pt. 1) (proposed regulations).

[85] 26 U.S.C. § 897(h)(2).

[86] *Id.* § 897(h)(4)(A)(i).

outstanding stock was directly or indirectly held by foreign persons," but the meaning of directly or indirectly held was ambiguous.[87] To clarify the ambiguity, the IRS has proposed a limited look-through approach, making it difficult for foreign investors to create a domestic corporation to then hold shares of the REIT for superficial "domestic[] control."[88]

Narrowing the exemption reflects a compromise amidst criticism of the statute's selective taxation of foreign capital in the property market.[89] The IRS's proposal would prevent taxpayers from using nominally domestic intermediaries to assert domestic control and avoid taxation on foreign capital. The IRS reinforces the tax statute's reach by looking through both strategic reorganizations and the foreign-domestic binary.

These tax rules thicken domestic and foreign labels and resonate with the anti-inversion provisions' aims. By insisting on measuring domestic control, the controlled foreign corporation rules and Subpart F regime deny tax benefits where the foreign identity is shallow. Similarly, new FIRPTA rules reimpose a tax burden when the foreign identity is deep.

B. Federalism and the Foreign Commerce Clause

Just as the fifty states treat human migrants unevenly in a purportedly federal domain, so should state tax authorities be afforded latitude.[90]

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[87] *Id.* § 897(h)(4)(B); 26 C.F.R. § 1.897-1(c)(2)(i) (2023).

[88] Guidance on the Foreign Government Income Exemption and the Definition of Domestically Controlled Qualified Investment Entities, 87 Fed. Reg. at 80100.

[89] *Compare* Willard B. Taylor, *Suppose FIRPTA Was Repealed*, 14 FLA. TAX REV. 1, 2-4 (2013) (chronicling the back and forth among FIRPTA's supporters and dissenters but arguing that "repeal is certainly worth considering"), *with* FEDERAL INCOME TAX PROJECT: INTERNATIONAL ASPECTS OF UNITED STATES INCOME TAXATION: PROPOSALS ON UNITED STATES TAXATION OF FOREIGN PERSONS AND OF THE FOREIGN INCOME OF UNITED STATES PERSONS 38 (Am. L. Inst. 1987) (supporting FIRPTA provisions while acknowledging the challenges of defining a real property interest).

[90] Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 734-50 (2013) (describing a proliferation of state and local immigrant-inclusionary measures); *see* Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571 (2008) (providing a state and local perspective to argue "that the federal exclusivity principle obscures our structural need for federal, state, and local participation in immigration regulation").

State tax law engages foreign corporations, whether as taxpayers or as subsidiaries sending dividends to domestic parent corporations.[91] The Supreme Court's decision in *National Pork Producers Council v. Ross* reaffirmed state regulatory (and potentially tax) powers against a dormant Commerce Clause challenge.[92]

To understand how state tax authorities encounter intertwined capital and human migration, consider a complicated case involving PepsiCo Inc. and affiliates in Illinois.[93] Pepsi tried to avoid paying Illinois taxes on 2.5 billion dollars of annual income attributed to one member of its business group, Frito-Lay North America, Inc. ("FLNA").[94] Although Illinois generally taxes an apportioned share of all income from a unitary business group, Pepsi sought to avail itself of a so-called "80/20 rule" in Illinois, whereby a company's income may be excluded if eighty percent of the activities fell outside of the United States.[95] The measurement for "activities" was based on payroll and property.[96] The case concerned the application of the payroll calculation to FLNA, which contained a Delaware LLC called PepsiCo Global Mobility ("Global Mobility").[97] Global Mobility was a conduit for U.S.-

[91] In one state supreme court case, a wholly owned Luxembourg subsidiary "checked-the-box" under federal law to disregard its status as a separate entity, including its income, losses, and deductions under its domestic parent corporation. Ashland Inc. v. Comm'r of Revenue, 899 N.W.2d 812, 814 (Minn. 2017). When the state revenue commissioner objected to the foreign subsidiary trying to "cease[] to exist," purportedly in violation of Minnesota tax law, the Minnesota Supreme Court sided with the taxpayer but clarified that "not all federal tax laws are binding for purposes of [state] tax liability." *Id.* at 820 n.5; *cf.* Shayak Sarkar, *Financial Immigration Federalism*, 107 GEO. L.J. 1561, 1571-75 (2019) [hereinafter *Financial Immigration Federalism*] (discussing federal-state divergence of Earned Income and Child Tax Credits, including by immigration status).

[92] Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023).

[93] PepsiCo Inc. v. Ill. Dep't of Revenue, Nos. 16 TT 82 & 17 TT 16 (Ill. Indep. Tax Tribunal Apr. 13, 2021), https://taxtribunal.illinois.gov/content/dam/soi/en/web/taxtribunal/documents/rules-decisions/16TT82-17TT16-pepsico.pdf [https://perma.cc/EK4K-VT89].

[94] *Id.* at 1.

[95] *Id.* at 2; 35 ILL. COMP. STAT. ANN. 5/1501(a)(27)(A) (2023).

[96] 35 ILL. COMP. STAT. ANN. 5/1501(a)(27)(A)(2023).

[97] *PepsiCo*, at 1-3.

paid expatriates who were on temporary global assignments.[98] In sum, Pepsi hoped to count these workers' compensation as foreign payroll towards the eighty percent property and payroll threshold, and therefore exclude FLNA's income.[99] The Tax Tribunal disagreed and upheld the Department of Revenue's Notice of Deficiency on "substance over form" grounds.[100] The controversy affirms state tax powers over multinational corporations while charting a unique relationship between migration of workers and capital.

To better understand state tax federalism's engagement with capital migration, this Section briefly addresses the Constitution's dormant Foreign Commerce Clause.[101] The Supreme Court's most recent decision in *National Pork* strengthened subnational tax authority.[102] While *National Pork* is formally about California's prohibition of pork meat from cruelly confined pigs,[103] the Commerce Clause analysis provides lessons for multinational taxation.

1. State Taxation and the Commerce Clause

The Foreign Commerce Clause's negative implications for state taxation follow *Complete Auto*'s four factors plus two additional ones.[104] When states tax corporations, whether domestic or foreign, the Supreme Court may strike down a tax if it "[1] does not have a sufficient

[98] *Id.* at 2-3.

[99] *Id.*

[100] *Id.* at 10.

[101] For corporate tax challenges under the *domestic* Commerce Clause, Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978), provides important precedent. In *Moorman*, the Court upheld "the single-factor sales formula employed by Iowa to apportion the income of an interstate business for income tax purposes" against constitutional challenge under both the Due Process and Commerce Clauses. Foreign Commerce Clause cases like *Japan Line* directly reference *Moorman*. *See infra* note 110.

[102] Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023); *see also* Darien Shanske, *How the States Can Tax Shifted Corporate Profits: An Application of Strategic Conformity*, 94 S. CAL. L. REV. 251, 288 (2021) (discussing how precedent "gives states considerable leeway in taxing multijurisdictional enterprises" as taxation is one of the state's "core functions, namely raising revenues").

[103] *Nat'l Pork*, 598 U.S. at 356 (quoting CAL. HEALTH & SAFETY CODE § 25990(b) (2018)).

[104] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 277 (1977).

nexus with the State; . . . [2] discriminates against interstate commerce; . . . [3] is unfairly apportioned; or . . . [4] is unrelated to services provided by the State."[105] These factors aim to protect an integrated market with free economic flows.[106]

For foreign commerce, reserved federal power requires addressing two more factors: first, "the enhanced risk of multiple taxation" and second, the federal government's ability to speak with "one voice when regulating commercial relations with foreign governments."[107] These factors emerged in the *Japan Line* case, when Japanese shipping corporations asked the Supreme Court whether a local government could impose apportioned, *ad valorem* taxation on commercial instrumentalities "owned, based, and registered abroad."[108] The County of Los Angeles argued that the cargo shipping containers were like other vehicles of commerce and subject to property taxation compliant with

[105] *Id.* at 277-78; Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 TEMP. L. REV. 331, 333 (2020) (arguing that, "[i]n the nontax context, the Court . . . [holds] that protectionist or discriminatory state laws are nearly per se invalid [,] . . . the Court subjects [nondiscriminatory] laws to a balancing test under which the state interest involved is weighed against the costs that the state law imposes on interstate commerce," and finally, "[t]he Court analyzes state tax statutes using a completely different approach"). *Compare* Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) (finding that, for an Oklahoma statute prohibiting the out-of-state commercial export of minnows, "such facial discrimination by itself may be a fatal defect, regardless of the State's purpose"), *with* Pike v. Bruce Church, Inc., 397 U.S. 137, 142-146 (1970) (striking down an Arizona fruit packing and processing statute as unconstitutional by balancing a state's interest against the burden on interstate commerce), *and Complete Auto*, 430 U.S. 274 (applying a multifactor tax-specific test to uphold a Mississippi tax statute). Thimmesch has argued that *Complete Auto* is not an "independent test" and that the Court should, and has already begun to, adopt a "unified dormant Commerce Clause" for both tax and nontax state laws. Thimmesch, *supra*, at 355.

[106] *Nat'l Pork*, 598 U.S. at 384 (discussing how the Commerce Clause "protects the 'interstate market'" (quoting *Pike*, 437 U.S. at 127-28)).

The Supreme Court's post-*Complete Auto* articulation that, to avoid "severe multiple taxation," "a State may not tax value earned outside its borders" seems to combine a number of the factors. Allied-Signal, Inc. v. Dir., Div. of Tax'n, 504 U.S. 768, 777 (1992). The "outside its borders" language also resonates with the extraterritoriality arguments addressed in *National Pork*. *Nat'l Pork*, 598 U.S.

[107] Japan Line, Ltd. v. Los Angeles Cnty., 441 U.S. 434, 434, 446 (1979) (internal citations omitted).

[108] *Id.* at 444.

the four *Complete Auto* factors.[109] The Court, however, applied the new factors to strike down the tax.

Even as *Japan Line* struck down the Los Angeles property tax, it preserved local and state taxing power over inevitable facets of foreign commerce.[110] While finding the tax eroded federal control in international commerce and trade by causing "multiple taxation in fact," the Court avoided ratifying the idea that "mere use of international routes is enough" to provide an instrumentality tax immunity "in a nondomiciliary State."[111] The case's cargo containers, "owned, based, and registered abroad," should be understood as a narrow instrumentality exclusion from state taxing power.[112] Additionally, multiple taxation concerns, persuasive to the majority in *Japan Line,*[113] receded from later cases.[114] The Supreme Court explicitly cabined *Japan Line* in upholding California's corporate tax system in *Container Corp. of America v. Franchise Tax Board*,[115] and Tennessee's

[109] *Id.* at 445-46.

[110] *Id.* at 454-56 (distinguishing *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), on the basis that i) *Moorman* was an interstate commerce as opposed to foreign commerce case and ii) the threat of multiple taxation was "speculative").

[111] *Id.* at 443-44.

[112] Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 893 (1986) (framing *Japan Line* as being decided on narrow grounds because of the particularly foreign nature of the instrumentalities).

[113] In a footnote, the Justices suggested that the record did not flesh out the Japanese tax, and that *amici* therefore argued that the insufficient record made it difficult to establish double taxation. *See Japan Line*, 441 U.S. at 452 n.17. The Solicitor General's representation that Japan taxed on the "full value" seemed to satisfy the majority. *Id.*

[114] Michael T. Fatale, *Foreign Commerce Clause Discrimination: Revisiting* Kraft *After* Wayfair, 72 BAYLOR L. REV. 47, 78-81 (2020). Fatale takes a much stronger normative stance that "it is arguably illogical to conclude that when a state applies tax to the commerce of a foreign nation, in a context in which the foreign nation also applies tax, that there can be, for that reason alone, impermissible multiple tax." *Id.* at 80-81.

[115] Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 196 (1983) (upholding state "unitary business" and formula apportionment methods). *See generally* Young Ran (Christine) Kim & Darien Shanske, *State Digital Service Taxes: A Good and Permissible Idea (Despite What You Might Have Heard)*, 98 NOTRE DAME L. REV. 741 (2022) (arguing for the desirability of state digital services taxes post-*Japan Line*).

sales tax on leases of cargo containers in *Itel Containers International Corp. v. Huddleston*.[116]

States engage migrating capital through revenue derived from American companies' overseas activities. The Supreme Court supported states' efforts to tax such foreign dividends in *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*.[117] Mobil, a New York corporation authorized to do business in Vermont, challenged Vermont's taxation of "annual net income tax on every corporation doing business within the State," where net income included dividends from foreign subsidiaries and affiliates.[118] Distinguishing *Japan Line*, the Court held that nothing "about the character of income earned from investments in affiliates and subsidiaries operating abroad" constitutionally precludes apportioned taxes across states, despite Mobil's preference for allocation to a single situs, like New York, Mobil's principal place of business and "commercial domicile."[119] The Court allowed Vermont to rely on unitary business principles to lay claim to revenue across corporate forms,[120] even as Mobil's Vermont business activity formed only "a small part of the corporation's worldwide enterprise."[121] The state could adopt its own approach, different from the federal (and most other countries') arm's-length approach.[122]

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[116] 507 U.S. 60 (1993).

[117] 445 U.S. 425 (1980).

[118] *Id.* at 429.

[119] *Id.* at 435-36. It unfortunately also based its holding on the fact that, unlike *Japan Line*, there was no "actual multiple taxation." *Id.* at 444.

[120] *Id.* at 438 (noting that even with separate accounting, a unitary business can be identified through "functional integration, centralization of management, and economies of scale"); *see also* F.W. Woolworth Co. v. Tax'n & Revenue Dep't of N.M., 458 U.S. 354, 362 (1982) ("The linchpin of apportionability for state income taxation of an interstate enterprise is the unitary-business principle." (internal citations and quotation marks omitted)).

[121] *Mobil*, 445 U.S. at 428. "We therefore hold that its foreign-source dividends have not been shown to be exempt, as a matter of due process, from apportionment for state income taxation by the State of Vermont." *Id.* at 442.

[122] *Id.* at 439-40. The court relied on a "unitary business," rejecting the various *amici* who "suggested that the division between parent and subsidiary should be treated as a break in the scope of unitary business, and that the receipt of dividends is a discrete 'taxable event' bearing no relation to Vermont." *Id.* at 439-40. The Court more fully endorsed states' use of the unitary approach in *Container Corp. See* Container Corp. of

The Supreme Court's deference to state tax power over multinational corporations resonates with the nexus of state tax and immigration.[123] Despite the stated "exclusive governance" of the federal government over "the regulation of immigration," states adopt their own classifications on many fronts.[124] Notably, states diverge from federal law in their parallel earned-income and child tax credits, just as states may deviate in the treatment of affiliated companies for apportionment purposes.[125] Tax federalism allows for divergence in migrants, whether human, capital, or corporate.

Yet this State authority is not without constraints: differential treatment of capital designated as "foreign" may still cross constitutional lines. In *Kraft General Foods v. Iowa Department of Revenue*, the Supreme Court struck down such a regime.[126] While Iowa taxed Kraft's dividends from subsidiaries incorporated and "doing business" in a foreign country, Iowa did not tax dividends received from domestic subsidiaries.[127] The Court found that the Iowa tax statute[128] facially

Am. v. Franchise Tax Bd., 463 U.S. 159, 184-97 (1983) (applying the *Japan Line* factors). For a description of the unitary approach, see *Allied-Signal, Inc. v. Dir., Div. of Tax'n*, 504 U.S. 768, 780 (1992) ("The unitary business rule is a recognition of two imperatives: the States' wide authority to devise formulae for an accurate assessment of a corporation's intrastate value or income; and the necessary limit on the States' authority to tax value or income that cannot in fairness be attributed to the taxpayer's activities within the State."). "[T]he unitary business principle . . . is not a novel construct, but one that we approved within a short time after the passage of the Fourteenth Amendment's Due Process Clause." *Id.* at 778.

[123] *Cf.* Tessa Davis, *The Tax-Immigration Nexus*, 94 DENV. L. REV. 195, 216-38 (2017) (defining the tax-immigration nexus in both theoretical and largely federal terms).

[124] Sarkar, *Financial Immigration Federalism*, *supra* note 91, at 1587-98 (canvassing federalism and preemption law as applied to state statutes addressing migrants).

[125] *Id.* at 1570-75 (describing state tax credits); *see also State and Local Backgrounders: State Earned Income Tax Credits*, URB. INST., https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-earned-income-tax-credits (last visited Sept. 22, 2023) [https://perma.cc/2NGA-L9JV] (discussing states that allow ITIN filers to claim state EITC).

[126] Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin., 505 U.S. 71, 73 (1992) (questioning "whether the disparate treatment of dividends from foreign and from domestic subsidiaries violates the Foreign Commerce Clause").

[127] *Id.* at 72-74.

[128] As some scholars and later cases note, the Iowa tax's single entity reporting method differed from combined reporting, which reflects foreign and global income. *See,*

discriminated against foreign commerce, apparently allowing foreign incorporation to overpower the state's tax authority.[129]

Kraft's seeming equation of dividend income from foreign-incorporated sources with foreign commerce provoked backlash.[130] Since the Court was analyzing a facial challenge, the dissent speculated about a hollow foreign subsidiary, without operations or assets in that country.[131] That hypothetical subsidiary had a New York bank account from which it remitted dividends to the U.S. parent.[132] The dissent understandably refused to be bound by the parties' stipulation to "foreign commerce."[133] By pointing to the need for "greater detail" of the subsidiaries and transactions, the dissent rejected the facial challenge and refused to concede power to foreign incorporation.[134] Many observers do not understand *Kraft* to have foreclosed the dissent's approach; courts may still apply a skeptical eye to foreign incorporation.[135] A foreign subsidiary can be quite domestic in practice.

e.g., E.I. Du Pont de Nemours & Co. v. State Tax Assessor, 675 A.2d 82, 87 n.9 (Me. 1996) ("Pursuant to single entity reporting . . . [t]he taxing authority carves out from the taxpayer's overall business those activities taking place . . . within a single state to determine the income attributable to the state. The various subsidiaries of a multijurisdictional enterprise are viewed as separate . . . and the income of the affiliates that do not do business in the state are not considered in the income of the 'single entity.'") (citing JEROME HELLERSTEIN & WALTER HELLERSTEIN, STATE AND LOCAL TAXATION 432 (4th ed. 1978)).

[129] The majority rejected the suggestion that "a State can force a taxpayer to conduct its foreign business through a domestic subsidiary in order to avoid discriminatory taxation of foreign commerce." *Kraft*, 505 U.S. at 78.

[130] *Id.* at 76 ("The flow of value between Kraft and its foreign subsidiaries clearly constitutes foreign commerce."). Iowa also appears to have conceded this foreign subsidiary-foreign commerce equality at oral argument before the Court. *Id.* at 76 n.16.

[131] *Id.* at 85 (Rehnquist, C.J., dissenting).

[132] *Id.*

[133] *Id.*

[134] *Id.* at 86.

[135] Commentators have agreed, refusing to read from *Kraft* cues to treat foreign corporate domicile as dispositive. Fatale, *supra* note 114, at 52 ("But the corporate domicile of an entity paying a dividend does not necessarily identify whether the associated commerce is foreign or domestic. For example, a foreign corporation can have domestic income, just as a domestic corporation can have foreign income.").

The Foreign Commerce Clause matters for state policy debates.[136] Many invoke the Supreme Court's 1824 remark that "[t]he States are unknown to foreign nations" to limit state powers, tax and otherwise.[137] The statement is no longer true if it ever was. States are known in any twenty-first century conception of foreign commerce — California, if an independent country, might overtake Germany to be the world's fourth largest economy.[138] But longstanding doctrines are shifting in a changing world. For example, in *South Dakota v. Wayfair,* the Court explained that the "nexus" requirement does not require a taxpaying business's physical presence, overturning its own earlier precedent.[139] That reflected the realities of modern e-commerce,[140] and the ongoing global battles over how to tax transnational digital businesses.[141] Just as the Court thoughtfully reversed itself to relax the physical nexus requirement in an increasingly digital world, so might it, less radically,

[136] *See, e.g.*, Dep't of Revenue v. Nabors Int'l Fin., Inc., 514 P.3d 893, 897 (Alaska 2022) (upholding ALASKA STAT. § 43.20.145(a)(5) (2020), requiring reporting of affiliates incorporated in or doing business in low-tax countries, after a Foreign Commerce Clause challenge).

Fatale, *supra* note 114, at 56-57 (discussing how *Kraft* may have unfortunately chilled state efforts to tax Subpart F income, which is particularly odd given that Subpart F is non-foreign dividend, "domesticated" income unlike that at direct issue in *Kraft*).

[137] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 228-29 (1824) ("[T]heir sovereignty exists only with relation to each other and the general government. Whatever regulations foreign commerce should be subjected to . . . , the general government would be held responsible for them."); Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 964 (2010) (invoking *Gibbons* to defend federal exclusivity). *But see* Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1133 (2000) (characterizing the *Gibbons* idea that "states are unknown" as "surreal").

[138] Press Release, Off. of Cal. Governor, ICYMI: California Poised to Become World's 4th Biggest Economy (Oct. 24, 2022), https://www.gov.ca.gov/2022/10/24/icymi-california-poised-to-become-worlds-4th-biggest-economy/ [https://perma.cc/UAA5-HG2U].

[139] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018).

[140] *Id.* at 2095 ("Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in" *Quill v. North Dakota*, 504 U.S. 298, 315 (1992)).

[141] *The United States and Its Partners Struggle to Implement Global Tax Agreement*, 116 AM. J. INT'L L. 863, 864 (2022) (discussing the first pillar of the "taxation of digital businesses that are physically located in one country but sell their services in another"); *Statement on a Two Pillar Solution*, *supra* note 77.

hew to a narrower negative implication of the Foreign Commerce Clause.[142]

2. Economic Federalism after *National Pork Producers Council v. Ross*

Despite often being viewed as a "regulatory" rather than tax decision,[143] the recent decision in *National Pork* portends a permissive approach to states' taxation of migrating capital. The *National Pork* Court allowed California to prohibit whole pork meat from pigs confined in a cruel manner, even as the prohibition would dramatically affect pig farmers in other states.[144] The Court acknowledged that "moral considerations" motivate consumer markets and animal welfare statutes and lie within states' traditional police power.[145]

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[142] *See* Lisa De Simone, Lillian F. Mills & Bridget Stomberg, *Using IRS Data to Identify Income Shifting to Foreign Affiliates*, 24 REV. ACCT. STUDS. 694, 698-700 (2019) (reviewing the literature on tax-motivated income shifting); *see also* Robert A. Green, *The Future of Source-Based Taxation of the Income of Multinational Enterprises*, 79 CORNELL L. REV. 18 (1993) (discussing the role of transfer pricing and arm's length standards in income shifting).

[143] Ruth Mason & Michael Knoll, *Bounded Extraterritoriality*, 122 MICH. L. REV. (forthcoming) (distinguishing regulatory and tax cases, and arguing, in anticipation of *National Pork*, for the extension of internal consistency from the tax to the regulatory domain); *see* Doug Kysar, State Public Morality Regulation and the Dormant Commerce Clause 30 (July 5, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4499178 [https://perma.cc/E7JD-TQ3F] (arguing that even if "an 'internal consistency' test might prove workable" for "fungible" taxes, "nontax regulations may be supported by a diverse range of state interests that do not lend themselves to the same commensurating analysis").

[144] Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 374 (2023) (explaining how "[i]n our interconnected national marketplace, many (maybe most) state laws have the practical effect of controlling extraterritorial behavior" including "state income tax laws [that] lead some individuals and companies to relocate to other jurisdictions") (internal alterations omitted). *But see* Michael S. Knoll & Ruth Mason, Opinion, *For Now, Court Is Cool with California in Charge*, REG. REV. (July 11, 2023), https://www.theregreview.org/2023/07/11/knoll-mason-for-now-court-is-cool-with-california-in-charge/ [https://perma.cc/2W5A-HDSZ] (arguing after *National Pork* that "other parties, raising better burden arguments, could survive summary judgment on an undue burdens claim").

[145] *Nat'l Pork*, 598 U.S. at 365-67; *see also* Eubank v. City of Richmond, 226 U.S. 137, 142 (1912) (defining the "police power" as "extend[ing] . . . not only to regulations which promote the public health, morals, and safety, but to those which promote the public

California's market value did not preclude California values from becoming law.[146] Opponents of the law contended that the law had too significant of an effect on national pork markets and sought a generalized undue-burden analysis of the law. Only Justice Thomas and Justice Barrett joined Justice Gorsuch's express discussion of the futility of judicial balancing of California's moral and health interests with costs to newly regulated producers;[147] but a majority tied this undue-burden strand of the Commerce Clause back to "antidiscrimination" origins.[148] In centering these antidiscrimination origins, the Court cited to *Camps Newfound/Owatonna,* a commerce-clause challenge to a state tax rule.[149]

National Pork reinforces the broad leeway given to traditional state powers, suggesting similar treatment of taxation. However, several features of the regulatory decision may limit its broader applicability to tax laws, reinforcing the regulatory-tax divide proffered by others.[150] First, whether state tax authority might be construed as morals regulation, while acknowledged in scholarship, remains thinly analyzed

convenience or the general prosperity"); B. Jessie Hill, *The Geography of Abortion Rights*, 109 GEO. L.J. 1081, 1133-34 (2021) (describing the conflict between state police powers in constitutional due process rights in the modern abortion landscape).

[146] Justice Kavanaugh, in his partial dissent, raised concerns about California's economic power. *Nat'l Pork*, 598 U.S. at 405-06 (Kavanaugh, J., dissenting in part); *see also* Shayak Sarkar & Joshua A. Rosenthal, PHH Corporation v. Consumer Financial Protection Bureau*: Financial Fairness and Administrative Anxiety*, 166 U. PA. L. REV. ONLINE 265, 268 (2018) (discussing then-Judge Kavanaugh's anxieties about economic regulation and financial fairness). *But see* Mason & Knoll, *supra* note 143 at 4 (arguing that "California's outsized influence has meant that . . . when California makes a regulatory error, the whole nation suffers the consequence").

[147] *Nat'l Pork*, 598 U.S. at 381 (majority opinion); *id.* at 380 (declining to read *Pike v. Bruce Church*, 397 U.S. 137 (1970) "as authorizing judges to strike down duly enacted state laws regulating the in-state sale of ordinary consumer goods (like pork) based on nothing more than their own assessment of the relevant law's 'costs' and 'benefits'").

[148] *Id.* at 369. Michael Knoll & Ruth Mason have nonetheless argued that, even after *National Pork*, *Pike* balancing survives, even if in confusing form. Knoll & Mason, *supra* note 144.

[149] *Nat'l Pork*, 598 U.S. at 369 (citing Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 567 (1997)).

[150] *See supra* note 143 and accompanying text.

in constitutional law.[151] *National Pork* analyzed an outright prohibition, and thus might more clearly convey a moral stance than a less significant tax.[152] Second, the petitioners disavowed any traditional discrimination claim, conceding that California had not sought "to advantage in-state firms or disadvantage out-of-state rivals."[153] Third and finally, *National Pork* lacked the international dimensions scrutinized by the Foreign Commerce Clause. The Canadian Pork Council filed an *amicus* brief arguing that California impermissibly regulates commerce occurring wholly in Canada and Mexico, but the Court seemed unconvinced.[154]

To provide a concrete example as to where the state's power confronts its limits, consider one hypothetical from the *amicus* briefing: "Texas, for example, might pass a law prohibiting the sale of fruit picked by undocumented workers (even in other States) and institute a certification and inspection program just like what California threatens

[151] *See, e.g.*, Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICH. L. REV. 439, 483 (2019) ("A society signals its values through the decisions it makes about whom and what to tax."); Tsilly Dagan, *The Currency of Taxation*, 84 FORDHAM L. REV. 2537, 2538 (2016) ("[T]he currency of taxation sets, reflects, and reinforces norms."). Further, a ballot initiative, as a literally "democratically adopted state law," Nat'l Pork, 598 U.S. at 390, might more clearly comprise morals legislation than a tax regulation promulgated by a state administrative body.

[152] *Nat'l Pork*, 598 U.S. at 369 ("'[A] State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to' the interests of its citizens" (quoting Guy v. City of Baltimore, 100 U.S. 434, 443 (1879))). In questioning the limits of the majority's holding, Justice Kavanaugh's partial dissent raised only hypothetical prohibitions, not taxes. *Id.* at 406-07 (Kavanaugh, J., dissenting in part); *see also* Mason & Knoll, *supra* note 143, at 7-8 (arguing that "judicial perceptions of differences between taxes and regulation" have ebbed); Jeffrey A. Miron, *The Effect of Drug Prohibition on Drug Prices: Evidence from the Markets for Cocaine and Heroin*, 85 REV. ECON. & STAT. 522, 522 (2003) (distinguishing "between prohibition and the taxation-cum-regulation regime that would apply if [goods] were legal").

[153] *Nat'l Pork*, 598 U.S. at 370.

[154] Brief of the Canadian Pork Council, Opormex, and the Illinois Pork Producers Association as Amici Curiae in Support of Petitioners, Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023) (No. 21-468), 2022 WL 2288160, at *2-3 (citing to *Japan Line* and arguing that California's pork rule violated the Foreign Commerce Clause). The Foreign Commerce Clause was mentioned briefly during oral argument. Transcript of Oral Argument at 69-70, Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023) (No. 21-468), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-468_n7io.pdf [https://perma.cc/R5HH-9DFY].

here."[155] Despite superficial similarities, the analogy is misguided. The Commerce Clause's negative implications stem from contexts where "Congress has failed to legislate on the subject."[156] But Congress has legislated on the subject of undocumented workers, as the Supreme Court has reiterated.[157] Such national legislation reflects the unique, if not exclusive, federal role in immigration.[158]

Moreover, the hypothetical Texas law implicates the federal government's ability to speak with "one voice when regulating commercial relations with foreign governments" by necessarily affecting foreign nationals and commerce.[159] That law may superficially resonate with the non-protectionist ballot initiative upheld in *National Pork*, but the differences are extensive. Preemptive legislation, federal authority over immigration, and foreign Commerce Clause factors all place it on shakier ground. Still, states should exercise caution before wading into legally fraught arenas such as immigration.

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Focusing on a strict regulatory-tax divide may miss *National Pork*'s significance. *National Pork* reinforces state flexibility in reacting to multinational corporations, while still respecting the federal government's power over its borders. Just as residents without federal status may be recognized for their presence in a state, states possess flexibility in taxing foreign capital and corporations.[160] Contrary to

[155] Brief of Indiana and 25 Other States as Amici Curiae in Support of Petitioners, Nat'l Pork Producers Council v. Ross, 598 U.S. 356 (2023) (No. 21-468), 2022 WL 2288157, at *33.

[156] *Nat'l Pork*, 598 U.S. at 368 (quoting Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995)).

[157] Arizona v. United States, 567 U.S. 387, 404 (2012) ("Congress enacted IRCA [the Immigration and Reform Control Act of 1986] as a comprehensive framework for 'combating the employment of illegal aliens.'" (quoting Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002))).

[158] *Id.* at 409-10.

[159] Japan Line, Ltd. v. Los Angeles Cnty., 441 U.S. 434, 449 (1979) (internal citations omitted); *see also Arizona*, 567 U.S. at 409 (describing how immigration decisions "touch on foreign relations and must be made with one voice").

[160] Moorman Mfg. Co. v. Bair, 437 U.S. 267, 279 (1978) (upholding Iowa's single-factor sales formula by emphasizing that "though the adoption of a uniform code would undeniably advance the policies that underlie the Commerce Clause, it would require a

some commenters' prescriptions, state corporate taxation may move in divergent directions, absent "fatal[] inconsisten[cy]" with federal priorities.[161]

II. CAPITAL (-BASED HUMAN) MIGRATION: A TAXONOMY

Beyond providing parallels, immigration law expressly collides with foreign capital in capital-based human migration. For example, governments may welcome foreign citizens after welcoming their fortunes through "citizenship for sale" programs.[162] These programs reflect myriad details and desires. American businesspeople recount seeking "safer" national identities and passports to present when traveling to Yemen, while some Syrian dissidents procure Caribbean citizenship and passports as they claim asylum in Canada.[163] If denied the ability to remain in North America, they may return to tropical islands as opposed to torture in their homeland.[164] Those who can, seek to make the world their home, crossing borders when their or their country's fortunes shift.

policy decision based on political and economic considerations that vary from State to State").

[161] Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 197 (1983). Some commenters, particularly when approaching from the foreign relations angle, view the Foreign Commerce Clause as a way to ensure "national uniformity." Scott Sullivan, *The Future of the Foreign Commerce Clause*, 83 FORDHAM L. REV. 1955, 1974 (2015). Sullivan accordingly argues that given "the need for uniform regulation in foreign commerce," even a silent federal government may "preclude state action." *Id.* at 1989; *see also* Colangelo, *supra* note 137, at 965 (discussing national uniformity vis-à-vis the Foreign Commerce Clause). Literally uniform regulation is too stringent a test. *Container Corp.*'s language of "not fatally inconsistent" better captures the place of federalism and the dynamics of the modern economy.

[162] *See, e.g.*, Allison Christians, *Buying in: Residence and Citizenship by Investment*, 62 ST. LOUIS U. L.J. 51, 56-58 (2017) (comparing countries' programs); Jeff Veteto, *The Alienability of Allegiance: An International Survey of Economic Citizenship Laws*, 48 INT'L LAW. 79 (2014) (analyzing Malta's "citizenship for sale" scheme in detail). Veteto also distinguishes between programs that offer residence but not a path to full-fledged citizenship and those that do offer full-fledged citizenship. Veteto, *supra*, at 88-90.

[163] Kristin Surak, *Millionaire Mobility and the Sale of Citizenship*, 47 J. ETHNIC & MIGRATION STUD. 166, 176-77 (2021).

[164] *Id.* at 177.

This Part explores visa categories and corners of immigration law affecting hundreds of thousands of noncitizens.[165] Viewing the United States as an exemplar of citizenship for sale,[166] scholars fail to locate investor visas within the larger American immigration system and to consider capital's broader role beyond "commodified citizenship" for the "capitalist class."[167] In fact, as I highlight, outside the narrow corner of the investor visa regime, foreign capitalists may find their experiences discounted rather than celebrated by American immigration law.[168]

To flesh out the role of foreign capital in American immigration, I outline three forms of interaction between foreign capital and human migration: foreign capital purchase, foreign capital facilitation, and foreign capital orthogonality. *Capital purchase* migration refers to the exchange of personal capital investment for a path to permanent residency through the EB-5 and E-2 visas. This form is closest to citizenship for sale, though the requirements of the sale differ between

[165] In recent years, the combination of L-1 and B-1 issuances alone (what I call capital-facilitating migration) has exceeded 100,000. U.S. DEP'T OF STATE, NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION: FY 2017-2021, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2021AnnualReport/FY21_%20TableXVB.pdf [https://perma.cc/4QVX-G8VR].

[166] *See, e.g.*, Ayelet Shachar, *Citizenship for Sale?*, *in* THE OXFORD HANDBOOK OF CITIZENSHIP 789, 795 (Ayelet Shachar, Rainer Bauböck, Irene Bloemrand & Maarten Vink eds., 2017) (arguing that the United States investor visas were "[a]n important step in the process of policy legitimization" of "citizenship for sale" globally); Surak, *supra* note 163, at 169 (describing the United States EB-5 visa as an example of the phenomenon of millionaire mobility).

Some scholars have gone one step further and focused on the tax treatment of these foreigners, noting that the United States does not (have to) differ its tax treatment to attract moneyed migrants. *See, e.g.*, Christians, *supra* note 162, at 55 n.16 (describing how Canada, France, the United Kingdom, and the United States "offer immigration by investment programs," "none of which include a tax benefit that is not also available to domestic residents"). On the other hand, some scholars have argued for expanding our vision for the taxation of emigrants. *See, e.g.*, Andrew Appleby, *No Migration Without Taxation: State Exit Taxes*, 60 HARV. J. ON LEGIS. 55 (2023) (arguing for and analyzing the constitutionality of subnational exit taxes).

[167] Marilyn Grell-Brisk, *Eluding National Boundaries: A Case Study of Commodified Citizenship and the Transnational Capitalist Class*, 8 SOCIETIES, 2018, at 1, 3 (providing a theoretical background for, and case study of, Domenica).

[168] *See infra* notes 226–240 (discussing foreign capital orthogonality).

these two investor visas in significant ways. Second, Congress recognized that multinational investment required *capital facilitating* migration by temporary workers, including through the L-1 and B-2 temporary visa programs. Third and finally, *capital orthogonal* migration reflects the inability of capitalist enterprise to secure migration rights.[169] I turn to each — capital purchase, capital facilitation, and capital orthogonality — in turn.

A. Foreign Capital Purchase Migration

Congress attracts personal capital contributions by offering paths to permanent residency through two primary programs: the better-known EB-5 visa, which includes an effort to shepherd capital to poor areas, and the commonly issued but rarely studied, treaty-based E-2 visa. The EB-5 is more universal, while the E-2 is accessible only to nationals of treaty countries and has a more flexible capital threshold.[170] Beyond shoring up American investment, these visas may welcome dictatorial families to our moneyed shores.[171]

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[169] The three express, modern immigration categories and laws should be situated against capital's role in the history of American immigration law. Foreign capital flows to source countries were perceived as a possible bulwark against poverty, perceived overpopulation, and people migrating to wealthier countries. *World Population: A Global Perspective: Hearings Before the H.S. Comm. on Population*, 95th Cong. 19 (1978) (statement of Dr. Albert T. Kapusinski, Professor of Econ., Caldwell Coll.); *id.* at 47 (statement of Ambassador Marshall Green, Coordinator of Population Aff., Bureau of Oceans & Int'l Env't & Sci. Aff.) (Even the pessimistic Ambassador Green conceded: "There has to be more capital brought into these countries for development."); *id.* at 36 (statement of Dr. Albert T. Kapusinski, Professor of Econ., Caldwell Coll.) ("What I would like to see is infusion of capital to the real little entrepreneur, the guy who owns the farm and the guy who has a bit of imagination and wants to start a little cement factory.").

[170] *See infra* notes 187–192 and accompanying text.

[171] *See, e.g.*, Kyra Gurney, Anjali Tsui, David Iaconangelo & Selina Cheng, *Suspected of Corruption at Home, Powerful Foreigners Find Refuge in the U.S.*, PROPUBLICA (Dec. 9, 2016), https://www.propublica.org/article/corrupt-foreign-officials-find-refuge-in-united-states [https://perma.cc/NXR2-2RDT] (discussing how, prior to the DOJ investigation, former President "Chun's daughter-in-law, a South Korean actress named Park Sang-ah, applied for an immigrant investor visa" and settled in the United States); Press Release, U.S. Dep't of Just., United States Assists Korean Authorities in Recovering Over $28.7 Million in Corruption Proceeds of Former President of the Republic of Korea (Mar. 4, 2015), https://www.justice.gov/opa/pr/united-states-assists-korean-authorities-recovering-

Since 1990, the EB-5 visa has exchanged conditional permanent residency for capital contributions that result in American workers' employment.[172] Concerned with "employment creation," the visa provides pathways to citizenship for foreign nationals who have engaged in a "new commercial enterprise."[173] That investment must not only meet a minimum capital threshold,[174] but also a labor threshold — the creation of at least ten (new) full-time jobs for those authorized to work in the United States.[175] Denying the rather apparent *quid pro quo*, some Senators suggested that the purpose was only "to infuse new capital into the country, *not* to provide immigrant visas to wealthy individuals."[176] Legislators conditioned migration rights on capital but hesitated to acknowledge the unseemly trade.

over-287-million-corruption-proceeds [https://perma.cc/6YYN-NUMS] (discussing recaptured proceeds from former Korean President Chun Doo-Hwan).

Safeguards exist to assure the capital is "clean." The government may require the investor to include individual and business tax records — both American and foreign — as part of the visa petition. 8 U.S.C. § 1153(b)(5)(L)(ii); U.S. CITIZENSHIP & IMMIGR. SERVS., POLICY MANUAL vol. 6, pt. G, ch. 2, A.4, https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-2 (last updated Sept. 12, 2023) [https://perma.cc/NWT2-DZRH]. People who have been found to have committed fraud (including only civilly rather than criminally) can be precluded from being involved in a regional center program, a subcategory of the EB-5 program. 8 U.S.C. § 1153(b)(5)(H)(i).

[172] Immigration Act of 1990, Pub. L. No. 101-649, § 121, 104 Stat. 4978, 4987-94 (amending 8 U.S.C. §§ 1153, 1186b).

[173] 8 U.S.C. § 1186b; *id.* § 1153(b)(5)(A). For earlier-established businesses, that could mean an investment that would expand a pre-existing business. Zhao v. Napolitano, No. SACV 13-01185, 2014 WL 12570248, at *4 (C.D. Cal. Mar. 31, 2014).

[174] 8 U.S.C. § 1153(b)(5)(A)(i); *id.* § 1153(b)(5)(C)(i)-(ii) (distinguishing between the higher $1,050,000 general investment threshold and $800,000 specific threshold for "targeted employment areas and infrastructure projects"). These thresholds were passed in 2022. Consolidated Appropriations Act, Pub. L. No. 117-103, 136 Stat 49 (2022). The agency tried unsuccessfully to revise earlier, lower statutory thresholds upwards administratively. *See* Behring Reg'l Ctr. LLC v. Wolf, 544 F. Supp. 3d 937 (N.D. Cal. June 22, 2021), *appeal dismissed sub nom.* Behring Reg'l Ctr. LLC v. Mayorkas, No. 21-16421, 2022 WL 602883 (9th Cir. Jan. 7, 2022).

[175] 8 U.S.C. § 1153(b)(5)(A)(ii).

[176] S. REP. NO. 101-55, at 21 (1989) (emphasis added). Years before, the then-president of the University of Notre Dame, and the lone dissenting voice on the 1981 Select Committee on Immigration, argued: "An investment is good for the USA. But the rich ought not to be able to buy their way into this country." 135 Cong. Rec. 14287 (1989) (statement of Sen. Bumpers) (agreeing with, and quoting, Father Hesburgh).

Beyond seeking foreign capital generally, the EB-5 rewards investment in particular corners of the American public: high unemployment areas and infrastructure.[177] If the visa applicant invests in a targeted employment area ("TEA") or with an infrastructure project, a smaller investment is required.[178] For the first possibility, TEAs can either be rural — generally meaning outside a metropolitan statistical area[179] — or federally designated as a high unemployment area.[180] For the second possibility, a government entity undertakes an infrastructure project in partnership with a government-approved "regional center," an entity which is created to pool foreign investors' capital.[181] Beyond allowing for reduced capital amounts, Congress also created a quantitative visa set aside for these TEA and infrastructure projects.[182] The EB-5's reach spanned to tribal lands, when the Navajo Nation hoped issuance would increase investment and employment on the reservation.[183] As such, the EB-5 attracts capital to less thriving areas of the United States.

Despite legislative focus on capital-scarce areas, foreign investments have sometimes served relatively flush regions.[184] EB-5 visas earlier

[177] This resonates with a global history of similar incentives. Charles I. Kingson, *The Coherence of International Taxation*, 81 COLUM. L. REV. 1151, 1161-62 (1981) (describing how "even the most industrialized states are forced to offer incentives for direct investment in their poorer or politically risky regions: Germany, for investment in West Berlin; Italy, for the Mezzogiorno; the United States, for Puerto Rico").

[178] 8 U.S.C. § 1153(b)(5)(C)(ii).

[179] *Id.* § 1153(b)(5)(D)(vii).

[180] *Id.* § 1153(b)(5)(B)(ii).

[181] *Id.* § 1153(b)(5)(D)(iv). Congress envisions regional centers "for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment." Behring Reg'l Ctr. LLC v. Wolf, 544 F. Supp. 3d 937, 942 (N.D. Cal. 2021).

[182] 8 U.S.C. § 1153(b)(5)(B)(i)(1) ("20 percent shall be reserved for qualified immigrants who invest in a rural area; 10 percent shall be reserved for qualified immigrants who invest in . . . a high unemployment area; and 2 percent shall be reserved for . . . infrastructure projects.").

[183] Adam Crepelle, *Decolonizing Reservation Economies: Returning to Private Enterprise and Trade*, 12 PEPP. UNIV. J. BUS., ENTREPRENEURSHIP & L. 413, 465 (2019).

[184] In contrast, the New Market Tax Credit employs a broader definition of qualifying low-income communities based on poverty rates *or* relative median family incomes. 26 U.S.C. § 45D(e).

relied on "financial gerrymandering," by which I mean investors' self-serving boundary drawing that technically meets capital-scarcity requirements. The federal government expressly acknowledged a specific form in the EB-5 context with "TEA gerrymandering," whereby relatively high employment and income areas were being joined together with lower employment and income areas for eligibility's sake, even as the capital flowed largely to the former.[185] Accordingly, new regulations made the designation process more stringent, including by eliminating states' designation abilities.[186]

Compared to the more universal EB-5 visa, the E-2 visa relies on investment treaties.[187] Only nationals of countries with whom the United States maintains a "treaty of commerce" may access the E-2.[188]

[185] EB-5 Immigrant Investor Program Modernization, 84 Fed. Reg. 35750, 35772 (July 24, 2019) (codified at 8 C.F.R. pts. 204, 216) (discussing the "best solution to deter 'gerrymandered' TEAs" as "to reform both the TEA definitions and designation process").

[186] *Id.* at 35752; (codified at 8 C.F.R. § 204.6(i) (2023)) (centralizing TEA designation authority with USCIS).

[187] In contrast to immigrant E-5 visas, E-2 visas are nonimmigrant, though the question of whether dual intent applies is a bit complicated. Dual intent is a doctrine in immigration law that allows those on nonimmigrant visas to nonetheless end up with permanent residency. 9 FOREIGN AFFAIRS MANUAL § 402.10-10(A) (2022) (explaining that a "nonimmigrant may have 'dual intent' i.e., the fact that [a] . . . nonimmigrant has sought permanent residence in the United States or will be seeking such status in the future does not preclude him or her from obtaining or maintaining [a] nonimmigrant status").

Immigration agencies have, at least by informal guidance, suggested that the E-visas permit dual intent. *See INS Agrees to Dual Intent for E Visa Holders*, 70 INTERPRETER RELEASES, no. 42, Nov. 1, 1993, at 1444. Dual intent is often discussed in the H-1B context. *See* 8 U.S.C. § 1101(a)(15)(H)(i); *id.* § 1184(b) (exempting H-1B applicants from immigrant presumption). *Compare* 8 C.F.R. § 214.2(h)(16)(i) (2023) (permitting a H-1C or H-1B nonimmigrant to "depart voluntarily at the end of his or her authorized stay and, at the same time, lawfully seek to become a permanent resident of the United States."), *with* 8 C.F.R. § 214.2(e)(5) (2023) (explaining that, while a noncitizen must "maintain an intention to depart the United States upon the expiration or termination of E–1 or E–2 status[, . . .] an application for initial admission, change of status, or extension of stay in E classification may not be denied solely on the basis of . . . a filed or approved immigrant visa preference petition.").

[188] 8 U.S.C. § 1101(a)(15)(E) (allowing someone "to enter the United States under . . . a treaty of commerce and navigation between the United States and the foreign state of which [she] is a national . . . and the spouse and children of any such [person] if

However, unlike the EB-5 numerical capital thresholds, the E-2's "substantial amount of capital" statutory requirement has no express numerical threshold — rather, it can satisfy a proportionality, rather than magnitude, standard.[189] The capital contributions must, like the EB-5, be established through audited and verified tax or financial documents.[190] The Department of State maintains the list of over eighty countries whose nationals may qualify, with Israel becoming the most recent addition in 2019.[191] Since underlying treaties expire, so might E-2 eligibility per the termination of bilateral investment treaties with Bolivia and Ecuador.[192] The E-2 visas are thus country-specific and time-specific mechanisms to attract capital migration.

Despite the E-2 investor visa's frequent issuance, it has attracted limited scholarly interest. Tens of thousands of E-2 visas are issued

accompanying or following to join [her]; . . . (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital"); 22 C.F.R. § 41.51(b)(5) (2023) (defining a treaty country as "a foreign state with which a qualifying Treaty of Friendship, Commerce, and Navigation or its equivalent exists").

[189] 9 FOREIGN AFFAIRS MANUAL § 402.9-6(D)(b)(i)-(iii) (2023) ("No set dollar figure constitutes a minimum amount of investment to be considered "substantial" for E-2 visa purposes.").

[190] *Id.* § 402.9-6(D)(d) (discussing how "unverified" and "unaudited" statements are likely "insufficient").

[191] *Treaty Countries*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/treaty.html (last visited Sept. 23, 2023) [https://perma.cc/AV8S-QQ7E].

[192] Notice of Termination of United States-Ecuador Bilateral Investment Treaty, Pub. Notice 10418, 83 Fed. Reg. 23327 (May 18, 2018); *Treaty Countries*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/fees/treaty.html (last visited Sept. 23, 2023) [https://perma.cc/AV8S-QQ7E] (noting eligibility sunsets for Bolivia and Ecuador); *U.S. Visa: Reciprocity and Civil Documents by Country – Bolivia*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country/Bolivia.html (last visited Sept. 23, 2023) [https://perma.cc/3EEL-RULS] (discussing bilateral investment treaty termination's effect on E-2 visas for Bolivia); *U.S. Visa: Reciprocity and Civil Documents by Country – Ecuador*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country/Ecuador.html (last visited Sept. 23, 2023) [https://perma.cc/T4H6-AQPW] (noting beginning of qualified investment sunset for E-2 visas in Ecuador on May 18, 2018).

annually.[193] Admittedly, their issuance is highly skewed across countries. In recent years, over twenty-five percent of visas were awarded to Japan, and the entire continent of Europe hovered around forty percent.[194] To put these shares in startling contrast, while Japan is regularly awarded over 10,000 visas, the over one dozen E-2 eligible African countries collectively claim less than 200.[195] The E-2 visa program thus clearly benefits certain countries and continents disproportionately.

Nationals of non-treaty countries seek creative paths to eligibility. Amidst the Russian war on Ukraine, nationals of Russia, absent from the E-2 list, first sought to procure citizenship from Grenada, included on the list and easily procured by investment, to then facilitate their goal of American relocation.[196] Thus, treaty countries with their own capital-for-citizenship schemes can serve as intermediaries for nationals of

[193] U.S. DEP'T OF STATE, FY1997-2022 NIV DETAIL TABLE (2023), https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html [https://perma.cc/CKB3-MUB8] [hereinafter NIV DETAIL TABLE] (based on pre-pandemic data on nonimmigrant visa statistics from FY16, FY18, and FY19, contained inside this Excel Spreadsheet).

[194] *Id.* (noting Japan's visa share of 13,609 out of 44,243 in FY16; 13,339 out of 41,181 in FY18; and 13,664 out of 43,286 in FY19). Meanwhile, Europe's visa share was 18,469 out of 44,243 in FY16; 16,567 out of 41,181 in FY18; and 16,556 out of 43,286 in FY19. *Id.* One of the few articles discussing E-2 visas, Leslie K.L. Thiele & Scott T. Decker, *Residence in the United States Through Investment: Reality or Chimera?*, 3 ALB. GOV'T L. REV. 103, 107 (2010), fails to discuss the distribution of visa issuances, much less mention Japan.

[195] NIV DETAIL TABLE, *supra* note 193 (noting Africa's visa share of 160 out of 44,243 in FY16; 170 out of 41,181 in FY18; and 148 out of 43,286 in FY19). These issuance numbers are quite different from admissions numbers, which can represent multiple entries within a year. *See* U.S. DEP'T OF HOMELAND SEC., 2020 YEARBOOK OF IMMIGRATION STATISTICS OFFICE OF IMMIGRATION STATISTICS 63-65 tbl. 25, (2022), https://www.dhs.gov/sites/default/files/2022-07/2022_0308_plcy_yearbook_immigration_statistics_fy2020_v2.pdf [https://perma.cc/2FMK-UTWF] (noting admissions statistics for treaty investors from FY 2011–FY 2020).

[196] NIV DETAIL TABLE, *supra* note 193; Joshua Zitser & Sam Tabahriti, *Rich Russians Offered a Caribbean Shortcut to US Visas by Paying Their Way to a Grenadian Passport*, BUS. INSIDER (Oct. 23, 2022, 1:30 AM PDT), https://www.businessinsider.com/rich-russians-offered-caribbean-shortcut-us-visas-grenada-passport-2022-10 [https://perma.cc/S5S7-7QZ8]; GRENADA CITIZENSHIP BY INVESTMENT, https://www.cbi.gov.gd/index.php (last visited Sept. 23, 2023) [https://perma.cc/RDK2-C6R6].

non-U.S. treaty countries, despite international pressure to end such workarounds.[197]

Capital purchase migration stands in stark relief to the denial of some visas for lack of capital. Discretionary visas and adjustment of status may be denied on "public charge" grounds.[198] While a statutory definition of public charge does not exist, a migrant's "assets, resources, and financial status" are one factor.[199] However, certain migrants may substitute an enforceable affidavit of support from a sponsoring relative.[200] Since the sponsor must agree to support the noncitizen financially at an income above the poverty line, they must submit multiple years of their federal income tax returns to demonstrate the necessary financial capacity.[201] Just as one's personal capital can pave the way to permanent residency, so might a lack of capital preclude one.

B. Foreign Capital Facilitating Migration

Personal capital may afford permanent residency, but Congress also contemplated how foreign investment would require temporary workers — what I call foreign capital-facilitating migration. This Section establishes foreign capital-facilitating migration where either workers from foreign offices or foreign entrepreneurs — respectively L-1 (intracompany transferees) and B-1 (business visitor) visa holders —

[197] *See, e.g.*, Press Release, Gov't of St. Kitts & Nevis, St. Kitts and Nevis Joins International Sanctions Against Russia and Belarus (Mar. 8, 2022), https://www.sknis.gov.kn/2022/03/08/st-kitts-and-nevis-joins-international-sanctions-against-russia-and-belarus/ [https://perma.cc/V7HC-28ZD] (pausing "citizenship application files from all applicants from Russia and Belarus irrespective of whether or not they are on the sanctioned list").

[198] 8 U.S.C. § 1182(a)(4)(A) (declaring that a noncitizen "likely at any time to become a public charge is inadmissible"). Before the statutory codification, nineteenth-century states also excluded migrants on economic grounds. *See, e.g.*, Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1848-57 (1993) (describing restrictions in Massachusetts and New York); Shayak Sarkar, *Crediting Migrants*, 71 STAN. L. REV. ONLINE 281, 284-85 (2019) (discussing the evolution of the public charge rule).

[199] 8 U.S.C. § 1182(a)(4)(B)(i)(IV).

[200] *Id.* § 1183a(a); *id.* § 1183a(f) (defining "sponsor").

[201] *Id.* § 1183a(f)(6)(A)(i).

seek short-term entry.[202] The L-1 is unique from the H1-B context, where American employers petition to hire foreign nationals who may not have a preexisting connection to the employer.[203] American employers use H1-Bs to obtain foreign, high-skilled workers on a temporary basis after demonstrating the limited prospects of the U.S. labor supply.[204] H1-Bs are not purely foreign capital-facilitating since American corporations with no foreign operations may petition for them. In contrast, the L-1 and B-1 programs permit intracompany transfers and business visitors so that foreign capital may enhance its American presence.[205]

[202] To be clear, a migrant's journey can involve multiple visa types. An individual who enters as a temporary business investor (B-1) may apply to change their status to a treaty investor (E-2). *I-129, Petition for a Nonimmigrant Worker*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/i-129 (last visited Sept. 23, 2023) [https://perma.cc/6M3Z-GS7N] ("Petitioners may also use this form to request . . . change of status to . . . E-2."). Similarly, an individual may begin as a treaty investor (E-2) and, as their business grows and investment increases towards the EB-5 thresholds, pursue a change in status. Keller Wurtz v. U.S. Citizenship & Immigr. Servs., No. 20-CV-2163, 2020 WL 4673949, at *1-2 (N.D. Cal. Aug. 12, 2020) (describing Mexican citizen's efforts to move from lawful E-2 status in the United Status to EB-5 investor visa and disinclination to return to Mexico and file for an E-2 extension).

[203] 8 U.S.C. § 1101(a)(15)(H)(i)(b) (describing "an alien (i) . . . (b) subject to section 1182(j)(2) of this title, who is coming temporarily to the United States to perform services . . . in a specialty occupation"). A specialty occupation is defined statutorily as "an occupation that requires — (A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." *Id.* § 1184(i). There are other non-specialty occupation visas within the H1-B. *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations (last visited Sept. 23, 2023) [https://perma.cc/W4AU-AD28]. However, the specialty occupation visas comprise the lion's share of H-1Bs.

[204] *See* U.S. CITIZENSHIP & IMMIGR. SERVS., CHARACTERISTICS OF H-1B SPECIALTY OCCUPATION WORKERS 2 (2022), https://www.uscis.gov/sites/default/files/document/data/H1B_Characteristics_Congressional_Report_FY2021-3.2.22.pdf [https://perma.cc/H2NC-L9YG] (describing the labor certification process, including the use of the Labor Condition Application to require the payment of competitive wages to noncitizens, thereby protecting American workers). While these workers benefit from the prospect of permanent residency, many face country-specific backlogs that render their status precarious, particularly amidst job loss. *See infra* note 225 and accompanying text.

[205] SELECT COMM'N ON IMMIGR. & REFUGEE POL'Y, 97TH CONG., U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: APPENDIX H TO THE STAFF REPORT OF THE SELECT

Through its 1970 creation of the L-1 visa program, Congress explicitly hoped to facilitate capital investment by relaxing immigration restrictions.[206] Multinational enterprises faced unique challenges in relocating executives and the specially-skilled to the United States, while American companies appeared not to face similar challenges when relocating their employees abroad.[207] L-1 visas allow for intracompany transferees, avoiding the foreign worker caps confronted by the H-1B system.[208] However, corporate abuse led to congressional reforms in 2004, which limited the ability of the visa to support off-site work or other tenuous transfers.[209] Despite these challenges, annual L-1 visa

COMMISSION ON IMMIGRATION AND REFUGEE POLICY PUBLIC INFORMATION SUPPLEMENT 358 (1981) [hereinafter U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST]. Some employers have allegedly used B-1s and L-1s to avoid the competitive and expensive lottery for capped H-1B visas. Franchitti v. Cognizant Tech. Sols. Corp., 555 F. Supp. 3d 63, 65-66 (D.N.J. 2021) (discussing employer's alleged manipulation of visa categories); U.S. GEN. ACCT. OFF., GAO 11-26, H-1B VISA PROGRAM: REFORMS ARE NEEDED TO MINIMIZE THE RISKS AND COSTS OF CURRENT PROGRAM 22 (2011) (reporting how multinational firms sent H-1B "candidate[s] to work in an overseas office" and then subsequently brought them "in on an L-1 visa, or by extending the practical training period allowed under their student visa for an additional year").

[206] Immigration and Nationality Act Amendments, Pub. L. No. 91-225, 84 Stat. 116 (1970); *see* 8 U.S.C. 1101(a)(15)(L) (providing for visas for those who, "within 3 years preceding the time of [their] application for admission into the United States, ha[ve] been employed continuously for one year . . . and who seek[] to enter the United States temporarily in order to continue to render [their] services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, [alongside] the [noncitizen] spouse and minor children of any such [noncitizen]").

L-1A visas serve those entering to provide "managerial" or "executive" services, with L-1Bs for "specialized knowledge" services., *L-1A Intracompany Transferee Executive or Manager*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/working-in-the-united-states/temporary-workers/l-1a-intracompany-transferee-executive-or-manager (last visited Nov. 20, 2023) [https://perma.cc/2MH3-GH6D]; *L-1B Intracompany Transferee Specialized Knowledge*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/working-in-the-united-states/temporary-workers/l-1b-intracompany-transferee-specialized-knowledge (last visited Nov. 20, 2023) [https://perma.cc/FQ2V-5QHY].

[207] H.R. REP. NO. 91-851 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 2750, 2751-52. L-1 workers can generally stay up to seven years. 8 U.S.C. §1184(c)(2)(D).

[208] Pub. L. No. 91-225, § 101(a)(15)(L), 84 Stat. at 116; 9 FOREIGN AFFAIRS MANUAL § 402.12-2(a) (2023) (defining "Intracompany transferee").

[209] The L-1 Visa (Intracompany Transferee) Reform Act of 2004, Pub. L. No. 108-447, 118 Stat. 3351 (amending the INA); *see also* 8 U.S.C. § 1184(c)(F)(ii) (precluding

issuance has approached 80,000 in recent years, manifesting Congress and the Department of State's ongoing "program of encouraging foreign investment in the United States."[210]

Large multinational enterprises are offered special worker visa privileges through the L-1 program's unique "blanket petition." The "blanket petition" covers parents, subsidiaries, and affiliates for continued approval of employee transfers to the United States.[211] Yet small businesses need not apply — to qualify, organizations with large workforces (greater than 1,000 U.S. employees) or significant sales (greater than $25 million) leverage those indicators of significant commerce to create an easier process for employee transfers.[212] In compelling only smaller companies to file separate petitions for each worker, the L-1 program makes explicit how significant corporate capital makes foreign capital-facilitating migration easier.[213]

In contrast to the employment relationships and intracompany transfers at the heart of the L-1, the B-1 focuses on individual entrepreneurs seeking temporary entry. Inaugurated with the 1952 Immigration and Nationality Act ("INA"), the B-1 visa requires neither the capital thresholds nor employment creation of the investor visa programs, but it also grants more limited rights.[214] The program offers entry to a person with "a residence in a foreign country which [s]he has no intention of abandoning and who is visiting the United States temporarily for business."[215] Admittedly, nationals of certain countries

"arrangement[s] to provide labor for hire for the unaffiliated employer"). Congressional proposals to further limit such off-site work persist. *See, e.g.*, The H-1B and L-1 Visa Reform Act, S. 3270, 117th Cong. (2022) (amending "the Immigration and Nationality Act to reform and reduce fraud and abuse in certain visa programs").

[210] H.R. REP. NO. 91-851 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 2750, 2761; *see* NIV DETAIL TABLE, *supra* note 193 (noting 76,988 L-1 visas in FY19 and 74,388 in FY18).

[211] 9 FOREIGN AFFAIRS MANUAL § 402.12-2(a) (allowing for "an individual or blanket petition").

[212] 8 C.F.R. § 214.2(l)(4)(i) (2023).

[213] *Id.* § 214.2(l)(5)(ii)(A); *I-129S, Nonimmigrant Petition Based on Blanket L Petition*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/i-129s (last visited Sept. 23, 2023) [https://perma.cc/E5CJ-83VS].

[214] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); Visas: Document of Non-immigrant Aliens Under the Immigration and Nationality Act, 17 Fed. Reg. 11568, 11569 (Dec. 19, 1952).

[215] 8 U.S.C. § 1101(a)(15)(B).

may not need such a visa, as the Visa Waiver Program ("VWP") may allow them to enter the United States for a short-term (less than ninety days) visit even without a visa, including for business purposes.[216]

The desire to facilitate capital entry through migration is not unbounded and faces stress tests. The B-1 visas face a familiar controversy — purportedly short-term visitors "overstay" in the United States and become undocumented. Citing his "commit[ment] to securing the borders of the United States," former President Trump singled out the B-1's "unacceptably high" overstay rates for nationals of certain countries.[217] For a recent fiscal year, dozens of non-VWP countries, predominantly in Africa and the Middle East, had visa overstay rates exceeding ten percent.[218] Nominal business visitors from these countries have overstayed the federal government's welcome for capital-facilitating migration.

Nationals of other countries have alleged troubling consular denials, even as high overstay rates persist for some countries' nationals. Beyond searing descriptions of refugee displacement, the Select Commission on Immigration and Refugee Policy Commission, established in 1978, learned of the more pedestrian delays and difficulties for temporary business visitors and workers, including the denial of short-term

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[216] *Id.* § 1187(a)(1). VWP country designation is based on "reciprocal privileges." *Id.* § 1187(a)(2)(A). *See generally* Muneer I. Ahmad, *The Citizenship of Others*, 82 FORDHAM L. REV. 2041, 2055 (2014) (describing the evolution of the Visa Waiver Program).

[217] Combating High Nonimmigrant Overstay Rates, 84 Fed. Reg. 19853, 19853-84 (Apr. 22, 2019).

[218] *See* U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2020 ENTRY/EXIT OVERSTAY REPORT 12-20 (2021), https://www.dhs.gov/sites/default/files/2021-12/CBP%20-%20FY%202020%20Entry%20Exit%20Overstay%20Report_0.pdf [https://perma.cc/927Z-FZGV] (calculating overstays "by entry rather than by individual"). Based on the total overstay rate, these countries include Afghanistan, Angola, Burkina Faso, Burma, Burundi, Cabo Verde, Chad, Djibouti, Equatorial Guinea, Eritrea, The Gambia, Guinea-Bissau, Kyrgyzstan, Laos, Liberia, Libya, Mauritania, Palau, Rwanda, Samoa, Sudan, Togo, and Yemen. *Id.* at 16-19.

Thus, African countries comprise the majority of those with high overstay rates. The overall average non-VWP country overstay rate was 2.55%. *Id.* at 13. The overall average VWP country overstay rate was, in light of the visa privileges, unsurprisingly lower, at .64%. *Id.* These rates are not higher than for other nonimmigrant visas, such as student visas. *See id.* at 20-24 (providing overstay estimates for F-, M-, and J-visas, i.e. education and other exchange visas).

business and intracompany transfer visas.[219] The U.S.-Asia Institute criticized how, despite these visas' focus on establishing foreign businesses and admitting essential personnel, American consulates in Asia issued restrictive visa guidelines.[220] The Institute argued that these administrative decisions violated "[t]he spirit and letter of the law . . . to encourage the investment of foreign capital."[221]

Nearly four decades later, these visas' eligibility criteria continue to attract criticism. As federal courts, agencies, and scholars have recognized, the B-1 visa's requirement of "business" remains undefined.[222] And while wait times in China and Japan are reasonable, Indian B-1 seekers face a nearly three-year wait for a consular interview appointment.[223] The Indian Foreign Minister accordingly raised their concerns with the U.S. Secretary of State, describing the visa program

[219] An Act to Amend the Immigration and Nationality Act, Pub. L. No. 95-412, § 4, 92 Stat. 907, 907-909 (1978) (establishing the Commission). The timely Commission worked amidst "refugee flows created by Soviet and satellite expansionism in Afghanistan and Ethiopia[, . . .] a cumulative flow of Haitians migrants claiming asylum[,] and a larger number of Cubans suddenly pushed out of their own country . . . [in an] untypical migration episode." U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, *supra* note 205, at 5; *cf.* John Cornyn, *Immigration Reform: Back to the Future*, 115 YALE L.J. POCKET PART 112, 113 (2005-06) (describing a throughline from the Commission to IRCA).

[220] U.S. IMMIGRATION POLICY & THE NATIONAL INTEREST, *supra* note 205.

[221] *Id.* Civil rights attorney and Japanese American historian Frank Chuman echoed these concerns in his testimony to the Commission, including by emphasizing the need to clarify the bases for L-1 eligibility. *Id.* at 123.

[222] *See, e.g.*, United States *ex rel.* Krawitt v. Infosys Techs. Ltd., 372 F. Supp. 3d 1078, 1089 (N.D. Cal. 2019) ("[T]he allowable business activities under a B-1 visa are not well-defined."); 9 FOREIGN AFFAIRS MANUAL § 402.2-5(A)(b) (2023) ("It can be difficult to distinguish between appropriate B-1 business activities, and activities that constitute skilled or unskilled labor in the United States that are not appropriate in B status.").

[223] *Global Visa Wait Times*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/global-visa-wait-times.html (last updated Sept. 22, 2023) [https://perma.cc/4CXW-Z7CY] (comparing wait times for Beijing, Shanghai, and Tokyo with Delhi, Mumbai, and Kolkata).

as "crucial" for business.[224] As such, there remains considerable country-based heterogeneity, echoing other corners of American immigration.[225]

Capital-facilitating migration through short-term business visitors and intracompany transfers has been marked by the country-dependent experiences of foreign nationals and subsequent scrutiny and reforms. But the programs have persisted.

C. Foreign Capital Orthogonal Migration

Third and finally lies capital orthogonal migration. Humanitarian immigration relief does not aim to facilitate foreign capital's entry.[226] In fact, petitioners who rely on their foreign business activities to seek protection face headwinds.[227] While not held against petitioners, their business activities are rarely helpful.

The primary forms of humanitarian relief, asylum, and statutory withholding of removal revolve around persecution, not poverty or prosperity *per se*. Both forms require an applicant to show fear of

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[224] Kanishka Singh, *Blinken Pledges Action to Address Indian Concerns on U.S. Visas*, REUTERS (Sept. 27, 2022, 10:52 AM PDT), https://www.reuters.com/world/india-flags-visa-concerns-us-2022-09-27/ [https://perma.cc/8DSC-DHGH].

[225] *See, e.g.*, 10 U.S Dep't of State Visa Bulletin, No. 72 (Dec. 2022), https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-december-2022.html [https://perma.cc/M3JG-H9MK] (showing the heterogeneous availability of immigrant visas — green cards — based on preference category and nationality).

[226] Humanitarian, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian (last visited Sept. 23, 2023) [https://perma.cc/Y4JH-MEGZ]; *see also* Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2086 (2008) (describing T-visas and U-visas for, respectively, victims of trafficking and general crimes).

[227] *See* 8 C.F.R. § 208.1(a)(1) (2023) (noting that this subpart will govern both asylum and withholding of removal cases).

As background, there are two forms of withholding of removal: under two intertwined bases: the Immigration and Nationality Act ("INA") and Article 3 of the Convention Against Torture ("CAT"). 8 U.S.C. § 1231(b)(3)(A) (INA basis); 8 C.F.R. § 208.16(c) (2023) (CAT basis). While the claims are often raised together, the INA basis requires group-based persecution, while CAT protects the against the risk of torture in the removal country for any reason. As such, applicants can face distinct outcomes under the two regimes. *See, e.g.*, Moreira v. Holder, 537 F. App'x 739, 740 (9th Cir. 2013) (denying petition for review of BIA denial on asylum and withholding of removal claims but granting petition of review on CAT claim).

returning to their country of origin because of their "race, religion, nationality, membership in a particular social group, or political opinion."[228] Despite a similar standard to asylum, withholding does not provide a path to permanent residency.[229] Withholding of removal is also country-specific — a successful applicant can, on occasion, still be deported to a third country.[230]

Migrants who assert a "particular social group" that hinges on past commercial activities rarely prevail. Multiple circuits have rejected recognition of generalized categories of "business owners" facing extortion as a particular social group.[231] Despite the rarity of relief, commercial threats can incorporate violent threats to one's life.[232] Courts may chastise adjudicators' "sanitized" or unsympathetic descriptions of business-related extortion and accompanying violence, but petitioners generally face difficult roads to group recognition.[233]

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[228] 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 208.1(a)-(c) (2023). Because the "clear probability" standard used in withholding of removal cases is more stringent than the "well-founded fear of persecution" standard used in asylum cases, the withholding of removal standard is understood as more stringent than that governing asylum. Zhao v. Holder, 569 F.3d 238, 246 n.10 (6th Cir. 2009); Turay v. Ashcroft, 405 F.3d 663, 667 (8th Cir. 2005) (same).

[229] I.N.S. v. Aguirre-Aguirre, 526 U.S. 415, 419 (1999). For certain otherwise inadmissible or deportable noncitizens, the government may cancel removal and offer permanent residency. 8 U.S.C. § 1229b(b).

[230] 8 C.F.R. § 208.16(f)(1) (2023). *See generally* Sarah Sherman-Stokes, *Third Country Deportation*, 53 IND. L. REV. 333, 347-357 (2020) (describing what precisely happens legally and logistically in "third country deportation").

[231] Davila-Mejia v. Mukasey, 531 F.3d 624, 629 (8th Cir. 2008) (declining to recognize "competing family business owners" as particular social group for both asylum and withholding of removal). More generally, "wealth, standing alone, is not an immutable characteristic of a cognizable social group." Dominguez-Pulido v. Lynch, 821 F.3d 837, 845 (7th Cir. 2016) (citing Tapiero de Orejuela, 423 F.3d 666, 672 (7th Cir. 2005)); *see Moreira*, 537 F. App'x at 740 (finding that the "social group of 'middle class small business owners'" does not satisfy immutability standard).

[232] Elizabeth Keyes, *Unconventional Refugees*, 67 AM. U. L. REV. 89, 140 (2017).

[233] Escobar v. Holder, 657 F.3d 537, 544 (7th Cir. 2011) (expressing concern about how "the Board said nothing about the threats of violence FARC made" against petitioner, and reminding that "[t]hreats can constitute persecution, if they are immediate, menacing, or the perpetrators attempt to follow up on them"). The court remanded rather than resolve the petition directly. *Id.* at 549.

On occasion, narrowly defined business experiences and services can form the basis of humanitarian relief.[234] For example, business owners may prevail where past, now-immutable commercial exchanges lead to persecution and threats beyond the economic realm.[235] But even if a petitioner belongs to a persecuted social group and experiences a threatening "long-standing business dispute," their humanitarian claim may fail without a "particular link" between the group membership and the dispute.[236] The law thus distinguishes a commercial grudge from group-based persecution.[237] Moreover, where petitioners are fleeing

[234] Outside of the humanitarian-visa context, migrants may obtain more purchase for their capital-related activities in applications for cancellation of removal. Four statutory requirements determine cancellation of removal: ten years of physical presence, "good moral character", a minimal criminal record, *and* "exceptional and extremely unusual hardship" to family from removal. 8 U.S.C. § 1229b(b)(1).

While business tax records are mechanically a means of establishing physical presence, immigration lawyers often use them to establish moral character and potential hardship. Jacqueline Laínez Flanagan, *Reframing Taxigration*, 87 TENN. L. REV. 629, 644 (2020) (discussing a 2019 survey of New York immigration attorneys). The role of a family business can arise both under "good moral character" and potential hardship for family. *See, e.g.*, de la Cruz-Flores v. Garland, No. 21-4003, 2022 WL 2903445, at *1 (6th Cir. July 22, 2022) (noting petitioner's food truck business but finding no hardship because "he is not the primary caregiver for his children and would still be able to provide some, albeit lessened financial support from Mexico").

[235] *Escobar*, 657 F.3d at 544 ("If Escobar had proffered the group 'all truckers' as his proposed social group, we would have no trouble agreeing with the Board['s denial]. But he did not, and the Board's assumption that he can shed the status of being a former trucker who resisted FARC and helped the government is incorrect.").

Some have explicitly connected the general challenges to recognition of business owners as a social group to immutability. *See, e.g.*, Keyes, *supra* note 232, at 140 (arguing that business owner "is not a reliable 'particular social group' as courts have found occupations to be changeable.").

[236] Cece v. Holder, 733 F.3d 662, 674 (7th Cir. 2013).

[237] Sompotan v. Mukasey, 533 F.3d 63, 71 (1st Cir. 2008) (denying appeal from withholding of removal where alleged events of persecution reflected "a personal grudge," including a poisonous fish and an unpaid loan "that was the root cause of the problems").

Despite American law's limitations, the United Nation's guidance suggests that "business owners and others unable or unwilling to meet extortion or other unlawful demands for money or services by gangs" could comprise a particular social group for asylum and related relief. U.N. HIGH COMM'R FOR REFUGEES, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO VICTIMS OF ORGANIZED GANGS 4 ¶ 12 (Mar. 2010),

accountability to judicially recognized (if unscrupulous) private creditors, recognition of a social group, and humanitarian relief, have been denied.[238]

In sum, foreign capitalists can rarely establish themselves as satisfying the "particular social group" requirement for humanitarian relief. Business-based persecution claims falter, even when layered with intersectional identities.[239] Foreign capitalists who are neither wealthy enough for investor or treaty visas nor employed or skilled enough for intracompany transfers confront challenging standards, even when fleeing serious threats. Beyond being the most capital orthogonal face of immigration, humanitarian relief is also the most visible, eliciting public scrutiny and fear.[240]

III. THE FEAR OF FOREIGN CAPITAL

Alongside a fear of foreign migrants lies a fear of foreign capital, despite its importance.[241] In early America, concerns about a reliance on foreign capital sparked institutional checks: separation of ownership and control might preclude foreign owners from harming national interests during crises.[242] Noncitizens were barred from serving as

https://www.aila.org/infonet/unhcr-guidance-refugee-victims-of-organized-gangs [https://perma.cc/5J3U-LMZR].

[238] Cruz-Funez v. Gonzales, 406 F.3d 1187, 1191-92 (10th Cir. 2005) (noting that "petitioners' debt was settled by a court, which ordered them to pay their creditor back.").

[239] *See, e.g.*, Vasquez-Ramos v. Barr, 792 F. App'x 43, 44 (2d Cir. 2019) (denying social group recognition for "Honduran single mothers who are business owners in Campo Sol with municipally issued business permits," since "gang extortion is common in Honduras and affects a large cross-section of the population beyond women and business owners").

[240] *See Most Americans Are Critical of Government's Handling of Situation at U.S.-Mexico Border*, PEW RSCH. CTR. (May 3, 2021), https://www.pewresearch.org/politics/2021/05/03/most-americans-are-critical-of-governments-handling-of-situation-at-u-s-mexico-border/ [https://perma.cc/V5V4-ELF9] (describing how amidst increasing Border Control apprehensions, about two-thirds of U.S. adults say that the government is doing a "very (33%) or somewhat (35%) bad job of dealing with the increased number of people seeking asylum at the country's southern border").

[241] *See, e.g.*, Kingson,*supra* note 177, at 1161 ("[C]ontrol by foreign interests threatens a country's pride, security, and sovereignty.").

[242] Sitaraman, *supra* note 8, at 1108.

directors of national banks, preventing those with neither "sympathy" nor "any allegiance to the Government" from "materially controlling the welfare of the nation."[243] The national threat felt by noncitizen financial leadership aptly illustrates capital as a historical launchpad for modern fears.

This Part starts with the much-discussed CFIUS but moves beyond it. I focus on CFIUS's looser definition and much broader scrutiny of "foreign control," in contrast to the quantitative measures applied to identify controlled foreign corporations. Yet "national security" cannot justify CFIUS's uniquely broad scrutiny. Beyond the term's elasticity, "national security" is also invoked in international taxation and immigration. While the wide breadth of CFIUS's scrutiny is unique, national security concerns are not.

For all the attention paid to CFIUS and national security, they hover far above the fear of foreign capital's physical, Main Street manifestations — a fear enshrined in municipal laws. I conclude this Part by describing affluent communities' resistance to aesthetic manifestations of residential and commercial investments by "foreign" capital. This resistance, including by earlier settled immigrants, blurs into express opposition to the migrants themselves.

A. *Committee on Foreign Investment in the United States (CFIUS) and Foreign Control*

Formed in 1975, CFIUS has few guardrails in reviewing commercial transactions with national security implications.[244] The committee balances the arguably "unequivocal" support of foreign investment in the United States with protecting national security.[245] Yet two particular

[243] *Id.* at 1109 (describing how early Congressman Thaddeus Stevens was concerned about noncitizen directors of national banks).

[244] Exec. Order No. 11858, 40 Fed. Reg. 20263 (May 7, 1975); These transactions include mergers, acquisitions, takeovers, real estate sales or leases, and investments, or "[a]ny other transaction, transfer, agreement, or arrangement, the structure of which is designed or intended to evade or circumvent the application of this section . . . ." 50 U.S.C. § 4565(a)(4)(B)(v). The Committee is chaired by the Treasury Secretary. *Id.* § 4565(k)(3).

[245] Exec. Order No. 13456, 73 Fed. Reg. 4677 (Jan. 23, 2008) (amending Exec. Order 11858 concerning foreign investment in the U.S.).

statutory ambiguities collide in the Committee's power to limit foreign stakes in American corporations: CFIUS's broad definition of foreign control and a similarly broad definition of national security.

CFIUS was born from, and remains preoccupied with, investment connected to particular countries, even as its authority seems ever-expanding and ambiguous.[246] Motivated by concerns about Japanese acquisition of U.S. firms, the passage of the Exon-Florio provision in 1988 energized the once-sleepy committee.[247] Countries in the Middle East would later inherit the mantle of uniquely threatening sovereigns.[248] Exon-Florio expanded CFIUS's authority over foreign mergers with, and acquisitions of, domestic firms while maintaining the "nation's long-standing international commitment to . . . foreign investment." [249]

The modern focus has shifted to Chinese capital.[250] The leading case expanding both investors' procedural protections and judicial review of

[246] *See generally* David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 86 (2009) (emphasizing CFIUS's role in relationships with, and actions by, China, India, and Germany); *id.* at 98 (describing how the "important terms that trigger CFIUS investigations" are "defined broadly").

[247] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, tit. V, § 5021, 102 Stat. 1107, 1115.

[248] Richard L. Kaplan, Book Review, 129 U. PA. L. REV. 486, 487 (1980) (reviewing EARL H. FRY, FINANCIAL INVASION OF THE U.S.A. (1980)) (discussing the growing threat of "petro- dollar[]" investments).

[249] JAMES K. JACKSON, CONG. RSCH. SERV., RL33312, THE EXON-FLORIO NATIONAL SECURITY TEST FOR FOREIGN INVESTMENT 3 (2013); *see also* Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 648-50 (2019) (describing how, after imposing a subsequently-retaliated tariff on Chinese imports under the 1947 Trade Act, President Trump's administration chose to await Congress's expansion of CFIUS powers rather than using Trade Act powers to further restrict Chinese investment).

[250] Matthew Jennejohn, Julian Nyarko & Eric Talley, *Contractual Evolution*, 89 U. CHI. L. REV. 901, 944 (2022) (arguing that "Chinese investors have been hit particularly hard" by CFIUS review); Ji Li, *Investing Near the National Security Black Hole*, 14 BERKELEY BUS. L.J. 1, 2-3 (2017) ("Reluctant to change its long-standing open market policy simply in response to surging investments from China, the U.S. government has been relying on a variety of regulatory institutions to mitigate the potential security risk."); Evan J. Zimmerman, *The Foreign Risk Review Modernization Act: How CFIUS Became a Tech Office*, 34 BERKELEY TECH. L.J. 1267, 1269 (2019) (describing how the Foreign Investment Risk Review Modernization Act's expansion of CFIUS was "born out of the nexus of

CFIUS's power — a rarity — arose from, and appears to have affected, Chinese investors.[251] (China is often the adversary in states forging CFIUS-like parallels and testing the limits of federalism.[252]) In contrast to China's treatment, Australia, Canada, New Zealand, and the United Kingdom are considered excepted states for the CFIUS process.[253]

Congress further expanded CFIUS's jurisdiction and power over foreign capital in recent years but did not increase transparency. The government added scrutiny to real estate transactions near sensitive locations and investments in businesses pertaining to "critical infrastructure," "critical technologies," and "sensitive personal data of

increased fear regarding China's growing strategic and economic clout and the potential loss of American technology supremacy, with urgency injected by the attempted Broadcom-Qualcomm merger").

[251] A notable decision concerning CFIUS's procedural protections and Chinese investors can be found in *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296 (D.C. Cir. 2014). In *Ralls,* an American corporation owned by two Chinese nationals purchased American businesses developing windfarms in Oregon, which CFIUS determined was a national security threat, leading to a Presidential Order requiring divestment. *Id.* at 304-06. Ralls took issue with the lack of notice of the evidence on which CFIUS and the President relied (and the lack of opportunity to rebut), leading to the Court's finding of due process violations. *Id.* at 325. *See also* Li, *supra* note 250, at 3 (arguing that Chinese investors view the CFIUS regime "more positively after the *Ralls* decision").

[252] Kristen E. Eichensehr, *CFIUS Preemption*, 13 HARV. NAT'L SEC. J. 1, 13-21 (2022) (discussing CFIUS's preemptive effect); *see supra* note 12 and accompanying text.

[253] *CFIUS Excepted Foreign States*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-excepted-foreign-states (last visited Sept. 18, 2023) [https://perma.cc/Y37P-T8YW]; *see also* COMM. ON FOREIGN INVESTMENT IN THE U.S., U.S. DEP'T OF THE TREASURY, ANNUAL REPORT TO CONGRESS: CY 2021, at 32 (2022), https://home.treasury.gov/system/files/206/CFIUS-Public-AnnualReporttoCongressCY2021.pdf [https://perma.cc/FVG9-2MD8] (noting the highest number of covered notices for China); Aidan Arasasingham & Gerard DiPippo, *Evaluating CFIUS in 2021*, CTR. FOR STRATEGIC & INT'L STUD. (Aug. 9, 2022), https://www.csis.org/analysis/evaluating-cfius-2021 [https://perma.cc/S7RY-Q78Q] ("Chinese investors are cognizant that their investments will face greater scrutiny by CFIUS and warrant more laborious notification under the notice process.").

Beyond diplomatic frustrations with the United States, China singled out Australia's rejection of Chinese foreign investment proposals. Daniel Hurst, *China's Infamous List of Grievances with Australia "Should Be Longer Than 14 Points," Top Diplomat Says*, GUARDIAN (Nov. 19, 2021, 2:00 PM EST), https://www.theguardian.com/australia-news/2021/nov/20/chinas-infamous-list-of-grievances-with-australia-should-be-longer-than-14-points-top-diplomat-says [https://perma.cc/GET3-QAH8].

United States citizens."[254] CFIUS now employs a multistage process, often beginning with voluntary notices, followed by formal filings, a review, and then potentially a deeper investigation and a recommendation to the President to block the transaction.[255]

CFIUS's regulation of foreign capital has long been shrouded in secrecy. In the winter of 2022, nearly fifty years after CFIUS's formation, the Department of Treasury released its first-ever CFIUS Enforcement and Penalty Guidelines.[256] The brief and informal Guidelines provide little clarity on how penalties and remedies will be fashioned for various information failures and non-compliance with CFIUS mitigation. As foreign capital has been subject to growing federal scrutiny, public understanding has not increased in tandem.

Foreign control is defined incredibly broadly for the purpose of CFIUS.[257] Federal law defines control as "the power, direct or indirect, whether exercised or not exercised, to determine, direct, or decide important matters affecting an entity."[258] Unlike definitions that require quantitative indicators of majority control, "even minority voting

[254] Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, § 1703, 132 Stat. 1636, 2177 (2018); *see* U.S. DEP'T OF THE TREASURY, SUMMARY OF THE FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2018, https://home.treasury.gov/system/files/206/Summary-of-FIRRMA.pdf [https://perma.cc/4Z7F-TBLB]; *see also* Kristen Eichensehr, *United States Pursues Regulatory Actions Against Tiktok and Wechat Over Data Security Concerns*, 115 AM. J. INT'L L. 124, 124 (2021) (noting CFIUS's "expanded . . . mandate"). These real estate transactions are much narrower than the broader concern and taxation of foreign-owned real estate. *See supra* notes 80–81 and accompanying text.

[255] Eichensehr, *supra* note 252, at 6-8.

[256] Press Release, U.S. Dep't of Treasury, Treasury Releases CFIUS Enforcement and Penalty Guidelines (Oct. 20, 2022), https://home.treasury.gov/news/press-releases/jy1037 [https://perma.cc/LLR9-C778].

[257] Many commentators have noted the uniquely broad scope of what comprises foreign control for CFIUS. George W. Dent, Jr., *The Essential Unity of Shareholders and the Myth of Investor Short-Termism*, 35 DEL. J. CORP. L. 97, 108-09 (2010) (noting how "'control' is defined very broadly"); Paul Rose, *Sovereigns as Shareholders*, 87 N.C. L. REV. 83, 111 (2008) (arguing that while "CFIUS defines control broadly," "[o]utside of CFIUS' jurisdiction, within the murkier sphere of shareholder influence, protection against political activity decreases").

[258] 50 U.S.C. § 4565(a)(3).

interests in the range of ten percent may be deemed controlling."[259] The United States is not alone in this broad construction — other countries have continued to adopt very low thresholds for control in their own investment review processes.[260] The requisite amount of control for foreign investment lies apart from conventional understandings.[261]

B. National Security and Foreign Control for CFIUS and Beyond

CFIUS's hawkishly broad definition of foreign control cannot be convincingly sourced in "national security." This Section shows how immigration and international taxation also invoke national security. As such, "national security" is more red herring than rationale.

National security's definition and relationship to foreign investment are not well-defined for CFIUS.[262] When Congress formalized CFIUS by statute,[263] the Department of Treasury's proposed regulations left commenters noting "that the [pursuant] regulations do not define 'national security'" and even suggest that "the scope of CFIUS's reviews

[259] Jonathan Wakely & Andrew Indorf, *Managing National Security Risk in an Open Economy: Reforming the Committee on Foreign Investment in the United States*, 9 HARV. NAT'L SEC. J. 1, 7 (2018).

[260] U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2022: INTERNATIONAL TAX REFORMS AND SUSTAINABLE INVESTMENT 58-59 (2022), https://unctad.org/system/files/official-document/wir2022_en.pdf [https://perma.cc/5J5F-XYYL] (describing investment review processes in Australia, Denmark, and Slovakia).

[261] 31 C.F.R. § 800.213(e) (2020) (providing examples of non-controlling equity interests in covered transactions); Eichensehr, *supra* note 252, at 5 (emphasizing how Congress expanded CFIUS's authority to noncontrolling investments by foreign persons).

[262] *See* George Stephanov Georgiev, *The Reformed CFIUS Regulatory Framework: Mediating Between Continued Openness to Foreign Investment and National Security*, 25 YALE J. ON REG. 125, 127 (2008) (noting the lack of a clear definition of national security); Li, *supra* note 250, at 32 (noting the lack of "clear definition of national security" but the presence of "a list of considerations for the CFIUS analysis"). *See generally* Shixue Hu, *State Enterprises in International Investment Disputes: Focus on Actor or Action?*, 51 GEO. J. INT'L L. 323, 371-72 (2020) ("To ensure that the foreign investment does not threaten the *national security* . . . , states that host foreign investment have the sovereignty to regulate inbound foreign capital." (emphasis added)).

[263] Zaring, *supra* note 246, at 95 (characterizing the Foreign Investment and National Security Act of 2007 as "Congressional displeasure at CFIUS's inaction").

is broader than national security."[264] The Committee's response was telling: it reminded the public of the longstanding policy "to welcome foreign investment" and the practice of reviewing "national security concerns on a case-by-case basis."[265]

Despite subsequent statutory amendments, CFIUS's definition of national security remains vague. CFIUS's extended investigations focus on the national security effects of not only transactions that "*could* result in the control of any United States business by a foreign government"[266] but also those that "would result in control of any critical infrastructure" by a foreign person.[267] National security's current definition is "relating to 'homeland security', including its application to critical infrastructure."[268] The ambiguous scope of national security, as with control, comports with the "global diffusion of CFIUS-like processes"[269] — in a United Nations study of foreign investment review processes, no country had a "clear-cut" or common definition of national security.[270]

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[264] Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70702, 70705 (Nov. 21, 2008).

[265] *Id.*

[266] 50 U.S.C. § 4565(a)(7) (defining "foreign government-controlled transaction") (emphasis added); *id.* § 4565(b)(2)(A) (describing national security reviews and investigations); *id.* § 4565(b)(2)(B)(i)(II).

[267] *Id.* § 4565(b)(2)(B)(i)(III); *id.* § 4565(b)(3) (describing certifications to Congress at completion review); *see also* Tricia Reville, *Rice Paddies on the White House Lawn: CFIUS & the Foreign Control Requirement*, 10 COLUM. J. RACE & L. 114, 155 n.232 (2020) (discussing how CFIUS defines "foreign" differently than the IRS).

[268] 50 U.S.C. § 4565(a)(1). National security is also secondarily defined through "critical infrastructure." *Id.* § 4552(2) ("The term 'critical infrastructure' means any systems and assets . . . vital to the United States[‘] . . . national security, *including, but not limited to, national economic security and national public health or safety*." (emphasis added)).

[269] Kristen E. Eichensehr & Cathy Hwang, *National Security Creep in Corporate Transactions*, 123 COLUM. L. REV. 549, 571-78 (2023) (describing legal changes to foreign investment review in the European Union, Australia, and the United Kingdom); *see also* Rose, *supra* note 257, at 127-30 (describing the growth of foreign investment review processes, particularly those focusing on sovereign wealth fund investments).

[270] U.N CONF. ON TRADE AND DEV., WORLD INVESTMENT REPORT 2016: INVESTOR NATIONALITY 94-96 (2016), https://unctad.org/system/files/official-document/wir2016_en.pdf [https://perma.cc/RH98-UGPR] (surveying 23 countries).

National security invocations transcend CFIUS.[271] While "expanding definitions"[272] render the term elusive, the Department of Defense's multipronged definition includes: "both national defense and foreign relations of the United States with the purpose of gaining: . . . [a] favorable foreign relations position."[273] The Immigration and Nationality Act defines the term as "the national defense, foreign relations, or economic interests of the United States."[274] These open definitions — whether through a "favorable foreign relations position" and/or the "economic interests of the United States" — implicate international taxation.

International taxation reflects national security concerns in multiple ways. One of the primary institutions addressing international taxation, the OECD, identifies national security as a core tax concern. In a handbook for tax examiners and tax auditors to combat "tax crimes," it describes tax evasion as a "serious threat to national security."[275] The handbook explicitly invokes national security concerns — including anti-terrorism financing — to train tax bureaucrats on suspicious transnational corporate arrangements.[276] The focus on national security

[271] Even as states exercise their tax power over multinational corporations, the dormant Foreign Commerce Clause permissiveness will have implications for national security. Sullivan, *supra* note 161, at 1957 (connecting the Foreign Commerce Clause to foreign affairs generally, including national security).

[272] Robert Knowles, *Delegating National Security*, 98 WASH. U. L. REV. 1117, 1123 (2021).

[273] *National Security*, MILITARYDICTIONARY.ORG, https://www.militarydictionary.org/term/national-security (last visited Sept. 20, 2023) [https://perma.cc/TQ4W-NW8V].

[274] 8 U.S.C. § 1189(d)(2).

[275] OECD, MONEY LAUNDERING AND TERRORIST FINANCING AWARENESS HANDBOOK FOR TAX EXAMINERS AND TAX AUDITORS 11 (2019), https://www.oecd.org/tax/crime/money-laundering-and-terrorist-financing-awareness-handbook-for-tax-examiners-and-tax-auditors.pdf [https://perma.cc/9KMY-VXMM]. The handbook warns of the use of foreign legal entities, including foreign corporations, to obfuscate true ownership. *Id.* at 18, 44, 60.

[276] *Id.* at 27. Historically, some scholars seemed to frame the calculation of an "international boycott factor" to reduce the foreign tax credit available to a U.S. taxpayer for "participation in or cooperation with an international boycott" as motivated by national security. 26 U.S.C. § 999(b)-(c). The provision also requires reporting by any person who operates in a country participating in the boycott. *Id.* § 999(a)(1); *see also* Henry J. Steiner, *International Boycotts and Domestic Order: American Involvement in the Arab-Israeli Conflict*, 54 TEX. L. REV. 1355, 1355 (1976) ("The boycott, once perceived as symbolism and gesture, assumes more threatening dimensions . . . .");

has not gone unnoticed. One critic has castigated the OECD and its wealthy-country members as "Global Governors" who are "exclusively focused on economic and national security matters," at the expense of development and rights-based concerns from the Global South.[277]

More generally, international taxation implicates national security through other countries' public finance. Other countries' economic security affects our national security.[278] National security experts see the days of poverty knowing territorial bounds as behind us, with threats to American security emerging from foreign economic struggles.[279] As such, poorer countries' domestic tax revenue shapes our national security, and foreign aid and sovereign debt are not perfect substitutes.[280] Unfortunately, the OECD Model Tax Convention[281]

id. at 1381 (arguing that such tax disincentives will particularly affect multinational corporations that benefit "substantially from tax credits and deferrals").

[277] Martin W. Sybblis, *Equality Offshore*, 63 B.C. L. REV. 2667, 2689 (2022).

[278] *See, e.g.*, Press Release, White House Briefing Room, Fact Sheet: The Biden-Harris Administration's National Security Strategy (Oct. 12, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/12/fact-sheet-the-biden-harris-administrations-national-security-strategy [https://perma.cc/Y42Y-2YZ6] (describing "affirmative engagement" "to promote prosperity in every region" as part of national security strategy). Even non-state actors, like coal worker unions, envision "national security through economic development," connecting their workers' wages and conditions to the country's ability to avoid foreign energy reliance. Trish Kahle, *The Front Lines of Energy Policy: The Coal Mining Workplace and the Politics of Security in the American Century*, 72 AM. Q. 627, 642-44 (2020).

[279] *See, e.g.*, Susan Rice, *The Threat of Global Poverty*, NAT'L INT., Spring 2006, at 76, 77 (describing how "transnational security threats" "emerge from impoverished, relatively remote regions of the world").

[280] Abhijit V. Banerjee & Esther Duflo, *Under the Thumb of History? Political Institutions and the Scope for Action*, 6 ANN. REV. ECON. 951, 960-61 (2014) (noting that "states that have easy access to resources (either natural resources or foreign aid) have limited incentives to invest in fiscal capacity"); Lee C. Buchheit, G. Mitu Gulati & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201 (2007) (taxonomizing sovereign debt, including "odious debt").

[281] OECD, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL 33 (2017), https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2017-full-version_g2g972ee-en [https://perma.cc/5PPR-GBEG]; Arthur J. Cockfield, *The Limits of the International Tax Regime as a Commitment Projector*, 33 VA. TAX REV. 59, 79 (2013) (discussing how courts in Canada and the United States have "used this model tax treaty and its Commentary as extrinsic aids to interpret the provisions of their legally binding bilateral tax treaties").

limits the tax rights of source countries absent a multinational enterprise's "permanent establishment," buffering wealthy tax residence countries' coffers at the expense of poorer source countries.[282] Model treaties' default principles affect poor countries' fiscal capacity and wealthy countries' national security.[283]

National security's ambiguity likewise surfaces in immigration.[284] On one hand, some military scholars (and Republican presidents) have argued that national security requires "liberalized admissions and

[282] *See* Mason, *supra* note 67, at 356 (discussing permanent establishment); *cf.* Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 YALE J. INT'L L. 1, 54 (2013) (discussing the general significance of model treaties, including for U.S. bilateral tax treaties).

[283] *See, e.g.*, U.N. DEP'T ECON. & SOC. AFFS., UNITED NATIONS MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES, at iii, U.N. Doc. ST/ESA/SER.E/213 (2017) ("The United Nations Model Convention generally favours retention of greater so called 'source country' taxing rights under a tax treaty — the taxation rights of the host country of investment — as compared to those of the 'residence country' of the investor."); Arthur J. Cockfield, *The Rise of the OECD as Informal "World Tax Organization" Through National Responses to E-Commerce Tax Challenges*, 8 YALE J.L. & TECH. 136, 147 (2006) (describing how developing countries benefit more from the United Nations Model Double Taxation Convention's language than the OECD "permanent establishment" language).

[284] Trump v. Hawaii, 138 S. Ct. 2392, 2409 (2018) ("[W]hen the President adopts 'a preventive measure . . . in the context of international affairs and national security,' he is 'not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions.'" (quoting Holder v. Humanitarian L. Project, 561 U.S. 1, 35 (2010) (alteration in original) (citation omitted)); Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1476 (2018) (discussing how constitutional doctrine has facilitated the "cohabitation of national security and immigration"). While Republicans now aggressively police the border more than Democrats, surveys suggest that the direction and magnitude of the partisan gap is of recent vintage. Based on annual survey data, in 2002, shortly after the attacks of Sept. 11, Democrats were more likely to perceive immigration as "a critical threat" at 62%, slightly more than the 58% of Republicans who felt similarly. BETTINA HAMMER & CRAIG KAFURA, THE CHI. COUNCIL ON GLOB. AFFS., REPUBLICANS AND DEMOCRATS IN DIFFERENT WORLDS ON IMMIGRATION 2 (2019), https://globalaffairs.org/sites/default/files/2020-12/report_republicans-democrats-different-worlds-on-immigration_20191008.pdf [https://perma.cc/EG7C-5GGN]. Two decades later, the parties flipped and diverged, with 78% of Republicans viewing immigration as a critical threat, compared to only 19% of Democrats. *Id.*

legalization policies."[285] Such open immigration outlooks counter the common conflation of national security and immigration enforcement.[286] At the intersection with tax law, even citizen family members have been disadvantaged by their associations with immigrants, echoing the broad catchment of CFIUS's foreign control.[287] Their exclusion from pandemic relief contradicted public sympathy and became immigration "enforcement laws imbued with a moral agenda often associated with criminal and national security law."[288] While noncitizens are often tax residents and have accordant tax obligations, some retain a disadvantage for many tax credits.[289] National security's amorphous character and omnipresence render it a suspect basis for CFIUS's uniquely broad foreign control rules — and foreign capital fears.

C. The Main Street Fear of Foreign Capital

Alongside foreign capital's federal attention lies its lower-key, everyday presence. Washington D.C.'s fraught relationship with foreign capital does not always dictate those of the cities and states. In the 1970s and 1980s, as growing foreign direct investment catalyzed "highly emotional" federal worries about "national economic sovereignty,"

[285] Donald Kerwin & Margaret D. Stock, *The Role of Immigration in a Coordinated National Security Policy*, 21 GEO. IMMIGR. L.J. 383, 409 (2007) (citing to Bush administration Secretary of Homeland Security Michael Chertoff).

[286] *Id.* at 425; Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1830 (2007) (connecting immigration enforcement to "the nation's security").

[287] *See* Sarkar, *Tax Law's Migration*, *supra* note 55, at 2227-36 (chronicling immigrant tax exclusions in the IRS's pandemic payments).

[288] *Id.* at 2253; Stephen Lee, *The Economic Dimensions of Family Separation*, 71 DUKE L.J. 845, 877 (2022).

[289] *Compare* 26 U.S.C. § 32(c)(1)(e), (c)(3)(D), (m) (requiring a Social Security Number for the Earned Income Tax Credit), *and* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 451, 110 Stat. 2105, 2276 (codified as amended in 26 U.S.C. § 32), *with* 26 U.S.C. § 24(c)(2), (h)(4)(a)-(c), (h)(7) (requiring a child's Social Security Number for the full Child Tax Credit, but allowing for a "partial credit" for those without a Social Security Number). *Cf.* Francine J. Lipman, *Bearing Witness to Economic Injustices of Undocumented Immigrant Families: A New Class of "Undeserving" Poor*, 7 NEV. L.J. 736, 746-51 (2007) (criticizing Congress's immigration-status restrictions of the EITC).

cities and most states still sought overseas offices.[290] Even as foreign exchange fluctuations and recessions could make foreign direct investment elusive,[291] subnational entities sought integration with the international economic system. Foreign capital flies coast to coast — from California, where anti-"foreign" laws nonetheless continue across class lines,[292] down to the rural South.[293]

Yet the fear of foreign capital surrounds us, far beneath interagency committees tasked with national security reviews, much less international organizations. I turn to the Main Street fear of foreign capital: the fear of migrants' capital clashing with our communities and the fear of capital catering to those migrants. In contrast to my focus on *foreign* capital's meaning, existing accounts focus on local responses to mobile but already domesticated capital, including through anti-chain or anti-"big box" ordinances.[294] In focusing on "foreign" but seemingly innocuous manifestations and *uses* of residential property, I also move beyond debates over foreign ownership of the land itself.

Affluent communities struggle to be at home with migrants, whose homes elicit municipal aesthetic restrictions. Consider the cities in the San Gabriel Valley, whose once postwar, majority white landscape has now been replaced by a majority Asian, increasingly foreign-born population providing a different vision.[295] Within the San Gabriel Valley lies the always wealthy but now majority Asian city of San Marino.[296]

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[290] Earl H. Fry, *Foreign Direct Investment in the United States: The Differing Perspectives of Washington, D.C. and the State Capitals*, 1989 BYU L. REV. 373, 373 (1989).

[291] OFF. OF TRADE & INV. ANALYSIS, U.S. DEP'T OF COMM., FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: 1983 TRANSACTIONS 3 (1984).

[292] GEORGE VERNEZ, PAC. COUNCIL ON INT'L POL'Y, THE NEW MELTING POT: CHANGING FACES OF INTERNATIONAL MIGRATION AND POLICY IMPLICATIONS FOR SOUTHERN CALIFORNIA 5 (2003), https://www.pacificcouncil.org/sites/default/files/related_resources_files/melting.pdf [https://perma.cc/KH7V-AEDD].

[293] *See infra* notes 316-322 and accompanying text.

[294] Schragger, *supra* note 1, at 517-20.

[295] *See, e.g.*, *QuickFacts: San Gabriel City, California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/sangabrielcitycalifornia (last visited Sept. 11, 2023) [https://perma.cc/HHN4-4ZF2] (estimating that, as of 2022, 60.7% of respondents identify as Asian and 54.2% foreign-born).

[296] *QuickFacts: San Marino City, California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/sanmarinocitycalifornia (last visited Sept. 11, 2023) [https://perma.cc/7ZEM-934V] (estimating that, as of 2023, 66.5% of respondents

Even as some affluent Asian people in California embraced the aesthetic status quo through "design assimilation," others sought privately built but public-facing architecture as a break from the city's past.[297]

Municipal codes resist the new tastes accompanying these demographic changes. Even where immigrants' design choices reflected deeper values, whether large homes to exercise newfound religious freedoms or second stories and units to house elderly relatives, aesthetic and zoning restrictions rejected those choices.[298] The 1999 San Marino Residential Design Guidelines spelled out that the neighborhood's "established character . . . should be reinforced and complemented, not negated or intruded upon."[299] While literally referring to the architecture, the language of intrusion and negativity marginalized property owners whose tastes were not "established." Foreign(ers') capital could buy them a home if not aesthetic freedom.

Fellow immigrants were sometimes inquisitors rather than translators. After the Iranian Revolution and significant immigration to its exclusive streets, Beverly Hills passed its own Residential Style Catalogue in 2004, responding to critical comments about "retention of the neighborhood character."[300] A Persian architect and former

identify as Asian and 46% foreign-born, with a median owner-occupied home value of $2 million).

[297] JAMES ZARSADIAZ, RESISTING CHANGE IN SUBURBIA: ASIAN IMMIGRANTS AND FRONTIER NOSTALGIA IN L.A. 11 (2022).

[298] Becky M. Nicolaides & James Zarsadiaz, *Design Assimilation in Suburbia: Asian Americans, Built Landscapes, and Suburban Advantage in Los Angeles's San Gabriel Valley Since 1970*, 43 J. URB. HIST. 332, 346 (2017) (quoting Taiwan native Richard Sun and discussing zoning); *id.* at 333 (defining "design assimilation"); Nahid Pirnazar, *The Process of Immigration to the United States and the Acculturation of Iranian Jews*, *in* 18 WANDERING JEWS: GLOBAL JEWISH MIGRATION 33, 47 (Steven J. Ross, Steven J. Gold & Lisa Ansell eds., 2020) (discussing diasporic housing choices as a reaction to ghetto-ization of Jewish people in Iran by religious clerics); WILLOW S. LUNG-AMAM, TRESPASSERS?: ASIAN AMERICANS AND THE BATTLE FOR SUBURBIA 151 (2017) (discussing a proposed ban on second-story additions).

[299] CITY COUNCIL OF THE CITY OF SAN MARINO, CITY OF SAN MARINO RESIDENTIAL DESIGN GUIDELINES 8 (1999), https://cms9files.revize.com/sanmarinoca/Residential-Design-Guidelines.pdf [https://perma.cc/UD9S-9NCW].

[300] CITY OF BEVERLY HILLS BEVERLY HILLS RESIDENTIAL STYLE CATALOGUE 2 (2008), http://www.beverlyhills.org/cbhfiles/storage/files/4702978971337846787/StyleCatalogRevisedMarch2008.pdf [https://perma.cc/G96F-DAXR] (passed and revised in 2004 and revised again in 2008).

professor in both Florence and Tehran chaired the Design Review Commission. He spoke disdainfully of "Persian Palaces" alleging that fellow new immigrants had "no sense of humility, or how to live quietly" and preferred to "explode[] with ostentation."[301] Eerily in parallel, and just a few miles away, a successful immigrant from Hong Kong who chaired San Marino's Design Review Committee told the new Asian immigrants that "what you like doesn't matter."[302] What apparently did matter was pure design and not confusing various European architectural styles.[303] Concerned with fellow immigrant-owned homes "that look[ed] . . . out of place" in Fremont, California, Indian-Americans founded a "Preserve Mission Ranch" organization to police local design choices.[304] When immigrant capital spoke volumes, their neighbors, often immigrants themselves, demanded architectural quiet.

When newcomers would leave their redesigned private residences, they patronized establishments shaped by new corporate foreign capital. From "the Denny's of Malaysia"[305] to bridal districts reminiscent of Taipei, newcomers demanded and opened new businesses. Yet since these stores displaced the old — hardware and sporting goods stores as well as vintage theaters — earlier residents protested, including in racist, public online tirades.[306] To some long-time residents, pearly

[301] Greg Goldin, *In Defense of the Persian Palace*, L.A. TIMES (Dec. 17, 2006, 12:00 AM PST), https://www.latimes.com/archives/la-xpm-2006-dec-17-tm-palaces51-story.html [https://perma.cc/C9TX-4A4H] (quoting architect Hamid Gabbay). Some scholars have characterized "McMansions" as a coded term used to disparage Asian immigrant aesthetic choices. Wendy Cheng, *The Changs Next Door to the Diazes: Suburban Racial Formation in Los Angeles's San Gabriel Valley*, 39 J. URB. HIST. 15, 31 (2013) (describing how the term "McMansions" reflects "a new kind of Yellow Peril expressed through buying up all the 'bigger homes' and 'nicer cars' (as one disgruntled white resident of San Marino put it)").

[302] Nicolaides & Zarsadiaz, *supra* note 298, at 346 (quoting and discussing Allan Yung).

[303] *Id.*

[304] LUNG-AMAM, *supra* note 298, at 149.

[305] Jim Thurman, *The Denny's of Malaysia Opens in Monterey Park*, L.A. WEEKLY (Aug. 14, 2015), https://www.laweekly.com/the-dennys-of-malaysia-opens-in-monterey-park/ [https://perma.cc/PC2C-WL5V].

[306] *See, e.g.*, Nhi T. Lieu, *Disrupting Nostalgic Scenes of Whiteness, Asian Immigrant Bridal Shops and Racial Visibility in the Ethnoburb*, 3 SPACES & FLOWS 1, 7-9 (2013) (providing examples of online vitriol).

white dresses and amorous engagement photographs became angry reminders of no-longer "foreign" commerce and personal displacement.

Foreign migrants' ownership and use of non-residential property have long faced resistance. In 1923, the Supreme Court in *Webb v. O'Brien* reviewed California's Alien Land Law, limiting property ownership by certain noncitizens like later Senator Daniel Inouye, whom the case concerned.[307] The Court permitted California to preclude noncitizens like Inouye from possessing land for agricultural purposes,[308] lest "the population living on and cultivating the farm lands might come to be made up largely" of noncitizens.[309] Recognizing the synergy between the California legislature and the U.S. Supreme Court, some Japanese Americans left behind rural farm life to work at small businesses in more urban areas.[310]

Those earlier restrictions foreshadowed legal conflicts surrounding commercial investments in demographically evolving communities. In *Asian American Business Group v. City of Pomona,* a federal court struck down city ordinances limiting foreign language use on commercial signs.[311] But other ordinances persist. For example, some California local officials expressed concern about the visual appeal, maintenance, and mix of stores in Asian malls, and the growth of individually owned,

[307] The Court declared that "[n]o constitutional right . . . is infringed." Webb v. O'Brien, 263 U.S. 313, 326 (1923). The restrictions on noncitizens comport with a history of Black and Native American exclusion. "[D]emocratic property ownership did not extend to . . . free Blacks and Native Americans" as rights were "contingent upon certain assumptions about the origin, race, and location of the property owners." Allison Brownell Tirres, *Ownership Without Citizenship: The Creation of Noncitizen Property Rights*, 19 MICH. J. RACE & L. 1, 43 (2013).

[308] *Webb*, 263 U.S. at 323.

[309] *Id.* at 324.

[310] BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990, at 60 (1993).

[311] Asian Am. Bus. Grp. v. City of Pomona, 716 F. Supp. 1328, 1329 (C.D. Cal. 1989) (finding unconstitutional on First Amendment and Equal Protection grounds a city ordinance requiring commercial "establishments which have advertising copy in foreign alphabetical characters [to] devote at least one half of the sign area to advertising copy in English alphabetical characters"); *see also* Cristina M. Rodríguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 197-99 (2001) (discussing the *Pomona* case).

smaller commercial condos that are not centrally managed or leased.[312] Fremont accordingly has an ordinance requiring commercial unit sizes to be "typical and customary."[313] Changing communities sought central control of commercial areas, fearful of how free-wheeling foreign capital might transform them.

Those conflicts reflect a historically rooted fear of foreignness, defined beyond citizenship. The guardians of California's villas and shopping villages channel the "Americans must rule America" cry from the notorious nineteenth-century nativist Know-Nothing party.[314] That conception of "Americans" excluded foreigners, which might include naturalized citizens and religious minorities, among others.[315]

Of course, sometimes foreign capital is better than no capital at all. Far from California's affluent ethnoburbs lie poorer Southern states inundated with new corporate capital flows.[316] Georgia, Louisiana, and Mississippi have placed state employees and offices in foreign countries — including China, Korea, and Japan — to help foreign entities looking to establish business or manufacturing operations in their states.[317] That

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[312] LUNG-AMAM, *supra* note 298, at 100-03, 116-20.

[313] FREMONT, CAL., MUN. CODE § 18.190.070(e)(1)(B) (2023), https://www.codepublishing.com/CA/Fremont/html/Fremont18/Fremont18190.html [https://perma.cc/D6NZ-DV7H].

[314] Peyton Hurt, *The Rise and Fall of the "Know Nothings" in California*, 9 CAL. HIST. SOC'Y Q. 16, 16 (1930).

[315] Party members hoping to hold office were expected to make an oath to, "if it may be done legally . . . remove all foreigners, aliens or Roman Catholics from office." *Id.* at 22.

[316] Sayuri Guthrie-Shimizu, *From Southeast Asia to the American Southeast: Japanese Business Meets the Sun Belt South*, *in* GLOBALIZATION AND THE AMERICAN SOUTH 135, 149 (James C. Cobb & William Stueck eds., 2005) (describing how "[S]outhern governors jostled each other to attract investment . . . in the unemployment plagued 1980s"). *See generally* MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY 38-42 (2016) (describing how representatives from Virginia, Wisconsin, Nebraska, and Ohio visited other countries to spur foreign investment).

[317] *International Representatives*, GA. DEP'T OF ECON. DEV., https://www.georgia.org/international/representatives (last visited Sept. 11, 2023) [https://perma.cc/9VT8-LH3R] (cataloguing representatives across the world); *Office of International Commerce Staff Directory*, LA. ECON. DEV., https://www.opportunitylouisiana.gov/about-led/staff-directory/office-of-international-commerce (last visited Sept. 11, 2023) [https://perma.cc/9J7A-NNAL] (same); *International Trade and Investment*, MISS. DEV. AUTH., https://mississippi.org/trade/ (last visited Sept. 11, 2023) [https://perma.cc/799Y-

has led to the automotive industry's growth, including through Korean Kia Motors in Georgia and Hyundai in Alabama.[318] The American South is a magnet for global capital and related migrants, distinct from preceding waves of poorer refugees.[319]

This corporate capital has transformed host communities, though sometimes less than hoped. In Opelika, Alabama, few Korean small businesses existed prior to the introduction of the auto manufacturer parts suppliers — now, restaurants, auto service, and entertainment venues don Korean signage, symbols of a community arrived.[320] And yet in West Point, Georgia, the arrival of Kia Motors did not bring the expected development, as the immigrant workers chose to live in larger, more prosperous neighboring towns.[321] While moneyed towns question newcomers' place, struggling ones may welcome foreign capital only to mourn the way it fails to remain within, much less transform, the community. Communities may prefer a storefront with foreign characters to no storefront at all.[322]

HR42] (describing "a network of overseas offices in Japan, South America, Europe and Korea").

[318] Timothy J. Minchin, *When Kia Came to Georgia: Southern Transplants and the Growth of America's "Other" Automakers*, 83 J.S. HIST. 889, 897-98 (2017).

[319] James C. Cobb, *Beyond the Y'all Wall: The American South Goes Global*, *in* GLOBALIZATION AND THE AMERICAN SOUTH, *supra* note 316 at 1 (discussing the role of "[state] subsidies and the more than ample pool of relatively cheap, overwhelmingly nonunion labor"); *see, e.g.*, Christopher A. Airriess & David L. Clawson, *Versailles: A Vietnamese Enclave in New Orleans, Louisiana*, 12 J. CULTURAL GEOGRAPHY 1 (1991) (using the Versailles subdivision of New Orleans to analyze how the arrival of Vietnamese refugees transformed communities in the American South); *see also id.* at 11 (describing how the subdivision "afforded social, cultural, and economic refuge").

[320] Donna Holly Park, Koreabama: Exploring the Recent Social and Landscape Impacts of South Korean Migration Trends and Patterns in the Rural South 75-78 (May 4, 2014) (Ph.D. dissertation, Auburn University), https://etd.auburn.edu/bitstream/handle/10415/4049/ParkThesis.pdf;sequence=2 [https://perma.cc/EK56-KC8M].

[321] Minchin, *supra* note 318, at 927.

[322] *Id.* at 900 (quoting a former chairman of the country commission describing how the area was "dying" before Kia arrived and explaining that "[t]he store fronts were closing [and] it was a really a tough, tough situation"). As been written in the international context, communities "that attract capital may have problems coping with the infusion" but "communities abandoned by capital are faced with a far more serious problem." Cao, *supra* note 19, at 437.

CONCLUSION

Capital migrates. And this phenomenon lies closer to human migration than recognized. From a snack-food company's attempted tax savings for employees sent abroad to the visas secured for Korean automotive managers to build Deep South factories, both people and capital move in our globalized economy. As this Article has revealed, the legal treatment of capital migration echoes that of human migration. Even beyond investor visas, capital paves many migrants' paths to legal residency in the United States. Existing communities resist capital migration, including the humans behind it.

The real asymmetry therefore may not be between capital and human migration. Rather it may be between America's persistent receipt of foreign capital and the omnipresent fear of foreign capital destroying a particular notion of "America."