

NEW YORK UNIVERSITY SCHOOL OF LAW

SPRING 2015  
COLLOQUIUM ON TAX POLICY  
AND PUBLIC FINANCE

“Citizenship Taxation”

**Ruth Mason**

University of Virginia Law School

March 3, 2015  
NYU Law School  
Vanderbilt Hall-208  
Time: 4:00-5:50 p.m.  
Number 6

## **SCHEDULE FOR 2015 NYU TAX POLICY COLLOQUIUM**

(All sessions meet on Tuesdays from 4-5:50 pm in Vanderbilt 208, NYU Law School)

1. January 20 – Brigitte C. Madrian, Harvard Kennedy School. “Does Front-Loading Taxation Increase Savings? Evidence from Roth 401(k) Introductions.”
2. January 27 – David Kamin, NYU Law School. “In Good Times and Bad: Designing Legislation That Responds to Fiscal Uncertainty.”
3. February 3 – Kimberly Blanchard, Weil, Gotshal & Manges. “The Tax Significance of Legal Personality: A U.S. View.”
4. February 10 – Eric Toder, Urban Institute. “What the United States Can Learn From Other Countries’ Territorial Tax Systems.”
5. February 24 - Linda Sugin, Fordham University, School of Law. “Invisible Taxpayers.”
6. **March 3 – Ruth Mason, University of Virginia Law School. “Citizenship Taxation.”**
7. March 10 – George Yin, University of Virginia Law School. “Protecting Taxpayers from Congressional Lawbreaking.”
8. March 24 – Leigh Osofsky, University of Miami School of Law, “Tax Law Non-Enforcement.”
9. March 31 – Shu-Yi Oei, Tulane Law School. “Human Equity? Regulating the New Income Share Agreements.”
10. April 7 – Lillian Mills, University of Texas Business School. “Topics [to be determined] in Financial Reporting and Corporate Tax Compliance.”
11. April 14 – Lawrence Zelenak, Duke University School of Law. “Up in the Air over the Taxation of Frequent Flyer Benefits: the American, Canadian, and Australian Experiences.”
12. April 21 – David Albouy, University of Illinois Economics Department. “Should we be taxed out of our homes? Leisure and housing as complements and optimal taxation.”
13. April 28 – David Schizer, Columbia Law School. “Tax and Energy Policy.”
14. May 5 – Gregg Polsky, University of North Carolina School of Law, “Private Equity Tax Games and Their Implications for Tax Practitioners, Enforcers, and Reformers.”

# Citizenship Taxation

Ruth Mason<sup>1</sup>

*The United States is the only country that taxes its citizens' worldwide income, even when those citizens live indefinitely abroad. This Article critically evaluates the traditional equity, efficiency, and administrability arguments for taxing nonresident citizens. It also raises new arguments against citizenship taxation, including that it puts the United States at a disadvantage when competing with other countries for highly skilled migrants.*

Introduction.....	2
I. Citizenship Taxation and Nonresident Americans .....	8
A. International Tax Primer .....	8
B. U.S. Citizenship Taxation .....	9
C. What Little We Know About Nonresident Americans ....	12
D. Revenue from Citizenship Taxation .....	14
E. Terminology.....	15
II. Fairness .....	17
A. Citizenship Tax as a Charge for Government Benefits ...	17
B. Citizenship Tax as a Social Obligation .....	24
III. Administrability .....	35
A. Compliance Complexity .....	36
B. Prudential Concerns .....	40
IV. Efficiency .....	44
A. Distorting Americans' Choices.....	45
B. Distorting Non-Americans' Decisions.....	47
V. Policy Alternatives.....	50
A. Citizenship as One Factor .....	50
B. Anti-Abuse Rules.....	53
VI. Conclusion .....	55

---

<sup>1</sup> Hunton & Williams Professor of Law, University of Virginia School of Law. For their valuable comments, I would like to thank Kerry Abrams, Alice Abreu, Reuven Avi-Yonah, Cynthia Blum, Allison Christians, Michael Doran, Michelle L. Drumbl, Daniel Gutmann, Andrew Hayashi, Brant Hellwig, Marjorie Kornhauser, Shu-Yi Oei, Greg Polsky, Ekkehart Reimer, Bernard Schneider, Wolfgang Schön, Ayelet Shachar, Gladriel Shobe, Jarrod Shobe, and Ethan Yale, and workshop participants at the Max Planck Institute for Tax Law and Public Finance in Munich, the Mid-Atlantic Tax Conference, Tulane Law School, Université Paris 1 (Panthéon Sorbonne), and Washington & Lee School of Law. Jasmine Hay, Mohammad Pathan, and Declan Tansey provided valuable research assistance.

## INTRODUCTION

When news broke that one of Facebook’s founders, thirty-year-old Eduardo Saverin, renounced his U.S. citizenship and moved to Singapore for its low taxes, critics ranging from politicians to bloggers joined in denouncing his action. Senators Charles Schumer and Robert Casey even proposed legislation that would bar Saverin from visiting the United States.<sup>2</sup> Politicians and journalists have condemned other wealthy Americans who renounced their citizenship for tax reasons as “economic Benedict Arnolds,”<sup>3</sup> “sleazy bums,”<sup>4</sup> and “financial draft evaders.”<sup>5</sup>

Recent legislation requires wealthy people like Saverin to pay tax on the appreciation of their assets upon relinquishing their citizenship.<sup>6</sup> Effective in 2008, this citizenship-renunciation tax has received significant scholarly attention. Commentators have argued that it is unconstitutional, violates human rights, conflicts with the values of a liberal society,<sup>7</sup> and is motivated by “pleasure-dome images of life overseas,”<sup>8</sup> and “animus towards expatriates.”<sup>9</sup> The controversial Reed Amendment reflects this view; it forbids citizens who formally renounce their citizenship to avoid taxes from ever returning to the United States.<sup>10</sup>

Analysis of the citizenship-renunciation tax and its predecessors,<sup>11</sup> although valuable and important, side-steps a more fundamental question.<sup>12</sup> Current law motivates taxpayers to renounce their citizenship because the United States is the only country that taxes its citizens on their worldwide income, even when those citizens live abroad, and no matter how long they live abroad.<sup>13</sup> With a few important exceptions, the same tax regime applies

---

<sup>2</sup> See Kathleen Hunter, *Schumer Proposes Tax on People Like Facebook’s Saverin*, Bloomberg News May 17, 2012, 8:36 PM, <http://www.bloomberg.com/news/articles/2012-05-17/schumer-proposes-tax-on-people-like-facebook-s-severin> “Eduardo Saverin wants to de-friend the United States of America just to avoid paying taxes. We aren’t going to let him.” (quoting Sen. Charles Schumer).

<sup>3</sup> Alice G. Abreu, *Taxing Exits*, 39 U.C. DAVIS L. REV. 1087, 1122 (1996) (quoting Assistant Secretary for Tax Policy Les Samuels).

<sup>4</sup> Abreu, *supra* note 3, at 1122 (quoting Rep. Abercrombie speaking to Congress).

<sup>5</sup> Michael Kinsley, *Love It or Leave It*, TIME, Nov. 28, 1994.

<sup>6</sup> I.R.C. § 877A.

<sup>7</sup> See, e.g., Abreu, *supra* note 3; William L. Dentino & Christine Manolakas, *The Exit Tax: A Move in the Right Direction*, 3 WM. & MARY BUS. L. REV. 341 (2012).

<sup>8</sup> John D. Maiers, *The Foreign Earned Income Exclusion: Reinventing the Wheel*, 34 TAX LAW. 691, 691 (1980).

<sup>9</sup> William T. Worster, *The Constitutionality of the Taxation Consequences for Renouncing U.S. Citizenship*, 9 FLA. TAX REV. 921, 1006 (2010).

<sup>10</sup> INA § 212(a)(10)(E), 8 U.S.C. § 1182(a)(10)(E).

<sup>11</sup> Citizens renouncing their citizenship prior to the passage of the exit tax were taxed as if they were still U.S. citizens for ten years after renunciation. See I.R.C. § 877.

<sup>12</sup> See 142 Cong. Rec. S.3690 (daily ed. April 18, 1996), “the expatriation issue has been the subject of more controversy than it probably deserves” (statement of Sen. Daniel Moynihan).

<sup>13</sup> Eritrea is sometimes cited as another country with citizenship taxation, but Eritrean citizenship tax differs from that of the United States, including, for example, that Eritrea applies a flat two-percent tax on nonresident Eritreans, whereas the United States

to both resident Americans and nonresident Americans.<sup>14</sup> Because the United States taxes citizens, whereas other countries tax residents, Americans living abroad face worldwide taxation by two jurisdictions: the United States and their country of residence.

Billionaires fleeing taxes represent only a tiny fraction of Americans abroad, who, by some estimates, number well over seven million.<sup>15</sup> Unlike Saverin, most Americans abroad retain their citizenship and therefore remain subject to the citizenship tax. This Article focuses on the impact of citizenship taxation on this large group. Notably, the United States does not limit its extraterritorial tax to citizens abroad; the United States also taxes green-card holders who live abroad, even though it denies them many of the rights and privileges available to citizens.

In order to enforce worldwide taxation of nonresident citizens and green-card holders, the United States imposes onerous reporting requirements on those groups. In addition to filing annual tax returns, Americans living abroad must file reports on their foreign bank and other financial accounts, even when they owe no U.S. taxes. Failure to meet these reporting obligation carries heavy penalties. The National Taxpayer Advocate, whose office within the IRS represents the interests of taxpayers to Congress, described the civil penalties applicable to nonresident Americans who fail to file the proper paperwork as “scary,” “disproportionate,” and “excessive to the point of possibly violating the U.S. Constitution.”<sup>16</sup> Indeed, the National Taxpayer Advocate blames the recently strengthened penalty regime for foreign asset and account reporting for “skyrocketing” renunciations of citizenship.<sup>17</sup>

Scholarly analysis reveals considerable divergence of views on citizenship taxation, even among its defenders.<sup>18</sup> For example, Cynthia

---

taxes nonresident Americans at regular progressive rates. The Eritrean tax has been subject to condemnation by a United Nations Security Council resolution. *See* UN Res. 2023, arts. 10-11, U.N. Doc. S/RES/2023 (Dec. 5, 2011) (resolving that “Eritrea shall cease using extortions, threats of violence, fraud and other illicit means to collect taxes outside Eritrea from its national or others individuals of Eritrean descent”).

<sup>14</sup> The most important exception excludes from taxable income \$100,800 of income earned abroad by nonresident citizens. *See* I.R.C. § 911.

<sup>15</sup> For the challenges in counting Americans abroad, as well as a range of estimates of that population, see *infra* Part I.C.

<sup>16</sup> NAT’L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS 147 (2012).

<sup>17</sup> *See* NAT’L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS 206 (2013).

<sup>18</sup> Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289 (2011); Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443 (2007); Renée J. Sobel, *United States Taxation of Its Citizens Abroad: Incentive or Equity*, 38 VAND. L. REV. 101 (1985), Philip F. Postlewaite & Gregory E. Stern, *Innocents Abroad? The 1978 Foreign Earned Income Act and the Case for Its Repeal*, 65 VA. L. REV. 1093 (1979).

Nor does the citizenship tax lack detractors. *See, e.g.*, Bernard Schneider, *The End of Taxation Without End: A New Tax Regime for U.S. Expatriates*, 32 VA. TAX REV. 1 (2012) (proposing a “departure tax regime” that would apply to residence changes); Cynthia Blum & Paula N. Singer, *A Coherent Policy Proposal for U.S. Residence-Based*

Blum and Paula Singer argue that although the equity arguments for citizenship taxation have merit, it should be abandoned because it is inadministrable.<sup>19</sup> In contrast, Edward Zelinsky argues that although the tax is unfair, one of its principal virtues is how easy it is to administer.<sup>20</sup> Michael Kirsch, the best-known defender of the citizenship tax, argues that it is both fair and efficient.<sup>21</sup>

Defenders of citizenship taxation make two main fairness arguments for the tax. First, they argue that because nonresidents receive benefits from the United States, they should pay U.S. tax.<sup>22</sup> Although this argument carries some weight, it cannot justify taxing nonresident Americans similarly to resident Americans who receive far more benefits. The benefits theory is weakest when used to support worldwide taxation of nonresident green-card holders, who receive fewer benefits than resident or nonresident citizens.

Second, commentators argue that citizens' membership in the national community obliges them to contribute to taxes, and that failure to tax overseas Americans' total income, no matter where earned, would result in their systematic underpayment of taxes compared to resident Americans.<sup>23</sup> Under this view, citizenship taxation maintains equal treatment of resident and nonresident citizens. But tax scholars generally have avoided the questions of how nonresidence impacts national community membership and what impact, if any, a taxpayer's connections to more than one national community should have on her tax obligations.<sup>24</sup> This Article draws on immigration literature and political theory to explore the connection between nonresident citizenship and taxation.<sup>25</sup> It concludes

---

*Taxation of Individuals*, 41 VAND. J. TRANSNAT'L L. 705 (2008) (proposing replacing citizenship taxation with an extended tax-residence rule). This Article differs from prior scholarship by focusing on the policy arguments for and against citizenship taxation, rather than proposing a specific legislative alternative to the current regime.

<sup>19</sup> See Blum & Singer, *supra* note 18, at 711-19.

<sup>20</sup> See Zelinsky, *supra* note 18, at 1291.

<sup>21</sup> Kirsch, *supra* note 18, at 501.

<sup>22</sup> See e.g., *id.* at 479-88.

<sup>23</sup> See, e.g., *id. supra* note 18, at 479-88. Postlewaite & Stern, *supra* note 18, at 1115-22.

<sup>24</sup> See, e.g., *id.*, at 480-81 (arguing that nonresident Americans are part of the U.S. national community, but not defining this community). See also J. Clifton Fleming, Robert J. Peroni, & Stephen E. Shay, *Fairness in International Taxation: The Ability-to-Pay Case for Taxing Worldwide Income*, 5 FLA. TAX REV. 299, 309-10 (2001) (expressly reserving on this question). Tax scholars are not alone in neglecting to analyze differences between resident and nonresident citizenship. See, e.g., David Fitzgerald, *Rethinking Emigrant Citizenship*, 81 N.Y.U. L. REV. 90, 90 (2006). ("Immigrant citizenship has received far more attention than emigrant citizenship[.]").

<sup>25</sup> See, e.g., Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11 (2006); Anupam Chander, *Homeward Bound*, 81 N.Y.U. L. REV. 60 (2006); Rainer Bauböck, *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, 75 FORDHAM L. REV. 2393 (2007).

that, of the traditional arguments, the social obligation theory of taxation provides the best support for citizenship taxation. Nevertheless, this Article argues that even if we agree that the obligation to pay taxes arises from the taxpayer's membership in the national community, worldwide taxation on the basis solely of citizenship is unfair across a range of cases. Finally, because the current U.S. tax regime falls far short of taxing resident and nonresident Americans the same, appeals to the equal treatment principle cannot justify the current regime.

A second argument for citizenship taxation is that it is easy to administer. Edward Zelinsky stresses the superiority of a bright-line citizenship rule over a more facts-and-circumstances residence approach. But Zelinsky's argument for citizenship taxation takes too narrow a view of tax administration. He is right that using citizenship rather than residence simplifies the initial determination of *who* will be subject to worldwide taxation. But that's not the end of the story. Worldwide taxation of citizens who reside outside the territorial jurisdiction of the United States creates serious enforcement difficulties, and the complexity of the international tax rules that apply to nonresident citizens impose a crushing burden on compliant overseas taxpayers. Indeed, for each year since 2008 in her annual report to Congress, the National Taxpayer Advocate has ranked problems facing international taxpayers as among the "most serious" problems facing U.S. taxpayers.<sup>26</sup>

Citizenship taxation distorts Americans' citizenship decisions by inducing them to renounce their U.S. citizenship to avoid tax and tax compliance obligations. Recent imposition of harsh new penalties for failure to report foreign assets spurred a five hundred percent increase in citizenship renunciations over five years.<sup>27</sup> While acknowledging this citizenship distortion, advocates of citizenship taxation argue that the tax produces efficiency gains because it promotes neutrality in taxpayers' choice of where to reside. Under the citizenship tax, an American pays U.S. taxes no matter where she lives, so she will have no motivation to move abroad for lower taxes.<sup>28</sup> This Article argues that the many deviations<sup>29</sup>

---

<sup>26</sup> NAT'L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS 141- 57 (2008) [hereinafter NTA 2008 REPORT]; NAT'L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS 134-55 (2009) [hereinafter NTA 2009 REPORT]; NAT'L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS (2010) [hereinafter NTA 2010 REPORT]; NAT'L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS 151-66, 191-206 (2011) [hereinafter NTA 2011 REPORT]; NAT'L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS (2012) 134-53, 262-81 [hereinafter NTA 2012 REPORT]; NAT'L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS (2013) 205-49 [hereinafter NTA 2013 REPORT]. NAT'L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS (2014) 79-93 [hereinafter NTA 2014 REPORT].

<sup>27</sup> See NTA 2013 REPORT, *supra* note 26, at 206 (attributing increase to the new penalty regime).

<sup>28</sup> See, e.g., Kirsch, *supra* note 18, at 488-493.

<sup>29</sup> The citizenship tax has not changed much since Skip Patton criticized it for failing to relieve double taxation of Americans abroad. See Brainard L. Patton, Jr., *United*

from citizenship taxation found under current law significantly compromise the ability of citizenship taxation to achieve the residence-neutrality results that proponents claim for it.<sup>30</sup>

Moreover, even if citizenship taxation were residence-neutral for Americans, it distorts both residence and citizenship decisions for immigrants to the United States. By subjecting green-card holders and naturalized U.S. citizens to life-long worldwide taxation (or the citizenship-renunciation tax if they give up their citizenship or green card and return home), citizenship taxation may discourage both initial migration to the United States as well as the decision by migrants to become permanent legal residents or citizens. In other words, this Article suggests that citizenship taxation not only encourages Eduardo Saverins to renounce, it also may discourage Sergey Brins from naturalizing.<sup>31</sup> Members of Congress and prior commentators simply have not considered the potential impact of citizenship taxation on immigration *to* the United States.<sup>32</sup>

Since highly skilled workers and wealthy individuals who have the most choices about where to migrate are likely to be the groups most affected by these incentives, tax law may subvert immigration law goals of attracting wealthy and highly skilled immigrants. By focusing exclusively on outbound migrants, tax scholars have missed the impact of citizenship taxation on inbound migration. As human capital flows become more important,<sup>33</sup> the United States should not disadvantage itself in the global market for talented workers.<sup>34</sup> At a minimum, Congress should expressly

---

*States Individual Income Tax Policy as It Applies to Americans Resident Overseas*, 1975 DUKE L.J. 691.

<sup>30</sup> Far from promoting residence neutrality, Congress views the principal deviation from the citizenship tax, the foreign-earned-income exclusion, as an incentive for taxpayers to move their residence abroad. Sobel, *supra* note 18, at 119-146.

<sup>31</sup> See Devon Pendleton, *In Pictures: Immigrant Billionaires*, FORBES (July 9, 2009), [http://www.forbes.com/2009/07/08/billionaire-immigrants-soros-yang-catsimatidis-business-billionaires-wealth\\_slide.html](http://www.forbes.com/2009/07/08/billionaire-immigrants-soros-yang-catsimatidis-business-billionaires-wealth_slide.html) (noting dozens of immigrants on Forbes “400 Richest Americans” list). Interestingly, Eduardo Saverin, a native of Brazil, was himself a naturalized U.S. citizen; he resided in the United States from 1998 to 2009. Hunter, *supra* note 2.

<sup>32</sup> Some economic models even assume that foreigners cannot move, which precludes consideration of the impact of tax policy on inbound migration. See, e.g., Laurent Simula & Alain Trannoy, *Shall We Keep the Highly Skilled at Home? The Optimal Income Tax Perspective* (CESifo Working Paper No. 3326, 2011). A few commentators have considered the impact of exit taxation on immigration, though none has considered the impact of citizenship taxation on immigration. See Jeffrey M. Colón, *Changing U.S. Tax Jurisdiction: Expatriates, Immigrants, and the Need for a Coherent Tax Policy*, 34 SAN DIEGO L. REV. 559, 587 (1997) (observing that “[o]ver the last sixty years, Congress has neglected to address the tax issues that arise for persons or property entering [the United States]”).

<sup>33</sup> Mihir Desai et al., *Sharing the Spoils: Taxing International Human Capital Flows*, 11 INT’L TAX & PUB. FIN. 663, 663 (2004) (compared to financial capital flows, “cross-border flows of human capital are likely to play an equally influential role in shaping the political and economic landscape over the next 50 years”).

<sup>34</sup> Ayelet Shachar, *Picking Winners: Olympic Citizenship and the Global Race for*

consider the trade-offs between taxing emigrants and attracting immigrants.

This Article proceeds in five parts. Part I provides demographic information about Americans abroad, a description of the origins and mechanics of citizenship taxation, and available data about the revenue raised by the tax. The Part emphasizes the difference between the U.S. regime, which taxes citizens on their worldwide income no matter where they reside, and the residence-based tax regimes employed by other countries. Parts II through IV critically evaluate the traditional equity, administrability, and efficiency arguments favoring citizenship taxation. In Part IV, I develop the argument that citizenship taxation adversely impacts U.S. immigration goals. Part V describes various policy proposals to replace citizenship taxation with something fairer and more efficient. Part V argues that the United States should address abusive tax-avoidance cases, such as Saverin's, with narrowly tailored anti-abuse rules that avoid ensnaring seven million ordinary Americans abroad in a complicated web of tax compliance that likely generates little revenue while undermining other tax policy and immigration goals.<sup>35</sup>

Discussion of the virtues and vices of citizenship taxation is particularly relevant today. When first enacted during the Civil War to punish draft dodgers, the citizenship tax affected few taxpayers because few Americans lived abroad. But globalization has wrought dramatic changes. In just the last five years, the number of Americans abroad has increased by an estimated fifty percent.<sup>36</sup> Citizenship tax problems have grown with the affected population, and citizenship taxation seems ever more out-of-step with a world where countries increasingly recognize, and even encourage, dual and multiple citizenship. Moreover, foreign account and asset reporting requirements impose disproportionate burdens on nonresident citizens, including the risk of severe penalties, even in cases where nonresidents owe no U.S. tax.<sup>37</sup> The wide net cast by this legislation has provoked heated backlash and extensive media coverage. Political advocacy groups are pressuring Congress to fix the taxation of Americans abroad.<sup>38</sup> Finally, recent political proposals in a number of European

---

*Talent*, 120 YALE L.J. 2088, 2096 (2011) (“Securing full membership in the political community remains one of the few goods that even the mightiest economic conglomerate cannot offer to a skilled migrant or talented athlete; only governments can allocate the precious property of citizenship. And, increasingly, a growing number of countries are willing to use this power to attract the “best and the brightest.”); Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1148 (1997) (advocating tax subsidies for immigrants).

<sup>35</sup> Statistics on the revenue raised by the citizenship tax are not publicly available. See *infra* Part I.D.

<sup>36</sup> NTA 2013 REPORT, *supra* note 26, at 205.

<sup>37</sup> For a discussion of the impact of the so-called Foreign Account Tax Compliance Act (FATCA) on nonresident taxpayers, see *infra* Part III.A.2.

<sup>38</sup> Such advocacy resulted in a bill sponsored by Congresswoman Carolyn B. Maloney (D.-N.Y.) proposing a presidential commission to study how federal laws and policies affect Americans abroad. See Commission on Americans Living Abroad Act,

countries to adopt citizenship taxation suggest that lawmakers elsewhere could benefit from analysis of the costs and benefits of citizenship taxation.<sup>39</sup>

## I. CITIZENSHIP TAXATION AND NONRESIDENT AMERICANS

### A. *International Tax Primer*

National tax systems were originally designed at a time when a taxpayer's residence, citizenship, and income could be expected to coincide in the same state. As taxpayers and commerce increasingly crossed borders, states had to resolve competing tax claims on income connected to more than one state. International tax law presently recognizes two types of jurisdiction to tax—*worldwide* and *source*.<sup>40</sup> Worldwide jurisdiction derives from personal connections between the taxing state and the *owner of the income*, whereas source jurisdiction derives from economic or territorial connections between the taxing state and the *income*.<sup>41</sup>

Worldwide tax jurisdiction is said to be unlimited because a state with worldwide tax jurisdiction over a person can tax all of her income, no matter where in the world derived.<sup>42</sup> Although international law recognizes three independent predicates for worldwide taxation—nationality, domicile, and residence—no state other than United States assesses worldwide income taxation solely on the basis of nationality.<sup>43</sup> Instead, states apply worldwide taxation to residents or domiciliaries, terms typically defined by reference to physical presence in the jurisdiction. For example, a common rule determines or presumes residence if the taxpayer is physically present in the jurisdiction for more than half the days of the year.<sup>44</sup> States also determine residence by evaluating connecting factors such as whether the taxpayer has a dwelling in the jurisdiction, whether her family resides there, and whether she has social and economic connections

---

H.R. 597, 113th Cong. § 4(a)(2)(B) (2013). Members of Congress recently asked the Government Accountability Office (“GAO”) to study the effects on the economy of the current tax treatment of nonresident citizens. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-387, ECONOMIC BENEFITS OF INCOME EXCLUSION FOR U.S. CITIZENS WORKING ABROAD ARE UNCERTAIN (2014) [hereinafter GAO, ECONOMIC BENEFITS], available at <http://www.gao.gov/assets/670/663322.pdf> (finding that it could not estimate the effects).

<sup>39</sup> Daniel Gutmann, *La lutte contre “l’exil fiscal” : du droit comparé à la politique fiscale*, 21 REVUE DE DROIT FISCAL 306 (2012) (reviewing expanded notions of tax residence in several European countries).

<sup>40</sup> See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §411 (1987).

<sup>41</sup> See *General Report*, 67b CAHIERS DE DROIT FISCAL INTERNATIONAL 1 (1982) (breaking national practices into “economic relationship” and “personal relationship,” and subdividing personal relationship into political allegiance (citizenship), residence, and domicile).

<sup>42</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 411, cmt. c (1987).

<sup>43</sup> *Id.* § 411 reporters’ note 1.

<sup>44</sup> See generally HUGH J. AULT & BRIAN J. ARNOLD, *COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS* 429-434 (2010).

to the jurisdiction.<sup>45</sup> This Article adopts common practice of referring to as a “resident” any person who meets a state’s threshold for worldwide tax by reason of her domicile *or* residence. The term “resident” as used in this Article therefore excludes anyone who is subject to worldwide tax solely on the basis of her nationality.

If a taxpayer is not a national or resident of a state, then under international custom that state has only *limited* or *source* jurisdiction over the person’s income. Under internationally accepted principles, the state can tax the person’s income only if it arises in the state’s territory.<sup>46</sup>

When one state has source jurisdiction over an item of income, while another state has worldwide jurisdiction over the owner of the income, double taxation may result. For example, most states regard the source of personal services income to be the state where the services were performed. At the same time, the state where the worker resides may tax *all* of the worker’s income, no matter where earned. International tax norms oblige the residence state to relieve double taxation that results from such jurisdictional overlaps.<sup>47</sup> Relief of double taxation may involve *exemption*, under which the residence state refrains from taxing income already taxed at source, or instead the residence state may *credit* taxes assessed by the source state against the tax due to the residence state. The United States primarily uses foreign tax credits to relieve double taxation.

#### B. U.S. Citizenship Taxation

Like many countries, the United States taxes the worldwide income of residents, defined by the United States to include (among others) anyone present in the United States for more than half the days of the year.<sup>48</sup> But in

---

<sup>45</sup> *See id.*, at 431.

<sup>46</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 411, cmt. c (1987). (state has limited tax jurisdiction if the “source of the income, the situs of the property, or the place of the transaction is in the taxing state”).

<sup>47</sup> *See, e.g.*, AM. LAW INST., FEDERAL INCOME TAX PROJECT, INTERNATIONAL ASPECTS OF UNITED STATES INCOME TAXATION § 413 (1987).

<sup>48</sup> I.R.C. § 7701(1)(A)(ii) (183-day test). The United States also taxes aliens present for less than half the current year if they spent significant time in the United States in the previous two years. *See id.* § 7701(b)(1)(A)(ii) (defining tax resident to include aliens meeting a “substantial presence test,” regardless of their immigration status). A taxpayer meets the substantial presence test if she was: (1) present in the United States for at least 31 days of the current calendar year and (2) present in the United States for at least 183 days in the past three years, determined by counting all of the days she was present in the current calendar year, plus 1/3 of the days in the preceding year, plus 1/6 of the days in the year before that. *See id.* § 7701(b)(3). Thus, if a taxpayer were present in the United States for 100 days of each of the last three years, she would fail part (2) of the test because the United States would count her days of physical presence as follows  $(100 \times 1) + (100 \times 1/3) + (100 \times 1/6) = 100 + 33 + 16 = 149$  days.

A day of physical presence in the United States does not count for the substantial presence test if, on that day, the alien is an “exempt individual,” a category that includes certain students, teachers and trainees, and employees of foreign governments and international organizations. I.R.C. § 7701(b)(5). A taxpayer who was present for fewer than 183 days in the current year, but who satisfies the “substantial presence test” avoids

addition to those physically present, the United States also taxes its citizens and lawful permanent residents (green-card holders) on their worldwide income, no matter where in the world they reside.<sup>49</sup> In contrast, as explained above, other states impose worldwide taxation *only* upon residents.<sup>50</sup> Thus, when a citizen of any other state moves abroad, such that she no longer satisfies her nationality state's tax-residence rule, she will no longer be subject there to worldwide taxation. Her new state will begin taxing her worldwide income as soon as she meets its residence threshold.

The U.S. treatment of domestic income is not significantly different from that of other states. States tax domestic income to its owner, regardless of her nationality. Thus, after a Canadian moves abroad and no longer meets Canadian tax-residence requirements, Canada will continue taxing the Canadian on income *from Canada*. Canada would similarly tax any nonresident alien on Canadian-source income. The U.S. approach is the same. The real difference between residence and citizenship tax regimes lies not in their treatment of domestic income. Rather, the difference lies in the taxation of nonresident citizens' *foreign* income. Other countries exempt their nonresident citizens' foreign-source income; the United States taxes it. Moreover, the United States continues to tax its nonresident citizens' foreign-source income no matter how long they reside abroad. Thus, if a Canadian lives and earns all her income in France, France will tax her, and Canada will not. If an American lives and earns all her income in France, then France will tax her, and so will the United States.<sup>51</sup> The next Subpart explains how the United States minimizes the resulting double tax.

### 1. Minimizing Double Taxation

The United States reduces the risk of double taxation for citizens abroad through two sets of policies. First, the United States allows a credit against U.S. tax for foreign taxes citizens pay.<sup>52</sup> As other commentators

---

U.S. residence tax if she: (1) has a foreign "tax home" and (2) has a closer connection with the other country. *See id.* §§ 7701(b)(3)(B), (b)(1)(A)(ii).

<sup>49</sup> The United States taxes on a worldwide basis all citizens and any "resident alien," defined for tax purposes as an alien who: (1) is lawfully admitted for permanent residence at any time during the calendar year; (2) satisfies a substantial presence test; or (3) elects to be treated as a resident alien. *Id.* § 7701(b)(1)(A)(i)-(iii). An alien is a lawful permanent resident if, at any time during the calendar year, she held a green card. *Id.* § 7701(b)(6)(A). Once she holds a green card, an alien remains a U.S. tax resident, regardless of where she actually resides, until her green-card status is rescinded or abandoned. *Id.* § 7701(b)(6)(B); *see also id.* § 7701(b)(3)(A) (substantial presence test).

<sup>50</sup> Zelinsky, *supra* note 18, at 1323 (calling this practice "near universal").

<sup>51</sup> Citizens of other countries may find themselves temporarily in a similar situation, as some countries apply an expanded definition of residence, under which the country continues to tax a departing resident or citizen for a period of years after their departure. *See* Gutmann, *supra* note 39, at [text accompanying notes 7 to 10]. Only the United States taxes nonresident citizens no matter how long they reside abroad.

<sup>52</sup> I.R.C. §§ 901-908, 960. As an alternative to credits, taxpayers can elect to deduct foreign taxes, though credits are usually preferable. *Id.* § 164(a).

have explained, although the foreign tax credit regime reduces the risk of double taxation for Americans residing abroad, the credit does not fully eliminate double tax because it is subject to a variety of limitations.<sup>53</sup>

Second, the United States annually excludes from the income of certain Americans abroad a set dollar amount of earned income. Under this foreign-earned-income exclusion, qualified nonresident citizens who reside in another country can exclude just over \$100,000 of foreign-earned income from their U.S. tax liability.<sup>54</sup> This amount is annually adjusted for inflation.<sup>55</sup> Like the foreign tax credit, the foreign-earned-income exclusion helps to mitigate double tax, but because it, too, is limited, and for additional reasons ably explained by others, it is not sufficient to ensure complete elimination of double tax.<sup>56</sup>

## 2. Congressional Waffling

If U.S.-style citizenship taxation is so exceptional, one might wonder how it evolved. Others have written about the history of the U.S. citizenship tax,<sup>57</sup> but it is worthwhile to note that citizenship taxation arose as a response to Americans who fled the United States to avoid the Civil War draft and tax.<sup>58</sup> Because the Civil War income tax applied only to the wealthiest Americans, so did the first citizenship tax.<sup>59</sup> Despite the passage

---

<sup>53</sup> This discussion omits many important details, which prior commentators have ably covered. For excellent recent treatment, see Schneider, *supra* note 18, at 17-32. For the classic account, see Patton, *supra* note 29, at 715-27 (giving numerical examples of the “faults in the credit system”). In 2011, the most recent year for which data is available, U.S. individual taxpayers paid \$22 billion in foreign taxes and were able to credit nearly \$16.5 billion of that amount against their U.S. tax liability. That means that U.S. taxpayers were unable to credit about \$5.5 billion of their foreign taxes against their U.S. liability, or about 23% of the foreign income tax they paid. See Scott Hollenbeck & Maureen K. Karr, *Individual Foreign-Earned Income and Foreign Tax Credit, 2011*, in I.R.S. STATISTICS OF INCOME BULLETIN, Spring 2014, at 139 [hereinafter, IRS STATISTICS ON INCOME 2014 REPORT].

<sup>54</sup> A qualified individual under the exclusion is one who is a “bona fide resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year” or “who, during any period of 12 consecutive months, is present in a foreign country or countries during at least 330 full days in such period.” I.R.C. § 911(d)(1). Earned income is “wages, salaries, or professional fees, and other amounts received as compensation for personal services actually rendered.” *Id.* § 911(d)(2)(a).

<sup>55</sup> *Id.* § 911(b)(2)(D)(ii). The amount is \$100,800 for 2015. See Rev. Proc. 2014-61, 2014-47 I.R.B. 860. Nonresident citizens also may exclude qualifying housing costs. I.R.C. § 911(a)(2) (allowing a deduction for certain overseas housing expenses that exceed a dollar threshold and also allowing an exclusion for employer-provided housing benefits that exceed the same threshold).

<sup>56</sup> See Schneider, *supra* note 18, at 17-32; Patton, *supra* note 29, at 706-13 (analyzing examples in which the foreign-earned-income exclusion offers little or no relief).

<sup>57</sup> See Kirsch, *supra* note 18, at 449-463 and references therein.

<sup>58</sup> See *id.*, at 450-51; *id.*, at 452 (noting that the tax “collected only a small amount”).

<sup>59</sup> Reuven S. Avi-Yonah, *The Case Against Taxing Citizens*, 58 TAX NOTES INT’L 389, 389 (2010).

of the war exigency, Congress continued the practice of taxing citizens abroad when it adopted the modern income tax in 1913.

Although citizenship has served as a jurisdictional basis for U.S. worldwide taxation since the inception of the federal income tax, this consistency obscures deep ambivalence about the policy of taxing nonresident citizens' foreign-source, and various legislative enactments that have wholly or partially excluded nonresidents' foreign earned-income reflect that ambivalence.<sup>60</sup> For example, when resident Americans began to view Americans abroad as ambassadors of American enterprise, Congress adopted the foreign-earned-income exclusion.<sup>61</sup> Since then, Congress has repeatedly changed the tax treatment of nonresident citizens' foreign earned-income. At one time, Congress limited the foreign-earned-income exclusion to Americans working abroad who were thought to be particularly important to the U.S. balance of trade, at another time, it substituted the exclusion for a variety of special deductions aimed at Americans abroad, including deductions to compensate for cost-of-living differentials, deductions for dependents' educational expenses, and so on.<sup>62</sup> The Senate voted on whether to completely repeal the foreign-earned-income exclusion as recently as 2003, while in 2006 a bill was introduced to provide an unlimited foreign-earned-income exclusion.<sup>63</sup> These frequent changes to and reconsiderations of the tax treatment of nonresident citizens reflect fundamental uncertainty about the best approach to taxing nonresident Americans' foreign-source income.<sup>64</sup>

### C. *What Little We Know About Nonresident Americans*

To get a sense of the population subject to citizenship taxation, and to avoid the problem of conflating the situations of millionaire and billionaire “tax Benedict Arnolds” with ordinary Americans working and living abroad, it would be helpful to have a clear picture of the demographics and incomes of nonresident Americans. But the United States government does not (and, by its own admission, cannot<sup>65</sup>) keep track of nonresident Americans. So, not only is it impossible to obtain a detailed description of this group and its income, it is not even possible to get an accurate account of the number of U.S. citizens residing abroad.<sup>66</sup>

---

<sup>60</sup> See, e.g., Patton, *supra* note 29, at 701-04 (giving history from 1923 to 1975); Kirsch, *supra* note 18, at 459-463 (covering the 1970s until the early 2000s).

<sup>61</sup> Kirsch, *supra* note 18, at 457-59.

<sup>62</sup> See, e.g., Postlewaite & Stern, *supra* note 18, at 1102-08 (describing the 1976 Tax Reform Act).

<sup>63</sup> Kirsch, *supra* note 18, at 463.

<sup>64</sup> See generally Sobel, *supra* note 18.

<sup>65</sup> See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-1077T, COUNTING AMERICANS OVERSEAS AS PART OF THE CENSUS WOULD NOT BE FEASIBLE (2004) [hereinafter GAO, COUNTING AMERICANS], available at <http://www.gao.gov/assets/120/111231.pdf>.

<sup>66</sup> See generally *id.*

Different offices in the government provide different estimates.<sup>67</sup> The National Taxpayer Advocate put the figure in 2013 at 7.6 million,<sup>68</sup> while the most recent State Department estimate, also from January 2013 was 6.8 million.<sup>69</sup> The federal office dedicated to assisting nonresident Americans with voting puts the population at 4.5 million to 6.5 million,<sup>70</sup> of which over 1 million are U.S. military personnel.

Despite gaps, available data tend to rebut the stereotype of tax-dodging Americans moving abroad to island tax havens. Reasons for Americans' migration vary. According to a recent survey of Americans in Europe, the most common reasons for living abroad were marriage or partnership, study or research, and employment.<sup>71</sup> Although Americans live in at least 100 countries<sup>72</sup>—most Americans abroad reside in wealthy, high-tax countries.<sup>73</sup> Indeed, most Americans abroad work in countries with higher overall tax burdens than our own.<sup>74</sup> That Americans abroad reside in high-tax countries means that basing our image of overseas Americans on renouncers like Eduardo Saverin represents a serious distortion. The IRS periodically reports statistics on a portion of nonresident Americans, namely those who apply for the foreign-earned-income exclusion. In 2011, this group had an average total foreign-earned income of \$120,738, but due to the exclusion and foreign taxes they paid, over 60% had no U.S. income tax liability.<sup>75</sup> For such taxpayers, annual tax and asset reporting represents

---

<sup>67</sup> For a critical review of available evidence, see Schneider, *supra* note 18, at 8-17.

<sup>68</sup> NTA 2013 REPORT, *supra* note 26, at 205.

<sup>69</sup> Joe Costanzo & Amanda von Koppenfels, *Counting the Uncountable: Overseas Americans*, MIGRATION POLICY INST. (May 17, 2013), <http://www.migrationpolicy.org/article/counting-uncountable-overseas-americans>.

<sup>70</sup> *Id.*

<sup>71</sup> AMANDA KLEKOWSKI VON KOPPENFELS, *MIGRANTS OR EXPATRIATES? AMERICANS IN EUROPE* (2014).

<sup>72</sup> Costanzo & von Koppenfels, *supra* note 69.

<sup>73</sup> According to United Nations data, the top ten residence countries in 2013 for Americans abroad were, in order, Mexico, Canada, United Kingdom, Germany, Australia, Israel, South Korea, Japan, Italy, and France). See *International Migrant Population by Country of Origin and Destination*, MIGRATION POLICY INST., <http://migrationpolicy.org/programs/data-hub/maps-immigrants-and-emigrants-around-world> (last visited Feb. 16, 2015) [hereinafter UN MIGRATION DATA]. Seventy-three percent of Americans abroad live in other OECD countries. See *id.*

<sup>74</sup> The top ten countries hosting Americans are all members of the OECD. According to OECD statistics, of these countries, only Mexico has a lower total tax burden as a percent of GDP than does the United States. ORG. FOR ECON. CO-OPERATION & DEV. (OECD), *Total Tax Revenue*, in OECD FACTBOOK 2013: ECONOMIC, ENVIRONMENTAL AND SOCIAL STATISTICS (2013), available at [http://www.oecd-ilibrary.org/economics/oecd-factbook-2013/total-tax-revenue-graph\\_factbook-2013-graph236-en](http://www.oecd-ilibrary.org/economics/oecd-factbook-2013/total-tax-revenue-graph_factbook-2013-graph236-en) (total Mexican burden in 2010 was 18.1 percent of GDP, compared to total U.S. burden of 24.8 percent of GDP).

<sup>75</sup> IRS STATISTICS ON INCOME 2014 REPORT, *supra* note 53, at 139, 141. This number represents an increase from the last reported year, 2006, in which 57.4% of nonresidents with foreign-earned income had no residual U.S. liability. *Id.* at 145.

a serious burden, although it results for the United States in no revenue. Part III explains why tax filing is more complicated for nonresident Americans than for resident Americans.

#### *D. Revenue from Citizenship Taxation*

Because we don't know how many overseas Americans there are, where they live, or how much income they have, it is impossible to get an accurate picture of how much tax overseas Americans owe.<sup>76</sup> Setting aside the open question of how much tax Americans abroad owe, we come to the question of how much they actually pay. Available statistics do not estimate or separately state the amount of revenue raised from nonresident citizens.<sup>77</sup> We gain some insight into this figure, however, from tax returns claiming the foreign-earned-income exclusion. Because taxpayers claiming the exclusion must be residents of a foreign state,<sup>78</sup> we can safely conclude those claiming the exclusion do not reside in the United States.<sup>79</sup> In 2011, the most recent year for which the IRS released statistics on the exclusion, nonresident Americans claiming the foreign-earned-income exclusion earned \$54.2 billion abroad, of which more than \$28.3 billion was not taxable due to the exclusion.<sup>80</sup> After application of the exclusion and foreign tax credits, this group's remaining U.S. income tax liability in 2011 was just over \$5 billion.<sup>81</sup> Although this number sheds some light, it underestimates the tax contributions of nonresident Americans because it excludes U.S. tax paid by nonresident Americans who do not claim the foreign-earned-income exclusion.<sup>82</sup> We do know, however, that reported

---

<sup>76</sup> See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-98-106, NONFILING AMONG CITIZENS ABROAD (1998) [hereinafter GAO, NONFILING] available at <http://www.gao.gov/assets/230/225849.pdf> (discussing unreliability of data on number of nonresident Americans, their incomes, and their tax compliance). *Id.*, at 21 (concluding that "some evidence suggests that nonfiling may be relatively prevalent in some segments of the U.S. population abroad, but that "the extent and impact of nonfiling abroad remain largely unknown").

<sup>77</sup> The IRS compiles statistics on returns claiming foreign tax credits, but many such returns are filed by resident Americans, and the IRS does not separately report foreign income of nonresidents. See generally IRS STATISTICS ON INCOME REPORT 2014, *supra* note 53.

<sup>78</sup> I.R.C. § 911(d) (qualifying individuals must be bona fide residents of another country for the year, or they must spend 330 days in a consecutive 12 month period abroad).

<sup>79</sup> See *id.* § 911(d)(1)(B). See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FY 2014 ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT 243, tbl. 16-1, (2014) (estimating the exclusion to cost \$33.7 billion from 2014 to 2018).

<sup>80</sup> See IRS STATISTICS ON INCOME 2014 REPORT, *supra* note 53, at 153.

<sup>81</sup> *Id.*, at 153.

<sup>82</sup> For example, even taxpayers who are entitled to this tax benefit may not bother claiming it if foreign tax credits will wipe out their residual U.S. tax liability. Nonresident Americans with only unearned income abroad pay U.S. taxes, but they are ineligible for the exemption and therefore are not included in the periodic IRS statistical report. Also ineligible are nonresidents with foreign earned-income who do not meet the statutory requirements to take the exclusion. See I.R.C. § 911. In 2011, IRS received just under

foreign-earned income increased over 30% in real terms between 2006 and 2001.<sup>83</sup> The National Taxpayer Advocate reported that over 80 percent of nonresident Americans had no U.S. tax liability in 2011.<sup>84</sup>

Even if we had good estimates of the revenue raised by the citizenship taxation, we would need more information to understand the revenue impact of reforming it. If the United States were to reduce or abolish citizenship taxation, we would expect the government to lose the revenue it currently collects on nonresident Americans' *foreign-source* income. But even after reform, nonresident Americans, like all nonresidents, presumably would continue to pay tax to the United States on any U.S.-source income they may have. The \$5 billion figure cited above includes tax on both foreign- and U.S.-source income.<sup>85</sup> Additionally, we would have to consider behavioral responses to the change in the tax rule. For example, the current citizenship tax presumably discourages some Americans from migrating overseas to avoid tax. But if Congress abolished the citizenship tax, some revenue the government now collects would be lost to tax-motivated migration. On the other hand, if overseas Americans could, like nonresident aliens, comply with their U.S. tax obligations by filing simpler nonresident returns, or by paying tax on their U.S.-source income primarily through final withholding taxes, more overseas Americans might comply, resulting more revenue.<sup>86</sup> Likewise, we would have to consider other impacts from a change in tax policy. For example, if claims are accurate that foreign corporations avoid employing Americans abroad because the citizenship tax makes American workers more expensive,<sup>87</sup> then reducing the extra expense could increase the use of Americans abroad, which would draw more employment income outside the U.S. tax base.

#### E. Terminology

To avoid confusion, I set forth the following terms to refer to particular categories of taxpayers.

*Nonresident Americans*, *Americans abroad*, and *nonresident citizens*. These terms refer to those who reside abroad while retaining their

---

450,000 returns claiming the foreign-earned income exclusion. IRS STATISTICS ON INCOME 2014 REPORT, *supra* note 53, at 141. Taxpayers claiming foreign tax credits reported nearly \$170 billion in foreign income (defined as income not exempt under the foreign-earned income exclusion), but IRS statistics do not report how much of this foreign income was earned by resident (versus nonresident) taxpayers. *Id.*, at 143, 163.

<sup>83</sup> IRS STATISTICS ON INCOME 2014 REPORT, *supra* note 53, at 139.

<sup>84</sup> NTA 2012 REPORT, *supra* note 26, at 262. IRS reported in 2014 that over 60% of foreign-earned income claimants had no U.S. tax liability for the same year. IRS STATISTICS ON INCOME 2014 REPORT, *supra* note 53, at 152.

<sup>85</sup> IRS STATISTICS ON INCOME REPORT 2014, *supra* note 53, at 152.

<sup>86</sup> Failure to collect U.S.-source tax via withholding from nonresident Americans could result in revenue losses if the nonresident citizen subsequently fails to comply with her obligation to declare the income to the United States on her regular U.S. return.

<sup>87</sup> For discussion, see *infra* Part III.A.

U.S. citizenship or green-card (lawful permanent resident) status.<sup>88</sup> This terminology is not meant to suggest that green-card holders are already U.S. citizens for purposes of immigration law; they are not. This Article combines U.S. citizens and green-card holders because the United States taxes both on their worldwide income, no matter where they reside.

*Accidental or happenstance Americans.* An important subset of nonresident Americans are the so-called accidental<sup>89</sup> or happenstance<sup>90</sup> Americans. Accidental or happenstance Americans are citizens of the United States by virtue of being born in the United States, particularly to noncitizen parents who were visiting the United States temporarily as workers or students. It also includes people who are U.S. citizens by virtue of being born abroad to a U.S.-citizen parent. The defining feature of these Americans is that they have few or no connections with the United States other than their U.S. citizenship. For example, they may never have resided in the United States, and they may not even be aware of their citizenship status. While the notion that a person could be a citizen of a country and not know it might stretch credulity, Senator Ted Cruz recently demonstrated that even political leaders well versed in the law may find that they are “accidental” citizens.<sup>91</sup> Because Senator Cruz received U.S. citizenship at birth through his U.S.-citizen mother, and Canadian citizenship by virtue of being born in Canada, he is a dual U.S.-Canadian citizen. The possibility that a person could be a U.S. citizen and not know it creates traps for the unwary, since U.S. law subjects nonresident Americans to tax and financial reporting requirements that carry severe penalties.<sup>92</sup>

*Resident Aliens or Tax-Resident Aliens.* These are noncitizens who do not hold green cards but who are subject to U.S. worldwide taxation by virtue of their physical presence in the United States. The term “tax-resident alien” is not coextensive with any particular immigration law status. Aliens without green cards are tax residents, and consequently taxable by the United States on their worldwide income, if they spend more

---

<sup>88</sup> Bernard Schneider subdivides this group into short-and long-term nonresidents. Schneider, *supra* note 18, at 6-8. Such subdivision could be important for implementing residence taxation. For example, many countries continue to tax short-term nonresidents as residents. *See generally infra* Part V.

<sup>89</sup> *See, e.g.,* Charles M. Bruce, *The Exit Tax—A Perfectly Bad Idea*, 41 TAX NOTES INT’L 867, 868 n.5 (2006).

<sup>90</sup> PETER J. SPIRO, BEYOND CITIZENSHIP AMERICAN IDENTITY AFTER GLOBALIZATION 20-22 (2008).

<sup>91</sup> When journalists pointed out to Senator Cruz that he might be a dual U.S.-Canadian citizen, he responded, “Because I was a U.S. citizen at birth, because I left Calgary when I was 4 and have lived my entire life since then in the U.S., and because I have never taken affirmative steps to claim Canadian citizenship, I assumed that was the end of the matter . . .” *Ted Cruz, Tea Party Favourite, to Renounce Canadian Citizenship*, CBC News (Aug. 20, 2013, 3:54 AM) (internal quotation marks omitted), <http://www.cbc.ca/news/world/ted-cruz-tea-party-favourite-to-renounce-canadian-citizenship-1.1408842?cmp=fbtl>.

<sup>92</sup> *See infra* Part III.A.2.

than half the year in the United States.<sup>93</sup>

*Renouncers.* This refers to U.S. citizens who relinquished their U.S. citizenship or permanent resident status (green card). Under current law, members of this group are not subject to taxation by the United States on their worldwide income unless they reside in the United States, although they may be subject to citizenship-renunciation tax on their assets.

## II. FAIRNESS

The fairness case for citizenship taxation has two elements. First, proponents of the tax argue that it represents fair payment for government benefits that Americans receive while abroad. Second, they argue that Americans should not be able to escape their social obligation to pay taxes simply because they live abroad. This Part critically examines these arguments and concludes that while the first lacks merit, the second represents the most persuasive justification for citizenship taxation. Nevertheless, I argue that our citizenship tax is unfair as applied to a range of cases, even when evaluated under the second conception of equity.

### A. *Citizenship Tax as a Charge for Government Benefits*

Some argue that citizenship tax is fair because people who receive government benefits have an obligation to contribute taxes.<sup>94</sup> The Supreme Court endorsed this view in holding that Congress did not exceed its constitutional power by taxing nonresident citizens' income from foreign assets.<sup>95</sup> The Court observed that “government by its very nature benefits the citizen and his property wherever found.”<sup>96</sup>

Nonresident citizens (but not nonresident green-card holders) retain the rights to vote in federal elections, travel on a U.S. passport, pass on U.S. citizenship to children born abroad, and gain access to the United States for certain noncitizen family members. Both citizens and green-card holders can re-enter the United States at will, work in the United States, and they may receive personal and property protection from the United States while abroad.<sup>97</sup> For example, nonresident Americans can apply for

---

<sup>93</sup> I.R.C. § 7701(b)(3) (defining “substantial presence”). Under certain circumstances, aliens also can be tax residents by spending fewer than 183 days in the United States. *See id.*

<sup>94</sup> *See, e.g.,* Kirsch, *supra* note 18, at 474-76; Robert J. Peroni, *Back to the Future: A Path to Progressive Reform of the U.S. International Income Tax Rules*, 51 U. MIAMI L. REV. 975, 1009 (1997). *But see* Zelinsky, *supra* note 18, at 1349 (questioning the “received wisdom” that “the benefits of U.S. citizenship justify worldwide taxation”).

<sup>95</sup> *Cook v. Tait*, 265 U.S. 47, 56 (1924). For a modern case taking the benefits approach, see *United States v. Rexach*, 558 F.2d 37 (1<sup>st</sup> Cir. 1977).

<sup>96</sup> *Cook*, 265 U.S. at 56.

<sup>97</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-989, WIDE RANGE OF EMERGENCY SERVICES PROVIDED TO AMERICAN CITIZENS OVERSEAS, BUT IMPROVED MONITORING IS NEEDED (2009), *available at* <http://www.gao.gov/assets/300/295802.pdf> (listing available benefits, including assistance in case of arrest).

diplomatic and consular services, and they can request evacuation in emergencies.<sup>98</sup>

As part of his robust defense of citizenship taxation, Michael Kirsch emphasizes that one of the most important benefits retained by nonresident citizens is their right to vote in federal elections.<sup>99</sup> The Revolutionary rallying cry “no taxation without representation” reflects the link Americans draw between voting and taxation. Likewise, payment of taxes by undocumented aliens has been described a crucial prerequisite to gaining citizenship (and thereby, voting rights) through immigration amnesties.<sup>100</sup> But pointing to a link between voting and taxes is not enough to establish that anyone entitled to vote should pay tax, even if they do not reside in the jurisdiction.<sup>101</sup> The question under the benefits theory of taxation is whether we would rally behind the motto “no representation without taxation.”

Although defenders of citizenship taxation have not advanced it, one argument for linking the entitlement to vote to the obligation to pay taxes might be that it would ensure that voters bear the economic consequences of their political participation. If nonresidents can vote without paying taxes, it worsens the usual moral hazard associated with absentee voting, namely that the absentee participates in making rules to which she is not herself subject. The ability of the absentee also to avoid funding the costs of public policies she supports exacerbates this problem.

While this argument carries some weight, there are also policy reasons for allowing nonresident citizens to vote at home, irrespective of

---

<sup>98</sup> See, e.g., Kirsch, *supra* note 18, at 470-77. A few commentators also list such diffuse benefits as foreign affairs, international development assistance and national defense among the benefits received by Americans abroad. See, e.g., Peroni, *supra* note 94 at 1009. But most recognize that such benefits are non-rivalrous, and indeed, aliens abroad may also receive them. Thus, unless it adopts the Monty Python plan to “tax all foreigners living abroad,” it seems that the United States cannot fairly distribute the costs among the beneficiaries of such policies. For more on the problem of accurately distributing costs under the benefits theory, see *infra* Part II.A.

<sup>99</sup> Kirsch, *supra* note 18, at 470-77. Americans abroad vote in their last state of domicile. 42 U.S.C. § 1973ff-6(5).

<sup>100</sup> George W. Bush, Pres. Messages, 109th Cong., 2d Sess., 2006 U.S.C.C.A.N. D60, at 3-4 (“I believe that illegal aliens who have roots in our country and want to stay should have to . . . pay their taxes . . . .”) {RM: I cannot find the original source but BB T1 (pp. 223-24) seems to be the appropriate formatting rule.}. In describing the proposed DREAM Act, President Obama stated: “We all agree that these men and women should have to earn their way to citizenship. . . . We’ve got to lay out a path — a process that includes . . . paying taxes . . . . That’s only fair.” Office of the Press Sec’y, Exec. Office of the President, Remarks by the President on Comprehensive Immigration Reform (Jan. 29, 2013), <http://www.whitehouse.gov/the-press-office/2013/01/29/remarks-president-comprehensive-immigration-reform>.

<sup>101</sup> We do not literally follow the “no taxation without representation” motto, as millions of resident aliens bear the consequences of federal elections, and must pay tax on their worldwide income, but they do not have the right to vote in federal elections. See generally Nancy Staudt, *Taxation Without Representation*, 55 TAX L. REV. 555 (2002) (criticizing tying political benefits to the payment of federal taxes).

whether they pay any tax there, let alone whether they pay tax on their foreign-source income.<sup>102</sup> For example, nonresident citizens may have property and family remaining in the United States, and many intend to return home at some point. These vested domestic interests of nonresidents may help satisfy prudential concerns about extending the vote to citizens who may not be real stakeholders in our society.<sup>103</sup> Second, as citizenship theorists have noted, Americans abroad often will not be entitled to vote in their residence state, since most states reserve voting for nationals.<sup>104</sup> As a result, if Americans abroad cannot vote in the United States, they may be disenfranchised.

Most other countries allow nonresident citizens to vote, even though they do not tax nonresident citizens on their worldwide income.<sup>105</sup> This trend is increasing.<sup>106</sup> Nor can voting help to justify worldwide taxation of nonresident green-card holders, since they cannot vote in federal elections, even when they reside in the United States.<sup>107</sup> Finally, voting could not have served as part of the original justification for worldwide taxation of nonresident citizens, since nonresident citizens were not guaranteed the right to absentee voter registration until 1975,<sup>108</sup> and it wasn't until the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA) that nonresident citizens became entitled to vote by uniform absentee ballot.<sup>109</sup>

Moreover, representation in Congress of nonresident citizens differs from that of resident citizens. For example, Americans abroad are not

---

<sup>102</sup> See generally Bauböck, *supra* note 25 (discussing external voting).

<sup>103</sup> In passing the Overseas Citizens Voting Rights Act of 1975, Congress reasoned that

American citizens outside the United States do have their own Federal stake--their own U.S. legislative and administrative interests--which may be protected only through representation in Congress and in the executive branch. The fact that these interests may not completely overlap with those of citizens residing within the State does not make them any less deserving of constitutional protection.

H.R. REP. NO. 94-649, at 6-7 (1975); S. REP. NO. 94-121, at 6-7 (1975).

<sup>104</sup> Ruth Rubio-Marín, *Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants*, 81 N.Y.U. L. REV. 117, 130 (2006).

<sup>105</sup> Costanzo & von Koppenfels, *supra* note 69 (“115 nations and territories allowed their overseas citizens to vote in national elections in 2007, and since then many more have signed on”). Bauböck, *supra* note 25, at 2423-24 (noting that countries may restrict external voting, for example, to a limited number of years after expatriation).

<sup>106</sup> Peter J. Spiro, *Perfecting Political Diaspora*, 81 N.Y.U. L. REV. 207, 211 (2006).

<sup>107</sup> INA § 316, 8 U.S.C. § 1427.

<sup>108</sup> Overseas Citizens Voting Rights Act of 1975, Pub. L. No. 94-203, 89 Stat. 1142 (repealed 1986) (guaranteed absentee registration and voting rights for overseas citizens regardless of whether they maintained a U.S. residence or address and regardless of intent to return).

<sup>109</sup> 42 U.S.C. §§ 1973ff to 1973ff-6.

counted in the census,<sup>110</sup> and the Government Accountability Office (GAO) concluded that attempting to count them would not be cost effective.<sup>111</sup> As a result, nonresident citizens do not affect apportionment or redistricting. The limited political representation of nonresident Americans contrasts with the practice in some other countries, where nonresident citizens have their own parliamentary representatives.<sup>112</sup> No seat in Congress is dedicated to nonresident Americans. Finally, voting from abroad presents a number of challenges that make it both more difficult for nonresidents to vote and less likely for their votes to be counted.<sup>113</sup> Thus, the link between voting and paying taxes is by no means straightforward.

In addition to voting, proponents of citizenship taxation review many other benefits retained by nonresident citizens. Take, for example, diplomatic, consular, and emergency assistance. Kirsch cites the example of the U.S. evacuation of its citizens from Lebanon in 2006 as helping to justify worldwide taxation of citizens.<sup>114</sup> A serious problem with pointing to the possibility (not entitlement)<sup>115</sup> of emergency evacuation as helping to justify worldwide taxation under the benefits theory is that the U.S. government seeks reimbursement from citizens for evacuation.<sup>116</sup> Logically, government services financed through fees cannot form the basis

---

<sup>110</sup> GAO, COUNTING AMERICANS, *supra* note 65, at 2 (nonresidents do not count for congressional apportionment purposes, except for “federally affiliated persons,” such as members of the military stationed abroad and their families).

<sup>111</sup> *See generally id.*

<sup>112</sup> Bauböck, *supra* note 25, at 2432 (“Currently, only seven countries have separate representation for expatriates: Cape Verde, Colombia, Croatia, France, Italy, Mozambique, and Portugal.”); *see also* Chander, *supra* note 25, at 71 (noting that the Mexican state Zacatecas provides dedicated congressional seats elected by nonresidents and that can be filled by part-time residents); *id.* (noting that Mexico established a government advisory council elected by nonresident Mexicans); Barry, *supra* note 25, at 14-16 (detailing successful election bids for state and local offices in Mexico by Mexicans living in the United States).

<sup>113</sup> *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/GGD-98-106, ELECTIONS: ACTION PLANS NEEDED TO FULLY ADDRESS CHALLENGES IN ELECTRONIC ABSENTEE VOTING INITIATIVES FOR MILITARY AND OVERSEAS CITIZENS 1 (2007) [hereinafter GAO, ELECTRONIC ABSENTEE VOTING], *available at* <http://www.gao.gov/assets/270/262023.pdf> (“because the multistep process of absentee voting relies primarily on mail, in some instances it can take so long to complete that these voters may, in effect, be disenfranchised ”); KEVIN J. COLEMAN, CONG. RESEARCH SERV., RS20764, THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT: OVERVIEW AND ISSUES 16-17 (2012), *available at* [http://assets.opencrs.com/rpts/RS20764\\_20121004.pdf](http://assets.opencrs.com/rpts/RS20764_20121004.pdf) (finding that states could not count overseas ballots because they received them too late and that nonresidents may never receive a ballot or receive it too late).

<sup>114</sup> Kirsch, *supra* note 18, at 472.

<sup>115</sup> The State Department’s website says, “Expectations of rescue by helicopters, the U.S. military, and U.S. government-provided transportation with armed escorts reflect a Hollywood script more than reality.” *See FAQ: What the Department of State Can and Can’t Do in a Crisis*, U.S. DEP’T OF STATE, <http://travel.state.gov/content/passports/english/emergencies/crisis-support.html> (last visited Feb. 16, 2015).

<sup>116</sup> *See id.* (“evacuation costs are ultimately your responsibility; you will be asked to sign a form promising to repay the U.S. government.”).

for their benefits tax. Similarly, the United States charges fees for other overseas services, such as passport renewal and departure assistance services, and nonresident green-card holders must purchase a reentry permit if they will reside abroad for periods over a year.<sup>117</sup>

Other countries that provide similar benefits to their nonresident citizens apparently conclude that such benefits do not warrant worldwide taxation of nonresidents. For example, it should not surprise us that other countries—countries without citizenship taxation—also evacuated their people from Lebanon.<sup>118</sup> Similarly, other countries also provide diplomatic and material aid to their citizens abroad.<sup>119</sup> Self-interest and the need to signaling strength motivate countries to protect their citizens abroad. Moreover, resident citizens may demand that a country act to protect nonresident citizens.<sup>120</sup> Some countries' constitutions even require the government to safeguard emigrants.<sup>121</sup>

As with diplomatic and material assistance, which overseas citizens of every nation can request from their governments, citizens of all countries have the right of reentry,<sup>122</sup> and countries permit nonresident citizens to use their passports for travel. Thus, the United States is not unique in providing these benefits to nonresident citizens. Its uniqueness stems from the citizenship tax.

Each of the benefits received from the United States by Americans abroad—including, but not limited to, the rights to vote, return to the United States, travel on a U.S. passport, and pass on citizenship by decent to children born abroad—is valuable,<sup>123</sup> but it is not clear that they collectively justify taxing nonresident citizens on the same basis as resident

---

<sup>117</sup> See U.S. CITIZENSHIP & IMMIGRATION SERVS., I AM A PERMANENT RESIDENT . . . HOW DO I GET A REENTRY PERMIT? (2013), *available at* <http://www.uscis.gov/sites/default/files/USCIS/Resources/B5en.pdf>. The current filing fee is \$360 plus \$85 for biometrics. The current filing fee is \$360 plus \$85 for biometrics. *Id.*

<sup>118</sup> See generally Andrew W.R. Thomson, *Doctrine of the Protection of Nationals Abroad: Rise of the Non-Combatant Evacuation Operation*, 11 WASH. U. GLOBAL STUD. L. REV. 627, 658 (2012) (citing the British and Canadian evacuations of their nationals from Lebanon).

<sup>119</sup> See generally *id.* (giving examples of many governments' interventions on behalf of nationals abroad).

<sup>120</sup> See Barry, *supra* note 25, at 33 (noting demand in India and other countries for government to secure release of citizens kidnapped while working abroad and characterizing the “willingness of emigration state governments to protect and defend their citizens” as a “test of those states’ commitment to the entire citizenry, resident and emigrant”).

<sup>121</sup> See Chander, *supra* note 25, at 78 (citing the Greek and Spanish constitutions); see also Fitzgerald, *supra* note 24, at 111 (noting that the constitution of the Philippines requires the government to “afford full protection to labor, local and overseas”).

<sup>122</sup> See Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., 183d plen. mtg. at 74, U.N. Doc. A/810 (Dec. 10, 1948).

<sup>123</sup> Cf. Peter J. Spiro, *The (Dwindling) Rights and Obligations of Citizenship*, 21 WM. & MARY BILL RTS. J. 899, 916 (2013) (arguing citizenship still has value, but that the value of a U.S. passport has “degraded”).

citizens. This becomes clearer we consider the benefits that Americans forgo when they move abroad.

Nonresident Americans do not send their children to public schools, drive on public roads, or make use of police or fire protection within the United States, all of which are funded in part through federal grants. Nonresident citizens' absence decongests these goods and services, making them more valuable to remaining residents. Nonresident citizens lose access to a variety of social welfare programs when they move abroad, including Medicare, Supplemental Security Income, SNAP and TANF,<sup>124</sup> and unemployment insurance,<sup>125</sup> although they continue to receive Social Security.<sup>126</sup> We can contrast U.S. policy, which denies many social welfare benefits to citizens abroad, with the more generous policies of other countries towards their nonresident citizens.<sup>127</sup>

Moreover, while proponents of citizenship taxation are correct that citizens may request personal and property protection from the United States while overseas, the ability of the United States to provide such protection outside its territory necessarily is constrained. Nor can the United States guarantee nonresident citizens the political and civil rights that they would enjoy at home. A U.S. citizen residing in a country without robust due process or respect for civil liberties is largely at the mercy of her residence state's government, and she has no guarantee that the United States would diplomatically intervene to help her, much less that such intervention would be effective. Finally, Americans abroad bear the risks associated with U.S. foreign policy more than do resident Americans because Americans abroad can suddenly find themselves unwelcome in a foreign land due to changes in U.S. policy that affect their host jurisdiction.<sup>128</sup>

*Final Observations.* Three final observations can be made about the benefits theory as a justification for worldwide taxation of nonresident Americans. First, taxing citizenship commodifies it. At least some nonresident Americans perceive the tax and administrative burdens of

---

<sup>124</sup> See GAO, COUNTING AMERICANS OVERSEAS, *supra* note 65, at 3-4.

<sup>125</sup> Eligibility requirements for unemployment vary by state, but most require sustained recent prior employment in the state (or another U.S. state), and many require the recipient to show up in-person for interviews. See generally U.S. Dep't of Labor, Comparison on State Unemployment Laws: Monetary Entitlement (2013) available at <http://workforcsecurity.doleta.gov/unemploy/pdf/uilawcompar/2013/monetary.pdf>.

<sup>126</sup> See 42 U.S.C. § 402; see also SOCIAL SEC. ADMIN., YOUR PAYMENTS WHILE YOU ARE OUTSIDE THE UNITED STATES (2013) available at <http://www.ssa.gov/pubs/EN-05-10137.pdf>.

<sup>127</sup> Postlewaite & Stern, *supra* note 18, at 1093, n. 3 (noting that France provides educational subsidies, health care and unemployment compensation to nonresident French).

<sup>128</sup> See also *FY 2004 Performance and Accountability Highlights*, BUREAU OF RES. MGMT., U.S. DEP'T OF STATE (2004), available at <http://www.state.gov/s/d/rm/rls/perfrpt/2004hlts/html/39853.htm> (listing "assisting Americans abroad in the face of continued threats of terrorism" as a "continuing challenge").

citizenship taxation as representing the price of retaining their citizenship.<sup>129</sup> Likewise, commentators regularly argue that the citizenship taxation is fair because citizens could choose to relinquish their citizenship if they didn't want to pay the tax.<sup>130</sup> This commodification of U.S. citizenship has adverse consequences. For example, it has led to citizenship renunciations by people who cannot afford to retain their citizenship, including people who would have preferred to remain U.S. citizens, still feel themselves to be American, and suffered emotional harm from renunciation.<sup>131</sup> Americans who renounced their citizenship after long periods abroad in order to escape tax (or tax compliance) obligations described the process as “emotional,” “hard,” “super stressful” and “extremely troubling.”<sup>132</sup> Alice Abreu and Bernard Schneider separately have argued that policies that tax citizenship devalue it.<sup>133</sup>

Second, attempts to justify citizenship taxation upon the benefits theory fail because the benefits theory itself fails.<sup>134</sup> Even in the purely domestic situation, the benefits theory of taxation has been discredited as a justification for income taxation.<sup>135</sup> Under modern income taxes, a person's *ability to pay*, rather than the amount of government *benefit she receives*, determines her tax liability.<sup>136</sup> We use the taxpayer's income as a measure of her ability to pay. Indeed, taxpayers receiving the largest government benefits may be those who, due to their low incomes, pay the least taxes. Additionally, a pure benefits tax is inadministrable. It is impossible to determine with precision the benefits each taxpayer receives from government.

---

<sup>129</sup> See, e.g., Sophia Yan, *Why Expats Are Ditching Their U.S. Passports*, CNN MONEY (Mar. 10, 2014, 9:59 PM), <http://money.cnn.com/gallery/pf/2014/03/10/expat-taxes-citizenship/?iid=EL>.

<sup>130</sup> See, e.g., Kirsch, *supra* note 18, at 481.

<sup>131</sup> See Yan, *supra* note 129. One renouncer described her drive to the consulate in the following terms “I couldn't eat; I couldn't think; I couldn't sleep.” *Id.* At the same time, people considering renouncing for tax reasons may continue to strongly identify as Americans. See *id.* (“I will always feel and be American, regardless of my passport.” Another reports, “I sound like an American, and I really am one. I just don't have the passport anymore.”).

<sup>132</sup> See *id.*

<sup>133</sup> See Schneider, *supra* note 18, at 65; cf. Abreu, *supra* note 3, at 1136 (arguing exit taxes “place the burden of taxation on those who care about citizenship. . . . The provisions honor wealth and debase citizenship.”).

<sup>134</sup> See Fleming et al., *supra* note 24, at 334 (2001) (labeling the benefits theory “a historical curiosity”).

<sup>135</sup> See James M. Buchanan, *The Pure Theory of Government Finance: A Suggested Approach*, in *FISCAL THEORY AND POLITICAL ECONOMY: SELECTED ESSAYS* 8, 13 (1960) (arguing that rejection of the benefits theory has a logistical basis, which concerns the difficulty of pricing government services for tax purposes, and an ethical basis, which rejects the very notion that government benefits should be exchanged for taxes, even if it were possible to make such calculations).

<sup>136</sup> James R. Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 VAND. L. REV. 1129, 1133–40 (2008) (discussing the benefits theory and the ability-to-pay principle).

Finally, although the notion that nonresident Americans should pay for what they get is intuitively attractive, the benefits theory cannot support current law treatment, which treats nonresidents similarly to residents who receive far more benefits. The GAO put it succinctly in a report considering the feasibility of counting overseas Americans for purposes of, among other things, congressional apportionment, “Americans residing abroad do not have the same rights and obligations under federal programs and activities as Americans living in the United States.”<sup>137</sup> Kirsch himself acknowledges this problem.<sup>138</sup>

### B. *Citizenship Tax as a Social Obligation*

The second equity argument for citizenship taxation implicitly relies on the idea that people have a moral obligation to support fellow members of their own society, but not to support all people everywhere.<sup>139</sup> Under this view, citizens cannot discharge their social obligation to contribute taxes merely by residing abroad. Furthermore, the amount of the social obligation must be determined for everyone in the same way, namely, by using her worldwide income to measure her ability to pay.<sup>140</sup> Because it links the tax obligation to the taxpayer’s ability to pay—rather than to the benefits she receives from government—this argument for citizenship taxation has more traction than the benefits argument. This Article does not attempt to support or refute the claim that a person’s tax obligation should be determined based on her ability to pay as measured by her worldwide income, or the claim that the source of that obligation is her moral duty to her society.<sup>141</sup> Instead, I assume these claims are correct to

---

<sup>137</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-470, OVERSEAS ENUMERATION TEST RAISES NEED FOR CLEAR POLICY DIRECTION 25 (2004) [hereinafter GAO, OVERSEAS ENUMERATION] available at <http://www.gao.gov/assets/250/242371.pdf>.

<sup>138</sup> Kirsch, *supra* note 18, at 479. Rather than fully justifying citizenship taxation, Kirsch sees the benefits theory, like the concept of nexus, as providing a jurisdictional basis for taxing nonresident citizens. *See id.*, at 479. Others rely on the benefits theory to a greater extent. *See Postlewaite & Stern, supra* note 18, at 1121.

<sup>139</sup> Many share this view. *See, e.g.,* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 191, 193 (1999) (“[T]he people of the United States do not yet have general responsibility for the well-being of people all over the world. At least for the time being, we can limit the benefits of our welfare state to those who are in some meaningful sense part of us.”). *See generally* JOHN RAWLS, A THEORY OF JUSTICE 457 (1971) (applying his theory of justice within a “self-contained national community,” by which he meant a territory with borders).

<sup>140</sup> *See, e.g.,* Fleming, et al, *supra* note 24, at 314; Kirsch, *supra* note 18, at 480.

<sup>141</sup> The notion that tax obligations arise from national community membership is not universal. For example, cosmopolitans view social obligations as extending beyond the national community. Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 448 (2000). (“[The cosmopolitan outlook] expresses loyalty and moral commitment to humanity at large, rather than any particular community of persons.”). As another alternative, advocates of source-based progressive taxation ground moral obligation in the benefits principle. Notice no mathematical (or even double tax) obstacle prevents every state from applying its own ability-to-pay principle on a source basis to everyone. The simplest design for a progressive tax system in which the brackets depend

evaluate whether they justify our citizenship tax.

In the purely domestic context, the object of the taxpayer's social obligation to pay tax is clear because there is only one relevant society, but in the cross-border situation we must determine *to which society* a person ought to pay tax according to her ability. This Subpart critically evaluates the social obligation argument for citizenship taxation, and it concludes that it represents the strongest of the traditional arguments for citizenship taxation. Nevertheless, this Subpart also concludes that the social obligation theory cannot support current law's taxation of citizens who have little or no connection to American society. Additionally, I argue that even when nonresident Americans are fairly taxed on their worldwide income because they are members of the U.S. national community, our citizenship tax regime violates the ability-to-pay principle in several ways, including by failing to fully credit nonresident citizens' foreign taxes.

### 1. Obligation of National Community Members

The income tax systems of the world provide evidence that redistributive taxation according to ability to pay finds ready support on a national scale, but not on a global scale. If redistributive taxation is accepted at the national level, but generally not at the global level, then defining the national community becomes important not only for determining who receives benefits, but also for determining who funds them. Under this view, the obligation to pay redistributive taxes attaches to national community membership,<sup>142</sup> and citizenship taxation is fair as long as citizenship serves as a good proxy for national community membership. Antecedent to the question of whether citizenship serves as a good proxy for such membership, however, is the question of how to define national community membership. While acknowledging its importance, tax scholars have avoided the question of how to determine whether nonresident citizens are members of the U.S. national community.<sup>143</sup> This Subpart explores how we should resolve the question of which state (which society) has the strongest claim on a taxpayer's resources when the taxpayer has relationships with more than one state (she's born in one, a national of two,

---

upon global (not just local) income would reduce the size of each state's tax brackets to reflect the share of income the cross-border taxpayer earned in that state. Although such systems would require accurate reporting of worldwide income, and would be very difficult to police, application of the ability-to-pay taxation need not be limited to only one state, and it need not follow community membership.

<sup>142</sup> Cf. Fleming, et al, *supra* note 24, at 314 ("Each country has the right to decide the notions of tax fairness that will prevail with respect to members of its society").

<sup>143</sup> See, e.g., Kirsch, *supra* note 18, at 480-481; see also Fleming et al., *supra* note 24, at 309-10 (asserting as a "basic principle" that "individuals substantially connected to the United States" should be taxed on their worldwide income and stating that "Congress has drawn lines to deal with this issue" by taxing nonresident citizens "and one can debate whether the lines have been properly positioned" but stating that the line-drawing question was "outside the scope of this article," which principally concerned the fairness of taxing the worldwide income of *resident* taxpayers).

has resided in many).

Although tax scholars have not focused on this issue, immigration scholars and political theorists have attempted to define the national community. Most have considered the question from the perspective of the rights and entitlements of immigrants rather than emigrants. That is, theorists consider the question from the perspective of resident *noncitizens*, rather than nonresident citizens.<sup>144</sup> Some theorists take a formal view of national community membership. For them, citizenship and national community membership overlap perfectly.<sup>145</sup> For others, “citizenship is neither a sufficient nor a necessary condition for substantive membership.”<sup>146</sup> Michael Walzer defines communities as “historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.”<sup>147</sup> The commitment members feel to each other serves as the basis of the social obligation to contribute taxes according to their ability to pay.

The dominant view conceives of a person’s relationship to a national community as a continuum, where meaningful contacts between a person and a state determine that person’s place on the continuum.<sup>148</sup> Citizenship and residence are among the most meaningful contacts between a person and a state;<sup>149</sup> others may include politics and civic culture,<sup>150</sup>

---

<sup>144</sup> The discussion in this Section draws on a rich literature exploring aliens’ membership in the American national community, when aliens should be entitled to naturalize, and when they must be afforded the same rights and entitlements as resident citizens. See, e.g., Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 960.

<sup>145</sup> See Kitty Calavita, *Law, Citizenship, and the Construction of (Some) Immigrant “Others”*, 30 LAW & SOC. INQUIRY 401, 405 (2005) (“The dichotomy between the immigrant-stranger-outsider and the citizen-member-insider has become the academic equivalent of conventional wisdom. But a host of apparently conflicting ideas runs through some of the recent literature on citizenship”). See generally *id.* (reviewing recent immigration scholarship).

<sup>146</sup> Cf. David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 201 (1983). (“[O]ur notions of membership in the national community are more complex and multi-layered than can be captured in the concept of citizenship alone.”); see *id.* at 203 (describing “different levels of community membership”); see also Calavita, *supra* note 145, at 407.

<sup>147</sup> MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 63 (1983).

<sup>148</sup> Calavita, *supra* note 145, at 406 (“This concept of a membership continuum is at least implicitly shared by virtually all who write on immigration law and belonging[.]”).

<sup>149</sup> See also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265-66 (1990) (citations omitted) (interpreting the term “the people” in the Constitution to refer to “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community”). See also Liliana M. Garces, *Evolving Notions of Membership: The Significance of Communal Ties in Alienage Jurisprudence*, 71 S. CAL. L. REV. 1037, 1039-40 (1998) (describing Supreme Court alienage cases as “reflecting the Court’s own evolving definition of membership in the national community, moving from a restrictive notion of membership in which only citizens are members of the national community to an inclusive notion of membership that

“societal culture,”<sup>151</sup> ethnicity, language, and religion.<sup>152</sup> As this brief description reveals, the meaning of national community membership is contested and constantly in flux. For example, increasing mobility and plural nationality may impact how we define the national community. Hence, Kenneth Karst observed that, “[e]ach generation passe[s] to the next an open question of who really belongs to American society.”<sup>153</sup> As a result, the question of how to define the population of taxpayers responsible to pay redistributive taxes cannot be fixed for all time. Nevertheless, tying the tax obligation to social membership resonates with intuitions about fairness, and it seems to accurately describe, if only in broad strokes, national tax systems.

## 2. Citizenship as a Proxy for National Community Membership

If taxing national community members is fair, then a crucial question for whether it is fair to tax nonresident citizens on account of their national community membership is how well citizenship aligns with our definition, albeit contested, of national community membership. For example, if we adopt the formal view of national community membership, under which citizens automatically are national community members regardless of their other substantive connections, then we would conclude that citizenship taxation is fair, although we would also conclude that some other justification is needed to include tax nonresident green-card holders in the same tax base.

On the other hand, if we adopt a more substantive view of national community membership, then we must evaluate whether nonresident citizens’ actual connections with American society justify their taxation as members of the community. I know of no advocate of citizenship taxation who argues that it is equitable to tax nonresident Americans on the basis only of their formal citizenship alone. Instead, proponents of such taxation

---

recognizes the impact of communal ties on the notion of membership”). With the rise of human rights and the extension of rights to resident aliens, scholars have begun to argue that residence is more important than citizenship for securing rights. *See, e.g.*, Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGR. L.J. 1 (1989).

<sup>150</sup> KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989) (American civic culture forms the core of American national identity).

<sup>151</sup> WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 76 (1995) (defining “societal culture” as “a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially concentrated, and based on a shared language.”).

<sup>152</sup> Steven Menashi, *Ethnonationalism and Liberal Democracy*, 32 U. PA. J. INT’L L. 57, 96 (2010) (discussing national communities in the European Union, now characterized by free movement of persons and the growing importance of EU citizenship)

<sup>153</sup> KARST, *supra* note 150, at 2.

point to substantive connections between nonresident Americans and the United States to establish the fairness of taxing nonresidents like residents.<sup>154</sup>

Citizenship is a good proxy for national community membership most of the time. Most people reside in their nationality state, and most people have the overwhelming majority of their contacts with only that state. Thus, few would argue that it is unfair to subject *resident* citizens to ability-to-pay taxation on their worldwide income. What matters for our purposes, however, is whether citizenship continues to serve as good proxy for national community membership when citizens reside outside their nationality state.

Nonresident Americans maintain a variety of contacts with the United States. They vote, contribute to political campaigns, lobby Congress, and work with U.S. political parties abroad. Retention by citizens abroad of the ability to vote in federal elections tends to show that resident citizens regard nonresident citizens as members of the national community. At the same time, failure to count nonresident Americans in the census, or to provide them dedicated representation in Congress, suggests that such nonresidents are not at the core of American political life. Low voter turnout by nonresident Americans reflects that not all nonresident citizens remain politically engaged in the United States.<sup>155</sup>

Besides political engagement, Americans abroad visit and send remittances to family members back home, own U.S. property, invest in U.S. businesses, litigate for their interests in U.S. courts, donate to American charities, observe American traditions in their adopted states of residence, speak English in their homes, send their children to local American schools and American universities, and so on.<sup>156</sup> Such activities may reflect nonresident Americans' continuing sense that they are members of the American national community. Nonresident citizens' unlimited right of reentry also suggests that resident Americans regard

---

<sup>154</sup> See, e.g., Fleming, et al, *supra* note 24, at 309-10 (“substantial connections” justify worldwide taxation). Kirsch, *supra* note 18, at 481-84 (citing as indicia of national community membership nonresident citizens’ retention of their citizenship, patriotic desire to be counted in the census, securing U.S. citizenship for foreign-born children, viewing of U.S. websites, evacuation from Lebanon, and tendency to resume residence in the United States); Zelinsky, *supra* note 18, at 1293-1303 (exploring a similar concept under the rubric “political allegiance”).

<sup>155</sup> The GAO estimates that there are 6 million voters abroad. Coleman, *supra* note 113, at 18. Overseas citizens submitted nearly 1 million ballots in 2008, a presidential election year. *Id.* Without an accurate account of American voters abroad, it is impossible to know their voter turnout, but the government has accurate counts for members of the military abroad, and their turnout has been about half that of the resident population in recent elections. Steven F. Huefner, *Lessons from Improvements in Military and Overseas Voting*, 47 U. RICH. L. REV. 833, 843 (2013) (noting that voter participation by overseas military in the 2008 election was 30%, compared to over 60% nationally).

<sup>156</sup> See generally VON KOPPENFELS, *supra* note 71 (documenting transnational activities by Americans in Europe).

Americans abroad as part of the national community, no matter how long their absence.

In a fascinating new study of the attributes and attitudes of Americans abroad, Amanda Klekowski von Koppenfels found that a significant proportion of Americans living in Europe are dual nationals.<sup>157</sup> Such dual nationality may signal overseas Americans' distance from the American national community. At the same time, however, dual nationals' willingness to retain their U.S. citizenship, despite the tax and administrative burdens, even when they possess nationality elsewhere, may reflect the strength of their commitment to the United States.<sup>158</sup>

The question remains whether nonresident Americans' connections to the United States amount to national community membership. When comparing citizenship taxation to residence-based taxation, the population of concern is the set of taxpayers who, were it not for their U.S. citizenship, would not qualify as U.S. tax residents. Thus, for purposes of this Article, citizens who do not meet the statutory "substantial presence" test in the United States comprise the relevant group. Although the actual rule is more inclusive, taxpayers will meet this test if they are present in the United States for more than half the days of the year.<sup>159</sup> Citizens may fail to meet the substantial presence test in the United States for a variety of reasons. It could be that the United States is their home base, but that they travel a lot for work, or perhaps they are on assignment to the foreign affiliate of their U.S. employer. For such global commuters and corporate transferees, their closest and most enduring ties likely would be to the United States, even in years in which they failed to meet the U.S. substantial presence test. For them, as for U.S. residents, citizenship is a good proxy for national community membership.

On the other end of the spectrum would be happenstance Americans and Americans who permanently resettle abroad, but retain U.S. citizenship.<sup>160</sup> A common resettlement scenario involves a U.S. citizen who marries a citizen of another country and resettles in her spouse's nationality

---

<sup>157</sup> VON KOPPENFELS, *supra* note 71, at \_\_\_\_.

<sup>158</sup> A dual citizen's retention of U.S. citizenship is more likely to indicate a commitment to the U.S. national community than is retention of U.S. citizenship by a person with no other passport. *But see* Kirsch, *supra* note 18, at 481 (arguing that retaining U.S. citizenship "is expressive of a voluntary identification with the United States. After all, a citizen living abroad has the right to renounce his U.S. citizenship if he desires"). For criticism of the notion that citizenship taxation is fair because U.S. citizens are free to renounce their citizenship, see Zelinsky, *supra* note 18, at \_\_\_\_ (noting, *inter alia*, that people with only one nationality cannot relinquish that nationality without subjecting themselves to the risks of statelessness, and moreover that domestic and international laws prevent statelessness).

<sup>159</sup> I.R.C. § 7701(b)(1)(A)(ii). *Id.* § 7701(b)(3) (providing more inclusive rule).

<sup>160</sup> *See* Schneider, *supra* note 18, at 6 (asserting that because different groups of Americans abroad have "different degrees of connection to the United States," they "do not warrant the same tax treatment"). *Id.* at 6-7 (distinguishing long and short-term nonresidents, accidental Americans, citizens by descent, and unaware citizens by descent).

state.<sup>161</sup> The longer the citizen resides abroad, the more tenuous becomes the argument that her citizenship proxies her national community membership. Depending on the period of overseas residence, at some point, if we apply a substantive rather than formal definition of national community membership, we might all agree that the nonresident citizen is no longer a member of the U.S. national community. A recent IRS survey of nonresident taxpayers revealed that more than half of respondent citizens had resided abroad for more than five years, but we simply do not know enough about nonresident Americans to determine the prevalence of permanent or long-term resettlement.<sup>162</sup>

The foregoing discussion raises the problem that, even lacking a precise definition of national community membership, citizenship and national community membership will not always coincide. In the case of resident citizens, citizenship is an excellent proxy for national community membership. But our question is whether citizenship is a better proxy than residence for national community membership in those cases where citizenship and residence diverge. In the divergent cases—which are the only ones that are relevant for evaluating the fairness of a policy that extends worldwide taxation not only to residents, but also to citizens—citizenship is not always a more reliable proxy for national community membership than is residence.

On the other hand, it is far from clear that residence-based standards are more likely than citizenship to coincide with substantive national community membership. The United States employs a widespread tax rule that regards as a tax resident anyone physically present in the jurisdiction for more than half the days of the year. Such formal standards would seem to be even more over-inclusive than citizenship. For example, citizen born and raised in one state who commutes daily to a neighboring state would fit this formal definition of tax resident, but few would regard her as a member of the national community of her work state. On the other hand, some countries use more substantive definitions of tax residence that look to the person's domicile, where her family lives, and whether she has significant economic and social connections to the state. Such definitions may coincide with national community membership better than does citizenship.

### 3. Membership in Multiple Communities

Dual and multiple nationals present interesting cases.<sup>163</sup> For

---

<sup>161</sup> *Id.* at \_\_\_\_.

<sup>162</sup> TIFFANIE N. REKER ET AL., WAGE & INV. RESEARCH & ANALYSIS (WIRA), INTERNAL REVENUE SERV., TAXPAYER EXPERIENCE OF INDIVIDUALS LIVING ABROAD: SERVICE AWARENESS, USE, PREFERENCES, AND FILING BEHAVIORS \_\_\_\_ (2012) [hereinafter IRS WIRA 2012 STUDY].

<sup>163</sup> See Matthew Lister, *Citizenship, In the Immigration Context*, 70 MD. L. REV. 175, 226-27 (2010) (describing liberalization of states' attitudes toward plural nationality and noting that "today dual citizenship is tacitly accepted by the [U.S.] government"); see

happenstance Americans, who are born U.S. citizens, but who reside their entire lives outside of the United States and who may not even be aware of their U.S. citizenship status, U.S. citizenship is a poor proxy for membership in the American national community. For such people their other nationality, or their residence, would better proxy their national community membership.<sup>164</sup> Other dual nationals may have closer connections to the United States than to their other nationality state or than to their residence state. Still others may feel allegiance and a sense of belonging in two or more states. Moreover, it is easy to imagine circumstances where a person who does not possess formal citizenship nevertheless is a member of a national community. Multiple national community memberships therefore can arise outside the dual citizenship context. Membership by non-citizens could be held by residents or nonresidents. Such cases merely highlight that citizenship is not only over-inclusive, but also under-inclusive, as a proxy for national community membership.

If the same individual is a member of more than one national community, then under the social-obligation theory, she would have duplicative social obligations; she would owe contributions to multiple communities. Since the social-obligation theory determines the amount of a person's tax liability by reference to her ability to pay, however, the theory should not result in full tax liability to multiple societies. The question then becomes how her tax obligation should be divided between the states.

Tax treaties take a winner-take-all approach to this problem. Although international tax law provides no definition of national community membership, tax treaties resolve dual tax-residence conflicts in favor of only one state. Dual-residence conflicts under tax treaties arise when each treaty partner regards the same individual as a tax resident under its domestic law. States use the following factors (in descending order of importance) to resolve the conflict: where the taxpayer maintains a permanent home, where her personal and economic relations are closer, where she has her habitual abode, and her nationality.<sup>165</sup> Thus, for most

---

also James A. Goldston, *Epilogue*, in STATELESSNESS AND CITIZENSHIP 209 (Brad K. Blitz & Maureen Lynch eds., 2011) (“as many as 175 million people worldwide are not citizens of the countries in which they reside,” of which an estimated 12 million are stateless).

<sup>164</sup> Lister, *supra* note 163, at 207 (“[S]tates may legitimately worry that extending *jus sanguinis* beyond the first foreign-born generation would dilute the value of citizenship by extending citizenship to people who have no social ties to, and who do not engage in social cooperation with, the state in question.”); *id.* (noting that children born to tourists or short-term visitors become citizens, even if the child and parents immediately return to their home country, and “it is not clear why that child ought to have the rights (and duties) of citizenship”).

<sup>165</sup> MODEL TAX CONVENTION ON INCOME AND ON CAPITAL (OECD Comm. on Fiscal Affairs 2010), art. 4(2) [hereinafter OECD MODEL TAX TREATY], available at <http://www.oecd.org/tax/treaties/oecdmtcavailableproducts.htm>. The OECD Model has served as the basis for more than 3,000 bilateral tax treaties in force. See Ruth Mason, *Tax Expenditures and Global Labor Mobility*, 84 N.Y.U. L. REV. 1542, 1543 (2009).

countries of the world, substantive personal connections trump formal nationality for purposes of adjudicating disputes between multiple states that possess a putative claim over a taxpayer's worldwide income. In its own treaties, however, the United States preserves its prerogative to tax its citizens as if the treaty did not apply.<sup>166</sup> This "saving clause" allows the United States to tax U.S. citizens on their worldwide income, no matter where in the world they reside, and no matter how close their connections to another state.

Despite the U.S. savings clause, the practical outcome of the U.S. citizenship tax does not result in winner-take-all taxation. Rather, because the United States credits the taxes its citizens' foreign taxes, the United States as a practical matter defers to the other taxing state tax. The result as a practical matter under the foreign tax credit limitation is that if the American lives in a higher-tax state, she pays tax only to her residence state. In contrast, if the American lives abroad in a lower-tax state, she pays tax first to her residence state, and then to the United States on the difference between the U.S. tax that would be due from a resident and the tax she paid abroad. Thus, the U.S. citizenship tax may result in splitting the individual's social-obligation contribution across two states. In cases where the nonresident American is a member of *both* national communities, this may be a fairer result than a winner-take-all approach. On the other hand, where the nonresident American is no longer a member of the U.S. national community, her residual taxation by the United States will be less fair than a winner-take-all approach that awarded to her residence state the exclusive authority to tax her worldwide income.

The idea that a person's obligation to pay tax attaches to her national community membership provides more support for current U.S. law treatment of nonresident citizens than does the benefits theory. But neither theory satisfactorily disposes of the fairness concerns raised by taxing nonresident citizens. The mismatches between citizenship and national community membership suggest that it would be fairer to regard citizenship as a factor, but not a determinative one, of worldwide taxation. Notably, however, the discussion in this Subpart highlights that the dominant residence rule, which looks to physical presence, imposes worldwide taxation on some resident aliens who are not members of their host state's national community. This imposition of tax is problematic if the fairness justification for taxing aliens' worldwide income is grounded in the national-community-membership theory. Although it is beyond the scope of this Article, it may be possible to justify taxing resident aliens' worldwide income on a different basis than that for citizens.<sup>167</sup>

---

<sup>166</sup> UNITED STATES MODEL INCOME TAX CONVENTION of November 15, 2006, art. 1(4) available at <http://ustreas.gov/press/releases/reports/hp16801.pdf>, reprinted in 1 Tax Treaties (CCH) ¶ 209 ("this Convention shall not affect the taxation by a Contracting State of... its citizens").

<sup>167</sup> For example, resident aliens receive significant benefits from their host states,

#### 4. Current Regime Violates the Ability-to-Pay Principle

The discussion of national community membership in the preceding Subpart addressed how to define the taxable population. It asked, *Who pays?* But citizenship taxation also involves calculating the tax burden. Thus, we must also ask, *How much does she pay?* As compared with the benefits theory, which measures the taxpayer's obligation by the benefits she received, the social-obligation theory measures the taxpayer's obligation according to her ability to pay. Ability to pay is a comparative concept. It says that, as a person's income rises relative to that of other taxpayers, so should her share of the burden to pay taxes. By taxing nonresident citizens like resident citizens, the United States implicitly assumes that nonresident citizens' ability to pay should be measured the same way as resident Americans'.

Many factors suggest, however, that it would be fairer to calculate a person's ability to pay by reference to the place where she lives, rather than the place where she holds her citizenship. For example, Americans abroad may face significantly different wage rates and costs of living compared to resident Americans. If the same dollar amount of income buys less (or more) abroad than it does in the United States, then taxing Americans abroad on the same scale as resident Americans will not promote the equity interest in taxing according to ability to pay.<sup>168</sup>

Moreover, if we conclude that, despite differences across countries in wage rates and costs of living, resident and nonresident Americans ought to be taxed alike, then presumably it would be important to *actually* tax them alike. To do this would require repealing the foreign-earned-income exclusion.<sup>169</sup> It also would require unlimited credits for foreign taxes. If the United States does not fully credit foreign taxes (and in a variety of circumstances, it does not<sup>170</sup>), then nonresidents' ability to pay tax will differ from residents'. As just one example, under the current regime,

---

and ability-to-pay taxation could be seen as a proxy benefits tax. Such claims would be susceptible to the criticisms of the benefits theory of taxation discussed *supra* Part II.B.1.

<sup>168</sup> Michael S. Knoll & Thomas D. Griffith, *Taxing Sunny Days: Adjusting Taxes for Regional Living Costs and Amenities*, 116 HARV. L. REV. 987 (2003) (arguing that the failure of the income tax to account for cost of living differentials results in misallocation of capital and labor in the United States). The foreign housing exemption accounts for cost-of-living differentials to some extent.

<sup>169</sup> See, e.g., Kirsch, *supra* note 18, at 523-24 (urging the repeal of the exclusion because such repeal would be more faithful to citizenship taxation).

<sup>170</sup> Patton, *supra* note 29, at 715-27 (reviewing deficiencies of the foreign tax credit regime, including the overall credit limitation, the incentive this limitation creates for nonresidents to artificially generate income that the U.S. will regard as foreign-source and therefore creditable, the failure to credit value-added taxes, and the failure to credit some payroll taxes); *id.* at 726 (concluding that given these "faults" in the credit system, an American abroad may be "at a staggering disadvantage in many countries when one looks at the tax burden he would have borne on the same amount of income had he resided in the United States").

nonresidents pay foreign consumption taxes that affect their ability to pay, but for which they receive no foreign tax credits from the United States.<sup>171</sup> Since other countries employ consumption taxes to a much greater extent than does the United States, failure to credit such taxes is an important violation of the ability-to-pay principle.<sup>172</sup>

To preserve equity, we also would want to make some kind of allowance for implicit taxes and subsidies. For example, if a nonresident American lives abroad in a country that does not have publicly funded highways, then the nonresident would have to pay out-of-pocket for the use of roads. That implicit tax would affect the nonresident's ability to pay compared to a resident's. Likewise, the host state may provide goods that are generally privately provided in the United States. For example, the nonresident may avoid out-of-pocket health insurance or medical care costs, which would enhance her ability to pay compared to a resident American. Such differences affect ability to pay, but the citizenship tax does not account for them. Thus, no matter how we decide the national community membership question, our citizenship tax fails to systematically account for important differences between resident and nonresident taxpayers that directly affect their relative abilities to pay.

\* \* \*

Both traditional fairness arguments for citizenship taxation are problematic. Whereas the benefits theory supports *some* taxation of nonresident Americans, commensurate with the benefits they receive from the United States, it cannot justify current law. If the United States wants to

<sup>171</sup> See I.R.C. § 901(b) (to be eligible for the credit, the foreign tax must be a compulsory income tax).

<sup>172</sup> The following table shows the comparative consumption tax burdens in the United States and the top ten receiving countries of Americans abroad.

	<b>Taxes on Goods &amp; Services (including local taxes) as Percentage of GDP in 2010 or Latest Available year</b>	<b>UN Estimate of Percentage of Country's Stock of Global American Migrants in 2010</b>
USA	4.5	--
Japan	5.1	2
Australia	7.6	3
Canada	7.5	11
South Korea	8.5	2
Mexico	9.8	27
Germany	10.7	4
France	10.7	2
United Kingdom	10.8	7
Italy	11.1	2
Israel	12.9	3

See OECD FACTBOOK 2013, *supra* note 74 (providing consumption tax data). Migration percentages were calculated by the author from UN data. See UN MIGRATION DATA, *supra* note 73.

increase the correlation between taxes paid and benefits received by nonresident citizens, it can charge nonresidents for more services.

In contrast with the benefits theory, the social-obligation theory represents a more convincing fairness case for citizenship taxation. Under the social-obligation theory, membership in the American national community gives rise to the obligation to contribute to taxes according to ability to pay. If that assumption is warranted, the question becomes whether a person's citizenship is a good predictor of her membership in the American national community. This Part argued that although citizenship is not a perfect proxy for national community membership, it is better than at least some residence standards, including the substantial presence test the United States uses to tax aliens. On the other hand, citizenship taxation is a poor proxy for national community membership in many cases. Part V presents worldwide taxing standards that would do a better job than pure citizenship taxation of aligning worldwide tax jurisdiction with national community membership. Such standards might combine citizenship with residence or other substantive connecting factors.

Finally, even when nonresident citizens are national community members, it nevertheless may be unfair to measure their ability to pay according to the same rules that apply to resident taxpayers because nonresidents' wage rates, costs of living, and other factors that directly impact ability to pay depend on conditions in their residence, rather than citizenship, states. Citizenship has no necessary connection to determinants of ability to pay.

### III. ADMINISTRABILITY

Edward Zelinsky argues that because citizenship is a bright line, whereas residence requires consideration of factors including the number of days present in the United States, citizenship taxation is easier to administer than residence taxation. As a result, Zelinsky concludes that citizenship taxation is more administrable than residence taxation.<sup>173</sup>

Zelinsky overstates the administrative advantages of citizenship taxation. For example, although Zelinsky is correct that citizenship taxation spares the government the need to litigate with the citizens over the number of days the citizen spent within the United States,<sup>174</sup> citizenship taxation does not relieve the United States of the obligation to administer its (admittedly) fact-intensive and manipulable substantial presence standard,

---

<sup>173</sup> Zelinsky, *supra* note 18, at 1323-42. Although Zelinsky compares citizenship taxation with taxation according to domicile, this section will continue comparing citizenship tax with residence taxation, where residence taxation encompasses *both* presence-based and domicile-based taxation. In all the examples Zelinsky cites—Canada, the United Kingdom, and Australia—domicile supplements a physical-presence test for determining a taxpayer's liability for worldwide taxation. *See* AULT & ARNOLD, *supra* note 44, at 429-34.

<sup>174</sup> Zelinsky, *supra* note 18, at 1323-25.

since that standard applies to all aliens present in the United States who are not green-card holders.<sup>175</sup> It is unlikely that the United States would forego worldwide taxation of resident aliens. So, whether or not it abolishes citizenship taxation, the United States will continue to litigate cases involving how many days taxpayers spend in the United States. Additionally, because Zelinsky limits his analysis to the threshold decision about *who* will be subject to worldwide taxation, not the broader question of *how* worldwide taxation can be enforced against nonresidents, he does not properly account for the administrative burdens of citizenship taxation. This Section explores those burdens and concludes that the government cannot adequately enforce citizenship taxation, and that the current citizenship taxation regime imposes an unreasonable compliance burden on ordinary taxpayers.

#### A. *Compliance Complexity*

##### 1. Government Enforcement Difficulties

Even if the IRS knew the whereabouts and income of every nonresident citizen, such that it could assess their tax liability, it would have trouble enforcing that liability for lack of territorial jurisdiction. The United States has no authority to conduct tax investigations abroad without the cooperation of the other country,<sup>176</sup> and many countries will not enforce foreign governments' tax claims or tax judgments.<sup>177</sup> Nor do foreign employers withhold taxes from American's wages or report information about those wages to the United States. While new legislation applicable to foreign financial institutions can be expected to increase offshore information-reporting on financial accounts,<sup>178</sup> and a new multilateral agreement promises to enhance tax enforcement,<sup>179</sup> the United States will

---

<sup>175</sup> See I.R.C. § 7701(b)(1)(A)(ii).

<sup>176</sup> Michael S. Kirsch, *The Tax Code as Nationality Law*, 43 HARV. J. ON LEGIS. 375, 433 (2006) [hereinafter Kirsch, *Nationality Law*] (citing Office of Legal Counsel materials).

<sup>177</sup> Dentino & Manolakas, *supra* note 7, at 415.

<sup>178</sup> See discussion of FATCA *infra* Part III.A.2. See also Michael S. Kirsch, *Revisiting the Tax Treatment of Americans Abroad*, 16 FLA. TAX REV. 117 (2014) (arguing that FATCA and other administrative advances make the citizenship taxation more enforceable).

<sup>179</sup> Convention on Mutual Administrative Assistance in Tax Matters (2011, as amended) available at <http://www.oecd.org/ctp/exchange-of-tax-information/ENG-Amended-Convention.pdf>. The United States has declined to provide many kinds of assistance called for in the Convention. Because obligations are bilaterally reciprocal under the Convention, other signatories need not provide assistance to the United States on areas where the United States has derogated. See *List of Declarations*, available at <http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=127&CM=8&DF=01/09/2014&CL=ENG&VL=1> (derogating from the last two of the three forms of assistance specified in the Convention; exchange of information, recovery of tax claims, and service of documents).

continue to face difficulties enforcing worldwide taxation of nonresident citizens.

## 2. FBAR and FATCA Fallout

The tax system relies on self-assessment, backed by third-party reporting obligations to police underreporting of income. Tax gap statistics reveal that self-reporting falls off dramatically in the absence of third-party reporting.<sup>180</sup> So a major obstacle to enforcing nonresident citizens' tax obligations is lack of third-party reporting about nonresident Americans' foreign income. In legislation commonly referred to as the Foreign Account Tax Compliance Act (FATCA), the United States recently imposed third-party reporting requirements on foreign banks and new self-reporting obligations on both residents and nonresidents who hold foreign financial accounts.<sup>181</sup> FATCA partially duplicates taxpayers' self-reporting obligations under the Bank Secrecy Act to file Foreign Bank Account Reports (FBARs), which are designed to prevent money laundering.<sup>182</sup> Both regimes require self-reporting of foreign accounts and other assets.<sup>183</sup> Because these regimes apply only to foreign holdings, they disproportionately burden nonresident Americans, whose ownership (unlike that of resident Americans) of foreign accounts and assets should arouse no special suspicion of money laundering or tax evasion.<sup>184</sup> FATCA<sup>185</sup> and FBAR<sup>186</sup> violations trigger stiff penalties, and the penalties

---

<sup>180</sup> IRS, Tax Gap for Tax Year 2006, at 3 (2012) available at [http://www.irs.gov/pub/newsroom/overview\\_tax\\_gap\\_2006.pdf](http://www.irs.gov/pub/newsroom/overview_tax_gap_2006.pdf).

<sup>181</sup> Effective in 2014, FATCA was enacted in 2010 as part of the Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, 124 Stat. 71 (Mar. 18, 2010). FATCA requires self-reporting on certain foreign assets if in aggregate they exceed \$200,000 for single nonresident filers, *See* Treas. Reg. § 1.6038D-2T(a). The FATCA filing thresholds are lower for resident Americans, who must report foreign assets that exceed \$50,000. *Id.* In addition to self-reporting, FATCA imposes third-party reporting obligations of foreign financial institutions. *Id.*

<sup>182</sup> The FBAR requirement was imposed on citizens and residents by the Bank Secrecy Act. 31 U.S.C. § 5314; 31 C.F.R. § 1010.350(a); 31 C.F.R. § 1010.306(c) (all foreign accounts reportable if their aggregate value exceeds \$10,000).

<sup>183</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-403, REPORTING FOREIGN ACCOUNTS TO IRS: EXTENT OF DUPLICATION NOT CURRENTLY KNOWN, BUT REQUIREMENTS CAN BE CLARIFIED (2012), *available at* <http://www.gao.gov/assets/590/588921.pdf>.

<sup>184</sup> Although the filing requirements apply to both resident and nonresident citizens (and tax-resident aliens), because nonresident Americans are much more likely than resident Americans to have foreign bank accounts, the FATCA and FBAR penalties are more likely to fall on nonresident than resident Americans who neglect to file their taxes.

<sup>185</sup> I.R.C. § 6038D(d)(1)-(2) (nonreporting penalty of \$10,000 to \$50,000 for failure to report covered assets and accounts). If taxpayers owe U.S. tax on undisclosed accounts, FATCA adds a 40 percent substantial understatement penalty. *See id.* § 6038D(d); *id.* § 6662(b)(7), (j). Finally, failure to file under FATCA leaves the statute of limitations open for the FATCA form and any related tax liability. *Id.* § 6501(c)(8)(A).

<sup>186</sup> 31 U.S.C. § 5321(a)(5)(B); 31 C.F.R. § 1010.350 (imposing \$10,000 penalty

for each regime stack, even though they require reporting of duplicative information.<sup>187</sup> Criminal penalties also may apply.<sup>188</sup>

These reporting requirements have been harshly criticized at home and abroad. For example, the National Taxpayer Advocate has repeatedly tried to draw congressional attention to the impact of these regimes on nonresident taxpayers. In her 2012 annual report to Congress, she raised the concern that the civil penalties of up to three hundred percent of the account value for failure to file FBARs were “scary,” “disproportionate,” and “excessive to the point of possibly violating the U.S. Constitution.”<sup>189</sup> Even foreign officials have criticized the compliance burden on U.S. citizens abroad. For example, then Canadian Finance Minister Jim Flaherty complained that FATCA applies to “honest and law-abiding people... [who] work and pay taxes in Canada. . . . [and] are not high rollers. . . .”<sup>190</sup> While FATCA may have been designed to combat tax evasion by resident taxpayers, it inflicts collateral damage on nonresident citizens who own offshore accounts for perfectly innocent reasons.

### 3. Other Compliance Challenges for Taxpayers

At a time when both the number of nonresident taxpayers and the penalties for noncompliance have increased sharply, the IRS provides little assistance to nonresident taxpayers in complying with their tax filing obligations, and according to the National Taxpayer Advocate the quality and quantity of that assistance is “worsening.”<sup>191</sup> For example, whereas there were twenty-eight overseas IRS offices in 1986,<sup>192</sup> today there are only four.<sup>193</sup> Taxpayers can email the IRS for help,<sup>194</sup> but calling a toll line is the only option for nonresident Americans without reliable internet

---

per non-willful FBAR violation).. Before 2004, penalties only applied to willful failures to report. 31 U.S.C. § 5321(a)(5)(C) (setting maximum penalty for willful violation to greater of \$100,000 or 50 percent of the balance in the account for each undisclosed year for up to six years).

<sup>187</sup> For a chart comparing filing obligations under the two regimes, see *Comparison of Form 8938 and FBAR Requirements*, INTERNAL REVENUE SERV., <http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements> (last updated Feb. 2, 2015).

<sup>188</sup> 31 U.S.C. §§ 5321(a)(5)(C) and 5322; 31 C.F.R. § 1010.840(b) (up to \$500,000 penalty and ten years imprisonment).

<sup>189</sup> NTA 2012 REPORT, *supra* note 26, at 147.

<sup>190</sup> Letter to the Editor by Canadian Finance Minister Jim Flaherty, *Financial Post* (Sept. 16, 2011) <http://business.financialpost.com/2011/09/16/read-jim-flahertys-letter-on-americans-in-canada/>.

<sup>191</sup> NTA 2013 REPORT, *supra* note 26, at 208 (2013).

<sup>192</sup> Blum & Singer, *supra* note 18, at 711-12, n 23.

<sup>193</sup> NTA 2013 REPORT, *supra* note 26, at 211 (noting that offices are in London, Paris, Frankfurt, and Beijing).

<sup>194</sup> See IRS WIRA 2012 STUDY, *supra* note 162, at 42, n. 16 (citing \$116.66 as the IRS’s unit cost for an e-mail).

access.<sup>195</sup> According to the GAO, the IRS should do more to inform nonresidents of their reporting requirements, and a 2012 IRS study concluded that the agency “underserved” nonresident citizens.<sup>196</sup> Making matters worse, in order to save costs, the IRS recently stopped mailing tax forms to nonresident Americans, which creates problems for overseas citizens who lack high-speed internet access.<sup>197</sup> The decision to stop mailing relevant forms coincided with implementation of the new FATCA reporting requirements that substantially duplicate FBAR reporting and carry significant penalties for noncompliance. The combination of eliminating mailings, performing inadequate outreach to inform nonresident citizens of their new reporting obligations, and imposing harsh penalties for failure to report begins to resemble a trap.<sup>198</sup>

In addition to onerous and duplicative financial account reporting requirements, other aspects of the taxation of nonresident Americans raise difficulties that resident Americans usually do not face. First, nonresident Americans generally must file full income tax returns in the United States as well as in their country of residence. They must file their taxes twice, according to two different sets of tax laws, even when they owe no U.S. taxes.<sup>199</sup>

Worse, when conducted abroad, ordinary economic activities draw nonresident citizens into what the National Taxpayer Advocate calls “the Kafka-esque U.S. international tax regime.”<sup>200</sup> For example, she points out that a nonresident citizen must consider whether Subpart F applies to her wholly-owned local corporation engaged in local business.<sup>201</sup> The Subpart F rules were developed to prevent cross-border profit-shifting by large, multinational enterprises, and the federal government estimates that it takes 15 eight-hour work days for a taxpayer to fill out the relevant form.<sup>202</sup> Nonresidents also must convert all their transactions to U.S. currency for filing purposes. Among other burdens, nonresident citizens married to noncitizens must obtain for their spouses and dependents Individual Taxpayer Identification Numbers (ITINs), but the application process for

---

<sup>195</sup> NTA 2013 REPORT, *supra* note 26, at 205, 208 (2013)

<sup>196</sup> See IRS 2012 WIRA STUDY, *supra* note 162, at 1.

<sup>197</sup> See IRS 2012 WIRA STUDY, *supra* note 162, at 23-24 (reviewing effects of Printing and Postage Budget Reduction Plan).

<sup>198</sup> See IRS 2012 WIRA STUDY, *supra* note 162, at 24 (noting that IRS’s discontinuation of its mailings meant that many overseas taxpayers were unaware of their new FATCA filing requirements). See *id.* at 23 (listing thirteen forms that IRS stopped mailing to nonresident citizens).

<sup>199</sup> Nonresident citizens need not file if their income is below the relevant statutory threshold (\$10,150 for single filers in 2014). See IRC § 6012(a); Treas. Reg. § 1.1-1(b). Taxpayers exceeding that threshold must file to claim the foreign-earned-income exclusion, even if after application of the exclusion and foreign tax credit they will have no residual U.S. tax liability. See Treas. Reg. § 1.911-7.

<sup>200</sup> NTA 2011 REPORT, *supra* note 26, at vi (2011).

<sup>201</sup> *Id.*, at 133.

<sup>202</sup> *Id.*

ITINs is so burdensome and error-prone that to avoid it nonresident citizens elect to forgo joint filing and personal exemptions, resulting in higher tax burdens.<sup>203</sup> Unlike most resident taxpayers, who have only domestic income, nonresidents usually have foreign-source income, so they must determine how to apply the complicated foreign tax credit regime. And while the foreign-earned-income exclusion represents a tax benefit available only to nonresident Americans, the GAO concluded that it is “unreasonably complex” and prevents many nonresident Americans from calculating their taxes without professional help.<sup>204</sup> Americans abroad who cannot afford to hire professional help may be noncompliant because they are overwhelmed by the complexity of the foreign tax regime. The National Taxpayer Advocate recently warned Congress of the difficulties faced by nonresident citizens, stating that “[t]he complexity of international tax law, combined with the administrative burden placed on these taxpayers, creates an environment where taxpayers who are trying their best to comply simply cannot.”<sup>205</sup>

### B. Prudential Concerns

The challenges inherent in collecting tax from overseas Americans paint a bleak picture of the ability of the U.S. government to enforce its citizenship tax. Like so much about nonresident Americans, the actual scope of tax noncompliance by this group is unknown.<sup>206</sup> The GAO lays part of the blame for enforcement gaps on elements beyond IRS control, such as lack of information reporting, but the GAO also found that the IRS does not pursue available information about nonresidents.<sup>207</sup> Deliberate or inadvertent noncompliance by nonresidents combines with IRS under-enforcement and lack of outreach to result in what may be widespread non-filing. For example, the IRS received fewer than 1 million individual returns from foreign addresses in 2012, while some estimates of the nonresident citizen population exceed 7 million.<sup>208</sup> And even though taxpayers must file to claim the foreign-earned-income exclusion, only

---

<sup>203</sup> Among the difficulties noted by the National Taxpayer Advocate are that the IRS keeps applicants’ passports and other original documents for months, resulting in risks for applicants of fines and incarceration in their residence states. NTA 2013 REPORT, *supra* note 26, at 217. The IRS also has a poor record of keeping track of such original documents. *Id.* at 229. Moreover, the “IRS. . . improperly suspends or rejects thousands of applicants.” *Id.* at 223.

<sup>204</sup> U.S. GEN. ACCOUNTING OFFICE, ID-81-29, AMERICAN EMPLOYMENT ABROAD DISCOURAGED BY U.S. INCOME TAX LAWS 14 (1981) [hereinafter GAO, AMERICAN EMPLOYMENT ABROAD] available at <http://www.gao.gov/14assets/140/132160.pdf>.

<sup>205</sup> NTA 2011 REPORT, *supra* note 26, at 129.

<sup>206</sup> GAO, NONFILING, *supra* note 76, at 21-22.

<sup>207</sup> *Id.*, at 14-17. FATCA should greatly expand the IRS’s access to information about nonresidents, which should enhance self-reporting, but it is unclear whether IRS will be able to increase its enforcement efforts.

<sup>208</sup> OFFICE OF RESEARCH, INTERNAL REVENUE SERV., PUBLICATION 6149: CALENDAR YEAR RETURN PROJECTIONS BY STATE 57 (2013), available at <http://www.irs.gov/pub/irs-pdf/p6149.pdf>.

about 450,000 taxpayers claimed the exclusion for tax year 2011, the last year for which statistics are available.<sup>209</sup> The revenue effects of noncompliance by this group are unknown.<sup>210</sup>

Likewise, FBAR compliance is notoriously low, perhaps because the United States does little outreach to inform taxpayers of their FBAR obligations.<sup>211</sup> Those that the IRS has managed to inform of their FBAR filing requirements seem bewildered by the notion that they would have to file information returns with the IRS for their foreign accounts, even in cases where they have no U.S. tax liability.<sup>212</sup> The FBAR requirement applies to all of the following who have qualifying non-U.S. accounts: resident Americans, resident aliens, nonresident citizens, and nonresident green-card holders.<sup>213</sup> But, notwithstanding the “draconian”<sup>214</sup> penalty regime for failure to file, in 2012, when as many as 7.6 million Americans and green-card holders resided abroad, and an unknown number of resident citizens and resident aliens had offshore accounts, the IRS received only 807,040 FBARs,<sup>215</sup> and only 21% of these were filed using foreign addresses. Despite this gap in compliance, the FBAR audit rate remains below 1%.<sup>216</sup>

Some commentators argue that it is important for the United States to at least *claim* to tax nonresident citizens the same as resident citizens, even if, due to the difficulties of enforcement, it cannot actually collect the tax. These commentators argue that the putative citizenship tax is an important aspect of the perceived fairness of the tax system.<sup>217</sup> But the

---

<sup>209</sup> IRS STATISTICS ON INCOME 2014 REPORT, *supra* note 53, at 141.

<sup>210</sup> See GAO, NONFILING, *supra* note 76, at 12 (noting that the revenue impact of such nonfiling cannot be estimated and that it could be “small or substantial”).

<sup>211</sup> See IRS WIRA 2012 STUDY, *supra* note 162, at 11 (concluding that IRS must improve outreach to nonresident citizens); *id.* at 26 (citing survey responses indicating that nonresidents are unsure of their filing requirements).

<sup>212</sup> Tax liability doesn’t matter because the FBAR is an anti-terrorism and anti-money-laundering regime, not specifically a tax enforcement regime. See, e.g., NTA 2011 REPORT, *supra* note 26, at 196-97 (quoting nonresident taxpayers calling the requirement “sick,” “not what America is supposed to be about,” “a big deal,” and “abusive,” with one taxpayer describing herself as “hunted down”).

<sup>213</sup> See Treas. Reg. §1. 6038D-2T(a).

<sup>214</sup> NTA 2013 REPORT, *supra* note 26, at 229.

<sup>215</sup> U.S. DEP’T OF TREASURY, A REPORT TO CONGRESS IN ACCORDANCE WITH § 361(b) OF THE UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT OF 2001, at 6 (2002) (estimating FBAR compliance at less than 20 percent). FBAR compliance has increased in recent years; the IRS received 349,667 FBARs in 2008 but 741,249 in 2011. NTA 2012 REPORT, *supra* note **Error! Bookmark not defined.**, at 142.

<sup>216</sup> NTA 2013 REPORT, *supra* note 26, at 229.

<sup>217</sup> Michael Kirsch acknowledges that the inability to enforce citizenship taxation could undermine voluntary compliance, but he concludes that failing to nominally tax nonresident citizens would have an even greater adverse impact on tax compliance because “the media is likely to highlight people who move from the United States in order to escape taxes.” Kirsch, *supra* note 18, at 502-03. As discussed below, abuse cases involving tax-motivated changes of residence are better handled by a narrow anti-abuse

same argument could be made on the other side. For example, nonresident Americans may perceive it as unfair that competing workers who reside in their residence state do not face citizenship taxation. Indeed, one of the original justifications for the foreign-earned income exclusion was to place Americans abroad “in an equal position with citizens of other countries . . . who are not taxed by their own countries.”<sup>218</sup>

Moreover, the assessment of taxes that a country has no means of collecting may itself undermine the perceived fairness of the tax system. Indeed, an OECD advisory group on electronic commerce urged member countries to avoid imposing taxes that as a practical matter they could not collect because, “the taxpaying public will perceive that the tax is unfair and discriminatory,” and this perception will undermine voluntary compliance.<sup>219</sup> Likewise, Blum and Singer argue that the IRS’s spotty enforcement of the tax obligations of overseas Americans harms the morale of both resident Americans and overseas Americans who engage in voluntary compliance.<sup>220</sup> The National Taxpayer Advocate recently echoed this concern, noting that although FATCA will bring more foreign accounts with U.S. owners to the attention to the IRS, the “IRS is unlikely to have additional resources to address. . . violations. . . . As a result, it will increasingly have to ignore violations that it can detect.”<sup>221</sup>

Finally, citizenship taxation, together heightened financial reporting of foreign accounts, tends to foster ill relations with Americans abroad.<sup>222</sup> The U.S. attitude towards nonresident citizens sharply contrasts with that of other major migrant-sending states like China, Mexico, and India, which actively encourage their emigrants to return,<sup>223</sup> or at least to contribute capital and expertise to their state of origin.<sup>224</sup> U.S. emigrants, like other emigrants, send remittances to family members back home, participate in brain circulation and technology transfers from abroad, and serve as

---

rule. It is unclear how it could improve the perceived fairness of our tax system to impose an unenforceable tax on nonresident citizens who depart the United States for reasons having nothing to do with taxation.

<sup>218</sup> S. REP. NO. 82-781, at 52-53 (1951) (another purpose was to “encourage citizens to go abroad”).

<sup>219</sup> OECD TECHNICAL ADVISORY GROUP, ARE THE CURRENT TREATY RULES FOR TAXING BUSINESS PROFITS APPROPRIATE FOR E-COMMERCE?, at 19, ¶ 73 (2006).

<sup>220</sup> Blum & Singer, *supra* note 18, at 718; *see also* Schneider, *supra* note 18, at 58 (concluding that “the United States should stop trying, and failing, to tax expatriates”).

<sup>221</sup> NTA 2012 REPORT, *supra* note 26, at 143.

<sup>222</sup> Countless websites and several political interest groups urge reforming the citizenship taxation. For example, the website of American Citizens Abroad, which describes itself as the voice of Americans overseas, lists under “Issues,” in order, Tax, FATCA and FBAR, voting, the right to pass citizenship automatically to children adopted abroad, Social Security, Medicare, and congressional representation. *See Issues*, AM. CITIZENS ABROAD, <http://americansabroad.org/issues/> (last visited Feb. 14, 2015) (highlighting eight leading issues for Americans abroad, six of which concerned tax).

<sup>223</sup> *See generally* Chander, *supra* note 25 (categorizing political, economic, and cultural devices that governments use to keep emigrants connected).

<sup>224</sup> *See generally* Barry, *supra* note 25.

ambassadors of American culture and as promoters of U.S. interests abroad, including by spreading democratic values.<sup>225</sup> In contrast, onerous tax and financial reporting requirements seem to convey suspicion of Americans abroad.<sup>226</sup> Implicitly casting Americans abroad as tax dodgers and money launderers tends to alienate them.<sup>227</sup> As Todd Pettys has argued, “One cannot continually find oneself on the receiving end of norms’ sanctions—whether. . . guilt, shunning, loss of respect, or some other undesirable phenomenon—and still regard oneself as a full-fledged, value-sharing member of the community.”<sup>228</sup>

\* \* \*

Zelinsky advocates citizenship taxation because citizenship is a brighter line than residence for determining liability to worldwide taxation. This claim is true, but it takes too narrow a view. Tax administration involves not only the initial decision of who will be subject to tax, but also all of the enforcement and compliance implications of that choice. Because citizenship taxation draws into the worldwide tax system people who reside indefinitely outside U.S. territory and who earn hard-to-detect foreign income, when viewed as a whole, citizenship taxation, when applied without regard to substantive connections between the taxpayer and the United States, vastly increases administrative burdens compared to residence taxation. In short, formal citizenship taxation creates an administrative burden that taxpayers and government are unable to bear. The result has been under-enforcement by the IRS and what is assumed to be widespread noncompliance by nonresident citizens.

---

<sup>225</sup> Cf. Fitzgerald, *supra* note 24, at 96-97 (recounting Mexican President Zedillo’s characterization of Mexico’s program to encourage U.S. naturalization by expatriate Mexicans as aiming “to develop a close relationship between his government and Mexican Americans, one in which they could be called upon to lobby U.S. policymakers on economic and political issues involving the United States and Mexico”).

<sup>226</sup> FATCA was a Democratic legislative proposal, but the official position of the Democrats Abroad is that “Congress did not fully anticipate the impact the regulations would have on overseas Americans and we, therefore, are now burdened with a tax reporting obligation that treats us like suspected tax cheats and money launderers.”) See *Democrats Abroad on FATCA and Reports*, DEMOCRATS ABROAD, <https://www.democratsabroad.org/group/fbarfatca> (last visited Feb. 16, 2015). The Facebook page of Republicans Overseas links to a congressional petition to repeal FATCA on the grounds that the law is “morally reprehensible and detrimental to overseas Americans’ basic human rights” and puts Americans abroad to the “horrible choice between citizenship and livelihood.” See *Petition to Abolish the Foreign Account Tax Compliance Act (FATCA)*, REPUBLICANS OVERSEAS, <https://www.abolishfatca.com/live/> (last visited Feb. 16, 2015).

<sup>227</sup> The notion that residing abroad is vaguely suspicious also can be seen in academic commentary. The title of one article favoring citizenship taxation is “Innocents Abroad?”, the question mark seeming to stand as an accusation of nonresident Americans’ motives. Postlewaite & Stern, *supra* note 18, (never explaining what calls into doubt the innocence of Americans abroad).

<sup>228</sup> Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481, 515 (2004).

#### IV. EFFICIENCY

Efficiency considerations usually dominate tax policy debates and particularly so for international tax. While we lack empirical studies of the specific impact of citizenship taxation on migration, the empirical evidence we have suggests that, for most people, taxes are not an important factor in decisions about where to reside.<sup>229</sup> The main motivators for migration are family, jobs, education, and similar factors—not taxation.<sup>230</sup>

While taxation does not represent a prime reason for most taxpayers to move, for the minority, taxes are an important deciding factor. I will call these taxpayers marginal migrants, and they are the relevant population for evaluating the efficiency of the U.S. method for taxing citizens abroad. The marginal migrant is someone with choices. She can decide whether to change her state of residence, and, by assumption, tax figures into her decision. Such a person is likely to be someone that states would like to like to attract for her skills, wealth, and income. Thus, whereas the impact of citizenship taxation on overall migration patterns is likely to be small, the effect may nevertheless be important to the extent that it affects decisions of highly desirable migrants.<sup>231</sup>

Supporters of citizenship taxation praise it for reducing the incentive for Americans to move abroad to avoid tax. This Part explains how the implementation of our citizenship taxation prevents it from achieving the residence neutrality benefits that proponents of the tax claim for it. Moreover, even supporters of citizenship taxation concede that the tax influences citizenship decisions by encouraging Americans abroad to renounce their U.S. citizenship to avoid tax. Prior analysis of citizenship taxation has overlooked, that, in addition to discouraging Americans from emigrating, citizenship taxation also may discourage immigrants from moving to the United States and naturalizing as citizens. Thus, the citizenship taxation puts the United States at a competitive disadvantage compared to other migrant-receiving states in attracting skilled foreign workers. As this Part explains, understanding the impact of citizenship taxation on both residence and citizenship decisions requires consideration not only of U.S. citizens' decisions to emigrate *from* the United States but also noncitizens' decisions to immigrate *to* the United States.

---

<sup>229</sup> OECD, TAXATION AND EMPLOYMENT, 128-131 (2011) (reviewing empirical studies).

<sup>230</sup> Costanzo & von Koppenfels, *supra* note 69.

<sup>231</sup> The empirical evidence is mixed. *See* OECD, TAXATION AND EMPLOYMENT 129 (2011) (noting that whereas tax generally has a small effect on migration, the effect is more pronounced for the young, highly skilled, highly educated, and those with high incomes). *But see* Cristobal Young & Charles Varner, *Millionaire Migration and State Taxation of Top Incomes: Evidence from a Natural Experiment*, 64 NAT'L TAX J. 255 (2011) (finding minimal migration response to state income tax increase on millionaires in New Jersey).

A. *Distorting Americans' Choices*

The efficiency argument favoring citizenship taxation over residence taxation is that citizenship taxation discourages Americans from migrating abroad to avoid U.S. taxes; that is, citizenship taxation is said to be residence neutral.<sup>232</sup> But even assuming that residence neutrality enhances welfare,<sup>233</sup> the current citizenship taxation is not residence neutral in all cases. For example, the foreign-earned-income exclusion provides a tax incentive for Americans who can earn income abroad to move to lower tax countries. Moreover, to be residence neutral, the citizenship tax would have to discourage movement not only to lower-tax countries, but also to higher-tax countries. Because the United States does not fully credit other countries' taxes, however, it discourages migration both to higher tax countries and to equal- or lower-tax countries whose taxes are not fully creditable against the U.S. citizenship tax.

Additionally, whether it helps or hurts the economy, the fisc, and taxpayers, citizenship taxation burdens free movement by double taxing and increasing compliance obligations of Americans abroad.<sup>234</sup> There are several problems with a tax that burdens free movement. First, liberal societies tend to see free movement of persons as an end in itself. For example, analyzing an exit tax proposal in 1995, the Joint Committee on Taxation quoted Hurst Hannum for the proposition that “[d]enial or discouragement of the right to emigrate cannot *itself* be a legitimate justification for a governmental action, as acts whose purpose is to destroy human rights are *per se* prohibited by international law.”<sup>235</sup> Human rights treaties reflect the value that liberal societies place on exit,<sup>236</sup> and Americans share this view.<sup>237</sup>

Free movement also can be seen as instrumental to other goals. For example, free movement of persons may improve government through regulatory competition. If people can freely choose where to live, governments must compete with each other for residents. Such competition may check government abuses of civil liberties as well as checking government spending.<sup>238</sup> Thus, free movement is important in democracies

---

<sup>232</sup> Kirsch, *supra* note 18, at 490.

<sup>233</sup> Kirsch concludes that taxes should be residence-neutral because migration decision should be personal. Kirsch, *supra* note 18, at 489.

<sup>234</sup> Part II.B.4 *infra* discussed double tax, and Part III.A. *infra* discussed compliance costs associated with citizenship taxation.

<sup>235</sup> Abreu, *supra* note 3, at 1130.

<sup>236</sup> See Universal Declaration of Human Rights, art. 13.1; International Covenant on Civil and Political Rights, art. 12.2; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, protocol 4 (guaranteeing a person the right to leave any country, including her nationality state).

<sup>237</sup> Cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 211 reporters' note 4 (1987) (“The United States has long taken the position that the ‘right of expatriation is a natural and inherent right of all people’”).

<sup>238</sup> Wolfram F. Richter, *Delaying Integration of Immigrant Labour for the*

because it serves as an alternative and amplifier to voice.<sup>239</sup> Free movement also may help reveal people's true preferences for levels of tax and public goods as people vote with their feet by moving to the jurisdiction that provides their desired mix of tax and benefits.<sup>240</sup>

Free movement in Europe has constituted one element of a strategy to integrate the people and economies of Europe so thoroughly as to make war "unthinkable."<sup>241</sup> Wolfram Richter echoes this goal when he concludes that citizenship taxation "is politically not acceptable for Europe. It deeply conflicts with the widely agreed objective of overcoming nationalistic tendencies in international relations." The guarantee of free movement under EU law is designed not only to prevent war and safeguard political freedom; it also aims to enhance economic growth. Like free trade, free movement of people is thought to advance global economic welfare by allocating human capital efficiently across jurisdictions.<sup>242</sup> Consistent with this idea, recent trade negotiations have made progress on liberalizing migration for the purposes of conducting services.<sup>243</sup> Thus, rather than promoting welfare through residence neutrality, citizenship taxation may reduce it by inhibiting free movement.

In addition to burdening free movement by increasing the costs to move, citizenship taxation encourages nonresident Americans to renounce their U.S. citizenship purely for tax reasons.<sup>244</sup> Increasingly, citizens abroad report that they renounced not to avoid not the tax liability associated with citizenship taxation, but rather its newly increased paperwork and financial reporting burdens.<sup>245</sup> Newspaper stories describe ordinary Americans who, at great emotional cost and sometimes after decades abroad, recently have relinquished their citizenship because their filing burden has become too expensive or complicated, without respect to the tax they owed.<sup>246</sup>

---

*Purpose of Taxation 5* (CESifo Working Paper No. 802, 2002) ("Taxpayers become exploitable when they cannot avoid home taxes by emigrating.").

<sup>239</sup> See Jonathan W. Moses, *Exit, Vote and Sovereignty: Migration, States and Globalization*, 12 REV. INT'L POL. ECON. 53 (2005) (modeling free international migration and showing that it improves government responsiveness to citizen demands).

<sup>240</sup> See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

<sup>241</sup> Schuman Declaration of 9 May 1950, available at [http://europa.eu/abc/symbols/9-may/decl\\_en.htm](http://europa.eu/abc/symbols/9-may/decl_en.htm).

<sup>242</sup> Chang, *supra* note 34, at 1148-9 ("[P]recisely the same theory applied to trade in goods also applies to trade in services. . . . [T]he free movement of workers across borders promotes economic welfare by promoting free trade in the labor market.").

<sup>243</sup> General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) (liberalizing free movement for purposes of providing services).

<sup>244</sup> See Schneider, *supra* note 18, at 28 (referring to U.S. taxes applicable to nonresident Americans as "the citizenship penalty").

<sup>245</sup> See discussion, *supra* Part III.A.

<sup>246</sup> One citizen who renounced after 21 years abroad stated, "I was double taxed

*B. Distorting Non-Americans' Decisions*

Few Americans relinquish their citizenship.<sup>247</sup> Compared to other connecting factors, including residence, citizenship is relatively inelastic. That is, taxpayers are less likely to give up their citizenship than their residence in order to save tax, so taxing them based on their citizenship will create fewer distortions than taxing them based on where they reside. Citizenship is inelastic for many reasons. Citizenship is valuable, and people have strong emotional attachments to their citizenship.<sup>248</sup> People who cannot secure citizenship elsewhere cannot relinquish their U.S. citizenship.<sup>249</sup> For some, relinquishing citizenship will trigger asset taxation.<sup>250</sup> Whatever the reasons, citizenship taxation has not precipitated mass renunciations of citizenship. If the high estimates of the number of nonresident Americans are correct, then only a few thousand out of as many as 7 million nonresident Americans relinquish their citizenship annually.<sup>251</sup>

If the loss of a few thousand citizens per year were the only distortion citizenship taxation caused, we might label the tax efficient. Because its defenders only consider the impact of citizenship taxation on U.S. citizens, however, they have failed to acknowledge that citizenship taxation also may distort inbound migration. The base case in prior analysis is a U.S. citizen who would like to pay less tax and, to achieve that goal, she is willing to migrate to a lower-tax jurisdiction, but not to renounce her U.S. citizenship. With respect to that hypothetical person, citizenship taxation is residence-neutral,<sup>252</sup> and, as long as she is unwilling to renounce

---

on my full pension, but it didn't bother me so much to pay taxes -- it was the annoying paperwork... Tax prep costs me about 1,000 Swiss francs (\$1,123) a year." Another, who renounced after more than thirty years abroad, stated, "The accountancy fee is the main reason why we both renounced our U.S. citizenship last year. It wasn't an easy decision -- super stressful, and very emotional." See Yan *supra* note 129, at [].

<sup>247</sup> NTA 2013 REPORT, *supra* note 26, at 206 (reporting five hundred percent increase in renunciation in recent years). See also *infra* note 251 (estimating renunciations per year in the low hundreds to low thousands).

<sup>248</sup> See Yan, *supra* note 129 (quoting a 71-year-old former citizen as saying, "I renounced my U.S. citizenship in 2011. After I did it, I was so emotional that I threw up outside the embassy. During my renunciation, I broke down. It was like getting a divorce.").

<sup>249</sup> Richard A. Westin, *Expatriation and Return: An Examination of Tax-Driven Expatriation by United States Citizens, and Reform Proposals*, 20 VA. TAX REV. 75, 124 (2000). (discussing statelessness).

<sup>250</sup> Under the U.S. citizenship-renunciation tax, citizens have a deemed sale of their assets when they relinquish their citizenship. The deemed realization triggers recognition if the built-in gain exceeds the inflation-adjusted statutory exemption amount, which was set to \$600,000 in 2008. See I.R.C. § 877A.

<sup>251</sup> Since 1998, the lowest number of listed renunciations was in 231 in the year 2008, and the highest number was 3,415 in the year 2014. See Andrew Mitchel, *2014 - More Expatriations Than Ever*, INTERNATIONAL TAX BLOG, [http://intltax.typepad.com/intltax\\_blog/number-of-expatriates/](http://intltax.typepad.com/intltax_blog/number-of-expatriates/) (Feb., 10, 2015) (last visited Feb. 18, 2015) (compiling statistics from the Federal Register).

<sup>252</sup> Even for this hypothetical person, the current citizenship tax is not residence-

her citizenship, it is also citizenship-neutral. But this analysis ignores the impact of the citizenship tax on inbound migration to the United States.

Citizenship taxation discourages both initial migration and naturalization by marginal migrants from other countries. These migrants are people the United States (and other countries) would like to attract. Economists have calculated that the “average net present value of a (permanent) immigrant [is] \$198,000 for an immigrant with more than a high school education.”<sup>253</sup> Such migrants are so valuable to the U.S. economy that commentators have advocated subsidies for migrants who choose the United States over staying at home or moving elsewhere.<sup>254</sup> And many wealthy countries provide tax incentives for migration by the wealthy or highly skilled.<sup>255</sup> But instead of subsidizing marginal migrants, the U.S. citizenship tax does the opposite—raises their costs.

In deciding whether and where to move, rational marginal migrants calculate the tax for the duration of their anticipated visit. But they also consider the possibility that they will stay permanently. In the United States, unlike in any of the countries with which the United States competes for skilled migrants, the decision to naturalize (or take up permanent legal residence) comes with a hefty price tag: life-long worldwide taxation for the migrant and any of her U.S.-citizen children.<sup>256</sup> And if the naturalized citizen or green-card holder decides to relinquish her U.S. citizenship or her green-card status, she will face the U.S. citizenship-renunciation tax.<sup>257</sup> The higher the immigrant’s income or wealth, the more current U.S. law discourages her from naturalizing. For immigrants to the United States who may be contemplating retiring back home or moving to a third country, the citizenship tax stands as a barrier to naturalization,<sup>258</sup> and probably also to initial migration.

Because marginal migrants are so valuable to the economy, the United States should encourage them to enter, and once they are here, the United States should encourage them to make an enduring commitment by naturalizing. U.S. immigration law reflects a policy to attract and retain this

---

neutral for movements to lower tax countries if she will qualify for the foreign-earned income exclusion amount, \$100,800 in 2015.

<sup>253</sup> Desai et al., *supra* note 33, at 669-70.

<sup>254</sup> See, e.g., Chang, *supra* note 76.

<sup>255</sup> See OECD, TAX AND EMPLOYMENT, OECD TAX POLICY STUDIES NO. 21, 138 (2011) (chart showing tax incentives available for skilled migrants in sixteen OECD countries).

<sup>256</sup> See, e.g., Yan, *supra* note 129 (quoting a dual Canadian-American citizen considering whether apply for U.S. citizenship for his son as wondering, “Do I want to impose a lifetime of paying to have U.S. tax returns prepared upon him?”).

<sup>257</sup> See I.R.C. § 877 (treating relinquishment of citizenship or green-card status as realization event for tax purposes for citizens and long-term (eight years or more) green-card holders who exceed income or wealth thresholds).

<sup>258</sup> One way this incentive may manifest is that when migrants marry Americans, the couple is more likely to move away from the United States.

desirable population.<sup>259</sup> In what Ayelet Shachar labels the “race for talent,” “the United States traditionally has relied on a combination of world-class universities and research institutes, the promise of greater personal freedom and political stability, and relatively lax immigration policies to attract the best international ‘knowledge migrants.’”<sup>260</sup> The United States engages in avid competition with other major migrant-receiving countries for high-skilled migrants, and according to Shachar, “the goal of gaining citizenship in the destination state [is] an independent factor that may affect the choices of knowledge emigrants in choosing a destination country, no less than conditions of pure professional advancement.”<sup>261</sup> In contrast with the United States, competing receiving states, including Canada, Australia, New Zealand, and, increasingly, European countries, offer expedited paths to citizenship for the skilled and highly educated without the specter of citizenship taxation.<sup>262</sup> Indeed, many receiving countries have special tax incentives for the highly skilled.<sup>263</sup> Citizenship taxation puts the United States at a competitive disadvantage in attracting the world’s talent.<sup>264</sup> The importance of encouraging highly skilled workers not only to migrate, but also to naturalize, grows as the sending states of the highly skilled—including India, China, South Korea, and Taiwan—increasingly employ programs to encourage their emigrants to return.<sup>265</sup>

\* \* \*

This Part has argued that, far from achieving residence neutrality, citizenship taxation imposes tax and compliance barriers to movements to and from the United States. Citizenship taxation thus undermines not only

---

<sup>259</sup> For example, in 1990, the United States dropped the requirement that H-1B (high-skill) visa applicants must express an intention to return home at the expiry of the visa. Desai et al., *supra* note 33, at 665. In contrast, the access terms for unskilled migrants are less favorable and the United States denies many need-based social welfare benefits to immigrants. See Chang, *supra* note 34, at 1177-80, 1202, and 1205-06.

<sup>260</sup> See generally Shachar, *supra* note 34, at 170-194 (comparing immigration incentives in six countries with those of the United States).

<sup>261</sup> See *id.*, at 158, 169 (“We are witnessing a dramatically increased worldwide competition for knowledge migrants”); Desai et al., *supra* note 33, at 666 (“[E]ven those countries that don’t explicitly account for skills through a point system appear to be shifting toward recognizing the importance of attracting skilled migrants as they compete in the international market for migrants.”). But see Stephen Yale-Loehr & Christoph Hoashi-Erhardt, *A Comparative Look at Immigration and Human Capital Investment*, 16 GEO. IMMIGR. L. J. 99 (2001) (arguing that U.S. immigration law is not designed to prefer permanent residence for the highly skilled).

<sup>262</sup> See generally Shachar, *supra* note 34, at 170-194 (emphasizing ease of naturalization as conferring a competitive edge in the global race for talent).

<sup>263</sup> OECD, TRENDS IN INTERNATIONAL MIGRATION 133-34 (2005).

<sup>264</sup> Cf. Shachar, *supra* note 34, at 153 (policymakers assume that “unless their governments proactively ‘match’ the offers of admission and settlement extended to the ‘best and brightest’ by other nations, their country will lose out”).

<sup>265</sup> *Id.*, at 167-69. See also Chander, *supra* note 34, at 75.

the value that society places on free movement itself, but also the instrumental goals of free movement, which include the ability of exit to discipline government, reveal preferences, allocate labor efficiently across jurisdictions, and promote international cooperation as a bulwark against war. The weight to assigned to these concerns depends on the impact citizenship taxation has on human mobility, an unanswered empirical question.

Evaluating the efficiency case for citizenship taxation involves other unanswered empirical questions, including whether the tax discourages the use of American workers abroad by raising the costs of employing them.<sup>266</sup> This Article can only raise these questions, it cannot answer them. It is worth noting, however, that the traditional case for citizenship taxation entirely ignores the effect of the tax on inbound migration. Policymakers considering reforming citizenship taxation should consider the impact of the tax on movements from *and to* the United States.

## V. POLICY ALTERNATIVES

Advocating a particular policy alternative to formal citizenship taxation is not a goal of this Article, but this Part reviews proposals that would better serve the fairness, administrative, and efficiency interests discussed earlier.

### A. *Citizenship as One Factor*

The United States could reformulate its citizenship tax in a variety of ways. Under a strict residence-based tax regime, such as the one proposed by Skip Patton, the United States would impose worldwide taxation on those meeting the substantial presence test under current law, whereas all others would be subject to tax by the United States on only U.S.-source income.<sup>267</sup> As the discussion in Part II.B. suggests, however, pure residence-based taxation does not accord well with the leading ethical justification for ability-to-pay taxation, namely that the tax obligation arises from a person's membership in a national community. Although citizens who meet the substantial presence test likely would be U.S. national community members, "substantial presence" taxation would fail to tax many Americans abroad who, although they do not meet the substantial presence test, nevertheless remain members of the national community.

Another possibility would be to move away from citizenship taxation, but not all the way to strict residence taxation. For example, the United States could tax the worldwide income only of citizens maintaining a permanent home in the United States. Or citizenship could function as a rebuttable presumption of tax residence, and citizens would have the

---

<sup>266</sup> GAO, UNCERTAIN BENEFITS, *supra* note 38, (concluding that the GAO was unable to determine the impact of increased costs on hiring of Americans abroad).

<sup>267</sup> Patton, *supra* note 29, at 730-32.

burden to show that they had closer personal and economic connections to another state. As another possibility, Blum and Singer propose combining a modified residence rule with an unlimited foreign-earned-income exclusion.<sup>268</sup> Under their proposal, a citizen would be considered a U.S. resident in any year that she meets the U.S. substantial presence test, as well as for the three years following that year. In those three years, however, the taxpayer would exclude her foreign earned-income without limitation.<sup>269</sup> Yet another possibility would be to retain citizenship taxation for certain groups, such as U.S. military personnel or other employees of the federal government, who are expected to reside abroad only temporarily.<sup>270</sup>

Other commentators have made other proposals, and they share the crucial feature that they would move from using the formal status of citizenship as sufficient basis for worldwide tax to a more substantive inquiry that accounts for contacts between the taxpayer and the state. Most states regard physical presence and the possession of a permanent abode in the territory to be the most important criteria for triggering worldwide taxation, but Part II gave reasons why it also would be fair to use citizenship as a factor.

If the United States moved away from pure citizenship taxation, it presumably would continue to exercise source jurisdiction over nonresident citizens' U.S.-source income, just as it exercises source jurisdiction over nonresident aliens' U.S.-source income. Thus, in the typical case, a nonresident American would pay taxes on her worldwide income only to the state where she resides, and she would pay U.S. tax only on income she earns in the United States. If her residence state also taxed her U.S.-source income, then her residence state would be obliged under international tax norms to credit the U.S. tax. Thus, the movement away from citizenship taxation principally would change the taxation of nonresident citizens' foreign-source income.

Although nonresident citizens would continue to have tax obligations to the United States to the extent of their U.S.-source income, the move away from taxing their foreign-source income would simplify

---

<sup>268</sup> Blum & Singer, *supra* note 18, at 724-38. Over the years, member of Congress have proposed retaining citizenship taxation with an unlimited foreign-earned-income exclusion. *See id.*

<sup>269</sup> *Id.*, at 725-31 (describing proposal and its similarity to Finnish law, which creates a rebuttable presumption of continued tax residence for three years after the taxpayer no longer meets the physical-presence test).

<sup>270</sup> Tax enforcement issues are less challenging for this group because they receive their wages from the federal government. Additionally, the U.S. Model and OECD Models contemplate that, in most cases, states retain exclusive jurisdiction to tax their own employees' salaries, even when those employees work abroad in the territory of the other member state. OECD MODEL TAX TREATY, *supra* note 165, art. 19; U.S. MODEL INCOME TAX CONVENTION OF NOVEMBER 15, 2006, art. 19, *available at* <http://ustreas.gov/press/releases/reports/hp16801.pdf>, *reprinted in* 1 Tax Treaties (CCH) ¶ 209.

their compliance obligations. Millions of Americans subject under current law to worldwide taxation could move into a simpler, source-based tax regime. Any such taxpayers who had no U.S.-source income would have no tax filing obligations to the United States. Nonresident citizens with U.S.-source income could file abbreviated returns in the United States, and many would be able to completely discharge their tax liability through withholding, thereby avoiding the need to file even an abbreviated return. To simplify nonresident citizens' compliance burdens, it would be crucial in appropriate cases also to relieve citizens of FBAR and FATCA reporting requirements if those citizens would not be subject under the new regime to worldwide taxation.

Congress also could provide relief to citizens abroad who *remain* members of the national community. For these nonresident citizens, Congress could adopt a strategy some countries employ in taxing multinational corporations, namely, a white list.<sup>271</sup> Under this strategy, Congress would direct the Treasury Department to identify a list of other high-tax countries, or create a set of criteria for identifying countries with tax burdens similar to or higher than that of the United States.<sup>272</sup> Then, if an American citizen could show that she resides abroad in a white list country,<sup>273</sup> she would be exempt from the citizenship tax.<sup>274</sup> Even if the United States placed only the *other OECD countries with higher overall tax burdens than ours* on the list, so that the list was only 31 countries long,<sup>275</sup> it could relieve about 40% of Americans abroad from the

---

<sup>271</sup> The white list approach is widely used in tax. *See, e.g.,* OECD, TOWARDS GLOBAL TAX CO-OPERATION: PROGRESS IN IDENTIFYING AND ELIMINATING HARMFUL TAX PRACTICES 17 (2000) (listing jurisdictions “failing commit to international standards on information exchange,” commonly called tax havens).

<sup>272</sup> Some countries use a percentage-of-home-tax approach. For example, a country might exempt income of foreign subsidiaries of domestic companies only if the subsidiaries is established in a country with a corporate tax rate of, say, 75% of the home country's rate. *See, e.g.,* AULT & ARNOLD, *supra* note 44, at 480-85 (describing several such regimes).

An overall-tax-burden approach, rather than an income-tax-only approach could accommodate significant differences in the tax mix between the United States and other major receiving countries of Americans abroad, which raise a much larger portion of revenues through consumption taxes. If the United States were to white list only OECD countries with higher *income* tax burdens than the United States, its white list would be shorter. *See* OECD FACTBOOK 2013, *supra* note 74 (showing that only 14 OECD countries had taxes on “income and profits” exceeding that of the United States in 2010, although those included five of the top ten receiving countries of American migrants, namely, Australia, Canada, Israel, Italy, and the United Kingdom).

<sup>273</sup> She could annually file with the United States a single form—a certificate of residency abroad.

<sup>274</sup> In the alternative to entirely exempting nonresident citizens in white-list countries from information filing requirements, Congress could apply those requirements only to taxpayers exceeding a large statutory income threshold indexed for inflation. Such a rule would work in conjunction with an exit tax to burden tax-motivated residence changes, while exempting the majority of ordinary Americans abroad.

<sup>275</sup> Of the 34 OECD countries including the United States, only Mexico and Chile

citizenship tax.<sup>276</sup> If the United States were willing to add to the list Mexico, an OECD country with a lower tax burden than ours, the white list could cover more than 70% of Americans abroad.<sup>277</sup> Such an approach need not have a significant revenue impact, since Americans who reside abroad in higher- or comparable-tax countries often owe no residual U.S. tax under the current regime due to a combination of the foreign-earned-income exclusion and the foreign tax credit. Although I have suggested adding OECD countries to the white list because so many Americans abroad reside in fellow OECD countries and because the OECD's publicly available statistics facilitate ready comparisons of national tax burdens, there would be no reason not to add to the list other jurisdictions with taxes comparable to that of the United States. A virtue of the white list approach is that it would focus administrative efforts on taxpayers who reside abroad in low tax countries or tax havens.

### B. *Anti-Abuse Rules*

A central problem with residence taxation, and one that citizenship taxation effectively mitigates, is abusive tax-motivated migration. An abuse case might involve, for example, someone who changes residence only temporarily to effectuate a sale of a highly appreciated capital asset while escaping tax by her original residence state on the sale.<sup>278</sup> Such transactions call for focused anti-abuse rules.

At a minimum, the United States should not permit a resident citizen to relinquish her U.S. tax residence until she has established tax residence in another country. This would avoid situations in which a person is stateless for tax purposes. As part of their proposal to move to extended-residence taxation, Blum and Singer would impose an exit tax upon loss of U.S. tax residence. Exit taxes typically treat loss of tax residence as a realization event, so that the person pays tax on the built-in appreciation of her assets. Likewise, Bernard Schneider recently proposed a departure tax regime, modeled on Canadian law, which would treat any termination of U.S. tax residence as a deemed disposition of the departing taxpayer's

---

have a lower tax burden as a percent of GDP than does the United States. *See Total Tax Revenue, in OECD FACTBOOK 2013, supra note 74, at 225* (U.S. taxes in 2010 were 24.8% of GDP, compared to 18.1 percent for Mexico, and 20.9 percent for Chile; the highest tax countries were Denmark at 48.2 percent and Sweden at 45.8 percent).

<sup>276</sup> I arrived at this estimate by dividing the UN's estimate of the sum of the U.S. migrant populations in the relevant OECD countries by the UN's estimate of the global U.S. migrant population. *See UN MIGRATION DATA, supra note 73.*

<sup>277</sup> *See supra note 73* for method of estimation.

<sup>278</sup> There is general agreement that the super-rich who renounce citizenship do so primarily to avoid estate taxes, not income taxes. *See, e.g., Westin, supra note 249, at 80.* Under the U.S. citizenship tax, patient citizens can avoid income tax on appreciation of capital assets, due to the basis step-up at death. I.R.C. § 1014. But a person must renounce citizenship to avoid the estate tax. Estate taxation has its own complex set of rules that police expatriation, which Congress could strengthen. This Article focuses on income, not estate, tax issues.

assets, but after payment of the departure tax, the United States would exempt nonresident citizens' foreign-source income.<sup>279</sup>

Exit taxation is a widespread approach to preventing tax-motivated migration.<sup>280</sup> Although exit taxes are common, they pose challenges of their own.<sup>281</sup> For example, like citizenship taxation, taxing changes of residence impairs free movement.<sup>282</sup> Acknowledging this, countries limit their exit taxes in various ways. For example, exit taxes may be subject to large exemption amounts—in the many hundreds of thousands or millions of dollars.<sup>283</sup> States also may defer payment of the exit tax until the taxpayer sells the underlying assets. Such deferral is consistent with the anti-abuse purpose; if the taxpayer did not move abroad to make a low-taxed disposition of her assets, the exit tax should not apply. Likewise, countries that impose exit taxes may suspend the payment of the tax for a period of years to see whether the exiting taxpayer sells her appreciated assets. If the exiting taxpayer does not sell her assets within a prescribed period—for example, five years—the country may waive the tax on the assumption that the change of residence was not tax-motivated.<sup>284</sup>

Finally, Congress could explore making the exit tax elective. For example, a taxpayer moving abroad could elect to pay the exit tax, which would remove her from the U.S. worldwide tax regime while abroad. This election would mirror the election available under current law for nonresident aliens to be taxed as U.S. tax-residents.<sup>285</sup> If an American did not make the election to pay exit tax, she would remain subject to U.S. worldwide taxation while abroad. Since Americans intending to return to the United States would be less likely to make the election to pay the exit tax, the availability of the election presumably would align citizenship taxation better with national community membership.

---

<sup>279</sup> The United States presumably would allow a basis step-up in the assets of taxpayers entering the country. Schneider, *supra* note 18, at 66-76.

<sup>280</sup> For a comprehensive analysis of exit tax regimes in dozens of jurisdictions, see Luc de Broe, *General Report: The Tax Treatment of Transfer of Residence by Individuals*, 87 CAHIERS DE DROIT FISCAL INT'L 19 (2002).

<sup>281</sup> See generally Abreu, *supra* note 3 (reviewing policy disadvantages of exit taxes).

<sup>282</sup> For this reason, the European Court of Justice (ECJ) held that the French exit tax, when applied to an EU national moving to another EU Member State, violated the freedom of movement of persons guaranteed by EU law. Case C-9/02, *De Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie*, 2004 E.C.R. I-2409. The ECJ has not reviewed a citizenship tax, although it upheld the Dutch estate tax's extended-residence rule that applied to Dutch citizens. The ECJ distinguished the Dutch extended residence rule from the French exit tax, because, the former did not accelerate taxation. See Case C-513/03, *van Hilten-van der Heijden v. Rijksbelastingdienst*, 2006 E.C.R. I-1957.

<sup>283</sup> Cf. I.R.C. § 877A(a)(3) (setting the exemption from the U.S. citizenship-renunciation tax to \$600,000 in 2008, and inflation-indexing it).

<sup>284</sup> See *Lasteyrie*, ¶¶ 3-7 (describing French exit tax as deferred for five years, after which it was waived if the taxpayer sold no assets).

<sup>285</sup> I.R.C. § 7701(b)(1)(A)(i)-(iii).

Formulating an exit tax that narrowly targets tax-motivated residence changes without unduly burdening free movement poses challenges, but it appears to be the lesser of two evils when compared to a regime that taxes all nonresident citizens on their worldwide income, regardless of whether taxes motivated their residence decision. While the current citizenship taxation treats all Americans abroad as tax dodgers, a more tailored rule could more narrowly target abuse cases.

## VI. CONCLUSION

The United States stands alone in the world in taxing its citizens' foreign income, no matter how long they reside abroad. The Treasury Department lists conforming with international tax norms as an independent tax policy goal,<sup>286</sup> and even supporters of the tax concede that it "push[es] the limits of acceptable state practice."<sup>287</sup> But the uniqueness of U.S. citizenship taxation is not enough to condemn it. Jurisdictional conflicts may be an acceptable cost of arriving at the right tax policy. The problem with citizenship taxation isn't just that it differs from the tax rules used by other countries. As this Article has shown, citizenship taxation is bad policy.

While this Article concluded that the equity case for citizenship taxation is mixed, citizenship taxation increases complexity for nonresident taxpayers, is impossible to enforce, and does not serve anti-abuse goals better than would less restrictive alternative regimes. Citizenship taxation makes the United States a less inviting receiving state for wealthy and skilled migrants who understand that if they become green-card holders or naturalize, they will be subject to tax on their worldwide income for the rest of their lives, even if they return to their home countries. Citizenship taxation therefore puts the United States at a disadvantage in attracting skilled immigrants in an environment where other major receiving countries are subsidizing resettlement and fast-tracking naturalization for highly desirable immigrants. In addition to helping the United States compete in the global race for talent, abandoning pure citizenship taxation also would promote free movement, improve our relations with Americans abroad, avoid commodifying citizenship, and reduce instances of unrelieved double taxation.

---

<sup>286</sup> According to the Treasury Department,

To promote the tax policy goal of conforming with international norms, countries should, to the extent possible, adopt broad tax policies that harmonize with the tax policies generally in use internationally. The adoption by one country of tax policies that deviate significantly from international norms can lead to double taxation or double non-taxation. Further, rules that are inconsistent with those generally in use internationally tend to increase administrative burdens.

U.S. DEP'T OF TREASURY, THE DEFERRAL OF INCOME EARNED THROUGH U.S. CONTROLLED FOREIGN CORPORATIONS: A POLICY STUDY 85 (2000).

<sup>287</sup> Kirsch, *Nationality Law*, *supra* note 176, at 401.

This Article has only begun to elaborate the case against citizenship taxation. Further consideration of the tax would reveal that it disproportionately burdens American women, who are more likely than American men to leave the United States due to marriage. Moreover, to the extent that the citizenship tax encourages such women to relinquish their U.S. citizenship, it leaves them more vulnerable upon divorce.<sup>288</sup> Citizenship taxation by the United States also could embolden developing countries to enact similar taxes in an effort to reduce brain drain. Such reforms would hamper the United States in attracting highly-skilled immigrants.

One marker of a sustainable international tax policy is that its adoption by every state should not lead to absurd results. Return to the case of Eduardo Saverin, who was born a Brazilian national and moved with his parents to the United States, where he naturalized without relinquishing his Brazilian nationality. Suppose that, when Saverin moved to Singapore, he gave up neither his U.S. nor Brazilian nationality. If Brazil adopted a U.S.-style citizenship tax, what would be the tax consequences? Singapore would be his residence state, but both Brazil and the United States would seek to tax his worldwide income. Would the United States credit the Brazilian tax, even if Saverin lived in Singapore? If not, dual and multiple nationals might experience stacking citizenship taxes.

Citizenship taxation was originally designed to punish “economic benedict Arnolds” who fled the United States during the Civil War to avoid Civil War taxes and the draft. In the modern era, migrating from the United States is not the disloyal act of a wealthy few. Our global economy and our increasingly interconnected world create professional and personal opportunities that Americans can only claim by moving abroad. Concerns about a few high-profile, rich tax defectors who can be sanctioned with targeted anti-abuse regimes should not drive tax policy governing seven million Americans reside abroad.

---

<sup>288</sup> The desire to avoid FATCA and FBAR reporting obligations worsen this vulnerability by encouraging couples in which only one member is an American to put their assets in the name of only the non-American spouse.