



ESSAY

Crediting Migrants

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Credit facilitates migration, and it may also provide a theoretical framework to understand it. This Essay examines the role of credit and financing in migration by focusing on changes to the “public charge” ground of inadmissibility—American immigration law’s nearly 150-year-old test for prohibiting migration by those financially dependent on governmental assistance.¹ In October 2018, U.S. Citizenship and Immigration Services (USCIS) issued a Notice of Proposed Rulemaking (NPRM) that would change how the agency will determine an immigrant’s likelihood of becoming a public charge and the consequences flowing from that determination.²

This Essay proceeds in four Parts to consider how the proposed public charge rule connects migration to credit. First, it highlights the role of credit in facilitating the process of migration itself. When immigrants lack resources in the present, credit markets provide the ability to forge a different future.

Second, it examines the public charge ground of inadmissibility and changes to the definition of the ground that have been proposed by the NPRM and have also been enacted in recent changes to State Department guidance. The NPRM includes a new requirement of “self-sufficiency,” a phrase that captures a more stringent vision of the statutory term “public charge.”³ These changes increase economic screening and, in particular, raise the financial thresholds faced by aspiring family-based migrants.

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1. See *infra* note 15 and accompanying text.

2. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,122-23 (proposed Oct. 10, 2018); *infra* Part II.C (describing the NPRM in greater detail); *infra* Part II.B (discussing how individuals otherwise inadmissible on public charge grounds may post a public charge bond for admissibility purposes).

3. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51,122 (“DHS seeks to better ensure that applicants for admission to the United States and applicants for adjustment of status to lawful permanent resident who are subject to the public charge ground of inadmissibility are self-sufficient, *i.e.*, do not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their family, sponsor, and private organizations.”); *id.* at 51,295 (requiring submission of declaration of self-sufficiency).

In the third Part, I explore federalist tensions that may arise from public charge bonds, which the NPRM proposes to revive as a tool in immigration law. But this tool may have unforeseen dimensions. Public charge bonds may provide an opportunity for states to counteract stricter federal immigration controls by financially assisting sponsors, who are immigrants' financial guarantors. In doing so, these bonds provide yet another ground for immigration federalism by allowing certain states to credit migrants notwithstanding the federal government's hesitation.

Finally, I briefly elaborate on how credit may provide a useful analogy for understanding some aspects of American immigration law. As policymakers advance a more actuarial approach, including through the proposed public charge rule, immigration law begins to mirror credit underwriting, raising questions as to who is credited and on what terms.

I. Credit for Migration

Migration can be strongly affected by constraints on formal credit,⁴ and the lack of migration can have consequences for both individuals and the broader economy.⁵ At the outset, migrants may borrow money from third parties to simply facilitate migration. The U.S. requires over \$1,200⁶ to pursue a green card (permanent residency), \$725 for naturalization,⁷ and nearly \$500 for

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4. Shu Cai, *Migration Under Liquidity Constraints: Evidence from Randomized Credit Access in China*, J. DEV. ECON. 1, 2 (forthcoming) (finding "that releasing liquidity constraints generally increases migration among households in treatment villages [in China] . . . [and] show[ing] that the program increases migration among households in low-asset villages, with the impact lessening as village assets increase"); Kaivan Munshi & Mark Rosenzweig, *Networks and Misallocation: Insurance, Migration, and the Rural-Urban Wage Gap*, 106 AM. ECON. REV. 46, 47 (2016) (describing how urban-rural disparities in insurance and credit availabilities explain the lack of internal migration in India); Manuela Angelucci, Note, *Migration and Financial Constraints: Evidence from Mexico*, 97 REV. ECON. & STAT. 224, 224 (2015) (finding empirical evidence that "access to credit for the poor and antipoverty programs may actually increase low-skilled migration" in Mexico).
 5. See, e.g., Douglas Gollin et al., *The Agricultural Productivity Gap*, 2014 Q.J. ECON. 939, 990 (tying their findings about the agricultural wage-productivity gap to evidence demonstrating how subsidizing worker migration can yield longitudinal income gains for workers).
 6. *I-485, Application to Register Permanent Residence or Adjust Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://perma.cc/799C-BJLS> (last reviewed/updated Jan. 7, 2019) (fee for green card applicants ages fourteen to seventy-eight).
 7. *Our Fees*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://perma.cc/69B6-7D3L> (last reviewed/updated Apr. 20, 2018) (fee for N-400 application is \$640, plus an \$85 biometric service fee). In lieu of the \$640, certain applicants may be eligible for a reduced \$320 filing fee, *id.*, or a fee waiver, see *Additional Information on Filing a Fee Waiver*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://perma.cc/3PJD-4CCZ> (last reviewed/updated June 2, 2016).

renewals of Deferred Action for Childhood Arrivals (DACA).⁸ These nontrivial fees have given rise to “Dreamer Loans,”⁹ as well as lending circles.¹⁰

Migrants who are unable to obtain formal credit may turn to less formal alternatives. They may enter into contracts with intermediaries—“smugglers”—perhaps to navigate the path to the U.S. or to arrange visas. Smugglers may operate on credit, secured by property in the origin country, with repayment demanded from individuals upon arrival in the destination country.¹¹ Migration’s debt is not empirically independent of migration’s law—the cost charged by smugglers to migrants appears to be positively correlated with enforcement activity.¹²

Some economists have suggested that when governments make it more difficult for illegal migrants to regularize their status, certain forms of illegal immigration may actually increase.¹³ For wealth-constrained migrants without collateral, smugglers utilize post-migration collection and monitoring, integrated with informal and often illegal work arrangements.¹⁴ If those migrants are integrated into formal society and more easily able to avail themselves of labor and legal protections, such collection and monitoring is more difficult for the smuggler. Thus, the ability of migrants to regularize their

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8. *I-821D, Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://perma.cc/2ND5-KULL> (last reviewed/updated Jan. 24, 2019).
 9. United We Dream, *Need Help Paying Your DACA?* (n.d.), <https://perma.cc/52ZW-RMZU>.
 10. Sophie Quinton, *The Immigrant Lending Circles That Pave the Way to Citizenship*, ATLANTIC (July 8, 2013), <https://perma.cc/N6RB-N8W2>.
 11. See, e.g., David Stoll, *From Wage Migration to Debt Migration? Easy Credit, Failure in El Norte, and Foreclosure in a Bubble Economy of the Western Guatemalan Highlands*, LATIN AM. PERSP., Jan. 2010, at 123, 135-38 (describing the effects of collateral-financed unauthorized migration on a Guatemalan municipality); Joshua Partlow & Nick Miroff, *For Central Americans, Children Open a Path to the U.S.—and Bring a Discount*, WASH. POST (Nov. 23, 2018), <https://perma.cc/6L4D-ADBL> (describing one migrant’s use of real property as collateral for smuggler fees); see also Mary C. Burke, *Introduction to Human Trafficking: Definitions and Prevalence*, in HUMAN TRAFFICKING: INTERDISCIPLINARY PERSPECTIVES 3, 13 (Mary C. Burke ed., 2013) (describing the practice among Thai farmworkers to pay H2A visa-related recruitment fees); PHILIP MARTIN, *REDUCING THE COST BURDEN FOR MIGRANT WORKERS: A MARKET-BASED APPROACH* 5 (2009), <https://perma.cc/7YFN-5V36> (“Most Bangladeshi migrants who fill low-skill jobs abroad are from rural areas, and sell land or take out loans using their homes or land as collateral to cover the cost of foreign employment.”).
 12. Bryan Roberts et al., U.S. Dep’t Homeland Security, *An Analysis of Migrant Smuggling Costs Along the Southwest Border 2* (2010), <https://perma.cc/G5HC-UZXM> (concluding “that enforcement activity does have a statistically and materially significant impact on smuggling costs and thus potentially deters some potential migrants from coming to the United States without proper documentation”).
 13. Guido Friebel & Sergei Guriev, *Smuggling Humans: A Theory of Debt-Finance Migration*, 4 J. EUR. ECON. ASS’N 1085, 1108 (2006).
 14. See, e.g., *Abarca v. Little*, 54 F. Supp. 3d 1064, 1066 (D. Minn. 2014); *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 679-81 (S.D. Tex. 2009).

status after unauthorized entry adds risk of nonrepayment and deters smugglers from financing migrants' trips.

For migrants who travel to the U.S. through both formal and informal channels, credit access may define their ability to move and the means by which they do so. As described in the following Part, USCIS's public charge NPRM proposes to deepen the connection between credit and ability to migrate.

II. Crediting Public Charges

The connection between economic status and migration has long been entrenched in American law. In 1882, Congress prohibited immigration by "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a *public charge*."¹⁵ Even before that, states had regulated the migration of potential public charges.¹⁶ The public charge limitation has remained, in various iterations. Currently, "[a]ny alien who . . . is likely at any time to become a public charge is inadmissible."¹⁷

Despite its longstanding presence in immigration law, there is no statutory definition for "public charge," although it is understood to involve some degree of reliance on government assistance. Two agencies are responsible for determining whether migrants are inadmissible under the public charge ground: USCIS for migrants who are present and have been previously admitted or paroled to the U.S., and the State Department (through its consular officers) for all other prospective migrants. The current administrative understanding at both agencies is that an individual becomes a public charge when he or she is "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense."¹⁸ Other forms of assistance, such as medical care and food assistance, have been excluded from the definition. Notwithstanding the lack of a statutory definition of public charge, Congress did mandate a set of factors to consider in assessing the public charge ground: "age"; "health"; "family status"; "assets, resources, and financial status"; and "education and skills," as well as an "affidavit of support."¹⁹

15. Immigration Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214, 214 (emphasis added) (repealed 1974).

16. *Infra* note 33 and accompanying text.

17. 8 U.S.C. § 1182(a)(4)(A) (2017).

18. See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (proposed May 26, 1999). Although the Immigration and Naturalization Service (INS) proposed a rule to formalize this definition, a final rule was never promulgated. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,133 (proposed Oct. 10, 2018) ("Ultimately, however, INS did not publish a final rule conclusively addressing these issues.").

19. 8 U.S.C. § 1182(a)(4)(B).

Two financial guarantees allow migrants to establish that they will not become public charges, notwithstanding their individual characteristics: the affidavit of support and the public charge bond. Below, I describe these two mechanisms, before examining recent changes and proposed changes to public charge determinations.

A. Affidavit of Support

The affidavit of support is an enforceable promise by the immigrant's visa sponsor to ensure that the immigrant lives above 125% of the federal poverty line, a statutory threshold.²⁰ If the visa sponsor is unable to meet this requirement, another individual may step in as a "joint" sponsor.²¹ The affidavit is now required for most family-based immigrants and for certain employment-based immigrants.²² Regardless of the category of the immigrant visa, however, the statute contemplates that both the sponsor and joint sponsor are natural persons.²³

Before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, these affidavits were unenforceable.²⁴ In the mid-twentieth century, the then-Department of Mental Hygiene of the State of California sued to enforce an affidavit of support in order to recoup the expenses incurred by an immigrant's stay in one of its hospitals. The court denied relief, finding that the "affidavits are moral obligations only" and not contracts.²⁵ Today, however, the affidavit can be enforced in two ways: An agency that provided means-tested benefits to a sponsored immigrant can seek reimbursement, or the sponsored immigrant can directly enforce the affidavit.²⁶ To date, sponsored immigrants

20. U.S. Citizenship & Immigr. Servs., Instructions for Affidavit of Support Under Section 213A of the INA 1 (2018), <https://perma.cc/8JFR-JYE7>. Howard F. Chang argues that "these sponsorship requirements, which obligate sponsors to support [sponsored] relatives . . . and to demonstrate the means to do so, have raised barriers that tend to screen out less educated family-sponsored immigrants." *The Economics of Immigration Reform*, 52 U.C. DAVIS L. REV. 111, 134 (2018).

21. 8 U.S.C. § 1183a(f)(5)(A).

22. See U.S. Citizenship & Immigr. Servs., *supra* note 20, at 1.

23. 8 U.S.C. § 1183a(f); see also 8 C.F.R. § 213a.1 (2018) (defining "joint sponsor" and "substitute sponsor," vis-à-vis the statutory requirements of "sponsor").

24. See Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1702-03 (2007) (questioning whether sponsors appreciate the nature of the commitment entailed by the affidavit of support).

25. Dep't of Mental Hygiene of State of Cal. v. Renel, 173 N.Y.S.2d 231, 235 (N.Y. App. Term 1958) (per curiam), *aff'd*, 175 N.Y.S.2d 556 (N.Y. App. Div. 1958), *aff'd*, 159 N.E.2d 678 (N.Y. 1959).

26. *Moody v. Sorokina*, 830 N.Y.S.2d 399, 402 (2007) ("[T]he sponsored immigrant 'has independent standing to enforce the sponsor's obligation' in any federal or state court.") (quoting *Davis v. Davis*, No. WD-04-020, 2004 WL 2924344, *3 (Ohio Ct. App. Dec. 17, 2004)); *Affidavit of Support*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://perma.cc/YB8S-VKMD> (last reviewed/updated June 26, 2017). Under "Responsibilities as a Sponsor,"

have been the most active enforcers of affidavits of support, using litigation to enforce family support obligations.²⁷

Until recently, both USCIS and consular officers largely treated a valid affidavit of support as sufficient to establish that a migrant would not become a public charge.²⁸ In other words, the promise by a third party to reimburse a government agency for any benefits has been treated as establishing that the prospective migrant is unlikely to become a public charge.

B. Public Charge Bonds

The other financial guarantee is the public charge bond. Congress provided the Attorney General authority to admit a migrant who has been found inadmissible on the public charge ground, on receipt of a “suitable and proper bond.”²⁹ The statutory purpose of the bond is to hold the federal government, states, and municipalities “harmless against such alien becoming a public charge.”³⁰

A bond, like an immigration detention bond or a bail bond, is an up-front posting of money (a cash bond) or an assurance from a trusted intermediary (a surety bond). Surety companies charge a “premium,” generally a percentage of the surety bond amount, for providing the assurance of compliance with the bond’s conditions.³¹ In the event of breach, the surety company pays the amount of the bond and generally seeks reimbursement for this amount from the individual. For the public charge bond, breach would occur if the admitted immigrant, for example, receives certain public benefits.³²

Public charge bonds have a long heritage. Before the federal government began regulating immigration, New York City required that bond be posted on behalf of immigrants to indemnify “the overseers of the poor of the city, from

USCIS notes that an agency can sue the sponsor in court to recoup the cost of a sponsored individual’s means-tested public benefit. *Id.*

27. See Veronica Tobar Thronson, *Til Death Do Us Part: Affidavits of Support and Obligations to Immigrant Spouses*, 50 FAM. CT. REV. 594, 597-600 (2012) (discussing the role of affidavits of support in family law litigation).

28. See, e.g., 9 U.S. Dep’t of State, Foreign Affairs Manual § 302.8-2(B)(3) (2016) (“[A] properly filed, non-fraudulent Form I-864 in those cases where it is required, should normally be considered sufficient to meet the INA 212(a)(4) requirements and satisfy the ‘totality of the circumstances’ analysis.”).

29. 8 U.S.C. § 1183 (2017).

30. *Id.*

31. See generally Robert D. Aicher et al., *Credit Enhancement: Letters of Credit, Guaranties, Insurance and Swaps (The Clash of Cultures)*, 59 BUS. LAW. 897, 920-22 (2004) (describing the relationship between the business of insurance and surety agreements).

32. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,225 (proposed Oct. 10, 2018).

all expenses of the maintenance of such person, or of the child or children of such person.”³³

But of late, the limited public charge definition and the enforceability of the affidavit of support had largely eliminated the need for public charge bonds.³⁴ USCIS thus currently lacks a “process in place to regularly accept public charge bonds.”³⁵

C. Proposed Changes to the Public Charge Determination

Currently, the public charge ground does not significantly limit migration. At consular posts worldwide, about 1% of immigrant visa rejections and a handful of nonimmigrant visa rejections were based on the public charge ground of inadmissibility in fiscal year 2017.³⁶ However, both the State Department and USCIS have shown an intent to make the public charge prohibition a more scrutinizing hurdle to overcome. For example, the Migration Policy Institute estimates that these new standards would raise questions about the potential inadmissibility of the majority of recent green card holders.³⁷

USCIS’s NPRM would enact more sweeping changes to the public charge ground, including redefining public charge to include a use of a wider range of social services and requiring heightened proof of “self-sufficiency.”³⁸ The

33. *Mayor of New York v. Miln*, 36 U.S. 102, 105 (1837). Massachusetts had a similar program. See, e.g., Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1848-50 (1993).

34. See *Adjudicator’s Field Manual—Redacted Public Version, 61.1 Posting, Cancellation and Breaching of Public Charge Bonds*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://perma.cc/V4LV-ZP6D> (archived Feb. 13, 2019) (“Policy. Although USCIS has the authority to require a public charge bond, such authority is rarely exercised in light of the statutory changes contained in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) which created the enforceable affidavit of support . . .”).

35. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51,219.

36. See U.S. Dep’t of State, Table XX Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act) Fiscal Year 2017 1, 3, <https://perma.cc/8V5R-5LTG> (archived Feb. 11, 2019). The majority of the nearly 3 million “immediate relatives, family-sponsored, employment-based, and diversity visa-based immigrants who obtained” lawful permanent resident (LPR) status in recent years had visa applications processed at overseas consulates prior to being admitted as an LPR at a port-of-entry. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51,134 (footnote omitted).

37. RANDY CAPPS ET AL., MIGRATION POLICY INST., GAUGING THE IMPACT OF DHS’ PROPOSED PUBLIC-CHARGE RULE ON U.S. IMMIGRATION 2 (2018), <https://perma.cc/2TQ9-T37Y>.

38. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51,123 (discussing “self-sufficiency” as a purpose of the proposed rule); *id.* at 51,165 (noting that “DHS believes that it is appropriate to expand the list of previously included public benefits,” including Supplemental Nutrition Assistance Program (SNAP) and Medicaid benefits). The proposed rules come after a “leaked” draft executive order from early 2017 that would have directed DHS to even more significantly expand the public charge basis for deportability. Andrew

proposed rule introduces a large set of factors, loosely based on the statutory factors.³⁹ One of these factors is the credit report and score of the migrant, if available. This use of credit history has come under criticism.⁴⁰ The NPRM proposes a much more scrutinizing approach to affidavits of support, which would also only comprise one factor among many that USCIS will consider.⁴¹ The State Department generally harmonizes its interpretations with those of USCIS, and observers expect this to occur if the public charge proposed rule is finalized.⁴² Even before the NPRM, however, the State Department changed its internal guidance to de-emphasize affidavits of support.⁴³ This change has led to a dramatic increase in the number of visa applications rejected on the public charge ground.⁴⁴

As the sufficiency of affidavits of support diminishes, the public charge bond appears primed to take on a larger role.⁴⁵ The NPRM expressly envisions pre-admissibility financial posting, in contrast to crediting immigrants with some benefit of the doubt (as reflected in an affidavit of support). The posting itself would be a privilege rather than a right. Certain “heavily weighed negative factors”⁴⁶ would make it unlikely that USCIS would permit the opportunity to

Hammond, *The Immigration-Welfare Nexus in a New Era?*, 22 LEWIS & CLARK L. REV. 501, 522 (2018) (discussing leaked Executive Order).

39. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51,198-210.

40. See, e.g., *The Wrong Tool for the Wrong Purpose: Why the Credit Scoring Provision in the Immigration Public Charge Proposal Is Illogical and Ill-Advised*, NAT'L CONSUMER L. CTR. (Oct. 2018), <https://perma.cc/F9KF-G5N2>.

41. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51,198.

42. *DHS Proposes Vast Changes to Public Charge Definition*, CATH. LEGAL IMMIGR. NETWORK, <https://perma.cc/XL2V-VVMQ> (archived Feb. 13, 2019); see also Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51,135 (noting that the State Department is “likely” to change the Foreign Affairs Manual to mirror a finalized USCIS rule).

43. Compare 9 U.S. Dep't of State, Foreign Affairs Manual § 302.8-2(B)(2) (2018) (“A properly filed, non-fraudulent Form I-864 in those cases where it is required, is a positive factor in the totality of the circumstances. The applicant must still meet the INA 212(a)(4) requirements and satisfy the ‘totality of the circumstances’ analysis, which requires the consideration of the factors listed in paragraph (1) above.”), with 9 U.S. Dep't of State, Foreign Affairs Manual § 302.8-2(B)(3) (2016) (“[A] properly filed, non-fraudulent Form I-864 in those cases where it is required, should normally be considered sufficient to meet the INA 212(a)(4) requirements and satisfy the ‘totality of the circumstances’ analysis.”).

44. See U.S. Dep't of State, Table XX Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act) Fiscal Year 2018 1, <https://perma.cc/RD9T-6QP4> (archived Mar. 1, 2019) (noting that the number of public charge findings more than quadrupled to 13,450, with a smaller proportion of those findings being later overcome).

45. See Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51,218, 51,293-95 (describing adjustment of status of aliens on submission of a public charge bond).

46. These proposed factors include “Lack of Employability,” “Current Receipt of One of [sic] More Public Benefit,” “Receipt of Public Benefits Within Last 36 Months of Filing Application,” “Financial Means To Pay for Medical Costs,” and “Alien Previously Found Inadmissible or Deportable Based on Public Charge.” Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51,115.

post bond.⁴⁷ Indeed, USCIS provides no aggregate cost estimates of the impact of the new public charge bond form because it is unable to estimate the number of people who would be eligible for the “fact-specific” public charge bond.⁴⁸ The minimum bond amount is proposed to increase tenfold, from the current minimum of \$1,000, to \$10,000, with even higher bond amounts required based on “individual circumstances.”⁴⁹ Moreover, violation of the bond with any amount of benefits use would result in forfeiture of the full bond amount; a \$10,000 bond could be forfeited because the migrant received \$50 of food stamps.⁵⁰

Although other Department of Homeland Security agencies allow cash bond for release from immigration detention, USCIS would initially only accept surety bonds for public charge bonds.⁵¹ Per the currently proposed rule, the obligor (the surety company) may thus be subject to a demand for full payment if USCIS determines that bond has been breached by the immigrant.⁵²

Thus, in the existing public charge regime, most migrants are not treated as likely public charges, based in part on a promise to repay any government benefits; in contrast, in the proposed regime, many more migrants would be found inadmissible as likely public charges, subject to entry only if they were able to (and permitted to) obtain a surety upfront.

III. Immigration Federalism and the Public Charge

One underappreciated and undertheorized aspect of the public charge rulemaking is the interaction of the financial guarantor provisions—both the affidavit of support and the public charge bond—with immigration federalism. Although the affidavit of support statute defines a sponsor to be a natural person, the statute is less express on a central point: Can a state provide funding to a third-party sponsor even when it itself cannot be one? Consider, for example, a state interested in supporting lower-income immigrant sponsors’ efforts at family reunification. State funding could manifest as full or partial indemnification should a sponsor be ultimately brought to court by the alien or

47. *See id.* at 51,221 (“DHS believes that offering a public charge bond in the adjustment of status context would generally only be warranted in limited circumstances in which the alien has no heavily weighed negative factors . . .”).

48. *Id.* at 51,227.

49. 8 C.F.R. 213.1 (2018); Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51,221. Parallel estimates of the median bond amount set by immigration judges hover around \$7,500. Jayashri Srikantiah, Essay, *Reconsidering Money Bail in Immigration Detention*, 52 U.C. DAVIS L. REV. 521, 526 (2018) (summarizing various studies); *Three-Fold Difference in Immigration Bond Amounts by Court Location*, TRACIMMIGRATION (July 2, 2018), <https://perma.cc/R2HC-7BAH>.

50. *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51,294-95.

51. *Id.* at 51,222.

52. *See id.* at 51,294-95.

a third-party under the affidavit of support, or, alternatively, as preferential financing for sponsors. For public charge bonds, a state could subsidize surety bonds by financing the bond premiums.

States should be able to finance visa sponsors without preemption concerns. The permissive place held by states with respect to affidavits of support undermines arguments that the state's informal financing of a statutorily-contemplated sponsor would "frustrate federal policies" for the purposes of preemption.⁵³ The fact that the statute explicates that a state *may* enforce the affidavit of support means that a state may also choose not to enforce it.⁵⁴ The state thus has the choice under the statute to insulate a sponsor from liability under the affidavit of support. Such insulation—which is expressly contemplated by the statute—could hardly be said to conflict with the federal scheme, whether it takes the form of declining to enforce the affidavit or of state funding for direct financial support for sponsors.

States may very well be interested in using financial resources to blunt the potential changes from the NPRM. California, for example, has recently considered leveraging its financial power and budget surplus for immigrant inclusion through a proposed expansion of the state earned income tax credit to undocumented immigrants.⁵⁵ This vanguard proposal, although not yet passed, coincides with California's so-called "sanctuary" laws, which limit municipal and employer cooperation with immigration enforcement and have been subject to challenge by the federal government.⁵⁶ Given that California's Attorney General joined nearly half of his peers in a comment letter opposing the proposed rule⁵⁷ and expressed particular concern about the tenfold increase in the public charge bond minimum,⁵⁸ the state (along with other signatories to the letter) may engage in financial resistance through the assistance to sponsors described above.

The financial immigration federalism questions in the public charge context are complicated. Consider that California's mid-twentieth century lawsuit to recover expenses for an immigrant's hospital stay was filed in a New

53. See *Arizona v. United States*, 567 U.S. 387, 402 (2012).

54. U.S. Citizenship & Immigr. Servs., *supra* note 20 ("If a Federal, state, local, or private agency provided any covered means-tested public benefit to the person who becomes a lawful permanent resident based on a Form I-864 that you signed, the agency *may* ask you to reimburse them for the amount of the benefits they provided. If you do not make the reimbursement, the agency *may* sue you for the amount that the agency believes you owe." (emphasis added)).

55. For a fuller analysis of this proposed expansion, see Shayak Sarkar, *Financial Immigration Federalism*, 103 GEO. L. J. (forthcoming 2019).

56. See *United States v. California*, 314 F. Supp. 3d 1077, 1090 (E.D. Cal. 2018).

57. Comment on Proposed Rule: Inadmissibility on Public Charge Grounds, DHS Docket No. USCIS-2010-0012 (October 10, 2018), Dec. 10, 2018, <https://perma.cc/R4MQ-CL3K>.

58. California Attorney General Xavier Becerra, Comments on Proposed Rule: DHS Docket No. USCIS-2010-0012; *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51114 (Oct. 10, 2018), RIN 1615-AA22, Dec. 10, 2018, <https://perma.cc/C8BX-YXLA>.

York court, where the sponsor lived.⁵⁹ While that case was focused on the affidavit of support, what would it mean for a New York agency to report either use of New York welfare programs or use of even California programs to USCIS, as a basis for the agency to find breach of a public charge bond?⁶⁰ What if that bond had been subsidized by California? Or, more interestingly, what would it mean for Huntington Beach, a city within California, to report an alien's breaching conduct to USCIS after California affirmatively contracted with the surety bond company?

These plausible hypotheticals illustrate how immigration federalism will have to confront the crediting of immigrants. While resistance to federal immigration enforcement has gained recent momentum in California and elsewhere, these hypotheticals illustrate not only innovative strategies through which immigration federalism might surface, but also the attendant and recurring Tenth Amendment and plenary power questions raised by such strategies—what are the constitutional limits of states' roles in immigration?

IV. American Immigration as Credit

The NPRM's proposed changes to the affidavit of support and public charge bond, even with potential state resistance, illustrate the helpfulness of analogizing immigration law to credit. Public charge admissibility focuses on the narrow question, and time period, of admission, but the test at admission increasingly examines past conduct to discern future potential.

Specifically, analogizing immigration law to credit brings a new perspective to the "domestic interest" approach to immigration law, which focuses on the benefits of immigration to the U.S.⁶¹ Domestic interest analyses of immigration law have often questioned a prospective migrant's contribution to "American society," while the credit approach—like the public charge analysis—expressly addresses the risk of a default on that potential. Credit resonates with an economically focused, actuarial analysis of immigration and minimizes humanitarian motivations or the intrinsic benefits of family unity. The NPRM values a prospective migrant's "self-sufficiency" over familial interdependency.

In contrast to the "domestic interest" approach, family-based visas (and the corresponding affidavits of support) would seem to ascribe creditworthiness based on an individual's relationships, rather than his or her own economic potential. By offering family-based visas for those with relatives already in

59. See *Dep't of Mental Hygiene of State of Cal. v. Renel*, 167 N.Y.S.2d 22, 23, 30 (N.Y. City Ct. 1957) (discussing uncle's employment of immigrant in New York and affidavit of support rendered by uncle and aunt), *aff'd*, 173 N.Y.S.2d 231 (N.Y. App. Term 1958) (per curiam), *aff'd*, 175 N.Y.S.2d 556 (N.Y. App. Div. 1958), *aff'd*, 159 N.E.2d 678 (N.Y. 1959).

60. See generally Hammond, *supra* note 38, at 530-38 (discussing confidentiality laws surrounding public benefits data).

61. See Kit Johnson, *Theories of Immigration Law*, 46 ARIZ. ST. L.J. 1211, 1224-28 (2014).

America, the American immigration system has traditionally credited those whose families have already been credited.⁶² But the NPRM would contract this credit by introducing higher financial hurdles for family-based migrants.⁶³

Credit also has a history of being extended on nonfinancial factors such as nationality, just as the Immigration and Nationality Act imposes country-based ceilings. Redlining—the denial “of credit to specific geographic areas due to the [demographics] of its residents”⁶⁴—historically operated against immigrants.⁶⁵ The language and analysis of redlining may help to identify ways that decisions to intentionally exclude particular groups of immigrants—like the NPRM would—can have long-term effects that create or exacerbate conditions that were the purported rationale for the original exclusion.⁶⁶

Finally, the credit analogy can help incorporate insight from other areas of legal scholarship into immigration law. For example, research on sureties and guaranties in commercial transactions can help inform the choice between the promise of reimbursement through an affidavit of support and the ex ante commitment of a surety bond—including the relative benefits of relying on sponsors versus commercial surety companies.

There are, of course, limitations to the credit analogy. Humanitarian immigration is less economic in its goals and therefore has rather unique rules.⁶⁷ Consider, for example, the exclusion of refugees and asylees from public

62. *But see* Chang, *supra* note 20, at 134-35 (suggesting both that family-sponsored immigrants may better adapt to the American labor market and that the privilege of sponsoring immigrants is a benefit that helps the U.S. compete for the most talented immigrants, including employer-sponsored immigrants, who may seek to sponsor relatives in the future); Anita Ortiz Maddali, *Left Behind: The Dying Principle of Family Reunification Under Immigration Law*, 50 U. MICH. J.L. REFORM 107, 110-11 (2016) (articulating how nontraditional families are excluded from the family reunification principle in American immigration law).

63. *See* JEANNE BATALOVA ET AL., MIGRATION POLICY INST., CHILLING EFFECTS: THE EXPECTED PUBLIC CHARGE RULE AND ITS IMPACT ON LEGAL IMMIGRANT FAMILIES’ PUBLIC BENEFITS USE 1 (2018), <https://perma.cc/C2JN-6NQC>.

64. *United Cos. Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192, 203 n.5 (D. Mass. 1998).

65. Jesus Hernandez, *Redlining Revisited: Mortgage Lending Patterns in Sacramento 1930-2004*, 33 INT’L J. URBAN & REGIONAL RES. 291, 298-99 (2009) (noting the combined effect of redlining and restrictive covenants to limit nonwhite residents, including Mexican and Asian residents, of Sacramento to a particular neighborhood for which limited mortgage credit was available).

66. *Compare* Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the “Criminal Street Gang Member,”* 2007 U. CHI. LEGAL F. 317, 349-51 & 351 n.167 (discussing how prior decisions to remove certain Central American youth with criminal convictions helped to foster criminal entrenchment in Central America, in turn spurring new individuals to migrate), *with* Daniel Aaronson et al., *The Effects of the 1930s HOLC “Redlining” Maps* 4 (Fed. Reserve Bank of Chi., Working Paper No. 2017-12, 2018) (noting lasting effects of Home Owners Loan Corporation redlining maps on racial segregation, homeownership rates, home values, and rents).

67. *See, e.g.,* Seyla Benhabib, *Transformations of Citizenship: The Case of Contemporary Europe*, 37 GOV’T & OPPOSITION 439, 452 n.29 (2002) (describing how Jewish people in premodern and

charge inadmissibility.⁶⁸ Moreover, a lopsided focus on domestic interest has been criticized for ignoring competing values in immigration law—such as its role to protect individual rights, reflect national values, and address global concerns.⁶⁹

Despite these limitations, the proposed public charge rulemaking illustrates not only the pull of the credit analogy on immigration, but also the contraction of credit within that framework. Federal officials are navigating new waters with respect to predicting, protecting, and crediting migrants, and subnational entities may respond in ways that reshape immigration federalism. As jurisdictions consider the degree of credit risk they are willing to accept, and separately, the degree they are willing to shoulder, we must resolve what credit migrants are ultimately due.

prerevolutionary Europe “were considered foreigners who were dependent upon the good will and beneficence of various sovereigns”); Elizabeth Keyes, *Unconventional Refugees*, 67 AM. U. L. REV. 89, 138 (2017) (“Humanitarian immigration sets out very specific categories: refugees and asylees; crime victims, with special provisions for human trafficking and domestic violence victims; and abused, abandoned, or neglected children.”). *But see* Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. 609, 611 (2017) (disagreeing with the purported “contrast between refugees (those deserving of protection) and economic migrants (those who should be returned to their countries of origin)”).

68. 8 U.S.C. § 1157(c)(3) (2017).

69. *See, e.g.*, Johnson, *supra* note 61, at 1249-50.