ARTICLES

CITIZENSHIP TAXATION

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

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INTRODUCTION

When news broke that one of Facebook's founders, thirty-year-old Eduardo Saverin, had renounced his U.S. citizenship and moved to Singapore for its low taxes, critics ranging from politicians to bloggers joined in denouncing his action.[1] Senators Charles Schumer and Robert Casey even proposed legislation that would have barred Saverin from visiting the United States.[2] Politicians and journalists have condemned other wealthy Americans who have renounced their citizenship for tax reasons as "economic Benedict Arnolds,"[3] "sleazy bums,"[4] and "financial draft evaders."[5]

Recent legislation requires high-income and wealthy people to pay tax on the appreciation of their assets when, like Saverin, they relinquish their citizenship.[6] Effective in 2008,[7] this citizenship-renunciation tax has received significant attention. Commentators have argued that it is unconstitutional, violates human rights, conflicts with the values of a liberal society,[8] and is motivated by "pleasure-dome images of life overseas,"[9] or "animus against expatriates."[10] Critics of the tax highlight the controversial Reed Amendment, which forbids tax-motivated renouncers from ever returning to the United States.[11]

Analysis of the citizenship-renunciation tax, although valuable and important, side-steps a more fundamental question. Current law motivates

1. *E.g.*, Jim Puzzanghera, *Two Senators Want to Stop Facebook's Saverin from Dodging Taxes*, L.A. TIMES (May 18, 2012), http://articles.latimes.com/2012/may/18/business/la-fi-facebook-saverin-20120518; Hayley Tsukayama, *Facebook Co-Founder Saverin Under Fire for Renouncing U.S. Citizenship*, WASH. POST (May 17, 2012), https://www.washingtonpost.com/business/technology/facebook-co-founder-saverin-under-fire-for-renouncing-us-citizenship/2012/05/17/gIQAPFCyVU_story.html.

2. Kathleen Hunter, *Schumer Proposes Tax on People Like Facebook's Saverin*, BLOOMBERG BUS. (May 17, 2012), http://www.bloomberg.com/news/articles/2012-05-17/schumer-proposes-tax-on-people-like-facebook-s-severin ("Eduardo Saverin wants to de-friend the United States of America just to avoid paying taxes . . . . We aren't going to let him . . . ." (quoting Sen. Charles Schumer)); Tsukayama, *supra* note 1.

3. Alice G. Abreu, *Taxing Exits*, 29 U.C. DAVIS L. REV. 1087, 1122 (1996) (quoting then-Assistant Secretary for Tax Policy Les Samuels).

4. *Id.* (quoting Rep. Abercrombie, speaking on the floor of the House).

5. Michael Kinsley, Essay, *Love It or Leave It*, TIME MAG., Nov. 28, 1994, at 96.

6. I.R.C. § 877A(a)(2) (2015).

7. Heroes Earnings Assistance and Relief Tax Act of 2008, Pub. L. No. 110-245, § 301(a), 122 Stat. 1624, 1638–44.

8. *See, e.g.*, Abreu, *supra* note 3, at 1138–40, 1138 n.185, 1160 n.251; William L. Dentino & Christine Manolakas, *The Exit Tax: A Move in the Right Direction*, 3 WM. & MARY BUS. L. REV. 341, 398 (2012).

9. John D. Maiers, *The Foreign Earned Income Exclusion: Reinventing the Wheel*, 34 TAX LAW. 691, 691 (1981).

10. William Thomas Worster, *The Constitutionality of the Taxation Consequences for Renouncing U.S. Citizenship*, 9 FLA. TAX REV. 921, 1006 (2010).

11. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, sec. 352, § 212(a)(10), 110 Stat. 3009-546, 3009-640 (codified as amended at 8 U.S.C. § 1182(a)(10)(E) (2000)); Dentino & Manolakas, *supra* note 8, at 367–69.

taxpayers to renounce their citizenship because the United States is the only country that taxes its citizens on their worldwide income, even when those citizens live abroad, no matter how long they live abroad.[12] With a few important exceptions, the same tax regime applies to both resident Americans and nonresident Americans.[13] Because the United States taxes its citizens, whereas other countries tax their residents, Americans living abroad face worldwide taxation by two jurisdictions: the United States and their country of residence.[14]

Billionaires fleeing taxes represent only a tiny fraction of the millions of Americans abroad.[15] Unlike Saverin, most Americans abroad retain their citizenship[16] and therefore remain subject to the citizenship tax. This Article focuses on the impact of citizenship taxation on this large group.

In order to enforce worldwide taxation of nonresident citizens and green-card holders, to whom the citizenship tax also applies,[17] the United States imposes onerous reporting requirements on those groups. In addition to filing annual tax returns, Americans living abroad must file reports on their foreign bank and other financial accounts, even when they owe no U.S. taxes.[18] Failure to meet these reporting obligations carries heavy penalties.[19] National Taxpayer Advocate, Nina Olson, whose office as an independent organization within the IRS represents the interests of taxpayers to Congress, described the civil penalties applicable to nonresident Americans who fail to file the proper paperwork as "scary," "disproportionate," and "excessive to the point of possibly violating the

12. Dentino & Manolakas, *supra* note 8, at 345; Worster, *supra* note 10, at 931. Eritrea is sometimes cited as another country with citizenship taxation. *E.g.*, Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443, 445 & n.5 (2007). However, Eritrean citizenship tax differs from that of the United States, including, for example, that Eritrea applies a flat 2 percent tax on nonresident Eritreans, whereas the United States taxes nonresident Americans at regular progressive rates. STAFF OF JOINT COMM. ON TAXATION, 104TH CONG., ISSUES PRESENTED BY PROPOSALS TO MODIFY THE TAX TREATMENT OF EXPATRIATION 17, app. B-2 (Joint Comm. Print 1995). The Eritrean tax has been subject to condemnation by a United Nations Security Council resolution. S.C. Res. 2023, ¶¶ 10–11 (Dec. 5, 2011) (resolving that "Eritrea shall cease using extortion, threats of violence, fraud and other illicit means to collect taxes outside of Eritrea from its nationals or other individuals of Eritrean descent").

13. *See* I.R.C. § 911(d)(1) (2015). The most important exception excludes from taxable income about $100,000 ($101,300 in 2016) of income earned abroad by nonresident citizens. *See* I.R.C. § 911(b)(2)(D).

14. Dentino & Manolakas, *supra* note 8, at 348, 404.

15. For the challenges in counting Americans abroad, as well as estimates of that population, see *infra* Part I.D.

16. STAFF OF JOINT COMM. ON TAXATION, *supra* note 12, at 65.

17. *See* I.R.C. § 7701(b)(6).

18. *Id.* § 6038D.

19. *See id.* § 6038D(d).

U.S. Constitution."[20] Indeed, the National Taxpayer Advocate blames the recently strengthened penalty regime for foreign asset and account reporting for "skyrocketing" renunciations of citizenship.[21]

Views on citizenship taxation diverge, even among its defenders.[22] For example, Cynthia Blum and Paula Singer argue that although the equity arguments for citizenship taxation have merit, citizenship taxation should be abandoned because it is inadministrable.[23] In contrast, Edward Zelinsky argues that one of the principal virtues of the citizenship tax is how easy it is to administer compared to other jurisdictional bases that are commonly used.[24] Michael Kirsch, the best-known defender of the citizenship tax, argues that the tax is both fair and efficient.[25]

Defenders of citizenship taxation make two main fairness arguments. First, they argue that because nonresidents receive benefits from the United States, they should pay U.S. tax.[26] Although this argument carries some weight, it cannot justify taxing nonresident Americans similarly to resident Americans who receive far more benefits.[27] The benefits theory is weakest when used to support worldwide taxation of nonresident green-card holders, who receive fewer benefits than resident and nonresident citizens.

Second, commentators argue that citizens' membership in the national community obliges them to contribute to taxes and so failure to tax overseas Americans' total income, no matter where earned, would be unfair.[28] Under this view, we need citizenship taxation to ensure equal

20. NINA E. OLSON, TAXPAYER ADVOCATE SERV., 2012 ANNUAL REPORT TO CONGRESS 147 (2012) [hereinafter NTA 2012 REPORT].

21. NINA E. OLSON, TAXPAYER ADVOCATE SERV., 2013 ANNUAL REPORT TO CONGRESS 206 (2013) [hereinafter NTA 2013 REPORT].

22. *Compare* Kirsch, *supra* note 12, *and* 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), *with* Renée Judith Sobel, *United States Taxation of Its Citizens Abroad: Incentive or Equity*, 38 VAND. L. REV. 101 (1985), *and* Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289 (2011). The citizenship tax also has detractors. *See, e.g.*, Cynthia Blum & Paula N. Singer, *A Coherent Policy Proposal for U.S. Residence-Based Taxation of Individuals*, 41 VAND. J. TRANSNAT'L L. 705, 705 (2008) (proposing replacing citizenship taxation with an extended-tax-residence rule); Bernard Schneider, Note, *The End of Taxation Without End: A New Tax Regime for U.S. Expatriates*, 32 VA. TAX REV. 1, 1 (2013) (proposing a "departure tax regime" that would apply to residence changes). My Article focuses on the policy arguments for and against citizenship taxation, rather than proposing a specific legislative alternative to the current regime.

23. *See* Blum & Singer, *supra* note 22, at 711–19.

24. *See* Zelinsky, *supra* note 22, at 1291.

25. *See generally* Kirsch, *supra* note 12 (defending citizenship taxation).

26. *See, e.g.*, *id.* at 470–79.

27. *See* Zelinsky, *supra* note 22, at 1314–16.

28. *See, e.g.*, Kirsch, *supra* note 12, at 479–88; Postlewaite & Stern, *supra* note 22, at 1115–22.

treatment of resident and nonresident citizens.[29] But tax scholars generally have avoided the questions of how nonresidence impacts national community membership and what impact, if any, a taxpayer's connections to more than one national community should have on her tax obligations.[30] This Article draws on immigration literature and political theory to explore the connection between nonresident citizenship and taxation.[31] It concludes that, of the traditional arguments, the social obligation theory of taxation provides the best support for citizenship taxation as applied in many, but far from all, cases.

A second argument for citizenship taxation is that it is easy to administer. Edward Zelinsky stresses the superiority of a bright-line citizenship rule over a more facts-and-circumstances residence approach.[32] But Zelinsky's argument for citizenship taxation takes too narrow a view of tax administration. He is right that using citizenship rather than residence simplifies the initial determination of *who* will be subject to worldwide taxation.[33] But that is not the end of the story. Taxing the foreign-source income of Americans residing outside the territorial jurisdiction of the United States is difficult, and the complexity of the international tax rules that apply to nonresident citizens imposes a crushing burden on compliant overseas taxpayers. Indeed, for almost every year since 2008, the National Taxpayer Advocate has ranked problems facing international taxpayers as among the most serious problems facing American taxpayers.[34]

29. *See* Kirsch, *supra* note 12, at 479–88; Postlewaite & Stern, *supra* note 22, at 1121–22.

30. *See, e.g.*, J. Clifton Fleming, Jr., Robert J. Peroni & Stephen E. Shay, *Fairness in International Taxation: The Ability-to-Pay Case for Taxing Worldwide Income*, 5 FLA. TAX REV. 299, 309–10 (2001) (expressly declining to address these questions); Kirsch, *supra* note 12, at 480–81 (arguing that nonresident Americans are part of the U.S. national community, but not defining this community). Tax scholars are not alone in neglecting to analyze differences between resident and nonresident citizenship. *See, e.g.*, David Fitzgerald, *Rethinking Emigrant Citizenship*, 81 N.Y.U. L. REV. 90, 90 (2006) ("Immigrant citizenship has received far more attention than emigrant citizenship . . . .").

31. Examples of such immigration literature include Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11 (2006); Rainer Bauböck, *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, 75 FORDHAM L. REV. 2393 (2007); and Anupam Chander, *Homeward Bound*, 81 N.Y.U. L. REV. 60 (2006).

32. Zelinsky, *supra* note 22, at 1323–25.

33. *See id.* at 1341.

34. NINA E. OLSON, TAXPAYER ADVOCATE SERV., 2008 ANNUAL REPORT TO CONGRESS 141–57 (2008); NINA E. OLSON, TAXPAYER ADVOCATE SERV., 2009 ANNUAL REPORT TO CONGRESS 134–54 (2009); NINA E. OLSON, TAXPAYER ADVOCATE SERV., 2011 ANNUAL REPORT TO CONGRESS 151–66, 191–206 (2011) [hereinafter NTA 2011 REPORT]; NTA 2012 REPORT, *supra* note 20, at 134–53, 262–81; NTA 2013 REPORT, *supra* note 21, at 205–49; NINA E. OLSON, TAXPAYER ADVOCATE SERV., 2014 ANNUAL REPORT TO CONGRESS 79–93 (2014).

In addition to debating the fairness and administrability of citizenship taxation, commentators also have discussed its impact on taxpayer behavior. Citizenship taxation encourages Americans abroad to renounce their U.S. citizenship to avoid tax and tax-compliance obligations.[35] New filing requirements enforced by harsh penalties spurred a 500 percent increase in citizenship renunciations over five years.[36] While acknowledging this citizenship distortion, advocates of citizenship taxation argue that the tax produces efficiency gains because it promotes neutrality in taxpayers' choice of where to reside.[37] Because Americans cannot escape the tax grasp of the United States merely by moving abroad, commentators claim that Americans have no motivation to move abroad for lower taxes.[38] This Article argues that the many deviations under current law from citizenship taxation compromise its residence neutrality.[39]

Moreover, even if citizenship taxation were residence neutral for Americans, it distorts both residence and citizenship decisions for immigrants to the United States. By subjecting green-card holders and naturalized U.S. citizens to life-long worldwide taxation (or the citizenship-renunciation tax if they give up their citizenship or green card and return home), citizenship taxation may discourage both initial migration to the United States as well as the decision by migrants to become permanent legal residents or citizens. In other words, this Article suggests that citizenship taxation not only encourages Eduardo Saverins to renounce, it also may discourage entrepreneurs like Paypal founder Elon Musk from naturalizing.[40] Members of Congress and prior commentators have not

35. Kirsch, *supra* note 12, at 493–95.

36. NTA 2013 REPORT, *supra* note 21, at 206–07 (attributing the increase to the new penalty regimes associated with information reporting).

37. *E.g.*, Kirsch, *supra* note 12, at 490–93.

38. *E.g.*, *id.* at 488–93.

39. For example, Congress views the principal deviation from the citizenship tax, the foreign-earned-income exclusion, as an incentive for taxpayers to move their residence abroad. Sobel, *supra* note 22, at 119–46. And the international tax regime has not changed much since Brainard Patton criticized it in 1975 for failing to relieve double taxation of Americans abroad. *See* Brainard L. Patton, Jr., *United States Individual Income Tax Policy as It Applies to Americans Resident Overseas: OR, If I'm Paying Taxes Equal to 72 Percent of My Gross Income, I Must Be Living in Sweden*, 1975 DUKE L.J. 691, 717–27.

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

considered the potential impact of citizenship taxation on immigration *to* the United States.[41]

Since highly skilled workers and wealthy individuals who have the most choices about where to migrate are likely to be the groups most affected by these incentives, tax law may subvert goals to attract wealthy and highly skilled immigrants. As human capital flows become more important,[42] the United States should not disadvantage itself in the global market for talented workers.[43] At a minimum, Congress should expressly consider the trade-offs between taxing emigrants and attracting immigrants.

This Article proceeds in five parts. Part I provides demographic information about Americans abroad, a description of the origins and mechanics of citizenship taxation, and available data about the revenue raised by the tax. It emphasizes the difference between the U.S. regime, which taxes citizens on their worldwide income no matter where they reside, and the residence-based tax regimes employed by other countries. Parts II through IV critically evaluate the traditional equity, administrability, and efficiency arguments favoring citizenship taxation, including the argument that citizenship taxation adversely impacts U.S. immigration goals. Parts II to IV conclude that traditional policy considerations cannot support worldwide taxation on the basis solely of citizenship, although the same policy considerations suggest that using citizenship in conjunction with other connecting factors, such as residence, would be fairer than using residence alone. Part V describes various policy proposals for replacing citizenship taxation. It concludes that a better

41. Some economic models even assume that foreigners cannot move, which precludes consideration of the impact of tax policy on inbound migration. *See, e.g.*, Laurent Simula & Alain Trannoy, *Shall We Keep the Highly Skilled at Home? The Optimal Income Tax Perspective* 2 (CESifo Working Paper No. 3326, 2011). A few commentators have considered the impact on immigration of exit taxation, though none has considered the impact on immigration of citizenship taxation. *See* Jeffrey M. Colón, *Changing U.S. Tax Jurisdiction: Expatriates, Immigrants, and the Need for a Coherent Tax Policy*, 34 SAN DIEGO L. REV. 1, 87 (1997) (observing that "[o]ver the last sixty years, Congress has neglected to address the tax issues that arise for persons or property entering [the United States]").

42. Mihir A. Desai et al., *Sharing the Spoils: Taxing International Human Capital Flows*, 11 INT'L TAX & PUB. FIN. 663, 663 (2004) (stating that compared to financial capital flows, "cross-border flows of human capital are likely to play an equally influential role in shaping the political and economic landscape over the next 50 years").

43. *See* Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1168–72 (1997) (advocating tax subsidies for immigrants); Ayelet Shachar, *Picking Winners: Olympic Citizenship and the Global Race for Talent*, 120 YALE L.J. 2088, 2105 (2011) ("Securing full membership in the political community remains one of the few goods that even the mightiest economic conglomerate cannot offer to a skilled migrant or talented athlete; only governments can allocate the precious property of citizenship. And, increasingly, a growing number of countries are willing to use this power to attract the 'best and the brightest . . . .'" (footnote omitted)).

balance between the fairness goal of taxing the right people and the administrative goal of maintaining a workable international tax regime could be achieved without major reforms.

Discussion of the virtues and vices of citizenship taxation is particularly relevant today. When first enacted during the Civil War to punish draft dodgers,[44] the citizenship tax affected few taxpayers because few Americans lived abroad.[45] But globalization has wrought dramatic changes. In just the last five years, the number of Americans abroad has increased by more than 50 percent.[46] Problems stemming from citizenship taxation have grown with the affected population, and citizenship taxation seems ever more out-of-step with a world in which countries increasingly recognize, and even encourage, dual and multiple citizenship.[47] Keenly aware of such problems, political advocacy groups pressure Congress to fix the taxation of Americans abroad.[48] Finally, analysis of the costs and benefits of citizenship taxation could benefit other countries considering expanding their definitions of residence.[49]

I. CITIZENSHIP TAXATION AND NONRESIDENT AMERICANS

A. INTERNATIONAL TAX PRIMER

National tax systems were originally designed at a time when a taxpayer's residence, citizenship, and income usually coincided in the same state.[50] As taxpayers and commerce increasingly crossed borders, states had to resolve competing tax claims on income connected to more than one state.[51] Today, international tax law recognizes two types of jurisdiction to

44. Act of June 30, 1864, ch. 173, § 116, 13 Stat. 223, 281; Kirsch, *supra* note 12, at 449–52.

45. Kirsch, *supra* note 12, at 452.

46. NTA 2013 REPORT, *supra* note 21, at 205.

47. *See* Chander, *supra* note 31, at 69.

48. Such advocacy resulted in a bill sponsored by Rep. Carolyn B. Maloney (D.-N.Y.) proposing a presidential commission to study how federal laws and policies affect Americans abroad. *See* Commission on Americans Living Abroad Act, H.R. 597, 113th Cong. § 4(a)(2)(B) (2013). Members of Congress recently asked the Government Accountability Office ("GAO") to study the effects on the economy of the current tax treatment of nonresident citizens. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-387, ECONOMIC BENEFITS OF INCOME EXCLUSION FOR U.S. CITIZENS WORKING ABROAD ARE UNCERTAIN (2014) [hereinafter GAO, ECONOMIC BENEFITS], http://www.gao.gov/assets/670/663322.pdf (finding that it could not estimate the effects).

49. *See* Daniel Gutmann, *La lutte contre "l'exil fiscal": du droit comparé à la politique fiscale*, 21 REVUE DE DROIT FISCAL [REV. DR. FISCAL] 27 (2012) (Fr.) (reviewing expanded notions of tax residence in several European countries).

50. The modern federal income tax dates back to 1913. *See* Kirsch, *supra* note 12, at 454.

51. *See generally* League of Nations Econ. & Fiscal Comm., *Report on Double Taxation Submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman, and Sir Josiah Stamp*, League of Nations Doc. E.F.S.73.F.19 (1923) (analyzing economic consequences of international

tax—*worldwide* and *source*.[52] Worldwide jurisdiction derives from personal connections between the taxing state and the *owner of the income*, whereas source jurisdiction derives from economic or territorial connections between the taxing state and the *income*.[53]

Worldwide tax jurisdiction is described as *unlimited* because a state with worldwide tax jurisdiction over a person can tax all of her income, no matter where in the world derived.[54] Although international law recognizes three independent predicates for worldwide taxation—nationality, domicile, and residence—no state other than the United States assesses worldwide income taxation solely on the basis of nationality.[55] Instead, states apply worldwide taxation to residents or domiciliaries, terms typically defined by reference to physical presence in the jurisdiction.[56] For example, a common rule determines or presumes residence if the taxpayer is physically present in the jurisdiction for more than half of the days of the year.[57] States also determine residence by evaluating connecting factors such as whether the taxpayer has a dwelling in the jurisdiction, whether her family resides there, and whether she has social and economic connections to the jurisdiction.[58] This Article adopts the common practice of referring to as a "resident" any person who meets a state's threshold for worldwide tax by reason of her domicile *or* residence. The term "resident" as used in this Article therefore excludes anyone who is subject to worldwide tax solely on the basis of her nationality.

If a taxpayer is not a national or resident of a state, then under international custom that state has only *limited* or *source* jurisdiction over the person's income.[59] Under internationally accepted principles, the state

double taxation in light of post-WWI economic liberalization, and proposing methods for avoiding double taxation).

52. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 411 (AM. LAW INST. 1987); Zelinsky, *supra* note 22, at 1293–94.

53. *See* Gérard Coulombe, *General Report: Taxation of Payments to Non-residents for Independent Personal Services*, 67b CAHIERS DE DROIT FISCAL INT'L 39–61 (1982) (breaking national practices into "economic relationship" and "personal relationship," and subdividing personal relationship into residence, domicile, and political allegiance, including citizenship).

54. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 411 cmt. c (AM. LAW INST. 1987).

55. *Id.* § 411 reporters' note 1.

56. *See id.* § 411 reporters' note 2.

57. HUGH J. AULT & BRIAN J. ARNOLD, COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS 429–34 (3d ed. 2010).

58. *Id.* at 431.

59. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 411 cmt. c (AM. LAW INST. 1987).

can tax the person's income only if it arises in the state's territory.[60] The rules for determining when income arises in a state are controversial and not uniform across states.[61]

When one state has *source* jurisdiction over an *item* of income while another state has *worldwide* jurisdiction over the *owner* of the income, double taxation may result. For example, most states regard the source of personal services income to be the state where the services were performed.[62] At the same time, the state where the worker resides may tax *all* of the worker's income, no matter where earned.[63] A worker who resides in one state but works in another may be subject to tax on her earnings by both states. International tax norms oblige the residence state to relieve double taxation that results from such jurisdictional overlaps.[64] Relief of double taxation may involve *exemption*, under which the residence state refrains from taxing income already taxed by the source state, or instead, the residence state may *credit* taxes assessed by the source state against the tax due to the residence state.[65] The United States primarily uses credits to relieve double taxation.[66]

B. U.S. CITIZENSHIP TAXATION

Like many countries, the United States taxes the worldwide income of residents, defined to include (among others) anyone present in the country for more than half of the days of the year.[67] But in addition to those

60. *Id.* (noting that a state has limited tax jurisdiction if the "source of the income, the situs of the property, or the place of the transaction is in the taxing state").

61. *See* Stephen E. Shay, J. Clifton Fleming, Jr. & Robert J. Peroni, *The David R. Tillinghast Lecture:* "*What's Source Got to Do With It?" Source Rules and U.S. International Taxation*, 56 TAX L. REV. 81 (2002) (identifying normative justifications for source taxation, offering guidelines for writing source rules, and criticizing current source rules).

62. AULT & ARNOLD, *supra* note 57, at 506–08.

63. *Id.*

64. *See, e.g.*, AM. LAW INST., FEDERAL INCOME TAX PROJECT: INTERNATIONAL ASPECTS OF UNITED STATES INCOME TAXATION 126 (1987).

65. *Id.* at 127, 131.

66. *Id.* at 6; Shay, Fleming & Peroni, *supra* note 61, at 147.

67. I.R.C. § 7701(b)(3)(A)(ii) (2015) (describing the 183-day test). The United States also taxes aliens present for less than half of the current year if they spent significant time in the United States in the previous two years. *See id.* § 7701(b)(1)(A)(ii) (defining "tax resident" to include aliens meeting a "substantial presence test," regardless of their immigration status). A taxpayer meets the substantial presence test if she was: (1) present in the United States for at least thirty-one days of the current calendar year, and (2) present in the United States for at least 183 days in the past three years, determined by counting all of the days she was present in the current calendar year, plus one-third of the days in the preceding year, plus one-sixth of the days in the year before that. *Id.* § 7701(b)(3). Thus, if a taxpayer were present in the United States for 100 days of each of the last three years, she would fail part (2) of the test because the United States would count her days of physical presence as follows: (100

physically present, and contrary to the practice of other countries,[68] the United States also taxes its citizens and lawful permanent residents (green-card holders) on their worldwide income, no matter where in the world they reside and no matter how long they reside there.[69] Thus, when nationals of other countries move abroad, sooner or later their state of nationality stops taxing them.[70] But the United States never stops taxing its citizens and green-card holders, no matter how long they live abroad.

To be precise, the United States differs from other states in its treatment of nonresident citizens' *foreign-source* income. States generally tax domestic income to its owner, regardless of her nationality or residence.[71] Thus, after a Canadian moves abroad and no longer meets Canadian tax-residence requirements, Canada will continue taxing her income *from Canada*.[72] Canada would similarly tax nonresident aliens on income from Canada.[73] The U.S. approach is the same; the United States generally taxes everyone's income from the United States.[74] The real difference between residence and citizenship tax regimes lies not in their treatment of domestic income, but rather in their treatment of *foreign* income. Other countries exempt nonresident citizens' foreign-source

x 1) + (100 x 1/3) + (100 x 1/6) = 100 + 33 + 16 = 149 days. A day of physical presence in the United States does not count for the substantial presence test if, on that day, the alien is an "exempt individual," a category that includes certain students, teachers and trainees, and employees of foreign governments and international organizations. *Id.* § 7701(b)(5). A taxpayer who was present for fewer than 183 days in the current year but who satisfies the "substantial presence test" avoids U.S. residence tax if she: (1) has a foreign "tax home," and (2) has a closer connection with the other country. *See id.* §§ 7701(b)(3)(B), (b)(1)(A)(ii).

68. Kirsch, *supra* note 12, at 445 & n.4–5.

69. I.R.C. § 1 (imposing tax). *See also* Treas. Reg. § 1.1-1(a)(1) (2015) ("Section 1 of the Code imposes an income tax on the income of every individual who is a citizen or resident of the United States . . . ."); *id.* § 1.1(b) ("[A]ll citizens of the United States, wherever resident, . . . are liable to the income taxes imposed by the Code whether the income is received from sources within or without the United States."). The United States taxes on a worldwide basis all citizens and any "resident alien," defined for tax purposes as an alien who: (1) is lawfully admitted for permanent residence at any time during the calendar year; (2) satisfies a substantial presence test; or (3) elects to be treated as a resident alien. I.R.C. § 7701(b)(1)(A)(i)–(iii). An alien is a lawful permanent resident if, at any time during the calendar year, she held a green card. *Id.* § 7701(b)(6)(A). Once she holds a green card, an alien remains a U.S. tax resident, regardless of where she actually resides, until her green-card status is rescinded or abandoned. *Id.* § 7701(b)(6)(B). *See also id.* § 7701(b)(3)(A) (describing the substantial presence test).

70. Other countries may apply extended-residence rules under which the country continues to tax a departing resident or citizen for a period of years after her departure. *See generally* Gutmann, *supra* note 49. Only the United States taxes nonresident citizens no matter how long they reside abroad. *See* I.R.C. § 1; Treas. Reg. § 1.1-1(a).

71. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 411 (AM. LAW INST. 1987).

72. AULT & ARNOLD, *supra* note 57, at 437 & n.34.

73. *Id.* at 496–97.

74. There are important exceptions from the general rule of taxing nonresident individuals' U.S.-source income, including the portfolio-interest exemption. *See* I.R.C. § 871(h).

income;[75] the United States taxes it. Moreover, the United States continues to tax nonresident citizens' foreign-source income no matter how long those citizens reside abroad.[76] To simplify, if a Canadian lives in France and earns all her income in France, France will tax her and Canada will not. If an American lives and earns all her income in France, then France will tax her and so will the United States.

One problem raised by the hypothetical of the American living in France is double taxation. The United States reduces the risk of double taxation for citizens abroad through two sets of policies. First, the United States allows a credit against U.S. tax for foreign taxes paid.[77] As other commentators have explained, although the foreign tax credit regime reduces the risk of double taxation for Americans residing abroad, the credit does not fully eliminate double tax because it is subject to a variety of limitations.[78]

Second, the United States annually excludes from the income of certain Americans abroad a set dollar amount of earned income. Under this foreign-earned-income exclusion, qualified Americans who reside in another country can exclude about $100,000 of foreign-earned income from their income taxable by the United States.[79] This amount is annually adjusted for inflation.[80] Like the foreign tax credit, the foreign-earned-income exclusion helps to mitigate double tax, but because it too is limited,

75. Kirsch, *supra* note 12, at 454–56.

76. I.R.C. § 7701(b).

77. I.R.C. §§ 901–908, 960. As an alternative to credits, taxpayers can elect to deduct foreign taxes, though credits are usually preferable. *Id.* § 164(a).

78. This discussion omits many important details that prior commentators have ably covered. For excellent recent treatment, see Schneider, *supra* note 22, at 17–32. For the classic account, see Patton, *supra* note 39, at 715–27 (giving numerical examples of problems with the foreign tax credit). In 2011, the most recent year for which data is available, U.S individual taxpayers paid $22 billion in foreign taxes and were able to credit nearly $16.5 billion of that amount against their U.S. tax liability. Scott Hollenbeck & Maureen K. Kahr, *Individual Foreign-Earned Income and Foreign Tax Credit, 2011*, *in* 33 I.R.S. STATISTICS OF INCOME BULLETIN 139, 139 (2014) [hereinafter IRS STATISTICS OF INCOME 2014 REPORT]. That means that U.S. taxpayers were unable to credit about $5.5 billion of their foreign taxes against their U.S. liability, or about 23 percent of the foreign income tax they paid. *See id.*

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

80. *Id.* § 911(b)(2)(D)(ii). The amount is $101,300 for 2016. Rev. Proc. 2015–44, 2015-53 I.R.B. 623. Nonresident citizens also may exclude qualifying housing costs. I.R.C. § 911(a)(2) (allowing a deduction for certain overseas housing expenses that exceed a dollar threshold and also allowing an exclusion for employer-provided housing benefits that exceed the same threshold).

and for additional reasons ably explained by others, it is not sufficient to ensure elimination of double taxation of Americans abroad.[81]

C. AMERICAN TAX EXCEPTIONALISM

If U.S.-style citizenship taxation is so exceptional, one might wonder how it evolved. Others have written about the history of the U.S. citizenship tax,[82] but it is worthwhile to note that citizenship taxation arose as a response to Americans who fled the United States to avoid the Civil War draft and tax.[83] Because the Civil War income tax applied only to the wealthiest Americans, so did the first citizenship tax.[84] Despite the passage of the war exigency, Congress continued the practice of taxing citizens abroad when it adopted the modern income tax in 1913.[85]

Although citizenship has served as a jurisdictional basis for U.S. worldwide taxation since the inception of the federal income tax, Congress has changed the tax several times.[86] For example, when resident Americans began to view Americans abroad as ambassadors of American enterprise, Congress adopted the foreign-earned-income exclusion.[87] Since then, Congress has repeatedly changed the tax treatment of nonresident citizens' foreign-earned income. At one time, Congress limited the foreign-earned-income exclusion to Americans working abroad who were thought to be particularly important to the U.S. balance of trade.[88] At another time, it substituted the exclusion for a variety of special deductions, including deductions to compensate for cost-of-living differentials, deductions for dependents' educational expenses, and so on.[89] The Senate voted on whether to completely repeal the foreign-earned-income exclusion as recently as 2003, while in 2006 a bill was introduced to provide an unlimited foreign-earned-income exclusion.[90] One commentator argued that these frequent changes to and reconsiderations of the tax treatment of

81. *See* Patton, *supra* note 39, at 706–13 (analyzing examples in which the foreign-earned-income exclusion offers little or no relief); Schneider, *supra* note 22, at 17–32.

82. *See* Kirsch, *supra* note 12, at 449–63.

83. *See id.* at 450–52 (noting that the tax "collected only a small amount").

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

85. *See* Kirsch, *supra* note 12, at 454.

86. *See id.* at 459–63 (covering the 1970s until the early 2000s); Patton, *supra* note 39, at 701–04 (giving history from 1923 to 1975).

87. Kirsch, *supra* note 12, at 457–59.

88. *Id.* at 455.

89. *See, e.g.*, Postlewaite & Stern, *supra* note 22, at 1098–1108 (describing the 1976 Tax Reform Act).

90. Kirsch, *supra* note 12, at 463.

nonresident citizens reflect fundamental uncertainty about the best approach to taxing nonresident Americans' foreign-source income.[91]

D. THE LITTLE WE KNOW ABOUT NONRESIDENT AMERICANS

To get a sense of the population subject to citizenship taxation and to avoid the problem of conflating the situations of millionaire and billionaire "tax Benedict Arnolds" with ordinary Americans working and living abroad, it would be helpful to have a clear picture of the demographics and incomes of nonresident Americans. But the United States government does not (and, by its own admission, cannot[92]) keep track of nonresident Americans. So, not only is it impossible to obtain a detailed description of this group and its income, it is not even possible to get an accurate account of the number of U.S. citizens residing abroad.[93] Different offices in the government provide different estimates.[94] The State Department's most recent estimate, in 2015, put the nonresident citizen population at 8.7 million, up from 7.6 million the year before.[95] The federal office dedicated to assisting nonresident Americans with voting puts the population at 4.5 million to 6.5 million,[96] of which under 200,000 are U.S. military personnel and their families.[97]

Despite gaps, available data tend to rebut the stereotype of tax-dodging Americans moving abroad to island tax havens. Reasons for Americans' migration vary. According to a recent survey of Americans in Europe, the most common reasons for living abroad were marriage or partnership, study or research, and employment.[98] Although Americans live in at least 100 countries,[99] most Americans abroad reside in wealthy, high-

91. *See* Sobel, *supra* note 22, at 155–60.

92. *See generally* PATRICIA A. DALTON, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-1077T, 2010 CENSUS: COUNTING AMERICANS OVERSEAS AS PART OF A CENSUS WOULD NOT BE FEASIBLE (2004), http://www.gao.gov/assets/120/111231.pdf (explaining the results of a study conducted by the U.S. Census Bureau on the practicality of counting all overseas Americans as part of the census).

93. *See id.* at 4–7 (explaining that obtaining an accurate count of Americans living overseas would be challenging and prohibitively expensive).

94. For a critical review of available evidence, see Schneider, *supra* note 22, at 8–17.

95. NINA E. OLSON, TAXPAYER ADVOCATE SERV., 2015 ANNUAL REPORT TO CONGRESS 73 (2015) [hereinafter NTA 2015 REPORT] (citing State Department estimates).

96. Joe Costanzo & Amanda Klekowski von Koppenfels, *Counting the Uncountable: Overseas Americans*, MIGRATION POL'Y INST. (May 17, 2013), http://www.migrationpolicy.org/article/counting-uncountable-overseas-americans.

97. NTA 2015 REPORT, *supra* note 95, at 73.

98. AMANDA KLEKOWSKI VON KOPPENFELS, MIGRANTS OR EXPATRIATES? AMERICANS IN EUROPE 50 (2014).

99. Costanzo & von Koppenfels, *supra* note 95.

tax countries.[100] Indeed, most Americans abroad work in countries with higher overall tax burdens than our own.[101] The fact that Americans abroad reside in high-tax countries shows that basing our image of overseas Americans on renouncers like Eduardo Saverin represents a serious distortion.

E. REVENUE FROM CITIZENSHIP TAXATION

Because we do not know how many overseas Americans there are, where they live, or how much income they have, it is impossible to get an accurate picture of how much tax overseas Americans owe.[102] Setting aside the open question of how much tax Americans abroad owe, we come to the question of how much they actually pay. Available statistics do not estimate or separately state the amount of revenue raised from nonresident citizens.[103] We gain some insight into this figure, however, from tax returns claiming the foreign-earned-income exclusion. To qualify for the exclusion, a taxpayer must reside abroad.[104] In 2011, the most recent year for which the IRS released statistics on the exclusion, nonresident Americans claiming the foreign-earned-income exclusion earned $54.2 billion abroad, of which more than $28.3 billion was not taxable due to the exclusion.[105] The government estimated the revenue lost to the foreign-earned-income exclusion to be nearly $34 billion between 2014 and

100. According to United Nations data, the top ten residence countries in 2013 for Americans abroad were, in order, Mexico, Canada, United Kingdom, Germany, Australia, Israel, South Korea, Japan, Italy, and France. *See International Migrant Population by Country of Origin and Destination*, MIGRATION POL'Y INST., http://www.migrationpolicy.org/programs/data-hub/charts/international-migrant-population-country-origin-and-destination (last visited Jan. 17, 2016) [hereinafter UN MIGRATION DATA]. Seventy-three percent of Americans abroad live in other OECD countries. *See id.*

101. The top ten countries hosting Americans are all members of the OECD. Organization for Economic Cooperation & Development (OECD), *Total Tax Revenue*, *in* OECD FACTBOOK 2013: ECONOMIC, ENVIRONMENTAL AND SOCIAL STATISTICS (2013), http://www.oecd-ilibrary.org/economics/oecd-factbook-2013/total-tax-revenue-as-a-percentage-of-gdp_factbook-2013-table235-en [hereinafter OECD Factbook 2013]. According to OECD statistics, of these countries, only Mexico has a lower total tax burden as a percent of GDP than does the United States. *Id.* (stating that the total Mexican burden in 2010 was 18.1 percent of GDP, compared to the total U.S. burden of 24.8 percent of GDP).

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

103. *See* IRS STATISTICS OF INCOME REPORT 2014, *supra* note 78, at 150–51.

104. I.R.C. § 911(d) (2015) (stating that qualifying individuals must be bona fide residents of another country for the year or they must spend 330 days in a consecutive twelve-month period abroad).

105. *See* IRS STATISTICS OF INCOME 2014 REPORT, *supra* note 78, at 139.

2018.[106] Even though taxpayers claiming the exclusion averaged $120,738 in total foreign-earned-income, due to the exclusion and foreign taxes they paid, over 60 percent of them had no U.S. income tax liability.[107] For such taxpayers, annual tax and asset reporting represents a serious burden, although it results in no tax revenue for the United States. We also know that foreign-earned income reported by claimants of the exemption increased over 30 percent in real terms between 2006 and 2001.[108] After application of the exclusion and foreign tax credits, this group's remaining U.S. income tax liability in 2011 was just over $5 billion.[109]

Despite these statistics, our ability to draw conclusions about the revenue raised by citizenship taxation is limited. First, the figure does not include U.S. tax paid by nonresident Americans who do not claim the foreign-earned-income exclusion.[110] In 2011, at a time when several million Americans lived abroad, the IRS received just under 450,000 returns claiming the foreign-earned-income exclusion.[111] Nonresident Americans may not claim the exclusion because, for example, they do not have foreign-earned income or they have sufficient foreign tax credits to wipe out the residual U.S. liability on their earned income.

Additionally, the $5 billion figure includes U.S. taxes paid on U.S.-source income.[112] Even if the United States narrowed or abolished citizenship taxation, presumably (like other countries) it would continue to collect tax on income sourced within its territory from everyone, including nonresident citizens.

Even if we had good estimates of the revenue raised by citizenship taxation, we would still need more information to understand the revenue

106. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2014, at 243 tbl.16-1 (2014) (estimating the exclusion to cost $33.7 billion from 2014 to 2018).

107. IRS STATISTICS OF INCOME 2014 REPORT, *supra* note 78, at 139, 141. This number represents an increase from the last reported year, 2006, in which 57.4 percent of nonresidents with foreign-earned income had no residual U.S. liability. *Id.* at 145.

108. *Id.* at 141.

109. *Id.* at 153. The total federal revenue that year was $2.3 trillion. *See The Federal Budget in 2013: A Closer Look at Revenues*, CONG. BUDGET OFF. (Apr. 17, 2012), https://www.cbo.gov/publication/43153.

110. Some nonresidents with foreign-earned income do not meet the statutory requirements to take the exclusion. *See* I.R.C. § 911 (2015) (providing the requirements for the exclusion). Taxpayers claiming foreign tax credits reported nearly $170 billion in foreign income (defined as income not exempt under the foreign-earned-income exclusion), but IRS statistics do not report how much of this foreign income was earned by resident (versus nonresident) taxpayers. IRS STATISTICS OF INCOME 2014 REPORT, *supra* note 78, at 143.

111. IRS STATISTICS OF INCOME 2014 REPORT, *supra* note 78, at 141.

112. *Id.* at 153.

impact of reforming it. For example, the current citizenship tax presumably discourages some Americans from migrating overseas to avoid tax. But if Congress abolished the citizenship tax, some revenue the government now collects presumably would be lost to tax-motivated migration. On the other hand, if overseas Americans could, like nonresident aliens, comply with their U.S. tax obligations by filing simpler nonresident returns or by paying tax on their U.S.-source income primarily through final withholding taxes, more overseas Americans might comply, resulting in more revenue.[113] Likewise, we would have to consider other impacts from a change in tax policy. For example, if claims are accurate that foreign corporations avoid employing Americans abroad because the citizenship tax makes American workers more expensive,[114] then reducing the extra expense could increase hiring of Americans abroad, which could draw more Americans outside the U.S. tax base.

While we lack good estimates of the revenue raised by citizenship taxation and the costs of its repeal, we do have a sense of the portion of the nonresident citizen filers who have no U.S. tax liability. IRS statistics for 2011 revealed that 60 percent of claimants of the foreign-earned-income exclusion owed no tax to the United States after application of the exclusion and foreign tax credits.[115] And the National Taxpayer Advocate reported that over 80 percent of nonresident Americans who filed returns had no U.S. tax liability in 2011.[116]

F. TERMINOLOGY

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

Nonresident Americans, *Americans abroad*, and *nonresident citizens* are people who reside abroad while retaining their U.S. citizenship or green-card (lawful permanent resident) status.[117] This terminology is not meant to suggest that green-card holders are already U.S. citizens for purposes of immigration law; they are not. This Article combines U.S.

113. Failure to collect tax from nonresident Americans on U.S.-source income via withholding results in revenue losses if nonresident citizens fail to comply with their obligation to declare the income to the United States when they file their regular U.S. returns.

114. *See infra* Part IV.A.

115. IRS STATISTICS OF INCOME 2014 REPORT, *supra* note 78, at 139.

116. NTA 2012 REPORT, *supra* note 20, at 262.

117. Bernard Schneider subdivides this group into short-term and long-term nonresidents. Schneider, *supra* note 22, at 6–7. Such subdivisions could be important for implementing residence taxation. For example, many countries continue to tax short-term nonresidents as residents. *See generally infra* Part V.

citizens and green-card holders because the United States taxes both on their worldwide income, no matter where they reside.

Resident aliens or *tax-resident aliens* are noncitizens who do not hold green cards but who are subject to U.S. worldwide taxation by virtue of their physical presence in the United States. The term "tax-resident alien" is not coextensive with any particular immigration law status. Aliens without green cards are tax residents, and consequently taxable by the United States on their worldwide income, if they spend more than half of the year in the United States.[118]

Renouncers are U.S. citizens who relinquished their U.S. citizenship or green-card (permanent resident) status. Under current law, members of this group are not subject to taxation by the United States on their worldwide income unless they reside in the United States, although they may be subject to citizenship-renunciation tax on their assets.[119]

II. FAIRNESS

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

A. RETENTION OF CITIZENSHIP AS CONSENT

Some assert that taxation of nonresident citizens is justified by consent.[120] Specifically, nonresident Americans' failure to renounce their

118. I.R.C. § 7701(b)(3) (2015) (defining "substantial presence"). Under certain circumstances, aliens also can be residents for tax purposes by spending fewer than 183 days in the United States. *See id.*

119. I.R.C. §§ 1, 877, 877A. *See also* Treas. Reg. § 1.1-1(a). For a discussion of exit taxes, see *infra* Part V.B.

120. *Cf.* Abreu, *supra* note 3, at 1157 (describing, though not endorsing, this argument in the exit tax context). Michael Kirsch sees the failure to renounce citizenship as bolstering the national community membership account of citizenship taxation. On this view, discussed *infra*, members of the U.S. national community are morally obliged to pay tax, and failure to renounce represents an affirmation of continued community allegiance. *See* Kirsch, *supra* note 12, at 481 (arguing that

citizenship constitutes implicit consent to the tax.[121] Political philosophers have wrestled with a similar question, namely whether continued residence in a state constitutes tacit consent to be governed.[122] Because the right of residence is linked inextricably to citizenship, arguments about tacit consent resonate for citizenship taxation. Consider whether the following passage from A. John Simmons remains equally persuasive when I substitute "nationality" for his use of the term "residence":

> Most men will treasure home, family, and friends above all things. But these goods are not moveable property and cannot simply be packed on the boat . . . . And this places a very heavy weight on the side of continued [nationality]. Emigration cannot be thought of as merely unpleasant or inconvenient for most of us; it may very well constitute a "disaster," if only a small one. And if that is true, . . . [we cannot] take continued [nationality] as a sign of tacit consent to the government's authority.[123]

If continued residence does not represent meaningful consent because the costs of abandoning residence are too high, then paying the citizenship tax likewise cannot constitute meaningful consent to the tax because the alternative—loss of citizenship—is too costly.

Joseph Tussman argued that tacit consent, including that evidenced by continued residence, is meaningful if two conditions are met: (1) the governed person must understand that continued residence means consent, and (2) she must have a genuine alternative to remaining.[124] If we extrapolate Tussman's account of residence to citizenship, retention of citizenship presumably does not amount to meaningful consent to citizenship taxation for those who have no genuine alternative. In light of the risks of statelessness and domestic and international laws that prevent statelessness, Americans who are citizens *only* of the United States lack a genuine alternative to retaining their U.S. citizenship. People who are citizens only of the United States, or who are citizens only of the United

retaining U.S. citizenship "is expressive of a voluntary identification with the United States. After all, a citizen living abroad has the right to renounce his U.S. citizenship if he desires"). Edward Zelinsky has criticized what he calls the "love-it-or-leave-it theory" of citizenship taxation. Zelinsky, *supra* note 22, at 1310–23.

121. Kirsch, *supra* note 12, at 481.

122. *See* A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 57–101 (1979) (defining "consent theory" as "any theory that political obligations of citizens are grounded in their personal performance of a voluntary act which is the deliberate undertaking of an obligation" and critically evaluating the role of consent arguments in modern political philosophy).

123. *Id.* at 99–100.

124. *See id.* at 98.

States and a repressive foreign regime, likewise have no reasonable alternative to paying the citizenship tax. As a result, citizenship taxation of this group requires a justification other than consent. The next two subparts explore the other leading justifications for citizenship taxation.

B. CITIZENSHIP TAX AS A CHARGE FOR GOVERNMENT BENEFITS

Some argue that citizenship taxation is fair because people ought to pay for government benefits they receive.[125] The Supreme Court endorsed this view in holding that Congress did not exceed its constitutional power by taxing nonresident citizens' income from foreign assets.[126] The Court observed that "government by its very nature benefits the citizen and his property wherever found."[127]

U.S. citizens retain many benefits while abroad. Nonresident citizens (but not nonresident green-card holders) retain the rights to vote in federal elections, travel on a U.S. passport, pass on U.S. citizenship to their children born abroad, and gain access to the United States for certain noncitizen family members.[128] Both citizens and green-card holders can re-enter the United States at will, work in the United States, and may receive personal and property protection from the United States while abroad.[129] Nonresident citizens have access to other benefits as well. For example, nonresident Americans can apply for diplomatic and consular services, and they can request evacuation in emergencies.[130]

As part of his robust defense of citizenship taxation, Michael Kirsch

125. *See, e.g.*, Kirsch, *supra* note 12, at 474–76 (exploring the benefits theory at length, but ultimately resting the argument for citizenship taxation primarily on ability-to-pay arguments); Robert J. Peroni, *Back to the Future: A Path to Progressive Reform of the U.S. International Income Tax Rules*, 51 U. MIAMI L. REV. 975, 1009 (1997). *But see* Zelinsky, *supra* note 22, at 1349 (questioning the "received wisdom" that "the benefits of U.S. citizenship justify worldwide taxation").

126. Cook v. Tait, 265 U.S. 47, 56 (1924). For a more recent case taking the benefits approach, see United States v. Rexach, 558 F.2d 37 (1st Cir. 1977).

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

128. Kirsch, *supra* note 12, at 474–76.

129. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-989, WIDE RANGE OF EMERGENCY SERVICES PROVIDED TO AMERICAN CITIZENS OVERSEAS, BUT IMPROVED MONITORING IS NEEDED 7–10 (2009), http://www.gao.gov/assets/300/295802.pdf (listing available benefits, including assistance in case of arrest).

130. *See, e.g.*, Kirsch, *supra* note 12, at 470–77. A few commentators also list such diffuse benefits as foreign affairs, international development assistance, and national defense among the benefits received by Americans abroad. *See, e.g.*, Peroni, *supra* note 125, at 1009. But most recognize that such benefits are non-rivalrous, and indeed, aliens abroad also may receive them. Thus, unless it adopts the Monty Python plan to "tax all foreigners living abroad," it seems that the United States cannot fairly distribute the costs among the beneficiaries of such policies. For more on the problem of accurately distributing costs under the benefits theory, see *infra* text accompanying notes 157 to 161.

emphasizes that one of the most important benefits retained by nonresident citizens is their right to vote in federal elections.[131] The Revolutionary rallying cry "no taxation without representation" reflects the link Americans draw between voting and taxation. Likewise, payment of taxes by undocumented aliens has been described as a crucial prerequisite to gaining citizenship (and thereby voting rights) through immigration amnesties.[132] But pointing to a link between voting and taxes is not enough to establish that anyone entitled to vote should pay tax, even if they do not reside in the jurisdiction.[133] The question under the benefits theory of taxation is whether we would rally behind the motto "no representation without taxation."[134]

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

On the other hand, there are also policy reasons for allowing nonresident citizens to vote at home, irrespective of whether they pay any tax there, let alone whether they pay tax on their foreign-source income. For example, nonresident citizens may have property and family remaining in the United States, and many intend to return home at some point. Vested domestic interests of nonresidents help satisfy prudential concerns about

131. Kirsch, *supra* note 12, at 474–77. Americans abroad vote in their last state of domicile. 42 U.S.C. § 1973ff-6(5) (2012).

132. GEORGE W. BUSH, 109TH CONG., PRESIDENT'S MESSAGES: IMMIGRATION REFORM (2006), *as reprinted in* 2006 U.S.C.C.A.N. D60 ("I believe that illegal aliens who have roots in our country and want to stay should have to . . . pay their taxes . . . ."). In describing the proposed DREAM Act, President Obama stated, "We all agree that these men and women should have to earn their way to citizenship. . . . We've got to lay out a path—a process that includes . . . paying taxes . . . . That's only fair." President Barack Obama, Office of the Press Sec'y, Remarks by the President on Comprehensive Immigration Reform at Del Sol High School (Jan. 29, 2013), http://www.whitehouse.gov/the-press-office/2013/01/29/remarks-president-comprehensive-immigration-reform.

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

134. *See* Avi-Yonah, *supra* note 84, at 392 (arguing that the right to vote logically follows taxation, but "it does not follow that because nonresident citizens vote they must be taxed").

extending the vote to citizens who are not real stakeholders in our society.[135]

Most other countries allow nonresident citizens to vote, at least for a limited number of years after emigration, despite not taxing nonresident citizens on their worldwide income.[136] This trend is increasing.[137] Further, the ability to vote cannot help to justify worldwide taxation of nonresident green-card holders, since they cannot vote in federal elections even when they reside in the United States.[138] Finally, the ability to vote could not have served as part of the original justification for worldwide taxation of nonresident citizens, since nonresident citizens were not guaranteed the right to absentee voter registration until 1975,[139] and it was not until the Uniformed and Overseas Citizens Absentee Voting Act of 1986 that nonresident citizens were entitled to vote by uniform absentee ballot.[140]

Moreover, representation in Congress of nonresident citizens differs from that of resident citizens. For example, Americans abroad are not counted in the census,[141] and the Government Accountability Office ("GAO") concluded that attempting to count them would not be cost effective.[142] As a result, nonresident citizens do not affect apportionment or redistricting. This limited political representation of nonresident Americans contrasts with the practice in some other countries, where nonresident citizens have their own parliamentary representatives.[143] No seat in

135. In passing the Overseas Citizens Voting Rights Act of 1975, Congress reasoned that:

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

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

136. Bauböck, *supra* note 31, at 2423–24 (noting that countries may restrict external voting, for example, to a limited number of years after expatriation); Costanzo & von Koppenfels, *supra* note 95 ("[One hundred fifteen] nations and territories allowed their overseas citizens to vote in national elections in 2007, and since then many more have signed on . . . .").

137. Peter J. Spiro, *Perfecting Political Diaspora*, 81 N.Y.U. L. REV. 207, 211 (2006).

138. *See* 8 U.S.C. §§ 1182, 1427 (2012).

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

140. 42 U.S.C. §§ 1973ff–1973ff-6 (2012).

141. DALTON, *supra* note 92, at 1 (noting that nonresidents do not count for congressional apportionment purposes, except for "federally affiliated individuals" such as members of the military stationed abroad and their families).

142. *Id.* at 14.

143. Bauböck, *supra* note 31, at 2432 ("Currently, only seven countries have separate representation for expatriates: Cape Verde, Colombia, Croatia, France, Italy, Mozambique, and Portugal."). *See also* DALTON, *supra* note 92, at 14 (noting that Mexico established a government

Congress is dedicated to nonresident Americans.[144] Finally, voting from abroad presents a number of challenges that make it both more difficult for nonresidents to vote and less likely for their votes to be counted.[145] Thus, the link between voting and paying taxes is by no means straightforward.

In addition to voting, proponents of citizenship taxation review many other benefits retained by nonresident citizens. Take, for example, diplomatic, consular, and emergency assistance. Kirsch cites the example of the U.S. evacuation of its citizens from Lebanon in 2006 as helping to justify worldwide taxation of citizens.[146] A serious problem with pointing to the possibility (not entitlement)[147] of emergency evacuation as helping to justify worldwide taxation under the benefits theory is that the U.S. government seeks reimbursement from citizens for evacuation.[148] Logically, government services financed through fees cannot form the basis for a benefits tax. For this and other reasons, Kirsch concluded that the United States should not charge for crisis assistance.[149] Similarly, the United States charges fees for other overseas services, such as passport renewal and departure assistance services, and nonresident green-card holders must purchase a reentry permit if they reside abroad for a period longer than a year.[150]

advisory council elected by nonresident Mexicans); Barry, *supra* note 31, at 14–16 (detailing successful election bids for state and local offices in Mexico by Mexicans living in the United States); Chander, *supra* note 31, at 71 (noting that the Mexican state Zacatecas provides dedicated congressional seats elected by nonresidents and that can be filled by part-time residents).

144. Kirsch, *supra* note 12, at 474–75 (raising this issue but arguing that dedicated representation for nonresidents is not needed or justified).

145. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-774, ELECTIONS: ACTION PLANS NEEDED TO FULLY ADDRESS CHALLENGES IN ELECTRONIC ABSENTEE VOTING INITIATIVES FOR MILITARY AND OVERSEAS CITIZENS 1 (2007), http://www.gao.gov/assets/270/262023.pdf ("Because the multistep process of absentee voting relies primarily on mail, in some instances it can take so long to complete that these voters may, in effect, be disenfranchised."); KEVIN J. COLEMAN, CONG. RESEARCH SERV., RS20764, THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT: OVERVIEW AND ISSUES 16–17 (2012), http://assets.opencrs.com/rpts/RS20764_20121004.pdf (finding that states could not count overseas ballots because they received them too late, and that nonresidents may never receive a ballot or receive it too late).

146. Kirsch, *supra* note 12, at 472.

147. The State Department's website says, "Expectations of rescue by helicopters, the U.S. military, and U.S. government-provided transportation with armed escorts reflect a Hollywood script more than reality." *See* U.S. Passports & Int'l Travel, *What the Department of State Can and Can't Do in a Crisis*, U.S. DEP'T ST., https://travel.state.gov/content/passports/en/emergencies/crisis-support.html (last visited Jan. 16, 2016).

148. *Id.* ("Evacuation costs are ultimately your responsibility; you will be asked to sign a form promising to repay the U.S. government.").

149. Michael S. Kirsch, *Revisiting the Tax Treatment of Americans Abroad*, 16 FLA. TAX REV. 117, 217–21 (2014).

150. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., INSTRUCTIONS FOR APPLICATION FOR TRAVEL DOCUMENT (Mar. 3, 2013). The current filing fee is $360 plus $85 for biometrics for

Other countries that provide similar benefits to their nonresident citizens apparently conclude that such benefits do not warrant worldwide taxation of nonresidents. For example, it should not surprise us that other countries—countries without citizenship taxation—also evacuated their people from Lebanon.[151] Similarly, other countries also provide diplomatic and material aid to their citizens abroad.[152] Self-interest and the need to signal strength motivate countries to protect their citizens abroad. Moreover, resident citizens may demand that a country act to protect nonresident citizens.[153] Some countries' constitutions even require the government to safeguard emigrants.[154]

As with diplomatic and material assistance, which overseas citizens of every nation can request from their governments, citizens of all countries have the right of reentry,[155] and countries permit nonresident citizens to use their passports for travel. Thus, the United States is not unique in providing these benefits to nonresident citizens. Its uniqueness stems from the citizenship tax.

Each of the benefits received from the United States by Americans abroad—including, but not limited to, the rights to vote, return to the United States, travel on a U.S. passport, and pass on citizenship to their children born abroad—is valuable,[156] but it is not clear that they collectively justify taxing nonresident citizens on the same basis as resident citizens. This becomes clearer when we consider the benefits that Americans forgo when they move abroad.

Nonresident Americans do not send their children to public schools, drive on public roads, or make use of police or fire protection within the

applicants ages 14 to 79. *Id.*

151. *See* Andrew W.R. Thomson, *Doctrine of the Protection of Nationals Abroad: Rise of the Non-Combatant Evacuation Operation*, 11 WASH. U. GLOBAL STUD. L. REV. 627, 657–58 (2012) (citing the British and Canadian evacuations of their nationals from Lebanon).

152. *See id.* (giving examples of many governments' interventions on behalf of nationals abroad).

153. *See* Barry, *supra* note 31, at 33 (noting demand in India and other countries for government to secure release of citizens who were kidnapped while working abroad and characterizing the "willingness of emigration state governments to protect and defend their citizens" as a "test of those states' commitment to the entire citizenry, resident and emigrant").

154. Chander, *supra* note 31, at 78 (citing the Greek and Spanish constitutions). *See also* Fitzgerald, *supra* note 30, at 111 (noting that the constitution of the Philippines requires the government to "afford full protection to labor, local and overseas" (quoting CONST. (1987), art. XIII (Phil.))).

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

156. *Cf.* Peter J. Spiro, *The (Dwindling) Rights and Obligations of Citizenship*, 21 WM. & MARY BILL RTS. J. 899, 915–16 (2013) (arguing citizenship still has value, but that the value of a U.S. passport has "degraded").

United States, all of which are funded in part through federal grants. Nonresident citizens' absence decongests these goods and services, making them more valuable to remaining residents. Nonresident citizens lose access to a variety of social welfare programs when they move abroad, including Medicare, Supplemental Security Income,[157] SNAP and TANF, and unemployment insurance,[158] although they continue to receive Social Security.[159] We can contrast U.S. policy, which denies many social welfare benefits to citizens abroad, with the more generous policies of other countries toward their nonresident citizens.[160]

Moreover, while proponents of citizenship taxation are correct that citizens may request personal and property protection from the United States while overseas, the ability of the United States to provide such protection outside its territory is constrained. The United States also cannot guarantee nonresident citizens the political and civil rights that they would enjoy at home. A U.S. citizen residing in a country without due process or respect for civil liberties is largely at the mercy of her residence state's government, and she has no guarantee that the United States would diplomatically intervene to help her, much less that such intervention would be effective. Finally, Americans abroad bear the risks associated with U.S. foreign policy to a greater extent than do resident Americans, because Americans abroad can suddenly find themselves unwelcome in a foreign land due to changes in U.S. policy that affect their host jurisdiction.[161]

Final Observations. Three final observations can be made about the benefits theory as a justification for worldwide taxation of nonresident Americans. First, taxing citizenship commodifies it. At least some nonresident Americans perceive the tax and administrative burdens of citizenship taxation as representing the price of retaining their citizenship.[162] Likewise, commentators regularly argue that the citizenship

157. DALTON, *supra* note 92, at 3–4.

158. Eligibility requirements for unemployment vary by state, but most states require sustained recent prior employment in the state (or another U.S. state), and many require the recipient to show up in person for interviews. *See generally* U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT LAWS: MONETARY ENTITLEMENT (2013).

159. 42 U.S.C. § 402 (2012). *See also* SOC. SEC. ADMIN., YOUR PAYMENTS WHILE YOU ARE OUTSIDE THE UNITED STATES (2013).

160. Postlewaite & Stern, *supra* note 22, at 1093 n.3 (noting that France provides educational subsidies, healthcare, and unemployment compensation to nonresident French).

161. *See* U.S. DEP'T OF STATE, FY 2004 PERFORMANCE AND ACCOUNTABILITY HIGHLIGHTS (2004), http://www.state.gov/s/d/rm/rls/perfrpt/2004hlts/ (listing "assisting Americans abroad in the face of continued terrorist threats" as a "continuing challenge[]").

162. *See, e.g.*, Sophia Yan, *Why Expats Are Ditching Their U.S. Passports*, CNN MONEY,

taxation is fair because citizens could choose to relinquish their citizenship if they did not want to pay the tax.[163] This commodification of U.S. citizenship has adverse consequences. For example, it has led to citizenship renunciations by people who cannot afford to retain their citizenship, including people who would have preferred to remain U.S. citizens, still feel themselves to be American, and have suffered emotional harm from renunciation.[164] Americans who renounced their citizenship after long periods abroad in order to escape tax (or tax compliance) obligations described the process as "emotional," "hard," "super stressful," and "extremely troubling."[165] Alice Abreu and Bernard Schneider have argued separately that policies that tax citizenship devalue it.[166]

Second, although the notion that nonresident Americans should pay for what they get is intuitively attractive, the benefits theory cannot support current law, which treats nonresidents similarly to residents who receive far more benefits. The GAO put it succinctly in a report considering the feasibility of counting overseas Americans for purposes of, among other things, congressional apportionment: "Americans residing abroad do not have the same rights and obligations under federal programs and activities as Americans living in the United States."[167] Kirsch himself acknowledges this problem.[168]

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http://money.cnn.com/gallery/pf/2014/03/10/expat-taxes-citizenship (last updated Mar. 10, 2014).

163. *See, e.g.*, Kirsch, *supra* note 12, at 481.

164. *See* Yan, *supra* note 162. One renouncer described traveling to the consulate to renounce her citizenship in the following terms: "I couldn't eat; I couldn't think; I couldn't sleep." *Id.* People considering renouncing their citizenship to avoid tax or tax-compliance burdens may continue to strongly identify as American. *Id.* (reporting that one renouncer said, "I will always feel and be American, regardless of my passport," while yet another said, "I sound like an American, and I really am one. I just don't have the passport anymore").

165. *Id.*

166. *See* Schneider, *supra* note 22, at 65. C*f.* Abreu, *supra* note 3, at 1136–37 (Exit taxes "place the burden of taxation on those who care about citizenship . . . . The provisions honor wealth and debase citizenship.").

167. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-470, OVERSEAS ENUMERATION TEST RAISES NEED FOR CLEAR POLICY DIRECTION 25 (2004).

168. Kirsch, *supra* note 12, at 478–79. Rather than fully justifying citizenship taxation, Kirsch sees the benefits theory, like the concept of nexus, as providing a jurisdictional basis for taxing nonresident citizens. *See id.* at 479. Neither customary international law nor the U.S. Constitution prevents the United States from taxing the foreign-source income of nonresident U.S. citizens. The question this Article tackles is not whether worldwide taxation of nonresident citizens has a sound jurisdictional basis, but rather whether it is justified. In contrast with Kirsch, others conclude that the benefits nonresident citizens receive while abroad justify nonresident citizens' worldwide taxation. *See* Postlewaite & Stern, *supra* note 22, at 1121. But most commentators who have considered the issue have not been persuaded by the benefits argument. *See, e.g.*, Zelinsky, *supra* note 22, at 1303–09, 1314–1323; *id.* at 1309 (concluding that "[m]inimal benefits do not justify maximal taxation").

Third, suppose counterfactually that we could determine how much the United States saves because it is relieved from the obligation to provide government benefits to nonresident citizens. Such savings would include, for example, USDA meat inspections and the portion of state grants that funds roads, but it would not include spending on the military, diplomacy, research, and other expenses that arguably benefit citizens wherever they reside. Let us assume that the United States could offer nonresidents a discount of the saved amount on their taxes; indeed, the foreign tax credit arguably plays precisely that discounting role.[169] The remaining tax liability would consist of funding for redistributive social programs, the military, diplomacy, and other programs with highly diffuse benefits. Under modern income taxes, we determine each taxpayer's contribution to funding such benefits according to her *ability to pay*, rather than the amount of government *benefits she receives*.[170] We use the taxpayer's income as a measure of her ability to pay. Indeed, taxpayers receiving the largest government benefits may be those who, due to their low incomes, pay the least taxes. Thus, attempts to justify citizenship taxation upon the benefits theory fail because the benefits theory itself fails.[171] Even in the purely domestic situation, the benefits theory of taxation has been largely abandoned as a justification for income taxation.[172]

C. CITIZENSHIP TAX AS A SOCIAL OBLIGATION

The third fairness argument for citizenship taxation implicitly relies on the idea that people have a moral obligation to support fellow members of their own society, but not to support all people everywhere.[173] Another

169. Postlewaite & Stern, *supra* note 22, at 1121.

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

171. *See* Fleming, Peroni & Shay, *supra* note 30, at 334 (2001) (labeling the benefits theory "a historical curiosity").

172. *See* James M. Buchanan, *The Pure Theory of Government Finance: A Suggested Approach*, 57 J. POL. ECON. 496 (1949), *reprinted in* FISCAL THEORY AND POLITICAL ECONOMY: SELECTED ESSAYS 8, 13 (1960) (arguing that rejection of the benefits theory has a logistical basis, which concerns the difficulty of pricing government services for tax purposes, and an ethical basis, which rejects the notion that government benefits should be exchanged for taxes, even if it were possible to make such calculations). *But see* Matthew Weinzierl, *Revisiting the Classical View of Benefit-Based Taxation* (Feb. 11, 2014) (working paper) (on file with the author) (arguing that under Adam Smith's original conception of benefits taxation, a taxpayer's income was the measure of her benefits received).

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

claim essential to this view is that the amount of the social obligation must be determined for everyone in the same way, namely, by using her worldwide income to measure her ability to pay.[174] If we take these foundational assumptions as given, then it follows that a *resident* citizen is obliged to contribute taxes for redistribution to fellow members of her society. But in the cross-border situation, we must determine *to which society or societies* the person owes this social obligation.

Proponents of worldwide taxation of nonresident citizens argue that citizens cannot avoid their social obligation to contribute taxes merely by residing abroad.[175] This subpart critically evaluates the social-obligation argument for citizenship taxation and concludes that it represents the strongest of the traditional arguments for the tax. Nevertheless, this subpart also concludes that the social-obligation theory cannot support current law's taxation of many nonresident citizens, who have little or no connection to American society. Additionally, I argue that even when nonresident Americans are fairly taxed on their worldwide income because they are members of the U.S. national community, our citizenship tax regime violates the ability-to-pay principle in several ways, including by failing to fully credit nonresident citizens' foreign taxes.

1. Obligation of National Community Members

The income tax systems of the world provide evidence that redistributive taxation finds ready support on a national scale, but not on a global scale. I do not attempt to support or refute the claim that a person's tax obligation should be based on her ability to pay as measured by her worldwide income, or the claim that the source of that obligation is her moral duty to her society.[176] Instead, I assume these claims are correct to evaluate the further claim that they justify our citizenship tax.

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174. *See, e.g.*, Fleming, Peroni & Shay, *supra* note 30, at 314; Kirsch, *supra* note 12, at 480.

175. Kirsch, *supra* note 12, at 470–79.

176. For thoughtful exploration of this idea, see Wolfgang Schön, *Persons and Territories—On the International Allocation of Taxing Rights*, 2010 BRIT. TAX REV. 554 (2010). The notion that tax obligations arise from national community membership is not universal. For example, cosmopolitans view social obligations as extending beyond the national community. Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 448 (2000) ("[The cosmopolitan outlook] expresses loyalty and moral commitment to humanity at large, rather than any particular community of persons."). As another alternative, advocates of progressive source-based taxation ground moral obligation in the benefits principle. Notice no mathematical (or even double tax) obstacle prevents every state from applying its own ability-to-pay principle on a source basis to everyone. The simplest design for a progressive tax system in which the brackets depend upon global (not just local) income would reduce the size of each state's tax brackets to reflect the share of income each particular cross-border taxpayer earned in that state. Although such systems would require accurate reporting of worldwide income, and would be very difficult to police, application of the ability-to-pay taxation need

If redistributive taxation is accepted at the national level, but generally not at the global level, then defining the national community becomes important not only for determining who receives benefits, but also for determining who funds them. Under this view, the obligation to pay redistributive taxes attaches to national community membership, and citizenship taxation is fair as long as citizenship serves as a good proxy for national community membership.[177] Antecedent to the question of whether citizenship serves as a good proxy for such membership, however, is the question of how to define national community membership. While acknowledging its importance, tax scholars have avoided the question of how to determine whether nonresident citizens are members of the U.S. national community.[178] This subpart explores how we should resolve the question of which state (which society) has the strongest claim on a taxpayer's resources when the taxpayer has relationships with more than one state—she was born in one, is a national of two, and has resided in many.

Although tax scholars have not focused on this issue, immigration scholars and political theorists have attempted to define the national community.[179] Most have considered the question from the perspective of the rights and entitlements of immigrants, not emigrants. That is, theorists consider the question from the perspective of resident *non*citizens, rather than nonresident citizens.[180] Some theorists take a formal view of national community membership. For them, citizenship and national community membership overlap perfectly.[181] For others, "citizenship is neither a

not be limited to only one state, and it need not follow community membership.

177. *Cf.* Fleming, Peroni & Shay, *supra* note 30, at 314 ("Each country has the right to decide the notions of tax fairness that will prevail with respect to members of its society.").

178. *See, e.g.*, Kirsch, *supra* note 12, at 480–81. *See also* Fleming, Peroni & Shay, *supra* note 30, at 309–10 (asserting as a "basic principle" that "individuals substantially connected to the United States" should be taxed on their worldwide income, and stating that "Congress has drawn lines to deal with this issue" by taxing nonresident citizens "and one can debate whether the lines have been properly positioned"; but stating that the line-drawing question was "outside the scope of this article," which principally concerned the fairness of taxing the worldwide income of *resident* taxpayers).

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

180. *See, e.g.*, *id.*

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

sufficient nor a necessary condition for substantive membership."[182] Political theorist Michael Walzer defines communities as "historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life."[183] The commitment members feel to each other serves as the basis of the social obligation to contribute taxes according to ability to pay.

The dominant view conceives of a person's relationship to a national community as a continuum, where meaningful contacts between a person and a state determine that person's place on the continuum.[184] Citizenship and residence are among the most meaningful contacts between a person and a state;[185] others may include politics and civic culture,[186] "societal culture,"[187] ethnicity, language, and religion.[188] As this brief description reveals, the meaning of national community membership is contested and constantly in flux. For example, increasing mobility and plural nationality may impact how we define the national community. Hence, historian

182. *Id.* at 407. *Cf.* David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 201 (1983). ("[O]ur notions of membership in the national community are more complex and multi-layered than can be captured in the concept of citizenship alone."). *See id.* at 203 (describing "different levels of community membership").

183. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 62 (1983).

184. Calavita, *supra* note 181, at 406 ("This concept of a membership continuum is at least implicitly shared by virtually all who write on immigration law and belonging . . . .").

185. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 265–66 (1990) (interpreting the term "the people" in the Constitution to refer to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"). *See also* Liliana M. Garces, Note, *Evolving Notions of Membership: The Significance of Communal Ties in Alienage Jurisprudence*, 71 S. CAL. L. REV. 1037, 1039–40 (1998) (describing Supreme Court alienage cases as "reflecting the Court's own evolving definition of membership in the national community, moving from a restrictive notion of membership in which only citizens are members of the national community to an inclusive notion of membership that recognizes the impact of communal ties on the notion of membership").With the rise of human rights and the extension of rights to resident aliens, scholars have begun to argue that residence is more important than citizenship for securing rights. *See, e.g.*, Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGR. L.J. 1, 91 (1989).

186. *See* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989) (arguing that American civic culture forms the core of American national identity).

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

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

Robert H. Wiebe observed that, "[e]ach generation passe[s] to the next an open question of who really belong[s] to American society."[189] As a result, the question of how to define the population of taxpayers responsible to pay redistributive taxes cannot be fixed for all time. Nevertheless, tying the tax obligation to social membership resonates with intuitions about fairness, and it seems to accurately describe, if only in broad strokes, national tax systems.

2. Citizenship as a Proxy for National Community Membership

If national community membership triggers the obligation to pay redistributive taxes on the basis of ability to pay, then evaluating the fairness of citizenship taxation amounts to evaluating how well citizenship overlaps with our conception, albeit contested, of national community membership. Citizenship is a good proxy for national community membership most of the time. Most people reside in their nationality state, and most people have the overwhelming majority of their contacts with that state. Thus, few would argue that it is unfair to subject *resident* citizens to ability-to-pay taxation on their worldwide income. What matters for our purposes, however, is whether citizenship continues to serve as a good proxy for national community membership when citizens reside outside their nationality state.

If we adopt the formal view of national community membership, under which citizens automatically are national community members regardless of their other substantive connections, then we would conclude that citizenship taxation is fair, although we would also conclude that some other reason is needed to justify worldwide taxation of nonresident green-card holders. On the other hand, if we adopt a more substantive view of national community membership, then we must evaluate whether nonresident citizens' actual connections with American society justify their taxation as members of the community.

As far as I know, none of the advocates for citizenship taxation regard citizenship as dispositive of the national community membership question. For example, Michael Kirsch relies on a substantive, rather than a formal, definition of membership when he argues, "To the extent that citizenship reflects membership in U.S. society, a citizen living abroad could be expected to help support that society apart from any direct benefits she may

189. KARST, *supra* note 186, at 2 (quoting ROBERT H. WIEBE, THE SEGMENTED SOCIETY 95 (1975).

or may not receive."[190] Similarly, other proponents of citizenship taxation point to substantive connections between nonresident Americans and the United States to establish the fairness of taxing nonresidents like residents.[191]

Nonresident Americans maintain a variety of contacts with the United States. They vote, contribute to political campaigns, lobby Congress, and work with U.S. political parties abroad. Retention by citizens abroad of the ability to vote in federal elections tends to show that resident citizens regard nonresident citizens as members of the national community. At the same time, failure to count nonresident Americans in the census, or to provide them dedicated representation in Congress, suggests that such nonresidents are not at the core of American political life. Low voter turnout by nonresident Americans reflects that not all nonresident citizens remain politically engaged in the United States.[192]

Nonresident citizens' unlimited right of reentry also suggests that resident Americans regard Americans abroad as part of the national community, no matter how long their absence. Americans abroad visit and send remittances to family members back home, own U.S. property, invest in U.S. businesses, litigate for their interests in U.S. courts, donate to American charities, observe American traditions in their adopted states of residence, speak English in their homes, send their children to local American schools and universities, and so on.[193] Such activities may reflect

190. Kirsch, *supra* note 149, at 126. *See also* Kirsch, *supra* note 12, at 481–84 (citing as indicia of national community membership nonresident citizens' retention of their citizenship the patriotic desire to be counted in the census, securing U.S. citizenship for their foreign-born children, viewing of U.S. websites, evacuation from Lebanon, and tendency to resume residence in the United States).

191. *See, e.g.*, Fleming, Peroni & Shay, *supra* note 30, at 309–10 (arguing that "substantial connections" justify worldwide taxation); Zelinsky, *supra* note 22, at 1293–1303 (exploring a similar concept under the rubric "political allegiance"). Zelinsky acknowledges, rather than advocates, political allegiance as a valid basis for worldwide taxation. *Id*. at 1293. He furthermore argues that when countries define tax residence as domicile, rather than physical presence, citizenship tax and residence tax "converge." *Id.* at 1293. As a result, in his view, U.S. citizenship taxation is not the global outlier it has been made out to be. *Id.* at 1291. Moreover, he argues that citizenship is an "administrable proxy" for domicile. *Id.*

192. In the 2008 presidential election, 1 million of the estimated 6 million voters abroad submitted ballots. Coleman, *supra* note 145, at 18. Without an accurate count of American voters abroad, it is impossible to know their voter turnout, but the government has accurate counts for members of the military abroad, and their turnout has been about half that of the resident population in recent elections. Steven F. Huefner, *Lessons from Improvements in Military and Overseas Voting*, 47 U. RICH. L. REV. 833, 843 (2013) (noting that voter participation by overseas military in the 2008 election was 30 percent compared to over 60 percent nationally).

193. *See generally* VON KOPPENFELS, *supra* note 98 (documenting transnational activities by Americans in Europe).

nonresident Americans' continuing sense that they are members of the American national community.

The degree of connection between a nonresident citizen and her citizenship state varies. Some nonresident Americans are closely connected to the United States. Perhaps they live abroad only temporarily for study or work, for example, on assignment to a foreign affiliate of their U.S. employer. For these Americans, their closest and most enduring ties likely would be to the United States, even when they fail to meet the statutory substantial presence test. For taxpayers like these, citizenship is a good proxy for national community membership.

Farther along the connectedness spectrum would be Americans who permanently resettle abroad but retain U.S. citizenship.[194] A common resettlement scenario involves a U.S. citizen who marries a citizen of another country and resettles in her spouse's nationality state.[195] The longer the citizen resides abroad, the more tenuous becomes the argument that her citizenship proxies her national community membership. Depending on the period of overseas residence, at some point, if we apply a substantive rather than formal definition of national community membership, we might all agree that the nonresident citizen is no longer a member of the U.S. national community. A recent IRS survey of nonresident taxpayers revealed that more than half of respondent citizens had resided abroad for more than five years, but we simply do not know enough about nonresident Americans to determine the prevalence of permanent or long-term resettlement.[196]

At the far end of the connectedness spectrum lie so-called "accidental Americans," who are citizens of the United States by virtue of being born in the United States, but who may never have resided in the United States

194. Schneider, *supra* note 22, at 6–7 (distinguishing long-term and short-term nonresidents, "accidental" Americans, citizens by descent, and unaware citizens by descent); *id.* at 66–73 (concluding that citizenship taxation should be replaced with a domicile or physical presence test). *See also id.* at 6 (asserting that because different groups of Americans abroad have "different degrees of connection to the United States," they "do not warrant the same tax treatment"). Rather than advocating abandoning citizenship taxation, this Article recommends using citizenship in conjunction with other factors to determine liability for worldwide taxation.

195. VON KOPPENFELS, *supra* note 98, at 51 (listing, in descending order of popularity, the reasons Americans in Europe gave for why they moved from the United States, and noting that the most popular answers were joining a partner or other family, study or research, own job offer, adventure, partner's job, and own or partner's intra-company job transfer).

196. TIFFANIE N. REKER ET AL., IRS WAGE & INV. RESEARCH & ANALYSIS (WIRA), 2012 TAXPAYER EXPERIENCE OF INDIVIDUALS LIVING ABROAD: SERVICE AWARENESS, USE, PREFERENCES, AND FILING BEHAVIORS 39 (2012) [hereinafter IRS WIRA 2012 STUDY].

and may not even be aware of their citizenship status.[197] Since their defining feature is their lack of connections with the United States other than their U.S. citizenship, their obligation to pay tax to the United States cannot be justified by their national community membership.

3. Residence as a Proxy for National Community Membership

The foregoing discussion raises the problem that, even lacking a precise definition of national community membership, citizenship and national community membership will not always coincide. But no administrable rule designed to identify national community members will be accurate in every case. Thus, although not generally phrased this way in the literature,[198] as a practical matter, the question becomes whether citizenship is a better proxy for national community membership than reasonably administrable alternatives.

The most common alternatives to citizenship taxation use a physical presence test or a domicile test. The United States applies a physical presence test to aliens.[199] The test regards as a tax resident anyone who spends more than half of the year in the United States.[200] In contrast, domicile rules look to factors such as whether the taxpayer maintains a dwelling in the jurisdiction, whether her family resides there, whether she intends to return to the jurisdiction, and the nature of her social and economic connections to the jurisdiction.[201] Additionally, many states have extended residence rules that treat taxpayers who leave the jurisdiction as residents subject to worldwide taxation for a limited time after their departure, after which they are no longer taxed as residents.[202]

197. Senator and presidential candidate Ted Cruz recently learned that he was an accidental Canadian; he received U.S. citizenship at birth through his U.S.-citizen mother, and Canadian citizenship by virtue of being born in Canada. *See* Todd J. Gillman, *No, Canada: Sen. Ted Cruz Has Formally Shed His Dual Citizenship*, DALL. MORNING NEWS (Jun. 10, 2014), http://trailblazersblog.dallasnews.com/2014/06/no-canada-sen-ted-cruz-has-formally-shed-his-dual-citizenship.html (reporting that "Cruz has said that when he was a child, his mother had told him she would have had to make an affirmative act to claim Canadian citizenship for him. Since that never happened, the family always had assumed that he did not hold Canadian citizenship"). The possibility that a person could be a U.S. citizen and not know it creates traps for the unwary, since U.S. law subjects nonresident Americans to tax and financial reporting requirements that carry severe penalties. *See infra* Part III.A.2.

198. An exception is Edward Zelinsky, who advocates citizenship taxation as a more administrable alternative to multi-factor domicile tests. Zelinsky, *supra* note 22, at 1314–23.

199. *See* I.R.C. § 7701(b)(3) (2015).

200. For anyone not meeting the 183-day test, there is a look-back rule that takes into consideration days spent in the United States in the current and previous two years. *See* I.R.C. § 7701(b)(3); *supra* note 67 (describing the 183-day test).

201. AULT & ARNOLD, *supra* note 57, at 431.

202. *See*, *e.g*., BRIAN J. ARNOLD, TAX DISCRIMINATION AGAINST ALIENS, NON-RESIDENTS, AND

A multifactor test that takes into consideration factors like the taxpayer's intent to return will capture national community membership better than will a bright-line rule like citizenship or number of days present in the jurisdiction. But administering such fact-intensive tests is costly, and, as a result, many states that employ factors tests nevertheless either presume residence or conclusively determine residence from physical presence.[203]

Recall the taxpayers described in the last subpart: the student, the temporary corporate transferee, the permanent resettler, and the accidental American. For the student and the corporate transferee, citizenship is a better proxy for national community membership than is physical presence. For the permanent resettler, citizenship is a better proxy for national community membership than physical presence in the early years, but eventually, a citizenship test would unjustly include her in the U.S. tax base. The accidental American's U.S. citizenship is a poor proxy for her membership in the U.S. national community, and her residence (or perhaps her other citizenship) would do a better job of aligning her tax obligation with her community membership.

Consideration of these few scenarios reveals that it is far from clear that residence-based standards are more likely than citizenship to coincide with substantive national community membership, at least when those residence-based standards rely principally on physical presence. On the other hand, some countries use substantive definitions of tax residence that look to the person's domicile, where her family lives, and whether she has significant economic and social connections to the state.[204] For nonresidents, such definitions may coincide with national community membership better than does citizenship. The United States could improve the correspondence between national community membership and the set of taxpayers it subjects to worldwide taxation by adding substantive factors to its citizenship test for nonresidents. Such accuracy would, however, come at the cost of administrability.

FOREIGN ACTIVITIES: CANADA, AUSTRALIA, NEW ZEALAND, THE UNITED KINGDOM, AND THE UNITED STATES 50 (1991) (describing Canadian rule that regards someone who departs Canada for more than two years as a nonresident from the first day of departure, unless the departing taxpayer maintains a dwelling in Canada, in which case she remains a Canadian tax-resident); Gutmann, *supra* note 49, at 28–29 (describing several European countries' extended-residence rules).

203. *See generally* ARNOLD, *supra* note 202, at 50, 160, 181 (describing several countries' rules).

204. AULT & ARNOLD, *supra* note 57, at 431–34.

4. Membership in Multiple Communities

Dual and multiple nationals present interesting cases for evaluating citizenship taxation.[205] A fascinating new study of the attributes and attitudes of Americans abroad found that a significant proportion of Americans living in Europe are dual nationals.[206] The impact of dual nationality on the national community membership question is indeterminate. On the one hand, dual nationality may signal overseas Americans' commitment to another society and therefore may signal distance from the American national community. On the other hand, dual nationals' willingness to retain their U.S. citizenship even when they possess nationality elsewhere, despite the tax and administrative burdens of remaining American, may reflect the strength of their commitment to the United States.[207]

We would need to know more about the individual dual citizen to know where we should assign her moral obligation to pay taxes under the national-community-membership theory. For accidental Americans, U.S. citizenship is a poor proxy for membership in the American national community. For such people, their other nationality, or their residence, would better proxy their national community membership.[208] But other dual nationals may have closer connections to the United States than to their other nationality state or residence state. Still, others may feel allegiance to and a sense of belonging in two or more states. Moreover, it is easy to imagine circumstances in which a person who does not possess formal citizenship nevertheless is a member of a national community.

205. *See* Matthew Lister, *Citizenship, in the Immigration Context*, 70 MD. L. REV. 175, 226–27 (2010) (describing liberalization of states' attitudes toward plural nationality and noting that "today dual citizenship is tacitly accepted by the [U.S.] government"). *See also* James A. Goldston, *Epilogue*, *in* STATELESSNESS AND CITIZENSHIP: A COMPARATIVE STUDY ON THE BENEFITS OF NATIONALITY 209, 209 (Brad K. Blitz & Maureen Lynch eds., 2011) ("As many as 175 million people worldwide are not citizens of the countries in which they reside," and an estimated 12 million of those people are stateless.).

206. VON KOPPENFELS, *supra* note 98, at 29–30.

207. For dual citizens, U.S.-style citizenship taxation may serve as an information-forcing mechanism. By maintaining their U.S. citizenship, despite the burdens, taxpayers reveal their continued membership in the U.S. national community. On the other hand, retention of U.S. citizenship by a person with no other passport cannot serve the same information-forcing capacity, since people with no other nationality must retain their U.S. nationality or be stateless.

208. *Cf.* Lister, *supra* note 205, at 204 ("[S]tates may legitimately worry that extending *jus sanguinis* beyond the first foreign-born generation would dilute the value of citizenship by extending citizenship to people who have no social ties to, and who do not engage in social cooperation with, the state in question."); *id.* at 207 (noting that children born to tourists or short-term visitors become citizens, even if the child and parents immediately return to their home country, and "it is not clear why that child ought to have the rights (and duties) of citizenship").

Multiple national community memberships therefore can arise outside the dual citizenship context. Membership by non-citizens could be held by residents or nonresidents. Such examples highlight that citizenship is not only over-inclusive but also under-inclusive as a proxy for national community membership. That the United States is not content to tax only its citizens' worldwide income, but also taxes aliens' worldwide income when those aliens reside in the United States, may reflect the under-inclusiveness of citizenship as a proxy for national community membership.[209]

More generally, the moral obligation to support a society may not be all or nothing. If substantial connections and full national community membership trigger full moral obligations to contribute taxes according to ability to pay, then more limited connections and partial membership may trigger more limited tax obligations. One thing is clear: since the social-obligation theory determines the amount of a person's tax liability by reference to her ability to pay, the theory should not result in full tax liability to multiple societies. If multiple and partial national community memberships are possible, the question then becomes how a taxpayer's obligation should be divided among the states in which she is a member.

In one sense, tax treaties take a winner-take-all approach to this problem. Although international tax law provides no definition of national community membership, tax treaties resolve dual tax-residence conflicts in favor of only one state.[210] Dual-residence conflicts under tax treaties arise when each treaty partner regards the same individual as a tax resident under its domestic law. States use the following factors (in descending order of importance) to resolve the conflict: where the taxpayer maintains a permanent home, where her personal and economic relations are closer, where she has her habitual abode, and her nationality.[211] Thus, for most countries of the world, substantive personal connections trump formal nationality for purposes of adjudicating disputes among multiple states that possess a putative claim over a taxpayer's worldwide income. In its own treaties, however, the United States preserves its prerogative to tax its citizens as if the treaty did not apply.[212] This "saving clause" allows the

209. On the other hand, worldwide taxation of resident aliens also could be justified by the benefits theory, but such justifications would be subject to the caveats raised in *supra* Part II.B.

210. The OECD Model has served as the basis for more than 3,000 bilateral tax treaties in force. *See* Ruth Mason, *Tax Expenditures and Global Labor Mobility*, 84 N.Y.U. L. REV. 1540, 1622 (2009).

211. *Id.*

212. UNITED STATES MODEL INCOME TAX CONVENTION OF NOVEMBER 15, 2006 art. 1(4), *reprinted in* 1 Tax Treaties (CCH) ¶ 209 ("This Convention shall not affect the taxation by a Contracting State of . . . its citizens.").

United States to tax U.S. citizens on their worldwide income, no matter where in the world they reside and no matter how close their connections to another state.

Substantively, however, despite the tie-breaker rules and the U.S. saving clause, the citizenship tax does not result in winner-take-all taxation. Rather, because the United States credits its citizens' foreign taxes, the United States as a practical matter defers to the other taxing state. The result under the foreign tax credit limitation is that if an American lives in a higher-tax state, she pays tax only to her residence state. In contrast, if the American lives abroad in a lower-tax state, she pays tax first to her residence state and then to the United States on the difference between the U.S. tax that would be due from a resident and the tax she paid abroad. Thus, the U.S. citizenship tax may result in splitting the individual's social-obligation contribution across two states.[213] In cases where the nonresident American is a full or partial member of *both* national communities, this is a fairer result than a winner-take-all approach, although the calculation that divides the revenue is arbitrary in the sense that it is unrelated to the moral basis for the tax, which is the degree of connection between the taxpayer and the community. In the other case, where the nonresident American is no longer a member of the U.S. national community, her residual taxation by the United States is less fair than would be a winner-take-all approach that awarded to her residence state the exclusive authority to tax her worldwide income.

The mismatches between citizenship and national community membership suggest that it would be fairer to regard citizenship as a factor, but not a determinative factor, of worldwide taxation. Notably, however, the discussion in this subpart highlights that the dominant residence rule, which looks to physical presence, fails to tax some nonresident citizens who remain members of their citizenship state's national community. It also imposes worldwide taxation on some resident aliens who are not members of their host state's national community. The latter case is only problematic if the fairness justification for taxing aliens' worldwide income is grounded in the national-community-membership theory. Although it is beyond the scope of this Article, it may be possible to justify taxing

213. *See* Kirsch, *supra* note 149, at 126 & n.33 (suggesting that the foreign tax credit acknowledges the taxpayer "is a part of two societies"). As noted in the text, this is a crude accounting device, and it also applies to resident citizens, most of whom are not members of any other national community, though in their case, the credit could be justified as an informal acknowledgment of benefits received in the source country.

resident aliens' worldwide income on a different basis than that for citizens.[214]

5. The Current Regime Violates the Ability-to-Pay Principle

The discussion of national community membership in the preceding subpart addressed how to define the taxable population. It asked, "*Who pays?*" Assuming we agree that at least some nonresident citizens ought to be included in the group that pays, we must also ask, "*How much do they pay?*" The question addressed by this subpart also differs from the question discussed earlier regarding how the tax collected from a person with connections to multiple national communities should be shared across those different communities. That discussion implicitly assumed that there was a reasonable method for determining the person's tax liability, and then it asked how the resulting revenue could be shared by the taxing states. This subpart analyzes that implicit assumption. It asks how to measure nonresidents' ability to pay and whether a state should use the same approach for both residents and nonresidents.

As compared with the benefits theory, which measures the taxpayer's obligation by the benefits she received, the social-obligation theory measures the taxpayer's obligation according to her ability to pay.[215] Ability to pay is a comparative concept. It says that as a person's income rises relative to that of other taxpayers, so should her share of the burden to pay taxes.[216] By taxing nonresident citizens like resident citizens, the United States implicitly assumes that nonresident citizens' ability to pay should be measured the same way as resident Americans'.[217]

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

214. For example, resident aliens receive significant benefits from their host states, and ability-to-pay taxation could be seen as a proxy for benefits taxation. Such claims would be susceptible to the criticisms of the benefits theory of taxation discussed in *supra* Part II.B.

215. Kirsch, *supra* note 12, at 479–88.

216. MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 27 (7th ed. 2013).

217. Commentators also make this assumption. *See, e.g.*, Postlewaite & Stern, *supra* note 22, at 1115, 1121 (assuming the appropriate comparator when determining nonresident Americans' ability to pay is resident Americans).

interest in taxing according to ability to pay. Of course, such cost-of-living differences also occur in different regions within the United States, and domestic tax rules do not correct for them.[218]

Moreover, if we conclude that, despite differences across countries in wage rates and costs of living, resident and nonresident Americans ought to be taxed alike, then presumably it would be important to *actually* tax them alike. To do so would require repealing the foreign-earned-income exclusion.[219] It also would require unlimited credits for foreign taxes. If the United States does not fully credit foreign taxes (and in a variety of circumstances, it does not[220]) then nonresidents' ability to pay will differ from residents' ability to pay. As just one example, under the current regime, nonresidents pay foreign consumption taxes that affect their ability to pay but for which they receive no foreign tax credits from the United States.[221] Since other countries employ consumption taxes to a much greater extent than does the United States, failure to credit such taxes is an important violation of the ability-to-pay principle.[222]

218. *Id.* at 1120; Michael S. Knoll & Thomas D. Griffith, *Taxing Sunny Days: Adjusting Taxes for Regional Living Costs and Amenities*, 116 HARV. L. REV. 987, 995–96 (2003) (arguing that the failure of the income tax to account for cost of living differentials results in misallocation of capital and labor in the United States). The foreign housing exemption accounts for cost-of-living differentials to some extent.

219. *See*, *e.g.*, Kirsch, *supra* note 12, at 523–24 (urging the repeal of the exclusion because such repeal would be more faithful to citizenship taxation); Postlewaite & Stern, *supra* note 22, at 1119 (same).

220. Patton, *supra* note 39, at 715–27 (reviewing deficiencies of the foreign tax credit regime, including the overall credit limitation; the incentive this limitation creates for nonresidents to artificially generate income that the United States will regard as foreign-source and therefore creditable; the failure to credit value-added taxes; and the failure to credit some payroll taxes); *id.* at 726 (concluding that given these "faults" in the credit system, an American abroad may be "at a staggering tax disadvantage in many countries when one looks at the tax burden he would have borne on the same amount of income had he resided in the United States").

221. I.R.C. § 901(b) (2015) (to be eligible for the credit, the foreign tax must be a compulsory income tax); Zelinsky, *supra* note 22, at 1297–98, 1347.

222. The following table shows the comparative consumption tax burdens in the United States and the top ten receiving countries of Americans abroad.

	Taxes on Goods & Services (including local taxes) as Percentage of GDP in 2010 or Latest Available Year	*UN Estimate of Percentage of Country's Stock of Global American Migrants in 2010*
USA	4.5	…
Japan	5.1	2
Australia	7.6	3
Canada	7.5	11
South Korea	8.5	2

To preserve equity, we also would want to make some kind of allowance for implicit taxes and subsidies. For example, if a nonresident American lives abroad in a country that does not have publicly funded residential water, then the nonresident would have to pay out-of-pocket for that utility.[223] That implicit tax would affect the nonresident's ability to pay compared to a resident's ability to pay. Likewise, the host state may provide goods that are generally privately provided in the United States. For example, the nonresident may avoid out-of-pocket health insurance or medical care costs, which would enhance her ability to pay compared to a resident American. Such differences affect ability to pay, but the citizenship tax does not account for them. Thus, no matter how we decide the national community membership question, our citizenship tax fails to systematically account for important differences between resident and nonresident taxpayers that directly affect their relative abilities to pay.

* * *

This Part has argued that each of the three traditional fairness arguments for citizenship taxation is problematic. The consent theory may have intuitive appeal, but it raises a host of issues about what makes consent meaningful. At best, it can justify citizenship taxation only for nonresident Americans that possess citizenship in other democratic countries that respect human rights.

The benefits theory supports *some* taxation of nonresident Americans, commensurate with the benefits they receive from the United States, but it

Mexico	9.8	27
Germany	10.7	4
France	10.7	2
United Kingdom	10.8	7
Italy	11.1	2
Israel	12.9	3

Source: OECD FACTBOOK 2013, *supra* note 101 (providing consumption tax data); UN MIGRATION DATA, *supra* note 100 (providing the calculations for the migration percentages).

223. Most U.S. residents receive water from publicly funded water management. U.S. ENVTL. PROT. AGENCY, FACTOIDS: DRINKING WATER AND GROUNDWATER STATISTICS FOR 2007 (2007), https://web.archive.org/web/20080909223047/http://www.epa.gov/safewater/data/pdfs/data_factoids_2007.pdf. Such utilities are partially federally funded. CONG. BUDGET OFFICE, FUTURE INVESTMENT IN DRINKING WATER AND WASTEWATER INFRASTRUCTURE 6, 7 (2002), https://www.cbo.gov/sites/default/files/107th-congress-2001-2002/reports/11-18-watersystems.pdf (describing federal regulation and oversight of the nation's water supply, including a description of how the 1996 amendments to the Safe Drinking Water Act created the federal funding structure for public water resources). In contrast, many other countries have privatized water provision. *See, e.g.*, Richard Seymour, *A Short History of Privatisation in the UK: 1972-2012*, GUARDIAN (Mar. 29, 2013) (detailing U.K. privatization of, among others, water, electricity, and the Royal Mail).

cannot justify current law. If the United States wants to increase the correlation between taxes paid and benefits received by nonresident citizens, it can charge nonresidents for more goods and services.

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

Finally, even when nonresident citizens are national community members, it nevertheless may be unfair to measure their ability to pay according to the same rules that apply to resident taxpayers because nonresidents' wage rates, costs of living, and other factors that directly impact ability to pay depend on conditions in their residence, rather than citizenship, states. While foreign tax credits and the foreign-earned-income exclusion mitigate this problem to some extent, they are not designed to cure it.

III. ADMINISTRABILITY

Edward Zelinsky argues that because citizenship is a bright line, whereas residence requires consideration of factors such as the number of days present in the taxing state, citizenship taxation is easier to administer than residence taxation.[224] Zelinsky also concludes that citizenship taxation ends up reaching largely the same people as residence taxation, at least for countries that define tax residence to include concepts like domicile or "ordinary residence"—concepts that look beyond mere physical presence

224. Zelinsky, *supra* note 22, at 1341.

to establish tax residence.[225] Thus, he concludes that citizenship taxation gets largely the same results as residence taxation, but does so in a more administrable fashion.[226]

But Zelinsky overstates the administrative advantages of citizenship taxation. Although Zelinsky is correct that citizenship taxation spares the government the need to litigate with citizens over the number of days spent within the United States,[227] citizenship taxation does not relieve the United States of the obligation to administer its (admittedly) fact-intensive and manipulable substantial presence standard, since that standard applies to all aliens present in the United States who are not green-card holders.[228] It is unlikely that the United States would forego worldwide taxation of resident aliens. So, whether or not it abolishes citizenship taxation, the United States will continue to litigate cases involving how many days taxpayers spend in the United States. More importantly, because Zelinsky limits his analysis to the threshold decision about *who* will be subject to worldwide taxation, not the broader question of *how* worldwide taxation can be enforced against nonresidents, he does not properly account for the administrative burdens of citizenship taxation. This Part explores those burdens and concludes that the government cannot adequately enforce citizenship taxation and that the current citizenship tax regime imposes an unreasonable compliance burden on ordinary taxpayers.

A. COMPLIANCE COMPLEXITY

1. Government Enforcement Difficulties

Even if the IRS knew the whereabouts and income of every nonresident citizen, such that it could assess their tax liability, it would have trouble enforcing that liability for lack of territorial jurisdiction. The United States has no authority to conduct tax investigations abroad without the cooperation of the other country,[229] and many countries will not enforce foreign governments' tax claims or tax judgments.[230] Additionally, foreign

225. *Id.* at 1323–42. Although Zelinsky compares citizenship taxation with taxation according to domicile, this subpart will continue comparing citizenship tax with residence taxation, where residence taxation encompasses *both* presence-based and domicile-based taxation. In all the examples Zelinsky cites—Canada, the United Kingdom, and Australia—domicile supplements a physical-presence test for determining a taxpayer's liability for worldwide taxation. *See* AULT & ARNOLD, *supra* note 57, at 431.

226. Zelinsky, *supra* note 22, at 1341.

227. *Id.* at 1323–25.

228. *See* I.R.C. § 7701(b)(1)(A)(ii) (2015).

229. Michael S. Kirsch, *The Tax Code as Nationality Law*, 43 HARV. J. ON LEGIS. 375, 433 (2006) (citing Office of Legal Counsel materials).

230. Dentino & Manolakas, *supra* note 8, at 415.

employers do not withhold taxes from Americans' wages and do not report information about those wages to the United States.[231] While new legislation applicable to foreign financial institutions can be expected to increase offshore information reporting on financial accounts,[232] and a new multilateral agreement promises to enhance tax enforcement,[233] the United States will continue to face difficulties enforcing worldwide taxation of nonresident citizens.

2. FBAR and FATCA Fallout

Tax gap statistics reveal that self-reporting of taxable income falls off dramatically in the absence of third-party reporting.[234] So a major obstacle to enforcing nonresident citizens' tax obligations is a lack of third-party reporting about nonresident Americans' foreign income. In legislation commonly referred to as the Foreign Account Tax Compliance Act ("FATCA"),[235] the United States recently imposed third-party reporting requirements on foreign banks and new self-reporting obligations on both residents and nonresidents who hold foreign financial accounts.[236] Congress passed FATCA to combat resident Americans' failure to report overseas accounts, including Swiss bank accounts.[237] FATCA partially duplicates taxpayers' obligations to file Foreign Bank Account Reports ("FBARs"),[238] which are designed to prevent money laundering and

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231. Kirsch, *supra* note 12, at 496–98.

232. *See* discussion of FATCA *infra* Part III.A.2. *See also* Kirsch, *supra* note 149, at 151–57 (arguing that FATCA and other administrative advances make citizenship taxation more enforceable).

233. OECD, CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS (June 1, 2011, as amended). The United States has declined to provide some forms of assistance called for in the Convention, and due to the reciprocal nature of the treaty, the treaty does not entitle any signatory who refuses to provide a particular type of support to request it of another signatory. *See Reservations and Declarations for Treaty No. 127 – Convention on Mutual Administrative Assistance in Tax Matters*, COUNCIL EUR., http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/127/declarations (last visited Feb. 13, 2016) (derogating from the last two of the three forms of assistance specified in the Convention; exchange of information, recovery of tax claims, and service of documents).

234. *Tax Gap for Tax Year 2006: Overview*, INTERNAL REVENUE SERV. 3 (Jan. 6, 2012), https://www.irs.gov/pub/newsroom/overview_tax_gap_2006.pdf.

235. Foreign Account Tax Compliance Act, Pub. L. No. 111-147, 124 Stat. 72 (2010) (codified as amended at 26 U.S.C. §§ 1471–1474 (2012)).

236. Effective in 2014, FATCA was enacted in 2010 as part of the Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, 124 Stat. 71 (2010). FATCA requires self-reporting on certain foreign assets if in aggregate they exceed $200,000 for single nonresident filers. *See* 26 C.F.R. § 1.6038D-2T(a) (2013). The FATCA filing thresholds are lower for resident Americans, who must report foreign assets that exceed in aggregate $50,000. *Id.* In addition to self-reporting, FATCA imposes third-party reporting obligations on foreign financial institutions. *Id.*

237. Joshua D. Blank & Ruth Mason, *Exporting FATCA*, 142 TAX NOTES 1245, 1246 (2014).

238. Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified in scattered sections of

terrorism financing.[239] Both regimes require self-reporting of foreign accounts and other assets.[240]

Michael Kirsch has pointed out that FATCA will help the IRS overcome its challenges in enforcing the law against nonresidents.[241] But much of this compliance benefit derives from information-reporting by foreign financial institutions, which presumably will encourage more accurate reporting by holders of foreign accounts. It is not clear that any additional compliance benefit justifies the onerous account-reporting obligations on individual taxpayers holding covered foreign financial accounts.[242] Moreover, Congress singled out foreign accounts because *resident* Americans employ them in tax evasion. But a nonresident citizen's ownership of a foreign account should arouse no special suspicion of tax evasion, at least when the taxpayer holds the foreign account in her state of residence.

Perhaps in recognition of nonresident citizens' need for local bank accounts for daily life (rather than tax evasion), the U.S. Department of the Treasury increased the threshold amounts that nonresident citizens must have in foreign accounts to make them reportable.[243] But because the reporting requirements apply to the aggregate of all covered accounts, including foreign retirement accounts, many nonresident Americans nevertheless remain subject to FATCA.[244]

FATCA[245] and FBAR[246] violations trigger stiff penalties, and the

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12 U.S.C.).

239. The FBAR requirement was imposed on citizens and residents by the Bank Secrecy Act. 31 U.S.C. § 5314 (2012); 31 C.F.R. § 1010.350(a) (2014); *id.* §1010.306(c) (all foreign accounts reportable if, in aggregate, their value exceeds $10,000).

240. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-403, REPORTING FOREIGN ACCOUNTS TO IRS: EXTENT OF DUPLICATION NOT CURRENTLY KNOWN, BUT REQUIREMENTS CAN BE CLARIFIED 7 (Feb. 2012), http://www.gao.gov/assets/590/588921.pdf.

241. *See generally* Kirsch, *supra* note 149, at 151–57.

242. For example, in the domestic context the government requires banks to report on residents' bank accounts, but it does not require individual taxpayers also to file the equivalent of FBARs or FATCA reports on their *domestic* accounts; there is, for example, no DBAR.

243. *See* 26 U.S.C. § 6038D (2010); 26 C.F.R. § 1.6038D-1(a)(2).

244. Although the filing requirements apply to both resident and nonresident citizens (and tax-resident aliens), because nonresident Americans are much more likely than resident Americans to have foreign bank accounts, the FATCA and FBAR penalties are more likely to fall on nonresident Americans than on resident Americans. *See* Schneider, *supra* note 22, at 32–37.

245. I.R.C. § 6038D(d)(1)–(2) (2015) (nonreporting penalty of $10,000 to $50,000 for failure to report covered assets and accounts). If taxpayers owe U.S. tax on undisclosed accounts, FATCA adds a 40 percent substantial understatement penalty. *See id*. §§ 6038D(d), 6662(b)(7), (j). Finally, failure to file under FATCA leaves the statute of limitations open for the FATCA form and any related tax liability. *Id.* § 6501(c)(8)(A).

246. 31 U.S.C. § 5321(a)(5)(B); 31 C.F.R. § 1010.350 (imposing $10,000 penalty per non-willful

penalties for each regime stack, even though they require reporting of duplicative information.[247] Criminal penalties also may apply.[248] These reporting requirements have been harshly criticized at home and abroad. For example, the National Taxpayer Advocate has repeatedly tried to draw congressional attention to the impact of these regimes on nonresident taxpayers.[249] In her 2012 annual report to Congress, the National Taxpayer Advocate raised the concern that the civil penalties of up to 300 percent of the account value for failure to file FBARs were "scary," "disproportionate," and "excessive to the point of possibly violating the U.S. Constitution."[250] Even foreign officials have criticized the compliance burden on U.S. citizens living abroad. For example, in 2011, then-Canadian Finance Minister Jim Flaherty complained that FATCA applies to "honest and law-abiding people . . . [who] work and pay taxes in Canada . . . . [and] are not high rollers . . . ."[251]

FATCA was designed to combat tax evasion by resident taxpayers, but it inflicts collateral damage on nonresident citizens who own offshore accounts for perfectly innocent reasons.

3. Other Compliance Challenges for Taxpayers

At a time when both the number of nonresident taxpayers and the penalties for noncompliance have increased sharply, the IRS provides little assistance to nonresident taxpayers in complying with their tax filing obligations, and according to the National Taxpayer Advocate, the quality and quantity of that assistance is "worsening."[252] For example, whereas there were twenty-eight overseas IRS attaché offices in 1986 where taxpayers could seek help,[253] the IRS closed its last four foreign attaché offices last year.[254] In 2015, the IRS also terminated its email help

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

247. For a chart comparing filing obligations under the two regimes, see *Comparison of Form 8938 and FBAR Requirements*, INTERNAL REVENUE SERV., https://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements (last updated Feb. 3, 2016). *See also* Schneider, *supra* note 22, at 33–36.

248. 31 U.S.C. §§ 5321(a)(5)(C), 5322; 31 C.F.R. § 1010.840(c)(2) (subjecting violators to penalties up to $500,000 or ten years imprisonment, or both).

249. *See, e.g.*, NTA 2012 REPORT, *supra* note 20, at 147.

250. *Id.*

251. Jim Flaherty, *Read Jim Flaherty's Letter on Americans in Canada*, FIN. POST (Sept. 16, 2011), http://business.financialpost.com/2011/09/16/read-jim-flahertys-letter-on-americans-in-canada.

252. NTA 2013 REPORT, *supra* note 21, at 208.

253. Blum & Singer, *supra* note 22, at 711–12 n.23.

254. NTA 2015 REPORT, *supra* note 95, at 2. NTA 2013 REPORT, *supra* note 21, at 211 (noting

program.[255] This means that, aside from paid preparers, nonresident Americans' only help options are calling or faxing a toll line, reading the "canned" IRS website, or watching the three YouTube videos the IRS produced for international taxpayers last year.[256] The IRS reduced its services to international taxpayers, effectively rendering helpless those without reliable Internet access,[257] while at the same time increasing its overseas enforcement presence, and despite a recent surge of inquiries from U.S. citizens abroad.[258]

According to the GAO, the IRS should do more to inform nonresidents of their reporting requirements,[259] and a 2012 IRS study concluded that the agency "underserved" nonresident citizens.[260] Making matters worse, in order to save costs, the IRS recently stopped mailing tax forms to nonresident Americans, which has created problems for overseas citizens who lack high-speed Internet access.[261] The decision to stop mailing relevant forms coincided with implementation of the new FATCA reporting requirements that substantially duplicate FBAR reporting and carry significant penalties for noncompliance.[262] According to the same 2012 IRS study, eliminating mailings while performing inadequate outreach to inform nonresident citizens of their new reporting obligations left many nonresident citizens unaware of their filing obligations.[263] On the

that offices are in London, Paris, Frankfurt, and Beijing).

255. *See* IRS WIRA 2012 STUDY, *supra* note 196, at 42 n.16 (citing $116.66 as the IRS's unit cost for an e-mail).

256. *See* NTA 2015 REPORT, *supra* note 95, at 76 (criticizing the IRS's decision to eliminate "the only free option for international taxpayers to meaningfully interact with the IRS"). *See id*. at 79. *But see* Kirsch, *supra* note 149, at 171 (speculating that this filing complexity will spur an overseas market for private professional tax preparation assistance, such as H&R Block, which could help ease the burden). *See also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-163, TAX FILING SEASON: 2014 PERFORMANCE HIGHLIGHTS THE NEED TO BETTER MANAGE TAXPAYER SERVICE AND FUTURE RISKS, 9–17 (Dec. 2014), http://www.gao.gov/assets/670/667563.pdf (describing and evaluating the IRS's telephone services).

257. *See* NTA 2015 REPORT, *supra* note 95, at 78 (noting survey results reporting that 35 percent of nonresident filers had no Internet access in 2012).

258. NTA 2015 REPORT, *supra* note 95, at 74, 76, n.23 (noting that the IRS has ten criminal investigation offices abroad). *Id*. at 76 (noting increase in inquiries from citizens abroad since fiscal year 2013).

259. GAO, NONFILING, *supra* note 102, at 22–24.

260. *See* IRS 2012 WIRA STUDY, *supra* note 196, at 1.

261. *See id.* at 23–24 (reviewing effects of the Printing and Postage Budget Reduction Plan).

262. *See infra* Part III.A.2.

263. *See* IRS 2012 WIRA STUDY, *supra* note 196, at 24 (noting that the IRS's discontinuation of its mailings meant that many overseas taxpayers were unaware of their new FATCA filing requirements); *id.* at 23 (listing twenty forms that the IRS stopped mailing to nonresident citizens). *But see* Kirsch, *supra* note 149, at 214 (arguing that although IRS guidance to nonresident taxpayers should be issued more formally in the future, recent guidance has improved the availability of information on

other hand, extensive media coverage of the controversies and compliance hurdles caused by FATCA likely means that many nonresident Americans recently have been made painfully aware of their tax filing obligations. The compliance complexity caused by FATCA has been extensively covered elsewhere,[264] and expatriating Americans have cited the onerous new reporting environment as a reason—independent of tax liability—for renouncing citizenship.[265]

In addition to onerous and duplicative financial account reporting requirements, other aspects of the taxation of nonresident Americans raise difficulties that resident Americans usually do not face. First, nonresident Americans generally must file full income tax returns in the United States as well as in their country of residence. They must file their taxes twice, according to two different sets of tax laws, even when they owe no U.S. taxes.[266]

Worse, when conducted abroad, ordinary economic activities draw nonresident citizens into what the National Taxpayer Advocate calls "the Kafka-esque U.S. international tax regime."[267] For example, she points out that Subpart F of the Internal Revenue Code applies to a nonresident's wholly owned local corporation engaged in local business.[268] The Subpart F rules were developed to prevent cross-border profit-shifting by large, multinational enterprises, and the federal government estimates that it takes

reporting requirements).

264. *See* Kirsch, *supra* note 149, at 166–70. *See also* Allison Christians, *Regulating Return Preparers: A Global Problem for the IRS*, 75 TAX NOTES INT'L 391 (Aug. 4, 2014) (analyzing compliance burden posed by FATCA for return preparers assisting overseas taxpayers); J. Richard (Dick) Harvey, Jr., *Worldwide Taxation of United States Citizens Living Abroad: Impact of FATCA and Two Proposals*, 4 GEO. MASON J. INT'L COM. L. 319 (2013) (discussing compliance burdens faced by nonresident taxpayers under a citizenship taxation regime and giving special attention given to issues caused by FATCA).

265. *See, e.g.*, Tom Geoghegan, *Why Are Americans Giving Up Their Citizenship?*, BBC NEWS MAG. (Sept. 27, 2013), http://www.bbc.com/news/magazine-24135021 (quoting an American who relinquished her U.S. citizenship after 32 years abroad as saying, "This has nothing to do with avoiding taxes. I was never in danger of having to pay taxes in the US since I pay more here. The issue for me was that it was becoming harder and harder to follow the tax code and comply. It was difficult already but when I knew FATCA was coming, I thought, 'Do I want to go through with it anymore?'").

266. Nonresident citizens need not file if their income is below the relevant statutory threshold. *See* IRC § 6012(a)(1)(A)(i) (no filing required for those whose income does not exceed the sum of the personal exemption and standard deduction). *See* Rev. Proc. 2015–53, 2015-44 I.R.B. 615 (Nov. 2, 2015) (providing $10,350 as exempt-from-filing amount for single filers in 2016). Taxpayers exceeding that threshold must file to claim the foreign-earned-income exclusion, even if after application of the exclusion and foreign tax credit they will have no residual U.S. tax liability. *See* Treas. Reg. § 1.911-7.

267. NTA 2011 REPORT, *supra* note 34, at vi.

268. *Id.* at 133.

fifteen eight-hour work days for a taxpayer to fill out the relevant form.[269] Nonresidents also must convert all their transactions to U.S. currency for filing purposes.[270] And nonresident citizens married to noncitizens must obtain for their spouses and dependents Individual Taxpayer Identification Numbers ("ITINs"), but the application process for ITINs is so burdensome and error-prone that nonresident citizens elect to forgo joint filing and personal exemptions in order to avoid the process, resulting in higher tax burdens.[271]

Moreover, unlike most resident taxpayers who have only domestic income, nonresidents usually have foreign-source income, so they must determine how to apply the complicated foreign tax credit regime. And while the foreign-earned-income exclusion represents a tax benefit available only to nonresident Americans, the GAO concluded that it is "unreasonably complex" and prevents many nonresident Americans from calculating their taxes without professional help.[272] Americans abroad who cannot afford professional help may be noncompliant because they are overwhelmed by the complexity of the foreign tax regime. The National Taxpayer Advocate recently warned Congress of the difficulties faced by nonresident citizens, stating that "[t]he complexity of international tax law, combined with the administrative burden placed on these taxpayers, creates an environment where taxpayers who are trying their best to comply simply cannot."[273]

B. PRUDENTIAL CONCERNS

The challenges inherent in collecting tax from overseas Americans paint a bleak picture of the ability of the U.S. government to enforce its citizenship tax. The scope of tax noncompliance by nonresident citizens is unknown.[274] The GAO lays part of the blame for enforcement gaps on elements beyond IRS control, such as lack of information reporting, but the

269. *Id.*

270. *See* INTERNAL REVENUE SERV., INSTRUCTIONS FOR FORM 1040NR (Jan. 13, 2016), https://www.irs.gov/pub/irs-pdf/i1040nr.pdf.

271. Among the difficulties noted by the National Taxpayer Advocate are that the IRS keeps applicants' passports and other original documents for months, resulting in risks for applicants such as fines and incarceration in their residence states. NTA 2013 REPORT, *supra* note 21, at 217. The IRS also has a poor record of keeping track of such original documents. *Id.* at 229. Moreover, the IRS "improperly suspends or rejects thousands of applicants." *Id*. at 223.

272. U.S. GOV'T ACCOUNTABILITY OFFICE, ID-81-29, AMERICAN EMPLOYMENT ABROAD DISCOURAGED BY U.S. INCOME TAX LAWS 14 (Feb. 27, 1981), http://www.gao.gov/assets/140/132160.pdf.

273. NTA 2011 REPORT, *supra* note 34, at 129.

274. GAO, NONFILING, *supra* note 102, at 21–22.

GAO also found that the IRS does not pursue available information about nonresidents.[275] Deliberate or inadvertent noncompliance by nonresidents combines with IRS under-enforcement and lack of outreach to result in what may be widespread non-filing. For example, the IRS received fewer than 1 million individual returns from foreign addresses in 2012,[276] at a time when the State Department estimated the nonresident citizen population at 6.8 million.[277] And even though taxpayers must file to claim the foreign-earned-income exclusion, only about 450,000 taxpayers claimed the exclusion for tax year 2011, the last year for which statistics are available.[278] The revenue effects of noncompliance by this group are unknown.[279]

Likewise, FBAR compliance is notoriously low, perhaps because the United States does little outreach to inform taxpayers of their FBAR obligations.[280] Those that the IRS has managed to inform of their FBAR filing requirements seem bewildered by the notion that they would have to file information returns with the IRS for their foreign accounts, even in cases in which they have no U.S. tax liability.[281] The FBAR requirement applies to all of the following who have qualifying non-U.S. accounts: resident Americans, resident aliens, nonresident citizens, and nonresident green-card holders.[282] But notwithstanding the large population[283] to which

275. *Id.* at 14–17.

276. OFFICE OF RESEARCH, INTERNAL REVENUE SERV., PUBLICATION 6149: CALENDAR YEAR RETURN PROJECTIONS BY STATE FY 2014–2021, at 57 (2013), http://www.irs.gov/pub/irs-pdf/p6149.pdf.

277. Bureau of Consular Affairs, *Who We Are and What We Do: Consular Affairs by the Numbers*, U.S. DEP'T ST. (Jan. 2013), http://travel.state.gov/content/dam/ca_fact_sheet.pdf.

278. IRS STATISTICS OF INCOME 2014 REPORT, *supra* note 78, at 141.

279. *See* GAO, NONFILING, *supra* note 102, at 12 (noting that the revenue impact of such nonfiling cannot be estimated and that it could be "small or substantial").

280. *See* IRS WIRA 2012 STUDY, *supra* note 196, at 19 (concluding that IRS must improve outreach to nonresident citizens); *id.* at 26 (citing survey responses indicating that nonresidents are unsure of their filing requirements). *See also* U.S. DEP'T OF TREASURY, A REPORT TO CONGRESS IN ACCORDANCE WITH § 361(B) OF THE UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT OF 2001, at 6 (2002) (estimating FBAR compliance at less than 20 percent).

281. Tax liability doesn't matter because the FBAR is an anti-terrorism and anti-money-laundering regime, not a tax-enforcement regime. *See, e.g.*, NTA 2011 REPORT, *supra* note 34, at 196–97 (quoting nonresident taxpayers calling the requirement "sick," "not what America is supposed to be about," "a big deal," and "abusive," with one taxpayer describing herself as "hunted down").

282. *See* Treas. Reg. § 1.6038D-2T(a).

283. The State Department estimated the nonresident citizen population at 8.7 million in 2015. *See* Bureau of Consular Affairs, *Who We Are and What We Do: Consular Affairs by the Numbers*, U.S. DEP'T ST. (Apr. 2015), http://travel.state.gov/content/dam/travel/CA%20by%20the%20Numbers-%20May%202015.pdf. An unknown number of resident citizens, resident aliens, and nonresident green-card holders hold offshore accounts that are reportable under the FBAR regime.

the requirement applies and the "draconian"[284] penalties for failure to file, in 2012 the IRS received only 807,040 FBARs,[285] and only 21 percent of these were filed using foreign addresses.[286] Despite this gap in compliance, the FBAR audit rate remains below 1 percent.[287]

Some commentators argue that it is important for the United States to at least *claim* to tax nonresident citizens the same as resident citizens, even if, due to the difficulties of enforcement, the government cannot actually collect the tax.[288] These commentators argue that the putative citizenship tax is an important aspect of the perceived fairness of the tax system.[289]

But the assessment of taxes that a country has no means of collecting may itself undermine the perceived fairness of the tax system. Indeed, an Organisation for Economic Co-operation and Development ("OECD") advisory group on electronic commerce urged member countries to avoid imposing taxes that as a practical matter they could not collect because "the taxpaying public will perceive that the tax is unfair and discriminatory," and this perception will undermine voluntary compliance.[290] Likewise, Blum and Singer argue that the IRS's spotty enforcement of the tax obligations of overseas Americans harms the morale of both resident Americans and overseas Americans who engage in voluntary compliance.[291] The National Taxpayer Advocate recently echoed this concern, noting that although FATCA will bring more foreign accounts with U.S. owners to the attention of the IRS, the "IRS is unlikely to have

284. NTA 2013 REPORT, *supra* note 21, at 229.

285. *Id.* at 235. FBAR compliance has increased in recent years; the IRS received 349,667 FBARs in 2008 but 741,249 in 2011. NTA 2012 REPORT, *supra* note 20, at 142.

286. NTA 2013 REPORT, *supra* note 21, at 240.

287. *Id.* at 229.

288. Michael Kirsch acknowledges that the inability to enforce citizenship taxation could undermine voluntary compliance, but he concludes that failing to nominally tax nonresident citizens would have an even greater adverse impact on tax compliance because "the media is likely to highlight people who move from the United States in order to escape taxes." Kirsch, *supra* note 12, at 502–03. As discussed *infra*, abuse cases involving tax-motivated changes of residence are better handled by a narrow anti-abuse rule. It is unclear how it could improve the perceived fairness of our tax system to impose an unenforceable tax on nonresident citizens who depart the United States for reasons having nothing to do with taxation.

289. Kirsch, *supra* note 149, at 196 (reasoning that public morale and confidence in a residence [rather than citizenship] tax system would suffer because citizens with the resources to move their residence could still participate in the national community without the burden of taxation).

290. OECD TECHNICAL ADVISORY GROUP, ARE THE CURRENT TREATY RULES FOR TAXING BUSINESS PROFITS APPROPRIATE FOR E-COMMERCE? ¶ 73 (2006).

291. Blum & Singer, *supra* note 22, at 718. *See also* Schneider, *supra* note 22, at 58 (concluding that "the United States should stop trying, and failing, to tax expatriates").

additional resources to address . . . violations . . . . As a result, it will increasingly have to ignore violations that it can detect . . . ."[292]

Finally, citizenship taxation, together with heightened reporting of foreign accounts, tends to foster ill relations with Americans abroad.[293] Onerous tax and financial reporting requirements seem to convey suspicion of Americans abroad.[294] And implicitly casting nonresident citizens as tax dodgers and money launderers alienates them.[295] As Todd Pettys has argued, "One cannot continually find oneself on the receiving end of norms' sanctions—whether . . . guilt, shunning, loss of respect, or some other undesirable phenomenon—and still regard oneself as a full-fledged, value-sharing member of the community . . . ."[296]

U.S. emigrants, like other emigrants, send remittances to family members back home, participate in brain circulation and technology transfers from abroad, and serve as ambassadors of American culture and as promoters of U.S. interests abroad, including by spreading democratic values.[297] But the attitude of the United States toward nonresident citizens sharply contrasts with that of other major migrant-sending states like

292. NTA 2012 REPORT, *supra* note 20, at 143 (reasoning that the resources required to pursue violations will decrease as the Treasury Department continues to succeed in negotiating and implementing intergovernmental agreements with foreign countries for financial information reporting).

293. Countless websites and several political interest groups urge reforming citizenship taxation. For example, the website of American Citizens Abroad, which describes itself as the voice of Americans overseas, lists under "Issues," in order, Tax, Cross-border Banking, FBAR, FATCA, Voting, Citizenship, Social Security, Medicare, and Representation in Congress. *See Issues*, AM. CITIZENS ABROAD, http://americansabroad.org/issues/ (last visited Jan. 12, 2016) (highlighting thirteen leading issues for Americans abroad, twelve of which concerned tax).

294. FATCA was a Democratic legislative proposal, but the official position of the Democrats Abroad is that "Congress did not fully anticipate the impact the regulations would have on overseas Americans and we, therefore, are now burdened with a tax reporting obligation that treats us like suspected tax cheats and money launderers.") *See Democrats Abroad on FATCA and Reports*, DEMOCRATS ABROAD, http://www.democratsabroad.org/tags/fatca (last visited Feb. 9, 2016). The Facebook page of Republicans Overseas links to a congressional petition to repeal FATCA on the grounds that the law is "morally reprehensible and detrimental to overseas Americans' basic human rights." *See Petition to Abolish the Foreign Account Tax Compliance Act (FATCA)*, REPUBLICANS OVERSEAS, https://www.abolishfatca.com/live/ (last visited Feb. 3, 2016).

295. The notion that residing abroad is vaguely suspicious also can be seen in academic commentary. The title of one article favoring citizenship taxation is "Innocents Abroad?", the question mark seeming to stand as an accusation of nonresident Americans' motives. *See* Postlewaite & Stern, *supra* note 22 (never explaining what calls into doubt the innocence of Americans abroad).

296. Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481, 515 (2004).

297. *Cf.* Fitzgerald, *supra* note 30, at 96–97 (recounting Mexican President Zedillo's characterization of Mexico's program to encourage U.S. naturalization by expatriate Mexicans as aiming "to develop a close relationship between his government and Mexican Americans, one in which they could be called upon to lobby U.S. policymakers on economic and political issues involving the United States and Mexico").

China, Mexico, and India, which actively encourage their emigrants to return[298] and to contribute capital and expertise to their state of origin.[299]

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Zelinsky advocates citizenship taxation because citizenship is a brighter line than residence for determining liability for worldwide taxation. This claim is true, but it takes too narrow a view. Tax administration involves not only the initial decision of who will be subject to tax, but also all of the enforcement and compliance implications of that choice. Unlike residence taxation, citizenship taxation draws into the worldwide tax system people who reside indefinitely outside U.S. territory and who earn hard-to-detect foreign income. As a result, citizenship taxation, at least when applied without regard to other substantive connections between the taxpayer and the United States, vastly increases administrative burdens compared to residence taxation. In short, citizenship taxation creates an administrative burden that taxpayers and the government are unable to bear. The result has been under-enforcement by the IRS and what is assumed to be widespread noncompliance by nonresident citizens. That a tax is difficult to administer may not, by itself, justify abandoning it. After all, it is difficult to enforce income tax laws against small business owners due to absence of third-party reporting, but no one suggests that we should exempt small businesses from tax for that reason. Our citizenship taxation differs from other hard-to-collect taxes because, as Part II argued, citizenship taxation is also unfair as applied to a broad range of cases. The next part argues that the traditional efficiency arguments for citizenship taxation are also unpersuasive.

IV. EFFICIENCY

Efficiency considerations usually dominate tax policy debates—particularly so for international tax. While we lack empirical studies of the specific impact of citizenship taxation on migration, the empirical evidence we have suggests that, for most people, taxes are not an important factor in decisions about where to reside.[300] The main motivators for migration are family, jobs, education, and similar factors—not taxation.[301] For this reason, the equity and administrability concerns raised in Part II and III

298. *See generally* Chander, *supra* note 31 (categorizing political, economic, and cultural devices that governments use to keep emigrants connected).

299. *See generally* Barry, *supra* note 31.

300. OECD, TAXATION AND EMPLOYMENT 128–31 (2011) (reviewing empirical studies concerning the effect of tax on migration decisions).

301. Costanzo & von Koppenfels, *supra* note 95.

should carry more weight in the citizenship tax debate than should the efficiency concerns discussed in this part.

While taxation does not represent a prime reason for most taxpayers to move, for the minority, taxes are an important deciding factor. I will call these taxpayers marginal migrants, and although this population may be very small, it is the relevant one for evaluating the efficiency of the U.S. method for taxing citizens abroad. The marginal migrant is someone with choices. She can decide whether to change her state of residence, and, by assumption, tax figures into her decision. Such a person is likely to be someone that states would like to attract for her skills, wealth, and income. Thus, whereas the impact of citizenship taxation on overall migration patterns is likely to be very small, the effect may nevertheless be important to the extent that it affects decisions of highly desirable migrants.[302]

Supporters of citizenship taxation praise it for reducing the incentive for Americans to move abroad to avoid tax. This part explains how the implementation of our citizenship tax prevents it from achieving the residence-neutrality benefits that proponents of the tax claim for it. Moreover, even supporters of citizenship taxation concede that tax influences citizenship decisions by encouraging Americans abroad to renounce their U.S. citizenship to avoid tax. But prior analysis of citizenship taxation has overlooked that citizenship taxation also may discourage immigrants from moving to the United States and naturalizing as citizens. If so, the citizenship tax puts the United States at a competitive disadvantage compared to other migrant-receiving states in attracting skilled foreign workers. While none of the distortions discussed in this part is likely to be large, understanding the impact of citizenship taxation on both residence and citizenship decisions requires consideration not only of U.S. citizens' decisions to emigrate *from* the United States, but also of noncitizens' decisions to immigrate *to* the United States.

A. DISTORTING AMERICANS' DECISIONS

The efficiency argument favoring citizenship taxation over residence taxation is that citizenship taxation discourages emigration by Americans who would otherwise move abroad to avoid U.S. taxes; that is, citizenship

302. The empirical evidence is mixed. OECD, *supra* note 300, at 128–29 (noting that whereas tax generally has a small effect on migration, the effect is more pronounced for the young, highly skilled, highly educated, and those with high incomes). *But see* Cristobal Young & Charles Varner, *Millionaire Migration and State Taxation of Top Incomes: Evidence from a Natural Experiment*, 64 NAT'L TAX J. 255, 255 (2011) (finding minimal migration response to state income tax increase on millionaires in New Jersey).

taxation is said to be residence neutral.[303] But even assuming that residence neutrality enhances welfare,[304] the current citizenship taxation is not residence neutral in all cases. For example, the foreign-earned-income exclusion provides a tax incentive for Americans who can earn income abroad to move to lower-tax countries. Indeed, the original justification for the exclusion was that it would encourage Americans to go abroad,[305] which would, in turn, increase U.S. exports.[306] Although empirical studies do not seem to bear out the effect on exports,[307] Americans abroad may generate other benefits back home, including goodwill, easing domestic unemployment, and so on.[308]

Moreover, to be residence neutral, the citizenship tax would have to discourage movement not only to lower-tax countries, but also to higher-tax countries. However, because the United States does not fully credit other countries' taxes, it discourages migration both to higher-tax countries and to equal-or lower-tax countries whose taxes are not fully creditable against the U.S. citizenship tax.

Additionally, whether it helps or hurts the economy, the fisc, or taxpayers, citizenship taxation burdens free movement by double taxing Americans abroad[309] and increasing their compliance obligations.[310] There are several problems with a tax that burdens free movement. First, liberal

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303. Kirsch, *supra* note 12, at 490.

304. Kirsch concludes that taxes should be residence-neutral because migration decision should be personal. Kirsch, *supra* note 12, at 489. Others would argue that tax-motivated migration enhances welfare, for example, because it encourages efficient sorting across jurisdictions. *See generally* Avi-Yonah, *supra* note 84.

305. S. REP. NO. 82-781, at 52–53 (1951) (noting that one of the original justifications for the foreign-earned income exclusion was to place Americans abroad "in an equal position with citizens of other countries . . . who are not taxed by their own countries;" another purpose was to "encourage citizens to go abroad").

306. *See generally* Sobel, *supra* note 22, at 119–46 (giving legislative history).

307. *See generally* GAO, ECONOMIC BENEFITS, *supra* note 48 (concluding that the GAO was unable to determine the impact of increased costs on hiring of Americans abroad or on exports).

308. *See generally* Sobel, *supra* note 22, at 119–46 (arguing that employment abroad by Americans may benefit the United States—by generating goodwill, easing domestic unemployment, and increasing exports—but that it also may hurt the United States by drawing skilled workers out of the United States and may adversely impact the balance of payments if Americans abroad work for companies that export to the United States).

309. In 2011, the most recent year for which data is available, U.S individual taxpayers were unable to credit about 23 percent of the foreign income tax they paid. *See* IRS STATISTICS OF INCOME 2014 REPORT, *supra* note 78, at 139. The data covers nonresident Americans, but it does not separate them out, so it is not clear whether nonresident Americans do better or worse than average at crediting their foreign taxes. For criticism of the citizenship tax regime because it fails to fully credit nonresident American's foreign taxes, see, Schneider, *supra* note 22, at 17–32. For the classic account, see Patton, *supra* note 39, at 715–27.

310. *See supra* Part III.A (discussing compliance costs associated with citizenship taxation).

societies tend to see free movement of persons as an end in itself that should not be frustrated. For example, when analyzing an exit tax proposal in 1995, the Joint Committee on Taxation quoted Hurst Hannum for the proposition that "'[d]enial or discouragement of the right to emigrate cannot *itself* be a legitimate justification for a governmental action, as acts whose purpose is to destroy human rights are . . . prohibited' by international law."[311] Human rights treaties reflect the value that liberal societies place on the right to exit,[312] and Americans share this view.[313]

Free movement also can be seen as instrumental to other goals. For example, free movement of persons may improve government through regulatory competition. If people can freely choose where to live, governments must compete with each other for residents. Such competition may check government abuses of civil liberties as well as checking government spending.[314] Thus, free movement is important in democracies because it serves as an alternative and amplifier to voice.[315] Free movement also may help reveal people's true preferences for levels of tax and public goods as people vote with their feet by moving to the jurisdiction that provides their desired mix of tax and government benefits.[316]

Free movement in Europe has constituted one element of a strategy to integrate the people and economies of Europe so thoroughly as to make war "unthinkable."[317] Wolfram Richter echoes this goal when he concludes that citizenship taxation "is politically not acceptable for Europe . . . [and]

311. Abreu, *supra* note 3, at 1130 n.162 (alteration and emphasis by the authors of the Joint Committee Report).

312. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, art. 12.2, Dec. 23, 1966, 999 U.N.T.S 171; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, protocol 4, Nov. 4, 1950, 213 U.N.T.S. 222 (guaranteeing a person the right to leave any country, including her nationality state).

313. *Cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 211 reporters' note 4 (1987) ("The United States has long taken the position that the 'right of expatriation is a natural and inherent right of all people.'").

314. Wolfram F. Richter, *Delaying Integration of Immigrant Labour for the Purpose of Taxation* 5 (CESifo Working Paper No. 802, 2002) ("Taxpayers become exploitable when they cannot avoid home taxes by emigrating.").

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

316. *See generally* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

317. *Schuman Declaration – 9 May 1950*, EUR. UNION, http://europa.eu/abc/symbols/9-may/decl_en.htm (last visited Feb. 14, 2016).

deeply conflicts with the widely agreed objective of overcoming nationalistic tendencies in international relations."[318]

Free movement of persons also enhances growth. The guarantee of free movement under European Union ("EU") law is designed not only to prevent war and safeguard political freedom, but also to make Europe's economy more competitive.[319] Like free trade, free movement of people is thought to advance global economic welfare by allocating human capital efficiently across jurisdictions.[320] Consistent with this idea, recent trade negotiations have made progress on liberalizing migration for the purposes of conducting services.[321] Thus, rather than promoting welfare through residence neutrality, citizenship taxation may reduce it by inhibiting free movement.

In addition to burdening free movement by increasing the costs to move, citizenship taxation encourages nonresident Americans to renounce their U.S. citizenship purely for tax reasons.[322] Perhaps worse, citizens abroad increasingly report that they renounced to avoid not the tax liability associated with citizenship taxation, but rather its newly increased paperwork and financial reporting burdens.[323] While most of these renouncers may already be outside the American national community,[324] some have renounced notwithstanding strong attachments to the United States. Newspaper stories describe ordinary Americans who, at great emotional cost and sometimes after decades abroad, recently have relinquished their citizenship because their filing burden became too expensive or complicated, without respect to the tax they owed.[325] One report quoted a seventy-one-year-old former citizen as saying, "I renounced

318. Richter, *supra*, note 314, at 4.

319. *See Schuman Declaration*, *supra* note 317.

320. Chang, *supra* note 43, at 1148–49.

321. General Agreement on Trade in Services, Apr. 15, 1994 (liberalizing movement for purposes of providing services).

322. *See* Schneider, *supra* note 22, at 24 (referring to U.S. taxes applicable to nonresident Americans as "the citizenship penalty").

323. *See supra* Part III.A.

324. *See* Kirsch, *supra* note 149, at 186–87 (2014) (arguing that the post-FATCA spike in citizenship renunciation may subside once the citizens with the most tenuous connections to the United States have renounced).

325. One citizen who renounced after 21 years abroad stated, "I was double taxed on my full pension, but it didn't bother me so much to pay taxes—it was the annoying paperwork . . . . Tax prep costs me about 1,000 Swiss francs ($1,123) a year." Yan, *supra* note 162. Another, who renounced after more than thirty years abroad, stated, "The accountancy fee is the main reason why we both renounced our U.S. citizenship last year. It wasn't an easy decision—super stressful, and very emotional." *Id. But see* Kirsch, *supra* note 12, at 493–94 (reasoning that the number of tax-related citizenship renunciations, while not insignificant, is insufficient to spur a policy change).

my U.S. citizenship in 2011. After I did it, I was so emotional that I threw up outside the embassy. During my renunciation, I broke down. It was like getting a divorce."[326]

B. Distorting Non-Americans' Decisions

Few Americans relinquish their citizenship.[327] Citizenship is relatively inelastic. That is, taxpayers are less likely to give up their citizenship than their residence in order to save tax, so taxing them based on their citizenship will create fewer distortions than taxing them based on where they reside. Citizenship is inelastic for many reasons. Citizenship is valuable, and people have strong emotional attachments to their citizenship. Moreover, people who cannot secure citizenship elsewhere cannot relinquish their U.S. citizenship.[328] For some, relinquishing citizenship will trigger asset taxation.[329] Whatever the reasons, citizenship taxation has not precipitated mass renunciations of citizenship. If the State Department's most recent estimate of the number of nonresident Americans is correct, then only a few thousand out of as many as 8.7 million nonresident Americans relinquish their citizenship annually.[330]

Evaluating the impact of citizenship taxation requires identification of the benefits and burdens of renunciation. Some may regard renunciation as per se undesirable. Others lament the collateral consequences of renunciation; for example, renouncers presumably will be less likely to return to the United States, depriving the United States of their investment, future consumption (for example, in retirement), and other positive contributions, including brain circulation. Others would condemn the psychic costs that result from commodifying citizenship and especially from renouncing citizenship. On the other hand, some may praise the

326. Yan, *supra* note 162.

327. Since 1998, the lowest number of listed renunciations was 231 (in 2008), and the highest number was 3,415 (in 2014). For the first three quarters of 2015, the Federal Register lists 3,221 renunciations. *See* Andrew Mitchel, *2015 Third Quarter Published Expatriates—A Record High*, INT'L TAX BLOG (Oct. 26, 2015), http://intltax.typepad.com/intltax_blog/number-of-expatriates/ (compiling statistics from the Federal Register). *But see* Schneider, *supra* note 22, at 62–64 (describing how the Federal Register underestimates expatriations).

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

329. Under the U.S. citizenship-renunciation tax, citizens have a deemed sale of their assets when they relinquish their citizenship. The deemed realization triggers recognition if the built-in gain exceeds the inflation-adjusted statutory exemption amount, which was set to $600,000 in 2008. I.R.C. § 877A (2015). *See* Rev. Proc. 2015-53, 2015-44 I.R.B. 623 (Nov. 2, 2015) (providing $693,000 as inflation-adjusted expatriation-tax exemption for 2016)

330. *See* discussion *supra* note 327.

citizenship tax for encouraging U.S. citizens who are not genuine members of the U.S. national community, and who therefore should not be entitled to the rights and benefits of membership, to formally sever ties with the United States.

If the loss of a few thousand citizens per year were the only distortion citizenship taxation caused, we might label the tax efficient. Because its defenders only consider the impact of citizenship taxation on U.S. citizens, however, they have failed to acknowledge that citizenship taxation also may distort inbound migration. The base case in prior analysis is a U.S. citizen who would like to pay less tax and, to achieve that goal, is willing to migrate to a lower-tax jurisdiction but not to renounce her U.S. citizenship. With respect to that hypothetical person, citizenship taxation is residence neutral,[331] and, as long as she is unwilling to renounce her citizenship, it is also citizenship neutral. But this analysis ignores the impact of the citizenship tax on immigration to the United States.

Citizenship taxation presumably discourages both initial migration and naturalization by marginal migrants from other countries. These migrants are people the United States (and other countries) would like to attract. Economists have calculated that the "average net present fiscal value of a (permanent) immigrant [is] . . . $198,000 for an immigrant with more than a high school education."[332] Such migrants are so valuable to the U.S. economy that commentators have advocated subsidies for migrants who choose the United States over staying at home or moving elsewhere.[333] And many OECD countries provide tax incentives for migration by the wealthy or highly skilled.[334] But instead of subsidizing marginal migrants, the U.S. citizenship tax does the opposite—it raises their costs.

In deciding whether and where to move, rational marginal migrants calculate the tax for the duration of their anticipated visit. But they also consider the possibility that they will stay permanently. In the United States, unlike in any of the countries with which the United States competes for skilled migrants, the decision to naturalize (or take up permanent legal residence) comes with a hefty price tag: life-long

331. Even for this hypothetical person, the current citizenship tax would not be residence neutral if she qualifies for the foreign-earned-income exclusion and moves to a lower-tax country.

332. Desai et al., *supra* note 42, at 669–70 (contrasting this estimate with the net present fiscal value of a permanent immigrant with less than a high school education as a loss of $13,000).

333. *See, e.g.*, Chang, *supra* note 43, at 1238–39.

334. *See* OECD, *supra* note 300, at 138 (2011) (showing tax incentives available for skilled migrants in sixteen OECD countries).

worldwide taxation for the migrant and any of her U.S.-citizen children.[335] And if the naturalized citizen or green-card holder decides to relinquish her U.S. citizenship or her green-card status, she may face the U.S. citizenship-renunciation tax.[336] The higher the immigrant's income or wealth, the more current U.S. law discourages her from naturalizing. For immigrants to the United States who may be contemplating retiring back home or moving to a third country, the citizenship tax stands as a barrier to naturalization,[337] and probably also to initial migration. As with the impact of citizenship taxation on citizenship renunciation, the impact of citizenship taxation on immigration to the United States is likely to be very small because it affects only those I have been calling the marginal migrants.

The United States should encourage marginal migrants to make an enduring commitment to the United States by naturalizing. U.S. immigration law reflects a policy to attract and retain this desirable population.[338] In what Ayelet Shachar labels the "race for talent," "[t]he United States has traditionally relied on a combination of world-class universities and research institutes, the promise of greater personal freedom and political stability, and relatively lax immigration policies to attract the best international 'knowledge migrants.'"[339] The United States engages in avid competition with other major migrant-receiving countries for highly skilled migrants, and according to Shachar, "the goal of gaining citizenship in the destination state [is] an independent factor that may affect the choices of knowledge emigrants in choosing a destination country, no less than considerations of pure professional advancement."[340] In contrast with

335. *See, e.g.*, Yan, *supra* note 162 (quoting a dual Canadian-American citizen considering whether to apply for U.S. citizenship for his son as stating, "Do I want to impose [upon my son] a lifetime of paying to have U.S. tax returns prepared?").

336. *See* I.R.C. § 877A (2015) (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).

337. One way this incentive may manifest is that when a migrant marries an American, the couple is more likely to move away from the United States.

338. For example, in 1990, the United States dropped the requirement that H-1B (high skill) visa applicants must express an intention to return home at the expiry of the visa. Desai et al., *supra* note 42, at 665. In contrast, the access terms for unskilled migrants are less favorable, and the United States denies many need-based social welfare benefits to immigrants. *See* Chang, *supra* note 43, at 1177–80, 1202, 1205–06.

339. Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 150 (2006) (comparing immigration incentives in six countries with those of the United States).

340. *Id.* at 158. *See also id*. at 169 ("We are witnessing a dramatically increased worldwide competition for knowledge migrants."); Desai et al., *supra* note 42, at 666 ("[E]ven those countries that don't explicitly account for skills through a points system appear to be shifting toward recognizing the importance of attracting skilled migrants as they compete in the international market for migrants.").

the United States, competing receiving states—including Canada, Australia, New Zealand, and, increasingly, European countries—offer expedited paths to citizenship for the skilled and highly educated without the specter of citizenship taxation.[341] Indeed, many receiving countries have special tax incentives for the highly skilled.[342] Citizenship taxation puts the United States at a competitive disadvantage in attracting the world's talent.[343] The importance of encouraging highly skilled workers not only to migrate, but also to naturalize, grows as the sending states of the highly skilled—including India, China, South Korea, and Taiwan—increasingly employ programs to encourage their emigrants to return.[344]

It bears repeating that, like the impact of citizenship taxation on citizenship renunciations, the impact of citizenship taxation on immigration and naturalization to the United States is likely to be small because, compared to other factors, tax plays a small role in a person's citizenship decision—whether that decision is to become American or to cease being American. Nevertheless, if we are to understand the impact of citizenship taxation on citizenship decisions, we should look at both emigration and immigration.

* * *

This Part has argued that, far from achieving residence neutrality, citizenship taxation imposes tax and compliance barriers to movement to and from the United States. Citizenship taxation thus undermines not only the value that society places on free movement itself, but its value as an instrument for disciplining government, revealing preferences, allocating labor efficiently across jurisdictions, and promoting international cooperation as a bulwark against war. The weight of these concerns depends on the impact citizenship taxation has on human mobility, an unanswered empirical question.

But cf. Stephen Yale-Loehr & Christoph Hoashi-Erhardt, *A Comparative Look at Immigration and Human Capital Investment*, 16 GEO. IMMIGR. L. J. 99 (2001) (arguing that U.S. immigration law is not designed to prefer the highly skilled).

341. *See* Shachar, *supra* note 339, at 170–95 (emphasizing ease of naturalization as conferring a competitive edge in the global race for talent).

342. OECD, TRENDS IN INTERNATIONAL MIGRATION 2004, at 133–34 (2005).

343. *Cf.* Shachar, *supra* note 339, at 153 (Policymakers assume that "unless their governments proactively 'match' the offers of admission and settlement extended to the 'best and the brightest' by other nations, their country will lose out.").

344. *Id.* at 167–69. *See* Chander, *supra* note 31, at 75.

V. POLICY ALTERNATIVES

Advocating a particular policy alternative to formal citizenship taxation is not the primary goal of this Article, but this part reviews alternatives to our current citizenship tax.

A. CITIZENSHIP AS ONE FACTOR

The United States could reformulate its citizenship tax in a variety of ways. Brainard Patton proposed worldwide taxation only for those meeting the "substantial presence" test under current U.S. law, whereas those not substantially present would be subject to tax by the United States on only U.S.-source income.[345] As the discussion in Part II.B suggests, however, pure residence-based taxation does not accord well with the leading moral justification for ability-to-pay taxation, namely that the tax obligation arises from a person's membership in a national community. Although citizens who meet the substantial-presence test likely would be U.S. national community members, substantial-presence taxation would fail to tax many Americans abroad who, although they do not meet the substantial presence test, nevertheless remain members of the national community.[346]

Blum and Singer base their proposal on Finnish law. They would pair an extended-residence rule with an unlimited foreign-earned-income exclusion.[347] Under their proposal, a citizen would be considered a U.S. resident in any year that she meets the U.S. substantial presence test, as well as for the three years following that year. In those three years, however, the taxpayer would exclude her foreign-earned income without limitation.[348] Yet another possibility, suggested by Bernard Schneider, would be to adopt domicile taxation but retain citizenship taxation for certain groups, such as U.S. military personnel, other government employees, or corporate secondees, who are expected to reside abroad only temporarily.[349] Other possibilities include taxing the worldwide income only of citizens maintaining an abode in the United States. Or citizenship

345. Patton, *supra* note 39, at 730–32.

346. *Id.* at 730–33.

347. Blum & Singer, *supra* note 22, at 724–38. Over the years, members of Congress have proposed pairing citizenship taxation with an unlimited foreign-earned-income exclusion. *See id*.

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

349. Schneider, *supra* note 22, at 52. For example, Schneider would substitute a domicile test in place of the citizenship tax, and he would impose exit taxation upon loss of domicile. *See* Schneider, *supra* note 22, at 69–75 (likening the domicile test to the "tax home" exception in I.R.C. § 7701(b)(3)(B) (2015)).

could function as a rebuttable presumption of tax residence, and citizens would have the burden to show that they had closer personal and economic connections to another state.

These proposals share the crucial feature that they would move from citizenship as the sole basis for worldwide tax to a more substantive inquiry that accounts for additional contacts between the taxpayer and the state. Most states regard physical presence and the possession of an abode in the territory to be the most important criteria for triggering worldwide taxation, but Part II gave reasons why it also would be fair to use citizenship as a factor. In addition to being fairer, applying worldwide taxation only to citizens who possess other significant contacts with the United States also would ease the enforcement difficulties associated with current law.[350]

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

Although nonresident citizens would continue to have tax obligations to the United States to the extent of their U.S.-source income, the move away from taxing their foreign-source income would simplify their compliance obligations. Millions of Americans now subject to U.S. worldwide taxation could move into a simpler, source-based tax regime. Any such taxpayers who had no U.S.-source income would have no tax filing obligations to the United States. Nonresident citizens with U.S.-source income could file abbreviated returns in the United States, and many would be able to completely discharge their tax liability through withholding, thereby avoiding the need to file even an abbreviated return. To simplify nonresident citizens' compliance burdens, it would be crucial

350. For example, pairing citizenship with a physical-presence requirement would mean that, unlike under the current citizenship taxation, the United States would have personal jurisdiction over the people it subjected to worldwide taxation, while an abode requirement would provide *in rem* jurisdiction as well as a correspondence address.

in appropriate cases also to relieve them of FBAR and FATCA reporting requirements.

Any approach that moves away from citizenship as a bright-line rule and toward a factor-based test would increase the administrative difficulties of the threshold determination of who is subject to U.S. worldwide taxation. As in so many areas of law, in worldwide taxation of nonresident Americans, equity and administrability are trade-offs. Part of the calculus in making this trade-off should be the administrative gains from removing people with minimal contacts to the United States from the taxable base.

B. Anti-Abuse Rules

A central problem with residence taxation—and one that citizenship taxation effectively mitigates—is abusive tax-motivated migration. An abuse case might involve, for example, someone who changes residence only temporarily to sell a highly appreciated capital asset and escape tax on the sale by her original residence state.[351] Such transactions call for focused anti-abuse rules. At present, the United States combats tax-motivated citizenship-renunciation by imposing a citizenship-renunciation tax upon the renouncing taxpayer's asset appreciation.[352] A green-card-relinquishment tax applies to certain green-card holders. Movement away from formal citizenship-based taxation would require different anti-abuse rules.

At a minimum, the United States should not permit a resident citizen to relinquish her U.S. tax residence until she establishes tax residence in another country. This would avoid situations in which a person is stateless for tax purposes. As part of their proposal to move to extended-residence taxation, Blum and Singer would impose an exit tax upon loss of U.S. tax residence.[353] Exit taxes typically treat loss of *tax residence* (as opposed to loss of citizenship) as a realization event, and the exiting person pays tax on the appreciation of her assets.[354] Likewise, Bernard Schneider recently

351. There is general agreement that the super rich who renounce citizenship do so primarily to avoid estate taxes, not income taxes. *See, e.g.*, Westin, *supra* note 328, at 80. Under the U.S. citizenship tax, patient citizens can avoid income tax on appreciation of capital assets due to the basis step-up at death. I.R.C. § 1014. But a person must renounce citizenship to avoid the estate tax. Estate taxation has its own complex set of rules that police tax-motivated expatriation, which Congress could strengthen. This Article focuses on income—not estate—tax issues.

352. *See* I.R.C. § 877A (providing limited exemptions for young dual citizens who did not have significant U.S. contacts at any time during their lives).

353. Blum & Singer, *supra* note 22, at 734.

354. Luc de Broe, *General Report: The Tax Treatment of Transfer of Residence by Individuals*, 87 CAHIERS DE DROIT FISCAL INT'L 19, 29 (2002).

proposed a departure-tax regime, modeled on Canadian law, which would treat any termination of U.S. tax residence as a deemed disposition of the departing taxpayer's assets.[355] After payment of a departure tax on the deemed disposition, under Schneider's proposal the United States would exempt nonresident citizens' foreign-source income.[356]

Exit taxation is a widespread approach to preventing tax-motivated migration.[357] Although exit taxes are common, they pose challenges of their own.[358] Similar to citizenship taxation, exit taxation impairs free movement.[359] Acknowledging this, countries limit their exit taxes in various ways. For example, exit taxes may be subject to large exemption amounts—in the many hundreds of thousands or millions of dollars.[360] States also may defer payment of the exit tax until the taxpayer sells the underlying assets.[361] Likewise, countries that impose exit taxes may suspend the payment of the tax for a period of years to see whether the exiting taxpayer sells her appreciated assets.[362] If the exiting taxpayer does not sell her assets within a prescribed period—for example, five years—the country may waive the tax on the assumption that the change of residence was not tax-motivated.[363] Such suspension and waiver is consistent with the anti-abuse purpose: if the taxpayer did not move abroad to make a low-taxed disposition of her assets, the exit tax should not apply.

I posited that the longer an American lives abroad, the less likely she is to remain a member of the American national community, and the more

355. Schneider, *supra* note 22, at 66–76.

356. *Id*. The United States presumably would allow a basis step-up in the assets of taxpayers entering the country. *Id.*

357. For a comprehensive analysis of exit tax regimes in dozens of jurisdictions, see de Broe, *supra* note 354.

358. *See generally* Abreu, *supra* note 3 (reviewing policy disadvantages of exit taxes).

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

360. *Cf*. I.R.C. § 877A(a)(3) (2015) (setting the exemption from the U.S. citizenship-renunciation tax to $600,000 in 2008 and indexing it for inflation). The inflation-adjusted exemption for 2016 is $693,000. Rev. Proc. 2015-53, 2015-44 I.R.B. 623 (Nov. 2, 2015).

361. de Broe, *supra* note 354, at 30.

362. *Id.* at 34.

363. *See generally id. See also de Lasteyrie du Saillant*, 2004 E.C.R. I-2409 ¶¶ 3–7 (describing French exit tax as deferred for five years, after which it was waived if the taxpayer did not sell the asset).

likely it is that her moral obligation to contribute ability-to-pay taxes shifts to her resettlement state. Congress might be able to devise a tax rule that would force taxpayers to reveal whether they intend to be abroad short term or long term. For example, a citizen moving abroad might be given an election to remain subject to worldwide citizenship taxation as under current law or to pay an exit tax. Electing the exit tax would remove the nonresident American from the U.S. worldwide tax regime while she resides abroad.[364] This election would mirror the election available under current law for nonresident aliens to be taxed as U.S. tax residents.[365]

Departing taxpayers would base their election on a comparison between the one-time exit tax liability and the ongoing annual tax liability and compliance costs associated with the current citizenship tax. Taxpayers with little asset appreciation or who intend to permanently resettle (and who presumably are not exiting only temporarily to sell assets) could elect the one-time tax and be free of annual U.S. tax and filing obligations.[366] On the other hand, taxpayers expecting to return to the United States or who have had significant asset appreciation presumably would not make the election. If the length of a citizen's absence from the United States bears on whether she remains a national community member, such an election could help increase the correspondence between national community membership and the set of people subject to worldwide taxation. Likewise, the election could dissuade tax-motivated migration.

If Congress were worried about the inhibition of free movement caused by such a regime, it could suspend the collection of the exit tax until a later triggering event. The trigger could be sale of the assets shortly after departure from the United States, since a quick sale would tend to signify that the taxpayer's departure was tax-motivated. Regardless of other triggers, Congress presumably would want to regard resettlement in the United States as a triggering event to retain the penalty-default aspect of the proposal.

Formulating an exit tax that narrowly targets tax-motivated residence changes without unduly burdening free movement poses significant challenges, but it appears to be the lesser of two evils when compared to a regime that taxes all nonresident citizens on their worldwide income,

364. Like the current citizenship-renunciation tax, the exit tax could be subject to an exemption. *Cf.* I.R.C. § 877A(a)(3) (providing $600,000 inflation-indexed exemption).

365. *Cf.* I.R.C. § 7701(b)(1)(A)(i)–(iii).

366. Those opting out of the citizenship tax would presumably still be liable for U.S. tax on U.S.-source income, but this could be collected via withholding, resulting in a vastly reduced burden on electing nonresidents.

regardless of whether taxes motivated their residence decision. While the current citizenship taxation treats all Americans abroad as tax dodgers, a more tailored rule could better target abuse cases.

C. LIMITED REFORM

Even in the absence of radical reforms, Congress could significantly improve the administration of the current citizenship taxation.

For example, Congress could provide an unlimited foreign-earned income exclusion, relying on the expectation that earned income usually will be taxed by the residence state.[367] This would help nonresident Americans avoid having to apply the complicated foreign-tax-credit regime. Under current law, citizens must affirmatively claim the complicated foreign-earned income exclusion. Instead of requiring this complicated tax filing from nonresident Americans, Congress could simply require all nonresident Americans earning an amount under the statutory exclusion amount ($101,300 in 2016[368]) to file an affirmation of that fact.

Many nonresident Americans wind up owing no residual tax to the United States because they reside in higher-tax jurisdictions, such that foreign tax credits wipe out their liability. If Congress allowed taxpayers to affirm that they would not owe residual U.S. tax on their income (rather than requiring them to make full returns that show that they owe no tax), full returns from this population could be eliminated as well. The National Taxpayer Advocate estimates that over 80 percent of nonresident Americans owe no U.S. tax,[369] and requiring them to make detailed filings according to the U.S. rules is a costly exercise that raises no revenue.

Of course, like resident Americans, nonresident Americans may lie; they may make fraudulent affirmations. The cross-border context raises special concerns about fraud because the IRS has limited access to third-party reporting from abroad. To help verify taxpayer's affirmations using information available from foreign third-party reporters, including other governments and foreign financial institutions subject to FATCA, the United States could require the taxpayer to append her foreign return. This would help prevent fraud while avoiding duplicative filings under different

367. The IRS could then focus its attention on nonresident citizens' foreign passive income, which may be less likely than their foreign earned income to be taxed by their residence state. New information exchange opportunities under FATCA give the IRS greater access to information about nonresident citizens' passive income and therefore make nonresidents more likely to report and pay tax on foreign passive income.

368. Rev. Proc. 2015-53, 2015-44 I.R.B. 623 (Nov. 2, 2015).

369. NTA 2012 REPORT, *supra* note 20, at 262.

tax regimes. Similarly, Congress could scrutinize more closely affirmations made by taxpayers residing in lower-tax countries than affirmations made by taxpayers in higher-tax countries, since residents of higher-tax countries are more likely to owe no residual U.S. tax.

Although FATCA and FBAR exist independently from citizenship taxation, it is important for the United States to provide nonresident Americans relief from these reporting requirements in appropriate circumstances. Nonresident Americans need local bank accounts to conduct day-to-day business in their residence state, and so, unlike with resident Americans, their ownership of such accounts does not signal tax evasion or intent to launder money. Moreover, it generally would be difficult for nonresident Americans to use state-sponsored foreign retirement accounts to evade taxes or launder money, so it would be reasonable to exclude such accounts from FATCA and FBAR reporting. The Treasury Department has begun to provide relief from FATCA, FBAR, and tax filing requirements for nonresidents, but commentators including Allison Christians, J. Richard Harvey, Jr., Michael Kirsch, and National Taxpayer Advocate Nina Olson have made further suggestions worthy of serious consideration.[370]

CONCLUSION

The Treasury Department lists conforming with international tax norms as a tax policy goal.[371] But the United States stands alone in the world in taxing its citizens' foreign income, no matter how long they reside abroad. Even supporters of the tax concede that it "push[es] the limits of

370. *See* Christians, *supra* note 264, at 8–9 (proposing a "same-country exemption" from FATCA for accounts located in the citizen's residence state); J. Richard Harvey, Jr., *FATCA: A Report from the Front Lines*, 135 TAX NOTES 713 (2012); Kirsch, *supra* 149, at 117, 210–21 (reviewing reforms that could "ameliorate unnecessary burdens faced by overseas citizens"). Nina Olson has repeatedly criticized the IRS's handling of its offshore voluntary compliance program, particularly for sweeping up what she calls "benign actors," people who are noncompliant from confusion or lack of assistance, rather than from bad or tax-evading intent. *See, e.g.*, NTA 2012 REPORT, *supra* note 20. The nature of these commentators' proposals, particularly regarding FATCA and FBAR (which include the suggestion that the IRS issue formal guidance about avoiding criminal liability for nonreporting overseas accounts, rather than simply providing such advice on its ephemeral website) show the administrative regime's overreaching in enforcing tax obligations related to offshore accounts. Kirsch, *supra* note 149, at 214 n. 435 (citing NTA 2013 REPORT, *supra* note 21, at 22).

371. According to the Treasury Department:

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

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

acceptable state practice."[372] The uniqueness of U.S. citizenship taxation, however, is not enough to condemn it. Jurisdictional conflicts may be an acceptable cost of arriving at the right tax policy. The problem with citizenship taxation is not just that it differs from the tax rules used by other countries. As this Article has shown, our citizenship tax is inadministrable, inefficient, and often unfair.

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

This Article has only begun to elaborate the case against citizenship taxation. Further consideration of the tax would reveal that it disproportionately burdens American women, who are more likely than American men to leave the United States due to marriage.[373] Moreover, to the extent that the citizenship tax encourages such women to relinquish their U.S. citizenship, it leaves them more vulnerable upon divorce.[374] Citizenship taxation by the United States also could embolden developing countries to enact similar taxes in an effort to reduce brain drain. Such reforms would hamper the United States in attracting highly skilled immigrants.

One marker of a sustainable international tax policy is that its adoption by every state should not lead to absurd results. Return to the case of Eduardo Saverin, who was born a Brazilian national and moved with his

372. Kirsch, *supra* note 229, at 401.

373. VON KOPPENFELS, *supra* note 98, at 52.

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

parents to the United States, where he naturalized without relinquishing his Brazilian nationality.[375] Suppose that when Saverin moved to Singapore, he gave up neither his U.S. nor Brazilian nationality. If Brazil adopted a U.S.-style citizenship tax, what would be the tax consequences? Singapore would be his residence state, but both Brazil and the United States would seek to tax his worldwide income. Would the United States credit the Brazilian tax, even if Saverin lived in Singapore? If not, dual and multiple nationals might experience stacking citizenship taxes.

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

375. Tsukayama, *supra* note 1.