DEFENDING U.S. CITIZENSHIP-BASED TAXATION IN THEORY AND IN PRACTICE: AN ESSAY ON FISCAL CITIZENSHIP IN A FATCA WORLD

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INTRODUCTION

For some Americans, a surprising aspect of the saga of Meghan Markle, also known as the Duchess of Sussex, was learning that, as a U.S. citizen living in the United Kingdom, the Duchess was obligated to pay U.S. income taxes on her worldwide income.[1] President Donald Trump has echoed concerns raised in this controversy about the United States' worldwide income taxation of its citizens living abroad. In particular,

1 *See, e.g.*, Edward A. Zelinsky, *US Is Not Unfair in Taxing Citizens Living Abroad*, LAW360 (Mar. 25, 2019, 3:37 PM), https://www.law360.com/articles/1142011/us-is-not-unfair-in-taxing-citizens-living-abroad [https://perma.cc/SQQ3-28N7] (defending U.S. income taxation of the Duchess of Sussex).

during his 2024 presidential campaign, President 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 and, in particular, defended the United States' taxation of its overseas citizens on their respective worldwide incomes.[4] 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.[5] In contrast, I argued for citizenship-based taxation on enforceability grounds, contending that citizenship is an administrable 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 while she is living in another nation? The answer, I argue, is to be found in the notion of "fiscal citizenship," an individual's obligation to support the national political community of which she is a member, even if living outside the borders of that nation.

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2 Andrew Duehren, *Trump Keeps the Tax Cut Promises Coming, Now for Americans Abroad*, N.Y. TIMES (Oct. 9, 2024), https://www.nytimes.com/2024/10/09/us/politics/trump-tax-cut-promise-overseas.html [https://web.archive.org/web/20241116170625/https://www.nytimes.com/2024/10/09/us/politics/trump-tax-cut-promise-overseas.html]; Alexander Rifaat, *Trump Vows to End "Double Taxation" of Overseas Citizens*, TAX NOTES (Oct. 11, 2024), https://www.taxnotes.com/featured-news/trump-vows-end-double-taxation-overseas-citizens/2024/10/10/7m68f [https://perma.cc/44YL-SVYN]; Stephanie Lai, *Trump Vows to Eliminate Income Taxes on Americans Living Abroad*, BLOOMBERG (Oct. 9, 2024, 10:05 PM), https://www.bloomberg.com/news/articles/2024-10-10/trump-vows-to-eliminate-income-taxes-on-americans-living-abroad; Bill Barrow, Adriana Gomez Licon & Isabella Volmert, *Donald Trump Rolls Out Tax Breaks, but No Specifics, for Overseas Citizens and Auto Buyers*, ASSOCIATED PRESS (Oct. 10, 2024, 5:07 PM), https://apnews.com/article/donald-trump-overseas-tax-plan-kamala-harris-92a2997896921889074bb993a2895cf8 [https://perma.cc/T22Z-ZFEB].

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

4 *Id.*

5 Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117, 129–31 (2014); *see also* Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 169, 212 (2016) (concluding that "the government cannot adequately enforce citizenship taxation").

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).[6] Many overseas U.S. citizens criticize FATCA as hampering their ability to conduct their routine financial affairs while living abroad.[7] In the FATCA world, some overseas citizens broaden their critique, arguing that the United States' citizenship-based taxation of its overseas citizens is both 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"[8]—an idiosyncratic departure from the international norm of residence-based income taxation.[9] According to these critics, the proper solution to the United States' improperly unique,[10] indeed "xenophobic,"[11] 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.[12] 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 United States should replace its policy of citizenship-based income taxation of overseas citizens with residence-based income taxation.

6 *See* I.R.C. §§ 1471–1474, 6038D (comprising FATCA's core withholding and reporting provisions).

7 *See infra* notes 262–266.

8 Laura Snyder, *Can Extraterritorial Taxation Be Rationalized?*, 76 TAX LAW. 535, 537 (2023) (discussing "the U.S. extraterritorial tax system").

9 Carl Greenstreet & Karen Alpert, Comment Letter with Proposal to Update the Outdated Australia-US Tax Treaty (Oct. 30, 2021), https://treasury.gov.au/sites/default/files/2023-01/c2022-338683-greenstreet.pdf [https://perma.cc/A2LU-99PM] (finding that residence-based taxation "is the convention accepted by the rest of the world").

10 Snyder, *supra* note 8, 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."); Greenstreet & Alpert, *supra* note 9 (discussing the "unique US practice of taxing on the basis of citizenship" (footnote omitted)); Karen Alpert, Investing with One Hand Tied Behind Your Back—An Australian Perspective on United States Tax Rules for Non-Resident Citizens 2 (Jan. 8, 2018), https://ssrn.com/abstract=3097931 [https://perma.cc/C52Z-6AU5] ("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."); Virginia La Torre Jeker, *Americans Abroad: IRS's E-Filing Plan Won't Solve the Problem!*, 181 TAX NOTES FED. 271, 274 (2023) (discussing how the United States has a "unique approach" of taxing its "citizens based on their worldwide income, regardless of where they reside").

11 Alpert, *Investing*, *supra* note 10, at 4.

12 La Torre Jeker, *supra* note 10, at 274 (suggesting that the 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"); *see* Residence-Based Taxation for Americans Abroad Act, H.R. 10468, 118th Cong. (2024).

I write now both to extend my earlier analysis and to 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 both better in practice and sounder in theory than 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 U.S. law call for the United States 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 income by deeming them to still reside in their respective home nations.

Moreover, under § 911 of the Internal Revenue Code, the United States 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.[13] The upshot of this exclusion and credit is that, in practice, relatively few U.S. citizens living abroad actually owe net taxes to the United States.[14] Those who do owe tend to be more affluent individuals, not rank-and-file taxpayers. While 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 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 live abroad, critics of U.S. law tend to slight the § 911 exclusion.

Good does not mean perfect. Critics of the status quo validly point to flaws in current U.S. law as it taxes U.S. overseas citizens. Critics cite these flaws to further their argument that the United States 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 of the United States' taxation of its citizens who live abroad. On a theoretical

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13 I.R.C. § 911.

14 Alpert, *supra* note 10, at 4 ("For many non-resident US taxpayers in the 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." (footnote omitted)).

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."[15] Other nations' incomes 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 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 her to support the United States. 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 their respective abilities to pay.

My 2011 article emphasized that citizenship can serve as an objective, administrable proxy for domicile.[16] 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

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15 LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX 17 (2013).

16 Zelinsky, *supra* note 3.

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. Part I of this Article provides a brief primer on some of the basic tax rules in this area.[17] Part II 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 critics contend, more reasonable and generous than they acknowledge.

Part II 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, fact-intensive determinations of residence and domicile—determinations which often result in the taxation of overseas 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 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.

Part II 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 § 911's uniquely generous exclusion of overseas U.S. citizens' foreign earned income; and discusses FATCA—a prime target and motivation of 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. However, 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 United States has negotiated with Canada and the United Kingdom, the two countries with

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17 Those knowledgeable about these basic tax rules can skip this Section and proceed to Part II.

the largest numbers of U.S. citizens living abroad.[18] Those treaties, following the model treaty, give 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"[19] 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.[20] In contrast, the departure levies assessed by Canada[21] and Australia[22] 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 taxation for individuals of modest circumstances abandoning their U.S. citizenships.

Also unique to U.S. law is the generous exclusion under § 911 for the foreign-earned income of U.S. citizens living abroad.[23] In practice, between the § 911 exclusion and the Internal Revenue Code's income tax credit for taxes paid to foreign income tax systems,[24] 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 critics to shift their concern to the compliance costs U.S. tax law imposes on overseas citizens. In this context, 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, at its core, FATCA's disclosure regime 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

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18 FEDERAL VOTING ASSISTANCE PROGRAM, U.S CITIZENS ABROAD AND THEIR VOTING BEHAVIORS IN 2020 OVERSEAS CITIZEN POPULATION ANALYSIS SUMMARY BRIEF 1, https://www.fvap.gov/uploads/FVAP/Reports/FVAP-VoterBrief_211105_v1a.pdf [https://perma.cc/E492-UY8Z].

19 Heroes Earnings Assistance and Relief Tax Act of 2008, Pub. L. No. 110-245, § 301, 122 Stat. 1624, 1631 (2008) (codified as amended at I.R.C. § 877A); Steven J. Arsenault, *Surviving a Heart Attack: Expatriation and the Tax Policy Implications of the New Exit Tax*, 24 AKRON TAX J. 37, 37 (2009).

20 I.R.C. § 877A(g)(4).

21 Income Tax Act, R.S.C. 1985, c 1 (5th Supp.), s 128.1(4)(b) (Can.).

22 *Income Tax Assessment Act 1997* (Cth) s 104.160 (Austl.).

23 I.R.C. § 911.

24 I.R.C. §§ 901, 911.

who live abroad. FATCA's flaws are remediable and should be remedied, not used as a justification 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 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.

Part III 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. principally 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.

Part IV of this Article explores and rejects 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.

Part V of this Article anticipates and addresses two issues which my analysis raises: my focus on three English-speaking nations (Canada, the United Kingdom, and Australia) and the difficulties of enforcement of

U.S. income taxation on many forms of income received by overseas citizens.

Part VI summarizes the improvements which could be made to the current system of U.S. citizenship-based income taxation. Critics cite the problems of current law as reasons to abandon citizenship-based taxation of overseas U.S. residents.[25] 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. 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 decision-makers have a reciprocal obligation to the fiscal citizen to enhance the fairness and the efficiency of the tax system 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 § 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 § 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 Foreign Bank and Financial Accounts (FBAR) reporting requirements[26] should be coordinated. The federal statute assuring overseas citizens of the right to vote should be broadened.

These changes would constitute appropriate refinements of the existing system of citizenship-based taxation of Americans' worldwide incomes. These reform measures are endorsed here to improve the equity, efficiency, and administrability of U.S. citizenship taxation of

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25 *See* discussion *infra* Part VI.

26 *Report of Foreign Bank and Financial Accounts (FBAR)*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/report-of-foreign-bank-and-financial-accounts-fbar [https://perma.cc/8QF8-NA8J] (Apr. 10, 2025) (discussing FBAR reporting requirements).

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.

I. A PRIMER ON SOME BASIC TAX RULES

Most nations tax income both on an *in personam* basis and an *in rem* basis.[27] Nations today typically assert *in personam* tax jurisdiction against an individual by virtue of her residence or her domicile in the taxing nation.[28] 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.[29] In contrast, when a nation exercises more limited *in rem* tax jurisdiction, it taxes only income which has its source in that nation.[30] Reflecting these prevailing tax norms, Justice Ruth Bader Ginsburg noted for the U.S. Supreme Court in *Oklahoma Tax Commission v. Chickasaw Nation*, that the international benchmark 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.[31]

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

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27 REUVEN S. AVI-YONAH, DIANE M. RING, YARIV BRAUNER & BRET WELLS, U.S. INTERNATIONAL TAXATION: CASES AND MATERIALS 26 (5th ed. 2022) (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 (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 410, cmt. c (AM. L. INST. 1980) (discussing "the right of a state to exercise prescriptive jurisdiction on the basis of domicile or residence, rather than just nationality"). For an earlier discussion of citizenship-based taxation in the context of emigration from developing nations to developed nations, see Richard D. Pomp & Oliver Oldman, *Tax Measures in Response to the Brain Drain*, 20 HARV. INT'L L.J. 1, 19, 25–27 (1979).

28 *Report of Foreign Bank and Financial Accounts (FBAR)*, *supra* note 26.

29 AVI-YONAH ET AL., *supra* note 27, at 26.

30 *Id.*

31 515 U.S. 450, 462–63 (1995) (noting that 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"); *id.* at 463, n.11 ("For nonresidents . . . jurisdictions generally may tax only income earned within the jurisdiction."). *In re Petition of Edward A. and Doris Zelinsky*, DTA Nos. 830517 & 830681, 2025 WL 1508341 (N.Y. Tax App. Trib. May 15, 2025), 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 interest of full disclosure, this author and his wife are the taxpayers in this case.

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 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.[32] 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 tax 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 United States and nation C will tax this individual's worldwide income. Insofar as nation C taxes income which the United States views as foreign source income, the U.S. credit for foreign taxes paid will abate and potentially eliminate double taxation. However, if nation C taxes income which the United States treats as U.S. source income, no credit will be extended by the United States to offset nation C's taxes.[33]

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.[34]

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32 AVI-YONAH ET AL., *supra* note 27, at 491–95 (discussing the U.S. income tax credit for foreign income taxes paid); *see* I.R.C. § 901 (establishing and regulating the foreign tax credit).

33 AVI-YONAH ET AL., *supra* note 27, at 491–95; *see also* I.R.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").

34 If X is a U.S. citizen or resident, X can deduct these property taxes but will not receive a dollar-for-dollar credit. I.R.C. § 164(a)(1) (providing for "deduction [of] . . . State and local, and

Nations enter into tax treaties to coordinate their tax treatments of their respective residents and their incomes.[35]

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

A. *Other Nations Tax the Worldwide Incomes of Residents Living Abroad*

While critics decry U.S. tax law as being uniquely[36] "extraterritorial,"[37] 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, when compared with the tax laws of other nations, emerges as less idiosyncratic than critics suggest and 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.[38] In practice, residence-based income systems often tax their overseas citizens' worldwide incomes in an "extraterritorial" manner similar to the United States' allegedly novel system of citizenship-based taxation. The opponents of current U.S. law ignore these realities.

1. Canada

Canada taxes the worldwide incomes of Canadian residents living abroad. This "extraterritorial" taxation is closer to U.S. law than critics of U.S. law 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. This individual, while living overseas, can be taxed on her worldwide income by Canada

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foreign, real property taxes[] . . . which are paid or accrued within the taxable year in carrying on a trade or business or an activity described in section 212"); *id.* § 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").

35 *See, e.g.*, discussion *infra* Section II.D (explaining the tax treatment of pensions under the U.S. model tax treaty and under the tax treaties the United States has negotiated with Australia, Canada, and the United Kingdom).

36 Greenstreet & Alpert, *supra* note 9.

37 Snyder, *supra* note 8, at 537.

38 *See* Edward A. Zelinsky, *Defining Residence for Income Tax Purposes: Domicile as Gap-Filler, Citizenship as Proxy and Gap-Filler*, 38 MICH. J. INT'L L. 271 (2017).

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.[39]

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," 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*.[40] 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,[41] and "ordinarily resident" in Canada despite being based in Japan for these three years.[42] Canada thus taxed Mr. McFadyen on his worldwide income as a Canadian resident even though he lived in Japan. 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 "significant"[43] residency-confirming "ties with Canada"[44] while living in Japan were his joint bank accounts in Canada and the two houses he owned in Canada.[45] While Mr. McFadyen was in Japan, among his other "personal"[46] 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

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39 VERN KRISHNA, 1 FUNDAMENTALS OF CANADIAN INCOME TAX: PERSONAL TAX 105 (2019) (alteration in original).

40 [2000] 4 C.T.C. 2573 (Can.).

41 *Id.* paras. 2, 97, 110.

42 *Id.* paras. 109, 155(a).

43 *Id.* para. 103.

44 *Id.*

45 *Id.* para. 104.

46 *Id.*

registered retirement savings plan ("RRSP"),[47] a tax-favored savings device similar to a U.S. individual retirement account ("IRA").[48]

While critics of the United States' worldwide income taxation of its overseas citizens claim that such taxation violates international norms,[49] *McFadyen* takes a different view. Quoting Justice Frank Iacobucci of Canada's Supreme Court, *McFadyen* highlights the similarity of Canada's worldwide income taxation 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 worldwide income."[50]

2. Australia

Similar observations are to be made about Australia's income tax. By adopting the "widest meaning"[51] 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 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"[52] or "whose domicile is in Australia, unless the Commissioner is satisfied that the person's permanent place of abode is outside Australia."[53] As understood and applied, these fact-laden concepts of residence and domicile can impose on Australian citizens living abroad the same "extraterritorial" worldwide income taxation excoriated by critics of U.S. income taxation of its overseas citizens.

For example, *Duff v. Federal Commissioner of Taxation*,[54] decided by Australia's Administrative Appeals Tribunal, involved an Australian

47 *Id.* paras. 24, 104.

48 I.R.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 39–42, 52–58 (2007).

49 Greenstreet & Alpert, *supra* note 9, at 1.

50 *McFadyen*, 4 C.T.C. para. 135.

51 *Iyengar v. Comm'r of Tax'n* [2011] AATA 856, ¶ 56 (Austl.); *see also id.* ¶ 86 (finding that "the ordinary meaning of 'reside'" should receive "the widest possible meaning").

52 *Income Tax Assessment Act 1936* (Cth) s 6(1)(a) (Austl.).

53 *Id.* s 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 family member of someone so covered. *Id.* ss 6(1)(a)(i), 6(1)(a)(ii).

54 [2022] AATA 3675.

citizen by birth who was an experienced chef.[55] Mr. Duff spent most of 2016 outside Australia, living and working in "international waters"[56] on ships owned by Viking Ocean Cruises.[57] These ships were flagged in Norway.[58] For 2016, Mr. Duff committed to two employment periods of four months each on these ships in international waters.[59] 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 outside Australia.[60] The Administrative Appeals 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.[61]

For years prior to 2016, Mr. Duff conceded that Australia was his domicile.[62] However, Mr. Duff's 2016 service on ships flagged in Norway, he maintained, shifted his domicile for that year from Australia to Norway.[63] The Administrative Appeals 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."[64] The Administrative Appeals Tribunal further explained:

> 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, there was nothing at all general and indefinite about his 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. To the contrary, his time aboard the ships was in each case fixed as to duration (4 months), limited as to

55 *Id.* ¶ 1.
56 *Id.* ¶ 12.
57 *Id.* ¶ 11.
58 *Id.* ¶ 10.
59 *Id.* ¶¶ 37–38.
60 *Id.* ¶ 19.
61 *Id.* ¶¶ 23–24, 70, 103.
62 *Id.* ¶ 29.
63 *Id.* ¶ 30.
64 *Id.* ¶ 35.

> particular purpose (duties of employment only) and self-evidently other than indefinite in its future contemplation . . . .[65]

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 residency in Norway during 2016."[66] These comments of the Tribunal are consistent with an argument advanced in this Article and my 2011 article: citizenship is probative of domicile.[67] According to the Tribunal, Mr. Duff remained an Australian domiciliary in 2016 for many reasons including his retention of Australian citizenship. Since he had no permanent place of abode abroad while remaining domiciled in Australia,[68] Mr. Duff paid Australian income tax on his worldwide income literally earned overseas from Australia—the same kind of "extraterritorial" income taxation for which critics excoriate U.S. citizenship-based taxation as unique and unjust.[69]

Of similar import to *Duff* is the opinion of the Administrative Appeals Tribunal in *Iyengar v. Commissioner of Taxation*,[70] another case in which an overseas Australian citizen[71] 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[72] and Qatar[73] for the tax years in question.[74] The Tribunal held that, despite living outside Australia, Mr. Iyengar was an Australian resident for tax purposes based on "ordinary concepts" of residence[75] as well as the statutory notion of domicile.[76]

Despite living abroad, many factors indicated that Mr. Iyengar had "continuity of association" with Australia for the two years he lived in Dubai and Qatar.[77] These residence-confirming facts included Mr.

65 *Id.* ¶¶ 37–38.

66 *Id.* ¶ 43.

67 Zelinsky, *supra* note 3.

68 *Id.* ¶¶ 71–72, 103.

69 Snyder, *supra* note 8, at 537.

70 [2011] AATA 856.

71 *Id.* ¶¶ 7, 9, 18–19

72 *Id.* ¶¶ 19–21, 28, 38.

73 *Id.* ¶¶ 41–42.

74 *Id.* ¶¶ 3, 34–35, 44–45, 47.

75 *Id.* ¶¶ 84–85. "Ordinary concepts" refers to whether a person "resides" in Australia according to the ordinary meaning of that term, considering factors such as physical presence, intention to treat a place as home, and continuity of association with that place.

76 *Id.* ¶¶ 101–03.

77 *Id.* ¶ 65.

Iyengar's home and family in Australia[78] and his Australian citizenship.[79] 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."[80] 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."[81]

While "the totality of facts and evidence"[82] indicated that Mr. Iyengar was an Australian resident for tax purposes under "ordinary concepts" of residence,[83] the Tribunal additionally concluded that Mr. Iyengar remained domiciled in Australia while living in Dubai and Qatar.[84] 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."[85] Because Mr. Iyengar had no "permanent place of abode" outside Australia for the years in question,[86] he was also subject to "extraterritorial" Australian income taxation of his worldwide income on the basis of domicile.

Contrary to critics' claim that the United States' worldwide taxation of its overseas citizens violates international norms,[87] 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 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

78 *Id.*

79 *Id.* ¶¶ 66–67.

80 *Id.* ¶ 66.

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

82 *Id.* ¶ 84.

83 *Id.*

84 *Id.* ¶¶ 101, 103.

85 *Id.* ¶ 100.

86 *Id.* ¶ 125.

87 Greenstreet & Alpert, *supra* note 9, at 1.

domiciliary status. In income tax controversies, citizenship is a compelling proxy for domicile.[88]

3. United Kingdom

In 2013, the United Kingdom adopted legislation establishing a "statutory residence test" for tax purposes.[89] Like the statutory residence laws of the various U.S. states[90] and the Internal Revenue Code's definition for tax purposes of a U.S. noncitizen resident,[91] 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 noncitizen. 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 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 tax purposes if she triggers either "the automatic residence" test or "the sufficient ties test."[92] The automatic residence test, in turn, has two components: "automatic U.K. tests"[93] and "automatic overseas tests."[94] The automatic U.K. tests measure the taxpayer's nexus in the year to the United Kingdom. One

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88 Professor Mason agrees that citizenship is a more administrable standard than such fact-based tests as residence and domicile. Mason, *supra* note 5, at 222. 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. *Id.* However, governments and individuals confront those same administrative burdens when governments tax their overseas residents and domiciliaries. *Id.*

89 Finance Act 2013, c. 29, § 218 (UK).

90 Zelinsky, *supra* note 38, at 274–76, 278–79 (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 FLA. TAX REV. 533, 542–46 (2014) (same).

91 I.R.C. § 7701(b)(1)(A) (defining a noncitizen resident for tax purposes as an individual who is a lawful permanent resident, meets the substantial presence test, or makes a first-year election under § 7701(b)(4)).

92 Finance Act 2013, c. 29, sch. 45, ¶ 3 (UK). For a summary of this law, see MARK HUNT, UK TAXATION: A SIMPLIFIED GUIDE FOR STUDENTS 108–11 (2022).

93 Finance Act 2013, c. 29, sch. 45, ¶¶ 5–10 (UK).

94 *Id.* ¶¶ 5, 11–16.

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.[95] The second automatic U.K. test is home-based.[96] An individual triggers this second test for any particular year if (i) she has a U.K. home during this year,[97] (ii) she uses that U.K. home on at least 30 days in the year,[98] 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.[99] The third, even more complicated automatic U.K. test is work-based. This test uses daunting, detailed formulas to determine if an individual works predominantly in the United Kingdom in any particular year.[100]

Conversely, the automatic overseas tests 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 United Kingdom in the current year.[101] 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 United Kingdom in the current year.[102] The third automatic overseas test uses a series of complex formulas to determine if the taxpayer works "sufficient hours overseas."[103]

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 U.K. tests" and none of the "automatic overseas tests."[104]

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 United States taxes its overseas citizens on their worldwide incomes but provides a generous exclusion for foreign-earned income.[105] Moreover, in particular cases, the maze of the U.K. statutory resident test

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95 *Id.* ¶ 7.

96 *Id.* ¶ 8.

97 *Id.* ¶ 8(1)(a).

98 *Id.* ¶¶ 8(1)(b), 8(4).

99 *Id.* ¶¶ 8(1)(c), 8(2), 8(3), 8(5).

100 *Id.* ¶ 9. There is a fourth automatic U.K. test for the year of an individual's death. *Id.* ¶ 10.

101 *Id.* ¶ 12.

102 *Id.* ¶ 13.

103 *Id.* ¶ 14. A fourth or fifth automatic overseas test may apply in the year an individual dies. *Id.* ¶¶ 15–16.

104 *Id.* ¶ 5.

105 I.R.C. § 911.

will tax an overseas British citizen on her worldwide income, just as the United States taxes the worldwide incomes of its citizens living abroad. U.S. citizenship-based taxation, again, proves less unique than 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 following month traveling peripatetically in different countries, and spends the remaining nine months in a home rented abroad for that nine-month period.

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 United Kingdom 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.[106]

Thus, the U.K. taxes this individual as a resident though he lives 10 months of the year abroad, one month traveling, and 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.[107] This fact-intensive test assesses such criteria as the time the individual spends in the United Kingdom, his "work tie[s]" to the United Kingdom, whether the individual has a U.K. home, and such individual's "family tie[s]" to the United Kingdom.[108]

To see the operation of this labyrinthine formula, assume 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.[109] 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."

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106 Finance Act 2013, c. 29, sch. 45, ¶¶ 5–10 (UK).

107 *Id.* ¶ 3.

108 *Id.* ¶¶ 17, 31.

109 *Id.* ¶¶ 17, 31–32.

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 the purposes of this discussion, the significance of the U.K. rules is that they belie the narrative that U.S. citizenship-based taxation is the extreme outlier critics claim it to be. Like Canada and Australia, the U.K. statute defines as residents for tax purposes individuals who largely live abroad—yet offers no tax relief similar to § 911's exclusion of their foreign earned income.[110] U.S. citizenship-based taxation is easier to administer than is the daunting U.K. statutory test of residence.

4. Summary

While critics excoriate U.S. tax law as being uniquely extraterritorial, Canada, Australia, and the United Kingdom 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."[111] 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 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 United States, Canada, and Australia.[112] When we

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110 I.R.C. § 911.

111 Young Ran (Christine) Kim, *Considering "Citizenship Taxation": In Defense of FATCA*, 20 FLA. TAX REV. 335, 353 (2017); *see also infra* Part IV.

112 The European Court of Justice has discouraged the member nations of the European Union from adopting exit taxes. Case C-9/02, *Hughes de Lasteyrie du Saillant and Ministere de l'Economie, des Finances et de l'Industrie*, 2004 E.C.R. I-02409 (finding that when a French taxpayer changes residence to Belgium, French exit tax assessed on "as yet unrealised increases in

compare the 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 to renounce U.S. citizenship.[113]

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.[114] This constructive sale treatment requires such individuals to recognize unrealized gain on appreciated assets by virtue of their respective transitions to nonresident status.[115]

Internal Revenue Code § 877A, the U.S. exit tax, also imposes a constructive sale on appreciated assets.[116] Additionally, § 877A taxes three other forms of income: "deferred compensation item[s]" such as

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 Goulder, *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.* Case C-513/03, Heirs of M.E.A. van Hilten-van der Heijden v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen, 2006 E.C.R. I-01957, ¶ 51 (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").

113 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 renunciation is regulated substantively only "whenever the United States shall be in a state of war." *Id.* § 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. *Id.* A wartime renunciation of U.S. citizenship, even if procedurally proper, is effective only if the Attorney General "approve[s] such renunciation as not contrary to the interests of national defense." *Id.* In *Kaufman v. Holder*, the U.S. District Court for the District of Columbia held that the United States was in "a state of war" for this purpose in 2004 and 2008, even though there was no formal declaration of war by Congress. 686 F. Supp. 2d 40, 43–44 (D.D.C. 2010).

114 *See infra* notes 124–29.

115 *Id.*

116 I.R.C. § 877A(a).

interests in qualified plans,[117] "specified tax deferred account[s]" such as IRAs,[118] and distributions from certain trusts.[119] However, the U.S. exit tax of § 877A only applies upon an individual's formal renunciation of her U.S. citizenship.[120] Thus, in comparison with the Australian and Canadian exit taxes, the comparable U.S levy is harder to trigger, as it operates only when 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.[121] Among its progressive provisions, § 877A contains a generous exemption from constructive sale treatment for an individual abandoning her U.S. citizenship.[122] 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. 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.

1. Canada

McFadyen suggests that, had Mr. McFadyen remained in Japan longer 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.[123] 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.[124] The result of the Canadian exit tax is Canadian income taxation of a former resident's unrealized appreciation in her investment assets, even though

117 *Id.* § 877A(d).

118 *Id.* § 877A(e).

119 *Id.* § 877A(f).

120 *Id.* § 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 . . . ." *Id.* § 877A(g)(2)(B).

121 *See infra* notes 132–36.

122 I.R.C. § 877A(a)(3)(A).

123 McFadyen v. The Queen, [2000] 4 C.T.C. 2573, para. 106 (Can.) (contrasting Mr. McFadyen's "three-year stay in Japan" with the appellant in *Beament v. M.N.R.*, [1952] S.C.R. 486 (Can.), who "lived abroad for almost six years").

124 Income Tax Act, R.S.C. 1985, c 1 (5th Supp.), s 128.1(4)(b) (Can.) (noting that when "a taxpayer ceases to be a resident in Canada . . . . the taxpayer is deemed to have disposed" of many of her forms of property).

she remain a Canadian citizen and even though she may have shifted to nonresident status inadvertently and unknowingly.[125]

2. 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."[126] This means that, if an individual "stop[s] being an Australian resident,"[127] she realize capital gains and losses on her appreciated investments.[128] This is sometimes called "deemed disposal,"[129] which 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 appreciation.[130]

3. United States

The United States 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.[131] A U.S. citizen who becomes a nonresident living abroad does not activate U.S. taxation under the provisions of § 877A as long as he retains his U.S. citizenship.[132]

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125 The nonresident may delay the Canadian exit tax by providing "adequate security." *Id.* s 220(4.5); Gov't of Can., *Dispositions of Property for Emigrants of Canada*, CAN. REVENUE AGENCY (Jan. 21, 2025), https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/individuals-leaving-entering-canada-non-residents/dispositions-property.html [https://perma.cc/U4U5-4AHZ].

126 *Income Tax Assessment Act* (*ITAA*) *1997* (Cth) s 104-160(1) (Austl.).

127 *Id.*

128 *Id.* s 104-160(4). Hence, the phrase "CGT event," refers to a capital gains tax event.

129 Austl. Gov't, *How Changing Residency Affects CGT*, AUSTL. TAX OFF. (Jan. 16, 2025), https://www.ato.gov.au/individuals-and-families/investments-and-assets/capital-gains-tax/foreign-residents-and-capital-gains-tax/how-changing-residency-affects-cgt [https://perma.cc/6B3U-5LNQ].

130 *Id.* (providing the following 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 their assets as "taxable Australian property." *ITAA* s 104-165(3). That election swaps immediate extraterritorial taxation for deferred extraterritorial taxation when the nonresident disposes of the asset. *Id.* s 104-165(3)(a).

131 I.R.C. §§ 877(a)(1), 877A(g).

132 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." I.R.C. § 877A(g)(3)(B).

Moreover, even if a U.S. citizen renounces his citizenship, § 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 $201,000,[133] (2) "the net worth of the individual . . . is $2,000,000 or more,"[134] or (3) the individual rejecting U.S. citizenship has not complied with the provisions of the Internal Revenue Code "for the [five] preceding taxable years."[135] The net effect of these provisions is progressive, focusing U.S. exit taxation on 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 2025, § 877A(a)(3) excludes the first $890,000 of gain from a former U.S. citizen's constructive sale liability.[136] This exclusion is sui generis. Neither the Canadian exit tax nor the Australian exit tax contains such an exclusion when a resident of either nation becomes a nonresident and thus triggers 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 other forms of income covered by § 877A, such as the renouncing citizen's IRAs[137] and pensions.[138]

In a world of tradeoffs, the § 877A(a)(3) exclusion tempers the policy that former U.S. citizens should pay tax on income that accrued but remained untaxed as of the date they renounce U.S. citizenship. This exclusion (like the focus of § 877A upon individuals with significant

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133 *Id.* §§ 877A(g)(1)(A), 877(a)(2)(A); Rev. Proc. 2023-34, 2023-48 I.R.B. 1287, § 3.37 (updating the income tax requirement of I.R.C. § 877(a)(2)(A) to $201,000).

134 I.R.C. §§ 877A(g)(1)(A), 877(a)(2)(B).

135 *Id.* §§ 877A(g)(1)(A), 877(a)(2)(C).

136 Rev. Proc. 2024-40, 2024-45 I.R.B. 1100, § 3.38 (updating the exclusion of I.R.C. § 877A(a)(3) to $890,000).

137 I.R.C. § 877A(e).

138 *Id.* § 877A(d). I suggest that the current exclusion, applicable today only to constructive sales of appreciated property, should be broadened to apply to such other items such as pensions, IRAs and trust interests. *See infra* Section VI.D. 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* I.R.C. § 877A(b) (providing election to defer U.S. exit taxation with adequate security), *with ITAA 1997* (Cth) s 104-165(3) (Austl.) (allowing deferral of exit taxation by former Australian residents), *and* Income Tax Act, R.S.C. 1985, c 1 (5th Supp.), s 220(4.5) (Can.) (permitting security for deferral of exit taxation by former Canadian residents). 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. *Id.* § 877A(d).

assets[139] or incomes[140]) implements 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 $890,000 of unrealized appreciation. U.S. exit taxation is also focused on affluent individuals by the Internal Revenue Code's net worth requirement of $2,000,000[141] and the average net annual income requirement of $201,000 or more.[142] 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.

4. 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 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.[143]

C. *The § 911 Exclusion for Foreign Earned Compensation*

Another generous provision of U.S. law slighted by critics is § 911.[144] In this case also, U.S. law is unique but is uniquely favorable towards its overseas citizens. Internal Revenue Code § 911 excludes from the gross income of a U.S. citizen who is a bona fide resident of a foreign nation the first $130,000 of such citizen's foreign earned income.[145] In addition,

139 I.R.C. §§ 877A(g)(1)(A), 877(a)(2)(B).

140 *Id.* §§ 877A(g)(1)(A), 877(a)(2)(A).

141 *Id.* §§ 877A(g)(1)(A), 877(a)(2)(B). This $2,000,000 net worth figure is not adjusted for inflation unlike § 877A's net annual income test.

142 I.R.C. §§ 877A(g)(1)(A), 877(a)(2)(A); Rev. Proc. 2023-34, 2023-48 I.R.B. 1287, § 3.37 (updating the annual income limit of I.R.C. § 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. I.R.C. §§ 877A(g)(1)(A), 877(a)(2)(C).

143 Professor Avi-Yonah cautions that the exit tax established by § 877A is constitutionally infirm if the U.S. Supreme Court were to hold that realization is constitutionally required for income taxation. Reuven Avi-Yonah, *Are Exit Taxes Discriminatory?*, 183 TAX NOTES FED. 2349 (2024).

144 I.R.C. § 911.

145 *Id.* § 911(b)(2)(D)(i); Rev. Proc. 2040-40, 2024-45 I.R.B. 1100, § 3.39.

§ 911 excludes from the U.S. gross incomes of overseas citizens certain housing allowances.[146]

To qualify for the § 911 exclusion, a U.S. citizen's "tax home" must be "in a foreign country."[147] While the normal definition of an individual's "tax home" is his principal place of business,[148] for § 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.[149] 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"[150] 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."[151] Code § 911 is thus not without its interpretive complexities.[152]

Code § 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 United Kingdom do not provide similar exclusions to individuals who remain taxable by those nations as continuing tax residents or domiciliaries. In light of the § 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.

Code § 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 § 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,

146 I.R.C. § 911(a)(2), (c).

147 *Id.* § 911(d)(1).

148 *See, e.g.*, Bellwood v. Comm'r, 118 T.C.M. (CCH) 322, at *16 (2019).

149 I.R.C. § 911(d)(3).

150 *Id.* § 911(d)(1)(A).

151 *Id.* § 911(d)(1)(B).

152 *See, e.g.*, *Bellwood*, 118 T.C.M. at *14–22 (discussing "tax home," "abode" and "bona fide residence" in the context of § 911); Duke v. Comm'r, No. 25906-17, 2020 U.S. Tax LEXIS 4, at *10–12 (T.C. 2020) (discussing "tax home" and "abode" in the context of § 911).

United Kingdom, Australia, France, and Israel with substantial income tax rates.[153] In these settings, the § 911 exclusion is often superfluous since U.S. citizens living in these nations with income tax rates comparable 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), § 911's exclusion of foreign earned income yields a substantial and unique tax benefit to the U.S. citizen. In these settings, the § 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 § 911's statutory maximum.

There are four potential justifications for § 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 United States taxes affluent U.S. expatriates with capital-based income or with labor-based earnings more than the maximum annual exclusion of § 911, which is currently $130,000.[154] Thus, § 911 serves as a symbolic confirmation of the progressivity of the Code's treatment of offshore Americans.

Second, as I discuss in Part VI,[155] § 911 could facilitate simplified reporting for rank-and-file overseas U.S. citizens whose income falls below the § 911 maximum. The IRS could promulgate a simplified return for overseas citizens, all of whose income is excluded from U.S. taxation by § 911.

A third justification for the § 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.[156] 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 § 911 exclusion can

153 FEDERAL VOTING ASSISTANCE PROGRAM, *supra* note 18, at 1.

154 Rev. Proc. 2024-40, 2024-45 I.R.B. 1100, § 3.39.

155 *See infra* Section VI.A.

156 *See, e.g.*, *Types of Taxes in Bermuda*, GOV'T OF BERM., https://www.gov.bm/types-taxes-bermuda [https://perma.cc/L8V3-LPE2] ("Individuals in Bermuda don't pay personal income tax.").

be interpreted as abating this double taxation by not taxing this overseas citizen's earned income. In these contexts, the § 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 § 911 exclusion pays no U.S. income taxes, but pays foreign sales, property, or VAT taxes.

A final potential justification of the § 911 exclusion is that it recognizes the enforcement difficulties of taxing the earned income of overseas Americans. This enforcement-related justification for § 911 reinforces the progressivity-enhancing aspect of § 911 by focusing taxation, and thus enforcement activity, upon those U.S. citizens who live abroad and who earn annual compensation-based income over $130,000 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 United States has acknowledged the pension-related tax concerns of overseas Americans and has mitigated those problems via treaties that extend to U.S. citizens living abroad favorable income tax treatment for their participation in foreign retirement plans.[157] The U.S. tax treaties with Canada and the United Kingdom grant the two largest groups of Americans living abroad favorable income tax treatment of their foreign pension savings.[158] The U.S. model income tax treaty suggests that similar relief should be granted to U.S. citizens who live in other foreign nations.[159] 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.[160] Thus, U.S. tax policy towards the foreign pensions of overseas Americans is more lenient than critics suggest.

157 *See infra* Sections II.D.6–8.

158 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, *supra* note 18, at 1.

159 *See infra* Section II.D.5.

160 I.R.C. § 911.

1. 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.[161] "Qualified" retirement savings are favorably taxed via the immediate deductibility of plan contributions, the tax-free growth of such contributions, and deferred taxation that is delayed until the actual and eventual distribution of cumulative contributions and earnings to the employee or her beneficiaries.[162] When, for example, a U.S. resident contributes to a 401(k) plan (a "qualified" retirement arrangement) by reducing her current salary, she excludes such contributed salary from her gross income,[163] thereby lowering her current income tax liability. The employer similarly receives a current deduction for its contributions to the plan.[164] Those employee and employer contributions, held in the 401(k) plan's trust, grow tax-free[165] and are only taxed when actually distributed (with earnings) from the 401(k) trust to the participating employee or to her beneficiaries.[166] 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 IRAs[167] and similar Roth arrangements attached to qualified retirement plans.[168] There is no income tax deduction for Roth

161 On the distinction between qualified and nonqualified retirement savings arrangements, see JOHN H. LANGBEIN, DAVID A. PRATT, SUSAN J. STABILE & ANDREW W. STUMPFF, PENSION AND EMPLOYEE BENEFIT LAW 287–315 (6th ed. 2015) (describing qualified retirement plans); *id.* at 315–33 (describing nonqualified deferred compensation); JOSEPH BANKMAN, DANIEL N. SHAVIRO, KIRK J. STARK & EDWARD D. KLEINBARD, FEDERAL INCOME TAXATION 293–308 (18th ed. 2019) (describing nonqualified deferred compensation); *id.* at 309–14 (describing qualified retirement arrangements).

162 *See infra* notes 163–66.

163 I.R.C. § 401(k)(2) (describing "qualified cash or deferred arrangement[s]"); *id.* § 401(g) (describing annual limits on "elective deferrals").

164 *Id.* § 404(a)(3)(A)(i) (noting that an employer contribution to a qualified profit-sharing plan is deductible "[i]n the taxable year when paid").

165 *Id.* § 501(a) (ensuring that a trust holding assets of a qualified retirement plan is "[a]n organization . . . exempt from taxation").

166 *Id.* § 402(a) (providing that amounts from a qualified plan are taxable to the distributee only when "actually distributed").

167 *Id.* § 408A. On the emergence and tax treatment of Roth IRAs, see Zelinsky, *supra* note 48, at 70.

168 I.R.C. § 402A.

contributions.[169] However, the earnings of such contributions grow tax-free,[170] and the ultimate distribution of Roth contributions and earnings to the employee or her beneficiary is generally income-tax-free as well.[171] Under certain circumstances,[172] 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 plan assets to employees or their beneficiaries versus no deductibility of contributions to the plan, tax-free growth of plan earnings, and 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.[173] 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.[174] The U.S. tax law

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169 *Id.* § 408A(c)(1) (noting that there is no deduction "for a contribution to a Roth IRA"); *id.* § 402A(a)(1) ("[A]ny designated Roth contribution . . . shall not be excludable from gross income.").

170 *Id.* § 408A(a) (describing that a Roth IRA is tax-free on earnings "in the same manner as an individual retirement plan"); *id.* § 402A(f)(1)(A) (noting that a designated Roth contribution is made to a trust "exempt from tax under section 501(a)").

171 *Id.* § 408A(d)(1) ("Any qualified distribution from a Roth IRA shall not be includible in gross income."); *id.* § 402A(d)(1) ("Any qualified distribution from a designated Roth account shall not be includible in gross income.").

172 LANGBEIN ET AL., *supra* note 161, at 297–98 ("[I]f tax rates remain constant, the benefits of pretax contributions to qualified plans and traditional IRAs are equivalent to taxing the contributions when they are made and permitting the *after-tax remainder* to earn investment income tax free. . . . Since contributions to Roth IRAs and Roth contributions to 401(k) plans are made after tax (i.e., no deduction), and the income on the contributions is tax-free (if taken as a 'qualified distribution'), they appear to offer essentially the same economic benefit as the traditional IRA or qualified plan.").

173 The statutory basis for the income tax treatment of nonqualified deferred compensation is I.R.C. § 83(a). *See* STEPHEN A. LIND, DANIEL J. LATHROPE & HEATHER M. FIELD, FUNDAMENTALS OF FEDERAL INCOME TAXATION: CASES AND MATERIALS 866–74 (20th ed. 2022) (describing § 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." Treas. Reg. § 1.83-3(e). 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.*

174 If nonqualified deferred amounts are held by the employer as an asset of the employer, the income earned by these deferred amounts will be taxed to the employer like any other income

concepts of "constructive receipt" and "economic benefit" assure that income immediately available but channeled by U.S. taxpayers into nonqualified deferred compensation arrangements is currently taxable to these taxpayers[175] 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.[176]

2. Canadian Deferred Compensation Arrangements

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."[177] Like a U.S. employer contributing to a qualified plan, a Canadian employer deducts its contributions to such a registered plan[178] when contributions are made.[179] 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.[180] Amounts from such Canadian plans are only taxed when finally "received" by a "beneficiary" from the "trustee."[181]

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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. I.R.C. § 1(e)(2) (tax rates for a trust's "taxable income").

175 *See* Treas. Reg. § 1.451–2 (discussing constructive receipt of income); BANKMAN ET AL., *supra* note 161, at 286–98 (discussing constructive receipt and economic benefit).

176 I.R.C. § 401(a) (describing how a "qualified trust" must be "created or organized in the United States").

177 Income Tax Act, R.S.C. 1985, c 1 (5th Supp.), s 147 (Can.).

178 *Id.* s 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 . . . .").

179 *Id.* s 147(8).

180 *Id.* s 147(7).

181 *Id.* s 147(10).

Similarly, contributions to a registered Canadian pension plan[182] are deductible for income tax purposes[183] and grow tax-free in the plan's trust.[184] These contributions and earnings are only taxed when ultimately paid as a "pension benefit."[185]

On the other hand, "salary deferral arrangement[s]" under Canadian tax law are analogous to nonqualified deferred compensation under U.S. tax law and are typically taxed when earlier earned even though not yet received.[186]

3. Australian Deferred Compensation Arrangements

By statute, Australian tax law includes the concept of constructive receipt.[187] The relevant statute 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 [the taxpayer's] behalf or as [the taxpayer] direct[s]."[188] 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."[189] 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."[190]

Australia has a system of mandatory private retirement savings, designated as "superannuation" plans.[191] In U.S. terms, the Australian tax treatment of these superannuation devices combines and modifies traditional qualified plan taxation and Roth-style taxation.[192] Employer

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182 *Id.* s 146(1).

183 *Id.* s 146(5).

184 *Id.* s 149(1)(o).

185 *Id.* s 56(1)(a)(i).

186 The statutory grounding for the Canadian treatment of salary deferral arrangements is Income Tax Act, R.S.C. 1985, c 1 (5th Supp.), ss 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 39, at 306–07. The rules of I.R.C. § 83 are similar. *See* I.R.C. § 83.

187 *See* Australian Taxation Office, *Foreign Pension Contributions* (Authorisation Number 1052062478666, 24 November 2022).

188 *ITAA 1997* (Cth) s 6-5(4) (Austl.).

189 Australian Taxation Office, *supra* note 187.

190 *See supra* notes 173–75.

191 *See infra* note 192.

192 For an overview of Australia's tax treatment of superannuation arrangements, see Jonathan Barry Forman & Gordon D. Mackenzie, *Optimal Rules for Defined Contribution Plans: What Can We Learn from the U.S. and Australian Pension Systems?*, 66 TAX LAW. 613, 625–29 (2013).

contributions to a superannuation fund are "usually" deducted by the employer and are "generally" excluded from the participating employee's income.[193] Contributions made by a participant into an Australian superannuation fund may be pre-tax ("concessional") contributions through "salary sacrific[e]"[194] (i.e., 401(k)-style salary reduction) arrangements or may be Roth-style, after-tax ("nonconcessional") contributions.[195] 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.[196] The superannuation plan also pays a relatively low "concessional" tax of 15% on its investment earnings.[197]

Upon distribution, superannuation payments, like U.S. Roth distributions, "are generally tax-free for people age 60 and over."[198]

4. U.K. "Pension Schemes"

The United Kingdom'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.[199] 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

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193 *Id.* at 625; CCH AUSTRALIA LTD., AUSTRALIAN MASTER TAX GUIDE ¶ 13-015 (72nd ed. 2023); *ITAA 1997* (Cth) s 280-10(1) ("Employers can usually deduct contributions they make in respect of their employees.").

194 Australian Taxation Office, *Understanding Concessional and Non-Concessional Contributions* (QC 23223, 1 August 2023).

195 *See id.*; Forman & Mackenzie, *supra* note 192, at 625–26; CCH AUSTRALIA LTD., *supra* note 193,¶ 13-730; *ITAA 1997* (Cth) s 280-10(1) ("Individuals can usually deduct contributions they make in respect of themselves to most complying superannuation funds."); *see supra* notes 161–71; *ITAA 1997* (Cth) s 280-15; CCH AUSTRALIA LTD., *supra* note 193,¶ 13-730.

196 Forman & Mackenzie, *supra* note 192, at 626; CCH AUSTRALIA LTD., *supra* note 193, ¶ 13-010(1); *ITAA 1997* (Cth) s 280-20(3).

197 Forman & Mackenzie, *supra* note 192, at 627; CCH AUSTRALIA LTD., *supra* note 193, ¶ 13-010(2).

198 Forman & Mackenzie, *supra* note 192, at 627; *see ITAA 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 the fund . . . .This covers the great majority of superannuation members."); *see also* Australian Taxation Office, *Tax on Super Benefits* (QC 23237, 1 August 2023).

199 The statutory basis for the United Kingdom's tax-favored treatment of approved pension schemes is the Income and Corporation Taxes Act (ICTA) 1988, c. I, pt. XIV (UK). A helpful overview of the United Kingdom's tax-favored treatment of approved pension schemes is HM Revenue & Customs, *General Principles: Overview of Pensions Taxation: The Basics*, *in* PENSIONS TAX MANUAL (2025). For an accessible summary of that tax treatment, see HUNT, *supra* note 92, at 115–20.

scheme receives an income tax deduction for its contributions.[200] 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.[201] Taxation eventually occurs on a deferred basis when such assets are ultimately distributed to the participant or her beneficiaries.[202]

5. 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.[203] Only U.S. retirement plans can be qualified for U.S. tax law purposes.[204] Consequently, a foreign, employment-related deferred compensation plan that 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.[205] 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 U.S. law on the contributions to and earnings of such plan.[206] 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 because of their foreign situs.

Dr. Alpert tells us that this "US tax treatment of [Australian] superannuation" results in "unfair taxation by the US."[207] 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

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200 *See supra* note 199.

201 *See supra* note 199.

202 HM Revenue & Customs, *supra* note 199 ("The UK's system of pensions tax relief is described as Exempt, Exempt, Taxed (E, E, T)."); *see* HUNT, *supra* note 92, at 115–16; *see also* ICTA 1988, c. I, pt. XIV, §§ 592–593 (UK).

203 *See, e.g.*, Snyder, *supra* note 8, at 567.

204 I.R.C. § 401(a) (indicating that a qualified trust must be "created or organized in the United States").

205 *Id.*

206 *Id.*

207 Greenstreet & Alpert, *supra* note 9, at 2.

recognize non-U.S. tax-advantaged retirement or other savings schemes."[208]

However, these criticisms fail 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[209] by the tax treaties the United States has negotiated with Canada and the United Kingdom.[210] Those treaties both implement the pro-taxpayer pension policy of the model U.S. income tax treaty.

The model U.S. treaty extends favorable treatment to a U.S. citizen residing abroad who is covered by a "pension fund established" in the nation in which the U.S. citizen resides.[211] In its model treaty, the United States treats this foreign pension fund as if it were a qualified U.S. plan with U.S. situs.[212] 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[213]—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, and deferred income taxation until actual distribution of contributions and earnings.

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.[214] 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

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208 Snyder, *supra* note 8, at 567.

209 *See* FEDERAL VOTING ASSISTANCE PROGRAM, *supra* note 18, at 1.

210 *See infra* notes 215–28.

211 U.S. DEP'T OF TREASURY, UNITED STATES MODEL INCOME TAX CONVENTION art. 18(1) (2016), https://home.treasury.gov/system/files/131/Treaty-US-Model-2016_1.pdf [https://perma.cc/46UZ-SJNH].

212 *Id.* arts. 1(5)(a), 17(2)(b), 18(3)(a).

213 *Id.*

214 I.R.C. § 901(a), (b)(1) (describing the credit against U.S. income tax in terms of "the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country").

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 United Kingdom, the two countries with the largest U.S. expatriate communities.

6. The U.S.-Canada Treaty Arrangements on Pension Savings

The tax treaty currently in effect between the United States and Canada extends the favorable treatment of the model U.S. tax treaty to U.S. citizens residing and working in Canada, the largest group of overseas U.S. citizens.[215] In the current version of the U.S.-Canada income tax treaty, the United States agrees that a U.S. citizen who lives and works in Canada will not pay current U.S. income tax on "[c]ontributions made to, or benefits accrued under, a qualifying retirement plan in [Canada] . . . ."[216] 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 . . . ."[217]

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.[218] Thus, if Canadian taxes equal or exceed the U.S. taxes on this retirement distribution, the U.S. citizen living and working in Canada will pay no U.S. tax on this retirement income, either during the citizen's working career or upon ultimate distribution.

215 FEDERAL VOTING ASSISTANCE PROGRAM, *supra* note 18, at 1.

216 Protocol Amending the Convention Between Canada and the United States of America, Can.-U.S., art. 13(3), Sept. 21, 2007, T.I.A.S. No. 08-1215.2, https://www.state.gov/wp-content/uploads/2019/02/08-1215.2-Canada-Taxation-ProtocolAmend.pdf [https://perma.cc/G89F].

217 *Id.* art. 13(2). 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. *Id.* The IRS has implemented this provision by Rev. Proc. 2002-23.

218 I.R.C. §§ 901, 911.

7. 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 United Kingdom favorable U.S. income tax treatment on contributions received and benefits accrued under qualified U.K. pension arrangements.

Article 18(5) of the U.S.-U.K. tax treaty applies to a U.S. citizen who lives and is employed in the United Kingdom and who participates in a U.K. "pension scheme."[219] If the U.S. "competent authority"[220] affirms that such U.K. "pension scheme generally corresponds to a pension scheme established in the United States,"[221] neither contributions[222] to nor accrued benefits[223] earned under such U.K. pension scheme are currently taxed to the U.S. citizen for U.S. income tax purposes. While the United States generally reserves the right to tax U.S. citizens living in the United Kingdom,[224] under the treaty, the United States specifically waives its right to tax a U.S. citizen who lives and is employed in the United Kingdom on contributions to and accrued benefits under an approved U.K. pension arrangement "generally correspond[ing]" to a qualified U.S. plan.[225]

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.[226] However, both the

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219 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, U.K.-U.S., art. 18(5)(a), July 24, 2001, T.I.A.S. No. 13161, https://www.state.gov/wp-content/uploads/2019/02/13161-United-Kingdom-Tax-Double-Income-7.19.2002.pdf [https://perma.cc/K536-6FSV] [hereinafter Convention Between the U.S. and the U.K.].

220 *Id.* art. 3(1)(g) ("[T]he term 'competent authority' means: (i) in the United States: the Secretary of the Treasury or his delegate . . . .").

221 *Id.* art. 18(5)(d).

222 *Id.* art, 18(5)(a)(i).

223 *Id.* art, 1(5).

224 *Id.* art. 1(4).

225 *Id.* art. 18(5)(b).

226 However, the Secretary, through her delegate, has entered into a competent authority agreement concerning the dividends received by U.K. pension schemes. *See* Press Release, Internal Revenue Service, Agreement Identifies U.K. Pension Arrangements for Tax Treaty Benefits (Apr. 13, 2005).

technical explanation of the U.S.-U.K. tax treaty[227] and the customary exchange of notes[228] 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 United Kingdom.

8. 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 United Kingdom 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.[229] Whereas a U.S. citizen living in Canada or in the United Kingdom 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 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.,

227 DEP'T 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 ON CAPITAL GAINS, 68 (2001) (explaining that 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").

228 Letter from William S. Farish, then-United States Ambassador to the United Kingdom, to Richard Wilkinson, then-Director for the Americas, Foreign and Commonwealth Office, 6 (July 24, 2001).

229 *Compare* Protocol Amending Convention with Australia Regarding Double Taxation and Prevention of Fiscal Evasion, U.S.-Australia, Sept. 27, 2001, T.I.A.S. No. 107-20, https://www.congress.gov/107/cdoc/tdoc20/CDOC-107tdoc20.pdf [https://perma.cc/YF9V-3FX5] *with* U.S. DEP'T OF TREASURY, *supra* note 211, *and* Protocol Amending the Convention Between Canada and the United States of America, *supra* note 216, *and* Convention Between the U.S. and the U.K., *supra* note 219.

U.S.-Canada, and U.S.-U.K. treaties.[230] "With regard to retirement plans," Dr. Alpert correctly observes, "both the UK and Canada have more favourable US tax treaties than Australia."[231]

While there are differences in U.S. and Australian tax law pertaining to the taxation of qualified retirement arrangements,[232] their tax treatments of their respective retirement devices are largely the same. Consequently, a revised 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 and the United States.

9. Summary

While the U.S.-Australian tax treaty provides no pension-related relief to U.S. citizens living in Australia, the two largest groups of U.S. citizens living abroad[233]—those in Canada and in the United Kingdom—receive favorable U.S. tax treatment with respect to those nations' pension arrangements 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 United States suggests extending this favorable treatment to U.S. citizens who live abroad in other nations.

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230 Greenstreet & Alpert, *supra* note 9, at 1–2 (supporting the "U.S. model tax treaty framework").

231 *Id.* at 2.

232 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%. *ITAA 1997* s 280-20; Forman & Mackenzie, *supra* note 192, at 26; CCH AUSTRALIA LTD., *supra* note 193, ¶¶ 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. I.R.C. § 501(a).

233 FEDERAL VOTING ASSISTANCE PROGRAM, *supra* note 18, at 1.

E. *FATCA and FBAR*

FATCA[234] is a chief target of critics of the United States' taxation of its overseas citizens.[235] 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"[236] to disclose to the IRS information about financial accounts owned by "specified United States person[s],"[237] a category that encompasses all U.S. citizens, including U.S. citizens who live abroad.[238] FATCA also imposes upon all U.S. citizens, including overseas U.S. citizens, the obligation to disclose to the IRS information about their foreign financial assets.[239] Critics complain that FATCA deters foreign financial institutions from permitting overseas U.S. citizens to open and maintain financial accounts. This, critics allege, makes it difficult, if not impossible, for Americans living abroad to conduct their routine financial affairs.[240] FATCA's supporters counter that 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.[241]

By statute[242] and by treaty,[243] 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, § 1471 imposes a 30% tax[244] on the institution's "withholdable payments," i.e., U.S. source investment income including

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234 I.R.C. §§ 1471–1474, 6038D.

235 FATCA is a central target of the extensive blogosphere attacking U.S. taxation of its overseas residents. *See, e.g.*, Jane Fletcher, *Do You Agree with the New FATCA Laws Regarding Leaving the United States?*, QUORA, https://www.quora.com/Do-you-agree-with-the-new-FATCA-laws-regarding-leaving-the-United-States [https://perma.cc/CLE7-2VJS].

236 I.R.C. § 1471.

237 *Id.* § 1471(c)(1)(A).

238 *Id.* §§ 1473(3), 7701(a)(30)(A).

239 *Id.* § 6038D.

240 *See infra* notes 265–69.

241 *See infra* notes 270–77.

242 *See, e.g.*, *id.* § 881(c) ("[N]o tax shall be imposed" on "any portfolio interest received by a foreign corporation from sources within the United States.").

243 *See, e.g.*, DEP'T OF THE TREASURY, *supra* note 211, art. 10(2) (limiting income tax on dividends to 5% in some cases, 15% in others).

244 I.R.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. I.R.C. § 1474(d); Treas. Reg. § 1.1474-6(e) (2017) ("[A U.S. withholding agent] may credit its withholding applied under chapter 4 against the amount of tax otherwise required to be withheld on this payment under section 1442.").

interest, dividends, and the sale proceeds of stocks or bonds.[245] 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," defined as an account held in such a foreign institution by "one or more specified United States persons."[246] The foreign financial institution must then report annually to the IRS such information as the identity of the U.S. account holder, the balance of the account, and the funds moving into and out of the account.[247]

Exempted from these FATCA reporting requirements for foreign financial institutions are "depository account[s]" maintained by "natural person[s]" at any foreign financial institution if the account has $50,000 or less.[248] For this purpose, institutions belonging to an "expanded affiliated group" are treated "as a single financial institution."[249] 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.[250] These agreements (designated as intergovernmental agreements ["IGAs"]) come in two versions.[251] 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 IRS.[252] Consequently, a foreign institution covered by a Model 1 IGA supplies to its home government information about the United States accounts this institution services.[253] The home government then provides to the IRS the information upon which the IRS and that government agree.[254] Under the alternative, designated as Model 2 IGA, the home government authorizes its financial institutions to provide information directly to the IRS notwithstanding any law of the foreign nation which would otherwise preclude that information from being reported.[255]

245 I.R.C. § 1473(1).

246 *Id.* § 1471(d)(1)(A).

247 *Id.* § 1471(c).

248 *Id.* § 1471(d)(1)(B).

249 *Id.*; *id.* § 1471(e); Treas. Reg. § 1.1471-5(i) (2019).

250 *FATCA Information for Governments*, INTERNAL REVENUE SERV. (Feb. 7, 2024), https://www.irs.gov/businesses/corporations/fatca-governments [https://perma.cc/4Z5Y-VTGE].

251 *Id.*

252 *Id.*

253 *Id.*

254 *Id.*

255 *Id.* FATCA also imposes upon certain "non-financial foreign entit[ies]" the 30% tax if the entity fails to disclose information about the entity's "substantial United States owners." I.R.C. § 1472.

In addition to the obligations FATCA establishes for foreign institutions to disclose information to the IRS, FATCA added to the Internal Revenue Code § 6038D, which requires individuals to disclose on their respective U.S. income tax returns their foreign financial accounts and certain other "foreign financial assets."[256] An individual is exempt from § 6038D's return-based reporting requirement to the extent that her foreign financial assets, including accounts, aggregate to $50,000 or less.[257] Using his statutory authority to increase this exemption level,[258] 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 for § 911's foreign earned income exclusion[259] needs to report to the IRS her foreign financial assets only if, at the end of the year, such assets exceed $200,000,[260] 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, § 6038D's reporting requirement is only triggered if, at year end, the foreign financial assets owned by either spouse exceed $400,000,[261] again constituting substantially more lenient treatment for U.S. citizens living abroad than for U.S. citizens residing at home.

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 U.S. Department of the Treasury.[262] The obligation to file FinCEN's Form 114, Report of Foreign Bank and Financial Accounts (FBAR), is triggered by ownership or control over foreign financial accounts whose aggregate value during the year exceeded $10,000.[263] Like the FATCA reporting thresholds, the $10,000 FBAR reporting trigger is not adjusted annually for increases in the cost-of-living.[264]

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256 I.R.C. § 6038D.

257 *Id.* § 6038D(a).

258 *Id.* The Secretary has used his authority to clarify that, for married couples, the reporting threshold for foreign financial assets owned by either spouse at year end is $100,000. Treas. Reg. § 1.6038D–2(a)(2)(i) (2016).

259 On the requirements for the § 911 exclusion, see *supra* notes 147–52 and accompanying text.

260 Treas. Reg. § 1.6038D–2(a)(3)(i) (2016).

261 *Id.* § 1.6038D–2(a)(4)(i) (2016). As to all four of the relevant categories, i.e., single citizens living overseas, single citizens living at home, married citizens living abroad, and married 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. *Id.* § 1.6038D–2(a)(1)(ii) to (a)(4)(ii) (2016).

262 I.R.S. News Release IR-2024-148 (May 28, 2024).

263 31 C.F.R. §§ 1010.306(c), 1010.350; *Report Foreign Bank and Financial Accounts*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/report-foreign-bank-and-financial-accounts [https://perma.cc/EDF8-SS96].

264 *See supra* note 263.

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."[265]

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 Abroad, Inc. calls for a "Same Country Exemption" for FATCA reporting.[266] 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."[267] 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.[268] According to Professor Mason, "relief from FATCA, FBAR, and tax filing requirements for nonresidents" is "worthy of serious consideration."[269]

While FATCA has its critics, it also has its defenders. Professor Kim, for example, credits FATCA with having stimulated and served as the model for the Organisation for Economic Co-operation and

265 La Torre Jeker, *supra* note 10, at 274; *see also Residence-Based Taxation: A Necessary and Urgent Tax Reform*, ASS'N OF AMS. RESIDENT OVERSEAS (Feb. 10, 2013), https://www.aaro.org/residence-based-taxation-rbt [https://perma.cc/Y7P6-NHVP] (explaining that 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 . . . .").

266 *Expatriates Group Reiterates Call for FATCA Relief*, TAXNOTES (Sept. 7, 2022), https://www.taxnotes.com/fatca-expert/fatca/expatriates-group-reiterates-call-fatca-relief/2022/09/08/7f25z [https://perma.cc/C5F4-TDFD].

267 *Id.*

268 Treas. Reg. § 1.6038D–2(a)(2)(i) (2016). I propose in Part VI 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* Section VI.C.

269 Mason, *supra* note 5, at 237. I agree. *See* discussion *infra* Section VI.A (proposing a simplified "postcard" filing for many overseas U.S. citizens); *see also infra* Section VI.C (proposing a simplification of FATCA and FBAR disclosure requirements).

Development's (OECD) Common Reporting Standards (CRS) project.[270] As she explains, "[t]he 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."[271] Thus, FATCA is not unique today, but rather has served as the forerunner of both greater "global transparency on tax information"[272] and initiatives "to combat offshore tax evasion."[273] Among the victories of this FATCA-led effort, Professor Kim tells us, has been Switzerland's "abandon[ment of] its Bank Secrecy Law and [its] cooperat[ion] to provide tax information of its bank customers to the customers' residence countries."[274]

In this same vein, Professors Kirsch[275] and Avi-Yonah[276] 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 fewer concerns about servicing offshore Americans "as FATCA compliance issues become better understood and the adoption of the CRS becomes more widespread."[277]

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 worldwide incomes, U.S. citizenship-based taxation is more administrable than other nations'

270 Kim, *supra* note 111, at 360–63.

271 *Id.* at 361.

272 *Id.* at 362.

273 *Id.*

274 *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, 154–55 (2019) (summarizing the CRS).

275 Kirsch, *supra* note 5, at 170–71 ("[A]rguments 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.").

276 Reuven S. Avi-Yonah, *Taxing Nomads: Reviving Citizenship-Based Taxation for the 21st Century* 14 (U. Mich. L & Econ. Working Paper, Paper No. 22-035, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4181471 [https://perma.cc/QT5B-PXY6] ("I do believe that today, it is possible to administer the taxation of non-resident US citizens by relying on FATCA."); *id.* 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.").

277 JANE G. GRAVELLE & DONALD J. MARPLES, CONG. RSCH. SERV., IF12166, THE FOREIGN ACCOUNT TAX COMPLIANCE ACT (FATCA) 2 (2022).

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, U.S. citizen-based taxation is in practice taxpayer-friendly, gentler than other nations' taxation of their overseas residents' worldwide incomes. 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—also 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 United States has also relieved U.S. citizens living and working in Canada and in the United Kingdom (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.

However, 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.[278] 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 altogether. 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.

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278 *See infra* Section IV.A (proposing simplified "postcard" filing for many overseas U.S. citizens).

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 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*, in which the U.S. Supreme Court affirmed the primacy of the obligation of U.S. citizens to pay taxes.[279] Mr. Trop was deemed to have lost his U.S. citizenship by briefly deserting from the Army in World War II.[280] A five-justice majority reversed Mr. Trop's loss of citizenship for his short-lived desertion.[281]

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."[282] 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."[283]

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

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279 356 U.S. 86 (1958).

280 *Id.* at 87–89.

281 *Id.* at 104.

282 *Id.* at 92.

283 *Id.*

obey the laws, and these duties appear to me to be fully as related to the nature of our citizenship as our military obligations."[284]

Five decades before *Trop*, California's Supreme Court in *Couts v. Cornell* similarly articulated the linkage between citizenship and the duty to pay tax: "[t]he obligation to pay his just proportion of the taxes legally levied is one of the highest civic duties of the citizen to the state."[285]

Even earlier, George Washington identified a citizens' 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."[286]

These statements reflect an understanding of U.S. citizenship which became pronounced toward the end of the nineteenth century and which we today call "fiscal citizenship." Professor Mehrotra, describing the events surrounding the emergence of progressive income taxation,[287] characterized these events as "redefin[ing] the social meaning of modern citizenship."[288] In the late nineteenth and early twentieth centuries,

> [N]ew 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.'[289]

The influential economist Edwin R.A. Seligman was an important figure in these events and was an early, prominent proponent of what is

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284 *Id.* at 113 (Brennan, J., concurring).

285 Couts v. Cornell, 82 P. 194, 195 (Cal. 1905); *see also* United States v. 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." (citing Cook v. Tait, 265 U.S. 47, 44 (1924)); Estate of Vriniotis v. Comm'r, 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." (citing *e.g.*, *Benitez Rexach*, 588 F.2d at 42) (holding that the estate of a dual Greece-U.S. citizen who died in Greece owed U.S. estate taxes); United States v. Goodman, No. 11-CV-00274-RBJ-MEH, 2012 WL 3150534, at *8 (D. Colo. Aug. 2, 2012) ("The responsibility of every citizen to pay taxes is well-settled.").

286 JOHN AVLON, WASHINGTON'S FAREWELL: THE FOUNDING FATHER'S WARNING TO FUTURE GENERATIONS 105 (2017).

287 AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929 (2013).

288 *Id.* at 11.

289 *Id.* at 12–13 (footnote omitted); *see also id.* at 19 ("[T]his new fiscal order reconfigure[d] the meaning of modern American citizenship . . . ."); *id.* at 129 (noting that the 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").

today labeled "fiscal citizenship."[290] Seligman's comments are of continuing relevance to today's debate about citizenship-based taxation.[291] Rejecting the then-prevailing notion that an individual's obligation to pay taxes is limited to 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."[292] 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."[293]

A critical event in the emergence of U.S. fiscal citizenship was the adoption of the 1913 federal income tax statute.[294] 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 extended this concept of fiscal citizenship to corporate entities.[295]

The precise term "fiscal citizenship" was first used by the eminent public finance economist Richard A. Musgrave in 1996.[296] 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."[297]

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

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290 *Id.* at 11 (noting that Edwin Seligman was "especially" important to these developments); *see also id.* at 98–104 (describing Seligman's background and career); *id.* 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.").

291 *See, e.g.*, Avi-Yonah, *supra* note 27, at 7, 19; Snyder, *supra* note 8, at 547.

292 ZELENAK, *supra* note 15, at 24 (quoting EDWIN R.A. SELIGMAN, ESSAYS IN TAXATION 72 (1895)).

293 MEHROTRA, *supra* note 287, at 114 (quoting RICHARD T. ELY, TAXATION IN AMERICAN STATES AND CITIES 13 (1888)).

294 Revenue Act of 1913, ch. 16, § 2, 38 Stat. 114.

295 MEHROTRA, *supra* note 287, at 280.

296 Richard A. Musgrave, *Clarifying Tax Reform*, 70 TAX NOTES 731, 732 (1996).

297 *Id.*

> [F]iscal 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 of those policies.[298]

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."[299] The annual filing process fulfills "the important civic purpose of recognizing and formalizing the financial responsibilities of citizenship."[300] This process brings "the taxpayer's attention to his status as a taxpayer and a purchaser of civilization."[301] As Professor Zelenak puts it, "[f]iling a tax return is a ceremony of fiscal citizenship, analogous to voting as a ceremony of political citizenship."[302]

This is not to say that the current filing system is perfect. Like other observers of contemporary tax law, Professor Zelenak advocates for the simplification of tax filing.[303] He notes that "[t]here is 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."[304] And ultimately, "[o]verwhelming complexity in return preparation," Professor Zelenak concludes, "undermines fiscal citizenship . . . ."[305]

However, Professor Mehrotra identifies a potential paradox in this context: if return filing is made too "painless and simple," such simplification may undermine the fiscal citizenship benefits of filing by making "citizen-taxpayers . . . less engaged."[306]

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

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298 ZELENAK, *supra* note 15, at 17; *see also id.* at 24 (quoting Seligman to support the notion of "the taxpaying duty of fiscal citizenship").

299 *Id.* at 124.

300 *Id.* at 4.

301 *Id.*

302 *Id.* at 17; *see also id.* at 119 (indicating that voting and tax return filing are the two "great ceremon[ies] of citizenship"); *id.* at 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 . . . .").

303 *Id.* at 121–24.

304 *Id.* at 113.

305 *Id.* at 121.

306 Ajay K. Mehrotra, *Reviving Fiscal Citizenship*, 113 MICH. L. REV. 943, 966 (2015) (reviewing ZELENAK, *supra* note 15).

taxpayer is a working parent entitled to a refundable earned income tax credit ("EITC").[307] 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."[308] Congress has defined this parent's "primary civic responsibility" as working to support herself and her family.[309] 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."[310]

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.[311]

Joseph J. Thorndike finds "fiscal citizenship" a useful concept albeit one often used "vaguely."[312] While Thorndike previously 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 short."[313] He now expands the definition of fiscal citizenship to also include "the responsibilities citizens owe to *one another* when it comes to paying taxes."[314] In his view: "Taxes . . . are the tie that binds citizens to the state. But they are also, crucially, the tie binding citizens to one another."[315]

In support of this broader definition of fiscal citizenship, Thorndike cites the European scholars Charlotte Schmidt, Eva Matthaei and Hans-Joachim Lauth.[316] They identify "reciprocity" among citizens as a key element of fiscal citizenship.[317] From the vantage of critics of the United

307 I.R.C. § 32.

308 ZELENAK, *supra* note 15, at 32.

309 *Id.*; I.R.C. § 32.

310 ZELENAK, *supra* note 15, at 70.

311 *See infra* Part IV.

312 Joseph J. Thorndike, *Tax History: Fiscal Citizenship Gives You a Stake in Other People's Taxes*, TAXNOTES (Jan. 15, 2024), https://www.taxnotes.com/tax-history-project/tax-history-fiscal-citizenship-gives-you-stake-other-peoples-taxes/2024/01/12/7j2f6 [https://perma.cc/EG9C-B4SE].

313 *Id.*

314 *Id.*

315 *Id.*

316 *Id.*; Charlotte Schmidt, Eva Matthaei & Hans-Joachim Lauth, *Conceptualizing Fiscal Citizenship* (The Fiscal Citizenship Project, Working Paper No. 2, 2023), https://fiscal-citizenship.com/wp-content/uploads/Working-Paper-No.2-April-2023-Schmidt-Matthaei-Lauth-Conceptualizing-Fiscal-Citizenship_CS.pdf [https://perma.cc/6RKA-X7E3].

317 Schmidt et al., *supra* note 316, at 13.

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 critics,[318] concerns itself with citizenship.

However, the analysis advanced by Schmidt, Matthaei and 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 critics maintain. Those other systems implement their versions of "fiscal citizenship" by imposing legal tax liability on the basis of domicile or residence.[319] 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."[320] In their view, "[a]s 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."[321]

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" is not necessary for "fiscal citizenship."[322] By emphasizing that "fiscal citizenship" is not just a relationship between citizens and the state but is also about "horizontal relations between fellow citizens,"[323] 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."[324]

Similarly reinforcing the ability-to-pay tradition is Professor Avi-Yonah's recent endorsement of citizenship-based taxation "under [the]

318 *See supra* note 10 (discussing the criticism that U.S. citizenship-based taxation is "unique").

319 Schmidt et al., *supra* note 316.

320 *Id.* at 3.

321 *Id.* at 4.

322 *Id.* at 28.

323 *Id.* at 7–8; *see also* Charlotte Schmidt & Eva Matthaei, *Conceptualizing Fiscal Citizenship*, *in* TAXATION, CITIZENSHIP AND DEMOCRACY IN THE 21ST CENTURY 53, 68 (Yvette Lind & Reuven S. Avi-Yonah eds., 2024) ("Fiscal citizenship comprises the behaviors, attitudes, and identifications of citizens towards the state and towards their fellow citizens which arise through the payment of taxes and are based on the idea of reciprocity."); *id.* at 79.

324 ZELENAK, *supra* note 15, at 53 (quoting Ronald G. Cummings, Jorge Martinez-Vazquez, Michael McKee & Benno Torgler, *Tax Morale Affects Tax Compliance: Evidence from Surveys and an Artefactual Field Experiment*, 70 J. ECON. BEHAV. & ORG. 447, 448 (2009)).

changing conditions" of the post-pandemic world.[325] Although he does not use the term "fiscal citizenship," Professor Avi-Yonah plants his embrace of citizenship-based taxation squarely upon Seligman's oeuvre.[326] Under current, post-Covid conditions (most prominently, the "newfound ability" of the "new nomads. . . . to work remotely" throughout the globe[327]), Professor Avi-Yonah contends that Seligman's "ability to pay principle"[328] is best implemented by citizenship-based taxation, arguing that "the 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."[329]

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."[330] 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."[331]

Professor Avi-Yonah criticizes the Internal Revenue Code for requiring noncitizen residents of the United States to pay U.S. income tax on their respective worldwide incomes.[332] Since these noncitizens lack the right to vote, he argues, they should just be taxed by the United States as if they were nonresident noncitizens, i.e., only on their U.S. source incomes, not on a worldwide, ability-to-pay basis as if they were U.S. citizens.[333]

For two reasons, I disagree and support the Code's citizenship-like taxation of U.S. resident noncitizens 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, noncitizen residents of the United States are properly-characterized as

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325 Avi-Yonah, *supra* note 276, at 5; *see also* Reuven S. Avi-Yonah, *Should the United States Abandon Citizenship-Based Taxation?* (U. Mich. L. & Econ., Working Paper, Paper No. 24-048, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5130868 [https://perma.cc/VHR8-NUQH].

326 Avi-Yonah, *supra* note 276, at 7, 19 ("Seligman, I believe, would have approved.").

327 *Id.* at 4.

328 *Id.* at 5.

329 *Id.* at 7.

330 *Id.* at 5–6.

331 *Id.* at 5.

332 *Id.* at 2, 6.

333 *Id.*

"quasi-citizens"[334] who receive substantial legal protections from U.S. law.[335] If noncitizens residing in the United States were taxed only on their U.S.-source incomes, such noncitizen residents (particularly those with significant non-U.S. incomes) would be incented to remain as noncitizens, enjoying the legal (and other) benefits the United States provides to them as residents while avoiding a chief obligation of U.S. citizenship, i.e., supporting the U.S. political 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."[336] That would be the case if noncitizens residing in the U.S. were treated for tax purposes like nonresident noncitizens, taxed only on U.S. source income. Such resident noncitizens 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:

> '[T]here 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, at least indirectly, expressing a voluntary identification with the United States, and '[a]ccordingly, 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).'. . . 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.[337]

Through the lens of fiscal citizenship, there is, as a substantive matter, significant congruence between U.S. tax law, which defines

334 Rainer Baubock, *Political Membership and Democratic Boundaries*, *in* THE OXFORD HANDBOOK OF CITIZENSHIP 67 (Ayelet Shachar, Rainer Baubock, Irene Bloemraad & Maarten Vink eds., 2017).

335 *See infra* note 358.

336 Baubock, *supra* note 334, at 73.

337 Kirsch, *supra* note 5, at 125–26 (footnotes omitted).

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 an objective marker—legal citizenship—to determine fiscal citizenship in the American polity. Other nations deploy more subjective, fact-based standards—domicile, residence, or both—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.[338] 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 critics maintain. U.S. citizens living abroad are deemed to be members of the U.S. polity just as 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,[339] Mr. Duff[340] and Mr. Iyengar[341] 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

338 Zelinsky, *supra* note 3, at 1350.

339 *See supra* notes 40–50 and accompanying text.

340 *See supra* notes 54–69 and accompanying text.

341 *See supra* notes 70–86 and accompanying text.

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 § 911 exclusion of foreign earned compensation.[342] The United States 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 first dollar of their respective taxable incomes. But, despite the United States' strong theoretical claim to support from its citizens living abroad, the United States generously and uniquely exempts from U.S. taxation the first $130,000 of such a citizen's earned income,[343] as well as certain housing allowances paid to a U.S. citizen living abroad.[344]

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 § 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: 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

342 I.R.C. § 911.

343 Rev. Proc. 2024-40, 2024-45 I.R.B. 1100, § 3.39.

344 I.R.S. Notice 2023-26, 2023-13 I.R.B. 577.

polity or to its members.[345] 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.[346] Richardson labels U.S. citizenship-based taxation as "absolutely immoral."[347] Overseas U.S. citizens, he tells us, are "being held prisoner and captive" to U.S. tax "policies."[348]

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."[349] 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" with no corresponding duty to the nation.[350] But Arendt did not say this. To the contrary, Arendt observed that citizens have "duties and responsibilities" to the nation as well as the rights flowing from citizenship.[351]

To further the argument that U.S. overseas citizens have no duty to support the American polity via tax payments, Dr. Snyder also quotes *Trop*, paraphrasing Arendt.[352] 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."[353] Dr. Snyder also quotes Article 15 of the Universal Declaration of Human Rights ("No one shall be arbitrarily

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345 *See, e.g.*, Laura Snyder, Karen Alpert & John Richardson, *Should Overseas Americans Be Required to Buy Their Freedom?*, 172 TAX NOTES FED. 223 (2021).

346 *Id.* at 223–24.

347 TaxConnections Inc., *Citizenship and Worldwide Taxation: Is It Morally Justified or Unjustified?*, YOUTUBE (May 17, 2019), https://www.youtube.com/watch?v=lo7nRpU6SDQ [https://perma.cc/RC4L-WHJ6].

348 *Id.*

349 Snyder, *supra* note 8, at 544–45.

350 *Id.* at 546.

351 HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 313 (1966); HANNAH ARENDT, MEN IN DARK TIMES 81 (1968) (referring to a citizen's "rights and duties").

352 Snyder, *supra* note 8, at 546 ("[T]he Court, manifestly influenced by Arendt, also described citizenship as 'the right to have rights.'").

353 Trop v. Dulles, 356 U.S. 86, 92 (1958).

deprived of his nationality"),[354] while ignoring Article 29 ("Everyone has duties to the community").[355] 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 United States. *Trop* emphasizes that the payment of taxes is preeminent among the duties of citizenship.

Dr. Snyder's characterization of my 2011 article and my observations that citizenship and domicile overlap is instructive in this context. Both citizenship and domicile reflect permanent allegiance to a political community and thus lead to a duty to support that community.[356] This perspective, Dr. Snyder tells us, "perceive[s] overseas Americans more as subjects than citizens."[357] While citizenship is "a necessary precondition for *all* other rights,"[358] citizenship entails no duties running from the citizen to the nation.

Dr. Snyder's attenuated view of U.S. citizenship denies the 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.[359] Among the most important of these "correlative obligations" of citizenship is the duty to pay tax to support the American polity.[360]

Commentators on citizenship, such as Professor Bellamy, agree that citizenship, by its nature, imposes duties on the citizen and that chief

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354 Snyder, *supra* note 8, at 545 (quoting G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15 (Dec. 10, 1948)).

355 G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 29, ¶ 1 (Dec. 10, 1948).

356 Snyder, *supra* note 8, at 542–46.

357 *Id.* at 543.

358 *Id.* at 546 (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. U.S. CONST. amends. I–X. Likewise, the Due Process and Equal Protection Clauses of the Fourteenth Amendment protect all "person[s]," not just citizens. U.S. CONST. amend. XIV, § 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." *See, e.g.*, LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 33 (2006); *id.* at 53–56 (discussing cases extending constitutional rights to noncitizens, including the seminal *Yick Wo* decision); *id.* 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." (footnote omitted)).

359 *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 . . . .").

360 *Id.* at 92.

among these duties is the obligation to pay taxes to support the political community of which the citizen is a member.[361]

Dr. Snyder correctly rejects the argument that the benefits overseas citizens receive from the federal government justify imposing U.S. income taxes on those citizens.[362] To support her rejection of benefits-based taxation, she invokes Seligman.[363] But, as Professor Avi-Yonah observes, Seligman's "ability-to-pay" rationale underpins U.S. citizenship-based taxation of its overseas citizens.[364] From this vantage, 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.[365] However, the traditional and prevailing conception of citizenship is "formal, juridical membership in an organized political community . . . ordinarily the political community of the nation-state."[366] 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.[367]

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361 RICHARD BELLAMY, CITIZENSHIP: A VERY SHORT INTRODUCTION 3 (2008) (stating that citizenship involves "rights and duties"); *id.* at 13 (explaining that a nation of citizens can "demand taxes" from its citizens); *id.* at 17, 75 (explaining that citizenship entails "duties" including "paying taxes"); *see also* Jo Shaw, *Citizenship and the Franchise*, *in* THE OXFORD HANDBOOK OF CITIZENSHIP 293 (Ayelet Shachar, Rainer Baubock, Irene Bloemraad & Maarten Vink eds., 2017) ("Citizenship 'creates a legal bond between individual members and a state and endows these individuals with certain rights and obligations.'" (quoting Maarten Vink & Rainer Baubock, *Citizenship Configurations: Analysing the Multiple Purposes of Citizenship Regimes in Europe*, 11 COMPAR. EUR. POL. 621, 622 (2013))).

362 Zelinsky, *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.").

363 Snyder, *supra* note 8, at 547 (citing Seligman).

364 Avi-Yonah, *supra* note 276, at 7, 19.

365 Snyder, *supra* note 8, at 564–66.

366 BOSNIAK, *supra* note 358, at 19.

367 *Id.* at 18, 78.

Professor Bellamy agrees: "Membership lies at the heart of citizenship. To be a citizen is to belong to a given political community."[368]

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.[369] For this proposition, she cites several benefits not available to overseas citizens.[370] This 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 the Code's restriction that a taxpayer cannot receive the earned income tax credit (EITC) if she use § 911's generous exclusion of foreign earned income.[371] 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 § 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 utilize that provision.[372] 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.[373] However, bad IRS service is a remediable problem, fixable through better management and more resources, not an inherent theoretical flaw in the taxation of U.S. overseas citizens. Moreover, many U.S. citizens living at home don't receive good

368 BELLAMY, *supra* note 361, at 52; *see also* Baubock, *supra* note 334, 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."); Chaim Gans, *Citizenship and Nationhood*, *in* THE OXFORD HANDBOOK OF CITIZENSHIP 107 (Ayelet Shachar, Rainer Baubock, Irene Bloemraad & Maarten Vink eds., 2017) ("Citizenship means membership of a state.").

369 Snyder, *supra* note 8, at 564–66.

370 *Id.* ("[O]verseas Americans are purposely excluded from: (i) critical aspects of the U.S. economy, (ii) multiple advantageous elements of the U.S. tax system, and (iii) federally funded emergency health care assistance touted as being available to 'all' Americans.").

371 *Id.* at 569; I.R.C. § 32(c)(1)(C).

372 I.R.C. § 32(a)(2).

373 Snyder, *supra* note 8, at 569–71.

service from the IRS either.[374] Pressed 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 § 911, the generous exclusion from foreign earned income only available to U.S. citizens living abroad.[375] 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 $130,000 of earned income plus additional housing allowances.[376] 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 taxes foreign taxes paid on foreign source income.[377] In light of these provisions, overseas U.S. citizens qualifying for the generous § 911 exclusion and for the foreign tax credit are treated more favorably 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

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[374] Ashlea Ebeling, *Millions of Taxpayers Call the IRS for Help. Two-Thirds Don't Reach Anyone*, WALL. ST. J. (June 26, 2024, 10:11 AM), https://www.wsj.com/personal-finance/taxes/irs-customer-service-phone-call-data-fe7c0e65 [https://perma.cc/3HCU-B5S7] ("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*, P'SHIP FOR PUB. SERV. (Mar. 16, 2002), https://ourpublicservice.org/blog/breaking-down-the-customer-experience-at-the-irs [https://perma.cc/Y2RV-LUHP] ("[T]he 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."); *Identity Theft Victims Are Waiting Nearly Two Years to Receive Their Tax Refunds*, TAXPAYER ADVOC. SERV. (June 6, 2024), https://www.taxpayeradvocate.irs.gov/news/nta-blog/identity-theft-victims-are-waiting-nearly-two-years-to-receive-their-tax-refunds/2024/06 [https://perma.cc/8N7C-4D7Y]; *Internal Revenue Service: Narrowing the Tax Gap and Improving Taxpayer Services: Hearing Before the Subcomm. on Financial Services and General Government of the S. Comm. on Appropriations*, 117th Cong. 1 (2021) (statement of Erin M. Collins, National Taxpayer Advocate) ("Over the past year, taxpayer service at the IRS has been historically poor. There is no way to sugarcoat it."); *id.* 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."); David Hood, Allyson Versprille & Kaustuv Basu, *Customer Service at the IRS Is So Bad, Even Tax Pros Are Fed Up*, BLOOMBERG L. (Jan. 4, 2022, 4:00 AM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/X5U83M8S000000.

[375] I.R.C. § 911.

[376] Rev. Proc. 2024-40, 2024-45 I.R.B. 1100, § 3.39; I.R.S. Notice 2023-26, 2023-13 I.R.B. 577.

[377] I.R.C. § 911.

"accidental" U.S. citizen who does not subjectively feel herself to be an American citizen.[378] A classic case of such an "accidental" American is someone who was born while her parents were temporarily in the United States, 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 United States,[379] has no affinity for the United States. Another incarnation of the "accidental" U.S. citizen is an individual born abroad to a U.S. citizen who is raised outside the United States with no connections to the United States.[380] 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 United States] might be so tenuous as to bring into question their membership in the community."[381]

Current law is responsive to this concern. The United States does not force an "accidental" American to remain a U.S. citizen if she wants to abandon her birth-based U.S. citizenship.[382] Indeed, the U.S. exit tax of § 877A facilitates this individual's renunciation of her U.S. citizenship by providing two specific exemptions from the tax for such "accidental" Americans.[383] 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 first $890,000 of gain from her constructive sale liability[384] and from the high income and asset thresholds that must be reached to trigger the U.S. exit tax.[385] In light of these relief provisions of § 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.[386]

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378 Snyder, *supra* note 8, at 565–66.

379 U.S. CONST. amend. XIV, § 1 ("All persons born . . . in the United States . . . are citizens of the United States . . . ."); 8 U.S.C. § 1401(a) (affirming that "a person born in the United States" is a "citizen of the United States at birth").

380 8 U.S.C. §§ 1401(c), 1401(g) (indicating when a person born abroad to a parent who is a U.S. citizen is herself a U.S. citizen).

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

382 For discussion on the voluntary renunciation of U.S. citizenship, see *supra* note 113.

383 I.R.C. § 877A(g)(1)(B).

384 Rev. Proc. 2024-40, 2024-45 I.R.B. 1100, § 3.38 (updating the exclusion of I.R.C. § 877A(a)(3) to $890,000).

385 I.R.C. § 877A(g)(1)(A), (a)(2)(A), (g)(2)(B).

386 *See* Patrick Driessen, *Beware High-Wealth Tilt in Residency-Based Tax Plans*, 163 TAX NOTES FED. 1839, 1843 (2019) ("[M]embership in the Accidental High-Wealth American Association can't be very broad.").

Dr. Snyder objects that the fee charged by the United States for the citizenship renunciation process—$2,350[387]—is too high.[388] She may be right. But this—like poor IRS service—is a remediable problem, not an inherent 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. overseas citizens who were born abroad and who cannot vote in federal elections.[389] 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."[390] However, a U.S. citizen born abroad was never domiciled in any state and never left the United States.[391] 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.[392] 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 lived abroad and if her parents 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.[393] The U.S. citizen born abroad who cannot vote is a

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387 22 C.F.R. § 22.1(8). There are indications that the State Department contemplates reducing this processing fee but, as of the date of this article, it has not. Robert W. Wood, *Fee to Renounce Citizenship to Drop, Reversing 422% Hike*, FORBES (Jan. 12, 2023, 10:01 PM), https://www.forbes.com/sites/robertwood/2023/01/12/fee-to-renounce-citizenship-to-drop-422/?sh=1a52e1be5a2b [https://perma.cc/L76Y-2YVY].

388 Snyder, *supra* note 8, at 574.

389 *Id.* at 549–50.

390 52 U.S.C. § 20302(a)(1) (requiring states to permit "overseas voters" to vote in federal elections); *id.* § 20310(5) (defining "overseas voter").

391 8 U.S.C. § 1401(c), (g).

392 *See, e.g.*, CONN. GEN. STAT. § 9-158b(c) (extending the 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"); N.Y. ELEC. LAW § 11-200(1-a) (McKinney 2023) (extending the 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).

393 ZELENAK, *supra* note 15, at 119–20; Avi-Yonah, *supra* note 276, at 5. The right to vote is central to Professor Bellamy's understanding of citizenship. BELLAMY, *supra* note 361, at 4 (describing how "being able to vote [is] crucial" to citizenship).

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 that the state in which their parents vote extend the vote to their U.S. citizen offspring born overseas.

In sum, 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 payments.

Dr. Snyder favors what she and other opponents of U.S. citizenship-based taxation call residence-based taxation, stating that this is the international norm.[394] But, given their opposition to what they call "extraterritorial" 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.[395] Other nations (not just the United States) 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.[396] As Justice Ginsburg observed for the Court, "extraterritorial," worldwide taxation of residents is both the domestic U.S. norm and the international norm.[397] 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 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, residence, or both. Dr. Snyder and other critics do not confront the extent to which other nations, not just the United States, engage in "exterritorial" taxation of the worldwide incomes of their citizens who live abroad.

Amplifying her theoretical attack on the Internal Revenue Code, Dr. Snyder also argues that the Code's taxation of overseas U.S. citizens violates Equal Protection.[398]

394 *See supra* note 8 and accompanying text.

395 Snyder, *supra* note 8, at 537.

396 *See supra* notes 40–86 and accompanying text (discussing *McFadyen*, *Duff*, and *Iyengar* cases).

397 Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 462–63 (1995).

398 Laura Snyder, *What A Decision on Affirmative Action Teaches About Taxation*, 51 RUTGERS L. REC. 102, 102 (2023).

Dr. Snyder's constitutional argument starts with *Cook v. Tait*,[399] the foundational U.S. Supreme Court decision upholding the United States' worldwide income taxation of its overseas citizens. The Court in *Cook* 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.[400] 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.[401] Mr. Cook's basic governmental services were provided by Mexico where he lived, not by the United States or by any of its states.[402]

Moreover, Dr. Snyder maintains, U.S. income taxation of overseas U.S. citizens is "nationality-based" and thus violates "Fourteenth Amendment Equal Protection."[403] 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."[404] From Dr. Snyder's perspective, the Code's taxation of overseas U.S. citizens is analogous to the race- and nationality-based admissions policies struck in *Students for Fair Admissions v. Harvard*.[405]

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 has a compelling interest in fiscal citizenship.

First, that the benefits-based rationale in *Cook* is unconvincing does not necessarily imply that the outcome in that decision is wrong. The outcome in *Brown v. Board of Education*[406] is iconic: "Separate educational facilities are inherently unequal."[407] However, *Brown*'s

399 *Id.*; 265 U.S. 47 (1924).

400 *Cook*, 265 U.S. at 47.

401 *See supra* notes 369–75.

402 *Cook*, 265 U.S. at 54; Zelinsky, *supra* note 3, at 1302–03.

403 Snyder, *supra* note 398, at 104. The Equal Protection Clause of the Fourteenth Amendment applies to the states, not to the federal government. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). The Equal Protection restraints on the federal government are grounded in the Due Process Clause of the Fifth Amendment. *Id.*

404 Snyder, *supra* note 398, at 110–11.

405 *Id.*; 600 U.S. 181 (2023).

406 347 U.S. 483, 494–96 (1954).

407 *Id.* at 495.

reasoning is often contested.[408] Similarly, taxing Mr. Cook on his worldwide income is a compelling result even if *Cook*'s underlying benefits-related rationale for taxing overseas U.S. citizens is today unpersuasive.

Second (and here a stronger rationale for *Cook* begins), the courts have made clear that Congress's authority to draw distinctions is at its greatest in the field of taxation. There is a strong assumption of constitutionality for imposing a tax law.[409] The Supreme Court has noted that "legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."[410]

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.[411] A U.S. citizen who earns more income is often in a higher marginal tax bracket than a U.S. citizen who earns less.[412] 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 § 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 remains the same: the 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 United States."[413] 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;"[414] "In general, all citizens of the United States, *wherever resident*, and all resident alien individuals

408 *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) ("[F]rom another perspective, *Brown*'s iconic status is puzzling.").

409 *See, e.g.*, Armour v. City of Indianapolis, 566 U.S. 673 (2012).

410 *Id.* at 680 (quoting Regan v. Tax'n with Representation, 461 U.S. 540, 547 (1983)); *see also* Nordlinger v. Hahn, 505 U.S. 1, 11 (1992) (stating that Equal Protection review "is especially deferential in the context of classifications made by complex tax laws").

411 I.R.C. § 24 (providing credit for a "qualifying child").

412 *Id.* § 1 (listing income tax rate schedules).

413 Snyder, *supra* note 398, at 110.

414 Treas. Reg. § 1.1-1(a)(1).

are liable to the income taxes imposed by the Code whether the income is received from sources within or without the United States."[415]

Fourth, in Equal Protection terms, a U.S. citizen is not taxed because of an "immutable characteristic"[416] like race, but is instead taxed because of a legal status which she can change. U.S. citizens can renounce their citizenships.[417] By choosing 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 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 elect to surrender.

Fifth, the United States 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 United States on her worldwide income) with the non-U.S. citizen who lives in that same foreign nation (taxable *in rem* by the United States only on her U.S. source income).[418] This difference constitutes nationality-based discrimination against the nonresident U.S. citizen, Dr. Snyder argues.[419]

But there is a strong reason for treating differently the overseas U.S. citizen and his noncitizen 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 noncitizen (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, i.e., the duty to support the community in accordance with his ability to pay as measured by his worldwide income. This is not true of the nonresident noncitizen who Dr. Snyder invokes as a comparator and who is not a member of the American national community.[420]

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

415 *Id.* § 1.1-1(b) (emphasis added).

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

417 *See supra* note 113.

418 *See* Snyder, *supra* note 398, at 110–11.

419 *Id.* at 102, 107–08.

420 *See* Snyder, *supra* note 398.

benefits he did or did not receive from the federal government. That is the nature of U.S. citizenship.

It is unsurprising that the Court in *Cook* invoked the benefits rationale for taxing overseas U.S. citizens. With the advantage of hindsight, we can now see that Seligman's ability-to-pay rationale was emerging triumphant from the events which began at the end of the nineteenth century.[421] But in 1924, when *Cook* 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* as a case about benefits.

But today the outcome in *Cook*, 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 United States 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"[422] as well as the relatively high percentage "of U.S. tax returns filed from outside the United States [which] show no tax is owed."[423]

As to the roughly $6 billion dollars on average collected annually from U.S. taxpayers who live abroad,[424] I observe, with apologies to Everett Dirksen, that "pretty soon you're talking real money."[425]

Instructive as to U.S. taxpayers who live abroad but owe no U.S. income taxes are Professor Zelenak's observations about taxpayers who owe no federal tax because they claim the EITC.[426] 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."[427]

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

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421 *See supra* notes 287–95.

422 Snyder, *supra* note 8, at 589.

423 *Id.* at 577.

424 *Id.* at 590.

425 The Dirksen Center says that it cannot find confirmation that Senator Dirksen actually said the adage attributed to him, yet this adage has nevertheless entered into the American vernacular. *See Everett Dirksen on Record*, THE DIRKSEN CONG. CTR., https://everettdirksen.dirksencenter.org/dirksenonrecord.htm [https://web.archive.org/web/20040816153245/http://www.dirksencenter.org/print_emd_billionhere.htm].

426 *See* discussion *supra* notes 305–10.

427 ZELENAK, *supra* note 15, at 32.

contribution to that community. At some point in the future, the United States 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 § 911 excludes and thus owe a net payment to the federal Treasury. Or Congress might change the § 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 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.

V. Other Issues

A. *Hard-to-Audit Income*

By requiring foreign financial institutions and U.S. citizens to disclose offshore 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.[428] 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 of citizenship-based taxation as unenforceable.[429]

However, hard-to-audit income and assets also present enforcement challenges vis-à-vis domestic taxpayers. It is difficult to tax domestic income which is not subject to withholding or to information reporting to the IRS.[430] 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 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-à-vis their respective residents who are deemed for tax purposes to reside at home even as they live abroad. When Canada taxes

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428 *See* discussion *supra* Section II.E.

429 Kirsch, *supra* note 381, at 216 (discussing opposition to citizenship-based taxation of overseas U.S. citizens "on practical, administrative grounds").

430 INTERNAL REVENUE SERV., PUB. 5869, TAX GAP PROJECTIONS FOR TAX YEARS 2020 & 2021 5 (2023) (summarizing that the "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").

Mr. McFadyen as a Canadian tax resident while he lives in Japan[431] or when Australia taxes Mr. Iyengar as an Australian domiciliary while he lives in Dubai and Qatar,[432] Canada and Australia have the same enforcement problems locating foreign source income as does the United States when it taxes the income of its overseas citizens. In this setting, there is again more similarity in practice between citizenship-based and residence-based taxation than 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 United Kingdom, Canada, and Australia to U.S. tax law. Using the United Kingdom, Canada, and Australia as comparators with the United States 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 United Kingdom, and Australia as they contain the largest communities of U.S. expatriates.[433]

Exploring the tax laws of the United Kingdom, 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 United Kingdom, and Australia living abroad also pay tax on their worldwide incomes to their home nations while they live overseas.

The two other nations with large numbers of U.S. expatriates are France and Israel.[434] France taxes *in personam* the worldwide incomes of those who are "fiscally domiciled" in France even though they may spend much time abroad.[435] Israel likewise taxes *in personam* the worldwide

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431 *See supra* notes 40–50 and accompanying text.

432 *See supra* notes 70–86 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 supra* notes 54–69 and accompanying text. But the same would have been true had Mr. Duff been a U.S. citizen working in international waters for Viking Ocean Cruises, i.e., the employer's potential U.S. nexus would have facilitated the enforcement of U.S. income taxation of its employee's income.

433 *See* THE FEDERAL VOTING ASSISTANCE PROGRAM, *supra* note 18, at 1.

434 *Id.*

435 Edouard Milhac & Annabelle Bailleul-Mirabaud, *Business Operations in France*, 7130 TAX MGMT. PORT. (BNA) § X(A)(2) (2016) (discussing French "fiscal domicile test"); Daniel Shaviro, *Taxing Potential Community Members' Foreign Source Income*, 70 TAX L. REV. 75, 82 (2016).

incomes of those whose "center of life" is deemed to be in Israel even if they spend significant time overseas.[436] Neither of these nations adheres to the cramped, mechanical notion of tax residence which critics of U.S. law claim to be the international norm. Instead, these nations (like Canada, Australia and the United Kingdom) 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 non-English-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 number of years."[437]

VI. IMPROVING U.S. INCOME TAXATION OF OVERSEAS U.S. CITIZENS

In this final Part, I outline several steps which the Treasury and Congress should take to improve the U.S. income taxation of overseas U.S. citizens. For 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 Part thus highlights a fundamental difference between proponents of U.S. citizenship-based taxation and its 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 to the legitimate tax-related concerns of the citizen including the legitimate tax concerns of the citizen who lives offshore.

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436 Amnon Rafael, *Business Operations in Israel*, 7180 TAX MGMT. PORT. (BNA) § XIII(A) (2015) (discussing the Israeli "center of life" test); Shaviro, *supra* note 435, at 82–83.

437 Kirsch, *supra* note 381, at 210.

A. *Simplifying Filing for Overseas Citizens*

Tax reporting for overseas U.S. citizens can and should be simplified, just as 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 § 911 exclusion of foreign earned income.

An instructive precedent in this context is the "e-postcard" 990-N, [438] 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 that such income is less than the maximum § 911 exclusion of $130,000 annually.[439] This "postcard" filing would be much simpler than IRS Form 2555, the current three-page form necessary to claim § 911's foreign earned income exclusion.[440]

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 § 911 exclusion. The data required on Form 2555 includes 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."[441]

There is an 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 § 911 exclusion to file Form 2555 with all its details once. Then, in subsequent years, this citizen could file the proposed electronic postcard, confirming that she still qualifies for

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438 *Annual Electronic Filing Requirement for Small Exempt Organizations—Form 990-N (e-Postcard)*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard [https://perma.cc/6ELU-CDYL].

439 Rev. Proc. 2024-40, 2024-45 I.R.B. 1100, § 3.39.

440 *Form 2555*, INTERNAL REVENUE SERV. (2024), https://www.irs.gov/pub/irs-pdf/f2555.pdf [https://perma.cc/8AY3-7H7C].

441 *Id.*

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."[442] My instinct is that a proposed "e-postcard," like 990-N, for overseas U.S. citizens qualifying under § 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 must file.[443] Again, this raises a tradeoff between the mandates of tax enforcement (which impel 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 simplify the forms required of overseas U.S. taxpayers without jeopardizing the IRS's ability to enforce the tax law vis-à-vis such U.S. citizens living offshore.

B. *Broadening the § 911 Exclusion*

The § 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 § 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 § 911's exclusion of earned income, subject to that provision's annual exclusion limit. Congress should amend § 911 accordingly.

A closer question is whether § 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, § 911 should be amended to exclude from offshore citizens' gross income such compensation-based payments, just as § 911 exempts from U.S. taxation other forms of earned income. The counterargument is that the favorable treatment of overseas

442 Mehrotra, *supra* note 306, at 966.

443 Edward A. Zelinsky, *Simplifying Income Tax Reporting for Americans Abroad*, 105 TAX NOTES INT'L 433, 434–35 (2022) (discussing possible simplification of IRS Forms 5471 and 1116).

taxpayers' pension payments should be established reciprocally by additional treaty negotiations between the United States and other nations. While this is another issue on which reasonable minds can differ, I now find more compelling the argument for the United States to pursue through reciprocal treaty negotiations the exclusion of pension distributions to overseas taxpayers from their income tax obligations to their home nations.[444]

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 FBAR reporting thresholds be automatically adjusted every year for increases in the cost of living. Taxpayers' filing obligations under FATCA and FBAR should be coordinated.

As observed, the Secretary of the Treasury has used their authority to liberalize the foreign financial asset reporting requirements of § 6038D for overseas U.S. citizens.[445] 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 exceed $200,000[446] (or $400,000 for a married couple).[447] 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 thirty percent FATCA tax on the institution's U.S. investment income.[448]

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 "[s]ame [c]ountry" exception[449] is a useful idea since the routine financial accounts maintained by a U.S. citizen living abroad will

444 *See* discussion *infra* Section VI.F.

445 *See supra* text accompanying notes 256–58.

446 Treas. Reg. § 1.6038D–2(a)(3)(i).

447 *Id.* § 1.6038D–2(a)(4)(i).

448 *Compare* I.R.C. § 6038D(a) (authorizing the Secretary to prescribe "such higher dollar amount"), *with* I.R.C. § 1471(d)(1)(B)(ii) (limiting accounts to those that do "not exceed $50,000").

449 *See supra* note 266 and accompanying text.

typically be established in a bank or similar institution located in the foreign nation in which this U.S. citizen resides.[450]

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.[451] 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 cost-of-living adjustment ("COLA") increases. The text of § 911 sets the foreign earned income exclusion at an annual maximum of $80,000 earned abroad.[452] However, post-2004, the statute also provides for annual cost-of-living increases to this exclusion figure.[453] As a result of these cumulative COLA increases, the § 911 exclusion annual maximum today is $130,000.[454] Likewise, the statutory exemption for unrealized gains recognized under § 877A upon the renunciation of U.S. citizenship is $600,000.[455] However, the statutorily-authorized COLA increases[456] have brought this figure today to $890,000.[457]

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.

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450 Letter from Marylouise Serrato, Charles Bruce & Jonathan Lachowitz, Am. Citizens Abroad, Inc., to Jose E. Murillo, Deputy Assistant Sec'y of Int'l Tax Affs., Douglass O'Donnell, Deputy Comm'r of Servs. & Enf't, & Kevin Nichols, Int'l Tax Couns. (Sept. 7, 2022), https://www.taxnotes.com/research/federal/other-documents/treasury-tax-correspondence/expatriates-group-reiterates-call-for-fatca-relief/7f25z [https://perma.cc/4EFK-2AVD].

451 *See supra* notes 446–47.

452 I.R.C. § 911(b)(2)(D)(i).

453 *Id.* § 911(b)(2)(D)(ii).

454 Rev. Proc. 2024-40, 2024-45 I.R.B. 1100, § 3.39.

455 I.R.C. § 877A(a)(3)(A).

456 *Id.* § 877A(a)(3)(B).

457 Rev. Proc. 2024-40, 2024-45 IRB 1100, § 3.38 (updating the exclusion of Code § 877A(a)(3) to $866,000).

D. *Broadening the Exit Tax Exemption*

As previously noted,[458] in addition to its constructive sale provisions, § 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 account[s]" such as IRAs;[459] (2) a former U.S. citizen is also subject to a thirty percent withholding tax when she actually receives distributions of other "eligible deferred compensation items" such as payments from a 401(k) and other qualified plans;[460] and (3) a former U.S. citizen also pays a thirty percent withholding tax when she receives actual distributions from certain trusts.[461]

The § 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[462] and income[463] rules of § 877A) relieves from exit taxation U.S. citizens of modest 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 $890,000 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 § 877A to enable a "covered expatriate"[464] to allocate the § 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 § 877A.

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458 *See* discussion *supra* Section II.B.

459 I.R.C. § 877A(e).

460 *Id.* § 877A(d)(1).

461 *Id.* § 877A(f)(1)(A); The IRS understands this withholding tax as applying to trust distributions of both in-kind property and money. I.R.S. Notice 2009-85, 2009-45 I.R.B. 598, § 7A (noting that property includes money).

462 I.R.C. §§ 877A(g)(1)(A); 877(a)(2)(B).

463 *Id.* §§ 877A(g)(1)(A); 877(a)(2)(A).

464 *Id.* § 877A(g)(1), (f).

E. *Assuring Overseas Citizens the Right to Vote*

As observed above,[465] 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 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 be negotiated with additional nations.[466] After the United Kingdom and Canada, the largest communities of overseas Americans are found in France, Australia, and Israel.[467] Mutual pension-related tax agreements with these three nations should be a priority.

With a treaty, both the United States 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.[468] Such mutuality is preferable to a unilateral surrender of U.S. tax authority unmatched by other nations.

CONCLUSION

U.S. taxation of its citizens living abroad is better in practice and sounder in theory than 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 United States to adopt residence-based taxation,

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465 *See supra* notes 389–92 and accompanying text.

466 *See* discussion *supra* Sections II.D.6–7.

467 FEDERAL VOTING ASSISTANCE PROGRAM, *supra* note 18, at 1.

468 *See* discussion *supra* Section II.D.7.

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 United States 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 § 911's exclusion for foreign earned income, in practice, relatively few U.S. citizens living abroad actually owe net taxes to the United States. 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 United States 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 fiscal citizenship 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 United States. The contemporary debate between critics and defenders of U.S. citizenship-based taxation is largely about the nature of citizenship, i.e., whether citizenship properly imposes the duties of tax support upon citizens wherever they live in accordance with the 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.