Defending U.S. Citizenship-Based Taxation in Theory and in Practice:

An Essay on Fiscal Citizenship in a FATCA World

Forthcoming in the Cardozo Law Review

DRAFT, NOVEMBER, 2024

Edward A. Zelinsky
Benjamin N. Cardozo School of Law
Yeshiva University
Room 941
55 Fifth Avenue
New York, New York 10003
zelinsky@yu.edu
203-787-4991

Table of Contents

I) Introduction

For many Americans, the most surprising aspect of the saga of Meghan Markle, a/k/a/ the Duchess of Sussex, was learning that, as a U.S. citizen living in the U.K., the Duchess was obligated to pay U.S. income taxes on her worldwide income.[1] President-elect Trump has echoed concerns raised in this controversy about the United States' worldwide income taxation of its citizens living abroad. In particular, during the 2024 campaign, President-elect Trump called for "ending the double taxation of overseas Americans."[2]

I found myself drawn into this debate about the United States' citizenship-based taxation by virtue of a 2011 article I had written in the Iowa Law Review.[3] In that article, I responded to criticism of the United States' citizenship-based taxation

---

[1] Edward A. Zelinsky, *US Is Not Unfair In Taxing Citizens Living Abroad*, LAW 360 TAX AUTHORITY (March 25, 2019) (defending U.S. income taxation of the Duchess of Sussex).

[2] Andrew Duehren, *Trump Keeps Tax Cut Promises Coming, Now for Americans Living Abroad*, NY TIMES (Oct. 11, 2024) A8; Alexander Rifaat, *Trump Vows to End "Double Taxation" of Overseas Citizens*, 2024 TNTF 197-2; Stephanie Lai, *Trump Vows to Eliminate Income Taxes on Americans Living Abroad*, BLOOMBERG LAW NEWS, DAILY TAX REPORT (Oct. 9, 2024); Bill Barrow, Adriana Gomez and Isabella Volmert, *Donald Trump rolls out tax breaks, but no specifics, for overseas citiznes and auto buyers*, AP NEWS (Oct. 10, 2024).

[3] Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA LAW REVIEW 1289 (2011) (hereinafter, Zelinsky, "Citizenship and Worldwide Taxation").

and, in particular, defended the United States' taxation of its overseas citizens on their respective worldwide incomes. A key component of the then-prevailing critique held that the United States cannot in practice enforce its income tax against U.S. citizens living abroad.[4] In contrast, I argued for citizenship-based taxation on enforceability grounds, contending that citizenship is an administratable proxy for domicile. Like domicile, citizenship reflects permanent allegiance to the home nation. Many nations tax individuals residing abroad on their respective worldwide incomes based on such individuals' continuing domiciles at home while they live overseas. U.S. taxation of its overseas citizens by virtue of U.S. citizenship is a more efficient way of obtaining similar results without engaging in the fact-intensive inquiries necessary to determine a taxpayer's residence or domicile.

This analysis raises a question which, among others, I now address: Why should an individual's domicile (or residence) in a nation be the basis for taxing that individual's worldwide income when they are living in another nation? The answer, I argue, is to be found in the emerging notion of "fiscal citizenship," an

---

[4] Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117, 129-131 (2014). *See also* Ruth Mason, *Citizenship Taxation*, 89 S. Cal. Rev. 169, 212 (2016) ("the government cannot adequately enforce citizenship taxation").

individual's obligation to support the national political community of which she is a member even if living outside the borders of that nation.

Subsequent to my 2011 article, there was a shift in the tone and substance of the debate about U.S. taxation of its citizens living abroad. This shift was largely engendered by the Foreign Account Tax Compliance Act (FATCA)[5]. Many overseas U.S. citizens criticize FATCA as hampering their ability to conduct their routine financial affairs while living abroad. In the FATCA world, some overseas citizens broaden the critique to argue that the United States' citizenship-based taxation of its overseas citizens is bad in practice and theoretically unsound because, inter alia, U.S. citizens living abroad have no duties of citizenship toward the United States.

U.S. citizenship-based taxation, these critics assert, is unacceptably "extraterritorial,"[6] an idiosyncratic departure from the international norm of residence-based income taxation.[7]

---

[5] Internal Revenue Code §§ 1471-1474, 6038D, 26 U.S.C. §§ 1471-1474, 6038D.

[6] Laura Snyder, *Can Extraterritorial Taxation Be Rationalized?*, 76 TAX LAWYER 535, 537 (2023) ("the U.S. extraterritorial tax system").

[7] Karen Alpert, *Update Proposal for the Outdated Australia-US Tax Treaty*, https://treasury.gov.au/sites/default/files/2023-01/c2022-338683-greenstreet.pdf (Oct. 30,2021) (residence-based taxation "is the

According to these critics, the proper solution to the United States' improperly unique,[8] indeed "xenophobic,"[9] income taxation of U.S. citizens living abroad is for the United States to follow other nations by taxing U.S. citizens' incomes solely on the basis of residence.[10] U.S. citizens living abroad, we are told, have no moral duty to support the federal government and should have no legal obligation to do so. Hence, the U.S. should replace its policy of citizenship-based income taxation of overseas citizens with residence-based income taxation.

I write now both to extend my earlier analysis and to

---

convention accepted by the rest of the world") (hereinafter, "Alpert, *Update*").

[8] Snyder, *supra*, note 6 at 537 ("The United States is unique in how it taxes not just its residents but also its overseas citizens based on their worldwide income."); Alpert, *Update*, *supra*, note 7 ("unique US practice of taxing on the basis of citizenship"); Karen Alpert, *Investing with one hand tied behind your back – An Australian perspective on United States tax rules for non-resident citizens*, SSRN-id3097931 at 3 ("The United States is unique among developed nations in taxing its citizens (and legal permanent residents) on worldwide income regardless of where those citizens live.") (hereinafter, "Alpert, *Investing*") (parenthetical in original); *Virginia La Torre Jeker, Americans Abroad: IRS's E-filing Plan Won't Solve the Problem!*, 181 TAX NOTES FEDERAL 271, 274 (2023) (U.S. has "unique approach" of taxing its "citizens based on their worldwide income, regardless of where they reside.").

[9] Alpert, *Investing, supra*, note 8 at 4.

[10] La Torre Jeker, *supra*, note 8 at 274 (United States should "[s]hift to a taxation system that bases an individual's tax liability on their current place of residence rather than their citizenship.").

respond to the FATCA-stimulated critique of the United States' taxation of its overseas citizens' worldwide incomes. U.S. taxation of its citizens living abroad is better in practice and sounder in theory than the critics maintain. While the U.S. is the only nation which uses legal citizenship to tax the worldwide incomes of its citizens living abroad, other nations' residence-based tax systems also often reach "extraterritorially" by taxing the worldwide incomes of overseas citizens as continuing residents of their home countries. U.S. citizenship-based taxation reaches similar results more efficiently by avoiding factually complex determinations of individuals' domiciles or residences. When opponents of current law call for the U.S. to adopt residence-based taxation, they do not acknowledge the extent to which existing residence-based tax systems in practice also tax citizens living abroad "extraterritorially" on their worldwide incomes by deeming them to still reside in their respective home nationa.

Moreover, under Section 911 of the Internal Revenue Code,[11] the U.S. abates its taxation of its citizens living abroad through a generous and unique exclusion for foreign earned income in addition to the income tax credit available to all U.S. taxpayers for foreign income tax paid on foreign-source income.

[11] Internal Revenue Code § 911, 26 U.S.C. § 911.

The upshot of this exclusion and credit is that, in practice, relatively few U.S. citizens living abroad actually owe net taxes to the U.S.[12] Those who do tend to be more affluent individuals, not rank-and-file taxpayers. While the critics deploy the label "unique" as a term of disapproval, the U.S. exclusion from income taxation of its overseas citizens' foreign earned compensation is uniquely taxpayer friendly in comparison with the tax laws of other nations. Just as the critics of U.S. law understate the extent to which other nations' residence-based tax systems often tax the worldwide incomes of their citizens who living abroad, the critics of U.S. law tend to slight the Section 911 exclusion.

Good does not mean perfect. Critics of the status quo validly point to flaws in current law as it taxes U.S. overseas citizens. The critics cite these flaws to further their argument that the U.S. should abolish citizenship-based taxation. In contrast, I observe that these flaws are remediable. These defects in current law should not be used as excuses to abandon citizenship-based taxation. Rather, these flaws can and should be corrected to improve the equity, efficiency and administrability

---

[12] Alpert, *Investing*, *supra* note 8 at 4 ("For many non-resident US taxpayers in high tax jurisdictions such as Australia, a combination of foreign tax credits (FTC) and the Foreign Earned Income Exclusion (FEIE) will mean that little US tax is actually due.") (parentheses in original, footnote deleted).

of the United States' taxation of its citizens who live abroad.

On a theoretical level, the United States' citizenship-based taxation compellingly implements what tax scholars increasingly designate as "fiscal citizenship," "contributing one's appropriate share – however modest – toward the financing of the political community of which one is a member."[13] Other nation's income taxes define such membership via domicile or residence. From the vantage of fiscal citizenship, an individual's permanent home is a political community to which that individual, by virtue of his membership in that community, owes an obligation of tax support in accordance with his ability to pay wherever that individual may live. A U.S. citizen who lives abroad is, by virtue of her U.S. citizenship, a member of the national political community of the United States. As a normative matter of fiscal citizenship, this overseas citizen (like a citizen living at home) is properly called upon to support that community through her tax payments based on her total, worldwide income.

Domicile or residence is best understood in this context as a marker for fiscal citizenship, the individual's continuing membership in a political community with the consequent obligation to support that community. Legal citizenship, I

[13] Lawrence Zelenak, LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX (2013) 17.

suggest, is a better, more administrable marker for fiscal citizenship than are the fact-intensive notions of residence and domicile. While fiscal citizenship can be implemented without citizenship-based taxation, fiscal citizenship justifies citizenship-based taxation including the "extraterritorial," worldwide income taxation of citizens who live offshore.

In contrast, recent criticism of U.S. taxation of its overseas citizens rests on a hyper-libertarian notion of U.S. citizenship as a one-way street which bestows benefits upon the citizen but entails no corresponding duty for the U.S. citizen to support the U.S. Thus, the contemporary debate between critics and defenders of U.S. citizenship-based taxation is largely about the nature of citizenship, namely, whether or not citizenship properly imposes duties of tax support upon citizens wherever they live in accordance with citizens' respective abilities to pay.

My 2011 article emphasized that citizenship can serve as an objective, administrable proxy for domicile. In this article, I explore the flip side of the coin: Deployed as a tax concept, domicile reflects the notion today labeled as "fiscal citizenship," the obligation to support a political community in accordance with one's ability to pay because of one's membership in that community. Using legal citizenship to assess such fiscal citizenship is more efficient than using fact-intensive assessments of domicile and residence to establish fiscal citizenship. Fiscal citizenship provides a compelling premise for the United States' taxation of the worldwide incomes of its citizens including its overseas citizens.

This Article presents its analysis in six steps. The first section of this article provides a brief primer on some of the basic tax rules in this area.[14] The second section of this article compares the implementation of U.S. citizenship-based taxation in practice with other nations' income taxation on the basis of domicile or residence. From this comparison of taxation in practice, U.S. tax law as actually implemented emerges better than the critics contend, more reasonable and more generous than the critics acknowledge.

This second section starts by exploring the extraterritorial taxation that is often imposed in practice on overseas residents' worldwide incomes by Canada's, Australia's and the United Kingdom's residence-based tax systems. Such residence-based taxation frequently requires difficult, factually-intensive determinations of residence and domicile, determinations which often result in the taxation of overseas

[14] Those knowledgeable about these basic tax rules can skip this section and proceed to page 21 where I begin my argument.

citizens who are deemed to still reside for tax purposes at home. Residence-based taxation in practice is often not as different from citizenship-based taxation as the critics maintain. Overseas citizens of other nations are often deemed for tax purposes to still reside in their nations of citizenship and thus owe income tax on their worldwide incomes to their home nations even if they live abroad. Citizenship-based taxation is more efficient procedurally as it avoids factually complex inquiries about domicile and residence. When opponents of U.S. law call for residence-based taxation, they effectively ignore how residence-based taxation in practice frequently taxes "extraterritorially" overseas citizens of the nations which find their citizens living abroad to still be residing for tax purposes at home.

This second section also compares U.S., Australian and Canadian exit taxation, explores the taxation of the pension earnings and contributions of U.S. citizens living abroad, reviews Code Section 911's uniquely generous exclusion of overseas U.S. citizens' foreign earned income, and discusses FATCA, a prime target and motivation of the critics of current law.

U.S. taxation of the pension benefits U.S. citizens earn abroad is a prominent target of the contemporary critique of U.S.

citizenship-based taxation. This critique ignores the U.S. model treaty position which, when agreed to by other nations, exempts U.S. citizens living and working abroad from U.S. taxation of their foreign pension contributions and earnings. This critique also ignores the treaties the U.S. has negotiated with Canada and the U.K., the two countries with the largest numbers of U.S. citizens living abroad. Those treaties, following the model treaty, give the critics what they want by exempting qualifying overseas U.S. citizens from U.S. taxation on their U.K. and Canadian pension contributions and earnings.

The U.S. "exit tax"[15] is more taxpayer-friendly than the more easily triggered exit taxes of the Australian and Canadian residence-based tax systems. The U.S. exit tax only applies if an individual explicitly renounces her U.S. citizenship. In contrast, the departure levies assessed by Canada[16] and Australia[17] are triggered by a change of tax residence, a change which can occur accidentally and unknowingly. Moreover, the U.S. Internal Revenue Code – unlike the Canadian and Australian departure taxes -- contains generous exemptions from U.S. exit

[15] Steven J. Arsenault, *Surviving a Heart Attack: Expatriation and the Tax Policy Implications of the New Exit Tax*, 24 AKRON TAX J. 37 (2009).

[16] Canada Income Tax Act ¶ 128.1(4)(b).

[17] Australian Income Tax Assessment Act 1997 § 104-160.

taxations for individuals of modest circumstances abandoning their U.S. citizenships.

Also unique to U.S. law is the generous exclusion under Code Section 911 for the foreign earned income of U.S. citizens living abroad. In practice, between the Section 911 exclusion and the Internal Revenue Code’s income tax credit for taxes paid to foreign income tax systems,[18] relatively few overseas U.S. citizens actually make any net tax payment to the U.S. Treasury. In practice, U.S. taxation of overseas citizens is progressive, focusing on the more affluent Americans who live abroad.

This causes the critics to shift their concern to the compliance costs U.S. tax law imposes on overseas citizens. In this context, the critics’ bete noire is FATCA. Indeed, the tone and substance of current criticism has been stimulated by FATCA and FATCA’s perceived interference with the routine financial transactions of overseas U.S. citizens. While some features of FATCA should be liberalized, FATCA’s disclosure regime at its core is a reasonable means of combating tax avoidance through offshore accounts. FATCA is thus a proper method of implementing the obligations of U.S. fiscal citizenship for all U.S. citizens including those citizens who live abroad. FATCA’s flaws are remediable and should be remedied, not used as a justification

[18] Internal Revenue Code § 901, 26 U.S.C. § 901.

for scrapping citizenship-based taxation.

In short, when compared with the rules by which other nations in practice tax their residents living abroad on their worldwide incomes, the United States implements the worldwide income taxation of its overseas citizens in a manner which is neither as idiosyncratic nor as harsh as the critics maintain. Moreover, in important respects, the uniqueness of U.S. tax law is taxpayer-friendly, gentler than other nations' taxation of their overseas residents' worldwide incomes.

The third section of this article addresses "fiscal citizenship." The nature of citizenship is the underlying theoretical disagreement between many of the contemporary critics of U.S. citizenship-based taxation and the defenders of that taxation. For many contemporary critics, citizenship is a one-way street with the U.S. citizen having no obligation to support the U.S. polity and its members. In contrast, the defense of citizenship-based taxation flows from the normative tradition that citizenship entails duties as well as rights. This tradition, increasingly labeled today in the tax context as "fiscal citizenship", holds that the members of a political community have, by virtue of that membership, an obligation to support the community through tax payments even if such members live outside the geographic borders of that community.

Citizenship is membership in a political community which bestows duties as well as rights. Chief among the duties of citizenship is supporting the community through tax payments in accordance with the citizen's ability to pay. Ability to pay is best measured by an individual's worldwide income – wherever she lives.

While other nations define fiscal citizenship by virtue of an individual's continuing residence or domicile, the U.S. principal defines fiscal citizenship in terms of legal citizenship. Fiscal citizenship can be implemented by means other than citizenship-based taxation, but fiscal citizenship justifies citizenship-based taxation including the taxation of offshore U.S. citizens' worldwide incomes.

The fourth section of this Article explores and rejects the critics' attenuated view of U.S. citizenship. From this hyper-libertarian perspective, U.S. citizenship is a one-way street which bestows rights upon the citizen but entails no corresponding duties of citizenship. This attenuated notion of citizenship fits poorly with the prevailing understanding of U.S. citizenship as a reciprocal relationship between the citizen and the state. Chief among the obligations of a U.S. citizen is tax support of the nation in accordance with the citizen's ability to pay based on his worldwide income.

The fifth section of this Article anticipates and addresses two issues which my analysis raises, in particular, my focus on three English-speaking nations (Canada, the U.K. and Australia) and the difficulties of enforcing of U.S. income taxation on many forms of income received by overseas citizens.

The final section summarizes the improvements which could be made to the current system of U.S. citizenship-based income taxation. The critics cite the problems of current law as reasons to abandon citizenship-based taxation of overseas U.S. residents. In contrast, I view these problems as pointing to plausible improvements in the treatment of U.S. citizens residing abroad.

The Internal Revenue Code often addresses the concerns of particular groups of taxpayers. Many of these accommodations reflect political favoritism, divorced from any compelling policy considerations. But other accommodations in the tax law are efforts to improve the equity, efficiency and administrability of such law by addressing the legitimate concerns of specific taxpayers. Just as fiscal citizenship requires the fiscal citizen to support the polity, the polity and its decisionmakers have a reciprocal obligation to the fiscal citizen to enhance the fairness and the efficiency of the tax and to minimize when possible taxpayers' compliance costs.

In this spirit, the income tax can be modified in certain respects to treat overseas U.S. citizens more fairly and efficiently: As an administrative matter, tax reporting for U.S. overseas citizens can be simplified. The favorable tax treatment of foreign pensions extended to overseas U.S. citizens under the U.S. model treaty and by the U.S.-Canada and U.S.-U.K. tax treaties should be negotiated with additional nations. The Section 911 exclusion could be broadened to exclude from U.S. income taxation additional forms of compensation income U.S. citizens earn abroad. It would make the tax law more equitable to extend Section 877A's exclusion for expatriates' gains on constructive sales to the other forms of income recognized on the surrender of U.S. citizenship. Exemptions under FATCA could be expanded to assist overseas citizens in the conduct of their routine financial affairs. To reduce taxpayers' compliance costs, their obligations under FATCA and FABR[19] should be coordinated. The federal statute assuring overseas citizens of the right to vote should be broadened.

These changes would constitute appropriate, incremental refinements of the existing system of citizenship-based taxation of Americans' worldwide incomes. These reform measures are

[19] IRS, *Report of Foreign Bank and Financial Accounts (FBAR)* (discussing FBAR reporting requirements) https://www.irs.gov/businesses/small-businesses-self-employed/report-of-foreign-bank-and-financial-accounts-fbar

endorsed here to improve the equity, efficiency and administrability of U.S. citizenship taxation of Americans living abroad, not to justify repeal of that taxation. The U.S. taxation of overseas citizens' worldwide incomes is ultimately justified as a matter of fiscal citizenship.

II) A Primer on Some Basic Tax Rules

Most nations tax income both on an *in personam* basis and an *in rem* basis.[20] Nations today typically assert *in personam* tax jurisdiction against an individual by virtue of her residence or her domicile in the taxing nation. When it exercises such residence- or domicile-based tax jurisdiction, the nation of residence (or domicile) usually taxes the entire worldwide income of the resident or domiciliary over whom the nation exercises *in personam* jurisdiction. In contrast, when a nation exercises more limited *in rem* tax jurisdiction, it taxes only income which has its source in that nation. Reflecting these prevailing tax norms, Justice Ginsberg noted for the U.S. Supreme Court in *Oklahoma Tax Commission v. Chickasaw Nation* that the international benchmark

---

[20] Reuven S. Avi-Yonah, Diane M. Ring, Yariv Brauner and Bret Wells, U.S. INTERNATIONAL TAXATION: CASES AND MATERIALS (5th ed. 2022) 25-27 (discussing in personam taxation based on "the personal connection" to the taxing jurisdiction versus in rem taxation based on "the territorial connection" to the item of income). *See also* Restatement (4th) of the Foreign Relations Law of the U.S. § 410, comment c (discussing "the right of a state to exercise prescriptive jurisdiction on the basis of domicile or residence, rather than just nationality...").

is that nations tax their residents' worldwide incomes but, lacking *in personam* jurisdiction over nonresidents, only tax such nonresidents *in rem* on income derived from sources within the taxing nation.[21]

This pattern creates the possibility of double taxation by two (or more) nations when one nation exercises tax jurisdiction over a resident *in personam* while another nation exercises tax jurisdiction over a nonresident's income *in rem.* Suppose, for example, that individual X resides in nation A and owns rent-producing real estate in nation B. Nation A taxes *in personam* the rent received by X as part of X's worldwide income as a resident of A. Nation B taxes this same rent *in rem* since the source of this income is real estate located in nation B.

As a matter of international tax practice, this double income taxation is typically abated by nation A, the state of X's

---

[21] *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 462-463 (1995) (It is "a well-established principle of interstate and international taxation...that a jurisdiction... may tax *all* the income of its residents, even income earned outside the taxing jurisdiction.") (emphasis in original). Id. at 463, n. 11. ("For nonresidents....jurisdictions generally may tax only income earned within the jurisdiction."). *In the Matter of Edward A. and Doris Zelinsky*, DTA Nos. 830517 and 830681, 2023 N.Y. Tax LEXIS 171, is a contemporary case which explores domestically the distinction between states' taxation *in personam* of their residents' worldwide incomes and their more limited, source-based taxation *in rem* of nonresidents' incomes. In the interests of full disclosure, I note that my wife and I are the taxpayers in this case.

residence, crediting against its income taxes on a dollar-for-dollar basis the income tax X pays to nation B on the rent earned in that country.[22] To continue this example, suppose that X receives $100 of income from her rental property in nation B, that B imposes $10 of tax on this rental income and that nation A (before any credit) imposes $15 of tax on this rental income as part of X’s worldwide income. In this example, the $10 of tax which X pays to B on the basis of source is credited, dollar-for-dollar, to reduce to $5 the net tax owed to A on the basis of residence. If nation A only imposes $10 of tax on X’s rental income, the $10 dollar-for-dollar credit for the taxed paid to nation B totally eliminates X’s tax owed to nation A on this rental income.

Double taxation may also result when two nations both exercise *in personam* tax jurisdiction over the same individual. Suppose, for example, that a U.S. citizen has lived abroad in nation C long enough that nation C considers this individual its resident for income tax purposes. In this context, both the U.S. and nation C will tax this individual’s worldwide income. Insofar as nation C taxes income which the U.S. views as foreign source income, the U.S. credit for foreign taxes paid will abate and

[22] Avi-Yonah, et al., supra, note 20 at 491-495 (discussing the U.S. income tax credit for foreign income taxes paid).

potentially eliminate double taxation. However, if nation C taxes income which the U.S. treats as U.S. source income, no credit will be extended by the U.S. to offset nation C's taxes.[23]

The United States and other nations with similar income taxes do not give credits for nonincome taxes paid to other nations. Thus, suppose that nation B does not levy an income tax but instead finances itself by an annual real property tax. In that case, X pays full income taxes on her rental income to nation A where she resides, pays property taxes to nation B where her property is located, and gets no credit in either nation for the tax she pays to the other.[24]

Nations enter into tax treaties to coordinate their tax treatments of their respective residents and their incomes.[25]

---

[23] *Id. See also* Internal Revenue Code § 904(a), 26 U.S.C. § 904(a) (limiting the U.S. tax credit to foreign taxes paid "on the taxpayer's taxable income from sources without the United States.").

[24] If X is a U.S. citizen or resident, X can deduct these property taxes but will not receive a dollar-for-dollar credit. Internal Revenue Code §§ 164(a)(1), 26 U.S.C. §§ 164(a)(1) (providing for "deduction [of] State and local, and foreign, taxes... which are paid or accrued within the taxable year in carrying on a trade or business or an activity described in section 212") and 164(b)(6) (exempting from annual deduction limit taxes "paid or accrued in carrying on a trade or business or an activity described in section 212.").

[25] *See, e.g.*, discussion starting at page 66 *infra* on the tax treatment of pensions under the U.S. model tax treaty and under the tax treaties the U.S. has negotiated with Australia, Canada and the U.K.

III) The Implementation of U.S. Citizenship-Based Taxation: Better in Practice Than the Critics Maintain

A) Other nations tax the worldwide incomes of residents living abroad

While critics decry U.S. tax law as being uniquely[26] extraterritorial,[27] other nations often use the fact-dependent concepts of residence and domicile to tax individuals living abroad on their worldwide incomes. U.S. citizenship-based tax law emerges from a comparison with other nation's tax laws as less idiosyncratic than critics suggest and as more administrable and enforceable than the subjective, fact-intensive residence-based systems of other countries. These systems often impose "extraterritorial" taxation on the worldwide incomes of residents living abroad. Citizenship is an administrable proxy for domicile. In practice, residence-based income systems often tax their overseas citizens' worldwide incomes in an "extraterritorial" manner similar to the United State's allegedly novel system of citizenship-based taxation. The opponents of current U.S. law ignore these realities.

[26] Alpert, *Update, supra*, note 7 ("unique US practice of taxing on the basis of citizenship").

[27] Snyder, *supra*, note 6 at 537 ("the U.S. extraterritorial tax system").

i) Canada

Canada taxes the worldwide incomes of Canadian residents living abroad. This "extraterritorial" taxation is closer to U.S. law than the critics of U.S. law of acknowledge. Under the fact-intensive residence tests of Canadian law, an individual living abroad can be a Canadian resident for tax purposes because of her continuing ties to Canada. Thus, this individual, while living overseas, can be taxed on her worldwide income by Canada as a Canadian resident even though she lives outside Canada. A leading text on Canadian income taxation observes:

> Nor is residence for tax purposes synonymous with physical presence in Canada. Residence for tax purposes refers to the legal and economic nexus that an individual has with Canada. Although physical presence is an important criterion for residence for tax purposes, it is not necessarily conclusive in establishing taxable nexus. A person who is physically present in Canada, for example, a transient visitor, is not necessarily a Canadian resident. Conversely, a person who is absent from Canada for a considerable period (for example, a Canadian diplomat) may be a Canadian resident for income tax purposes.[28]

While Canadian tax law does not explicitly use the term domicile, the Canadian concept of residence for tax purposes reflects domiciliary concerns. Under the rubric of "residence,"

---

[28] Vern Krishna, 1 FUNDAMENTALS OF CANADIAN INCOME TAX: PERSONAL TAX (2019) 105 (parenthetical in original).

Canadian tax law reaches results similar to the United States' taxation of the worldwide incomes of its citizens living abroad, taxing the worldwide incomes of Canadians who live overseas but who are deemed to remain as residents of Canada for income tax purposes.

Instructive in this context is the decision of the Tax Court of Canada in *Neil Barry McFadyen v. Her Majesty the Queen.*[29] According to the court, Mr. McFadyen, a Canadian citizen living in Japan, was for Canadian tax purposes in 1993, 1994 and 1995 a "factual resident" of Canada[30] and "ordinarily resident" in Canada despite being based in Japan for these three years.[31] Canada thus taxed Mr. McFadyen on his worldwide income as a Canadian resident even though he lived in Japan for these three years. This domicile-like result is the same outcome which would have been obtained more efficiently had Canada taxed Mr. McFadyen's worldwide income on the basis of his Canadian citizenship.

According to the Tax Court, among Mr. McFadyen's

---

[29] 2000 DTC 2473.

[30] *Id.* at ¶¶ 97 and 110.

[31] *Id.* at ¶¶ 109 and 155(a).

"significant"[32] residency-confirming "ties with Canada"[33] while living in Japan were his joint bank accounts in Canada and the two houses he owned in Canada.[34] While Mr. McFadyen was in Japan, among his other "personal"[35] ties to Canada making him taxable as a resident by Canada on his worldwide income were property Mr. McFadyen stored in Canada and his Canadian registered retirement savings plan (RRSP),[36] a tax-favored savings device similar to a U.S. individual retirement account (IRA).[37]

While the critics of the United States' worldwide income taxation of its overseas citizens claim that such taxation violates international norms,[38] *McFadyen* takes a different view. Quoting Justice Iacobucci of Canada's Supreme Court, *McFadyen* highlights the similarity of Canada's worldwide income taxation

[32] *Id.* at ¶ 103.

[33] *Id.*

[34] *Id.* at ¶ 104.

[35] *Id.*

[36] *Id.*

[37] Internal Revenue Code §408, 26 U.S.C. §408 (governing individual retirement accounts). On the role of IRAs in the evolution of the American system of defined contribution savings, *see* Edward A. Zelinsky, THE ORIGINS OF THE OWNERSHIP SOCIETY: HOW THE DEFINED CONTRIBUTION PARADIGM CHANGED AMERICA (2007) 39-42, 52-58.

[38] Alpert, *Update*, *supra*, note 7 ("unique US practice of taxing on the basis of citizenship").

of its overseas residents and the United States' worldwide income taxation of its overseas citizens: "In the United States and Canada, such comprehensive taxation is taxation on world-wide income."[39]

ii) Australia

Similar observations are to be made about Australia's income tax. By adopting the "widest meaning"[40] of residence and also deploying the explicit concept of domicile, Australia imposes worldwide income taxation on Australian citizens living abroad. This results in taxation which is closer to U.S. tax practice than the critics of U.S. law acknowledge.

As a statutory matter, Australia defines as a resident for income tax purposes a "person... who resides in Australia"[41] or "whose domicile is in Australia, unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia.[42]" As understood and applied, these fact-laden

---

[39] 2000 DTC at ¶ 135.

[40] *Iyengar v. Commissioner of Taxation*, (2011) 85 ATR 924, [2011] AATA 856, BC201109255 at ¶ 56. *See also id.* at 86 ("the ordinary meaning of `reside'" should receive "the widest possible meaning."

[41] Income Tax Assessment Act 1936 § 6(1)(a).

[42] *Id.* at § 6(1)(a)(i). Australia also defines an individual as a resident for tax purposes if such individual is "actually...in Australia...more than one-half of the year" or is covered by Australian's Superannuation arrangements or is a

concepts of residence and domicile can impose on Australian citizens living abroad the same "extraterritorial"[43] worldwide income taxation excoriated by critics of U.S. income taxation of its overseas citizens.

For example, *Duff v. Commissioner of Taxation*,[44] decided by Australia's Administrative Appeals Tribunal, involved an Australian citizen by birth who was an experienced chef.[45] Mr. Duff spent most of 2016 outside Australia, living in "international waters"[46] on ships owned by Viking Ocean Cruises.[47] These ships were flagged in Norway.[48] For 2016, Mr. Duff committed to two employment periods of four months each on these ships in international waters.[49] Mr. Duff denied that he owed any Australian income taxes for this year, claiming that in 2016 he was not a resident of Australia because he spent most of the year

---

family member of someone so covered. *Id.* at §§ 6(1)(a)(i) and 6(1)(a)(ii).

43 Snyder, *supra*, note 6 at 537 ("the U.S. extraterritorial tax system").

44 [2022] AATA 3676, BC 202280941.

45 *Id.* at ¶ 1.

46 *Id.* at ¶ 12.

47 *Id.* at ¶ 11.

48 *Id.* at ¶ 30.

49 *Id.* at ¶¶ 38 and 40.

outside Australia.[50] The Administrative Appeal Tribunal disagreed, finding that Australia was Mr. Duff's domicile for tax purposes in 2016 even though he spent most of that year outside Australia on cruise ships.[51]

For years prior to 2016, Mr. Duff conceded that Australia was his domicile.[52] However, Mr. Duff's 2016 service on ships flagged in Norway, he maintained, shifted his domicile for that year from Australia to Norway.[53]

The Administrative Appeal Tribunal disagreed, holding that Mr. Duff, though largely abroad in 2016, remained domiciled in Australia. Mr. Duff was thus obligated to pay Australian income tax on his salary earned abroad with Viking Ocean Cruises: "[T]here is simply no evidence from which it can be established that Mr. Duff, in 2016, *intended* to give up his Australian domicile and, instead, become a domicile of Norway."[54]

> To establish an intent to change domicile, residence in the new country cannot be fixed for a limited period or for a particular purpose and must be general and indefinite in its future contemplation. In Mr. Duff's case,

---

[50] *Id.* at ¶ 19.

[51] *Id.* at ¶¶ 24, 70 and 103.

[52] *Id.* at ¶¶ 29 and 30.

[53] *Id.*

[54] *Id.* at ¶ 35 (emphasis in original).

> there was nothing at all general and indefinite about this deployment on the cruise liners. This is so whether he was employed pursuant to separate contracts (as Mr. Duff deposed to and as I have found) or pursuant to one longer term contract that governed his two deployments aboard ship in 2016.[55]
>
> To the contrary, his time aboard the ships was in each case fixed as to duration (4 months), limited as to particular purpose (duties of employment only) and self-evidently other than indefinite in its future contemplation...[56]

Particularly instructive for this article's analysis are the Tribunal's observations about Mr. Duff's Australian citizenship. Among other factors belying Mr. Duff's claim that Norwegian domicile had replaced his Australian domicile, "Mr. Duff did not apply for citizenship or any right of permanent residence in Norway during 2016."[57] These comments of the Tribunal are consistent with an argument of this article and my 2011 article: Citizenship is probative of domicile. According to the Tribunal, Mr. Duff remained an Australian domiciliary in 2016 for many reasons including his retention of Australian citizenship. Since

[55] *Id.* at ¶ 37.

[56] *Id.* at ¶ 38 (parenthetical in original).

[57] *Id.* at ¶ 43.

he had no permanent place of abode abroad[58] while remaining domiciled in Australia, Mr. Duff paid Australian income tax on his worldwide income literally earned overseas from Australia – the same kind of "extraterritorial"[59] income taxation for which critics excoriate U.S. citizenship-based taxation as unjust and unique.

Of similar import to *Duff* is the opinion of the Administrative Appeals Tribunal in *Iyengar v. Commissioner of Taxation*,[60] another case in which an overseas Australian citizen[61] was deemed for tax purposes to be a resident of Australia and thus taxable by Australia on his worldwide income despite living abroad. Mr. Iyengar was subject to residence-based income taxation by Australia even though he lived in Dubai[62] and Qatar[63] for the tax years in question.[64] The Tribunal held that, despite living outside Australia, Mr. Iyengar was an Australian resident

---

[58] *Id.* at ¶¶ 72 and 103.

[59] Snyder, *supra*, note 6 at 537 ("the U.S. extraterritorial tax system").

[60] (2011) 85 ATR 924, [2011] AATA 856, BC201109255.

[61] *Id.* at ¶ 7.

[62] *Id.* at ¶¶ 19-22, 28 and 38.

[63] *Id.* at ¶¶ 41 and 42.

[64] *Id.* at ¶¶ 3, 34-35, 44-45 and 47.

for tax purposes based on "ordinary concepts" of residence[65] as well as the statutory notion of domicile.[66]

Despite living abroad, many factors indicated that Mr. Iyengar had "continuity of association"[67] with Australia for the two years he lived in the Dubai and Qatar. These residence-confirming facts included Mr. Iyengar's home and family in Australia[68] and his Australian citizenship.[69] While in "most cases" consideration of citizenship is unnecessary to determine residence, the Tribunal opined, in close cases "that could go either way, the citizenship of a person may not be completely irrelevant in the conclusion to be drawn from all the relevant facts."[70] In *Iyengar*, it was deemed relevant to a determination of Mr. Iyengar's residence for Australian tax purposes that he and his family "all became Australian citizens in June 2003."[71]

---

[65] *Id.* at ¶¶ 84 and 85.

[66] *Id.* at ¶¶ 101 and 103.

[67] *Id.* at ¶ 65

[68] *Id.*

[69] *Id.* at ¶ 66.

[70] *Id.*

[71] *Id.* at ¶ 67. See also *id.* at ¶ 69 (that "all" members of the Iyengar family "became Australian citizens in 2003" is a factor indicating "continuity of association" with Australia, making Iyengar a resident for tax purposes).

While "the totality of facts and evidence"[72] indicated that Mr. Iyengar was an Australian resident for tax purposes under "ordinary concepts" of residence,[73] the Tribunal additionally concluded that Mr. Iyengar remained domiciled in Australia while living in Dubai and Qatar.[74] Among the factors indicating continuing domicile in Australia, "[b]y 2003...Mr. Iyengar and his family had all taken the step of becoming Australian citizens..."[75] Because Mr. Iyengar had no "permanent place of abode" outside Australia for the years in question,[76] he was also subject to "extraterritorial" Australian income taxation of his worldwide income on the basis of domicile.

Contrary to the critics' claim that the United States' worldwide taxation of its overseas citizens violates international norms,[77] the facts of *McFadyen*, *Duff* and *Iyengar* produce the same results under the U.S., Canadian and Australian tax systems, i.e., "extraterritorial," *in personam* worldwide

---

72 *Id.* at ¶ 84.

73 *Id.*

74 *Id.* at ¶¶ 101 and 103.

75 *Id.* at ¶ 100.

76 *Id.* at ¶125.

77 Alpert, *Update, supra*, note 7 ("unique US practice of taxing on the basis of citizenship").

income taxation of individuals living abroad. In these cases, Canadian and Australian tax law both required fact-intensive inquiries to determine that its citizens, though living abroad, were still subject to worldwide income taxation as residents and domiciliaries with continuing ties to their nations of citizenship. The U.S. tax system achieves the same results more efficiently and predictably on the basis of citizenship: Since these three individuals retained citizenship while living abroad, U.S. citizenship-based taxation would automatically have taxed them on their worldwide incomes – the same results Canada and Australia obtained after fact-intensive inquiries of residence and domiciliary status. In income tax controversies, citizenship is a compelling proxy for domicile.[78]

iii) United Kingdom

In 2013, the United Kingdom adopted legislation establishing a "statutory residence test" for tax purposes.[79] Like the

---

[78] Professor Mason agrees that citizenship is a more administrable standard than such fact-based tests as residence and domicile. However, she criticizes this as "too narrow a view" because there are other "administrative burdens" involved in enforcing U.S. income tax on overseas citizens and in such citizens complying with U.S. tax law. Mason, *supra*, note 4 at 222. However, governments and individuals confront those same administrative burdens when governments tax their overseas residents and domiciliaries.

[79] Finance Act 2013, Chapter 29, Schedule 45 Statutory Residence Act.

statutory residence laws of the various U.S. states[80] and the Internal Revenue Code's definition for tax purposes of a U.S. noncitizen resident,[81] the U.K. statutory residence test makes the determination of tax residence more objective and mechanical than it is under such rubrics as "domicile." However, the U.K. statutory residence test is far more detailed and labyrinthine than the U.S. states' statutory residence laws and the Code's tax definition of a resident alien. Of central importance to the argument of this article, the U.K. statutory residence test can effectively reach domicile-like results, classifying individuals as U.K. tax residents taxable *in personam* on their worldwide incomes even though these individuals spend most of their time living outside the U.K. Citizenship-based taxation is simpler and more administrable than the new, complex U.K. statutory residence test.

The onerously complicated U.K. statutory residence test provides that, for any year, an individual is a U.K. resident for

---

[80] Edward A. Zelinsky, *Defining Residence for Income Tax Purposes: Domicile as Gap-Filler, Citizenship as Proxy and Gap-Filler,* 38 MICHIGAN J. OF INT'L L. 271, 274-276, 278-279 (2017) (discussing state statutory residence laws); Edward A. Zelinsky, *Apportioning State Personal Income Taxes to Eliminate the Double Taxation of Dual Residents: Thoughts Provoked by the Proposed Minnesota Snowbird Tax*, 15 FLORIDA TAX REV. 533, 542-546 (2014) (same).

[81] Internal Revenue Code § 7701(b), 26 U.S.C. § 7701(b).

tax purposes if she triggers either "the automatic residence" test or "the sufficient ties test."[82] The automatic residence test, in turn, has two components, "automatic U.K. tests"[83] and "automatic overseas tests."[84] The automatic U.K. tests measure the taxpayer's nexus in the year to the U.K. One automatic U.K. test (similar to some U.S. statutory residence laws) is satisfied if an individual spends 183 or more days in the U.K.[85] The second automatic U.K. test is home-based.[86] An individual triggers this second test for any particular year if (i) she has a U.K. home during this year,[87] (ii) she uses that U.K. home on at least 30 days in the year,[88] and (iii) there are at least 91 consecutive days (of which at least 30 must be in the year in question) during which she has no overseas home or she uses any overseas home for less than 30 days in the year.[89] The third, even more

[82] Finance Act 2013, Chapter 29, Schedule 45 Statutory Residence Act, ¶ 3. For a summary of this law, *see* Mark Hunt, UK TAXATION: SIMPLIFIED GUIDE FOR STUDENTS (2022) 108-111.

[83] Finance Act 2013, Chapter 29, Schedule 45 Statutory Residence Act, ¶¶ 5-10.

[84] *Id.* ¶¶ 5, 11-16.

[85] *Id.* ¶ 7.

[86] *Id.* ¶ 8.

[87] *Id.* ¶ 8(1)(a).

[88] *Id.* ¶¶ 8(1)(b) and 8(4).

[89] *Id.* ¶¶ 8(1)(c), 8(2), 8(3), 8(5).

complicated automatic U.K. test is work-based. This test uses daunting, detailed formulas to determine if an individual works predominantly in the U.K. in any particular year.[90]

The automatic overseas tests conversely measure an individual's time spent abroad. The first automatic overseas test is triggered in the current year if an individual was a U.K. resident during any of the three immediately preceding years and spends less than 16 days in the U.K. in the current year.[91] The second automatic overseas test is met in the current year if an individual was not a U.K. resident in any of the three preceding years and spends less than 46 days in the U.K. in the current year.[92] The third automatic overseas test uses a series of complex formulas to determine if the taxpayer works "sufficient hours overseas."[93]

Under the statutory "automatic residence test," an individual is deemed to be a U.K. resident for tax purposes in each year in which an individual triggers one of the "automatic

---

[90] *Id.* ¶ 9 There is a 4th automatic U.K. test for the year of an individual's death. *Id.* ¶ 10.

[91] *Id.* ¶ 12.

[92] *Id.* ¶ 13.

[93] *Id.* ¶ 14. A 4th or 5th automatic overseas test may apply in the year an individual dies. *Id.* ¶¶ 15 and 16.

U.K. tests" and none of the "automatic overseas tests."[94]

Even those inured to the Byzantine quality of much statutory tax law must find the details of the U.K. statutory residence test formidable. This complexity makes U.S. law attractively streamlined by comparison, i.e., the U.S. taxes its overseas citizens' on their worldwide incomes but provides a generous exclusion for foreign earned incomes.[95] Moreover, in particular cases, the maze of the U.K. statutory resident test will tax an overseas British citizen on her worldwide income, just as the U.S. taxes the worldwide incomes of its citizens living abroad. Thus, U.S. citizenship-based taxation again proves less unique than the critics contend and also more administrable than other nations' tax laws.

Consider, for example, the case of a retired U.K. citizen who has a U.K. home but spends most of his time living abroad, enjoying his retirement. Suppose further that, in the current year, this individual spends two months living at his U.K. home (with no foreign home), lives the month following this two month U.K. period traveling peripatetically in different countries, and spends the remaining nine months in a home rented abroad for that nine month period.

---

[94] *Id.* ¶ 5.

[95] Internal Revenue Code § 911, 26 U.S.C. § 911.

Under the U.K. automatic residence test, this individual (despite spending most of the current year abroad) is deemed to be a U.K. resident for income tax purposes, taxable by the U.K. on his worldwide income. On these facts, the hypothetical retiree triggers the second automatic U.K. test because he has a U.K. home in which he lived for more than 31 days and had a 91 day period without a foreign home. Moreover, this individual triggers none of the "automatic overseas tests" because he lived in the U.K. more than 46 days in the year and does not work.

Thus, the U.K. taxes this individual as a resident though he lives 10 months of the year abroad, one month traveling, the other nine months living in a foreign residence.

Suppose now our hypothetical retiree complies in the current year with both an automatic U.K. test and an automatic overseas test. In this case, whether this individual is a U.K. resident for tax purposes depends on his compliance vel non with the "sufficient ties test" for the year. This fact-intensive test assesses such criteria as the time the individual spends in the U.K., his "work tie[s]" to the U.K., whether the individual has a U.K. home, and such individual's "family tie[s]" to the U.K.[96]

To see the operation of this labyrinthine formula, assume

---

[96] Finance Act 2013, Chapter 29, Schedule 45 Statutory Residence Act, ¶ 17 et seq.

now that our hypothetical retiree has failed the automatic residence test but was a U.K. tax resident in one of the three prior years. Assume further that, in the current year, this individual spends 91 days in the U.K., living in a home he provides to a "civil partner" and their minor child. Though this individual spends almost three-quarters of the year living abroad, he is deemed to be a U.K. tax resident under the "sufficient ties test."

It is an interesting issue of tax policy whether the certainty created in particular cases by the relatively mechanical U.K. statutory residence law justifies the detailed complexities engendered by that statute. For purposes of the present discussion, the significance of the new U.K. rules is that they belie the narrative that U.S. citizenship-based taxation is the extreme outlier the critics maintain. Like Canada and Australia, the U.K. statute defines as residents for tax purposes individuals who largely live abroad – without giving those individuals tax relief similar to Code Section 911's exclusion of their foreign earned income. U.S. citizenship-based taxation is easier to administer than is the daunting U.K. statutory test of residence.

iv) Summary

While the critics excoriate U.S. tax law as being uniquely extraterritorial, Canada, Australia and the U.K. also tax their citizens living abroad on such citizens' worldwide incomes based on expansive and fact-dependent concepts of residence and domicile. Professor Kim similarly observes that Korean tax cases demonstrate that "the countries with residence-based taxation are heavily involved in time-consuming, costly tax disputes with high net-worth individuals with dual residency."[97] From a comparison of how residence-based taxation in practice actually works, U.S. citizenship-based tax law emerges as more administrable and enforceable than the often subjective, fact-intensive residence-based systems of other countries. In their critique of U.S. law, the opponents of that law ignore the reality that other nations' residence-based tax systems generate factually complex litigation to tax their tax overseas citizens' worldwide incomes "extraterritorially" by deeming them to reside in their home nations.

B) U.S. Exit Taxation: More progressive, taxpayer friendly

In assessing how other nations in practice tax their respective overseas residents, another important point of comparison is the exit taxation levied by the U.S., Canada and

[97] Young Ran (Christine) Kim, *Considering "Citizenship Taxation": In Defense of FATCA*, 20 FLA. TAX REV. 335, 353 (2017).

Australia.[98] When we compare these exit taxes assessed by these three nations, the U.S. tax treats affected individuals more leniently than do the Canadian and Australian departure taxes. Because the U.S. exit levy is triggered only by an explicit renunciation of formal U.S. citizenship, it is more predictable and more easily avoided than are the departure taxes which Canada and Australia impose when individuals (perhaps inadvertently) shift to nonresident status. Moreover, the U.S. exit tax is more progressive and generous towards individuals of modest economic circumstance. Significant exemptions focus the U.S. exit tax upon affluent citizens who choose[99] to renounce U.S. citizenship.

---

[98] The European Court of Justice has discouraged the member nations of the European Union from adopting exit taxes. *Hughes de Lasteyrie du Saillant and Ministere de l'Economie, des Finances et de l'Industrie* (Case C-9/02) (March 11, 2004) (when French taxpayer changes residence to Belgium, French exit tax assessed on "as yet unrealized increases in value" violates "[t]he principle of freedom of establishment.") *See also* Andrew Appleby, *No Migration Without Taxation: State Exit Taxes*, 60 HARV. J. ON LEGIS. 55, 68-71 (2023) (discussing European exit taxes); Robert Gouldner, *Does Europe Have a* Moore *Problem?* 113 TAX NOTES INT'L 1585 (2024) ("The Court of Justice of the European Union has an impressive history of finding flaws in member states' exit taxes."). *Cf. Heirs of M.E.A. van Hilten-van der Heijden v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* (Case C-513/03) (Feb. 23, 2006) (upholding estate tax on "the estate of a national of that Member State who dies within 10 years of ceasing to reside in that Member State.")

[99] As a procedural matter, when a U.S. citizen chooses to renounce her U.S. citizenship, her "formal renunciation" must be made "before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State." 8 U.S.C. § 1481(a)(5). Citizenship

It is possible that, in different years and under different circumstances, Mr. McFadyen, Mr. Duff or Mr. Iyengar might have satisfied the fact-based standards of Canadian and Australian law and thereby become nonresidents for income tax purposes. At that point, as nonresidents, they would (perhaps unknowingly) have been subject to the exit taxes imposed by Canada or Australia. These levies impose constructive sales for tax purposes upon individuals who cease to be residents of Canada or Australia. This constructive sale treatment requires such individuals to recognize unrealized gain on appreciated assets by virtue of their respective transitions to nonresident status.

Internal Revenue Code Section 877A, the U.S. exit tax, also imposes a constructive sale on appreciated assets.[100] Additionally, §877A taxes three other forms of income: "deferred

---

renunciation is regulated substantively only "whenever the United States shall be in a state of war." 8 U.S.C. § 1481(a)(6). In the case of a wartime abandonment of U.S. citizenship, the "formal written renunciation" of citizenship must be made "in the United States" using "such form" as the Attorney General prescribes before "such officer" as the Attorney General designates. A wartime renunciation of U.S. citizenship, even if procedurally proper, is effective only if the Attorney General "shall approve such renunciation as not contrary to the interests of national defense." In *Kaufman v. Holder*, 686 F. Supp. 2d 40 (Dist. D.C. 2010), the U.S. District Court for the District of Columbia held that the U.S. was in "a state of war" for this purpose in 2004 and 2008 even though there was no formal declaration of war by Congress.

[100] Internal Revenue Code § 877A(a), 26 U.S.C. § 877A(a).

compensation item[s]" such as interests in qualified plans,[101] "specified tax deferred account[s]" such as individual retirement accounts (IRAs),[102] and distributions from certain trusts.[103] However, the U.S. exit tax of Code § 877A only applies upon an individual's formal renunciation of her U.S. citizenship.[104] Thus, in comparison with the Australian and Canadian exit taxes, the comparable U.S levy is harder to trigger since the U.S. departure tax only operates if a U.S. citizen affirmatively renounces her U.S. citizenship. Mere nonresidence does not activate the U.S. exit tax for U.S. citizens.

Moreover, the U.S. exit tax (unlike the Australian and Canadian departure levies) is focused on affluent individuals renouncing U.S. citizenship. Among its progressive provisions, Section 877A contains a generous exemption from constructive sale

---

[101] Internal Revenue Code § 877A(d), 26 U.S.C. § 877A(d).

[102] Internal Revenue Code § 877A(e), 26 U.S.C. § 877A(e).

[103] Internal Revenue Code § 877A(f), 26 U.S.C. § 877A(f).

[104] Internal Revenue Code § 877A(g)(2)(A), 26 U.S.C. § 877A(g)(2)(A) (defining an "expatriate" covered by the exit tax as a "United States citizen who relinquishes his citizenship.") The U.S. exit tax also applies to "any long-term resident of the United States who ceases to be a lawful permanent resident of the United States.") Internal Revenue Code § 877A(g)(2)(B), 26 U.S.C. § 877A(g)(2)(B).

treatment for an individual abandoning her U.S. citizenship.[105] In sum, the U.S. exit tax is more lenient than the equivalent Australian and Canadian levies because the U.S. exit tax is harder to activate and, even if activated, contains significant exemptions. The critics of U.S. law ignore this taxpayer-friendly aspect of U.S. law in comparison with the exit taxes assessed by Australia and Canada.

i) Canada

McFadyen suggests that, had Mr. McFadyen remained longer in Japan or had he attenuated some of his contacts with Canada, at some future point he might have ceased to be a Canadian resident for tax purposes.[106] At that time, as a nonresident of Canada, Mr. McFadyen would have experienced for Canadian tax purposes a "deemed disposition" of such assets as his investment stocks and bonds.[107] The result of the Canadian exit tax is Canadian income taxation of a former resident's unrealized appreciation in her investment assets, even though she remains a Canadian citizen and

---

[105] Internal Revenue Code § 877A(a)(3)(A), 26 U.S.C. § 877A(a)(3)(A).

[106] 2000 DTC 2473 at ¶106 (Contrasting Mr. McFadyen's "three-year stay in Japan" with Mr. Beament who "lived abroad for almost six years.").

[107] Income Tax Assessment Act 1997 § 128.1(4)(4) (If "a taxpayer ceases to be a resident of Canada" "the taxpayer is deemed to have disposed" of many of her forms of property).

even though she may have shifted to nonresident status inadvertently and unknowingly.[108]

ii) Australia

Just as Canada imposes a "deemed disposition" on an individual removing herself from Canadian tax jurisdiction by becoming a nonresident, Australia similarly treats the establishment of nonresidence as a "CGT event."[109] This means that, if an individual "stop[s] being an Australian resident,"[110] she realizes capital gains and losses on her appreciated investments.[111] "This is sometimes called `deemed disposal'"[112] and entails "extraterritorial" taxation as the now nonresident of Australia is required, by virtue of her new status as a nonresident, to pay Australian income tax on unrealized

---

[108] The nonresident may delay the Canadian exit tax by providing "adequate security." *Id.* at § 220(4.5); Government of Canada, *Dispositions of property for emigrants of Canada* at https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/individuals-leaving-entering-canada-non-residents/dispositions-property.html.

[109] Income Tax Assessment Act 1997 § 104-160.

[110] *Id.* at § 104-160(1).

[111] *Id.* at § 104-160(4). Hence, the phrase "CGT event," i.e., capital gains tax event.

[112] Australian Government, Australian Tax Office, *How changing residency affects CGT* (June 30, 2023).

appreciation.[113]

iii) United States

The U.S. also imposes an exit tax. However, in contrast to the Australian and Canadian departure levies triggered by a shift to nonresident status, the U.S. departure levy is hard for a U.S. citizen to trigger as the tax only applies to such a citizen when he legally surrenders his formal U.S. citizenship. A U.S. citizen who becomes a nonresident living abroad does not activate U.S. taxation under the provisions of Internal Revenue Code § 877A as long as he retains his U.S. citizenship.[114]

Moreover, even if a U.S. citizen renounces his citizenship, Section 877A's exit tax is only triggered if one of three further conditions is met: (1) for the five prior taxable years, the former U.S. citizen had "average annual net income tax" more than

---

[113] *Id.* example ("As Jemima and Maurice have stopped being Australian residents, they are taken to have disposed of their shares for market value..."). The new nonresident has the option under Australian tax law of electing to treat her assets as "taxable Australian property." Income Tax Assessment Act 1997 § 104-165(3). That election swaps immediate extraterritorial taxation for deferred extraterritorial taxation when the nonresident disposes of the asset. *Id.* at § 104-165(3)(a).

[114] The U.S. exit tax does apply if "a long-term resident of the United States," not a U.S. citizen, "ceases to be a lawful permanent resident of the United States." Internal Revenue Code § 877A(g)(3)(B), 26 U.S.C. § 877A(g)(3)(B).

$201,000,[115] (2) "the net worth of the individual...is $2,000,000 or more"[116] or (3) the individual rejecting U.S. citizenship has not complied with the provisions of the Internal Revenue Code "for the 5 preceding taxable years."[117] The net effect of these provisions is progressive, focusing U.S. exit taxation upon former U.S. citizens with significant incomes or assets. A U.S. citizen of modest economic circumstances is excluded from the coverage of the U.S. exit tax provided that he has complied with U.S. tax law for the prior five years.

In addition, the U.S. exit tax (unlike the Australian and Canadian exit levies) contains a generous exemption for constructive sales of appreciated property. In 2024, Internal Revenue Code § 877A(a)(3) excludes the first $866,000 of gain from a former U.S. citizen's constructive sale liability.[118] This exclusion is sui generis. Neither the Canadian exit tax nor the Australian exit tax contains such an exclusion when a resident of

[115] Internal Revenue Code §§ 877A(g)(1)(A) and 877(a)(2)(A), 26 U.S.C. §§ 877A(g)(1)(A) and 877(a)(2)(A); Rev. Proc. 2023-34, 2023-48 IRB 1287, § 3.37 (updating the income tax requirement of Code § 877(a)(2)(A) to $201,000).

[116] Internal Revenue Code §§ 877A(g)(1)(A) and 877(a)(2)(B), 26 U.S.C. §§ 877A(g)(1)(A) and 877(a)(2)(B).

[117] Internal Revenue Code §§ 877A(g)(1)(A) and 877(a)(2)(C), 26 U.S.C. §§ 877A(g)(1)(A) and 877(a)(2)(C).

[118] Rev. Proc. 2023-34, 2023-48 IRB 1287, § 3.38 (updating the exclusion of Code § 877(a)(3) to $866,000).

either nation becomes a nonresident and thus trigger's his nation's exit tax. However, the § 877A(a)(3) exclusion only applies to a U.S. citizen's unrealized property-based gains, not to the three other forms of income covered by §877A such as the renouncing citizen's IRAs[119] and pensions.[120]

In a world of trade-offs, the §877A(a)(3) exclusion tempers the policy that former U.S. citizens should pay tax on income accrued but untaxed as of the date they renounce U.S. citizenship. This exclusion (like the focus of Section 877A upon individuals with significant assets[121] or incomes[122]) implements

---

[119] Internal Revenue Code § 877A(e), 26 U.S.C. § 877A(e).

[120] Internal Revenue Code § 877A(d), 26 U.S.C. § 877A(d). I suggest that the current exclusion, applicable today only to constructive sales of appreciated property, be broadened to apply to such other items such as pensions, IRAs and trust interests. *See infra* at page 145. Like the Canadian and Australian exit taxes, the U.S. departure levy allows for the deferral of a former citizen's tax if such former citizen provides adequate security. Compare Internal Revenue Code § 877A(b), 26 U.S.C. § 877A(b) (election to defer U.S. exit taxation with adequate security) with Income Tax Assessment Act 1997 § 104-165(3) (deferral of exit taxation by former Australian resident) and Income Tax Act 1997 § 220(4.5) (security for deferral of exit taxation by former Canadian resident). However, a former U.S. citizen can only defer exit taxation for the property-based taxation of unrealized appreciation, not for exit taxation on such other items as IRAs or pension interests.

[121] Internal Revenue Code §§ 877A(g)(1)(A) and 877(a)(2)(B), 26 U.S.C. §§ 877A(g)(1)(A) and 877(a)(2)(B).

[122] Internal Revenue Code §§ 877A(g)(1)(A) and 877(a)(2)(A), 26 U.S.C. §§ 877A(g)(1)(A) and 877(a)(2)(A).

two other important policies, taxing progressively and facilitating citizenship renunciation by U.S. citizens of modest economic circumstances. The § 877A(a)(3) exclusion focuses exit taxation upon affluent U.S. citizens seeking to surrender U.S. citizenship by exempting from such taxation individuals with less than $866,000 of unrealized appreciation. U.S. exit taxation is also focused on affluent individuals by the Code's net worth requirement of $2,000,000[123] and the average net annual income requirement of $201,000 or more.[124] An individual who falls below these thresholds pays no U.S. exit tax on renunciation of U.S. citizenship provided that she is in compliance with U.S. tax law.

iv) Summary

On balance, the U.S. exit tax is more taxpayer friendly than are the equivalent Canadian and Australian departure taxes, both because the U.S. exit levy is only activated for U.S. citizens by

[123] Internal Revenue Code § 877A(g)(1)(A), 26 U.S.C. § 877A(g)(1)(A), incorporating Internal Revenue Code § 877(a)(2)(B), 26 U.S.C. § 877(a)(2)(B). This $2,000,000 net worth figure is not adjusted for inflation unlike § 877A's net annual income test.

[124] Internal Revenue Code § 877A(g)(1)(A), 26 U.S.C. § 877A(g)(1)(A), incorporating Internal Revenue Code § 877(a)(2)(A), 26 U.S.C. § 877(a)(2)(A); Rev. Proc. 2023-34, 2023-48 IRB 1287, § 3.37 (updating the annual income limit of Code § 877(a)(2)(a) to $201,000). To avoid the exit tax imposed by § 877A, a U.S. citizen must be in compliance with U.S. tax law. Internal Revenue Code § 877A(g)(1)(A), 26 U.S.C. § 877A(g)(1)(A), incorporating Internal Revenue Code § 877(a)(2)(C), 26 U.S.C. § 877(a)(2)(C).

an explicit renunciation of formal U.S. citizenship and because the U.S. exit tax contains progressive and generous provisions which focus the U.S. departure tax on affluent citizens who choose to renounce U.S. citizenship.[125]

C) The Section 911 exclusion for foreign earned compensation

Another generous provision of U.S. law slighted by critics is Internal Revenue Code Section 911.[126] In this case also, U.S. law is unique but is uniquely favorable towards its overseas citizens. Section 911 excludes from the gross income of a U.S. citizen who is a bona fide resident of a foreign nation the first $126,500 of such citizen's foreign earned income.[127] In addition, Section 911 excludes from the U.S. gross incomes of overseas citizens certain housing allowances.[128]

To qualify for the Section 911 exclusion, a U.S. citizen's "tax home" must be "in a foreign country."[129] While the normal definition of an individual's "tax home" is his principal place

---

[125] Professor Avi-Yonah cautions that the exit tax established by Section 877A is constitutionally infirm if the U.S. Supreme Court holds that realization is constitutionally required for income taxation. Reuven Avi-Yonah, *Are Exit Taxes Discriminatory?* 183 TAX NOTES FEDERAL 2349 (2024).

[126] Internal Revenue Code § 911, 26 U.S.C. § 911.

[127] Rev. Proc. 2023-34, § 3.39.

[128] Notice 2023-26.

[129] Internal Revenue Code §911(d)(1), 26 U.S.C. §911(d)(1).

of business,[130] for Section 911 purposes, an individual's offshore principal place of business qualifies as a tax home only if the individual lacks an "abode" within the United States.[131] In addition, a U.S. citizen seeking the foreign earned income exclusion must either be "a bona fide resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year"[132] or must "during any period of 12 consecutive months [be] present in a foreign country or countries during at least 330 full days in such period."[133] Section 911 is thus not without its interpretive complexities.[134]

Section 911 represents a unilateral and generous surrender by the United States of *in personam* tax authority over its qualifying citizens living abroad. Australia, Canada and the U.K. do not provide similar exclusions to individuals who remain taxable by those nations as continuing tax residents or

---

[130] *Bellwood v. Commissioner*, T.C. Memo 2019-135 at p.16-17.

[131] Internal Revenue Code §911(d)(3), 26 U.S.C. §911(d)(3).

[132] Internal Revenue Code §911(d)(1)(A), 26 U.S.C. §911(d)(1)(A).

[133] Internal Revenue Code §911(d)(1)(B), 26 U.S.C. §911(d)(1)(B).

[134] *See, e.g.*, *Bellwood v. Commissioner*, T.C. Memo 2019-135 (discussing "tax home," "abode" and "bona fide residence" in the context of Section 911); *Duke v. Commissioner*, 2020 U.S. Tax Lexis (discussing "tax home" and "abode" in the context of Section 911).

domiciliaries. In light of the Section 911 exclusion for foreign earned income, U.S. tax law can be more favorable for U.S. citizens living abroad than are the Australian, Canadian and U.K. income tax systems which do not extend any equivalent exclusion to overseas individuals deemed to be domiciled or resident at home for income tax purposes.

Section 911 does not reduce an overseas U.S. citizen’s net income tax burden when such citizen lives and works in a foreign nation with income tax rates equal to or greater than U.S. income tax rates. In that case, the credit for foreign income taxes paid by the overseas citizen fully offsets the U.S. income taxes otherwise owed by her. When the foreign tax credit wipes out an overseas citizen’s U.S. income tax liability, the Section 911 exclusion is financially redundant since this citizen living abroad does not owe any U.S. income tax by virtue of the dollar-for-dollar credit she receives against her U.S. income tax liability for the foreign income taxes she pays. Most overseas U.S. taxpayers live in nations such as Canada, U.K., Australia, France and Israel with substantial income tax rates.[135] In these settings, the §911 exclusion is typically superfluous since U.S. citizens living in these nations with income tax rates comparable

[135] *U.S CITIZENS ABROAD AND THEIR VOTING BEHAVIORS IN 2020*, https://www.fvap.gov/uploads/FVAP/Reports/FVAP-VoterBrief_211105_v1a.pdf.

to U.S. rates already benefit from the dollar-for-dollar credit against U.S. tax liability for the foreign income taxes these overseas citizens pay.

On the other hand, when a U.S. citizen works and lives in a foreign nation with relatively low income tax rates (or with no income tax at all), Section 911's exclusion of foreign earned income yields a substantial and unique tax benefit to the U.S. citizen. In these settings, the Section 911 exclusion assures that the U.S. citizen who pays no or minimal foreign income taxes also pays no U.S. income tax on her earned income up to Section 911's statutory maximum.

There are four potential justifications for Section 911's uniquely favorable treatment of U.S. overseas citizens' foreign earned income. First, symbols matter. Section 911 symbolically confirms that, as a matter of tax equity, U.S. taxation of its overseas citizens is not focused upon low-income, working overseas citizens or even middle class U.S. citizens who live and work abroad. In practice, the U.S. taxes affluent U.S. expatriates with capital-based income or with labor-based earnings more than the maximum annual exclusion of Section 911, currently $125,500. Section 911 thus serves as a symbolic confirmation of the progressivity of the Code's treatment of offshore Americans.

Second, as I discuss *infra*,[136] Section 911 could facilitate simplified reporting for rank-and-file overseas U.S. citizens whose income falls below the Section 911 maximum. The I.R.S. could promulgate a simplified return for overseas citizens all of whose income is excluded from U.S. taxation by Section 911.

A third justification for the Section 911 exclusion stems from the fact that a foreign nation with low (or no) income tax rates often has high sales, property and/or VAT taxes. Reflecting prevailing international practice, the Internal Revenue Code does not credit such foreign sales, property and VAT taxes against U.S. income taxes. Some might decry this result as unacceptable double taxation since the overseas U.S. citizen pays both U.S. income tax and foreign nonincome taxes without any credit for the latter against the former. When an overseas U.S. citizen with foreign earned income pays little or no foreign income taxes but pays significant foreign sales, property or VAT taxes, the Section 911 exclusion can be interpreted as abating this double taxation. In these contexts, the Section 911 exclusion serves as an implicit recognition of the noncreditable foreign sales, property and VAT taxes the overseas U.S. citizen pays. This overseas citizen protected by the Section 911 exclusion pays no U.S. income taxes but just pays foreign sales, property or VAT

---

[136] *Infra* at page 138.

taxes.

A final potential justification of the Section 911 exclusion is that it recognizes the enforcement difficulties of taxing the earned income of overseas Americans. This enforcement-related justification for Section 911 reinforces the progressivity-enhancing aspect of Section 911 by focusing taxation and thus enforcement activity upon those U.S. citizens who live abroad and who earn annual compensation-based income over $125,500 per year.

D) Taxing Pensions and Deferred Compensation

Among the areas of U.S. tax law condemned by critics is U.S. income taxation of the retirement savings of overseas Americans. However, U.S. tax treaties tell a different story: The U.S. has acknowledged the pension-related tax concerns of overseas Americans and has mitigated those problems via treaties which extend to U.S. citizens living abroad favorable income tax treatment for their participation in foreign retirement plans. The U.S. tax treaties with Canada and the U.K. grant to the two largest[137] groups of Americans living abroad favorable income tax treatment of their foreign pension savings. The U.S. model income

---

[137] The Federal Voting Assistance Program (FVAP) concludes that, among the nations in which adult U.S. citizens reside, Canada has the largest number of such U.S. citizens and the U.K. has the second largest number. Federal Voting Assistance Program, *U.S CITIZENS ABROAD AND THEIR VOTING BEHAVIORS IN 2020*, https://www.fvap.gov/uploads/FVAP/Reports/FVAP-VoterBrief_211105_v1a.pdf.

tax treaty suggests that similar relief should be granted to U.S. citizens who live in other foreign nations. When U.S. income tax is due on the distribution from "qualified" foreign pension plans, that U.S. tax is abated or eliminated by the Internal Revenue Code's credit for foreign income taxes. Thus, U.S. tax policy towards the foreign pensions of overseas Americans is more lenient than the critics suggest.

i) Background: Distinguishing Qualified Deferred Compensation from Nonqualified Deferred Compensation

Modern income tax systems typically distinguish between two kinds of deferred compensation for employees, what U.S. law calls "qualified" retirement savings in contrast to "nonqualified" deferred compensation.[138] "Qualified" retirement saving is favorably taxed via the immediate deductibility of plan contributions, the tax-free growth of such contributions, and deferred taxation which is delayed until the actual and eventual distribution of cumulative contributions and earnings to the employee or her beneficiaries. When, for example, a U.S. resident

---

[138] On the distinction between qualified and nonqualified retirement savings arrangements, *see* John H. Langbein, David A. Pratt, Susan J. Stabile and Andrew W. Stumpff, PENSION AND EMPLOYEE BENEFIT LAW (6th ed. 2015) at 287-315 (describing qualified retirement plans) and at 315-333 (describing nonqualified deferred compensation); Joseph Bankman, Daniel N. Shaviro, Kirk J. Stark and Edward D. Kleinbard, FEDERAL INCOME TAXATION (18th ed. 2019) at 293-308 (describing nonqualified deferred compensation) and at 309-314 (describing qualified retirement arrangements).

contributes to a 401(k) plan (a "qualified" retirement arrangement) by reducing her current salary, she excludes such contributed salary from her gross income,[139] thereby lowering her current income tax liability. The employer similarly receives a current deduction for its contributions to the plan.[140] Those employee and employer contributions, held in the 401(k) plan's trust, grow tax-free[141] and are only taxed when actually distributed (with earnings) from the 401(k) trust to the participating employee or to her beneficiaries.[142] That distribution may occur many years (often decades) in the future during which earnings continue to grow tax-free.

U.S. tax law extends another favorable pattern of tax treatment to Roth individual retirement accounts[143] and similar

---

[139] Internal Revenue Code § 401(k)(2), 26 U.S.C. § 401(k)(2) (describing "qualified cash or deferred arrangement"); Internal Revenue Code § 401(g), 26 U.S.C. § 401(g) (describing annual limits on "elective deferrals").

[140] Internal Revenue Code § 404(a)(3)(A)(i), 26 U.S.C. § 404(a)(3)(A)(i) (employer contribution to qualified profit sharing plan deductible "[i]n the taxable year when paid."

[141] Internal Revenue Code § 501(a), 26 U.S.C. § 501(a) (a trust holding assets of a qualified retirement plan is "[a]n organization...exempt from taxation").

[142] Internal Revenue Code § 402(a), 26 U.S.C. § 402(a) (amounts from qualified plan taxable to distributee when "actually distributed").

[143] Internal Revenue Code § 408A, 26 U.S.C. § 408A. On the emergence and tax treatment of Roth IRAs, *see* Zelinsky, *supra*,

Roth arrangements attached to qualified retirement plans.[144] There is no income tax deduction for Roth contributions.[145] However, the earnings of such contributions grow tax-free[146] and the ultimate distribution to the employee or her beneficiary of Roth contributions and earnings is generally income tax-free as well.[147] Under certain circumstances,[148] identically favorable results for the taxpayer are ultimately generated by these two patterns of qualified retirement compensation -- immediate deductibility of contributions to the plan, tax-free growth of plan earnings, taxability deferred until actual distribution of

---

note 37 at 70.

[144] Internal Revenue Code § 402A, 26 U.S.C. § 402A.

[145] Internal Revenue Code § 408A(c)(1), 26 U.S.C. § 408A(c)(1) (no deduction "for a contribution to a Roth IRA"); Internal Revenue Code § 402A(a), 26 U.S.C. § 402A(a) ("designated Roth contribution...shall not be excludable from gross income.").

[146] Internal Revenue Code § 408A(a), 26 U.S.C. § 408A(a) (Roth IRA is tax-free on earnings "in the same manner as an individual retirement plan"); Internal Revenue Code § 402A(f)(1)(A), 26 U.S.C. § 402A(f)(1)(A) ("designated Roth contribution" is made to a trust "exempt from tax under section 501(a)").

[147] Internal Revenue Code § 408A(d)(1), 26 U.S.C. § 408A(d)(1) ("Any qualified distribution from a Roth IRA shall not be includible in gross income."); Internal Revenue Code § 402A(d)(1), 26 U.S.C. § 402A(d)(1) ("Any qualified distribution from a designated Roth account shall not be includible in gross income.").

[148] Langbein et al, *supra*, note 138 at 298.

plan assets to employees or their beneficiaries v. no deductibility of contributions to the plan, tax-free growth of plan earnings, tax-free distribution of plan assets to participating employees or their beneficiaries.

These benign tax treatments of funds held in qualified retirement arrangements contrast with U.S. taxation of funded but "nonqualified" deferred compensation. A U.S. employee is taxed upfront on funded nonqualified compensation when that compensation vests in the employee, even though that compensation is not yet distributable to her.[149] Moreover, the earnings resulting from the investment of nonqualified compensation funds are immediately taxable – unlike the earnings of qualified plans which are untaxed until actually distributed to the plan participant, often at a much later date.[150] Such U.S. tax law

---

[149] The statutory basis for the income tax treatment of nonqualified deferred compensation is Code § 83. Internal Revenue Code § 83(a), 26 U.S.C. § 83(a). *See* Stephen A. Lind, Daniel J. Lathrope and Heather M. Field, FUNDAMENTALS OF FEDERAL INCOME TAXATION: CASES AND MATERIALS (20th ed. 2022) 866-874 (describing Code § 83). Included within the definition of "property" for purposes of § 83 is "a beneficial interest in assets (including money) which are transferred or set aside from the claims of creditors of the transferor, for example, in a trust or escrow account." Treasury Reg. § 1.83-3(e), 26 C.F.R. § 1.83-3(e) (parenthetical in original). Thus, the income taxation of a funded nonqualified deferred compensation program will typically be governed by § 83 as it will involve money being "set aside" "in a trust or escrow account." *Id.*

[150] If nonqualified deferred amounts are held by the employer as an asset of the employer, the income earned by these deferred

concepts as "constructive receipt" and "economic benefit" assure that income immediately available but channeled by U.S. taxpayers into nonqualified deferred compensation arrangements are currently taxable[151] to these taxpayers in contrast to the deferred taxation of amounts contributed to and earned in qualified retirement plans.

The underlying issue for overseas U.S. citizens is that, absent treaty relief, a foreign pension plan in which they participate, while qualified under the tax laws of that nation, is not qualified for U.S. income tax purposes because of such plan's foreign situs. Thus, absent treaty relief, a U.S. citizen is taxed currently on foreign pension contributions and earnings since foreign pension plans, by virtue of their foreign situs, are nonqualified arrangements for U.S. law purposes.[152]

ii) Canadian deferred compensation arrangements

---

amounts will be taxed to the employer like any other income earned by the employer. If nonqualified deferred amounts are conveyed to a nonqualified trust, the trust will be taxed on the income generated by these trust-held deferred amounts. Internal Revenue Code § 1(e)(2), 26 U.S.C. § 1(e)(2) (tax rates for trust "taxable income").

[151] *See* Treasury Regulation §1.451-2, 26 C.F.R. § 1.451-2 (discussing constructive receipt of income); Bankman et al., *supra*, note 138 at 286-298 (discussing constructive receipt and economic benefit).

[152] Internal Revenue Code § 401(a), 26 U.S.C. § 401(a) ("qualified trust" must be "created or organized in the United States").

Canada’s tax treatment of deferred compensation is similar to U.S. law, distinguishing between retirement savings which receive favorable income tax treatment and those retirement arrangements which are not taxed favorably. Analogous to a U.S. qualified retirement plan (like a 401(k) arrangement) are such tax-favored Canadian devices as a “deferred profit sharing plan.”[153] Like a U.S. employer contributing to a qualified plan, a Canadian employer deducts its contributions to such a “registered”[154] plan when contributions are made.[155] Just as income grows tax-deferred in a 401(k) plan or other U.S. qualified retirement arrangement, income earned by a Canadian trust holding the assets of a deferred profit sharing plan is tax-free.[156] Amounts from such Canadian plans are only taxed when finally “received” by a “beneficiary” from the “trustee.”[157]

Similarly, contributions to a registered Canadian pension

---

[153] ITA § 147.

[154] ITA § 147(1) (“In this section, **deferred profit sharing plan** means a profit sharing plan accepted by the Minister for registration for the purposes of this Act”) (bold in original).

[155] ITA § 147(8).

[156] ITA § 147(7).

[157] ITA § 147(10).

plan[158] are deductible for income tax purposes[159] and grow tax-free in the plan's trust.[160] These contributions and earning are only taxed when ultimately paid as a "pension benefit."[161]

On the other hand, "salary deferral arrangements" under Canadian tax law are analogous to nonqualified deferred compensation under U.S. tax law and are typically taxed earlier when earned even though not yet received.[162]

iii) Australian deferred compensation arrangements

By statute, Australian tax law includes the concept of constructive receipt.[163] The relevant statute[164] provides that, as a general rule, "an amount of ordinary income" is immediately taxable "as soon as it is applied or dealt with in any way on

---

[158] ITA § 147.1.

[159] ITA § 147.2(1).

[160] ITA § 149(1)(o).

[161] ITA § 56(1)(a)(i).

[162] The statutory grounding for the Canadian treatment of salary deferral arrangements is ITA 6(1)(a)(v), 6(1)(i), 6(11)-(14), 248(1). These provisions effectively tax "salary deferral arrangements on an accrual basis" subject to a rule which delays immediate taxation if there is a "substantial risk" of forfeiture. Krishna, *supra*, note 28 at 306-307. The rules of Internal Revenue Code § 83 are similar.

[163] Australian Taxation Office, Authorisation Number: 1052062478666, Date of advice: 24 November 2022.

[164] Subsection 6-5(4) of the ITAA 1997.

[the taxpayer's] behalf or as {the taxpayer] direct[s]." This statutory "constructive receipt rule... is designed to ensure that if an amount is applied or dealt with in any way on an individual's behalf or at an individual's direction, the individual is taken to have received the amount."[165] This result – immediate taxability of constructively received income – is the same as U.S. law provides for nonqualified compensation and as Canadian tax law provides for "salary deferral arrangements."

Australia has a system of mandatory private retirement savings, designated as "superannuation" plans. In U.S. terms, the Australian tax treatment of these superannuation devices combines and modifies traditional qualified plan taxation and Roth-style taxation.[166] Employer contributions to a superannuation fund are "usually" deducted by the employer and are "generally" excluded from the participating employee's income.[167] Contributions made by a participant into an Australian superannuation fund may be pre-

---

[165] Australian Taxation Office, Authorisation Number: 1052062478666, Date of advice: 24 November 2022.

[166] For an overview of Australia's tax treatment of superannuation arranagements, *see* Jonathan Barry Forman and Gordon D. Mackenzie, *Optimal Rules for Defined Contribution Plans: What Can We Learn from the U.S. and Australian Pension Systems?* http://ssrn.com/abstract=1954879 (2013) at 24-29.

[167] *Id.* at 24. CCH, AUSTRALIAN MASTER TAX GUIDE (72nd ed. 2023) ¶ 13-015; Income Tax Assessment Act 1997 § 280-10(1) ("Employers can usually deduct contributions they make in respect of their employees.").

tax ("concessional") contributions through "salary sacrifice" (i.e., 401(k)-style salary reduction) arrangements or be may be Roth-style, after-tax ("nonconcessional") contributions.[168] The superannuation plan itself pays a relatively low "concessional" tax of 15% on the amounts it receives which were deducted by the employer and excluded by the employee.[169] The superannuation plan also pays a relatively low "concessional" tax of 15% on its investment earnings.[170]

On distribution, superannuation payments, like U.S. Roth distributions, "are generally tax-free for people age 60 and over."[171]

---

[168] Forman and Mackenzie, *supra*, note 166 at 24-25; CCH, AUSTRALIAN MASTER TAX GUIDE (72nd ed. 2023) ¶ 13-730; Income Tax Assessment Act 1997 § 280-10(1) ("Individuals can usually deduct contributions they make in respect of themselves to most complyings superanuation funds.") and § 280-15; Australian Taxation Office, *Understanding concessional and non-concessional contributions* (August 1, 2023) available at https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/super/growing-and-keeping-track-of-your-super/caps-limits-and-tax-on-super-contributions/understanding-concessional-and-non-concessional-contributions.

[169] Forman and Mackenzie, *supra*, note 166 at 26; CCH, AUSTRALIAN MASTER TAX GUIDE (72nd ed. 2023) ¶ 13-010(1); Income Tax Assessment Act 1997 § 280-20.

[170] Forman and Mackenzie, *supra*, note 166 at 26; CCH, AUSTRALIAN MASTER TAX GUIDE (72nd ed. 2023) ¶ 13-010(2).

[171] Forman and Mackenzie, *supra*, note 166 at 28; Income Tax Assessment Act 1997 § 280-30(2) ("If the member is aged 60 or over, superannuation benefits (both lump sums and income streams) are tax-free if the benefits have already been subject to tax in

iv) U.K. "Pension Schemes"

The U.K.'s favorable tax treatment of approved "pension schemes" resembles the U.S. tax treatment of qualified plans and the Canadian tax treatment of tax-favored arrangements.[172] Analogous to the tax treatment for a qualified U.S. plan (such as a 401(k) arrangement), the employer contributing to an approved U.K. pension scheme receives an income tax deduction for its contributions. An employee contributing to such a U.K. pension scheme also receives a deduction or exclusion for her contributions while the assets of the U.K. pension scheme grow tax-free. Taxation eventually occurs on a deferred basis when such assets are ultimately distributed to the participant or her beneficiaries.[173]

---

the fund...This covers the great majority of superannuation members."). Australian Tax Office, *Tax on super benefits*, available at https://www.ato.gov.au/individuals-and-families/super-for-individuals-and-families/super/withdrawing-and-using-your-super/early-access-to-super/tax-on-super-benefits;

[172] The statutory basis for the U.K.'s tax-favored treatment of approved pension schemes is Chapter I of Part XIV of the Income and Corporation Taxes Act 1988. A helpful overview of the U.K.'s tax-favored treatment of approved pension schemes is HM Revenue & Customs, PENSIONS TAX MANUAL (May 13, 2024), available at https://www.gov.uk/hmrc-internal-manuals/pensions-tax-manual/ptm024100. An accessible summary of that tax treatment is Hunt, *supra*, note 82 at 115-120.

[173] HM Revenue & Customs, *supra*, note 172 at *PTM024100 - General principles: overview of pensions taxation: the basics* ("The UK's system of pensions tax relief is described as Exempt,

v) The problem, the critique and the U.S. model treaty

Critics fault U.S. tax law for taxing overseas U.S. citizens currently on pension contributions and earnings which are tax-deferred in the nations in which such U.S. citizens live and work.[174] Only U.S. retirement plans can be qualified for U.S. tax law purposes.[175] Consequently, a foreign employment-related deferred compensation plan which is qualified (and thus receives favorable tax treatment) in that nation is nonqualified for purposes of U.S. tax law because of its foreign situs. Absent treaty relief, a foreign pension plan does not generate favorable U.S. tax treatment.

For example, a Canadian arrangement, "qualified" under Canadian tax law, is not qualified under the terms of the Internal Revenue Code because only domestic U.S. trusts are qualified under the Code.[176] Absent treaty relief, an overseas U.S. citizen who participates in a tax qualified plan under the laws of the nation in which he lives is immediately taxable under

---

Exempt, Taxed (E, E, T)."); Hunt, *supra*, note 82 at 115-116; Income and Corporation Taxes Act 1988 §§ 592-593.

[174] Snyder, *supra*, note 6 at 567.

[175] Internal Revenue Code § 401(a), 26 U.S.C. § 401(a) ("qualified trust" must be "created or organized in the United States").

[176] *Id.*

U.S. law on the contributions to and earnings of such plan. Even though these amounts are not currently distributable to the U.S. citizen and are not currently taxable in the nation in which this citizen lives, these are nonqualified assets under the Internal Revenue Code of their foreign situs.

Dr. Alpert tells us that this "U.S. tax treatment of [Australian] superannuation" results in "unfair taxation by the US."[177] Dr. Snyder cites the U.S. tax treatment of foreign pensions as a reason that overseas citizens are not members of the American polity: "U.S. rules do not recognize non-U.S. tax advantaged retirement or other savings schemes."[178]

However, this criticism fails to acknowledge the extent to which the federal government has ameliorated the problem by extending via treaties "qualified" U.S. tax treatment to overseas U.S. citizens who participate in foreign pension plans. Indeed, the problem has been remedied for the two largest groups of overseas U.S. citizens[179] by the tax treaties the U.S. has negotiated with Canada and the U.K. Those treaties both implement the pro-taxpayer pension policy of the model U.S. income tax

---

[177] Alpert, *Update*, *supra*, note 7.

[178] Snyder, *supra*, note 6 at 567.

[179] See The Federal Voting Assistance Program, *supra*, note 137.

treaty.

The model U.S. treaty extends favorable treatment to a U.S. citizen residing abroad who is covered by a "pension fund established"[180] in the nation in which the U.S. citizen resides. In its model treaty, the U.S. treats this foreign pension fund as if it were a qualified U.S. plan with U.S. situs. Consequently, under the model U.S. tax treaty, instead of immediate taxation of the contributions to and the earnings of the foreign retirement plan, U.S. income taxation of the pension income earned by a U.S. citizen living and working abroad is deferred until she receives an actual distribution from the foreign plan[181] – just as if this foreign retirement arrangement were a qualified U.S. retirement plan.

Far from penalizing overseas U.S. citizens, the U.S. model treaty seeks tax parity for nonresident citizens by treating for U.S. tax purposes the foreign pensions in which they participate as if these overseas pensions were qualified U.S. plans entitled to favorable qualified treatment, i.e., immediate deductibility of contributions, tax-free growth of plan earnings, deferred income taxation until actual distribution of contributions plus earnings.

---

[180] U.S. Model Income Tax Treaty, Article 18(1).

[181] *Id.* at Articles I(5)(a), 17(2)(b) and 18(3)(a).

When actual distribution occurs from a foreign pension plan to an overseas U.S. citizen, U.S. income taxation of that distribution is abated by the credit for the foreign tax paid on that pension distribution.[182] If the applicable foreign tax rate equals or exceeds the U.S. tax rate, the credit ensures that no U.S. tax will be due. If the applicable foreign tax rate is less than the U.S. rate, the foreign tax credit ensures that U.S. tax will be due on the retirement distribution only to the extent of the excess of the U.S. tax rate over the foreign income tax rate.

In short, the model treaty embodies the policy critics of U.S. law favor by extending to overseas Americans favorable tax treatment of the foreign retirement plans in which such Americans participate. This policy has been implemented in practice by the United States' tax treaties with Canada and the U.K., the two countries with the largest U.S. expatriate communities.

vi) The U.S.-Canada Treaty Arrangements on Pension Savings

The tax treaty today in effect between the U.S. and Canada extends the favorable treatment of the model U.S. tax treaty to U.S. citizens resident in and working in Canada, the largest

---

[182] Internal Revenue Code § 901, 26 U.S.C. § 901 (credit against U.S. income tax "the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country...").

group of overseas U.S. citizens.[183] In the current version of the U.S.-Canada income tax treaty, the U.S. agrees that a U.S. citizen who lives and works in Canada will not pay current U.S. income tax on "contributions made to, or benefits accrued under, a qualifying retirement plan in Canada."[184] In addition, the U.S.-Canada treaty allows a U.S. citizen residing in Canada to elect to defer taxation of "any income accrued in the [Canadian] plan but not distributed by the plan, until such time as and to the extent that a distribution is made from the plan..."[185]

Consequently, a U.S. citizen living and employed in Canada pays no U.S. tax on any "qualified" Canadian retirement income until such income is distributed. When distributed, the U.S. income tax owed by such citizen is reduced by a credit for the Canadian income tax the U.S. citizen pays on the distribution. Thus, if Canadian taxes equal or exceed the U.S. taxes on this retirement distribution, the U.S. citizen living and working in

---

[183] The Federal Voting Assistance Program, *supra*, note 137.

[184] Protocol dated September 21,2007 amending the convention between the United States of America and Canada with respect to Taxes on Income and on Capital, 3 amending article XVIII by adding paragraph 13.

[185] *Id.* 3, amending article XVIII by adding paragraph 7. This provision applies not just to a U.S. citizen who works and lives in Canada but to any U.S. or Canadian citizen who has a pension arrangement in the other country. The IRS has implemented this provision by Rev. Proc. 2002-23.

Canada pays no U.S. tax on this retirement income, during the citizen's working career or upon ultimate distribution.

vii) The U.S.-U.K. Treaty Arrangements on Pension Savings

Like the U.S.-Canada tax treaty, the U.S.-U.K. tax treaty implements the policy of the model U.S. tax treaty by treating an approved U.K. pension arrangement as if it were a domestic retirement arrangement, qualified for U.S. tax purposes. This extends to U.S. citizens living and employed in the U.K. favorable U.S. income tax treatment on their contributions received and benefits accrued under qualified U.K. pension arrangements.

Article XVIII(5) of the U.S.-U.K. tax treaty applies to a U.S. citizen who lives and is employed in the U.K. and who participates in a U.K. "pension scheme."[186] If the U.S. "competent authority"[187] affirms that such U.K. "pension scheme generally corresponds to a pension scheme established in the United

[186] Article 18(5)(a), Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains (July 24, 2001).

[187] *Id.* at Article 3(1)(g) ("the term `competent authority' means: (i) in the United States: the Secretary of the Treasury or his delegate;").

States,"[188] neither contributions[189] to nor accrued benefits[190] earned under such U.K. pension scheme are currently taxed to the U.S. citizen for U.S. income tax purposes. While the U.S. generally reserves the right to tax U.S. citizens living in the U.K.,[191] under the treaty, the U.S. specifically waives its right to tax a U.S. citizen who lives and is employed in the U.K. on contributions to and accrued benefits under an approved U.K. pension arrangement "generally correspond[ing]" to a qualified U.S. plan.

The Secretary of the Treasury, in her capacity as the competent authority under the U.S.-Canada tax treaty, has not issued a formal statement for purposes of these treaty provisions.[192] However, both the technical explanation of the U.S.-U.K. tax treaty[193] and the customary exchange of notes[194]

---

[188] *Id.* at Article 18(5)(d)(i).

[189] *Id.* at Article 18(5)(a)(i).

[190] *Id.* at Article 1(5).

[191] *Id.* at Article 1(4)(a).

[192] However, the Secretary, through her delegate, has entered into a competent authority agreement concerning the dividends received by U.K. pension schemes. See IR-2005-44, April 13, 2005.

[193] Department of the Treasury, Technical Explanation of the Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and

clarify which U.K. retirement plans are deemed to "correspond" to U.S. pension plans and thus trigger treaty relief for U.S. citizens living and employed in the U.K.

viii) The Less Favorable U.S.-Australia Treaty Arrangements on Pension Savings

The favorable pension tax treatment extended by treaty to U.S. citizens living in Canada and in the U.K. contrasts with the less favorable tax treatment of U.S. citizens living in Australia with its superannuation system of mandatory private pension coverage. The U.S-Australia income tax treaty does not contain provisions comparable to the taxpayer-friendly pension-related terms of the model U.S. tax treaty, the U.S.-Canada tax treaty and the U.S.-U.K. tax treaty. Whereas a U.S. citizen living in Canada or in the U.K. owes no U.S. income tax on her contributions or accrued benefits under qualifying Canadian or U.K. pension arrangements, a U.S. citizen living in Australia owes current U.S. tax on contributions, earnings and benefits under any Australian superannuation plan in which he participates. That plan, while "qualified" for Australian law

---

on Capital Gains at 68 (Article 18(5) "applies with respect to retirement benefit schemes for the purpose of Chapter I of Part XIV of the Income and Corporation Taxes Act 1988.").

[194] United States response to United Kingdom note setting forth additional agreements regarding the U.S.-U.K. Double Taxation Convention, signed July 24, 2001, London at 6.

purposes, is not qualified under the Internal Revenue Code because of the Australian plan's foreign situs. There is no treaty relief for a U.S. citizen living in Australia and participating in that nation's superannuation arrangements.

Dr. Alpert argues that U.S. citizens resident in Australia should receive the taxpayer-friendly treatment provided for in the model U.S., U.S.-Canada and U.S.-U.K. treaties.[195] "With regard to retirement plans," Dr. Alpert correctly observes, "both the UK and Canada have more favourable US tax treaties than Australia."[196]

While there are differences in U.S and Australian tax law pertaining to the taxation of qualified retirement arrangements,[197] their tax treatments of their respective retirement devices are largely the same. Consequently, a revised

---

[195] Alpert, *Update*, *supra*, note 7 (supporting the "U.S. model tax treaty framework").

[196] *Id.*

[197] As to the deductible/excludable contributions made by or on behalf of a participant in an Australian superannuation arrangement, the superannuation fund pays Australian income tax at a lower ("concessionary") 15% rate. The earnings in that superannuation account are similarly taxed at a lower, ("concessionary") rate of 15%. Income Tax Assessment Act 1997 § 280-20; Forman and Mackenzie, *supra*, note 166 at 26; CCH, AUSTRALIAN MASTER TAX GUIDE (72nd ed. 2023) ¶¶ 13-010(1), 13-010(2). In contrast, no contributions to a qualified U.S. retirement plan are taxable to the plan and plan earnings are tax-free. Internal Revenue Code § 501(a), 26 U.S.C. § 501(a).

U.S.-Australian treaty should treat Australian superannuation accounts as having no U.S. tax consequences for a U.S. citizen living and working in Australia – at least as long as contributions are subject to limits similar to the contribution limits of U.S. qualified plan contributions. Such a treaty revision requires the consent of both nations, Australia as well as the U.S.

ix) Summary

By treaty, the two largest groups of U.S. citizens living abroad[198] in Canada and in the U.K. receive favorable U.S. tax treatment with respect to the pension arrangements of those two nations which resemble "qualified" U.S. retirement arrangements. For such an overseas U.S. citizen living abroad and participating in a qualified Canadian or U.K. deferred compensation arrangement, no U.S. tax is due until an actual distribution is made to the citizen or to her beneficiaries. Even on such distribution, U.S. income tax will be abated or eliminated by the U.S. foreign income tax credit. In the U.S. model treaty, the U.S. suggests extending this favorable treatment to U.S. citizens who live abroad in other nations.

E) FATCA and FBAR

[198] The Federal Voting Assistance Program, *supra*, note 137.

The Foreign Account Tax Compliance Act (FATCA)[199] is a chief target of critics of the United States' taxation of its overseas citizens.[200] Indeed, FATCA largely stimulated the current wave of criticism of U.S. citizenship-based taxation of Americans living abroad.

To combat tax evasion through the use of offshore assets, FATCA requires "foreign financial institutions"[201] to disclose to the I.R.S. information about financial accounts owned by "specified United States persons,"[202] a category which encompasses all U.S. citizens including U.S. citizens who live abroad.[203] FATCA also imposes upon all U.S. citizens, including overseas U.S. citizens, the obligation to disclose to the I.R.S.

---

[199] Internal Revenue Code §§ 1471-1474, 6038D, 26 U.S.C. §§ 1471-1474, 6038D.

[200] FATCA is a central target of the extensive blogosphere attacking U.S. taxation of its overseas residents. *See, e.g.,* Jane Fletcher, *Why didn't the international community unite to reject FATCA?*, Quora, https://www.quora.com/Why-didnt-the-international-community-unite-to-reject-FATCA.

[201] Internal Revenue Code § 1471(d)(4), 26 U.S.C. § 1471(d)(4).

[202] Internal Revenue Code § 1471(d)(1)(A), 26 U.S.C. § 1471(d)(1)(A).

[203] Internal Revenue Code §§ 1473(3), 7701(a)(30)(A), 26 U.S.C. §§ 1473(3), 7701(a)(30)(A).

information about their foreign financial assets.[204] The critics complain that FATCA deters foreign financial institutions from permitting overseas U.S. citizens to open and maintain financial accounts. This, the critics allege, makes it difficult, if not impossible, for Americans living abroad to conduct their routine financial affairs. FATCA's supporters counter FATCA-mandated disclosure is an important tool to combat income tax evasion through offshore accounts by U.S. citizens, including U.S. citizens who live offshore.

By statute[205] and by treaty,[206] U.S. tax law encourages foreign investment in the United States by granting foreign investors favorable income tax rates on U.S. source investment income. If, however, a foreign financial institution fails to comply with FATCA's disclosure requirements, Code Section 1471 instead imposes upon such institution a 30% tax[207] on the

---

[204] Internal Revenue Code § 6038D, 26 U.S.C. § 6038D.

[205] *See, e.g.*, Internal Revenue Code § 881(c), 26 U.S.C. § 881(c) ("no tax shall be imposed" on "any portfolio interest received by a foreign corporation from sources within the United States").

[206] *See, e.g.*, United States Model Income Tax Convention (2016), Article 10(2) (limiting income tax on dividends to 5% in some cases, 15% in others).

[207] Internal Revenue Code § 1471(a), 26 U.S.C. § 1471(a). If the 30% FATCA withholding tax applies, the amounts withheld pursuant to FATCA are "credit[ed]...against" other amounts which must be withheld. Internal Revenue Code § 1474(d), 26 U.S.C. §

institution's "withholdable payments," i.e., U.S. source investment income including interest, dividends and the sale proceeds of stocks or bonds.[208] To avoid this 30% tax (and thus receive the more favorable tax treatment for U.S. source investment income), a foreign financial institution must agree to identify any "United States account,"[209] defined as an account held in such foreign institution by "one or more specified United States persons."[210] The foreign financial institution must then report annually to the I.R.S. such information as the identity of the U.S. account holder, the balance of the United States account, and the funds moving into and out of the account.[211]

Exempted from these FATCA reporting requirements for foreign financial institutions are "depository accounts" maintained by "natural persons" at any foreign financial institution if the

---

1474(d); Treas. Reg. § 1.1474-6(e) example, Treas. Reg. § 1.1474-6(e) example ("WA may credit its withholding applied under chapter 4 against the amount of tax otherwise required to be withheld on this payment under section 1442").

[208] Internal Revenue Code § 1473(1), 26 U.S.C. § 1473(1).

[209] Internal Revenue Code § 1471(d)(1)(A), 26 U.S.C. § 1471(d)(1)(A).

[210] *Id.*

[211] Internal Revenue Code § 1471(c), 26 U.S.C. § 1471(c).

account has $50,000 or less.[212] For this purpose, institutions belonging to an "expanded affiliated group" are treated "as a single financial institution."[213] This $50,000 limit is not adjusted for inflation.

To implement the financial institution reporting requirements of FATCA, the United States has entered into agreements with many foreign nations.[214] These agreements (designated as intergovernmental agreements [IGA]) come in two versions. Under what is known as Model 1 IGA, the foreign nation signing the IGA effectively acts for FATCA purposes as an intermediary between the foreign nation's financial institutions and the I.R.S. Consequently, a foreign institution covered by a Model 1 IGA supplies to its home government information about the United States accounts this institution services. The home government then provides to the I.R.S. the information upon which the I.R.S. and that government agree. Under the alternative, designated as Model 2 IGA, the home government authorizes its financial institutions to provide information directly to the

---

[212] Internal Revenue Code § 1471(d)(1)(B), 26 U.S.C. § 1471(d)(1)(B).

[213] *Id.* Internal Revenue Code § 1471(e), 26 U.S.C. § 1471(e), Treas. Reg. § 1.1471-5(i), 26 CFR § 1.1471-5(i).

[214] I.R.S., *FATCA information for governments*, https://www.irs.gov/businesses/corporations/fatca-governments.

I.R.S. notwithstanding any law of the foreign nation which would otherwise preclude that information reporting.[215]

In addition to the obligations FATCA establishes for foreign institutions to disclose information to the I.R.S., FATCA added to the Internal Revenue Code Section 6038D which requires individuals to disclose on their respective U.S. income tax returns their foreign financial accounts and certain other "foreign financial assets."[216] An individual is exempt from Section 6038D's return-based reporting requirement to the extent that her foreign financial assets, including accounts, aggregate $50,000 or less.[217] Using her statutory authority to increase this exemption level,[218] the Secretary of the Treasury has provided more lenient treatment for U.S. citizens living abroad. Specifically, any unmarried overseas U.S. resident who qualifies

---

[215] FATCA also imposes upon certain "non-financial foreign entities" the 30% tax if the entity fails to disclose information about the entity's "substantial United States owners." Internal Revenue Code § 1471(d)(1)(B), 26 U.S.C. § 1471(d)(1)(B).

[216] Internal Revenue Code § 6038D, 26 U.S.C. § 6038D.

[217] Internal Revenue Code § 6038D(a), 26 U.S.C. § 6038D(a).

[218] *Id.* The Secretary has used her authority to clarify that, for married couples, the reporting threshold is foreign financial assets owned by either spouse at year end of $100,000. Treas. Reg. § 1.6038D-2(a)(3)(i), 26 C.F.R. § 1.6038D-2(a)(3)(i).

for Section 911's foreign earned income exclusion[219] need report to the I.R.S. her foreign financial assets only if, at the end of the year, such assets exceed $200,000,[220] i.e., four-times the statute's $50,000 reporting threshold applicable to U.S. citizens who live at home. For any married overseas resident, Section 6038D's reporting requirement is only triggered if, at year end, the foreign financial assets owned by either spouse exceed $400,000,[221] again, substantially more lenient treatment for U.S. citizens living abroad.

In addition to the return-based FATCA foreign asset reporting requirement, U.S. persons must also comply with the foreign account disclosure requirements of the Financial Crimes Enforcement Network (FinCEN) of the Department of the Treasury.[222]

---

[219] On the requirements for the Section 911 exclusion, *see* notes 129 through 134, *supra*, and accompanying text.

[220] Treas. Reg. § 1.6038D-2(a)(2)(i), 26 C.F.R. § 1.6038D-2(a)(2)(i).

[221] Treas. Reg. § 1.6038D-2(a)(4)(i), 26 C.F.R. § 1.6038D-2(a)(4)(i). As to all four of the relevant categories, i.e., single citizens living overseas, single citizens living at home, married citizens living abroad, and single citizens living at home, the regulations provide that the obligation to report foreign financial assets is triggered by somewhat higher asset value thresholds reached at any point during the year. Treas. Reg. § 1.6038D-2(a)(1)(ii), 26 C.F.R. § 1.6038D-2(a)(1)(ii); § 1.6038D-2(a)(2)(ii), 26 C.F.R. § 1.6038D-2(a)(2)(ii); § 1.6038D-2(a)(3)(ii), 26 C.F.R. § 1.6038D-2(a)(3)(ii); § 1.6038D-2(a)(4)(ii), 26 C.F.R. § 1.6038D-2(a)(4)(ii).

[222] IR-2024-148 (May 28, 2024).

The obligation to file FinCEN's Form 114, Report of Foreign Bank and Financial Accounts (FBAR), is triggered by ownership and/or control over foreign financial accounts whose aggregate value during the year exceeded $10,000. Like the FATCA reporting thresholds, the $10,000 FBAR reporting trigger is not adjusted annually for increases in the cost-of-living.

While the FATCA and FBAR reporting requirements apply to all U.S. citizens, critics maintain that these provisions disproportionately impact overseas citizens as foreign banks shun U.S. customers rather than risk FATCA's 30% withholding tax on U.S. investment income. The upshot, we are told, is the "refusal by foreign financial institutions to service" overseas U.S. citizens and the "closure of [such citizens'] foreign financial accounts."[223]

To ameliorate the perceived FATCA-caused reluctance of foreign banks to allow Americans living abroad to establish bank accounts for their routine financial affairs, American Citizens

[223] La Torre Jeker, *supra*, note 8 at 274. *See also* The Association of Americans Resident Overseas, *Residence-Based Taxation: A Necessary and Urgent Tax Reform*, available at https://www.aaro.org/residence-based-taxation-rbt (February 10, 2013) (As a result of FATCA, FBAR and citizenship-based taxation, overseas U.S. citizens "are being denied access to banking and other financial services"); Richard White, *FATCA: Who Forgot to Attach the Carrot to the Stick*, 10 *Geo. Mason J. Int'l Com. L.* 78, 80 (2018) ("According to a Democrats Abroad Survey, as of 2014, one in every five Americans living abroad were affected by the closure of an account in a foreign bank due to the FATCA.").

Abroad, Inc. calls for a "Same Country Exception" for FATCA reporting.[224] This exception would exempt from foreign banks' FATCA reporting requirements "bank and investment accounts in the country where [overseas U.S. citizens] are legitimately resident thus alleviating the many problems US citizens overseas face due to FATCA reporting, primarily financial account lockout which leaves many without banking and investment services while living and working overseas."[225] Another possibility is to exempt from financial institutions' FATCA reporting requirements the larger accounts which are now exempt from an overseas citizens' duty to report to the IRS.[226] According to Professor Mason, "relief from FATCA, FBAR, and tax filing requirements for nonresidents" is "worthy of serious consideration."[227]

While FATCA has its critics, it also has its defenders.

---

[224] American Citizens Abroad, Inc., *Expatriates Group Reiterates Call for FATCA Relief*, 2022 TNTI 174-22 (September 7, 2022).

[225] *Id.*

[226] Treas. Reg. § 1.6038D-2(a)(2)(i), 26 C.F.R. § 1.6038D-2(a)(2)(i). I propose *infra* that these two approaches be combined by exempting from institutions' FATCA reporting requirements accounts established by Americans in the countries in which they live to the extent such accounts are less than the higher reporting thresholds. *See infra* at page 143.

[227] Mason, *supra*, note 4 at 237. I agree. *See* discussion *infra* at page 138 (proposing simplified "postcard" filing for many overseas U.S. citizens) and at page 142 (proposing simplification of FATCA and FBAR disclosure requirements).

Professor Kim, for example,[228] credits FATCA with having stimulated and served as the model for the OECD's Common Reporting Standards (CRS) project. "The CRS calls on governments to obtain detailed account information from their financial institutions and to exchange that information automatically with other jurisdictions on an annual basis."[229] Thus, FATCA is today not unique, but rather has served as the forerunner of greater "global transparency on tax information"[230] "to combat offshore tax evasion."[231] Among the victories of this FATCA-led effort, Professor Kim tells us, has been Switzerland's "aband[ment of] its Bank Secrecy Law and [its] cooperat[ion] to provide tax information of its bank customers to the customers' residence countries."[232]

---

[228] Kim, *supra*, note 39 at 360.

[229] *Id.* at 360-361.

[230] *Id.* at 362.

[231] *Id.*

[232] *Id. See also* Robert T. Kudrle, *The New Global Attack on Personal Tax Evasion Using Foreign Investment and the Role of the United States*, 47 DENV. J. INT'L L. & POL'Y 147, 154-155 (2019) (summarizing the Common Reporting Standard).

In this same vein, Professors Kirsch[233] and Avi-Yonah[234] support FATCA as facilitating enforcement of U.S. income taxation of its overseas citizens. The Congressional Research Service concludes that, while there is "anecdotal evidence" that FATCA hinders overseas U.S. citizens from maintaining routine financial accounts abroad, foreign institutions should have less concerns about servicing offshore Americans "as FATCA compliance issues become better understood and the adoption of the CRS becomes more widespread."[235]

F) Summary

U.S. taxation of its overseas citizens is better in practice than critics maintain. When compared with the manner in which other nations actually tax their residents living abroad on their

---

[233] Kirsch, *supra*, note 4 at 170-171 ("arguments against citizenship-based taxation due to the IRS's inability to enforce the law are much weaker than they previously were, particularly once FATCA enforcement begins.").

[234] Reuven S. Avi-Yonah, *Taxing Nomads: Reviving Citizenship-Based Taxation for the 21st Century* (2022), U. of Mich. Law & Economics Working Papers 237 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4181471 at 14 ("I do believe that today, it is possible to administer the taxation of non-resident US citizens by relying on FATCA.") and at 16 ("The enactment of FATCA means that it is no longer easy for US citizens living overseas to evade US taxation, and they are also much more aware of their US citizenship.").

[235] Congressional Research Service, *The Foreign Account Tax Compliance Act (FATCA)* (July 15, 2022) at page 2 available at https://crsreports.congress.gov/product/pdf/IF/IF12166.

worldwide incomes, U.S. citizenship-based taxation is more administrable than other nations' systems which require fact-intensive inquiries about domicile and residence. Besides being more enforceable, U. S. taxation of its overseas citizens on their worldwide incomes is neither as idiosyncratic nor as harsh as critics contend. Other nations' systems also reach "extraterritorially," taxing the worldwide incomes of individuals who live abroad but who remain for tax purposes residents and domiciliaries of their home nations.

In important respects, the uniqueness of U.S. citizen-based taxation is in practice taxpayer-friendly, gentler than other nations' taxation of their overseas residents' worldwide incomes. Code Section 911's exclusion of foreign earned income is sui generis in its favorable treatment of U.S. citizens living abroad. The U.S. exit tax is harder to trigger than the Canadian and Australian exit taxes and also provides to former U.S. citizens unique and generous exemptions from U.S. exit taxation.

Upon examination, two other facets of U.S. tax law – FATCA and U.S. taxation of overseas citizens' employment-based pensions - fare better than critics maintain. The Treasury has granted U.S. citizens living abroad significantly higher thresholds than U.S. citizens living at home for mandatory reporting of foreign financial assets on such citizens' U.S. income tax returns. By treaty, the U.S. has also relieved U.S. citizens living and working in Canada and in the U.K. (the two largest U.S. expatriate communities) of U.S. taxation of foreign pension contributions and earnings. The U.S. model treaty reflects a willingness to extend this relief to other U.S. citizens living and working abroad.

Some criticism of U.S. taxation of its overseas citizens is telling. For example, U.S. income tax filing for most citizens abroad can and should be simplified.[236] Critics today generally cite the flaws of the status quo, not to remedy those flaws, but to justify the abolition of U.S. taxation of its overseas citizens. For these critics, the fundamental issue is that U.S. citizens living abroad owe no duty of support to the American political community. Thus, the ultimate, theoretical issue which separates these critics from the supporters of citizenship-based taxation is the nature of U.S. citizenship. It is to this underlying issue that this Article now turns.

III) The Fiscal Citizenship Justification for Citizenship-Based Taxation

As a matter of theory, the principle of "fiscal citizenship" justifies the United States' income taxation of U.S. citizens who

[236] *See* discussion *infra* at page 138 (proposing simplified "postcard" filing for many overseas U.S. citizens).

live abroad. Overseas U.S. citizens are, by virtue of their legal citizenships, members of the American political community. That national community legitimately calls upon all U.S. citizens, including those living abroad, to support the community through income tax payments as an exercise of fiscal citizenship. As members of a national political community, all U.S. citizens, including overseas citizens, have a normative obligation to support the community of which they are a part based on such citizens' abilities to pay. Duties as well as rights are integral to U.S. citizenship. While fiscal citizenship can be (and often is) implemented by means other than citizenship-based taxation, the notion of fiscal citizenship supports citizenship-based taxation including U.S. income taxation of its offshore citizens.

While the term "fiscal citizenship" is relatively new to tax discourse, the antecedents of this concept are deep. Consider initially *Trop v. Dulles*, 356 U.S. 86, (1958), in which the U.S. Supreme Court affirmed the primacy of the obligation of U.S. citizens to pay taxes. Mr. Trop was deemed to have lost his U.S. citizenship by briefly deserting from the Army in World War II. A five-justice majority reversed Mr. Trop's loss of citizenship for his short-lived desertion.

In a plurality opinion for himself and three of his colleagues, Chief Justice Warren declared that "[t]he duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and well-being of the Nation."[237] As the two exemplars of the "basic responsibilities of citizenship," the Chief Justice cited a citizen's obligation "to pay his taxes" as well as a citizen's duty "to abide by the laws safeguarding the integrity of elections."[238]

Justice Brennan's separate *Trop* concurrence was of controlling significance since Justice Brennan provided the fifth, deciding vote restoring Mr. Trop's U.S. citizenship. Justice Brennan, like the rest of the *Trop* majority, cited the payment of taxes as a crucial obligation of citizenship:

> As citizens we are also called upon to pay our taxes and to obey the laws, and these duties appear to me to be fully as related to the nature of our citizenship as our military obligations.[239]

Five decades before *Trop*, in *Couts v. Cornell*, 147 Cal. 560, 561–62 (1905), California's Supreme Court similarly articulated the linkage between citizenship and the duty to pay tax: "The obligation to pay his just proportion of the taxes legally levied is one of the highest civic duties of the citizen to the

[237] *Trop,* 356 U.S. at 92.

[238] *Id.*

[239] *Id.* at 113.

state."[240]

Even earlier, George Washington identified a citizen's fundamental duties to the nation as paying taxes and military service:

> Every citizen who enjoys the protection of a free government owes not only a portion of his property, but even of his personal services to the defense of it.[241]

These statements reflect an understanding of U.S. citizenship which became pronounced toward the end of 19th century and which we today call "fiscal citizenship." Professor Mehrotra, in his narrative of the events surrounding the emergence of progressive income taxation,[242] characterized these events as "redefin[ing] the social meaning of modern

[240] See also *United States v. Lucienne D'Hotelle de Benitez Rexach*, 558 F. 2d 37, 42 (1st cir. 1977) ("American citizenship implies not only rights but also duties, not the least of which is the payment of taxes."); *Estate of Vriniotis v. Commissioner of Internal Revenue*, 79 T.C. 298, 304 (1982) ("The courts have consistently held that U.S. citizenship implies not only rights but also duties, one of which duties is the payment of taxes.") (holding that estate of dual Greece-U.S. citizen who died in Greece owed U.S. estate taxes); *United States v. Goodman*, 2012 U.S. Dist. LEXIS 108724 at *23, 2012-2 U.S. Tax Cas. (CCH) P50,503, 110 A.F.T.R.2d (RIA) 2012-5556, 2012 WL 3150534 ("The responsibility of every citizen to pay taxes is well-settled.").

[241] John Avlon, WASHINGTON'S FAREWELL: THE FOUNDING FATHER'S WARNING TO FUTURE GENERATIONS (2017) 105.

[242] Ajay K. Mehrotra, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877-1929 (2013).

citizenship."[243] In the late 19th and early twentieth centuries,

> new forms of taxation based on rejuvenated egalitarian principles...recalibrate[d] thinking about fiscal citizenship. Belonging to a broader political and social community meant that taxes were no longer simply the price paid for government services and benefits. Instead, the new democratic meaning of civic identity was based on the idea that each citizen owed a debt to society in proportion to his or her "ability to pay."[244]

The influential economist Edwin R.A. Seligman was an important figure in these events and was an early, prominent proponent of what is today labeled "fiscal citizenship."[245] Seligman's comments are of continuing relevance to today's debate about citizenship-based taxation.[246] Rejecting the then-prevailing notion that an individual's obligation to pay tax is limited to

[243] *Id.* at 11.

[244] *Id.* at 12-13. *See also id.* at 19 ("this new fiscal order reconfigure[d] the meaning of modern American citizenship"). *See also id.* at 129 (federal income tax adopted in 1894 reflected "the notion that, no matter where they resided in the world, well-heeled U.S. citizens – individuals and corporations alike – had a social obligation and an ethical duty to share the burden of financing the modern American state.").

[245] *Id.* at 11 ("especially Edwin R.A. Seligman"). *See also id.* at 98-104 (describing Seligman's background and career) and at 133 ("The professor had long been a champion of the graduated income tax, and by the mid-1890s he had become one of the leading academic authorities on taxation.").

[246] *See, e.g.*, Avi-Yonah, *supra*, note 234 at 7 and 19; Snyder, *supra*, note 6 at 547.

the individual's receipt of government benefits, Seligman declared that we instead support the state through tax payments because "the state is an integral part of us."[247] There is, Seligman postulated, a "moral obligation to pay taxes as a contribution to society"[248] based on the taxpayer's ability to pay. In this same vein, Seligman's colleague, Richard T. Ely, opined that "[t]he citizen pays [tax] because he is a citizen, and it is his duty as a citizen to do so. It is one of the consequences which flow from the fact that he is a member of organized society."[249]

A critical event in the emergence of U.S. fiscal citizenship was the adoption of the 1913 federal income tax statute. That statute (like the earlier Civil War income tax and the current Code) applied to all U.S. citizens including citizens living abroad:

> This commitment to worldwide taxation based on citizenship reinforced the notion that the new levy was linked not to the benefits conferred by any particular sovereign state, but rather to the principle that all American citizens – no matter where they lived – had a social obligation and ethical duty to pay their fair share of U.S. tax burdens based on their ability to pay...The new law also

[247] Zelenak, *supra*, note 13 at 24 (quoting Seligman).

[248] *Id.* at 53 (quoting Seligman).

[249] Mehrotra, supra, note 242 at 114 (quoting Ely).

> extended this concept of fiscal citizenship to corporate entities.[250]

It is generally agreed that the precise term "fiscal citizenship" was first used by the eminent public finance economist Richard A. Musgrave in 1996.[251] Professor Musgrave deployed this term to contrast an "impersonal" tax like a value added tax, collected "at the business level only," with a personal income tax paid by each citizen:

> Moving to a wholly depersonalized system would reduce taxpayer awareness of the fiscal process and thereby dilute responsible fiscal citizenship.[252]

Professor Zelenak has also focused attention upon the notion of fiscal citizenship and the Seligman tradition. Professor Zelenak observed that

> fiscal citizenship is performed by contributing one's appropriate share – however modest – toward the financing of the political community of which one is a member. In its second aspect, fiscal citizenship is exercised by becoming informed about government taxing and spending policies, and by becoming involved (as least as a voter, and perhaps more deeply) in the determination

---

[250] *Id.* at 280.

[251] Richard A. Musgrave, *Clarifying Tax Reform*, 70 TAX NOTES 731, 732 (1996), 96 TNT 27-60.

[252] *Id.*

of those policies.[253]

Central to Professor Zelenak's analysis of fiscal citizenship is the much-criticized U.S. income tax filing system. There are, he tells us, "fiscal-citizenship benefits" which stem from "return-based mass taxation."[254] The annual filing process fulfills "the important civic purpose of recognizing and formalizing the financial responsibilities of citizenship."[255] This process brings "the taxpayer's attention to his status as a taxpayer and a purchaser of civilization."[256] "Filing a tax return is a ceremony of fiscal citizenship, analogous to voting as a ceremony of political citizenship."[257]

Which is not to say that the current filing system is perfect. Like other observers of contemporary tax law, Professor Zelenak advocates the simplification of tax filing.[258] "There is

---

[253] Zelenak, *supra*, note 13 at 17 (parenthetical in original). *See also id.* at 24 (quoting Seligman).

[254] *Id.* at 124.

[255] *Id.* at 4.

[256] *Id.*

[257] *Id.* at 17. *See also id.* at 119 (Voting and tax return filing are the two "great ceremon[ies] of citizenship.") and 120 ("Voting is an act of political citizenship and an important civic ceremony...paying one's income tax is an act of fiscal citizenship and an important civic ceremony...).

[258] *Id.* at 121-124.

good reason...to suspect that the potential civic benefits of the return-filing requirement have been seriously eroded by the increasing complexity of the income tax rules applicable to most taxpayers."[259] "Overwhelming complexity in return preparation," Professor Zelenak concludes, "undermines fiscal citizenship..."[260]

However, Professor Mehrotra identifies a potential paradox in this context: If return filing is made too "painless and simple," such filing may forfeit the fiscal citizenship benefits of such filing by making "citizen-taxpayers...less engaged."[261]

What about a taxpayer who owes no tax or who actually obtains a net payment from the federal fisc? The paradigmatic case of such a taxpayer is a working parent entitled to a refundable earned income tax credit (EITC).[262] According to Professor Zelenak, this parent, by filing her federal income tax return and claiming the refundable credit, engages in "an exercise in fiscal citizenship, despite the absence of any cash transfer from the parent to the Treasury."[263] Congress has defined

---

[259] *Id.* at 113.

[260] *Id.* at 121.

[261] Ajay K. Mehrotra, *Reviving Fiscal Citizenship*, 113 MICH. L. REV. 943, 966 (2015) (book review).

[262] Internal Revenue Code §32, 26 U.S.C. § 32.

[263] Zelenak, *supra*, note 13 at 32.

this parent's "primary civic responsibility" to be to work to support herself and her family.[264] Congress defines the federal government's corresponding duty to be its tax-based assistance to this taxpayer:

> Under this view, filing an income tax return in order to claim the EITC serves as a ceremony documenting a low-wage worker's satisfaction of his social duty to work for a living.[265]

This analysis proves helpful when we consider the argument advanced by critics of citizenship-based taxation that many overseas U.S. citizens do not actually owe U.S. tax and thus should be spared the bother of U.S. tax filing obligations.[266]

Joseph J. Thorndike finds "fiscal citizenship" a useful concept albeit one often used "vaguely."[267] While Thorndike had defined "fiscal citizenship" as "the web of reciprocal rights and responsibilities that binds the individual to the state and the state to the individual," he now thinks that definition "falls

---

[264] *Id.*

[265] *Id.* at 70.

[266] *See infra* at page 129.

[267] Joseph J. Thorndike, *Tax History: Fiscal Citizenship Gives You a Stake in Other People's Taxes*, 182 TAX NOTES FEDERAL 418 (2024).

short."[268] Thorndike now expands the definition of fiscal citizenship to also include "the responsibilities citizens owe to *one another* when it comes to paying taxes"[269]:

> Taxes...are the tie that binds citizens to the state. But they are also, crucially, the tie binding citizens to one another.[270]

In support of this broader definition of fiscal citizenship, Thorndike cites the European scholars Charlotte Schmidt, Eva Matthaei and Hans-Joachim Lauth.[271] They identify "reciprocity" among citizens as a key element of fiscal citizenship. From the vantage of the critics of the United States' citizenship-based income taxation, it is anomalous for these European scholars to focus upon "fiscal citizenship." Only the U.S. income tax, we are told by the critics[272], concerns itself with citizenship.

However, the analysis advanced by Schmidt, Matthaei and

---

268 *Id.*

269 *Id.*

270 *Id.* at 419.

271 Charlotte Schmidt, Eva Matthaei and Hans-Joachim Lauth, *Conceptualizing Fiscal Citizenship*, Working Paper No. 2, The Fiscal Citizenship Project (April, 2023) available at https://fiscal-citizenship.com/wp-content/uploads/Working-Paper-No.2-April-2023-Schmidt-Matthaei-Lauth-Conceptualizing-Fiscal-Citizenship_CS.pdf.

272 *See* note 8 *supra* (discussing criticism of U.S. citizenship-based taxation as "unique").

Lauth implies that the Internal Revenue Code, which formally imposes worldwide income taxation on the basis of legal citizenship, has more in common with other nations' tax systems than the critics maintain. Those other systems implement their versions of "fiscal citizenship" by imposing legal tax liability on the basis of domicile or residence. The U.S. more efficiently imposes the tax obligation of fiscal citizenship through the marker of legal citizenship.

Schmidt, Matthaei and Lauth define "fiscal citizenship" "as a multidimensional trait composed of behaviors, attitudes, and identifications of citizens toward the state and towards their fellow citizens, that emerge through taxation."[273]

> As a central element of the social contract, taxation lies at the heart of any civil state because tax payments provide the state with funds to finance public goods and guarantee the rights that accompany citizenship. Tax compliance is therefore essential to fully enable the concept of citizenship.[274]

From this vantage, societies which mandate income tax liabilities on the basis of domicile or residence thereby impose duties of "fiscal citizenship" since "formal citizenship status"

---

[273] Schmidt, *supra*, note 271 at 3.

[274] *Id.*

is not necessary for "fiscal citizenship."[275] By emphasizing that "fiscal citizenship" is not just a relationship between citizens and the state but is also about "horizontal relations between fellow citizens,"[276] Schmidt, Matthaei and Lauth reinforce the Seligman tradition that members of political communities have a "moral obligation to pay taxes as a contribution to society."[277]

Similarly reinforcing the Seligman, ability-to-pay tradition is Professor Avi-Yonah's recent endorsement of citizenship-based taxation "under [the] changing conditions" of the post-Pandemic world.[278] Although he does not use the term "fiscal citizenship," Professor Avi-Yonah plants his embrace of citizenship-based taxation squarely upon Seligman's oeuvre.[279] Under current, post-Covid conditions (most prominently, the "newfound ability" of the

---

[275] *Id.* at 28.

[276] *Id.* at 7. *See also* Charlotte Schmidt and Eva Maataei, *Conceptualizing fiscal citizenship* in TAXATION, CITIZENSHIP AND DEMOCRACY IN THE 21ST CENTURY (Yvette Lind and Reuven S. Avi-Yonah, ed.) (2024) at 68 ("Fiscal citizenship comprises the behaviors, attitudes, and identifications of citizens toward the state and towards their fellow citizens which arise through the payment of taxes and are based on the idea of reciprocity.") and at 79 (same).

[277] Zelenak, *supra*, note 7 at 53 (quoting Seligman).

[278] Avi-Yonah, *supra*, note 234 at 5.

[279] *Id.* at 7 ("Seligman, I believe, would have approved.") and at 19 (same).

"new nomads" "to work remotely" throughout the globe[280]), Professor Avi-Yonah contends that Seligman's "ability to pay principle"[281] is best implemented by citizenship-based taxation:

> [T]he US approach to taxing its citizens on global income regardless of where they live is justified by the ability to pay principle...Seligman, I believe, would have approved.[282]

In the contemporary world of greater mobility among nations, Professor Avi-Yonah concludes, "the country of citizenship should be able to impose any non-zero tax rate it wants on its citizens" as they are the "adult members of a political community."[283] Critical to Professor Avi-Yonah's conclusion is the ability of nonresident citizens as members of the political community "to vote and thereby determine the appropriate tax rates and the degree of progressivity of the tax rate schedule."[284]

Professor Avi-Yonah criticizes the Internal Revenue Code for requiring noncitizen residents of the U.S. to pay U.S. income tax on their respective worldwide incomes.[285] Since these noncitizens

---

[280] *Id.* at 4.

[281] *Id.* at 5.

[282] *Id.* at 7.

[283] *Id.*

[284] *Id.* at 5.

[285] *Id.* at 2 and 6.

lack the right to vote, he argues, they should just be taxed by the U.S. as if they were nonresident aliens, i.e., only on their U.S. source incomes, not taxed on a worldwide, ability-to-pay basis as if they were U.S. citizens.[286]

For two reasons, I disagree and support the Code's citizenship-like taxation of U.S. resident aliens on their respective worldwide incomes. First, the U.S. taxation of the worldwide incomes of noncitizen residents is formally similar to the practices of other nations which tax individuals' worldwide incomes on the basis of their residence. Second, alien residents of the U.S. are properly-characterized as "quasi-citizens"[287] who receive substantial legal protections from U.S. law.[288] If noncitizens residing in the U.S. were only taxed on their U.S. source incomes, such noncitizen residents (particularly those with significant nonU.S. incomes) would be incented to remain as noncitizens, enjoying the legal (and other) benefits the U.S. provides to them as residents while avoiding a chief obligation of U.S. citizenship, i.e., supporting the U.S. political

---

[286] *Id.*

[287] Rainer Baubock, *Political Membership and Democratic Boundaries* in Ayelet Shachar, Rainer Baubock, Irene Bloemraad and Maarten Vink (eds.), THE OXFORD HANDBOOK OF CITIZENSHIP (2017) 67 (hereinafter, Shachar et al., "OXFORD HANDBOOK").

[288] *See* note 310 *infra*.

community on the basis of ability-to-pay taxation as measured by worldwide income.

In this vein, one prominent commentator on citizenship observes that, "when liberal states disconnect rights from citizenship status and grant them to permanent residents," such residents "lack then instrumental incentives for naturalization."[289] That would be the case if aliens residing in the U.S. were treated for tax purposes like nonresident aliens, taxed only on U.S. source income. Such resident aliens might conclude that they can have the best of both worlds by eschewing U.S. citizenship, thereby receiving the rights bestowed by U.S. law by virtue of residence without supporting the U.S. polity in accordance with their respective abilities-to-pay as measured by their worldwide incomes. The Code instead encourages noncitizen residents to embrace citizenship by taxing them on their worldwide incomes as if they were citizens.

Professor Michael S. Kirsch is another well-known commentator whose writings on citizenship-based taxation reinforce the notion of fiscal citizenship:

> There are strong arguments for treating citizens abroad as members of U.S. society for purposes of the distributional equity analysis. For example, a citizen living overseas who retains his U.S. citizenship is,

[289] Baubock, *supra*, note 287 at 73.

> at least indirectly, expressing a voluntary identification with the United States, and accordingly, it is reasonable to conclude that this retention reflects a self-identification with the population of the United States or the belief that the benefits of citizenship are worth the tax cost.[290]
>
> 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 or may not receive.[291]

Through the lens of fiscal citizenship, there is, as a substantive matter, significant congruence between U.S. tax law, which defines membership in the American polity by means of legal citizenship, and other nations' tax laws, which define membership in those communities via such concepts as domicile or residence. Under both approaches, the underlying task is to delineate who are the "fiscal citizens" of each of these nations, i.e., the individuals who are members of the national political community with the attendant responsibility to support the community via their tax payments even when they are overseas.

U.S. tax law uses a objective marker – legal citizenship – to determine fiscal citizenship in the American polity. Other nations deploy more subjective, fact-based standards – domicile

[290] Kirsch, supra, note 4 at 125 (brackets, internal quotation marks, and internal citations deleted).

[291] *Id.* at 126.

and/or residence – to establish their versions of fiscal citizenship in those national communities. However, the underlying enterprise is the same in both cases, namely, to determine who is a fiscal citizen, obligated by membership in the national community to support it through tax payments.

In my 2011 article, I observed that the concepts of citizenship and domicile both reflect permanent allegiance to the nation in question.[292] This overlap allows legal citizenship to be seen as an objective proxy for domicile for tax purposes. The concept of fiscal citizenship illuminates the other side of coin. Domicile and domicile-like concepts of residence deployed for tax purposes are means of identifying fiscal citizens, members of the political community who, by virtue of such membership, are obligated to furnish tax-based support to the community even if they live abroad.

It is thus unsurprising that, when the outcomes achieved by other nation's tax systems are compared with U.S. taxation of its overseas citizens, in practice the United States' "extraterritorial" income taxation of its citizens living offshore is less unique than the critics maintain. U.S. citizens living abroad are deemed to be members of the U.S. polity just as

[292] Zelinsky, *Citizenship and Worldwide Taxation, supra*, note 3 at 1350.

other nations deem overseas domiciliaries and residents to be members of those national communities with the attendant obligation to support those nations through tax payments on such members' worldwide incomes. Under the tax laws of Canada and Australia, Mr. McFadyen,[293] Mr. Duff[294] and Mr. Iyengar[295] were deemed to be residents and thus fiscal citizens, members of their respective national communities for tax purposes though living abroad.

Consequently, the most unique feature of U.S. law is not the taxation of its overseas citizens' worldwide incomes. U.S. taxation produces results similar to other nations' taxation of their overseas citizens who are deemed to reside at home for tax purposes. Rather, the most unusual feature of U.S. law taxing its overseas citizens is the generosity of U.S. law towards its overseas citizens in the form of the Code Section 911 exclusion of foreign earned compensation. The U.S. would be justified in taxing its overseas citizens on the first dollar of their respective taxable incomes, just as U.S. citizens living at home pay income tax on the first dollar of their respective taxable incomes and as overseas residents of other nations pay tax on the

[293] *See* notes 29 through 39, *supra*, and accompanying text.

[294] *See* notes 44 through 58, *supra*, and accompanying text.

[295] *See* notes 60 through 74, *supra*, and accompanying text.

first dollar of their respective taxable incomes. But, despite the United States’ strong theoretical claim for support from its citizens living abroad, the U.S. generously and uniquely exempts from U.S. taxation the first $126,500 of such citizen’s earned income[296] as well as certain housing allowances paid to U.S. citizens living abroad.[297]

In this respect, U.S. income taxation of overseas U.S. citizens is more generous towards such citizens living abroad than is U.K., Canadian or Australian taxation of their overseas residents and domiciliaries – who do not benefit from a comparable exclusion like Section 911.

In sum, the concept of fiscal citizenship does not require taxation based on legal citizenship since domicile and residence can be (and typically are) used instead to determine membership in the national political community for tax purposes. But fiscal citizenship justifies U.S. citizenship-based taxation as legal citizenship is traditionally viewed as the sign that an individual is a member of the U.S. national community with the attendant obligation to support that community through tax payments assessed on the citizen’s worldwide ability to pay.

IV) The Contemporary Critique of Citizenship-Based Taxation:

---

[296] Rev. Proc. 2023-34, § 3.39.

[297] Notice 2023-26.

Citizenship as One-Way Street

In contrast to the duty to pay tax which follows from the concept of fiscal citizenship, the contemporary critique of U.S. taxation of its overseas citizens rests upon an attenuated conception of U.S. citizenship. From this hyper-libertarian vantage, there is no such thing as fiscal citizenship; U.S. citizens have no obligation to support the American political community. For these critics, U.S. citizenship is a one-way street, which entails no obligations from the overseas citizen to the American polity or to its members. In this narrative, fiscal citizenship is not a compelling principle, but, rather, is an oxymoron as citizenship entails no duties. At its theoretical core, the underlying disagreement between supporters of U.S. citizenship-based taxation and the opponents of such taxation is about the nature of U.S. citizenship.

Reflecting this attenuated notion of U.S. citizenship, Dr. Laura Snyder, Dr. Karen Alpert and Attorney John Richardson analogize U.S. taxation of its overseas residents to slavery and penal labor.[298] Attorney Richardson labels U.S. citizenship-based

[298] Laura Snyder, Karen Alpert and John Richardson, *Should Overseas Americans Be Required to Buy Their Freedom?* 172 TAX NOTES FEDERAL 223, 224 (2021).

taxation as "absolutely immoral."[299] Overseas U.S. citizens, he tells us, are "being held prisoner and captive" to U.S. tax "policies."[300]

Dr. Snyder advances the argument that U.S. overseas citizens have no obligation to the American polity by citing Hannah Arendt's much-quoted aphorism about "`the right to have rights.'"[301] Dr. Snyder understands this famous maxim to mean that citizens derive rights as such, but have no corresponding obligation to support the nations of which they are citizens and from which they obtain rights. Properly understood, Dr. Snyder tells us, citizenship is only "a source of rights"[302] with no corresponding duty to the nation.

But Arendt did not say this. To the contrary, Arendt observed that citizens have "duties and responsibilities"[303] to the nation as well as the rights flowing from citizenship.

---

[299] Debate sponsored by Tax Connections, Inc., *Citizenship And Worldwide Taxation: Is It Morally Justified Or Unjustified?* available at https://www.youtube.com/watch?v=lo7nRpU6SDQ&t=308s (May 17, 2019) at 5.07 and 6.48.

[300] *Id.* at 13.45.

[301] Snyder, *supra*, note 6 at 544-545.

[302] *Id.* at 546.

[303] Hannah Arendt, THE ORIGINS OF TOTALITARIANISM (1966) 313; Hannah Arendt, MEN IN DARK TIMES (1968) 81 (citizen's "rights and duties").

To further the argument that U.S. overseas citizens have no duty to support the American polity via tax payments, Dr. Snyder quotes *Trop,* paraphrasing Arendt.[304] But, the *Trop* Court, like Arendt herself, did not say that citizens owe no duties to their nations of citizenship. Indeed, in their two opinions, the five justices who held for Mr. Trop said just the opposite, citing tax payments as an exemplar of the "basic responsibilities of citizenship."[305]

Dr. Snyder also quotes Article 15 of the Universal Declaration of Human Rights[306] ("No one shall be arbitrarily deprived of his nationality") while ignoring Article 29 ("Everyone has duties to the community..."').[307] In short, the authorities on which Dr. Snyder relies for a hyper-libertarian conception of citizenship actually affirm the duties of U.S. citizens to the U.S. *Trop* emphasizes that the payment of taxes is pre-eminent among the duties of citizenship.

Instructive in this context is Dr. Snyder's characterization of my 2011 article and my observations that citizenship and domicile overlap. Both citizenship and domicile reflect permanent

---

[304] Snyder, *supra*, note 6 at 546.

[305] *Trop,* 356 U.S. at 92.

[306] Snyder, *supra*, note 6 at 545

[307] Universal Declaration of Human Rights, Article 29(1).

allegiance to a political community and thus lead to a duty to support that community.[308] This perspective, Dr. Snyder tells us, "perceives overseas Americans more as subjects than as citizens."[309] While citizenship is "a necessary precondition for *all* other rights,"[310] citizenship entails no duties running from the citizen to the nation.

Dr. Snyder's attenuated view of U.S. citizenship denies the

---

[308] Snyder, *supra*, note 6 at 542-546.

[309] *Id.* at 543.

[310] *Id.* (emphasis added). As a matter of U.S. law, it is incorrect to say that all legal rights under the U.S. Constitution extend only to citizens. The term "citizen" appears nowhere in the Bill of Rights. The rights of the first ten amendments apply to all persons within U.S. jurisdiction, not just to U.S. citizens. Likewise, the Due Process and Equal Protection Clauses of the 14th Amendment protect all "person[s]," not just citizens. U.S. Constitution, Amendment 14, § 1. The four *Trop* dissenters alluded to these constitutional provisions when they affirmed the "very substantial rights and privileges that the alien in this country enjoys under the federal and state constitutions." *Trop,* 356 U.S. at 127 (Frankfurter, J. dissenting). See also *id.* ("The multitudinous decisions of this Court protective of the rights of aliens bear weighty testimony.").

Legal scholars generally credit Alexander Bickel for the seminal academic statement that "possession of citizenship status has long been, and should remain, fundamentally insignificant in the American constitutional order." Linda Bosniak, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP (2006) 33. *See also id.* at 53-56 (discussing cases extending constitutional rights to aliens including the seminal *Yick Wo* decision) and at 117 ("Citizenship, it turns out, is *not* actually `the right to have rights,' despite the conventional wisdom. In many situations, only personhood is required.") (emphasis and quotation marks in original; footnote deleted).

reciprocity between citizen and state which is central to American citizenship. It does not treat a U.S. citizen as a "subject" to observe that her rights of citizenship "impose[] correlative obligations" upon the citizen.[311] Among the most important of these "correlative obligations" of citizenship is the duty to pay tax to support the American polity.[312]

Commentators on citizenship, such as Professor Bellamy, agree that citizenship, by its nature, imposes duties on the citizen and that chief among these duties is the obligation to pay taxes to support the political community of which the citizen is a member.[313]

Dr. Snyder correctly rejects the argument that the benefits overseas citizens receive from the federal government justify

---

[311] *Trop*, 356 U.S. at 121 (Frankfurter, J. dissenting) ("Possession by an American citizen of the rights and privileges that constitute citizenship imposes correlative obligations.").

[312] *Id.* at 92.

[313] Richard Bellamy, CITIZENSHIP: A VERY SHORT INTRODUCTION (2008) 3 (citizenship involves "rights and duties"), 13 (nation of citizens can "demand taxes" from the citizen), 17 (citizenship entails "duties" including "paying taxes") and at 75 ("paying taxes"). *See also* Jo Shaw, *Citizenship and the Franchise*, in Shachar et al., OXFORD HANDBOOK, *supra*, note 287 at 293 ("Citizenship creates a legal bond between individual members and a state and endows these individuals with certain rights and obligations." (internal quotation marks and citation deleted).

imposing U.S. income taxes on those citizens.[314] To support her rejection of benefits-based taxation, she cites Seligman.[315] But, as Professor Avi-Yonah observes,[316] Seligman's "ability-to-pay" rationale underpins U.S. citizenship-based taxation of its overseas citizens. As Seligman articulated the ability-to-pay principle, there is a "moral obligation to pay taxes as a contribution to society."[317] Benefits (or the lack thereof) are irrelevant to citizens' obligations to support the national community of which they are part.

Responding to Professor Kirsch, Dr. Snyder argues that, despite their U.S. citizenships, overseas Americans are not really members of the U.S. polity.[318] However, the traditional and prevailing conception of citizenship is "formal, juridical membership in an organized political community...ordinarily the

---

[314] Zelinsky, *Citizenship and Worldwide Taxation*, *supra*, note 3 at 1309 ("[T]he citizenship-based benefits enjoyed by Mr. Cook and other U.S. citizens resident abroad are limited.... [T}hese minimal benefits make it difficult to justify worldwide taxation of such citizens' assets and income under a benefits theory of taxation. Minimal benefits do not justify maximal taxation.").

[315] Snyder, *supra*, note 6 at 547 (citing Seligman).

[316] Avi-Yonah, *supra*, note 234 at 7 and 19.

[317] Zelenak, *supra*, note 247 at 53 (quoting Seligman).

[318] Snyder, *supra*, note 6 at 564-566.

political community of the nation-state."[319] Professor Bosniak observes:

> [M]ost commentators approach citizenship as a concept that designates some form of community membership, either membership in a political community (political and constitutional theorists) or membership in a common society (the sociologists).
>
> The concept of citizenship is particularly resonant in its evocation of a mutual and engaged relationship between the political community and its members.[320]

Professor Bellamy agrees:

> Membership lies at the heart of citizenship. To be a citizen is to belong to a given political community.[321]

Notwithstanding the traditional understanding of citizens as members of the political community of which they are citizens, Dr. Snyder argues that overseas U.S. citizens are not members of the U.S. polity.[322] For this proposition, she cites several benefits not available to overseas citizens. This

---

[319] Bosniak, *supra*, note 310 at 19.

[320] Id. at 78.

[321] Bellamy, *supra*, note 313 at 52. *See also* Baubock, *supra*, note 287 at 65 ("Citizenship is a membership-based concept. It means many other things too, but all interpretations of citizenship need to rely (explicitly or implicitly) on its conceptual core, which is membership in a political community.") (parenthetical in original); Chaim Gans, *Citizenship and Nationhood* in *Political Membership and Democratic Boundaries* in Shachar et al., OXFORD HANDBOOK, *supra*, note 287 at 107 ("Citizenship means membership of a state.").

[322] Snyder, *supra*, note 6 at 564-566.

invocation of benefits contradicts the Seligman ability-to-pay tradition which holds that the obligation to support the U.S. political community stems not from benefits received, but rather derives from the citizen's ability to defray the social overhead of the community of which she is a part.

The benefits which Dr. Snyder identifies as unavailable to overseas U.S. citizens are also unavailable to many U.S. citizens living at home. For example, for the proposition that overseas U.S. citizens are not members of the U.S. polity, Dr. Snyder cites[323] the Code's restriction that a taxpayer cannot receive the earned income tax credit (EITC) if she uses Code Section 911's generous exclusion of foreign earned income.[324] A more compelling characterization of this restriction on the EITC is that it prevents "double dipping" by overseas U.S. citizens. When they pay their federal income taxes, U.S. citizens living abroad must choose between the tax benefit of the EITC or the tax benefit of the Section 911 exclusion but they cannot use both.

Moreover, most Americans resident in the U.S. are ineligible for the EITC since they earn too much income to

---

[323] *Id.* at 569.

[324] Internal Revenue Code § 32(c)(1)(C), 26 U.S.C. § 32(c)(1)(C).

utilize that provision.[325] Does this income-based ineligibility to use the EITC also suggest that these resident U.S. citizens are not members of the American polity?

Good service from the IRS is another benefit denied to overseas U.S. citizens according to Dr. Snyder.[326] But bad IRS service is a remediable problem, fixable by better management and more resources, not an inherent theoretical flaw in the taxation of U.S. overseas citizens. Many U.S. citizens living at home don't receive good services from the IRS either.[327] Pressed

---

[325] Internal Revenue Code § 32(a)(2), 26 U.S.C. § 32(a)(2).

[326] Snyder, *supra*, note 6 at 569-571.

[327] Ashlea Ebeling, *Taxpayers Trying to Call The IRS Still Are Frustrated*, WALL. ST. J. (June 27, 2024) A10 ("For the 2.1 million people who called the agency's collections phone line, for instance, less than one-fifth reached a representative..."); Henry Katz, *Breaking down the customer experience at the IRS*, Partnership for Public Service, https://ourpublicservice.org/blog/breaking-down-the-customer-experience-at-the-irs/ (March 16, 2022) ("the IRS reported a dramatic spike in calls to their customer service lines—approximately 82.5 million in total—in part because people were unable to find answers to their questions on the IRS website. While the majority of callers who got through to an IRS representative reported having a helpful experience, only 53% of those who called were able to get through, leaving many taxpayers without answers. In addition, people struggled to verify their identity when accessing certain online services. In fiscal 2020, only 42% of taxpayers attempting to verify their identity and register for a new online account were able to meet IRS' authentication standards."); Taxpayer Advocate Service, *Identity Theft Victims Are Waiting Nearly Two Years to Receive Their Tax Refunds* (June 6, 2024), https://www.taxpayeradvocate.irs.gov/news/nta-blog/identity-theft-victims-are-waiting-nearly-two-years-to-receive-their-tax-refund

to its logical conclusion, Dr. Snyder's argument that poor governmental benefits terminate membership in the American polity leaves no one paying U.S. income tax.

Countervailing the benefits limited to U.S. citizens living at home is Section 911, the generous exclusion from foreign earned income only available to U.S. citizens living abroad.[328] Many U.S. citizens who reside domestically would gladly swap all of the benefits to which Dr. Snyder points for the benefit she slights: The ability of qualifying overseas citizens to exclude from gross income $126,500 of earned income plus additional housing allowances.[329] Qualifying overseas U.S. residents receive this generous exclusionary benefit as well as being eligible (like all U.S. citizens) to credit against their U.S. income

---

s/2024/06/; Erin M. Collins, National Taxpayer Advocate, Written Statement, Hearing on Internal Revenue Service: Narrowing the Tax Gap and Improving Taxpayer Services, Subcommittee on Financial Services and General Government, Committee on Appropriations, United States Senate (May 19, 2021) at 1 ("Over the past year, taxpayer service at the IRS has been historically poor. There is no way to sugarcoat it.") and at 7 ("The IRS received more than 150 million calls during the filing season (through May 1). Employees answered 13.3 million – just nine percent.") (parenthesis in original); David Hood, Allyson Versprille and Kaustuv Basu, *Customer Service at the IRS Is So Bad, Even Tax Pros Are Fed Up*, BLOOMBERG LAW NEWS (JAN. 4, 2022).

[328] Internal Revenue Code § 911, 26 U.S.C. § 911.

[329] Rev. Proc. 2023-34, § 3.39; Notice 2023-26.

taxes foreign taxes paid on foreign-source income.[330] In light of these provisions, overseas U.S. citizens qualifying for the generous 911 exclusion and for the foreign tax credit are treated better for tax purposes than are many (perhaps most) U.S. citizens living at home.

Dr. Snyder furthers her argument that overseas Americans are not members of the U.S. national community by citing the so-called "accidental" U.S. citizen who does not subjectively feel herself to be an American citizen.[331] A classic case of such an "accidental" American is someone who was born while her parents were temporarily in the U.S., who left the U.S. with her parents while she was still young and who has had no subsequent connection with the U.S. but instead views herself solely as a citizen of the nation in which she grew up. This individual, while a "birth-right" citizen of the U.S.,[332] has no affinity for the U.S. Another incarnation of the "accidental" U.S. citizen is an individual born abroad to a U.S. citizen who is raised

---

[330] Internal Revenue Code § 911, 26 U.S.C. § 911.

[331] Snyder, *supra*, note 6 at 565-566.

[332] U.S. Constitution, Amendment 14, § 1 ("All persons born...in the United States...are citizens of the United States..."); 8 U.S.C. § 1401(a) ("a person born in the United States" is a "citizen of the United States at birth.").

outside the U.S. with no connections to the U.S.[333] This individual may also have no affinity for the United States. Professor Kirsch, while a supporter of citizenship-based taxation, agrees that, "for some U.S. citizens living overseas," the "connection [to the U.S.] might be so tenuous as to bring into question their membership in the community."[334]

Current law is responsive to this concern. The U.S. does not force an "accidental" American to remain a U.S. citizen if she wants to abandon her birth-based U.S. citizenship.[335] Indeed, the U.S. exit tax of Code Section 877A facilitates this individual's renunciation of her U.S. citizenship by providing two specific exemptions from the tax for such "accidental" Americans.[336] In addition, even if an individual does not qualify for either of these exemptions from the U.S. exit tax, she would often benefit both from the tax's general exclusion for the

---

[333] 8 U.S.C. §§ 1401(c) and 1401(g) (indicating when a person born abroad to a parent who is a U.S. citizen is herself a U.S. citizen).

[334] Michael S. Kirsch, *Citizens Abroad and Social Cohesion at Home: Refocusing a Cross-Border Tax Policy Debate*, 36 VA. TAX. REV. 205, 215 (2017).

[335] *See* note 99, *supra*, on the voluntary renunciation of U.S. citizenship.

[336] Internal Revenue Code § 877A(g)(1)(B), 26 U.S.C. § 877A(g)(1)(B).

first $866,000 of gain from her constructive sale liability[337] and from the high income and asset thresholds which must be reached to trigger the U.S. exit tax.[338] In light of these relief provisions of Section 877A, it is hard to envision that an "accidental" U.S. citizen often has U.S. exit tax liability when she renounces her U.S. citizenship.

Dr. Snyder objects that the fee charged by the U.S. for the citizenship renunciation process – $2,350[339] - is too high.[340] She may be right. But this – like poor IRS service – is a remediable problem, neither an inherent theoretical flaw in U.S. citizenship-based taxation nor a convincing basis to deny that all U.S. citizens are members of a national political community, with the rights and responsibilities that such membership entails.

Dr. Snyder observes that there is a category of U.S.

---

337 Rev. Proc. 2023-34, 2023-48 IRB 1287, § 3.38 (updating the exclusion of Code § 877(a)(3) to $866,000).

338 Internal Revenue Code §§ 877A(g)(1)(A), 877A(a)(2)(A), 877A(g)(2)(B), 26 U.S.C. §§ 877A(g)(1)(A), 877A(a)(2)(A), 877A(g)(2)(B).

339 There are indications that the State Department contemplates reducing this processing fee but, as of the date of this draft, it has not. Robert W. Wood, *Fee To Renounce Citizenship To Drop, Reversing 422% Hike*, https://www.forbes.com/sites/robertwood/2023/01/12/fee-to-renounce-citizenship-to-drop-422/?sh=1a52e1be5a2b.

340 Snyder, *supra*, note 6 at 574.

overseas citizens who were born abroad and who cannot vote in federal elections.[341] Federal law protects the right of an overseas citizen to vote in the state in which she was previously domiciled "before leaving the United States."[342] However, a U.S. citizen born abroad[343] was never domiciled in any state and never left the United States. Thus, federal law does not protect the right to vote of this citizen born offshore.

Many (but not all) states extend to an overseas citizen born abroad the right to vote if one of her parents votes or voted in that state.[344] Thus, a U.S. citizen born offshore to parents who vote in a state like Connecticut or New York can vote in the same state as his parents. However, if a U.S. citizen was born and has always live abroad and if her parents

---

[341] *Id.* at 549-550.

[342] 52 U.S.C. §§ 20302(a)(1) (requiring states to permit "overseas voters" to vote in federal elections) and 20310(5) (defining "overseas voter").

[343] 8 U.S.C. §§ 1401(c) and 1401(g).

[344] *See, e.g.,* Conn. Gen. Stat. § 9-158b(c) (extending right to vote in federal elections to a "citizen of the United States born outside of the United States" if her "parent or guardian was a bona fide resident of a town in this state immediately prior to moving outside the United States...'); NY CLS Elec § 11-200(1-a) (extending right to vote in federal elections to "[e]very citizen of the United States of voting age, residing outside of the United States, who has never resided within the United States, and who has one parent who qualifies as a special federal voter" in New York).

were previously domiciled in a state like Alabama or Florida which does not extend voting rights to U.S. citizens born abroad, her right to vote is protected by neither federal law nor state statute because the relevant state does not grant the vote to a U.S. citizen born abroad.

Professors Zelenak and Avi-Yonah both link citizenship-based taxation to voting.[345] The U.S. citizen born abroad who cannot vote is a legitimate concern from the vantage of fiscal citizenship. But this problem is also remediable. Either the state in which her parents vote could extend the vote to her or Congress could broaden the definition of a federally-protected "overseas voter" to require the state in which her parents vote to extend the vote to their U.S. citizen off-spring born overseas.

In sum, the face of the traditional and compelling understanding is that citizens are members of the national political community of which they are citizens. It is unconvincing to argue, as does Dr. Snyder, that overseas U.S. citizens are not members of the American polity with the attendant obligation to support that polity through their tax

[345] Zelenak, *supra*, note 13 at 119-120; Avi-Yonah, *supra*, note 234 at 5. And the right to vote is central to Professor Bellamy's understanding of citizenship. Bellamy, *supra*, note 313 at 4 ("being able to vote [is] crucial" to citizenship).

payments.

Dr. Snyder favors what she and other opponents[346] of U.S. citizenship-based taxation call residence-based taxation, stating that this is the international norm. But, given their opposition to what they call "extraterritorial"[347] taxation, Dr. Snyder and her fellow opponents of current U.S. law do not favor residence-based taxation as actually implemented in practice by other nations. Other nations (not just the U.S.) impose "extraterritorial" taxation by levying income taxes on citizens living abroad on the basis of their continuing domicile or residence in their nation of citizenship.[348] As Justice Ginsburg observed for the Court,[349] extraterritorial, worldwide taxation of residents is both the domestic U.S. norm and the international norm. Such taxation is understandable as the implementation by nations of fiscal citizenship, the identification and taxation of the members of the national political community who live abroad. Other nations and the United States differ in that the U.S. taxes its fiscal citizens

---

[346] *See supra*, note 8.

[347] Snyder, *supra*, note 6 at 537.

[348] *See* notes 29 through 74, inclusive, *supra*, and accompanying text (discussing *McFadyen*, *Duff* and *Iyengar* cases).

[349] *Chickasaw Nation*, 515 U.S. at 462-463.

living abroad via the objective marker of their legal U.S. citizenships while other nations tax their overseas fiscal citizens through the factually subjective rubrics of domicile and/or residence. Dr. Snyder and other critics do not confront the extent to which other nations, not just the U.S., thereby /engage in "exterritorial" taxation of the worldwide incomes of their citizens who live abroad.

Amplifying her theoretical attack on the Code, Dr. Snyder also argues that the Code's taxation of overseas U.S. citizens violates Equal Protection.[350]

Dr. Snyder's constitutional argument starts with *Cook v. Tait*,[351] the foundational U.S. Supreme Court decision upholding the United States' worldwide income taxation of its overseas citizens. The Court in *Cook v. Tait* justified such worldwide income taxation by invoking the benefits the U.S. government allegedly furnished to Mr. Cook, a U.S. citizen, while he lived in Mexico. This benefits-based rationale, Dr. Snyder correctly asserts, does not persuasively ground the Court's decision upholding the United States' taxation of Mr. Cook's worldwide income on the basis of his U.S. citizenship. Mr. Cook's basic

---

[350] Laura Snyder, *What a Decision on Affirmative Action Teaches About Taxation*, 51 RUTGERS L. REC. 102 (2023).

[351] 265 U.S. 47 (1924).

governmental services were provided by Mexico where he lived, not by the U.S. or by any of its states.[352]

Moreover, Dr. Snyder maintains, U.S. income taxation of overseas U.S. citizens is "nationality-based" and thus violates "Fourteenth Amendment Equal Protection."[353] In particular, U.S. taxation of worldwide income "classifies [overseas U.S. citizens] based on their country of origin," subjecting them to worldwide U.S. taxation not borne by overseas persons "whose country of origin is not the United States." From Dr. Snyder's perspective, the Code's taxation of U.S. overseas citizens is analogous to the race- and nationality-based admissions policies struck in *Students for Fair Admissions v. Harvard*.[354]

For five reasons, this constitutional critique of U.S. taxation of its overseas residents is unpersuasive. Today we can see that the imperatives of fiscal citizenship underlie the United States' taxation of Mr. Cook who lived in Mexico while retaining his membership in the U.S. polity. The United States

---

[352] Zelinsky, Citizenship and Worldwide Taxation, *supra*, note 3 at 1303.

[353] Snyder, *supra*, note 350 at 104. The Equal Protection Clause of the 14th amendment applies to the states, not to the federal government. The Equal Protection restraints on the federal government are grounded in the Due Process Clause of the Fifth Amendment. *Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

[354] 600 U.S. 181 (2023).

has a compelling interest in fiscal citizenship.

First, that the benefits-based rationale for *Cook v. Tait* is unconvincing does not necessarily imply that the outcome in that decision is wrong. The outcome in *Brown v. Board of Education*[355] is iconic: "Separate educational facilities are inherently unequal."[356] However, *Brown*'s reasoning is often contested.[357] Similarly, taxing Mr. Cook on his worldwide income is a compelling result even if *Cook v. Tait*'s underlying, benefits-related rationale for taxing overseas U.S. citizens is today unpersuasive.

Second, (and here a stronger rationale for *Cook v. Tait* begins), the courts have made clear that Congress' authority to draw distinctions is at its greatest in the field of taxation. There is a strong assumption of constitutionality for a tax law. "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."[358]

---

[355] 347 U.S. 483 (1954).

[356] *Id.* at 495.

[357] *See, e.g.,* Matthew E. K. Hall, *Bringing Down* Brown: *Super Precedents, Myths of Rediscover, and the Retroactive Canonization of* Brown v. Board of Education, 18 J. L. & POL'Y 655, 659 (2010) ("from another perspective, *Brown*'s iconic status is puzzling").

[358] *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012), quoting *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983). *See also Nordlinger v. Hahn*, 505 U.S. 1, 11 (Equal Protection review "is especially deferential in the context of

Third, the policy of taxing U.S. citizens on their worldwide incomes applies to all U.S. citizens, both to U.S. citizens who live abroad and to U.S. citizens who live at home. Details in implementation alter the precise tax obligations of different U.S. citizens. For example, a U.S. citizen with a qualifying dependent child pays less tax than an otherwise identical U.S. citizen who is childless.[359] A U.S. citizen who earns more income is often in a higher marginal tax bracket than is a U.S. citizen who earns less.[360] So too U.S. citizens who live abroad face some tax restrictions by virtue of living abroad but also benefit from the generous earned income exclusion of Section 911. These kinds of distinctions are inherent in taxation, distinctions to which the courts defer. But for all U.S. citizens wherever they live, the Code's fundamental policy is the same, namely, worldwide income taxation of their respective incomes.

Dr. Snyder retorts that it is "cursory" to say that the U.S. taxes "all U.S. citizens including those who live in the

---

classifications made by complex tax laws.").

[359] Internal Revenue Code § 24, 26 U.S.C. § 24 (credit for qualifying child).

[360] Internal Revenue Code § 1, 26 U.S.C. § 1 (income tax rate schedules).

United States."[361] No, both as a matter of text and a matter of logic, it is a straightforward understanding of U.S. law that the U.S. taxes the worldwide incomes of all of its citizens wherever they live. As the relevant Treasury regulations state, the Code "imposes an income tax on the income of every individual who is a citizen or resident of the United States."[362]

> In general, all citizens of the United States, *wherever resident*, and all resident alien individuals are liable to the income taxes imposed by the Code whether the income is received from sources within or without the United States.[363]

Fourth, in Equal Protection terms, a U.S. citizen is not taxed because of an "immutable characteristic"[364] like race but is instead taxed because of a legal status which she can change. U.S. citizens can renounce their citizenships.[365] While they choose to remain U.S. citizens, such citizens express political allegiance to the United States. If they elect to surrender their citizenships, such renunciation legally terminates that

---

[361] Snyder, supra, note 350 at 110.

[362] Treas. Reg. § 1.1-1(a)(1), 26 C.F.R. § 1.1-1(a)(1).

[363] Treas. Reg. § 1.1-1(b), 26 C.F.R. § 1.1-1(b) (emphasis added).

[364] *Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004) ("Political affiliation is not an immutable characteristic").

[365] *See* note 99, *supra*.

allegiance. Nothing “immutable” like race occurs when individuals retain the U.S. citizenships which they acquired at birth or by naturalization and which they can choose to surrender.

Fifth, the U.S. has a compelling interest in fiscal citizenship. Dr. Snyder compares the U.S. citizen who lives in a foreign nation (taxable *in personam* by the U.S. on her worldwide income) with the nonU.S. citizen who lives in that same foreign nation (taxable *in rem* by the U.S. only on her U.S. source income). This difference constitutes nationality-based discrimination against the nonresident U.S. citizen, Dr. Snyder argues.[366]

But there is a strong reason for treating differently the overseas U.S. citizen and his alien neighbor: fiscal citizenship. A nonresident U.S. citizen is a member of the U.S. polity unlike the foreign resident who is not a U.S. citizen. Congress compellingly distinguishes the tax obligations of a U.S. citizen living abroad (taxable on her worldwide income) from the tax obligations of a nonresident alien (taxable only on her U.S. source income). The citizen is a member of the U.S. political community with the obligations of fiscal citizenship, the duty to support the community in accordance with his ability

[366] Snyder, supra, note 350 at 102, 107-108.

to pay as measured by his worldwide income. This is not true of the nonresident alien who Dr. Snyder invokes as a comparator and who is not a member of the American national community.

Taxing Mr. Cook on his worldwide income while he lived in Mexico was a compelling exercise by the United States of fiscal citizenship. Such citizenship required Mr. Cook to support the American political community of which he was a continuing member in accordance with Mr. Cook's ability to pay from his worldwide income, regardless of what benefits he did nor did not receive from the federal government. That is the nature of U.S. citizenship.

It is unsurprising that the Court in *Cook v. Tait* invoked the benefits rationale for taxing overseas U.S. citizens. With the advantage of hindsight, we can now see that the Seligman, ability-to-pay rationale was emerging triumphant from the events which began at the end of the 19th century. But in 1924, when *Cook v. Tait* was decided, the benefits rationale for federal taxation remained plausible, a viable contender with the ability-to-pay doctrine we now call fiscal citizenship. In historic context, it is understandable that the Court framed *Cook v. Tait* as a case about benefits.

But today the outcome in *Cook v. Tait*, sustaining the United States' worldwide income taxation of its overseas citizens, is best understood as implementing fiscal citizenship and its ability-to-pay perspective. The U.S. compellingly requires all of its citizens, wherever they live, to support the American political community of which they are members based on their worldwide incomes and without regard to the benefits vel non they receive from the federal government.

Dr. Snyder also points to what she dubs the "little revenue [collected] from overseas Americans"[367] as well as the relatively high percentage "of U.S. tax returns filed from outside the United States [which] show no tax is owed."[368]

As to the roughly $6 billion dollars on average collected annually from U.S. taxpayers who live abroad,[369] I observe, with apologies to Everett Dirksen, "that pretty soon you're talking real money."[370]

Instructive as to U.S. taxpayers who live abroad but owe no U.S. income taxes are Professor Zelenak's observations about

---

[367] Snyder, *supra,* note 6 at 589.

[368] *Id.* at 577.

[369] *Id.* at 590.

[370] The Dirksen Center says that it cannot find confirmation that Senator Dirksen actually said the adage attributed to him. This adage has nevertheless entered into the American vernacular. See Dirksen Center, *A billion here, a billion there*...", available at https://web.archive.org/web/20040816153245/http://www.dirksencenter.org/print_emd_billionhere.htm.

taxpayers who owe no federal tax because they claim the EITC.[371] As a matter of fiscal citizenship, a U.S. citizen may have a "primary civic responsibility" which does not entail "any cash transfer...to the Treasury."[372]

In this spirit, an overseas U.S. citizen who files a tax return which shows no tax owed fulfills her "civic responsibility" to the American political community by affirming her membership in and potential fiscal contribution to that community. At some point in the future, the U.S. may call upon this overseas citizen to provide financial support to the community. For example, the citizen living abroad may in the future earn more than Code Section 911 excludes and thus owe a net payment to the federal Treasury. Or Congress might change the Section 911 exclusion in response to the revenue requirements of a national emergency. By filing a no-tax return today, the overseas U.S. citizen confirms her membership in the American polity and recognizes the possibility that, under changed circumstances, she may be called upon to render financial support to that community.

A final consideration in this context is the revenue which would be lost if U.S. citizens could avoid U.S. income taxation

---

[371] *See* discussion *supra* at page 94.

[372] Zelenak, *supra*, note 247 at 32.

by establishing overseas residence while retaining U.S. citizenship. Today, an individual who wants to retain U.S. citizenship has no tax incentive to move offshore as he remains liable for U.S. income taxes on a worldwide basis by virtue of his continuing U.S. citizenship. But under a residence-based regime, this individual could potentially eliminate her U.S. income tax liability by moving abroad to defeat U.S. *in personam* tax jurisdiction and switching her income to foreign sources to defeat U.S. *in rem* tax jurisdiction – while remaining a U.S. citizen. It is a matter of conjecture how many U.S. citizens would engage in such tax-motivated relocations abroad, but the possibility of such relocations is a further revenue-based justification for citizenship-based taxation: moving abroad does not abate citizenship-based taxation.

To summarize: The contemporary critique of U.S. taxation of its overseas citizens rests upon an attenuated conception of U.S. citizenship. Under this hyper-libertarian conception of citizenship, U.S. citizens have no obligation to support the American political community; U.S. citizenship is a one-way street, which entails no obligations from the overseas citizen to the American political community or to its members. At its theoretical core, the underlying disagreement between supporters of U.S. citizenship-based taxation and the opponents of such taxation is the nature of U.S. citizenship.

VI) Other issues

A) Hard to Audit Income

By requiring foreign financial institutions and U.S. citizens to disclose offshort bank accounts and other overseas financial assets to the IRS, FATCA has enhanced the IRS's ability to enforce the federal income tax obligations of U.S. citizens who have such offshore accounts and assets.[373] However, it remains a challenge to collect the federal tax liabilities of overseas U.S. citizens when such citizens have other, more easily hidden forms of foreign income. For example, a U.S. citizen living abroad may evade her U.S. tax obligations by investing in foreign real estate through offshore holding entities which disguise the ownership of such investments. Alternatively (or in addition), an overseas U.S. citizen may evade federal income taxes by engaging in cash transactions or by owning and trading expensive but untraceable collectibles such as valuable art and jewelry. In the face of such evasion techniques, the problems of enforcing U.S. income taxation against overseas citizens lead some to call for the abandonment

[373] *See* discussion of FATCA, starting at page 74.

of citizenship-based taxation as unenforceable.[374]

However, hard-to-audit income and assets also present enforcement challenges vis-a-vis domestic taxpayers. It is difficult to tax domestic income which is not subject to withholding or to information reporting to the IRS.[375] In the face of these enforcement problems, the Internal Revenue Code does not declare domestic cash and illegal income tax-free. We instead accept the enforcement challenges associated with taxing such hard-to-locate income as an unavoidable problem to be managed. It would be unfair to compliant taxpayers for Congress to amend the Code to award a free pass to those trafficking in cash, illegal activity and other forms of hard-to-detect income by declaring such income to be tax-free. It would also be inefficient to encourage compliant taxpayers to switch to these alternatives by legally exempting such hard-to-audit alternatives from U.S. income taxation.

In this respect, domestic and overseas enforcement problems are similar. While the enforcement challenges associated with

---

[374] Kirsch, *supra*, note 334 at 216 (discussing opposition to citizenship-based of overseas U.S. citizens "on practical, administrative grounds.").

[375] IRS, TAX GAP PROJECTIONS FOR TAX YEARS 2020 & 2021 (Pub. 5869) at page 5 ("misreporting of wages, which is subject to substantial information and withholding, is 1 percent compared to 55 percent for nonfarm proprietor income, which is subject to little or no information reporting.").

taxing the incomes of overseas U.S. citizens are real, as a matter of equity, these problems do not justify abandoning the effort to tax U.S. citizens living abroad – any more than we should formally condone tax evasion at home by amending the Code to officially exempt from taxation illegal or unreported cash income.

Moreover, residence-based tax systems have the same problem of enforceability vis-a-vis their respective residents who are deemed for tax purposes to reside at home even as they live abroad. When Canada taxes Mr. McFadyen as a Canadian tax resident while he lives in Japan[376] or when Australia taxes Mr. Iyengar as an Australian domiciliary while he lives in Dubai and Qatar,[377] Canada and Australia have the same enforcement problems locating foreign source income as does the U.S. when it taxes the income of its overseas citizens. In this setting, there is again more similarity in practice between citizenship-based and

[376] *See* notes 29 through 39, inclusive, and accompanying text.

[377] See notes 60 through 74, inclusive, and accompanying text. The enforcement of Australia's taxation of Mr. Duff's income might have been facilitated by the fact that Mr. Duff was an employee of Viking Ocean Cruises, an employer with potential nexus to Australia. *See* notes 44 through 58, inclusive, and accompanying text. But the same would have been true had Mr. Duff been an U.S. citizen working in international waters for Viking Ocean Cruises, i.e., that the employer's potential U.S. nexus would have facilitated the enforcement of U.S. income taxation of its employee's income.

residence-based taxation than the critics of U.S. tax law acknowledge.

B) My Focus on English-speaking nations

My discussion focuses on three English-speaking nations by comparing the tax codes of the U.K., Canada and Australia to U.S. tax law. Using the U.K., Canada and Australia as comparators with the U.S. reflects the shared common law tradition and mutual language of these nations. Shared tradition and language facilitate comparison of these English-speaking nations' respective tax systems. It is also sensible to focus on Canada, the U.K. and Australia as they contain the largest communities of U.S. expatriates.[378]

Exploring the tax laws of the U.K., Canada and Australia confirms that opponents of U.S. citizenship-based taxation overstate the difference in practice and in theory between the U.S. taxation of its overseas citizens and the taxation of overseas residents and domiciliaries of other nations. Like offshore U.S. citizens, residents and domiciliaries of Canada, the U.K. and Australia living abroad also pay tax on their worldwide incomes to their home nations while they live overseas.

---

[378] *U.S CITIZENS ABROAD AND THEIR VOTING BEHAVIORS IN 2020*, https://www.fvap.gov/uploads/FVAP/Reports/FVAP-VoterBrief_211105_v1a.pdf.

The two other nations with larges numbers of U.S. expatriates are France and Israel.[379] France taxes *in personam* the worldwide incomes of those who are "fiscally domiciled" in France even though they may spend much time abroad.[380] Israel likewise taxes *in personam* the worldwide incomes of those whose "center of life" is deemed to be in Israel even if they spend significant time overseas.[381] Neither of these nations adheres to the cramped, mechanical notion of tax residence which the critics of U.S. law claim to be the international norm. Instead, these nations (like Canada, Australia and the U.K.) often tax the worldwide incomes of persons who largely live abroad but who are deemed to be subject to *in personam* tax jurisdiction by their home nations. In English-speaking and nonEnglish-speaking nations alike, the definition of tax residence is, in Professor Kirsch's evocative phrase, "'sticky,' continuing to treat a citizen who moves abroad as a tax resident for a specified

[379] *Id.*

[380] Edouard Milhac and Annabelle Bailleul-Mirabaud, Business Operations in France, Bloomberg Tax, BNA Portfolio 7130-1st, § X(A)(2) (discussing French "fiscal domicile test"); Daniel Shaviro, *Taxing Potential* Community *Members' Foreign Source Income*, 70 TAX L. REV. 75, 82 (2016).

[381] Amnon Rafael, Business Operations in Israel, Bloomberg Tax, BNA Portfolio 7180-1st, § XIII(A) (discussing Israeli "center of life" test); Shaviro, *supra*, note 380, 381 at 82-83.

number of years."[382]

VII) Improving U.S. Income Taxation of Overseas U.S. Citizens

In this final section, I outline several steps which the Treasury and Congress should take to improve the U.S. income taxation of overseas U.S. citizens. For the critics of citizenship-based taxation, the flaws of the current system indicate that Congress should stop altogether taxing overseas U.S. citizens on their worldwide incomes.

This section thus highlights a fundamental difference between proponents of U.S. citizenship-based taxation and opponents. As the problems of current law are remediable, proponents of citizenship-based taxation like myself conclude that these problems should be solved by legislation and by administrative actions to improve the system of citizenship-based taxation.

In response to politics and policy considerations, Congress adjusts the Code to accommodate the equity, efficiency and administrative concerns raised by different groups of U.S. taxpayers. As a matter of fiscal citizenship, Congress can and should respond to the compelling tax concerns raised by overseas U.S. citizens. Fiscal citizenship imposes not just duties on the citizen to the polity, but also obligates the polity to respond

[382] Kirsch, *supra*, note 334 at 210.

to the legitimate tax-related concerns of the citizen including the legitimate tax concerns of the citizen who lives offshore.

A) Simplifying Filing for Overseas Citizens

Tax reporting for overseas U.S. citizens can and should be simplified, as indeed tax filing can and should be simplified for U.S. taxpayers who live at home. A particularly attractive possibility would be for the IRS to promulgate a simplified Form 1040 for overseas U.S. citizens who owe no U.S. income tax because all of their income qualifies for the Section 911 exclusion of foreign earned income.

An instructive precedent in this context is the "electronic postcard" 990-N,[383] a simplified annual filing option for small nonprofit organizations. Based on this model, one could envision a similarly simple "postcard" filing under which an overseas citizen would confirm electronically her basic identification data and would affirm under oath that she owes no U.S. income tax in the current year because she lives abroad full-time, has only earned income and such earned income is less than the maximum Section 911 exclusion, $126,500 annually.[384] This

---

[383] https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard

[384] Rev. Proc. 2023-34, § 3.39.

"postcard" filing would be much simpler than IRS Form 2555, the current, 3 page form necessary to claim Section 911's foreign earned income exclusion.

A potential objection to this simplification proposal is that Form 2555 requires the disclosure of data confirming that the U.S. citizen living abroad indeed qualifies for the Section 911 exclusion. The data required on Form 2555[385] include the date on which the U.S. citizen's foreign residence began (and ended), the nature of the overseas citizen's living quarters, whether any of the citizen's family members lived with her, and whether the U.S. citizen claiming to live abroad has "submitted a statement to the authorities of the foreign country" where the U.S. citizen lives declaring that the U.S. citizen is not "a resident of that country."

There is inherent tension between the enforcement imperative that the taxpayer disclose more information to the tax collector to facilitate review and audit and the simplification goal that the taxpayer be required to disclose less to the IRS. A potential compromise would be for an overseas U.S. citizen claiming the Section 911 exclusion to file Form 2555 with all its details once. Then, in subsequent years, this citizen could file the proposed electronic postcard, confirming

[385] IRS Form 2555, Part II.

that she still qualifies for the exclusion since there has been no material change in her situation living abroad.

Another potential objection to this simplification proposal is Professor Mehrotra's concern that, if return filing is made too "painless and simple," such filing may forfeit the fiscal citizenship benefits of filing by making "citizen-taxpayers...less engaged."[386] My instinct is that a proposed "electronic postcard" like 990-N for overseas U.S. citizens qualifying under Section 911 could draw many such citizens into compliance with U.S. tax law. If so, this simplification would, on balance, enhance in toto the fiscal citizenship of overseas U.S. citizens – but this is a judgment call about which reasonable persons can disagree.

It would also be possible for the IRS to simplify other reporting forms which overseas U.S. citizens are required to file.[387] Again, this raises a trade-off between the mandates of tax enforcement (which requires the taxpayer to provide more information to the tax collector to facilitate review and audits) and the desirability of simplifying taxpayers' compliance burdens. I believe that the IRS could considerably

---

[386] Mehrotra, *supra,* note 242 at 966.

[387] Edward A. Zelinsky, *Simplifying Income Tax Reporting for Americans Abroad*, 105 TAX NOTES INTERNATIONAL 433, 434-435 (2022) (discussing possible simplification of IRS Forms 5471 and 1116).

simplify the forms required of overseas U.S. taxpayers without jeopardizing the IRS's ability to enforce the tax law vis-a-vis such U.S. citizens living offshore.

B) Broadening the Section 911 Exclusion

The Section 911 exclusion should be expanded to exclude from U.S. income taxation additional forms of compensation income U.S. citizens earn abroad. In particular, Congress should amend Section 911 to include within that section's exclusion such compensation-related income as disability and unemployment payments. Disability and unemployment payments are wage substitutes. These compensation-related forms of income fall comfortably within the ambit of Section 911's exclusion of earned income, subject to that provision's annual exclusion limit. Congress should amend Section 911 accordingly.

A closer question is whether Section 911 should be expanded to exclude from overseas U.S. citizens' gross incomes their pension and retirement distributions. On the one hand, these distributions are best understood as deferred wages. From this vantage, Section 911 should be amended to exclude from offshore citizens' gross income such compensation-based payments, just as Section 911 exempts from U.S. taxation other forms of earned income. The counterargument is that the favorable treatment of overseas taxpayers' pension payments should be established reciprocally by additional treaty negotiations between the U.S. and other nations. While this is another issue on which reasonable minds can differ, I now find more compelling the argument for the U.S. to pursue through reciprocal treaty negotiations the exclusion of pension distributions to overseas taxpayers from their income tax obligations to their home nations.[388]

C) Reforming FATCA and FBAR

Exemptions under FATCA should be expanded to assist overseas citizens in the conduct of their routine financial affairs. Congress should also mandate that the FATCA and FABR reporting thresholds be automatically adjusted every year for increases in the cost-of-living. Taxpayers' filing obligations under FATCA and FABR should be coordinated.

As observed *supra*, the Secretary of the Treasury has used her authority to liberalize the foreign financial asset reporting requirements of Code § 6038D for overseas U.S. citizens.[389] In particular, the Secretary has by regulation decreed that a U.S. citizen living abroad in general need not report foreign financial assets to the IRS unless such assets

---

[388] *See* discussion at page 148, *infra*.

[389] *See supra* page 79.

exceed $200,000[390] ($400,000 for a married couple[391]). FATCA does not give the Secretary similar authority to increase for overseas citizens the size of "depository accounts" which they can maintain abroad without the foreign financial institution risking the 30% FATCA tax on the institution's U.S. investment income.[392]

To facilitate routine financial accounts maintained by overseas U.S. citizens, Congress either should amend FATCA to give the Secretary additional authority or should itself provide more relief legislatively for overseas U.S. citizens' routine financial accounts. In this context, the proposed "Same Country" exception[393] is a useful idea since the routine financial accounts maintained by a U.S. citizen living abroad will typically be established in a bank or similar institution located in the foreign nation in which this U.S. citizen

---

[390] Treas. Reg. § 1.6038D-2(a)(2)(i), 26 C.F.R. § 1.6038D-2(a)(2)(i).

[391] Treas. Reg. § 1.6038D-2(a)(4)(i), 26 C.F.R. § 1.6038D-2(a)(4)(i).

[392] Compare Internal Revenue Code § 6038D(a), 26 U.S.C. § 6038D ("or such higher dollar amount as the Secretary may prescribe") with Internal Revenue Code § 1471(d)(1)(B)(ii), 26 U.S.C. § 1471(d)(1)(B)(ii) ("such account does not exceed $50,000").

[393] American Citizens Abroad, Inc., *Expatriates Group Reiterates Call for FATCA Relief*, 2022 TNTI 174-22 (September 7, 2022).

resides.

Thus, to help overseas U.S. citizens conduct their routine financial affairs, Congress should authorize the Secretary to provide that foreign financial institutions have no FATCA reporting requirements for a “same country” account maintained in the nation in which a U.S. overseas citizen lives as long as such account is less than $200,000 in value or $400,000 in value for a married couple. Alternatively, Congress could itself place this expanded exception into FATCA.

I also recommend that the FATCA and FBAR reporting thresholds be adjusted annually to reflect increases in the cost-of-living. Section 911 provides an instructive example of the value of such automatic COLA increases. The text of Section 911 sets the foreign earned income exclusion at an annual maximum of $80,000 earned abroad.[394] However, the statute also provides for post-2004 annual cost-of-living increases to this figure.[395] As a result of cumulative COLA increases, the Section 911 exclusion annual maximum is today $126,500.[396] Likewise, the statutory exemption for unrealized gains recognized under Code

---

[394] Internal Revenue Code §911(b)(2)(D)(i), 26 U.S.C. § 911(b)(2)(D)(i).

[395] Internal Revenue Code §911(b)(2)(D)(ii), 26 U.S.C. § 911(b)(2)(D)(ii).

[396] Rev. Proc. 2023-34, § 3.39.

Section 877A upon the renunication of U.S. citizenship is $600,000.[397] However, the statutorily-authorized COLA adjustments[398] have today brought this figure to $866,000.[399]

In similar fashion, the FATCA and FBAR thresholds should be automatically adjusted annually to reflect the impact of inflation.

FATCA and FBAR reporting should also be coordinated to minimize duplicative reporting. One possibility would be to provide a waiver on the FATCA reporting schedule, IRS Form 8938, to permit the IRS to disclose that form to FINCEN. If a taxpayer has no authority over any foreign financial account other than those accounts disclosed on Form 8938 and if the taxpayer checks the box to permit that form to be furnished by the IRS to FINCEN, the taxpayer should be deemed to have satisfied her FBAR reporting obligations.

D) Broadening the Exit Tax Exemption

As noted supra,[400] in addition its constructive sale

---

[397] Internal Revenue Code § 877A(a)(3)(A), 26 U.S.C. § 877A(a)(3)(A).

[398] Internal Revenue Code § 877A(a)(3)(B), 26 U.S.C. § 877A(a)(3)(B).

[399] Rev. Proc. 2023-34, 2023-48 IRB 1287, § 3.38 (updating the exclusion of Code § 877(a)(3) to $866,000).

[400] *Supra* page 41.

provisions, Code Section 877A also imposes three other taxes when a U.S. citizen renounces her citizenship: (1) Upon his renunciation of U.S. citizenship, the former citizen is deemed to have received in taxable distributions the amounts in her "specified tax deferred accounts" such as IRAs.[401] (2) A former U.S. citizen is also subject under Section 877A to a 30% withholding tax when she actually receives distributions of other "eligible deferred compensation items" such as payments from 401(k) and other qualified plans.[402] (3) A former U.S. citizen also pays a 30% withholding tax when she receives actual distributions from certain trusts.[403]

The Section 877A(a)(3) exclusion does not apply in these three contexts. In the interests of equity, it should. The § 877A(a)(3) exemption (like the net worth[404] and income[405] rules of § 877A) relieves from exit taxation U.S. citizens of modest

---

[401] Internal Revenue Code § 877A(e), 26 U.S.C. § 877A(e).

[402] Internal Revenue Code § 877A(d)(1), 26 U.S.C. § 877A(d)(1).

[403] Internal Revenue Code § 877A(f), 26 U.S.C. § 877A(f). The IRS understands this withholding tax as applying to trust distributions of both in-kind property and money. Notice 2009-85, p. 44 (property includes money).

[404] Internal Revenue Code §§ 877A(g)(1)(A), 26 U.S.C. § 877A(g)(1)(A), and 877(a)(2)(B).

[405] Internal Revenue Code §§ 877A(g)(1)(A), 26 U.S.C. § 877A(g)(1)(A), and 877(a)(2)(A).

means and thereby aims such taxation upon affluent individuals, i.e., those with significant incomes, ample net worths and substantial unrealized gains. This progressive focus allows U.S. citizens of modest means and income to surrender U.S. citizenship with little tax complication.

There is no convincing reason to exempt from exit taxation a former citizen who has $866,000 or less of unrealized, property-based appreciation while taxing a former citizen with the same untaxed income in the form of an IRA, a 401(k) account or similar assets. In the interests of equity among taxpayers, Congress should amend Section 877A to enable a "covered expatriate"[406] to allocate the Section 877A(a)(3) exclusion not just to constructive sales of property on her renunciation of citizenship, but among all of the tax-generating events defined by Section 877A.

E) Assuring Overseas Citizens the Right to Vote

As observed *supra*,[407] there is a category of U.S. citizens unable to vote in U.S. elections. If a U.S. citizen is born abroad and if her parents were last domiciled in a state (such as Florida or Alabama) which does not extend voting rights to

---

406 Internal Revenue Code § 877A(g)(1), 26 U.S.C. § 877A(g)(1). Internal Revenue Code § 877A(f), 26 U.S.C. § 877A(f)

407 *See supra* at page 118.

this U.S. citizen born overseas, neither federal nor state law grants this citizen the right to vote.

Congress should amend federal law to guarantee U.S. citizens born abroad the right to vote. If Congress does not act, the states should. This proposal is compelling independent of U.S. citizenship-based taxation. All adult U.S. citizens should have the right to vote.

F) Extending The Model Treaty's Treatment of Pensions

The favorable tax treatment of foreign pensions extended to overseas U.S. citizens under the U.S. model treaty and by the U.S.-Canada and U.S.-U.K. tax treaties should also be negotiated with additional nations. After the U.K. and Canada, the largest communities of overseas Americans are found in France, Australia and Israel.[408] Mutual pension-related tax agreements with these three nations should be a priority.

With a treaty, both the U.S. and its treaty partner agree that its respective citizens/residents living in the other nation will receive favorable income tax treatment for participation in a pension arrangement in that other nation. Such mutuality is preferable to a unilateral surrender of U.S. tax authority unmatched by other nations.

---

[408] *U.S CITIZENS ABROAD AND THEIR VOTING BEHAVIORS IN 2020*, https://www.fvap.gov/uploads/FVAP/Reports/FVAP-VoterBrief_211105_v1a.pdf.

VIII) Conclusion

U.S. taxation of its citizens living abroad is better in practice and sounder in theory than the critics maintain. Other nations' residence-based tax systems tax "extraterritorially" by often classifying their overseas citizens as continuing residents for tax purposes and, on that basis, taxing these individuals' worldwide incomes. U.S. citizenship-based taxation reaches similar tax results more efficiently by avoiding factually complex determinations of individuals' domiciles or residences. When opponents of current law call for the U.S. to adopt residence-based taxation, they do not acknowledge the extent to which existing residence-based systems in practice also tax citizens living abroad extraterritorially on their worldwide incomes by deeming them for tax purposes to still reside in their home nations.

The U.S. abates its taxation of its citizens living abroad through a generous and unique exclusion for foreign earned income in addition to the income tax credit available to all U.S. taxpayers for foreign income tax paid on foreign-source income. Between the credit for foreign taxes paid and Section 911's exclusion for foreign earned income, in practice relatively few U.S. citizens living abroad actually owe net taxes to the U.S. The critics of U.S. law slight the benefits to overseas U.S. citizens of these Code provisions.

Critics cite the flaws of current law to further their argument that the U.S. should abolish citizenship-based taxation. But these flaws are remediable. As a matter of fiscal citizenship, these flaws can and should be corrected to improve the United States' taxation of its citizens who live abroad, not used as excuses to abandon citizenship-based taxation.

On a theoretical level, the United States' citizenship-based taxation compellingly implements what tax scholars increasingly designate as "fiscal citizenship." Other nations' income taxes define such membership via domicile or residence. From the vantage of fiscal citizenship, an individual's permanent home is a political community to which that individual, by virtue of his membership in that community, owes an obligation of tax support in accordance with his ability to pay. A U.S. citizen who lives abroad is a member of the national political community of the United States. As a normative matter of fiscal citizenship, an overseas U.S. citizen (like a U.S. citizen living at home) is properly called upon to support that community through her tax payments on her total, worldwide income.

Recent criticism of U.S. taxation of its overseas citizens rests on the hyper-libertarian notion of U.S. citizenship as a one-way street which bestows benefits but entails no corresponding duty to support the U.S. The contemporary debate between critics and defenders of U.S. citizenship-based taxation is largely about the nature of citizenship, i.e., whether or not citizenship properly imposes duties of tax support upon citizens wherever they live in accordance with citizens' respective abilities to pay. Fiscal citizenship provides a compelling premise for the United States' taxation of the worldwide incomes of all its citizens including its citizens who live offshore.

****

Edward A. Zelinsky is the Morris and Annie Trachman Professor lf Law at the Benjamin N. Cardozo School of Law of Yeshiva University. For comments on earlier drafts of this paper, he thanks the participants in the Cardozo faculty workshop and Professors Reuven S. Avi-Yonah, Michael S. Kirsch, Ajay K. Mehrotra, and Lawrence Zelenak. For research assistance, Professor Zelinsky thanks Cardozo students Evan Joseph, David Lazar, Jason Nadboy, Fraidy Stein and Senih Toraman.