

Reasons for Citizenship-Based Taxation?

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ABSTRACT

The United States is alone in its practice of taxing the worldwide income of not only U.S. residents, but also U.S. citizens. Such a practice, at least at first glance, presents serious equitable concerns for Americans who live abroad. The author notes that the government last discussed its reasons for using such a system in 1924, the year in which the Supreme Court affirmed the constitutional validity of citizenship-based taxation in *Cook v. Tait*. In justifying its decision, the Supreme Court relied on the inherent benefits received by U.S. citizens and their property from the U.S. government, regardless of where the citizens made their home or where the citizens' property was located. Despite the Supreme Court's finding, the appropriateness of using citizenship as a jurisdiction to tax has been the subject of academic controversy. In addition, there is strong evidence that American citizens living abroad view citizenship-based taxation as unfair and unjustified. If citizenship taxation is to continue, then it would be helpful if Congress or the Executive Branch explained the reasons for its continued use to combat the perception of unfairness.

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I. OVERVIEW OF CITIZENSHIP-BASED TAXATION

The United States is alone in its practice of citizenship-based taxation.¹ When income tax was first introduced in the United States to

1. The United States reserves its right to tax all “United States persons,” which include U.S. citizens, regardless of where that citizen is resident. I.R.C. § 7701(a)(30) (2012). Eritrea is sometimes cited as an example of another country that taxes based on citizenship. *But see* Michael S. Kirsch, *Revisiting the Taxation of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117, 208–210 (2014) (showing that the Eritrean diaspora tax is different, to the extent that its purpose is to fund political destabilization in the Horn of Africa and it is enforced through illicit means such as violence, fraud, and extortion. The Eritrean diaspora tax is also a flat, two percent levy on nonresidents, in contrast with the U.S. system’s progressive rates.).

The Philippines has also been cited as practicing citizenship-based taxation, *see* STAFF OF J. COMM. ON TAXATION, 104TH CONG., ISSUES PRESENTED BY PROPOSALS TO MODIFY THE TAX TREATMENT OF EXPATRIATION app. B 6 (Comm. Print 1995) [hereinafter J. COMM. ON TAXATION REPORT], but it ceased to do so in 1997. Tax Reform Act of 1997, Rep. Act No. 8424, § 23(C) (Dec. 11, 1997) (Phil.). Similarly, Mexico experimented with citizenship-based taxation until 1981, when it concluded this practice. J. COMM. ON TAXATION REPORT, *supra*, at 1.

As an interesting counter-normative development, China appears to be experimenting with a form of citizenship-based taxation. *See* Keith Bradsher, *China Wants Taxes Paid by Citizens Living Afar*, N.Y. TIMES, Jan. 7, 2015, <http://www.nytimes.com/2015/01/08/business/international/china-starts-enforcing-tax->

raise revenue for the Civil War, the government imposed a higher rate of tax on the U.S.-source income of nonresident Americans. In imposing this higher rate, Congress reasoned that because American citizens abroad were shirking their duties to the United States while it was at war, these citizens should compensate for their lack of civic engagement by paying a higher rate of tax on their U.S.-source income.² When true citizenship-based taxation (that is, a regime that taxes a nonresident citizen's worldwide income) was introduced in subsequent tax legislation, the government put forward a rationale based on a citizen's duties to the state and notions of community membership.³

Although ancillary issues concerning citizenship-based taxation were debated after the enactment of the Revenue Act of 1913,⁴ which was the first "modern" or post-Sixteenth Amendment⁵ tax legislation, the U.S. government was silent on the main issue of why the United States should be practicing citizenship-based taxation. This silence continued

law-for-citizens-working-abroad.html. If China were in fact successful at adopting a citizenship-based tax regime, it would change the conversation from citizenship-based taxation being a counter-normative anomaly, to something more along the lines of citizenship-based taxation being a privilege of superpower countries (and perhaps also an indicator of those countries' hubris). Professor Allison Christians, however, says that the *New York Times* report on China's adoption of citizenship-based taxation was false, and that the United States remains unique in its practice of taxing the worldwide income of nonresident individual citizens. Allison Christians, *UPDATE: China Does NOT Follow US lead, Taxing its Global Diaspora. (If they did, it would be a terrible idea)*, TAX, SOCIETY & CULTURE (Jan. 8, 2015, 12:14 PM), <http://taxpol.blogspot.ca/2015/01/china-to-follow-us-lead-taxing-its.html>.

2. See *infra* Part II, note 36 and accompanying text.

3. See *infra* Part II, note 45 and accompanying text.

4. Act of Oct. 3, 1913, ch. 16, 38 Stat. 114, 166.

5. The Sixteenth Amendment to the Constitution allowed Congress greater flexibility in its taxing power. U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."). Prior to its adoption in 1913, other Constitutional provisions required that Congress apportion direct taxes according to population, see U.S. CONST. art. I, § 2, cl. 3; that Congress ensure that any duties and excise taxes were "uniform throughout the United States," *id.* art. I, § 8, cl. 1; that Congress guide the apportionment of taxes according to population with the Constitutionally required census, *id.* art. I, § 9, cl. 4, § 2, cl. 3; and that Congress not impose state-based export taxes or duties, *id.* art. I, § 9, cl. 5.

The motivation for adopting the Sixteenth Amendment was the Supreme Court's decision in *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429 (1895), *aff'd on rehearing*, 158 U.S. 601 (1895). The *Pollock* decision reasoned that an income tax on property—including interest, rents, and dividends—was a direct tax and thus must be apportioned according to population as indicated in Article I, Section 2, Clause 3. *Pollock*, 158 U.S. at 621. The result was that *Pollock* invalidated general taxing statutes because they failed the apportionment requirement (for example, the Revenue Act of 1894, ch. 349, §73, 28 Stat. 509, 553, 556 (1895), which imposed a two percent tax on income over \$4,000), and had the practical effect of restricting any future federal income taxation to salaries, gifts, inheritances, and corporate profits. *Pollock*, 158 U.S. at 637.

for the almost 90 years between 1924, when the Supreme Court found citizenship-based taxation to be constitutional based on an inherent-benefits-received rationale,⁶ and 2010, when the U.S. government enacted the Foreign Account Tax Compliance Act (“FATCA”)⁷ for the purposes of enforcing tax compliance by U.S. taxpayers, both resident and nonresident, who use foreign bank accounts.⁸ The primary objective of FATCA is to stop tax evasion by U.S. residents who use foreign bank accounts to hide money; the legislation requires foreign banks to share information about any person with indicia of U.S. tax status.⁹ An important secondary effect of FATCA, however, is that the U.S. capacity to administer citizenship-based taxation is greatly increased, which makes it an opportune moment for the United States to revisit its reasons for taxing those who have no economic connection to the country except

6. *Cook v. Tait*, 265 U.S. 47, 56 (1924) (“[T]he government, by its very nature, benefits the citizen and his property wherever found, and therefore has the power to make the benefit complete. Or to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, and was not and cannot be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen.”).

7. Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, §§ 501–502 (2010), 124 Stat. 71, 97–109. FATCA functions by imposing new reporting requirements on foreign financial institutions (broadly defined, *see* Treas. Reg. § 1.1471-5(d) (as amended in 2014)) that serve U.S. persons. These reporting requirements are enforced by 30 percent withholding of any U.S.-sourced payment to the foreign financial institution. I.R.C. § 1471 (2012).

8. To arrive at this statement, I surveyed all relevant government documents created between 1789 and 2015 using ProQuest Congressional and ProQuest Legislative Insight databases. The documents I consulted included the Congressional Record, the Congressional Globe, the Annals of Congress, House and Senate Journals, House and Senate documents, House and Senate Reports, Executive Branch Documents, and published and unpublished hearings. I additionally consulted statements and publications issued by the Joint Committee on Taxation, the Joint Committee of Internal Revenue, the Senate Committee on Foreign Relations, the Senate Committee on Finance, and the House Committee on Ways and Means.

9. *See* Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, § 501. By “foreign banks,” I mean “foreign financial institutions” as defined by Treas. Reg. § 1.1471-5(d). For background information on the events that led to the enactment of FATCA, *see* Allison Christians, *Putting the Reign Back in Sovereign: Advice for the Second Obama Administration*, 40 PEPP. L. REV. 1373, 1373–74, 1382 (2013) (“FATCA arose directly in response to publicity surrounding well known and venerable foreign institutions, most especially in Switzerland, that have helped U.S. customers hide income and assets from the IRS.”). The most famous actor in this controversy was the Swiss bank UBS AG, which, after Bradley Birkenfeld, one of UBS’s bankers, informed the U.S. Department of Justice of the Swiss bank’s tax evasion practices, was forced to pay \$780 million in fines. *UBS to Pay \$780 Million to Settle Tax Case*, N.Y. TIMES: DEALBOOK (Feb. 18, 2009, 4:28 PM), <http://dealbook.nytimes.com/2009/02/18/ubs-reaches-deal-over-offshore-banking-services/>.

for their citizenship status.¹⁰ But, despite being an appropriate time for examining this issue, the U.S. government has restricted its statements to discussions of how FATCA will deter offshore tax evasion and “tax cheats,” and has so far failed to take advantage of the opportunity to discuss the larger concept of citizenship-based taxation.¹¹

In America, the fact that the United States assesses a worldwide tax based on an individual’s citizenship is not a topic of everyday conversation.¹² Among those U.S. residents who are aware of citizenship-based taxation, most are unaware of the problems associated with this unique practice and are thus unable to empathize with those who are disproportionately affected by its burdens. In particular, it is the invisible nature of this system’s imposition of tax on a nonresident citizen’s worldwide income, and the fact that individuals lack recourse against such imposition, that makes its use, at least on first impression, controversial. Those burdened by it—namely, American citizens living abroad—have no dedicated representative in Congress,¹³ and their

10. It is important to remember how difficult it is to administer a citizenship-based tax regime without mandatory global reporting. There is no mechanism by which the United States tracks the location of its citizens. Similarly, unless U.S.-citizen taxpayers either work for a U.S. corporate subsidiary or have previously complied with their foreign reporting and filing obligations, the IRS has no real way of knowing who is compliant and who is not. Thus, although not enacted for reasons related to citizenship-based taxation, the effect of FATCA’s worldwide reporting is to make, for the first time, the effective administration of citizenship-based taxation a reality. Note, however, that there are concerns about the capacity of the IRS to enforce citizenship-based taxation, even with the increased information offered by FATCA. See NAT’L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS 143 (2008).

11. FATCA’s central goal is “rooting out individuals hiding their money in bank secrecy jurisdictions[.]” Douglas Shulman, Prepared Remarks of Commissioner Douglas Shulman before the 22nd Annual George Washington University International Tax Conference (Dec. 10, 2012). For a typical statement from an elected representative concerning FATCA, see the remarks of Senator Max Baucus (D-Mont.) quoted in *The New York Times*. See David Jolly, *For Americans Abroad, Taxes Just Got More Complicated*, N.Y. TIMES, Apr. 15, 2012, <http://www.nytimes.com/2012/04/16/business/global/for-americans-abroad-taxes-just-got-more-complicated.html> (“Offshore tax evasion costs the U.S. jobs and billions of dollars each year, and it puts an unfair burden on the average American taxpayer to make up the difference. . . . In an era when budgets are tight, it’s critical for the I.R.S. to have the resources it needs to root out tax cheats.”).

12. Those with Green Card status, formally termed “lawful permanent residents,” are deemed to be residents of the United States and are thus also subject to tax on their worldwide income regardless of whether or not they actually live in the U.S. See I.R.C. §§ 7701(b)(1)(A), 7701(b)(6) (2012).

13. See generally Nancy Staudt, *Taxation Without Representation*, 55 TAX L. REV. 555 (2002). Also, note that even residents of U.S. territories have nominal representation in Congress, despite the fact that some of those residents, such as those of American Samoa, are not U.S. citizens but rather U.S. nationals. In contrast, note that the residents of Washington, D.C., like citizens abroad, have no voting Congressional representation (although they do have three electoral college votes for presidential elections). Since November 2000, the District of Columbia has used the slogan “Taxation Without

physical absence from the United States makes them ill-positioned to mount a public-relations campaign against the practice.¹⁴ Thus, in effect, citizenship-based taxation is a system that disproportionately affects a vulnerable minority.

A rebuttal to this assertion would be that only those who choose to leave the United States are affected by citizenship-based taxation. Therefore, because the practice exclusively affects a self-selecting group, many of the nefarious characteristics associated with minority discrimination are removed. However, classifying those affected by citizenship-based taxation as self-selecting negates the reality of children who are born in America and receive citizenship as a birthright, even if they leave at a very young age (often termed “accidental Americans”);¹⁵ children of Americans who are born abroad and obtain citizenship by lineage;¹⁶ and the general, globalized nature of today’s world, which often requires people to leave the United States for personal, education, or employment reasons.¹⁷ Further, to the extent that those supporting citizenship-based taxation do so on the premise that nonresident

Representation” on its motor vehicle license plates. Chan Sewell, *Message Gets Rolling; D.C. Government Enlists Residents’ Vehicles In Campaign for Congressional Representation*, WASH. POST, Nov. 5, 2000, at C.01. For more on the lack of dedicated Congressional representation for U.S. citizens living abroad, see *infra* note 81, and the accompanying text.

14. A rebuttal to the argument that those who live abroad have no capacity to mount a public relations campaign would be the presence of American Citizens Abroad and other similar expatriate lobbying groups. But while recognizing that small pockets of expatriates form communities and are thus able to combine their resources, the expatriate community is generally diffuse and is thus at a structural disadvantage. One could, however, argue that the internet is an equalizer in terms of facilitating association and would remove most, if not all, barriers that would prevent an expatriate from engaging with support and advocacy groups such as American Citizens Abroad.

15. The Fourteenth Amendment to the U.S. Constitution bestows citizenship on anyone born in the United States. U.S. CONST. amend XIV § 1, cl. 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”). See also 8 U.S.C. § 1401(a) (2012) (listing those who are nationals and citizens of the United States at birth). The result of this policy is that a person who is born in the United States, but then leaves permanently at a very young age, is nonetheless considered a citizen and is thus subject to worldwide taxation on all sources of income. Boris Johnson is among the most famous examples of those affected. See, e.g., David A. Graham, *London Mayor Boris Johnson Hates the IRS, Too*, ATLANTIC (Feb. 17, 2015), <http://www.theatlantic.com/international/archive/2015/02/boris-johnson-renounces-us-citizenship-tax-bill-mayor-london/385554/>.

16. See 8 U.S.C. §§ 1401(c)–(e), (g) (2012).

17. For examples of Americans moving abroad for employment, see Emilie Yam, *Young Americans Going Abroad to Teach*, CNN (Mar. 20, 2009), <http://www.cnn.com/2009/TRAVEL/03/20/teaching.abroad/index.html>. For a statistic showing that the amount of Americans studying abroad has tripled in the past twenty years, see Press Release, Institute of International Education, *Open Doors 2013: International Students in the United States and Study Abroad by American Students are at All-Time High* (Nov. 11, 2013).

Americans who do not wish to be taxed by the United States while abroad may simply relinquish their citizenship, such proponents of citizenship-based taxation have grossly underestimated the breadth of the relinquishment process. In addition to the financial,¹⁸ administrative, and emotional burdens associated with relinquishing citizenship, one must also have a new citizenship available post-relinquishment to avoid the specter of being stateless.¹⁹ The combined effect of these disadvantages means that citizenship becomes a quasi-immutable characteristic, which makes any discrimination on this ground all the more suspect.

Despite the lack of popular debate about, and awareness of, citizenship-based taxation, which is likely due to the fact that those affected by it have a reduced visibility and presence within the United States, many academic commentators have produced in-depth analyses of the substantive issues associated with the topic. Professor Reuven Avi-Yonah has argued that citizenship-based taxation is an outdated mode of assessment and has no place in today's globalized society.²⁰ Professor Ruth Mason has provided thoughtful and meticulous rebuttals to the arguments in favor of citizenship-based taxation.²¹ Professor Daniel Shaviro has proposed a method for making citizenship-based taxation fairer,²² and Professor Edward Zelinsky has argued that citizenship-based taxation is simply a proxy for assessing taxes based on an individual's domicile.²³ Finally, Professor Michael Kirsch acknowledges the problems associated with the current administration of citizenship-based taxation, but argued first that due to the benefits that

18. For more on the financial burdens involved with relinquishing citizenship, see I.R.C. § 877 (2012) (treating relinquishment of citizenship or green-card status as a realization event for tax purposes for those who exceed income or wealth thresholds). With respect to administrative fees, the State Department announced its intention to increase the fee for renunciation of U.S. citizenship by 422% from \$450 to \$2,350 in 2014. Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulate—Visa and Citizenship Services Fee Charges, 79 Fed. Reg. 51,247, 51,251 (Aug. 28, 2014) (codified at 22 C.F.R. § 22.1).

19. Although the U.S. is one of the few countries that will allow relinquishment of citizenship even if the person relinquishing does not hold citizenship in another country, State Department guidelines require its employees to convey the difficulties that such a person would face, including the loss of consular assistance and greatly reduced ability to travel. *Statelessness Resulting from Loss of Nationality*, 7 U.S. Dep't of State, Foreign Affairs Manual § 1215 (2008). Accordingly, unless a person intends to become stateless as a form of political protest, the consequences of doing so are great enough to make it a practically impossible option.

20. Reuven S. Avi-Yonah, *The Case Against Taxing Citizens*, 58 TAX NOTES INT'L 389 (2010).

21. See generally Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. (2016).

22. See generally Daniel Shaviro, *Taxing Potential Community Members' Foreign Source Income*, NYU Law and Economics Research Paper No. 15-09.

23. Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1291 (2011).

citizens receive, and, more recently, because citizenship serves as an important indicator of a person's membership in a community, citizenship-based taxation can accordingly be a rational, fair way to assess an individual.²⁴

In addition to the substantive issues discussed by academic commentators, there are important administrative and enforcement issues that greatly influence how citizenship-based taxation is experienced by nonresident Americans. Most important among these are the unreasonably high compliance costs imposed by the U.S. citizenship-based taxation regime. In Canada—which is a good comparator to the United States because the countries share a language, have similar financial accounting and fiscal principles,²⁵ and because Canadian financial professionals are generally familiar with any differences between the U.S. and Canadian systems²⁶—estimates for accounting costs to file a basic offshore income tax return, even when one does not

24. See generally Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N. Y. U. L. REV. 443, 470–79 (2007) (discussing the “benefits theory” of citizenship-based taxation); Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad*, *supra* note 1, at 126–27. It is worth noting that Professor Kirsch's *Taxing Citizens in a Global Economy* provides a thorough history of citizenship-based taxation, which is so comprehensive that some tax historians cite it as a quasi-primary source. See, e.g., Joseph J. Thorndike, *Tax History: Why We Tax Everyone on Everything*, TAX ANALYSTS TAX HISTORY PROJECT (Mar. 13, 2014), <http://taxhistory.org/thp/readings.nsf/ArtWeb/3AF72D29CABEB75085257D1B0041C874>.

25. For support of the statement that the United States and Canada share similar accounting principles, see, e.g., Eli Amir, Trevor S. Harris & Elizabeth K. Venuti, *A Comparison of the Value-Relevance of U.S. versus Non-U.S. GAAP Accounting Measures Using Form 20-F Reconciliations*, 31 J. ACCT. RES. 230, 233 (1993) (noting that Canadian companies were excluded from the article's survey due to similarities between accounting systems). See also the “wraparound” SEC Forms F-7, F-8, and F-80, which permit Canadian companies to avoid the U.S. GAAP reconciliation exercise that would otherwise be required by Form 20-F. See 17 C.F.R. § 239.37 (2016) (Form F-7); 17 C.F.R. § 239.38 (2016) (Form F-8); 17 C.F.R. § 239.41 (2016) (Form F-80). But see SEC Form F-10, which does not offer Canadian companies an exemption from U.S. GAAP reconciliation. 17 C.F.R. § 239.40 (2016) (Form F-10).

For the assertion that Canadian and U.S. fiscal principles are similar, this proposition rests on the generally accepted notion within the tax community that the two systems share substantive commonalities. For example, Professor Stafford Smiley, in his Comparative Income Tax Law class at the Georgetown University Law Center noted that, despite some differences, the two systems, in practice, were “basically the same.” Stafford Smiley, Professor of Law, Geo. U. L. Ctr., Class Lecture (Jan. 22, 2016).

26. For example, Robert Raizenne, a beloved adjunct tax professor at the McGill University Faculty of Law and a prominent member of the Canadian tax bar, tells his international tax students that every Canadian practitioner must know at least some U.S. tax principles. Similarly, every Canadian accountant who is employed at a Big Four firm with whom I have spoken has shown a knowledge of the differences between U.S. and Canadian GAAP and IFRS.

owe any tax to the United States, easily reach the thousands of dollars.²⁷ This disadvantage is compounded when one considers that those taking advantage of state-sponsored savings programs (e.g., the foreign equivalents of IRAs, Roth IRAs, and Coverdell Education Savings Accounts) are deemed to have foreign trusts that trigger the passive foreign investment company (“PFIC”) rules in the Internal Revenue Code and their corresponding filing obligations.²⁸ Similarly, any investment in non-U.S. mutual funds by U.S. citizens living abroad will generally trigger the PFIC regime, even if the mutual fund is located in the jurisdiction where the taxpayer is actually living.²⁹ By the IRS’s own estimate, the relevant forms for such PFICs take over 40 hours to complete.³⁰

Additionally, the IRS itself has noted the failure of the United States to properly inform its citizens abroad of their tax obligations.³¹ These

27. See, e.g., John Richardson, *Ruth, Video Testimony Prepared for Submission to Senate Finance Committee International Tax Working Group* (2015), <https://vimeopro.com/citizenshiptaxation/video-testimonials>. The full submission to the Senate Finance Committee International Tax Working Group by John Richardson, which includes the previously cited video testimony, is available at <http://www.finance.senate.gov/legislation/details/?id=34184f67-5056-a032-52c8-0a4960018d92>.

28. I.R.C. §§ 1291–97 (2012). The United States and Canada, however, have solved the problem of having some state-sponsored savings programs being deemed foreign trusts. See *Convention with Respect to Taxes on Income and on Capital*, art. XVIII(7) Sept. 26, 1980, Can.-U.S., 1980 U.S.T. 93; INTERNAL REVENUE SERVICE, FORM 8891 (2012). This exemption is only available for registered retirement savings plans (RRSPs) and registered retirement income funds (RRIFs). Other Canadian government-sponsored savings plans, such as tax free savings accounts (TFSA), registered education savings plans (RESP), and registered disability savings plans (RDSP) are still deemed PFICs under I.R.C. § 1297 (2012). Note that U.S. government-sponsored savings programs, such as Roth IRAs, are not always restricted to U.S. residents, see, e.g., I.R.C. § 408 (2012), but in practice, one generally needs to be a U.S. resident, or have a preexisting relationship with a foreign bank that has a U.S. branch, before a bank will open such an account. Although there is anecdotal evidence of some nonresident U.S. citizens gaining access to government-sponsored savings programs, my argument here is not that it is impossible to do so, but rather that a benefit that is not easily accessible and requires uncertain practices, say, listing the address of a U.S.-resident family member on the relevant bank forms, is not really a benefit at all.

29. I.R.C. § 1291 (2012).

30. See INTERNAL REVENUE SERVICE, INSTRUCTIONS FOR FORM 8621 13 (2014).

31. TIFFANIE N. REKER, DAVID C. CICO & SAIMA S. MEHMOOD, 2012 TAXPAYER EXPERIENCE OF INDIVIDUALS LIVING ABROAD: SERVICES AWARENESS, USE, PREFERENCES, AND FILING BEHAVIORS 1, 24 (showing that citizens abroad were often unaware of their FBAR and FATCA obligations due to the IRS ceasing to send information by post). Nina Olson, the National Taxpayer Advocate, affirms the IRS’s dwindling capacity to inform citizens abroad of their U.S. taxation obligations, and expresses regret that all of the IRS’s foreign individual offices are scheduled to close. *Breakfast Conference: The Role of the National Taxpayer Advocate Service in Protecting Taxpayer Rights and Ensuring a Fair and Just Tax System*, CANADIAN TAX FOUNDATION (July 2, 2015), http://www.ctf.ca/CTFWEB/EN/Conferences_Events/2015/Recordings/15PD-

administrative shortcomings take on new urgency when one considers the disproportionately high penalties for non-compliance (mere non-filing can result in large penalties even when no tax is owing)³² and the increasing capacity of the United States to enforce citizenship-based taxation due to the enactment of FATCA. Although Professor Kirsch, who argues that administration and enforcement issues must not be conflated with the substantive merits of citizenship being indicative of community membership and thus amenable to taxation,³³ is correct in principle, the often offensive results stemming from the administration of citizenship-based taxation cannot be ignored when assessing the fairness of the regime.

In the preceding paragraphs, my aim has been to contextualize my thesis by giving a brief overview of citizenship-based taxation and the most prominent academic discussions of this topic in order to provide readers with necessary background information before proceeding to Parts II and III of this article. In the next part, I will provide an analysis of the reasons given by the U.S. government for enacting citizenship-based taxation, and, where such reasons are lacking, I will comment on possible causes for these omissions, as well as on the problems that result from such silence.

II. A MODERN RATIONALE FOR CITIZENSHIP-BASED TAXATION?

A. *Reasons for Citizenship-Based Taxation*

1. Civil War Tax Acts

The rationale for enacting an income tax that obtained its jurisdiction to tax through citizenship was, generally speaking, based on the idea that a citizens had a duty to contribute to their country—especially when that country was at war and its existence as a Union was threatened. As discussed in Part I, the first federal income tax legislation, enacted in 1861 and 1862, was spurred by the outbreak of the

MTL_Video.aspx/. See also Kat Lucero, *IRS Closures Worry Overseas Taxpayers*, 77 TAX NOTES INT'L 389 (Feb. 2, 2015).

32. For FATCA-related penalties, see I.R.C. §§ 6038D(d)(1)–(2) (2012) (non-reporting penalty of \$10,000 to \$50,000 for failure to report covered assets and accounts). For FBAR-related penalties, see 31 U.S.C. § 5321(a)(5)(B) (2012) and 31 C.F.R. § 1010.350 (2016) (penalty of \$10,000 for each non-willful FBAR violation); 31 U.S.C. § 5321(a)(5)(C) (2012) (willful violation penalty of the greater of \$100,000 or 50 percent of the balance in the account for each undisclosed year for up to six years).

33. American Citizens Abroad Global Foundation, *21st Century Taxation of Americans Abroad: Citizenship-based Taxation vs. Residence-based Taxation*, YOUTUBE (May 2, 2014), <https://www.youtube.com/watch?v=RMiAMc4NLxA>.

Civil War.³⁴ These statutes taxed nonresident citizens on U.S.-source income only, which, based on a first impression, would suggest a territorial system of taxation, instead of a worldwide one. But the flavor of citizenship-based taxation as we know it today—that is, the taxation of nonresidents on their worldwide income—was present. The Civil War tax acts effectively penalized nonresidents by taxing U.S.-source income at a higher rate and denying nonresident citizens the base exemption amount that was offered to resident citizens.³⁵ The purpose of imposing a higher rate on nonresident citizens, as described by Senator Jacob Collamer, was to ensure that the nonresident did not earn income from U.S. sources, such as public debt or real property, and then go “skulking away from contributing his personal support to the Government in this day of its extremity.”³⁶

Citizenship-based taxation of nonresidents’ worldwide income began in 1864.³⁷ In contrast with the earlier 1861 and 1862 legislation, however, nonresidents were now assessed at the same rates as residents.³⁸ In other words, the tax system had moved from penalizing the U.S.-sourced income of nonresident citizens, by assessing that income at a higher marginal rate and denying income exemptions, to taxing all sources of a citizen’s income, regardless of residence, at the same marginal rates. The rationale for moving to the worldwide taxation of a nonresident citizen’s income, as opposed to a punitive level of tax on a nonresident’s U.S.-source income, as seen in the 1861 and 1862 legislation, is not clear. *The Congressional Globe* records Senator

34. See Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 292, 309, *repealed* by Act of July 1, 1862, ch. 119, § 89, 12 Stat. 432, 473; Act of July 1, 1862, ch. 119, § 90, 12 Stat. 432, 473 (repealed 1865).

35. One could argue that taxing U.S.-source income at a higher rate could not only approximate the tax that would otherwise be collected on a taxpayer’s worldwide income, but would also be much easier to administer and enforce. Further, such a method of taxation would arguably be more just, as there is a greater rational connection between a citizen’s U.S.-source income and that citizen’s duty owed to the United States, the citizen’s substantive membership to the U.S. community, and any benefits that the citizen would receive from the state, as compared to the connection between the citizen’s non-U.S.-source income and any duty owed to, membership in, or benefits received from U.S. society.

36. CONG. GLOBE, 38th Cong., 1st Sess. 2661 (1864) (statement of Sen. Collamer) (discussing the Act of July 1, 1862). A contextual reading of Senator Collamer’s statement will reveal a characterization of nonresident Americans as wealthy pleasure-seekers living abroad in exotic locales. See *id.* (American citizens should not “go out of the country, reside in Paris or elsewhere, avoiding the risk of being drafted or contributing anything personally to the requirements of the country at this time, and get off with as low a tax as anybody else.”).

37. See Act of June 30, 1864, ch. 173, § 116, 13 Stat. 223, 281, *amended* by Act of Mar. 3, 1865, ch. 78, § 1, 13 Stat. 469, 479.

38. *Id.* (providing for tax collection until December 31, 1866); Act of Mar. 2, 1867, ch. 169, § 13, 14 Stat. 471, 478 (providing for tax collection until December 31, 1868).

Collamer stating that he did “not know exactly upon what ground” Congress was basing its reasons for proposing the worldwide taxation of nonresident citizens.³⁹ Professor Kirsch, however, notes that worldwide taxation at a lower rate could raise more revenue than U.S.-source-based taxation at a higher rate, and further posits that the move toward citizenship-based taxation could be linked to the era’s growing emphasis and focus on the importance of federal citizenship.⁴⁰

All subsequent versions of Civil War–era income tax legislation included citizenship-based taxation.⁴¹ Similarly, the 1894 Tax Act,⁴² which the Supreme Court would ultimately find unconstitutional for its lack of apportionment of benefits among the states in *Pollock v. Farmers’ Loan & Trust Co.*,⁴³ taxed nonresident citizens on a worldwide basis. Like the duty-based rationale for taxing nonresidents expressed during the Civil War by Senator Collamer,⁴⁴ legislators such as Senator George Hoar characterized those living abroad as shirking their obligations as citizens to support their communities, and reasoned that such an avoidance of community obligations justified taxing nonresidents on their worldwide income.⁴⁵ Post–Sixteenth Amendment, the modern-day federal income tax system was introduced with the Revenue Act of 1913,⁴⁶ which maintained citizenship-based taxation on all sources of income, regardless of the citizen’s residence.⁴⁷ The U.S. government has maintained this form of citizenship-based taxation in every subsequent federal tax statute.⁴⁸

Until 1924, when *Cook v. Tait*⁴⁹ was decided, the duty-based rationale of Senator Collamer and the similar community-membership reasoning of Senator Hoar were the only government-offered explanations of why the United States ought to tax nonresident citizens

39. CONG. GLOBE, 38th Cong., 1st Sess. 2661 (1864).

40. Kirsch, *Taxing Citizens in a Global Economy*, *supra* note 24, at 452 n.28; *id.* at 452 n.29 and accompanying text.

41. See Act of Mar. 3, 1865, ch. 78, § 1, 13 Stat. 469, 479; Act of Mar. 2, 1867, ch. 169, § 13, 14 Stat. 471, 478; Act of July 14, 1870, ch. 255, § 6, 16 Stat. 256, 257.

42. Act of Aug. 27, 1894, ch. 349, § 27, 28 Stat. 509, 553.

43. *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 637 (1895).

44. See the discussion of Senator Collamer, *supra* note 36.

45. See 26 CONG. REC. 6, 632–33 (1894) (statement of Sen. Hoar) (“There are a great many people, I am sorry to say, who go abroad for that very purpose [of avoiding tax], and some of them went abroad during the late [Civil W]ar. They lived in luxury, at the same time at less cost, in a foreign capital; they had none of the voluntary obligations which rest upon citizens, of charity, or contributions, or supporting churches, or anything of that sort, and they escaped taxation.”).

46. Revenue Act of 1913, Pub. L. No. 63-16, § II(A)(1), 38 Stat. 114, 166 (1913).

47. *Id.*

48. For a list of all relevant statutes and provisions, see Kirsch, *Taxing Citizens in a Global Economy*, *supra* note 24, at 454 n.41.

49. *Cook v. Tait*, 265 U.S. 47, 47 (1924).

in a way that was essentially punitive, especially when compared to citizens of most other countries, which did not tax in such a manner. In the midst of the Civil War, Senator Collamer's frustrations seem reasonable: who, after all, would want those who could either fight or financially support a war effort to leave when the state was in need? More interesting are Senator Hoar's justifications for a citizenship-based tax, which go further in the sense that they include ideas of community membership by referring to the "voluntary obligations which rest upon citizens, of charity, or contributions, or supporting churches, or anything of that sort."⁵⁰ This community membership theory is currently the leading justification used by academic commentators to explain why it would not be inequitable for the United States to continue to practice citizenship-based taxation.⁵¹

2. Post-Civil War and *Cook v. Tait*

In the post-Civil War era, the rationales previously given by the government seemed outdated and citizenship-based taxation soon came under scrutiny. In 1918, to counter the problems of citizenship-based taxation, the foreign tax credit was introduced,⁵² not only for reasons of fairness (i.e., to eliminate double taxation),⁵³ but also due to concerns about competitive disadvantages faced by American corporations operating abroad, which were aired before Congress⁵⁴ and the House Committee on Ways and Means.⁵⁵ In 1921, the Departments of Commerce, State, and Treasury rallied to exempt foreign income of corporations that derived 80 percent of their income from foreign sources, but the proposed legislation was ultimately defeated in the

50. See 26 CONG. REC. 6, 632-33 (1894) (statement of Sen. Hoar).

51. See, e.g., Kirsch, *Revisiting the Tax Treatment of Citizens Abroad*, *supra* note 1, at 126-27; see generally Shaviro, *Taxing Potential Community Members' Foreign Source Income*, *supra* note 22. See also Mason, *Citizenship Taxation*, *supra* note 21, at 197-211 (discussing the community rationale).

52. Revenue Act of 1918, ch. 18, § 222(a), 40 Stat. 1057, 1073 (1919) (repealed 1921); see Michael J. Graetz & Michael M. O'Hear, *The 'Original Intent' of U.S. International Taxation*, 46 DUKE L.J. 1021, 1045 (1996) (stating that "[i]n 1918, however, with the world at war and tax rates inflating rapidly around the globe, international double taxation was becoming a far more serious burden on Americans doing business or investing abroad. The top marginal rates on individuals in the United States reached seventy-seven percent, and although the basic corporate rate was only ten percent, an excess profits tax at rates from eight to sixty percent also applied to many large companies. In such circumstances, additional layers of taxation from other nations were potentially confiscatory. Relief became a matter of some urgency.").

53. 56 CONG. REC. at 677-78 (1918) (statement of Rep. Kitchin).

54. *Id.*

55. Hearings Before the House Committee on Ways and Means on the Revenue Act of 1918, 65th Cong., 2nd Session 648 (1918).

Senate.⁵⁶ This shift from the government discussing citizenship-based taxation itself, as exemplified through the reasons offered by Senators Hoar and Collamer, to addressing discrete problems raised by citizenship-based taxation, was a preview of what would become the government's standard operating procedure regarding the issue.

The decision of George Cook to contest the U.S. taxation of his foreign source income in 1922, however, momentarily stopped the government's trend of focusing on the ancillary issues raised by citizenship-based taxation, and ultimately forced the Supreme Court to affirm the validity of the practice and justify its existence in the 1924 *Cook v. Tait* decision. Mr. Cook had moved from the United States to Mexico almost 20 years prior to his contestation of the United States' right to tax him based merely on the fact that he was an American citizen.⁵⁷ Mr. Cook was domiciled in Mexico City, and the income on which the United States was assessing tax was entirely sourced in Mexico.⁵⁸ Feeling that the assessment was unjust, Mr. Cook contested the constitutionality of citizenship-based taxation. He argued that it violated Article I, sections eight and nine, of the U.S. Constitution, and additionally argued that citizenship-based taxation was a taking of his property in breach of the Fifth Amendment.⁵⁹

Despite the lack of an obvious connection to the United States except for Mr. Cook's citizenship, the Supreme Court found not only that the federal government had the capacity to enforce citizenship-based taxation because it did not violate the Constitution, but also that the rationale for taxing the worldwide income of nonresidents was that "government, by its very nature, benefits the citizen and his property wherever found."⁶⁰ The Court further noted that it was wrong to equate the United States' sovereign power with the country's "relations to its citizens and their relation to it."⁶¹ In other words, the fact that the United States would lack jurisdiction to enforce laws was of no consequence to the constitutionality of citizenship-based taxation. Situs, source, and domicile were accordingly not determinative, and a person's status as a U.S. citizen for tax purposes, due to the benefits that the citizen receives

56. 61 CONG. REC. 7023, 7026 (1921). Later that year, however, Congress would allow for the exemption of corporate income earned in a U.S. citizen's possession, but not remitted to the United States, which arguably is the beginning of the exclusion for corporate income that is held offshore.

57. Transcript of Record at 1–2, *Cook v. Tait*, 265 U.S. 47 (1924) (No. 220).

58. *Id.* at 5, 9.

59. Brief for Petitioner at 5, *Cook v. Tait*, 265 U.S. 47 (1924) (No. 220).

60. *Cook*, 265 U.S. at 56.

61. *Id.*

from the government, was sufficient to impose tax on that citizen's worldwide income.⁶²

B. Move from Reasons to Patches

One of the most interesting aspects of the post-*Cook v. Tait* discourse is that the conversation resumes the trend started after the Civil War whereby the government moved away from discussing citizenship taxation itself, and instead concentrated on finding solutions or “patches” to the discrete equitable and commercial problems that arose from taxing nonresident citizens on their worldwide income. Although it is true that in 1918, prior to the *Cook v. Tait* decision, American entrepreneurs were already informing legislators of the potential commercial disadvantages to American exports due to citizenship-based taxation, there is a marked change in the tenor and subject matter of legislative debate after *Cook v. Tait* was decided. As best set out in Professor Kirsch's *Taxing Citizens in a Global Economy*, the debate and subsequent legislation were altered⁶³ to focus on the foreign earned income exclusion, first introduced in 1926, and proposals for its expansion and abolishment.⁶⁴ The foreign earned income exclusion, as it appears today, excludes approximately the first \$100,000 of income from an individual's assessment.⁶⁵ Together with the foreign tax credit, it is one of the two main patches that combat the inequitable effects of citizenship-based taxation. The problems with both of these solutions, however, are many.

Concerning the foreign earned income exclusion, the first “patch” to alleviate the equitable problems associated with citizenship-based taxation, one of the most obvious problems is that only certain wage income is excluded.⁶⁶ Although likely designed as a way to ensure that

62. *Id.*

63. Revenue Act of 1926, Pub. L. No. 69-20, § 213(b)(14), 44 Stat. 9 (1926).

64. Kirsch, *Taxing Citizens in a Global Economy*, *supra* note 24, at 457–460.

65. See I.R.C. § 911 (2012). The amount for 2016 is \$101,300. Rev. Proc. 2015-53. The excluded amount is also indexed for inflation. I.R.C. § 911(b)(2)(D) (2012). Note that, if any income remains taxable after using the foreign earned income exclusion, such income will be taxable at the marginal rates that would otherwise have been applicable but for the foreign earned income exclusion. I.R.C. § 911(f) (2012). For example, if a person had earned \$200,000 in foreign earned income in 2016, the amount above \$101,300 would be taxed at the marginal rates applicable to \$101,301–\$200,000, as opposed to the rates applicable to \$0–\$101,300. Any income exempted by the foreign earned income exclusion is ineligible for a foreign tax credit.

66. For more on the problems associated with the foreign earned income exclusion, see generally 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) and Renée Judith Sobel, *United States Taxation of Its Citizens Abroad: Incentive or Equity*, 38 VAND. L. REV. 101 (1985). See also Brainard L. Patton, Jr., *United States Individual*

passive income from offshore investment was not excluded, the provision establishes no exclusion for active profits from one's business. On the one hand, proprietors of small businesses could easily plan around this hurdle by paying themselves a wage.⁶⁷ But on the other hand, and perhaps more importantly, independent contractors would receive no exemption for the income derived from the services that they provided. This is particularly important when one considers the current, prevalent practice of using independent contractors for what are arguably employee positions.⁶⁸ Consider the following example: two U.S. citizens reside abroad and work as truck drivers for courier companies. One citizen works as an independent contractor, the other, as an employee. In this case, the employee truck driver will benefit from the foreign earned income exclusion, while the independent contractor will not. While leaving aside the issue of whether or not their situations would be equalized through the use of the foreign tax credit, we see here a clear case of horizontal inequity, where two similarly situated persons are treated differently due to nominal distinctions.

With respect to the foreign tax credit, the second "patch," the principal issue is that it is applicable only to income taxes as defined by the Internal Revenue Code and that statute's associated regulations.⁶⁹ This raises a horizontal equity issue similar to the one discussed in regard to the foreign earned income exclusion; namely, that of similarly situated

Income Tax Policy as It Applies to Americans Resident Overseas, 1975 DUKE L.J. 691, 706–12 (1975).

67. Note however that such a strategy could put one at a tax disadvantage in the non-U.S. country where the small business operates. Canada, for example, has rules that provide advantageous tax rates for small businesses. If the business was not either making (or losing) enough money to take advantage of both the U.S. foreign earned income exemption and the advantageous rates offered by Canada, the business and its owner would be at a disadvantage when compared to similarly situated Canadian businesses and owners.

68. This aggressive avoidance technique, which often borders on evasion, has become so well known that the U.S. revenue services are taking note and stepping up their efforts to curb this practice. See, e.g., Elizabeth Milito, *IRS Vows to Intensify Enforcement of Employment Tax Evasion*, NATIONAL FEDERATION OF INDEPENDENT BUSINESSES (Feb. 19, 2009), <http://www.nfib.com/press-media/press-media-item?cmsid=48723>; Janet Novack, *Independent Contractor Enforcement: There's More than the IRS to Fear*, FORBES (May 9, 2013), <http://www.forbes.com/sites/janetnovack/2013/05/09/independent-contractor-enforcement-theres-more-than-the-irs-to-fear/>; Betty Wang, *IRS Cracking Down on "Independent Contractors"*, FIND LAW: FREE ENTERPRISE (July 31, 2013), http://blogs.findlaw.com/free_enterprise/2013/07/irs-cracking-down-on-independent-contractors.html. There is, however, anecdotal evidence that this trend may be shifting in some sectors, for reasons unrelated to litigation risk. See Biz Carson, *There's One Major Reason Startups are Switching Their Workers from Contractors to Employees, and it's not Lawsuits*, BUSINESS INSIDER, Aug. 4, 2015, <http://www.businessinsider.com/why-startups-switch-from-contractors-to-employees-2015-8>.

69. I.R.C. § 901(b)(1) (2012); Treas. Reg. § 1.901-2 (as amended in 2013) (limiting the foreign tax credit to income, war profits, and excess profits taxes).

persons being treated differently due to nominal distinctions, which would arise when one country taxes income and another country taxes on the basis of one or a combination of property, consumption, or excise. For example, putting aside the applicability of the foreign earned income exclusion, a U.S. citizen living abroad in a high-income-tax jurisdiction could likely set off any U.S. income tax owed through the foreign tax credit. Conversely, a similarly situated citizen living in a country that raises revenue only through property and value-added taxes would not be able to set off any income tax owing to the United States using the foreign tax credit.

One could certainly argue that the two legislative “patches” designed to alleviate the problems associated with citizenship-based taxation, the foreign earned income exclusion and the foreign tax credit, are meant to work in tandem. Therefore, singling out one of these patches for scrutiny gives an inaccurate impression of how citizenship-based taxation operates in practice.⁷⁰ In other words, most of those who live abroad will have the inequitable aspects of citizenship-based taxation attenuated by one or both of the legislative patches, and the instances of horizontal inequity are accordingly much rarer than the impression given by my previous examples. But, although the legislative patches would seem to limit the amounts actually owed under a citizenship-based taxation regime, it is interesting that the debate about how best to patch citizenship-based taxation was not eclipsed, or at least accompanied by a concurrent conversation about why the United States should tax nonresident citizens in the first place.

C. *The Lack of a Current Rationale*

1. Problems with the Conversation

In retrospect, the shift away from debating the merits of citizenship-based taxation is not unsurprising. The Supreme Court’s decision in *Cook v. Tait* affirmed the constitutional validity of citizenship-based taxation. Accordingly, due to the difficulty of reversing a Supreme Court precedent, future challenges to the system would have to be made

70. Note, however, that there have been several proposals to eliminate the foreign earned income exclusion. See, e.g., Sens. Gregg & Wyden, *Estimated Revenue Effects of S. 3018* (Nov. 10, 2010), <http://www.wyden.senate.gov/imo/media/doc/Score.pdf>; Congressional Progressive Caucus, *Back to Work Budget*, <http://cpc.grijalva.house.gov/uploads/Back%20to%20Work%20Budget%20-%20Executive%20Summary.pdf>; see generally NATIONAL COMMISSION OF FISCAL RESPONSIBILITY AND REFORM, REPORT OF THE NATIONAL COMMISSION ON FISCAL RESPONSIBILITY AND REFORM (2010), https://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12_1_2010.pdf. Singling out the foreign tax credit for analysis on its own is therefore not inappropriate.

in the political, instead of the legal, sphere.⁷¹ Once the debate became political, however, the importance of lobbying increased, and along with this shift came different strategies for effectuating change. A lobbyist does not need systemic change in order to be successful. Rather, lobbyists must only influence legislation to the degree necessary to give their clients the desired result. Here, multinationals that exported American goods and services sought to eliminate the U.S. taxation of their American workers abroad.⁷² Because the foreign tax credit could have uneven results depending on the jurisdiction in which a particular worker was employed, the simplest solution was to lobby for an exemption of the wage income earned by nonresident U.S. workers. Once the multinationals obtained the result they sought, any other equitable issues arising from citizenship-based taxation were dismissed as irrelevant, and the focus of lobbyists turned to maintaining the gains that they had already won.

In addition to changing the focus from legal to political solutions, the rise of lobbying also created barriers to entry. Although there has been much research by commentators on access to justice showing that legal fees constitute a barrier to entry and can chill actions from those with valid claims,⁷³ there is also research showing that the costs of lobbying are even higher than those of bringing a legal action.⁷⁴ To add further to the disparity between those who can lobby and those who cannot, certain studies have shown that those who can afford the costs of lobbying reap extraordinary returns on their expenditures.⁷⁵

The rational reasons for the change in tenor with respect to the conversation about citizenship-based taxation do not, however, change the problematic result that, to this day, Congress has not offered any reasons, or any discussion at all for that matter, for continuing its unique and facially problematic exercise of citizenship-based taxation since

71. Consider that Congress had to amend the Constitution, by way of the Sixteenth Amendment, in order to reverse the effect of *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 429 (1895). In addition, to date, the only tax-related decision that has been reversed by the Supreme Court itself is *Pollock*, which had its holding on the immunity of state bond interest from a nondiscriminatory federal tax overruled in *South Carolina v. Baker*, 485 U.S. 505 (1988). An interesting ancillary effect of the enduring nature of legal precedent is that the cost of arguing for change becomes greater, which could arguably create access to justice issues.

72. Kirsch, *Taxing Citizens in a Global Economy*, *supra* note 24, at 457–458.

73. See generally Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785 (2001).

74. See generally Raquel Alexander, Susan Scholz & Stephen Mazza, *Measuring Rates of Return for Lobbying Expenditures: An Empirical Analysis Under the American Jobs Creation Act*, 25 *J.L. & POLITICS* 401 (2009).

75. *Id.*

Cook v. Tait was decided.⁷⁶ As the United States is no longer in a state of civil war, the initial rationale for imposing citizenship-based taxation is inapplicable. Accordingly, the effective result of the U.S. government's silence on the issue of citizenship-based taxation is an affirmation of the inherent-benefits-received rationale put forward in *Cook v. Tait*. The de facto reliance on this rationale is troubling because, even in 1924 when the decision was issued, the benefits received by citizens from the government were unclear.

2. On Inherent Benefits: Non-representation and A Right of Return

Professor Kirsch, in *Taxing Citizens in a Global Economy*, lists the benefits that nonresidents could conceivably derive from the U.S. government, including the protection of one's person and property, the right of return, and the right to vote.⁷⁷ In *Citizenship Taxation*, Professor Mason offers convincing rebuttals to the soundness of characterizing the foregoing occurrences as benefits—or, perhaps more accurately, of characterizing such occurrences as benefits that justify the taxation of a nonresident's worldwide income. In making her rebuttals, Professor Mason often notes that other countries do not require worldwide taxation in order for nonresidents to have the benefits named by Professor Kirsch.⁷⁸ This comparative analysis is important to the extent that the United States' practice of citizenship-based taxation is based on the benefits provided by the state, as it recognizes other ways in which the worldwide taxation of nonresidents' income makes the United States an outlier. Two of these benefits in particular, voting rights and the right to return, merit further discussion.

It is important to remember that U.S. citizens living abroad did not have the right to vote until 1975—more than fifty years after *Cook v. Tait* was decided on the inherent-benefits-received rationale and more than a century after citizenship-based taxation was first implemented.⁷⁹ Further, even once nonresident voting was established, administrative inefficiencies mean that the ballots are sometimes not processed in time to be counted.⁸⁰ Coupled with the lack of dedicated Congressional

76. For more on the methodology used to arrive at this claim, see the discussion *supra*, note 8.

77. Kirsch, *Taxing Citizens in a Global Economy*, *supra* note 24, at 470–78.

78. Mason, *supra* note 21, at 16–24.

79. Overseas Citizens Voting Rights Act of 1975, Pub. L. No. 94-203, 89 Stat. 1142 (repealed 1986).

80. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-98-106, ELECTIONS: ACTION PLANS NEEDED TO FULLY ADDRESS CHALLENGES IN ELECTRONIC ABSENTEE VOTING INITIATIVES FOR MILITARY AND OVERSEAS CITIZENS I (2007) (noting that because the registration and

representation for nonresident citizens,⁸¹ these facts further establish the narrative that citizenship-based taxation burdens a minority that does not have a political voice. It is not surprising, then, that politicians do not actively take up the concerns raised by nonresident citizens, as they have no political incentive to do so. This assertion is even more true with respect to those who are “lawfully admitted for permanent residence,” more commonly known as Green Card holders, who are treated as U.S. residents for tax purposes regardless of where they actually live.⁸² Because Green Card holders cannot vote,⁸³ they are even more removed than nonresident citizens from American political life, and thus politicians have even less incentive to consider the needs of nonresident Green Card holders, who are nonetheless subject to U.S. taxation on their worldwide income.

The right to return, and the corresponding right to participate in the American economic and social community, is, in my opinion, the most important benefit that a U.S. citizen (and a Green Card holder) derives from that status. The United States is a coveted destination for immigrants, who recognize the social, political, and economic freedoms that the country offers.⁸⁴ For entrepreneurs, the United States holds a special attraction due to its arguably unique comfort with failure, both because of cultural attitudes and bankruptcy laws that allow a person to “give it another try.”⁸⁵ Even if one does not recognize the country’s

voting processes are normally done by mail, some votes do not arrive in time to be counted).

81. By a lack of “dedicated Congressional representation,” I mean that U.S. citizens abroad lack a representative in Congress whose sole function is to present and advocate for their needs and concerns. U.S. citizens who vote from abroad generally register with the state in which they resided immediately prior to leaving the United States. Assuming that citizens living abroad share similar needs and concerns, the fact that their voices are not aggregated and directed toward one or more persons directly accountable to them in Congress means that their effective representation will invariably be diluted. Accordingly, because citizens living abroad are a minority in many jurisdictions instead of being a majority in one, the issues important to them will take second place to the issues raised by those who actually reside in the Congressional districts in which the citizens living abroad vote.

82. I.R.C. § 7701(b)(1)(A) (2012).

83. Immigration and Nationality Act, Pub. L. No. 414, § 316, 66 Stat. 477 (1952); 8 U.S.C. § 1427 (2012).

84. See, e.g., OECD INTERNATIONAL MIGRATION DATABASE, <https://stats.oecd.org/Index.aspx?DataSetCode=MIG> (last visited Sep. 5, 2015).

85. Telephone Interview with Richard Fortin, Chief Financial Officer, Link Energy (Aug. 3, 2015). Richard Fortin, a former foreign-exchange officer with several prominent Canadian banks, has over a decade of experience working in East and Southeast Asia (stating during the interview that “[w]hile working in Asia, many of my foreign colleagues had a fascination with the U.S.’s ability to tolerate, and even celebrate, failure. In their home countries, if you failed, you were doomed to work at an entry-level job for the rest of your life. But in the U.S., they had the impression that, if you have the nerve to get up again, you can be reborn like a phoenix.”).

status in some or all of these areas as preeminent, it would be hard to argue that the United States is not among a handful of nations where immigrants from around the world aspire to live. Accordingly, even though no other nation does this, it would conceivably not be unreasonable for the United States to tax the worldwide income of all its citizens, both resident and nonresidents, as a fee for the benefit of being a member of its community, which may be exercised through the right to return and work in the United States at any time.

And so if the reason that the United States continues to use citizenship-based taxation is based on the benefits citizens receive from the ability to participate in American society—that is, a right of return—it would be helpful if the U.S. government publicly stated this rationale. One could argue that this characterization is only a slightly updated version of the inherent-benefits-received theory set out in *Cook v. Tait*. If that is true, then it follows that reaffirming those reasons may be redundant. But I disagree with that premise. Let us assume that the United States continues to justify citizenship-based taxation through some kind of inherent-benefits-received rationale, as derived from *Cook v. Tait*. First, the changing way in which citizens relate to the state in a globalized society means that, unless updated, a rationale based on the realities of 1924 would be largely inapplicable today. In addition, there is academic controversy surrounding the appropriateness of citizenship-based taxation, as well as strong evidence that American citizens living abroad view citizenship-based taxation as unfair and unjustified.⁸⁶ Thus, in this particular circumstance, where there are both concerns of unfairness and the group affected is vulnerable,⁸⁷ it would be both helpful and appropriate for the U.S. government to give reasons as to why it still practices citizenship-based taxation.

3. Commentary

The United States' practice of citizenship-based taxation seems, at first glance, suspect. Although other countries have tried, no other state has successfully employed citizenship-based taxation. Arguably, the main reason for these other countries' failure to tax based on citizenship has to do with problems of enforcement and administration, and not with any deep-seated concerns about the justness of the practice. If one accepts this assertion, then the lack of normative consensus on the topic and the fact that the United States is an outlier in its practice of citizenship-based taxation is not a cause for concern. But to dismiss all

86. To be further discussed in Part III, *infra*.

87. For example, through its lack of real Congressional representation, as discussed *supra* note 81.

concerns associated with the United States' citizenship-based taxation based merely on the fact that the other countries that have tried citizenship-based taxation have failed due to problems of enforcement seems unreasonable. Taken by itself, without any supporting reasons, the proposition of one country taxing a person's income without a jurisdiction based on either source or residence appears unjust. Due to this *prima facie* injustice, governments that exercise the right to tax based on citizenship would likely alleviate controversy and increase taxpayer morale by declaring their reasons for doing so.

In addition to the controversy surrounding the basic proposition of citizenship-based taxation, one must remember that the relationship between the citizen and the state has changed greatly since 1924, when the Supreme Court put forward the inherent benefits rationale for supporting citizenship-based taxation in *Cook v. Tait*. Most importantly, the phenomenon of globalization has upended many assumptions—about how people will live, interact with their families, and earn a living—that would make citizenship-based taxation viable. For example, many people now carry more than one passport. Having citizenship ties to more than one country means that using citizenship as a proxy for community membership becomes a tenuous exercise, as certain passports likely represent only nominal membership to a community, while another passport (or perhaps no passport) may give an indication of the real community to which a specific person belongs.

A globalized, multi-citizenship world, where citizenship is no longer a sure indicator of community membership, also serves as a rebuttal to Professor Zelinsky's argument that citizenship is an administrable proxy for domicile.⁸⁸ Commentators were aware of this issue as early as 1923, when the four economists charged with advising the League of Nations on international taxation noted the diminished power of both citizenship and community membership to serve as a valid indicator of a state's jurisdiction to tax. Terming the combination of formal and informal ties to one's community as "political allegiance," the economists dismissed such criteria as a basis on which to tax, and instead focused on an individual's "economic allegiance."⁸⁹ Their conclusion was that the starting-point of a modern theory of international

88. See generally Zelinsky, *supra* note 23.

89. BRUIN, EINAUDI, SELIGMAN & STAMP, REPORT ON DOUBLE TAXATION TO THE FINANCIAL COMMITTEE OF THE LEAGUE OF NATIONS BY THE PANEL OF EXPERTS 19–20 (1923) ("In modern times, however, the force of political allegiance has been considerably weakened. The political ties of a nonresident to the mother-country may often be merely nominal. His life may be spent abroad, and his real interests may be indissolubly bound up with his new home, while his loyalty to the old country may have almost completely disappeared The starting-point of the modern theory must therefore be the doctrine of economic allegiance.").

taxation must, according to the doctrine of economic allegiance, be based on the concepts of source and residence. Thus, even in 1923, the world's new globalized reality seemed at odds with the very concept of citizenship-based taxation.

Some commentators, including Professor Kirsch, have argued that perhaps it is not a good thing that people hold more than one passport, especially if the second (or third) one is held on a nominal basis.⁹⁰ This argument is in effect saying that citizenship can be a good proxy for community membership, and the real problem is that, in a wave of enthusiasm for the prestige, convenience, or other benefit derived from holding many passports, we have moved away from applying the concept of citizenship with any rigor. It would therefore follow that those who hold U.S. passports on a nominal basis and do not wish to be taxed on their worldwide income while a nonresident should relinquish their citizenship. Putting aside the difficulty of relinquishing one's citizenship, this argument has merit due to its congruence with the rationales that Professor Kirsch puts forward in favor of citizenship-based taxation.⁹¹ But it is not enough for academics or policy analysts to posit this explanation. The government itself, due to the novelty and controversy surrounding citizenship-based taxation, ought to articulate its reasons for supporting such a policy.

As a precedent for my recommendation that the government give reasons for supporting citizenship-based taxation, I point to both preambular legislative descriptions, and the guidance given by executive departments and federal agencies. Due to the controversy surrounding its purpose and method of operating, the Patriot Act⁹² can serve as both a comparator to citizenship-based taxation and an example of how the government can be proactive in publicizing its reasons for enacting legislation. In its preamble, the Patriot Act states that its purpose is "to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes."⁹³ Although I recognize that finding a suitably narrow and laconic preamble for the Internal Revenue Code that not only states its revenue-raising purpose, but also addresses issues concerning citizenship-based taxation is almost certainly impossible, it is nonetheless a point of departure for thinking about how governments already provide the kind of guidance and clarification that I am proposing. In addition to this preamble, executive branch departments

90. American Citizens Abroad Global Foundation, *supra* note 33.

91. That is, the "benefits received" and "community membership" arguments. See the text and accompanying references *supra* note 24.

92. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

93. *Id.*

and federal agencies also issue statements that clarify the outcomes of the Patriot Act. For example, the Treasury's Financial Crimes Enforcement Network states that:

The purpose of the USA PATRIOT Act is to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and other purposes, some of which include:

To strengthen U.S. measures to prevent, detect and prosecute international money laundering and financing of terrorism;

To subject to special scrutiny foreign jurisdictions, foreign financial institutions, and classes of international transactions or types of accounts that are susceptible to criminal abuse;

To require all appropriate elements of the financial services industry to report potential money laundering;

To strengthen measures to prevent use of the U.S. financial system for personal gain by corrupt foreign officials and facilitate repatriation of stolen assets to the citizens of countries to whom such assets belong.⁹⁴

One could imagine the Treasury, which already publishes substantial explanatory preambles for Internal Revenue Code Regulations in its Treasury Decisions, to similarly outline the government's position on why it continues to practice citizenship-based taxation. To the extent that such a proposal is novel, the precedents mentioned show that any change would be incremental.

In further support of my recommendation that the government give reasons for supporting citizenship-based taxation, we must remember that it is not as if politicians are loath to comment on tax matters. In the realm of corporate taxation, a plethora of politicians are eager to have their voices heard on the territorial versus worldwide debate.⁹⁵

94. U.S. DEPARTMENT OF TREASURY FINCEN, *USA PATRIOT Act*, <https://www.fincen.gov/resources/statutes-regulations/usa-patriot-act> (last visited Sept. 16, 2016).

95. See, e.g., Jonathan Weisman, *Plan to Curb U.S. Taxation of Overseas Profit Finds Bipartisan Support*, N.Y. TIMES, July 8, 2015, <http://www.nytimes.com/2015/07/09/business/end-to-us-taxation-of-overseas-profit-finds-bipartisan-support.html> (citing Sens. Rob Portman (R-Ohio) and Chuck Schumer (D-N.Y.) in their support of a move toward a territorial system of international taxation). See generally LOUIS EISENSTEIN, *THE IDEOLOGIES OF TAXATION* (Harvard University Press 2010) (1961) (arguing that all rationales or "ideologies" for a given tax policy are actually partisan positions designed to benefit a particular segment of society). By inference, it seems clear that Eisenstein is at least saying that reasons must be given when a state imposes tax.

Politicians are similarly eager to label taxpayers as tax dodgers when issues like inversions and tax evasion are on the table.⁹⁶ Concerning tax evasion, the conversation around FATCA is interesting because, although politicians are often willing to discuss how it will impair the ability of U.S. residents to evade tax by hiding income abroad in foreign bank accounts,⁹⁷ they do not mention that FATCA will also greatly increase the enforceability of citizenship-based taxation. This lack of focus on the legislation's effect on nonresident citizens, however, can perhaps be explained by the fact that there is no evidence that FATCA was enacted to perfect citizenship-based taxation.⁹⁸

Regardless of whether or not the purpose of FATCA was to bolster citizenship-based taxation, its effect on the practice will be substantial. To the extent that compliance with citizenship-based taxation was previously largely unenforceable, FATCA gives the United States the potential to find those nonresident U.S. citizens who were not complying with citizenship-based taxation. But although there is a general consensus that people who deliberately evade taxes assessed in the jurisdiction in which they reside or the jurisdiction that is the source of their income should be punished, there is much less popular support for taxing based on neither residence nor source, but rather on citizenship. This lack of popular support for citizenship-based taxation is perhaps because there is no consensus on what citizenship represents. Those who hold many passports may consider citizenship, or at least some citizenship in some countries, to be only nominal and representative of nothing more than their place of birth or ethnic origin. Others may consider citizenship to be intrinsically linked with community membership. Still others may consider citizenship to be a mechanism through which social contract theory can be expressed. The lack of consensus on the actual nature of citizenship means that any tax imposed purely on that basis, such as the taxation of nonresident citizens on their non-U.S.-source income, would greatly benefit from an explanation of why such a practice is valid.

96. See, e.g., Hayley Tsukayama, *Facebook Co-founder Saverin Under Fire for Renouncing U.S. Citizenship*, WASH. POST, May 17, 2012, http://www.washingtonpost.com/business/technology/facebook-co-founder-saverin-under-fire-for-renouncing-us-citizenship/2012/05/17/gIQAPFCyVU_story.html (discussing Sens. Chuck Schumer (D-N.Y.) and Bob Casey's (D-Pa.) "Ex-PATRIOT" Act bill, designed to stop the renunciation of citizenship for tax-avoidance purposes).

97. See, e.g., Jolly, *supra* note 11 (discussing the remarks of Senator Max Baucus (D-Mont.) quoted in the *New York Times*).

98. Rather, FATCA was a reaction to the UBS scandal. See Christians, *supra* note 9, at 1373–74.

III. POPULAR CONCEPTIONS OF CITIZENSHIP-BASED TAXATION

Thus far, in this article, I have promoted the thesis that, due to academic controversy and perceived unfairness, the U.S. government ought to give reasons for maintaining citizenship-based taxation. In Part II, I showed the progression of the reasons given for citizenship-based taxation from the Civil War until *Cook v. Tait*. Of note is the fact that, post-*Cook v. Tate*, the debate about citizenship-based taxation itself ended. Instead, the conversation in Congress turned to fixing the problems associated with citizenship-based taxation through patches, instead of evaluating the substance of this method of taxation. I posited that if the government is to rely on the *Cook v. Tait* inherent-benefits-received reasoning, then the government ought to set out which benefits it deems to be valuable enough to justify its unique practice of citizenship-based taxation. In Part II, I also argued that, if the government is going to rely on a benefits rationale to justify citizenship-based taxation, then the only benefit that truly distinguishes U.S. citizens and Green Card holders from those with noncitizen status is the right to return. Although the U.S. right of return is not distinguishable on its substantive characteristics from the right of return offered by other countries, it is arguably more valuable due to the opportunity to participate in U.S. societal and economic life.

In this part, I will present a case study of popular conceptions of citizenship-based taxation in order to examine how the experience of those actually affected by the practice aligns with my arguments, as well as other theoretical accounts of citizenship-based taxation—in particular, Professor Kirsch’s “community membership” theory.⁹⁹ Other commentators, especially the National Taxpayer Advocate Nina Olson in her annual reports, have done much to show the effects of citizenship-based taxation on everyday non-resident U.S. citizens.¹⁰⁰ In order to be able to base my own research primarily on firsthand accounts, however, I will rely mainly on video testimony that is available online through a submission to the United States Senate Finance Committee International Tax Working Group by John Richardson, a resident of Canada who has been very active in the grassroots opposition to U.S. citizenship-based taxation and FATCA. To broaden the scope of my inquiry, I will also review written responses to a survey on the topic of relinquishing

99. See Kirsch, *Taxing Citizens in a Global Economy*, *supra* note 24, at 479–88; American Citizens Abroad Global Foundation, *supra* note 33.

100. See, e.g., NAT’L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS 147 (2012) (discussing the penalties flowing from noncompliance with the little-known Report of Foreign Bank and Financial Accounts (“FBAR”) form, which is an integral part of the information-acquiring apparatus needed for the U.S. to enforce citizenship-based taxation, and describing such penalties as disproportionate and draconian).

citizenship by nonresident U.S. citizens conducted by Dr. Amanda Klekowski von Koppenfels.

A. *Why We Tax*

When thinking about how everyday U.S. citizens who live abroad understand taxation, it is helpful to re-examine the premise of taxation beginning from its fundamentals. Taxation is primarily about raising revenue for the state.¹⁰¹ The state must raise revenue because, through its government, it provides services. At the federal level in the United States, such services include defensive ones, notably maintaining borders and protecting U.S. interests through the armed forces. The state also provides oversight services, such as federal penitentiaries to remove known felons from the population, courts to act as a last resort when one has been wronged, and regulatory bodies to help stop wrongs from occurring in the first place. There are administrative services, such as the Government Printing Office, which distributes and gives notice of the government's activities; the IRS, which raises revenue by enforcing the Internal Revenue Code and Treasury regulations; and the National Park Service, which maintains nature reserves. Finally, there are basic and advanced infrastructure services. At the basic end of the spectrum, I would include commonly accepted state functions such as building roads. More advanced services include providing education, healthcare, and some sort of a minimum living standard through unemployment insurance, the earned income tax credit, or other similar programs.

Over time, societies have relied on different forms of taxation to raise the revenue necessary to fund the state.¹⁰² These forms of taxation have included a proportionate levy on physical goods produced, such as crops;¹⁰³ head taxes, which require that each citizen (meaning, in this case, each member of the community) pay a flat fee;¹⁰⁴ tariffs on goods

101. STEPHEN B. COHEN, *FEDERAL INCOME TAXATION: A CONCEPTUAL APPROACH* 11 (West Publishing, 1989) ("The primary purpose of the income tax is to pay for government expenditures.").

102. One could argue that, in the case of ancient societies, such as the Old Kingdom dynasties in Ancient Egypt or the Mesopotamians, a large reason for levying taxes was not to provide services, but rather to enrich the ruling class and fund their opulent lifestyle. CAROLYN WEBBER & AARON WILDAVSKY, *A HISTORY OF TAXATION AND EXPENDITURE IN THE WESTERN WORLD* 65–76 (Touchstone Books, 1st ed. 1986). While recognizing that this is true, I would add that, in addition to providing benefits for themselves, ancient royals also had to defend their citizens when faced with a foreign threat. They also sometimes provided minimal oversight and administrative services, such as by dispensing justice and by regulating prices of basic food provisions. *Id.* at 77–84.

103. *Id.*

104. *Id.*

that cross borders as a fee for gaining access to a particular market;¹⁰⁵ and usage-based fees, such as tolls for a particular road or bridge.¹⁰⁶ Modern societies, including the United States, also tax consumption, such as through a sales tax or value added tax;¹⁰⁷ real-estate holdings, in order to fund municipal projects such as schools;¹⁰⁸ and wealth taxes.¹⁰⁹ In the United States, we also use income tax—that is, a tax based on one’s ability to pay—as a general-purpose revenue raiser for the federal government.¹¹⁰

Once the state decides what kind of tax it wants to apply, the state will then need to determine the tax base—that is, the class of persons on whom the tax will be levied. When determining the base, the state must consider issues of jurisdiction, enforceability, and administrability. If the Municipality of Anchorage, Alaska decided that it would begin collecting tolls from anyone who used the Brooklyn Bridge in New York City, it would have no legal jurisdiction to do so because the bridge is owned and operated by the New York City Department of Transportation. In addition, the Municipality of Anchorage would also need to have equipment and persons on site in order to administer the tax, which would make administration difficult. Finally, it is unlikely

105. See, e.g., Tariff Act of 1789, ch. 2, 1 Stat. 24.

106. The medieval-era London Bridge, for example, levied tolls on its users. See generally TONY SHARP, THE ORIGINS OF THE BRIDGE HOUSE ESTATES AND BRIDGE HOUSE TRUST (2009). This tradition of using tolls for particular bridges or roads is alive and well today, to which any user of the U.S. east-coast turnpike system, the Central London congestion charge, or any of the EU’s many toll roads can attest.

107. See, e.g., N.Y. TAX LAW § 1105 (McKinney 2016).

108. See, e.g., N.Y. REAL PROP. TAX LAW § 1302 (McKinney 2016).

109. A pure tax on wealth is generally considered difficult to administer due to administrative and enforcement issues. COHEN, *supra* note 101, at 12 (“Doesn’t wealth itself provide a better measure of ability to pay for the cost of government? What are the practical obstacles to taxing wealth?”) Professor Cohen expended on this concept in the second, draft edition (unpublished, draft on file with author). With the coming into force of FATCA, as well as advances in accounting and actuarial sciences, one wonders if these reasons against a wealth tax will be true in the coming decades. See Montano Cabezas, *Tax Transparency and the Marketplace: A Pathway to State Sustainability*, 10:2 J. SUSTAINABLE DEV. L. & POL’Y 179 (2015). Also, Professor Thomas Piketty has famously argued for a tax on wealth for global economic and equitable reasons. See THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 515–39 (Belknap Press, 3rd ed. 2014).

The estate tax, however, especially when combined with the income tax, arguably acts as a proxy for a pure wealth tax. See 26 U.S.C. Subtitle B (2012); Reuven S. Avi-Yonah, *Corporations, Society and the State: A Defense of the Corporate Tax*, 90 VA. L. REV. 1193 (2004) (arguing that income and estate taxes were enacted partially because of their potential to curb excessive accumulations of political, economic, and social power by the rich). See also Reuven S. Avi-Yonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation*, 111 YALE L. J. 1391 (2002) (reviewing JOEL SLEMROD (ED.), DOES ATLAS SHRUG? THE ECONOMIC CONSEQUENCES OF TAXING THE RICH (2001)).

110. 26 U.S.C. Subtitle A.

that the relevant New York state, municipal, and law enforcement authorities would allow the Municipality of Anchorage to physically enforce the tax, say by way of a barricade or similar device; similarly, it is unlikely that the assertive people of New York City would submit to being taxed by an entity that is foreign to them, to which they have no connection beyond being part of the Union, and from which they receive no services.¹¹¹ Here, the principal issue is that the Municipality of Anchorage has no jurisdiction. One can imagine similar challenges regarding the implementation of a sales or consumption tax, or a property tax, where one does not have jurisdiction or control over the market (for example, the Municipality of Anchorage imposing taxes on those who own real estate in New York City, or administering a five percent levy on all sales transactions in Manhattan).

When thinking further about administrability and enforcement, it may be useful to switch from caricature-like hypotheticals like the Municipality of Anchorage taxing individuals in the City of New York to the real-life practice of taxing nonresidents on their non-U.S.-source income via citizenship-based taxation. With respect to administrability, one must be able to obtain sufficient data to assess the tax, and must communicate effectively with the taxpayer in a manner that would allow the state to impose the tax in question. Prior to the introduction of FATCA, the United States relied largely on self-reporting in order to assess citizenship-based taxation. This is because, unless the nonresident taxpayer worked for a U.S. government employer or some other entity that was required to report the earnings of its employees abroad,¹¹² there was neither oversight of the nonresident's income nor any record of who was abroad for the purposes of alerting the IRS that they should investigate a given taxpayer. Today, however, if a nonresident U.S. taxpayer is living in a country that has adopted FATCA¹¹³ and refuses to share personal bank information with the IRS, then that taxpayer may be denied access to a bank account on the basis of the taxpayer's

111. Concerning the possibility of the Municipality of Anchorage providing services to New York City, one could imagine a scenario in which the Municipality of Anchorage did provide services directly to New York City, such as by providing satellite or antennae-relay services to allow for faster connections to the Asian financial markets by New York City bankers, patrolling the air space over the Northern Pacific to prohibit Eastern-hemisphere-originating missile strikes on New York, and any other services that the Municipality of Anchorage is uniquely poised to accomplish because of its geographic location.

112. *See, e.g.*, I.R.C. § 406 (2012).

113. PRICEWATERHOUSECOOPERS LLP, FOREIGN ACCOUNT TAX COMPLIANCE ACT (FATCA): INTERGOVERNMENTAL AGREEMENT (IGA) MONITOR, <http://www.pwc.com/us/en/financial-services/publications/fatca-publications/intergovernmental-agreements-monitor.jhtml> (last visited Sept. 6, 2015) (showing over 121 FATCA intergovernmental agreements signed, in effect, or in advanced stages of negotiation).

“recalcitrant account holder” status.¹¹⁴ With respect to enforcement, the revenue rule—that is, the common-law principle that prohibits one country from collecting revenue on behalf of another—makes enforcement largely impossible.¹¹⁵ Until FATCA, the only practical recourse that the United States had against someone who owed taxes but did not have U.S.-based assets was to deny that person a right of re-entry.¹¹⁶ Although commentators have noted that, due to the IRS’s lack of resources, it may not have the capacity to effectively administer FATCA, much less enforce it,¹¹⁷ FATCA does in some respects circumvent the traditional limitations on enforcing tax abroad found in the revenue rule. By greatly reducing the capacity of those who maintain recalcitrant account holder status to access foreign bank accounts,¹¹⁸ FATCA increases the hardship felt by those who do not comply with its requirements, and thus increases the United States’ capacity to enforce citizenship-based taxation.

One could argue that the reason for the need to begin my explanation of citizenship-based taxation with caricature-like hypotheticals is because the taxation of nonresidents on their non-U.S.-source income is a caricature-like proposition to begin with. With the exception of citizenship-based taxation, all other taxes are levied on some form or combination of residence, source, and situs.¹¹⁹ A toll or tariff on goods crossing borders would be a tax based on situs; if a person wants to move something of value across borders or use a public service, then the thing being taxed must actually cross the border or use the service. Consumption or sales taxes, and, usually, the income taxation of nonresidents, is based on source; if a person is to be taxed in this manner, the transaction must occur in or the income must arise from a market or place within the state’s jurisdiction. Head taxes and the taxation of the income of those domiciled in a community are based on residence; a person must actually live in the community for that person to be taxed.

114. See Treas. Reg. § 1.1471-1(b)(110) (as amended in 2014).

115. For further discussion of the revenue rule, see Brenda Mallinak, *The Revenue Rule: A Common Law Doctrine for the Twenty-First Century*, 16 DUKE J. COMP. & INT’L L. 79 (2006).

116. See, e.g., S. 1813, 112th Cong. § 40304 (2012). This bill would have restricted travel by any person who owed more than \$50,000 in federal taxes. The final version of this legislation, Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, 126 Stat. 405 (2012), did not contain this provision. Note that, due to the lack of a national database cataloging citizens abroad, it would be difficult for the State Department to enforce such a travel restriction without further infrastructure developments.

117. See generally Thomas Zehnle, *Rethinking the Approach to Voluntary Disclosures*, 134 TAX NOTES 575 (Jan. 30, 2012).

118. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad*, *supra* note 1, at 166.

119. See BRUIN, EINAUDI, SELIGMAN & STAMP, *supra* note 89, at 19–20.

In addition, the income of residents is generally taxed on a worldwide basis; in other words, a community will not lay a claim to the entirety of a person's income unless the person is domiciled in that community. Accordingly, because citizenship-based taxation is outside the sphere of commonly accepted norms of taxation, it not unsurprising that many intuitively view it as an aberration.

This lack of obvious reasons for taxing the non-U.S.-source income of nonresident citizens, especially in the absence of unique benefits offered to citizens abroad, makes it easy to see why nonresident U.S. citizens are not only surprised by their counter-normative tax burdens, but also find such burdens to be unfair. In the paragraphs that follow, I will examine firsthand accounts of how American citizens who live abroad perceive and react to citizenship-based taxation.

B. Case Studies

1. Video Testimony

The following review of video testimony on citizenship-based taxation from U.S. citizens who are living in Canada is derived from John Richardson's submission to the Senate Finance Committee International Tax Working Group.¹²⁰ I recognize that any small-scale sample group, such as the one that I am proposing to use for this case study, is flawed not only due to the participants' self-selecting nature and inherent bias, but also because the sample group lacks diversity. That said, using U.S. citizens residing in Canada as a comparator is not without merit. Like the United States, Canada is a high-tax country, and the two share many cultural and lifestyle attributes. Such similarities reduce the chance of a person's thoughts on citizen-based taxation being distorted by culture shock or unfamiliarity with Western norms. In addition, Canada is the United States' most important trading partner,¹²¹ and it is the country with the second-largest population of U.S. expatriates.¹²² Finally, the Richardson testimonial compilation is a

120. *Video Testimony Prepared for Submission to Senate Finance Committee International Tax Working Group*, *supra* note 27. The videos themselves can be accessed directly at <https://vimeopro.com/citizenshiptaxation/video-testimonials>. For more on Mr. Richardson, see his personal website at <http://citizenshipsolutions.ca>.

121. U.S. CENSUS BUREAU, *Foreign Trade: Top Trading Partners—December 2013*, <https://www.census.gov/foreign-trade/statistics/highlights/top/top1312yr.html>.

122. MIGRATION POLICY INST., *International Migrant Population by Country of Origin and Destination*, <http://www.migrationpolicy.org/programs/data-hub/charts/international-migrant-population-country-origin-and-destination> (last visited June 18, 2016). According to working group submissions, there are currently 7.6 million American citizens living outside of the United States. UNITED STATES SENATE COMMITTEE ON FINANCE, THE INTERNATIONAL TAX BIPARTISAN TAX WORKING GROUP REPORT 80–81

unique source because it is, to the best of my knowledge, the only similar collection of testimony on the matter of citizenship-based taxation. The cases of individual nonresident U.S. citizens are set out below.

i. Ruth: Paying Taxes in Return for Government Services¹²³

Ruth characterizes herself as a patriotic American, and felt that living abroad increased her identification with being a U.S. citizen. She believes that it is her duty as a citizen to give back to her country, and regularly flew to the United States to volunteer, including a trip to Oklahoma City in order to help after the 1995 bombing of the Alfred P. Murrah Federal Building. With respect to taxation, Ruth is happy to pay Canadian taxes. She feels that doing so is fair because Canada is where she receives government services. Ruth knew about her obligation to file U.S. taxes, but would not always do so because, after consulting with the IRS, she was told that she did not meet the threshold necessary to file. When Ruth first heard about FATCA, she thought that it was a great idea to the extent that the legislation would help stop tax evasion. But she became upset when her husband, a Canadian with no U.S. tax status, started receiving negative treatment from banks due to Ruth's U.S. tax status. For example, Ruth had offers of favorable mortgage rates rescinded after her bank found out about her U.S. tax obligations under FATCA.¹²⁴ As the IRS and other government actors began discussing FATCA, Ruth felt that the perception of those making and enforcing U.S. legislation was that if she did not like FATCA, it was because she was a criminal. Ruth also noted that when individuals who were arguably improperly affected by FATCA made their position known, the

(July 2015) [hereinafter INTERNATIONAL TAX BIPARTISAN REPORT]. Mexico is currently the country that has the highest population of American emigrants.

During the Vietnam War, an estimated 50,000 to 100,000 Americans fled the United States to avoid the military draft operated by the Selective Service System. JOHN HAGAN, NORTHERN PASSAGE: AMERICAN VIETNAM WAR RESISTERS IN CANADA 3 (2001). If we assume that, but for the Vietnam War, none of those draft dodgers would have left the United States, then Canada's claim to having the second highest number of U.S. emigrants would likely be affected. It is possible that, without the U.S. draft dodgers, the Philippines, and perhaps Israel, would have a higher number of U.S. emigrants than Canada does.

123. *Video Testimony Prepared for Submission to Senate Finance Committee International Tax Working Group*, *supra* note 27.

124. Note that the FATCA regulations prohibit discrimination based on U.S. status by foreign financial entities. See Treas. Reg. § 1.1471-5(f)(1)(i)(A)(9) (as amended in 2014). Most IGAs further include anti-discrimination clauses. Canada, interestingly, does not include such a clause in its IGA. For more on this issue, see Yvonne Woldeab, Comment, "Americans: We Love You, But We Can't Afford You": How the Costly U.S.-Canada FATCA Agreement Permits Discrimination of Americans in Violation of International Law, 30 AM. U. INT'L L. REV. 611 (2015).

IRS simply released more statements to the press, which gave the impression that she was a criminal for not complying.¹²⁵ Ruth eventually gave up her citizenship. She was upset that she was forced to choose between the wellbeing of her family in Canada and her allegiance with the United States, her country of birth.¹²⁶

ii. Barbara: Treated Like a Criminal¹²⁷

Barbara assumed that she would lose her American citizenship after taking Canadian citizenship, and did not know that a formal renunciation was required. In an effort to become compliant, Barbara participated in the offshore voluntary disclosure program, an amnesty program. While going through the voluntary disclosure process, she found that the IRS was very unhelpful to her accountant with respect to how to become compliant, and was shocked and embarrassed when letters from the IRS had “CRIMINAL INVESTIGATION” in bold red letters printed on the envelope. The characterization of Barbara as a criminal by the IRS was too much for her to bear, and she eventually renounced her citizenship.

125. “Of the 347 submissions made to the international working group, nearly three-quarters dealt with the international taxation of individuals, mainly focusing on citizenship-based taxation, the Foreign Account Tax Compliance Act (FATCA), and the Report of Foreign Bank and Financial Accounts (FBAR). While the co-chairs were not able to produce a comprehensive plan to overhaul the taxation of individual Americans living overseas within the time-constraints placed on the working group, the co-chairs urge the Chairman and Ranking Member to carefully consider the concerns articulated in the submissions moving forward.” INTERNATIONAL TAX BIPARTISAN REPORT, *supra* note 188, at 80–81.

A similar reluctance to engage with FATCA issues also exists abroad. One person, who from contextual inference seems to be a resident of Israel, noted: “I am a U.S. citizen. I had an account at the Bank Leumi so I could buy and hold Israeli stock. The bank made me close the account because the American demands for paperwork was too much for them. I had under \$50,000, too little for the trouble. Even my MP, who I have discussed this with, doesn’t get it. His comments could be summed up as ‘They’ll likely never find you.’” Michael Phillips, Comment to *Taxed Into Renouncing Their US Citizenship?*, TIMES OF ISRAEL (Mar. 27, 2014, 6:44 AM), <http://www.timesofisrael.com/taxed-into-renouncing-their-us-citizenship/>.

126. Ruth also feels betrayed by Canada, and believes that she ought to be protected from this kind of discrimination under Canada’s privacy laws and its Charter of Rights and Freedoms.

127. *Video Testimony Prepared for Submission to Senate Finance Committee International Tax Working Group*, *supra* note 27.

iii. Mike's Wife: No Connection to the U.S. and Unaware of Tax Obligations¹²⁸

Mike is the husband of a woman who has U.S. tax status. I have inferred that Mike is speaking on his wife's behalf because she is afraid of being identified by the IRS. Mike's wife was born in the U.S., but, according to him, she did not know that she likely had U.S. tax status until recently. Mike's wife believes that, because the United States is a foreign country, it is not fair that she should be obliged to report to a state with which she has no connection except the fact that she was born there. Mike explained that, in his wife's case, saying that she was noncompliant and would owe penalties for not filing was like being fined for failing to stop when there was no stop sign present. He feels that it is "inhumane" for a country to levy taxes when a person has left and does not come back.

iv. Peter: U.S. Citizenship as a Liability¹²⁹

Peter lived in Canada for seventeen years as a U.S. citizen before he relinquished his citizenship. Although he was compliant for his first ten years as a nonresident, Peter lapsed because of his resentment that he had to pay taxes to a country in which he had not lived and whose public services he had not used for over ten years. Peter made the decision to relinquish his citizenship because he feared that he could become a covered expatriate and would then have to pay an effective exit tax should he wish to relinquish at a later date.¹³⁰ Peter noted that he was not given credit for non-income taxes, such as Canada's national sales tax, on his U.S. tax return. He also disliked that some of his Canadian government-sponsored savings plans were not given similar beneficial treatment by the United States, especially since devices like the Roth IRA were not available to nonresident citizens.¹³¹ Peter believes that citizenship is a liability for a U.S. citizen living abroad, and felt that a great burden had been lifted from him when he relinquished it.

128. *Id.*

129. *Id.*

130. *Cf.* I.R.C. § 877 (2012) (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).

131. See the discussion *supra* at note 28.

v. Katie: Turned Against the U.S.¹³²

Katie came to Canada from the U.S. as a preschooler. She retained U.S. tax status and did not agree with citizenship-based taxation, so she relinquished her citizenship. Katie no longer has any goodwill for her country of birth, and considers citizenship-based taxation to be a human rights violation.

vi. Linda: Cannot Afford to Become Compliant; Cannot Afford to Relinquish Citizenship¹³³

Linda is a homemaker who does not want to pay compliance costs to simply tell the U.S. that she does not owe any money. She feels that paying taxes in Canada, the country where she consumes public goods and which she calls home, ought to be enough. In particular, Linda was upset that her Canadian mutual funds were treated as passive foreign investment companies (“PFICs”),¹³⁴ and said that it would cost \$134,000, more than twice her annual income, to become compliant, which is a prerequisite to relinquishing her U.S. citizenship. Because of the high cost of relinquishing, she is effectively trapped in her U.S. citizenship.

vii. Marilyn: Cannot Afford to Remain a U.S. Citizen¹³⁵

Marilyn, a U.S.-trained lawyer who taught law at a Canadian University was a proud American. When she was required to take Canadian citizenship to be admitted to practice law in Ontario,¹³⁶ Marilyn filed an affidavit with the U.S. consulate in Toronto stating that she was not taking a repudiatory step by accepting another citizenship and explained that the second citizenship was required for professional reasons. What ultimately moved Marilyn to relinquish her citizenship was the fact that she could not own Canadian mutual funds without filing the relevant PFIC forms, which, by the IRS’s own estimation, requires approximately 41 hours of work.¹³⁷ Marilyn was shocked that the United States would consider her Canadian mutual investment to be a foreign

132. *Video Testimony Prepared for Submission to Senate Finance Committee International Tax Working Group*, *supra* note 27.

133. *Id.*

134. See the discussion *supra* at note 28.

135. *Video Testimony Prepared for Submission to Senate Finance Committee International Tax Working Group*, *supra* note 27.

136. Note that one need no longer obtain Canadian citizenship to practice law in Canada. See generally *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143 (Can.).

137. See INTERNAL REVENUE SERVICE, INSTRUCTIONS FOR FORM 8621, at 14 (2014).

fund, as she was both domiciled and resident in Canada.¹³⁸ Ultimately, Marilyn could not afford to remain a U.S. citizen, as the cost of compliance—including accounting fees and U.S. taxes (which would include a higher tax rate on Marilyn’s Canadian mutual funds due to their PFIC status)—would have cost her and her husband more than \$125,000 of their retirement money over the next 15 to 20 years.¹³⁹ This discriminatory treatment made Marilyn feel like U.S. citizens living abroad were treated as second-class citizens. Marilyn also noted the chance nature of her awareness of Report of Foreign Bank and Financial Accounts (“FBAR”) and PFIC filing obligations, and said that if she had not read about them in a seniors’ magazine, she would have been ignorant of them. Marilyn is “bitter and angry” that the United States, the country in which her family has lived since before the Civil War, “is treating its own citizens abroad like criminals and tax cheats, and making their lives miserable because of an unfair tax regime.”¹⁴⁰

2. Survey

Another tool that is useful to gauge popular reactions to citizenship-based taxation is the survey conducted by Dr. Amanda Klekowski von Koppenfels, of the University of Kent.¹⁴¹ Dr. von Koppenfels’s research surveyed 1,404 U.S. citizens and 142 former citizens living outside of the United States in December 2014 and January 2015. Dr. von Koppenfels describes her work as an “an opt-in snowball survey, distributed initially via overseas American organizations. The survey included closed-ended and open-ended questions, allowing for both quantitative and qualitative analysis.”¹⁴²

138. Marilyn also mentioned that, even if she wanted to purchase U.S. mutual funds, she could not because her Canadian broker was prohibited from selling her such investments. See *Video Testimony Prepared for Submission to Senate Finance Committee International Tax Working Group*, *supra* note 27.

139. Richardson, *supra* note 27. Note that, with the American dollar getting stronger and the steady weakening of the Canadian dollar due to falling oil prices, the cost of becoming compliant would almost certainly be even more expensive today and in the future.

140. *Id.* Marilyn goes on to say that she believes that her “earliest known American ancestor, who settled in Bowling Green, Kentucky in 1848, would understand [her] predicament.” A version of Marilyn’s story, in the form of a letter to President Barack Obama was published by *Forbes* magazine in 2014. See *Dear Mr. President, Why I’m Leaving America*, FORBES, Aug. 15, 2014, <http://www.forbes.com/sites/robertwood/2014/08/15/dear-mr-president-why-im-leaving-america/>.

141. AMANDA KLEKOWSKI VON KOPPENFELS, SURVEY OF CITIZENSHIP RENUNCIATION INTENTIONS AMONG US CITIZENS ABROAD (2015), <http://www.kent.ac.uk/brussels/documents/kvksurveyresults.pdf>.

142. *Id.* at 1.

Among her main findings, Dr. von Koppenfels notes that compliance and accounting costs were totally out of proportion with the amount of tax actually owed to the United States. One survey respondent did not want to “pay an accountant 2000€ in order to pay the USA \$0.00 in the end.”¹⁴³ Another respondent said that remaining compliant would require the payment of nearly ten percent of the respondent’s annual income in accounting and administrative fees.¹⁴⁴ It seems reasonable to assume that some of these high accounting fees are due to the fact that mutual funds, as well as other government-sponsored savings programs, such as retirement and education savings accounts, are generally deemed to be PFICs unless there is an exemption in that particular country’s tax treaty.¹⁴⁵

Another recurring theme is the fact that filing FBARs with the Financial Crimes Enforcement Network (“FinCEN”) made the respondents feel like criminals. This is consistent with the sentiment expressed in the video testimonies of Barbara and Ruth, discussed above. The survey respondents also commented on the punitive nature of the FBAR non-filing penalties, and felt that they were akin to criminal sanctions. Perhaps the most well-known example of excessive FBAR penalties is the case of Patricia Anderson d’Addario, whose \$80,000 FBAR penalty was imposed despite the fact that Ms. Anderson d’Addario was compliant with her IRS forms.¹⁴⁶

The concerns about additional costs under FBAR were also true under FATCA, except that, in addition to increased compliance costs, respondents noted difficulties in maintaining or opening bank and investment accounts, as well as in securing mortgages.¹⁴⁷ While almost all FATCA IGAs have clear anti-discrimination provisions,¹⁴⁸ in practice, this simply means that institutions cannot merely point to the IGA in order to justify their position. The discriminating institution must then make a modicum of effort in order to find another way to refuse to provide a given service. To the extent that such covert discriminatory

143. *Id.* at 2.

144. *Id.* (“To maintain tax compliancy with my pension account I was going to have to pay my accountant at least £1500 per year and I only earn £18 to £20,000 per year.”).

145. See the discussion *supra* at note 28.

146. Letter from Patricia M. Anderson d’Addario to the United States Senate Committee on Finance (Apr. 14, 2015), <http://www.finance.senate.gov/legislation/download/?id=862e6322-f9f1-4852-9e72-82d24ae25ccb>. The arguably disproportionate penalization of those who do not file FBARs has been noted by U.S. National Taxpayer Advocate Nina Olson. See NAT’L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS 79–94 (2014). On the other hand, however, if one is going to administer an anti-fraud program, it makes sense to have substantial penalties in order to induce compliance.

147. VON KOPPENFELS, *supra* note 141, at 2.

148. See the discussion *supra* note 124.

practices exist, they remind one of the tacit redlining and other institutional discrimination that still occurs today.¹⁴⁹

An additional issue related to bank discrimination that also caused hardship for the survey participants was the effects of one spouse's U.S.-tax status in mixed-nationality marriages. Foreign financial institutions are required not only to report the account information of those with U.S. tax status, but also of those whose spouses have U.S. status.¹⁵⁰ Anecdotal evidence shows that banks may additionally impose their own restrictions such as the closing of joint accounts, exclusion from family trusts, and forced reorganization of financial affairs.¹⁵¹ The survey notes that the deleterious effects on the affected mixed-nationality marriages are generally much worse when one spouse does not earn income. This situation echoes the sentiment expressed in Ruth's video testimony, above, when she noted that she felt like she had to choose between her non-U.S. family and her country of birth.

For those who wish to give up their citizenship, including accidental and unknowing Americans, there was a feeling among some respondents that the media was portraying the administrative aspects of the citizenship relinquishment process as much easier than they actually were, and characterized having U.S. citizenship akin to "being in a cage."¹⁵² For example, from a financial perspective, as discussed by Peter in his video testimony, if persons are deemed to be "covered expatriates," they could face a significant tax payment should they choose to relinquish. Note that in order to relinquish, one must also be compliant for the five years prior to the date that citizenship would end.¹⁵³ Becoming compliant could entail FBAR penalties, as well as significant accounting fees if the relinquisher holds accounts deemed to be PFICs. Similarly, from an administrative perspective, the delay in processing can be onerous. As discussed in Marilyn's video testimony, she decided to relinquish in

149. See, e.g., Press Release, U.S. Dep't of Hous. & Human Dev., HUD & Associated Bank Reach Historic \$200 Million Settlement of 'Redlining' Claim (May 26, 2015), http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2015/HUDNo_15-064b. For another example of tacit discrimination, see, e.g., Leon Neyfakh & Aaron Wolfe, *Why Police Are So Violent Toward Black Men*, SLATE, Aug. 6, 2015, http://www.slate.com/articles/news_and_politics/crime/2015/08/baltimore_ex_cop_discusses_police_violence_toward_young_black_men.html.

150. Treas. Reg. § 1.1471-1(b) (as amended in 2014).

151. Virginia La Torre Jeker, *Thank You, FATCA, You've Just Busted My Marriage*, ANGLINFO: UNITED ARAB EMIRATES, DUBAI (Sept. 19, 2014), <http://blogs.angloinfo.com/us-tax/2014/09/19/thank-you-fatca-youve-just-busted-my-marriage/>. See generally DEMOCRATS ABROAD, *FATCA: AFFECTING EVERYDAY AMERICANS EVERY DAY* (2014), <http://www.finance.senate.gov/imo/media/doc/Att%202%20Democrats%20Abroad%20014%20FATCA%20Research%20Report1.pdf>.

152. VON KOPPFELDS, *supra* note 141, at 3.

153. I.R.C. § 877(a)(2) (2012).

Quebec because the wait time was over one year in Toronto, the city with the nearest U.S. consulate.

Finally, the respondents expressed a sense of “being targeted,” noting that they had to combat the widespread attitude that those living outside the U.S. are tax cheats. One respondent was tired of being treated like a criminal merely because the respondent was an expatriate, and would not have relinquished U.S. citizenship had the United States treated the respondent with respect. Another respondent felt angered that the treatment of a nonresident U.S. citizen as a suspected criminal extended to one’s family “all because one family member is American who dared to marry abroad.”¹⁵⁴ This treatment is compounded with frustration over a lack of dedicated political representation for Americans abroad, such that the U.S. system feels like “[d]ouble taxation without representation, without services, but with onerous ‘Orwellian’ compliance.”¹⁵⁵

C. *Commentary*

The sentiments expressed in both the video testimonials and the survey support the assertions made by Nina Olson, the National Taxpayer Advocate, concerning the perception of those affected by citizenship-based taxation to the effect that its administration and enforcement are “scary,” “disproportionate,” and “excessive to the point of possibly violating the U.S. Constitution.”¹⁵⁶ Such a uniformly poor perception is perhaps to be expected from a self-selecting group of respondents. Those who are indifferent to, or who perhaps accept, citizenship-based taxation, would be much less motivated to participate in the testimonial or survey when compared to someone who is either extremely enthusiastic about the concept or loathes the very idea of taxing based on citizenship. That said, the responses, especially the video testimonials, are not uniform. With some participants, one feels as though they have truly been wronged. But with others, one wonders if the “love it or leave it” motto would be appropriate.

With respect to those who have been wronged, one can easily think of Ruth, who legitimately seems to have been forced to choose between her family in Canada and allegiance with the United States. Barbara as well seems to have objectively valid reasons for feeling humiliated and worn down by the IRS characterizations of her actions, which consisted of nothing more than living an ordinary life outside of the United States, as criminal. On the other hand, with respect to Peter, who chose to relinquish his citizenship for purely economic reasons, one struggles to

154. VON KOPPFELS, *supra* note 141, at 3.

155. *Id.*

156. NAT’L TAXPAYER ADVOCATE, ANNUAL REPORT TO CONGRESS 147 (2012).

feel the kind of empathy that is elicited when Ruth and Barbara tell their stories. In fact, Peter's actions seem to be a perfect example of the lack of community membership posited by Professor Kirsch, and thus his relinquishing of American citizenship could arguably be a good thing. For the moment, I will set aside this type of case. Instead I will focus on the three recurring problems discussed in the video testimonials and surveys; namely, the problem of burdening accidental Americans with citizenship-based taxation, the high compliance costs of citizenship-based taxation, and the lack of benefits provided to those on whom citizenship-based taxation is imposed.

Concerning accidental Americans (or perhaps more accurately "unknowing" Americans), the case of Mike's wife seems to be the paradigmatic example of a person who is burdened with U.S. tax obligations but who has no community connection to the United States beyond the fact that she was born there. But there are other, perhaps thornier, issues at play, such as whether an accidental Americans should be excused from citizenship-based taxation if they occasionally visit family in the United States. The real problem here, however, seems to be a conflation of citizenship and domicile, which makes Professor Zelinsky's proposal of using citizenship as a proxy for domicile problematic.¹⁵⁷ The best solution to the problem seems to be the same-country exception recommendation by Professor Allison Christians, which would eliminate the application of citizenship-based taxation on income that arose in the jurisdiction in which a person is resident or domiciled.¹⁵⁸ The Obama administration has also signaled their awareness of this issue, and has proposed measures to facilitate the relinquishment of American citizenship by accidental Americans, thus easing some of the burden of citizenship-based taxation.¹⁵⁹ In short, the plight of accidental Americans is clearly unjust, and whether or not citizenship-based taxation is maintained, this issue must be addressed.

The issues associated with the high costs of compliance have been discussed earlier in this article, but their frequent repetition in the video testimonials and survey results seem to validate being concerned about them. We are reminded of Linda, the person who would like to give up citizenship but cannot afford to do so because the United States treats her Canadian mutual funds as foreign, which makes them subject to the PFIC regime. We are also reminded of Marilyn, who similarly could not

157. See generally Zelinsky, *supra* note 23.

158. See generally Allison Christians, *Could a Same-Country Exception Help Focus FATCA and FBAR?*, 67 TAX NOTES INT'L 157 (2012).

159. DEP'T OF THE TREASURY, GENERAL EXPLANATION OF THE ADMINISTRATION'S FISCAL YEAR 2016 REVENUE PROPOSALS 282-83 (2015), <https://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2016.pdf>.

afford to keep her U.S. citizenship because of the high PFIC-related compliance costs associated with her Canadian mutual funds. Clearly, it is wrong that people have to spend thousands of dollars simply to tell the United States that they owe nothing in taxes. Additionally, Americans living abroad should ideally face U.S. tax obligations that are no greater than those of their U.S.-resident fellow citizens. The simplification of reporting requirements is the most obvious solution. Part of the problem seems to be that all Americans living abroad are forced to file FBAR forms, which are designed to impair money laundering (and accordingly have unusually steep penalty fees for noncompliance), as opposed to enhancing the revenue-collecting capacity of the individual income tax regime. Additionally, the characterization of a person's home country investments as PFICs seems unreasonable—especially from the taxpayer's perspective. No doubt many nonresident citizens are aghast to find out that their home country's retirement saving plan is a "foreign" account. Again, as Professor Christians recommends,¹⁶⁰ a same-country exception would be a simple way to eliminate many of the problems, including high compliance costs, associated with citizenship-based taxation, while still maintaining the integrity of the system.

The final recurring issue is the lack of social services received by U.S. citizens living abroad. While it is true that some nonresident Americans in certain countries may continue to maintain some social security benefits after moving abroad,¹⁶¹ this must be distinguished from the true lack of everyday benefits referred to in the video testimony and survey. As discussed in Part II, above, and more specifically as rebutted by Professor Mason,¹⁶² the proposition put forward by *Cook v. Tait*, that Americans benefit inherently from the U.S. government while abroad, has little basis in reality. There is no real solution to this issue, and the U.S. government should therefore clarify why it is imposing citizenship-based taxation in the first place.

CONCLUSION

The U.S. government has not commented on the rationale for citizenship-based taxation since *Cook v. Tait* was decided in 1924. The world has changed significantly since that time. We now live in a globalized society and people are moving abroad more than ever. While there is an active conversation about citizenship-based taxation, it is not

160. See generally Christians, *supra* note 158.

161. See the description of social security totalization agreements at *International Agreements*, SOC. SEC. ADMIN., http://www.ssa.gov/international/totalization_agreements.html (last visited June 18, 2016).

162. See generally Mason, *supra* note 21.

happening in the political sphere. Instead, this conversation is happening quietly among friends in the homes of expatriates and in the academic community. This ought to change, and the debate should be taken into the legislature. The taxes imposed on nonresident citizens are perceived as being counter-normative and counter-intuitive, and those paying taxes have a right to know why they are paying. If the U.S. government intends to rely on the benefits rationale, then that reliance should be reaffirmed. It seems unreasonable to tacitly rely on a disputed precedent that is almost 100 years old.

Although the prospect of the government giving explanatory reasons for the laws that it enacts may seem novel, the legislature, the executive branch, and administrative agencies often give guidance for the rationales behind statutes in preambles and other supplementary texts, and any difference between these precedents and what I am proposing would thus be incremental. Further, politicians are often eager to give their opinions on the policy behind laws and regulations. Because of the academic controversy and perceived unfairness surrounding citizenship-based taxation, it seems ideally placed to receive additional governmental guidance with respect to its rationale. My analysis shows that the rationale for citizenship-based taxation set out in *Cook v. Tait* is wrong to the extent that it suggests that the citizen benefits inherently from the government in a manner that justifies taxation. But the Supreme Court was right to the extent it held that the only way a government could rationally tax the non-U.S.-source income of a citizen living abroad was if that government conferred a benefit on the person being taxed.

If there is a benefit being conferred on nonresident U.S. citizens, it is the benefit of a right to return. This right of return is not in substance different from the right of return offered by other countries, but it is arguably more valuable, and thus could potentially justify citizenship-based taxation. By not articulating this position, however, the U.S. government is contributing to poor political discourse. Congress should remedy this situation, and set out the grounds for its decision to tax citizens abroad. It follows that if the U.S. government feels that it cannot justify citizenship-based taxation, then it should be abolished.