SIMPLIFYING INTERNATIONAL JURISDICTION FOR UNITED STATES TRANSFER TAXES: RETAIN CITIZENSHIP AND REPLACE DOMICILE WITH THE GREEN CARD TEST

ROBERT J. MISEY JR.*

I. INTRODUCTION

The Internal Revenue Code (the "Code") distinguishes the taxation of residents and citizens from the taxation of nonresidents who are not citizens. The Code provides for a dual jurisdictional standard, imposing taxes on residents or citizens of the United States.

For purposes of transfer taxes—estate[1] and gift[2]—decedents who were residents or citizens[3] are taxed on their worldwide assets,[4] but nonresidents who are not citizens incur transfer taxes only on assets situated in the United States.[5] For example, suppose a decedent's estate includes a house in the United States and a house in France. If the decedent was a citizen or resident of the United States, the decedent's estate must pay taxes on the value of both houses. If the decedent was neither a citizen nor a resident—that is, a nonresident alien—the estate must pay taxes only on the value of the house located in the United States.

---

* Trial Attorney, Office of the Associate Chief Counsel (International), Internal Revenue Service, Washington, D.C.; M.L.T., Georgetown University, 1991; J.D.-M.B.A., Vanderbilt University, 1987; B.A., University of Kentucky, 1983. This Article reflects the view of Mr. Misey and is not the opinion of the Internal Revenue Service or the Associate Chief Counsel (International).

The author would like to thank Edward J. Beckwith, Professor of Law at Georgetown University Law Center, for his thoughtful comments on previous drafts of this Article.

1. *See* I.R.C. subtit. B, ch. 11 (1988). All references are to the 1988 Code unless otherwise indicated.

2. *See* I.R.C. subtit. B, ch. 12.

3. The Internal Revenue Code imposes an estate tax on the taxable estate of every citizen or resident of the United States. I.R.C. § 2001(a).

4. For citizens or residents of the United States, the estate tax is based on the value of the gross estate at the time of the decedent's death, and includes all property, real or personal, tangible or intangible, wherever situated. I.R.C. § 2031(a).

5. For nonresident decedents who are not citizens of the United States, an estate tax will also be imposed but only to the extent of the decedent's gross estate situated in the United States at the time of the decedent's death. I.R.C. §§ 2101(a), 2103.

Similarly, for income tax purposes,[6] residents and citizens are taxed on their worldwide income wherever it is derived.[7] However, nonresident aliens are taxed only on their United States source income.[8]

The United States tax law provides two different definitions of residence. Congress has never defined residence for transfer tax purposes, leaving in place the Internal Revenue Service's (IRS) regulatory interpretation of residence based on the subjective standard of domicile.[9] However, after many years of permitting the IRS to provide regulatory guidance, Congress in 1984 defined residence for income tax purposes by employing an objective standard.[10] Similarly, citizenship is a hybrid standard, containing elements of a subjective and an objective standard.

A proper jurisdictional standard is important to planners and litigators. It would conclusively determine, for example, whether the United States has estate tax jurisdiction when a decedent had lived half of each year abroad and half in the United States. The seminal case in this area is *Estate of Paquette v. Commissioner*.[11] In *Paquette*, a Canadian citizen lived in a house he owned in Florida from October to April. After the sale of his Canadian home, he no longer possessed living quarters in Canada and only returned to Canada several months each summer to handle his investments while living in a hotel during that period. In ruling for Paquette's estate, the Tax Court strained to find that the decedent was a domiciliary of Canada by looking at numerous facts and circumstances to determine his intent.[12] As the following discussion of subjective standards will show, the current standard of domicile causes problems. The time has come for Congress to legislate the proper jurisdictional standard for estate taxation.

This Article addresses what Congress should legislate as the proper jurisdictional standard for transfer tax purposes, analyzing the usefulness of objective, subjective, and hybrid standards. Part II discusses the development of the dual standard of citizenship or domicile and the dearth of legislative history in this area. Part III reviews the policies common to all taxes and those unique to transfer or international taxes and attempts to determine the goals that an international transfer tax jurisdiction standard

6. *See* I.R.C. subtit. A.

7. *See* Cook v. Tait, 265 U.S. 47 (1924); *see also* I.R.C. §§ 861-863.

8. Nonresident aliens are taxed on their fixed, determinable annual, or periodic United States source income at a flat rate of 30%. I.R.C. § 871(a)(1). Income that is effectively connected with the conduct of a trade or business within the United States is taxed at graduated rates. I.R.C. § 871(b)(1).

9. *See* Treas. Reg. § 20.0-1(b)(1) (1958).

10. *See* I.R.C. § 7701(b).

11. 46 T.C.M. (CCH) 1400 (1983).

12. The Tax Court did not make any findings regarding the decedent's visa status. *Id.*

should attain. Part IV examines the possible jurisdiction of a subjective standard based on domicile, an objective standard based on residence, and a hybrid standard based on citizenship. Part V explains why the combination of a hybrid standard and an objective standard is the proper international jurisdictional standard for transfer tax purposes.

II. The Historical Development of Transfer Tax Jurisdiction

Congress first distinguished the taxation of residents from nonresidents and citizens from noncitizens when it legislated the income tax in the Revenue Act of 1913.[13] Unfortunately, the Act and the legislative history[14] failed to discuss the definition of resident, nonresident, citizen, and alien. Congress renewed this scheme for income tax purposes in the 1916 Act[15] and promulgated the same distinction for the then newly enacted estate tax.[16] The legislative history again failed to explain why Congress created distinctions in its tax regime between resident and nonresident and between citizen and alien.[17]

For estate tax purposes, the IRS finally provided guidance in 1919 by defining residence to be domicile.[18] The IRS adopted this definition from a line of state transfer tax cases that deemed domicile to be the proper standard for a state's taxing jurisdiction.[19] The reasoning behind this definition of residence was that the state of domicile is the state that would have power over the decedent's chattels.[20] This original interpretation of domicile, with a few minor changes, continues as law under Treasury Regulation

---

13. Revenue Act of 1913, ch. 16, § IIA, 38 Stat. 166-67 (repealed 1916).

14. H.R. Rep. No. 5, 63d Cong., 1st Sess. xxxvi-xxxix (1913).

15. Revenue Act of 1916, ch. 463, §§ 1(a), 6(a), 39 Stat. 756, 760-61 (repealed 1918). Section 1(a) provided for an income tax on residents while Section 6(a) clarified that nonresident aliens were not subject to tax on foreign source income. *Id.*

16. Section 201 of the 1916 Act permitted a tax on the gross estate of both residents and nonresidents. Revenue Act of 1916, ch. 463, § 201, 39 Stat. 756, 777 (repealed 1918). The components of the gross estate for residents were set forth in Section 203(a)(1) while Section 203(b) set forth the gross estate for nonresidents. Revenue Act of 1916, ch. 463, § 203(a)(1), (b), 39 Stat. 756, 778 (repealed 1918).

17. H.R. Rep. No. 922, 64th Cong., 1st Sess. 3-5 (1916); S. Rep. No. 793, 64th Cong., 1st Sess. 5 (1916); Committee of Conference, 64th Cong., 1st Sess., Conference Report on the Bill (H.R. 16763) to Increase the Revenue, and for Other Purposes 8 (Comm. Print 1916).

18. Office of Commissioner of Internal Revenue, Regulations 37 (revised, 1919) (relating to Estate Tax Under the Revenue Act of 1918 art. 5, at 5 (1919)).

19. *See, e.g.*, Texas v. Florida, 306 U.S. 398 (1939); Frick v. Pennsylvania, 268 U.S. 473 (1925).

20. Bullen v. Wisconsin, 240 U.S. 625, 631 (1916). The interpretation of residence as domicile withstood its first judicial challenge in Guaranty Trust Co. v. Commissioner, 25 B.T.A. 507, 512 (1932).

section 20.0-1(b)(1).[21] Hereinafter, the term domicile will refer to the subjective definition of residence for transfer tax purposes, and the term residence will refer to the objective standard of residence for income tax purposes.[22]

A consensus standard for transfer tax jurisdiction has yet to emerge among treaty partners of the United States. Australia,[23] France,[24] Germany,[25] Greece,[26] Ireland,[27] Japan,[28] and the United Kingdom[29] use domicile as their jurisdictional standard. Conversely, Denmark[30] and the

---

21. The regulation states:

> A person acquires a domicile in a place by living there, for even a brief period of time, with no definite present intention of later removing therefrom. Residence without the requisite intention to remain indefinitely will not suffice to constitute domicile, nor will intention to change domicile effect such a change unless accompanied by actual removal.

Treas. Reg. § 20.0-1(b)(1) (1958).

In 1921, the IRS adopted the subjective standard for the income tax as well. *See* OFFICE OF COMMISSIONER OF INTERNAL REVENUE, REGULATIONS 62 (1922 ed.) (relating to the Income Tax and War Profits and Excess Profits Tax under the Revenue Act of 1921 art. 4, at 20 (1922)).

22. The IRS's subjective definition of residence continues in force with respect to transfer (estate and gift) taxes. However, the IRS's subjective definition of residence as it applies to the income tax has been supplanted by Congress's adoption of an objective standard. *See supra* notes 9-10 and accompanying text.

23. Jurisdiction in Australia for the estate tax is identical to jurisdiction for the gift tax. If the decedent was domiciled in Australia, the estate would be taxed on all property, except real estate located outside of Australia. If the decedent was domiciled outside Australia, the estate would be taxed only on Australian situated property. INTERNATIONAL PROGRAM IN TAXATION, HARVARD LAW SCHOOL, TAXATION IN AUSTRALIA 65-69, 75 (1958).

24. France imposes a succession tax on inheritees. COMMISSION OF THE EUROPEAN COMMUNITIES, INVENTORY OF TAXES LEVIED IN THE MEMBER STATES OF THE EUROPEAN COMMUNITIES 320-21 (13th ed. 1990).

25. Germany imposes an inheritance tax based on the domicile of the decedent. However, Germany determines domicile by looking to the presence or absence of external and recognizable facts rather than the decedent's intent. HARVARD LAW SCHOOL, TOPICAL LAW REPORTS: GERMANY (CCH) 703 & n.4 (1980).

26. Greece imposes an inheritance tax on legatees based on the domicile of the decedent. It imposes the tax on all property situated in Greece owned by Greek domiciles and citizens as well as their movable property located abroad, except where domiciled abroad for more than 10 years. COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 24, at 218-19.

27. Ireland imposes a transfer tax on the recipient for the worldwide situated property of a dispenser domiciled in Ireland and for any property located in Ireland regardless of domicile. Income Tax Act (ITA) 1967 pt. ix, s.198, at 187-88 (1982).

28. A nondomiciliary pays only an inheritance tax on property situated in Japan. JOHN HUSTON ET AL., JAPANESE INTERNATIONAL TAXATION § 7.02[1] (1990).

29. The United Kingdom imposes an inheritance tax payable by the transferor on all property located inside the United Kingdom, regardless of the transferor's domicile. COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 24, at 652.

30. If the deceased resided outside Denmark, the inheritance tax is payable only if the inheritance includes real estate or other property under Danish control. If neither the giver nor the recipient is a resident of Denmark, the donor pays a gift tax only. COMMISSION OF THE EUROPEAN COMMUNITIES, *supra* note 24, at 84-85.

Netherlands[31] base their transfer tax jurisdiction on residence. Sweden[32] uses a combination of residence and citizenship. Finally, Italy[33] employs a different scheme altogether, basing transfer taxes on situs instead of nationality.[34]

Considering the diverse standards of United States treaty partners, there is no compelling need for consistency in transfer tax jurisdiction. In addition, because Congress did not conclusively define its jurisdictional standards, the United States can start fresh, choosing the definition that best interacts with the policies of international transfer tax objectives—whether that definition is objective, subjective, or a hybrid.

III. The Policy Concerns of Taxation

One of the difficulties in formulating the proper jurisdictional standard for international transfer tax purposes is the different and occasionally competing policy interests affecting the chosen standard. The analyst can divide these policies into three categories: (1) policies that are general for all tax purposes; (2) policies that are unique for transfer tax purposes; and (3) policies that are unique for international tax purposes.

A. Policies General for All Tax Purposes

Several policy considerations are not unique to transfer tax purposes or international tax purposes, but are relevant for all tax purposes. To the extent possible, when determining the proper jurisdictional standard for international transfer tax purposes, Congress should consider these policies.

Raising revenue is a policy underlying all taxation. Although the general consensus is that transfer taxes should act to redistribute wealth as

31. The Netherlands imposes succession duties (Successierechten). These are payable by recipients of gifts, inheritances, and legacies received from persons not residing in the Netherlands on property located in the Netherlands. These duties are also imposed on an inheritance or gift from a person residing in the Netherlands. Citizens who have not resided outside the Netherlands for 10 years are treated for purposes of the transfer tax as residing in the Netherlands. Law on Succession Duties 1956 (June 28, 1956) Stb. 546 (as amended in 1987 (Stb. 335)).

32. Sweden imposes a succession tax on recipients who are Swedish citizens or residents wherever the property is located. In all other cases, Sweden imposes the succession tax only on property situated in Sweden. The jurisdictional standard for the gift tax is identical. Martin Norr et al., The Tax System in Sweden 97-98 (1972).

33. Italy imposes a transfer tax on transfers of property located only in Italy when the decedent died. It is immaterial where the decedent died, resided, or had nationality. Commission of the European Communities, *supra* note 24, at 462.

34. Italy imposes a death tax on all assets situated in Italy. Commission of the European Communities, *supra* note 24, at 462. Such a regime is the antithesis of United States taxation of worldwide assets. *See supra* note 4 and accompanying text.

opposed to raising revenue, there is some opinion in Congress that the tax writing committees should not propose laws which do not raise revenue.[35]

Another general policy is progressivity: taxing the wealthy at a greater rate than the poor. In the Economic Recovery Act of 1981,[36] Congress endorsed progressive transfer taxes by increasing the exemption for transfer taxes through an increase in the unified credit from $60,000 to $600,000.[37] Although income tax rates have lost some progressivity in recent years,[38] it would be politically unpopular for Congress to make transfer taxes, which try to redistribute wealth, regressive.

Another policy consideration is the usefulness of an objective test. Objective tests typically result in a trade-off between certainty and fairness. It is a good way to eliminate the subjective standard of intent, which is hard to plan for and even more difficult to litigate because of the inconsistent results derived from case-by-case judicial determinations.[39] The certainty that planning affords should favor tax determination, not tax avoidance. Objective tests also increase compliance and reduce administrative costs.[40]

Opponents, however, say that objective tests are unfair and believe that the law should foster fairness even at the cost of litigation, complexity, and the lack of planning opportunities.[41] They further argue that objective standards are advocated only by those who can use the standard to their tax advantage.[42]

---

35. During the legislation of the earnings stripping provision (I.R.C. § 163(j) of the Omnibus Budget Reconciliation Act of 1989), Rep. Dan Rostenkowski, Chairman of the House Ways and Means Committee, indicated disfavor with resolving nonrevenue problems with fiscal solutions. *Tax Policy Aspects of Mergers and Acquisitions: Hearings Before the House Comm. on Ways and Means*, 101st Cong., 1st Sess. 2-9 (1989) (statements of Rostenkowski and Nicholas F. Brady, Secretary of the Treasury).

36. Pub. L. No. 97-34, 95 Stat. 172 (codified as amended in scattered sections of 26 U.S.C.).

37. *See* I.R.C. § 2010(a). Tax policy makers can achieve progressivity by technical amendments as well as rate changes. JOINT COMM. ON THE ECONOMIC REPORT, 84TH CONG., 1ST SESS., FEDERAL TAX POLICY FOR ECONOMIC GROWTH AND STABILITY 819, 838 (Joint Comm. Print 1955) (papers submitted by panelists appearing before the subcommittee on tax policy).

38. For example, the top marginal rate has decreased from 50% in 1985 to 31% in 1990.

39. *See, e.g.*, Stallforth v. Helvering, 77 F.2d 548 (D.C. Cir.), *cert. denied*, 296 U.S. 606 (1935); Hechavarria v. United States, 374 F. Supp. 128 (S.D. Ga. 1974); Park v. Commissioner, 79 T.C. 252 (1982), *aff'd without op. sub. nom.* Park v. C.I.R., 755 F.2d 181 (D.C. Cir. 1985); Brittingham v. Commissioner, 66 T.C. 373 (1976), *aff'd*, 598 F.2d 1375 (5th Cir. 1979); Dawson v. Commissioner, 59 T.C. 264 (1972); Adams v. Commissioner, 46 T.C. 352 (1966), *acq.* 1967-2 C.B. 1.

40. *See* UNITED STATES TREASURY DEPT., A STUDY OF INTERCOMPANY PRICING (White Paper) 74 (1988), *reprinted in* 1988-49 I.R.B. 7-83, *and in* Standard Fed. Tax Rep. (CCH), extra ed. No. 53 (Oct. 20, 1988).

41. David Williams, II, *Back to the Future: A Time for Rethinking the Test for Resident Alien Status Under the Income Tax Laws*, 21 VAND. J. TRANSNAT'L L. 965, 1021 (1988).

42. UNITED STATES TREASURY DEPT., *supra* note 40, at 73.

The advantages and disadvantages of objective tests are related to the policy of simplicity.[43] Unfortunately, the policy of simplicity is hindered by nontax policies that make Code provisions complex.[44]

The proper legal development of a standard is also a policy concern. A standard that lends itself to jurisprudential development is a better standard than one that develops haphazardly or in a one-sided manner. If only one party has an interest in a case's precedential value, that party will litigate with a view toward developing the precedent in its favor.[45] However, if that party litigates both sides of a dispute, it will not overstep its bounds when arguing either side.

B. Policies Unique to Transfer Tax Purposes

Transfer taxes in the form of death taxes are the oldest method of United States taxation, dating back to 1797.[46] Death taxes were designed to impose moral obligations on the wealthy to use their fortunes for social purposes.[47] In the nineteenth century, many people advocated death taxes as a way to redistribute wealth.[48] This redistribution of wealth theory found popularity with the progressive policies of Theodore Roosevelt, who did not believe that government should allow the wealthy to provide more than a minimal amount to future generations.[49] Supporters rationalized that the idle rich were unproductive, that everyone should earn a living, and that the United States should offer true equality of opportunity.[50] The policy of redistribution is prevalent in the legislative history of the major transfer tax enactments.[51]

Some commentators claim that death taxes are the price of the government's protection of property rights. They argue that death taxes are either

---

43. *See Tax Law Simplification and Improvement Act of 1983: Hearing Before the House Comm. on Ways and Means*, 98th Cong., 1st Sess. 224 (1983) (statement of M. Bernard Aidinoff, Chairman, Section of Taxation, American Bar Association, informing the Committee of the ABA's proposal for defining a nonresident alien).

44. *See, e.g.*, I.R.C. § 952(a)(3)(B) (pertaining to international boycotts).

45. Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGIS. STUD. 51, 53-55 (1977).

46. JOINT COMM. ON THE ECONOMIC REPORT, *supra* note 37, at 820-21. Initially, death taxes were imposed by placing a stamp duty on legacies and intestate shares of personalty. *Id.*

47. JOSEPH A. PECHMAN, FEDERAL TAX POLICY 234-35 (5th ed. 1987).

48. JOINT COMM. ON THE ECONOMIC REPORT, *supra* note 37, at 865.

49. JOINT COMM. ON THE ECONOMIC REPORT, *supra* note 37, at 825 (statement of Louis Eisenstein regarding the rise and decline of the estate tax) (citing 17 WORKS OF THEODORE ROOSEVELT 434 (1925)).

50. BORIS I. BITTKER & ELIAS CLARK, FEDERAL ESTATE AND GIFT TAXATION xxv (5th ed. 1984).

51. *See, e.g.*, S. REP. NO. 144, 97th Cong., 1st Sess. 124 (1982) (The goal of estate taxation is "to break up large concentrations of wealth.").

a belated fee for the protection of private property during the decedent's life[52] or a fee for the use of the probate machinery to facilitate the transfer of private property.[53] Although ostensibly sound, both of these arguments encounter difficulty in the international arena. They leave unanswered the question of which country's government provides the protection.

Although the original purpose of the estate tax was to produce revenue for World War I,[54] revenue is not a major policy concern of transfer taxes.[55] Not only do transfer taxes generate less revenue than the income tax, but transfer tax revenue pales in comparison to the revenue generated by any other tax.[56]

The policy of equity supports society's desire to impose the same tax on estates of equal size.[57] The equalizing treatment of spouses is seen in the marital deduction,[58] which mitigates inequities created by community property laws. The credit for previously paid tax[59] mitigates the inequity created when a legatee dies shortly after the decedent's estate paid estate tax on the property transferred.

The proper standard should account for these transfer tax policies. However, these policies will not adequately deal with the estates of decedents who have connections to more than one country.

C. Policies Unique for International Tax Purposes

Although international taxation does not have as strong and rich a tradition as transfer taxation, it has evolved quickly since the end of World

52. PECHMAN, *supra* note 47, at 234.

53. BITTKER & CLARK, *supra* note 50, at xxxii.

54. JOINT COMM. ON THE ECONOMIC REPORT, *supra* note 37, at 865 (recommendations of Boris I. Bittker, Yale University, for revision of federal estate and gift taxes).

55. PECHMAN, *supra* note 47, at 235.

56. For example, the following data indicates revenue collected in billions of dollars for each tax for the period beginning in fiscal year 1985 and ending in fiscal year 1990 (data is rounded to the nearest billion).

	Total Revenue	Income Taxes	Employment Taxes	Excise Taxes	Estate and Gift Taxes
1985	743	474	225	37	7
1986	782	497	244	34	7
1987	886	568	277	33	8
1988	935	583	318	26	8
1989	1013	632	346	26	9
1990	1056	650	367	27	12

Data for the above table was derived from INTERNAL REVENUE SERVICE, DEPT. OF THE TREASURY, STATISTICS OF INCOME BULLETIN 120 (1990).

57. PECHMAN, *supra* note 47, at 240.

58. I.R.C. § 2056.

59. I.R.C. § 2013.

War II.[60] This has coincided with the growth of world trade exceeding the growth of world output.[61] The major international tax policy behind implementing an estate tax jurisdictional standard is compatibility with transfer tax treaties.

Unlike many other countries, where treaties supersede the foreign country's domestic law, the Supremacy Clause of the United States Constitution[62] treats federal legislation and treaties equally.[63] Consequently, if a treaty conflicts with legislation, the later enacted law will prevail.[64] The term "treaty override" describes legislation that conflicts with an earlier enacted treaty.[65] When determining whether a statute overrides a treaty, the analyst should attempt to read the statute and treaty in harmony, viewing a subsequent statute as conflicting only if its terms clearly and distinctly conflict with the treaty.[66] Although Supreme Court dictum has stated that Congress has not breached treaty obligations unless there is a clear expression of intent,[67] the intent shown in the legislative history is irrelevant when a clear and distinct conflict exists between the language of the treaty and the statute.[68]

Treaty overrides do not limit the effect of the legislation, but they do result in a loss of trust by treaty partners.[69] This may have especially damaging effects when negotiating future tax treaties. Tax treaties represent a careful balancing of interests. They confer benefits on both United States

---

60. For example, all of the current United States income or estate and gift tax treaties were negotiated after 1945.

61. GERALD M. MEIER, INTERNATIONAL ECONOMICS: THE THEORY OF POLICY 2 (1980).

62. U.S. CONST. art. VI, § 2.

63. Interestingly, the Internal Revenue Code originally prohibited treaty overrides. In 1954, Congress enacted Section 7852(d), which stated that no Code provision would contradict any treaty obligation in effect upon enactment of the 1954 Code. Congress revised Section 7852(d) in 1988 to specify that neither treaties nor laws would receive priority. *See* I.R.C. § 7852(d).

64. Reid v. Covert, 354 U.S. 1, 18 (1957) (citing Whitney v. Robertson, 124 U.S. 190 (1888)).

65. The United States lawmaking procedure permits overrides because the lawmakers advancing the treaty are not the same lawmakers legislating the Code. The Treasury Department negotiates tax treaties in consultation with the State Department. The President then forwards the treaty to the Senate. After deliberations in the Senate Foreign Relations Committee, the full Senate must give its advice and consent by a two-thirds vote. U.S. CONST. art. II, § 2, cls. 1 & 2. On the other hand, the House Ways and Means Committee originates tax legislation that must pass the House before going to the Senate and its Finance Committee.

66. Robert J. Misey Jr., *An Unsatisfactory Response to the International Problem of Thin Capitalization: Can Regulations Save the Earnings Stripping Provision?*, 8 INT'L TAX & BUS. LAW. 171 (1991).

67. Cook v. United States, 288 U.S. 102, 120 (1933), *disapproved of by* United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

68. David Brockway, *Override of Tax Treaties by Ordinary Legislation*, 34 BULL. FOR INT'L FISCAL DOCUMENTATION 553 (1980).

69. Misey, *supra* note 66, at 171.

decedents with foreign connections and foreign decedents with United States connections.[70] By overriding tax treaties, tax legislation tilts the balance of interests. The foreign country will likely try to rebalance, hindering the long-term economic and political interests of the United States.[71]

Although the content of the eighteen United States transfer tax treaties vary with the date of enactment,[72] they all tend to follow the same general principles. In treaties, two articles affect the United States jurisdiction of international transfer taxes: the fiscal domicile article and the nondiscrimination article.

According to the fiscal domicile article, transfer taxes only apply to domiciliaries and citizens[73] as defined by each country's domestic law.[74] The deference to each country's domestic law applies on the date of the law's enactment,[75] which should eliminate most override problems.

The jurisdictional standard, however, could override the nondiscrimination article. The relevant paragraph of the nondiscrimination article prevents the United States from taxing the estates of similarly situated foreign citizens more burdensomely than the estates of United States citizens.[76]

70. H.R. CONF. REP. NO. 42, 101st Cong., 1st Sess. 29 (1989).

71. *Id.*

72. *Compare* Estate Tax Convention, Apr. 10, 1947, U.S.-S. Afr. *with* Estate and Gift Tax Convention, Apr. 27, 1983, U.S.-Den.

73. U.S. Model Estate and Gift Tax Treaty, art. 1(1) (1977) *in* Tax Treaties (CCH) (1990) [*hereinafter* 1977 Model Treaty]; U.S. Model Estate and Gift Tax Treaty, art. 1(1) (1980), *in* Tax Treaties (CCH) (1990) [hereinafter 1980 Model Treaty].

74. Estate Tax Convention, May 14, 1993, U.S.-Austl., art. III(1), 5 U.S.T. 92, 95; Gift Tax Convention, May 14, 1953, U.S.-Austl., art. III(1), 4 U.S.T. 2264, 2267; Estate and Gift Tax Convention, Apr. 27, 1983, U.S.-Den., arts. 1(3), 4, T.I.A.S. 11082; Estate Tax Convention, Mar. 3, 1952, U.S.-Fin., art. III(1), 3 U.S.T. 4464, 4466; Estate, Gift, and Inheritance Tax Convention, Nov. 24, 1978, U.S.-Fr., arts. 1(2), 4(1), 32 U.S.T. 1935, 1938, 1941; Estate and Gift Convention, Dec. 3, 1980, U.S.-F.R.G., arts. 4(1), (5), T.I.A.S. 11082; Estate Tax Convention, Feb. 20, 1950, U.S.-Greece, art. IV(1), 5 U.S.T. 12, 19; Estate Tax Convention, Sept. 13, 1949, U.S.-Ir., art. III(1), 2 U.S.T. 2294, 2297; Estate Tax Convention, Mar. 30, 1955, U.S.-Italy, arts. III(1), (2), 7 U.S.T. 2977, 2980-82; Estate, Gift and Inheritance Convention, Apr. 16, 1954, U.S.-Japan, arts. II(3), III(1), 6 U.S.T. 113, 116-19; Estate and Inheritance Tax Convention, July 15, 1969, U.S.-Neth., arts. 1, 4(1), 22 U.S.T. 247, 249, 251; Estate Tax Convention, June 13, 1949, U.S.-Nor., arts. III(1), (2), 2 U.S.T. 2353, 2355-56; Estate Tax Convention, Apr. 10, 1947, U.S.-S. Afr., art. III(1), 3 U.S.T. 3792, 3798; Estate, Inheritance and Gift Taxation Convention, June 13, 1983, U.S.-Sweden, arts. 1(1), 4(1), T.I.A.S. 10826; Estate Tax Convention, July 9, 1951, U.S.-Switz., art. IV(1), 3 U.S.T. 3972, 3975; Estate and Gift Tax Convention, Oct. 19, 1978, U.S.-U.K., art. 4(1)(a), 30 U.S.T. 7223, 7226.

75. 1980 Model Treaty, *supra* note 73, art. 4(1).

76. The language of the 1980 Model Treaty explains:

> Citizens of a Contracting State, wherever they are resident, shall not be subjected in the other contracting State to any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which citizens of that other State in the same circumstances are or may be subjected. However, for purposes of United

Unfortunately, Congress and the IRS have traditionally strained their interpretations to exclude almost all situations from being "similar circumstances."[77]

Treaties are merely a tool to help eliminate double taxation and tax evasion, the goals of every transfer tax treaty.[78] To this end, the proper jurisdictional standard will have one, and only one, country impose tax on the estate of a decedent. When the United States does not have a treaty with a foreign country, the United States grants a credit for transfer taxes paid to that foreign country.[79]

The policy of collection is crucial to international taxation. Although Congress has the power to impose a tax on transfers occurring anywhere in the world,[80] the IRS would undoubtedly encounter difficulty collecting the tax. The United States cannot sue in a foreign court to collect a tax owed because, under international law, one country will not enforce the revenue laws of another country.[81] Known as Lord Mansfield's Rule,[82] this princi-

---

> States taxation, United States citizens who are not residents of the United States are not in the same circumstances as citizens . . . who are not residents of the United States.

1980 Model Treaty, *supra* note 73, art. 10.

77. For example, when dealing with discrimination against residents of other countries, the IRS has taken the view that it can treat foreign taxpayers differently than United States residents because foreign residents do not pay a local tax on their worldwide income. H.R. CONF. REP. NO. 386, 101st Cong., 1st Sess. 568 (1989). However, Congress has shown concern about foreign discrimination against United States citizens. In 1966, when liberalizing the estate taxation of nonresident aliens in the Foreign Investors Tax Act (FITA), Congress passed I.R.C. Section 2108. Section 2108, which Congress has not repealed, gives the President the power to eliminate any of the liberalizing changes if he finds that United States citizens do not receive reciprocal concessions from foreign countries. *Removal of Tax Barriers to Foreign Investment in the United States: Hearings on H.R. 5916 Before the House Comm. on Ways and Means*, 89th Cong., 1st Sess. 21 (1965).

78. The preamble to every estate and gift tax treaty states that its purpose is to prevent both double taxation and fiscal evasion.

79. I.R.C. § 2014. The foreign death tax credit, which does not affect treaty obligations, takes effect when the United States imposes a tax on the entire estate and the foreign country imposes a tax on property situated within that foreign country. S. REP. NO. 781, 82d Cong., 1st Sess. 89 (1951); STAFF OF THE JOINT COMM. ON INTERNAL REVENUE TAXATION, 92D CONG., 1ST SESS., SUMMARY OF THE PROVISIONS OF THE REVENUE ACT OF 1951 (H.R. 4473) AS AGREED TO BY THE CONFEREES 58 (1951).

80. U.S. CONST. art. I, § 8, cl. 1.

81. Federal courts give effect to foreign money judgments. *See* Hilton v. Guyot, 159 U.S. 113, 163 (1895). *But cf.* Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989); Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986); Tahan v. Hodgson, 662 F.2d 862 (D.C. Cir. 1981). Federal courts do not enforce foreign tax money judgments. *See* United States v. Van der Horst, 270 F. Supp. 365 (Del. 1967); Newcomb v. Commissioner, 23 T.C. 954 (1955), *acq.* 1955-2 C.B. 7.

82. The principle of international law that one country will not enforce the revenue laws of another country may be traced to Lord Mansfield's dictum regarding national sovereignty that "no country ever takes notice of the revenue laws of another." Hollman v. Johnson, 98 Eng. Rep. 1120, 1121 (K.B. 1775).

ple is based on international sovereignty, and is enforced in the United States against foreign countries[83] and abroad against the United States.[84] For example, a United States court would not enforce an Australian transfer tax against shares of a corporation situated in Delaware.

There are, however, mutual collection articles contained in six of the estate and gift tax treaties that provide for assistance in the collection of taxes.[85] These articles are found in the older treaties, the most recent of which was ratified in 1979.[86] Nevertheless, these articles are ineffective collection devices because they provide only for collecting from citizens of third-party countries.[87] Other than these mutual collection articles, there are no known methods to collect United States taxes abroad.

The collection of income taxes is simple because the taxes are withheld by the payor of the United States source income,[88] thus ensuring collection and minimizing the administrative burdens for taxpayers and the government. The withholding tax is the major source of revenue from foreign investors.[89] However, withholding does not occur if the IRS determines that the withholding requirements impose an undue administrative burden and that an exemption will not jeopardize or delay the collection of tax.[90]

---

83. *See* cases cited *supra* note 81.

84. *See, e.g.*, United States v. Harden, [1963] S.C.R. 366 (Can.). In *Harden*, British Columbia's Court of Appeals dismissed a United States suit for collection of taxes on a judgment obtained in a United States district court due to Lord Mansfield's Rule. Canada's Supreme Court upheld the dismissal. *Id.*

85. Estate Tax Convention, Mar. 3, 1952, U.S.-Fin., arts. VIII-IX, 3 U.S.T. 4464, 4470; Estate, Gift, and Inheritance Tax Convention, Nov. 24, 1978, U.S.-Fr., art. 16, 32 U.S.T. 1935, 1958-59; Estate Tax Convention, Mar. 30, 1955, U.S.-Italy, art. VII, 7 U.S.T. 2977, 2984; Estate, Gift, and Inheritance Tax Convention, Apr. 16, 1954, U.S.-Japan, art. VI(2), 6 U.S.T. 113, 123; Estate Tax Convention, June 13, 1949, U.S.-Nor., art. IX (art. IX is not accepted by the U.S.), 2 U.S.T. 2353, 2358-59; Estate Tax Convention, Apr. 10, 1947, U.S.-S. Afr., art. VIII, 3 U.S.T. 3792, 3799.

86. Estate and Gift Tax Convention, Nov. 24, 1978, U.S.-Fr., art. 16, 32 U.S.T. 1935, 1958-59.

87. Collection assistance is not required for citizens of the country to which the creditor country applies. However, for Norway and South Africa, the United States will collect from citizens only if the estate receives a credit. Furthermore, for Finland and Italy, the United States will collect from a citizen's estate to ensure that a country not entitled to a credit does not receive it. *See* sources cited *supra* note 85.

88. The Internal Revenue Code provides that all persons having the control, receipt, custody, disposal, or payment of any fixed, determinable annual, or periodic income shall deduct and withhold the applicable tax. I.R.C. § 1441(a), (b).

89. Task Force on Promoting Increased Foreign Investment in United States Corporate Securities and Increased Foreign Financing for United States Corporations Operating Abroad, Report to the President of the United States 23, *reprinted in* Legislative History of H.R. 13103, 89th Cong., 2d Sess. Foreign Investors Tax Act of 1966 (1967) (Henry H. Fowler, Chairman).

90. S. REP. No. 1707, 89th Cong., 2d Sess. 1083 (1966); 1966-2 C.B. 1059. Exceptions are listed in I.R.C. § 1441(c).

Another collection device the Code authorizes is a *writ ne exeat republica*. This writ entitles the IRS to imprison a citizen who tries to leave the United States to avoid payment of a tax on assessment.[91] Although the writ would be ineffective in collecting estate taxes, it might be useful in collecting gift taxes.[92]

Another policy matter is the imposition of taxes based on the number and extent of benefits conferred to the individual.[93] Thus, individuals who received substantial and continuous benefits should pay more to the country's maintenance and operation than those who received minimal or infrequent benefits.[94] This policy deals directly with the jurisdictional issue of classifying the number and extent of benefits conferred to noncitizens.

A few of these policies are competing. Although it might be difficult to find a standard that satisfies all these policy concerns, the proper standard should satisfy most of them.

IV. THE POTENTIAL STANDARDS OF JURISDICTION

The Code contains three standards for taxing jurisdiction: domicile, a subjective standard; residence, an objective standard; and citizenship, a hybrid of an objective standard with underlying subjectivity. Transfer taxes currently contain a dual jurisdictional scheme of the subjective standard of domicile or the hybrid standard of citizenship. The following discussion analyzes the three different types of standards to determine if there are any special nuances or intricacies that will help to develop the proper standard.

A. The Subjective Standard of Domicile

Because the current United States transfer tax regime contains the subjective standard of domicile as one of its two jurisdictional standards,[95] this Article will initially review subjective standards. A subjective standard includes the unmanifested element of intent[96] because the decedent's physical presence alone is inconclusive.

---

91. I.R.C. § 7402(a).

92. The writ may even provide for a receiver to repatriate the assets necessary to ensure collection. *See* United States v. Ross, 302 F.2d 831 (2d Cir. 1962). Although I.R.C. § 7402 does not preclude issuing a writ to a citizen of a foreign country, such a writ and the subsequent imprisonment could be considered an interference with international sovereignty.

93. David R. Tillinghast, *A Matter of Definition: "Foreign" and "Domestic" Taxpayers*, 2 INT'L TAX & BUS. LAW. 239, 240 (1984).

94. JOINT COMM. ON THE ECONOMIC REPORT, *supra* note 37, at 824 (statement of Louis Eisenstein regarding the rise and decline of the estate tax.).

95. *See* Treas. Reg. § 20.0-1(b)(1) (1958).

96. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 26 (3d ed. 1987) (unmanifested intent is that which an individual believes).

Legal theorists postulate that domicile is closely tied to the meaning of home, as it is the country to which the individual intends to be connected.[97] The subjective aspect of the domicile standard would indicate that it is the place where an individual considers herself to be a member of society, which would indicate the legal system, such as the transfer tax system, to which the individual belongs.[98]

Domicile may change over the course of a person's life. An individual acquires a domicile at birth—usually that of her parents.[99] Upon majority, she acquires her domicile by being physically present in the new location and by having the necessary intent to live there.[100] Upon acquiring a domicile, she retains it until acquiring another domicile elsewhere.[101] In the absence of conflicting evidence, the analyst should presume that an existing domicile continues until a challenger can prove otherwise.[102]

Although the Code differentiates the transfer taxation of resident aliens from nonresident aliens,[103] the recently enacted objective standard of residence[104] does not apply for transfer tax purposes.[105] Instead, the standard is, and has always been, domicile, which focuses on the intent and physical presence elements. The regulations provide:

> A person acquires a domicile in a place by living there, for even a brief period of time, with no definite present intention of later removing therefrom. Residence without the requisite intention to remain indefinitely will not suffice to constitute domicile, nor will intention to change domicile effect such a change unless accompanied by actual removal.[106]

By including the word "intention," the IRS has created a subjective standard.

Prior to the recent adoption of the objective standard of residence for income tax purposes, some considered it easier to grapple with the definition of domicile than the former subjective standard of residence for income

---

97. Willis L.M. Reese & Robert S. Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV. 561, 562 (1953).

98. Elizabeth MacDonald, *Domicile: Certainty or Flexibility?*, 135 NEW L.J. 865, 866 (1985).

99. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 14 (1971).

100. *Id.* § 15.

101. Weible v. United States, 244 F.2d 158, 163 (9th Cir. 1957).

102. Mitchell v. United States, 88 U.S. (Wall.) 350, 353 (1875); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 19 (1971).

103. *Compare* I.R.C. § 2001(a) *with* I.R.C. § 2101(a).

104. I.R.C. § 7701(b).

105. The definitions of resident alien and nonresident alien do not apply to subtitles B and C, the estate and gift tax sections. *See supra* notes 9-10, 22 and accompanying text.

106. Treas. Reg. § 20.0-1(b)(1) (1958). For the gift tax, see Treas. Reg. § 25.2501-1(b) (1958).

tax purposes.[107] Because of the difficulty with the subjective definition of domicile, courts have borrowed principles from state conflict of law cases for transfer tax purposes.[108] The decedent must have both intent and physical presence.[109]

1. Legal Intention to Make a Home

The subjective requirement of intent poses a problem in litigation. As with all subjective standards, courts try to determine unmanifested signs of intent by analyzing all the facts and circumstances.[110] The courts view non-tax-related declarations[111] of the decedent's intent to make a home as having greater weight than tax-related declarations.[112]

However, the subjective standard of intent can create problems when nonpermanent visitors on a visa stay in the United States longer than they are allowed.[113] The resolution of this issue often turns on the legal capacity of the alien. An alien must have the requisite intent to establish domicile, but one cannot have the requisite intent without the legal capacity to do so. A minor, for example, is not competent to form the requisite intent to establish domicile and adopts her parents' domicile.[114] However, a person has the legal capacity to form the requisite intent if she can make an informed, intelligent decision, regardless of whether she can be ordered to go else-

---

107. *See* Joel Karp, *Definition of Citizenship, Residence and Domicile for U.S. Income, Gift and Estate Tax Purposes*, 43d N.Y.U. INST. ON FED. TAX, ch. 13, § 13.04 (1985).

108. *See, e.g.*, Rodiek v. Commissioner, 33 B.T.A. 1020 (1936), *aff'd sub. nom.* Rodiek v. Helvering, 87 F.2d 328 (2d Cir. 1937).

109. Treas. Reg. § 20.0-1(b)(1) (1958).

110. *Rodiek*, 33 B.T.A. at 1033-34. In *Rodiek*, the Board of Tax Appeals ruled that because the taxpayer never lived on U.S. real estate and merely used it as an investment, he did not have sufficient intent to live in the United States. *Id.*; *see also* Commissioner v. Nubar, 185 F.2d 584 (4th Cir. 1950), *cert. denied*, 341 U.S. 925 (1951).

111. *See* Paquette v. Commissioner, 46 T.C.M. (CCH) 1400 (1983).

112. *See* Vriniotis v. Commissioner, 79 T.C. 298 (1982).

113. See *In re* Lok, 15 I. & N. Dec. 720 (B.I.A. 1976), *remanded sub. nom.* Lok v. INS, 548 F.2d 37 (2d Cir. 1977), *on remand*, 16 I. & N. Dec. 441 (B.I.A. 1978), *later proceeding*, 18 I. & N. Dec. 101 (B.I.A. 1981), *aff'd on other grounds*, Lok v. INS, 681 F.2d 107 (2d Cir. 1982), which interprets 8 U.S.C. § 1212(c) to require seven years of residence in the United States for domicile. Thus, it is possible for a person to have domicile in the United States even though the person is an illegal alien. It should be noted, however, that *Lok* was modified by a subsequent Eleventh Circuit case. *See* Marti-Xiques v. INS, 741 F.2d 350 (11th Cir. 1984). *Lok* has also been disagreed with by Cabasug v. INS, 847 F.2d 1321 (9th Cir. 1988); Variamparambil v. INS, 831 F.2d 1362 (7th Cir. 1987); and Moreno v. INS, 779 F.2d 1086 (5th Cir. 1986).

114. American Home Benefit Ass'n v. United Am. Benefit Ass'n, 125 P.2d 1010 (Idaho 1942); 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 10.2 (1935); SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 222 (Walter H.E. Jaeger ed., 3d ed. 1959).

where.[115] Thus, an alien has the legal capacity to form the intent to acquire domicile even when the immigration laws prevent her from permanently living in the United States.[116]

In *Elkins v. Moreno*,[117] an alien possessing a G-4 temporary visa, which is for the immediate family members of an international organization employee,[118] tried to obtain educational benefits available only to domiciliaries of Maryland. The Supreme Court decided that a holder of a G-4 visa had the legal capacity to acquire domicile in the United States.[119] The Court first found that if an alien under a G-4 visa terminates her employment with an international treaty organization, both she and her family will lose their immigration status under section G-4; but, they will not necessarily be subject to deportation or have to leave and re-enter the country in order to become immigrants again.[120] The Court rationalized that, unlike other visa holders, G-4 visa holders could establish domicile in the United States because they did not have to establish a home elsewhere.[121]

Although the Court, in dictum, implied that holders of other types of visas did not have the requisite legal capacity, the IRS clarified its position in two Revenue Rulings based on *Elkins*.[122] Increasing the estate tax revenue base, the IRS ruled that someone who has never gained the right to be in the United States still has the requisite legal capacity because that person is subject to the same risk of deportation as someone who holds a temporary visa but overstays her welcome.[123]

---

115. Rev. Rul. 80-209, 1980-2 C.B. 248. In Stifel v. Hopkins, 477 F.2d 1116, 1120 (6th Cir. 1973), the court held that a prisoner has the necessary legal capacity to form the intent to live elsewhere. In Ellis v. Southeast Constr. Co., 260 F.2d 280 (8th Cir. 1958), the court ruled that a member of the armed services has the necessary legal capacity to form the intent to live elsewhere.

116. This would apply if, for example, she does not qualify to obtain a green card. *See infra* note 172.

117. 435 U.S. 647 (1978).

118. 8 C.F.R. § 214.2(g)(2) (1992); 8 U.S.C. § 1101(a)(15)(G)(iv) (1988).

119. In an earlier case, the Second Circuit Court of Appeals had also ruled that an illegal alien could possess the intent necessary for lawful domicile. *See* Lok v. INS, 681 F.2d 107 (2d Cir. 1982); Lok v. INS, 548 F.2d 37 (2d Cir. 1977). For the full history of this case, see *supra* note 113.

120. *Elkins*, 435 U.S. at 666-67.

121. *Id.*

122. *See* Rev. Rul. 80-363, 1980-2 C.B. 249; Rev. Rul. 80-209, 1980-2 C.B. 248. Revenue Ruling 80-363 revoked Rev. Rul. 74-364, 1974-2 C.B. 321, which stated that the holder of a G-4 visa was under a legal disability such that she could not form the requisite intent to remain indefinitely in the United States.

123. *See* sources cited *supra* note 122.

2. Physical Presence

Intent without physical presence is not enough to establish domicile.[124] Like intent, the physical presence requirement is based on facts and circumstances. Unlike the intent requirement, courts do not use facts and circumstances to determine what the decedent was thinking. The IRS has ruled that to establish domicile, an alien must perform an affirmative act to establish physical presence in the United States. Absence from the country of original domicile is not enough.[125] In another ruling, the IRS listed factors that show physical presence. These include the location of the alien's permanent job, any church membership, declarations in the alien's will, and the location of the bulk of the alien's estate.[126] In addition, the IRS looks to the alien's ties to the local community, the location of any homes the alien owns, and the period of time the alien lived with her family in the United States.[127] Many of these factors are also used to analyze physical presence under the former subjective standard of residence for income tax purposes.[128]

The major advantage of a subjective test is that it offers flexibility to otherwise rigid rules.[129] In this manner, the subjective standard provides equity by accounting for the special characteristics of each individual taxpayer.[130] For example, in *Nienhuys v. Commissioner*,[131] the decedent was a domiciliary of the Netherlands travelling out of the Netherlands when World War II began. Because of the War, he lived in the United States and was unable to return to the Netherlands before dying in the United States in 1946. The Court ruled that the decedent, at death, was a domiciliary of the Netherlands, providing a result that an inflexible standard could not provide.

---

124. *In re* Dorrance's Estate, 163 A. 303 (Pa. 1932), *cert. denied sub. nom.* Dorrance v. Pennsylvania, 287 U.S. 660 (1932) *and* 288 U.S. 617 (1933).

125. Rev. Rul. 58-70, 1958-1 C.B. 341. The IRS cited Mitchell v. United States, 88 U.S. 350, 353 (1874), for the proposition that absence from a foreign home is not enough of a physical presence to establish domicile. Rev. Rul. 80-209, 1980-2 C.B. 248.

126. Rev. Rul. 80-209, 1980-2 C.B. 248.

127. *Id.* The ruling cited Farmer's Loan & Trust Co. v. United States, 60 F.2d 618 (S.D.N.Y. 1932). It also cited the *Special Note on Evidence for Establishment of a Domicile on Choice, following* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 20, at 20 (1971).

128. *See* Fokker v. Commissioner, 10 T.C. 1225 (1948), *acq.* 1943-2 C.B. 2; Rev. Rul. 58-70, 1958-1 C.B. 341.

129. Stephen J. McGarry, Student Paper, *State of Mind Standards in Taxation*, 7 AM. J. TAX POL'Y 249, 303 (1988).

130. Lawrence G. Van Horn, *The Need for More Objective Tax Laws*, 51 TAXES 589, 596 (1973).

131. 17 T.C. 1149 (1952).

Despite the lack of a discernible causal connection, the use of the subjective standard of domicile correlates with the policy of redistribution of wealth. A 1990 poll indicates that the majority of billionaires were self-made individuals who did not inherit their money.[132]

There are, however, many problems with using the subjective standard of domicile for transfer tax purposes. The subjective standard of domicile is vague and uncertain,[133] which is evident in the multitude of cases on the issue of proper domicile.[134] Aliens will not necessarily know the ramifications of tax laws because the regulation's definition does not provide clear guidance for possible transfer tax liability. The courts determine both intent and physical presence on a case-by-case basis,[135] making it virtually impossible for a reasonable person to plan for her expected estate tax liability. This is aggravated by the IRS's reluctance to rule on transfer tax issues.[136] Congress has provided certainty to income tax planners;[137] Congress should now provide certainty to transfer tax planners as well.[138]

Not only is determining intent difficult, but basing United States domicile on living in the United States "for even a brief period of time"[139] is unjust. Because transfer taxes are based on an individual's accumulated wealth, it is improper and overreaching for the United States to claim transfer taxes from an individual living in the United States for only a brief period of time who has not manifested an intent to live in the United States through an objective act. For example, consider a slight variation of the *Paquette*[140] facts with a wealthy Canadian citizen. When the Canadian citi-

---

132. Less than a third of all billionaires inherited their wealth. *The Richest People in America: The Forbes 400*, FORBES (Special Fall 1990 Issue), Oct. 22, 1990, at 318-27 [hereinafter *The Richest People in America*].

133. *Tax Law Simplification and Improvement Act of 1983*, *supra* note 43, at 221.

134. *See, e.g.*, Paquette v. Commissioner, 46 T.C.M. (CCH) 1400 (1983); Nienhuys v. Commissioner, 17 T.C. 1149 (1952); Rev. Rul. 80-363, 1980-2 C.B. 250; Rev. Rul. 80-209, 1980-2 C.B. 248; Rev. Rul. 74-364, 1974-2 C.B. 321. The lead cases under the former subjective standard for the income tax pursuant to Treas. Reg. § 1.871-2 are cited *supra* note 39. The problem with subjective standards is not limited to the United States. For United Kingdom cases, see Commissioners of Inland Revenue v. Bullock, 51-1 T.C. 522 (Ch. 1975); Fielden v. Commissioners of Inland Revenue, 42 T.C. 501 (Ch. 1965); Faye v. Commissioners of Inland Revenue, 40 T.C. 103 (Ch. 1961).

135. Rodiek v. Commissioner, 33 B.T.A. 1020, 1033-34 (1936).

136. *See, e.g.*, Rev. Proc. 89-3, 1989-1 C.B. 763; Rev. Proc. 88-50, 1988-2 C.B. 711.

137. *See* I.R.C. § 7701(b).

138. *See* James A. Fellows, *Alien Taxpayers and Estate and Gift Taxation After the Tax Reform Act of 1984: A Critical Response*, 62 TAXES 751, 752 (1984).

139. Treas. Reg. § 20.0-1(b) (1958) (estate tax); Treas. Reg. § 25.2501-1(b) (1958) (gift tax); *see also supra* note 106 and accompanying text.

140. Paquette v. Commissioner, 46 T.C.M. (CCH) 1400 (1983); *see supra* notes 11-12 and accompanying text.

zen reaches the age of sixty-five, he purchases a condominium in Florida and lives there every January. At seventy-five, he sells his Canadian home in the fall and travels to Florida. He dies a month later. If the decedent's estate cannot prove his intent to live in Canada, his entire estate, wherever located, will be subject to tax in the United States based on his brief presence in the United States.[141] This seems quite inequitable. After all, if the decedent's activities have enough of a connection to the United States, the United States can impose an income tax through the objective standard of residency.[142] However, it is inequitable to impose the estate tax on his lifelong accumulation of wealth.[143] The United States should not be able to claim taxation of the worldwide assets of an individual who has not objectively desired to take advantage of the benefits that the United States offers. The standard needs the formulation of objective criteria to determine substantial physical presence. Combined with the subjective element of intent, physical presence for an unspecified time is incapable of serving as an adequate standard.

Domicile is a difficult standard to apply in a modern, mobile, and industrialized society. With people moving easily from one country to another,[144] multiple countries could subjectively assert that the decedent domiciled herself in their country despite an insufficient connection between the decedent and the country.[145] In the interests of certainty, the present standard of domicile unreasonably requires that an individual sever all ties with a country when relocating. Such a requirement raises further problems. If an individual moves to a different country for a new job that she discovers she does not like, then returns to her original country and dies, the country of residence is unclear. It also hurts the global business of United States industry, which needs qualified personnel to relocate. Furthermore, a subjective definition was more suitable in the 1920s and 1930s, when travel to the United States was rare. But today, travel is easier; a European can reach the United States in several hours.[146]

---

141. I.R.C. § 2001(a); Treas. Reg. § 20.0-1(b)(1) (1958). Furthermore, there is no transfer tax treaty between Canada and the United States.

142. *See* Afroyim v. Rusk, 387 U.S. 253, 262 (1967).

143. JOINT COMM. ON THE ECONOMIC REPORT, *supra* note 37, at 855, 857 (economic effects of estate and gift taxation by C. Lowell Harriss, Columbia University).

144. For example, the ease of travelling throughout the EEC has never been easier.

145. Denis Sheridan, *Private International Law: The Law of Domicile: Observations on the Joint Report*, 1989 BRIT. TAX. REV. 230, 236.

146. *See Tax Law Simplification and Improvement Act of 1983*, *supra* note 43, at 223.

Many of the fifty states use a definition of domicile to impose transfer taxes.[147] However, the subjective definition of domicile is necessary for states to differentiate allegiance because they do not have a concept similar to citizenship, which is a national concept.

The use of a subjective standard of domicile produces mixed results when interacting with transfer tax treaties. Domicile does not override, but it has limited usefulness. The purpose of transfer tax treaties is to ensure the collection of a single death tax by avoiding double taxation and preventing tax evasion.[148]

Because each country applies its domestic law to determine domicile, an individual may find herself in the predicament of possessing multiple domiciles, and therefore subject to estate taxation in multiple countries unless protected by a treaty. For example, if an individual intends to live in the United States, where she has a winter home in Florida, but spends her summers in the Netherlands, which has an objective standard,[149] her estate would be subject to tax in both countries. Although the newer treaties provide for tiebreakers in case of double domicile, the tiebreakers have limited effectiveness.

A special tiebreaker rule applies if an individual is a double domiciliary, but a citizen of one country. The individual is domiciled in the country of citizenship if she has not lived in the other country for seven of the last ten years. In all other cases, the analyst should consider the following in determining the country of domicile: (1) the permanent home of the decedent; (2) the center of the decedent's vital interests; (3) the habitual abode of the decedent; (4) the citizenship of the decedent; and (5) the mutual agreement of the competent authorities of the two countries.[150]

These tiebreaking procedures for determining domicile are inadequate. First, although the newer treaties contain the tiebreakers, there are eleven older treaties that do not have a tiebreaker article.[151] Second, the tiebreak-

147. White v. United States, 511 F. Supp. 570 (S.D. Ind. 1981), *aff'd*, 680 F.2d 1156 (7th Cir. 1982); *see also*, CAL. REV. & TAX. § 14,199 (West 1991); FLA. STAT. § 198.01(6) (1991); N.Y. TAX LAW § 605(b)(1)(A) (McKinney 1991).

148. *See supra* note 78 and accompanying text.

149. *See supra* note 31 and accompanying text.

150. Estate and Gift Tax Convention, Nov. 24, 1978, U.S.-Fr., art. 4(2), 32 U.S.T. 1935, 1941-42; Estate and Gift Tax Convention, Dec. 3, 1980, U.S.-F.R.G., art. 4(2), T.I.A.S. 11082; Estate Tax Convention, July 15, 1969, U.S.-Neth., art. 4(3), 22 U.S.T. 247, 252; Estate and Gift Tax Convention, June 13, 1983, U.S.-Swed., art. 4(3), T.I.A.S. 10826; Estate and Gift Tax Convention, Oct. 19, 1978, U.S.-U.K., art. 4(4), 30 U.S.T. 7223, 7227.

151. These older treaties generally avoid the determination of which country has jurisdiction by granting a credit based on the proportionate value of the property. Estate Tax Convention, May 14, 1953, U.S.-Austl., art. V(2), 5 U.S.T. 92, 98; Gift Tax Convention, May 14, 1953, U.S.-

ing standards themselves are troublesome. Treaty negotiators could improve the special tiebreaker by eliminating the seven year standard and deeming domicile to be the country of citizenship. The first four on the list are difficult to ascertain because they are undefined in any of the treaties. Fortunately, the analyst can usually determine citizenship by a country's local law. The final tiebreaker, agreement by the competent authorities, does not guarantee a single domicile and is irreconcilable with the policy of certainty. The Treasury Department could simplify these tiebreakers by proposing citizenship as the ultimate tiebreaker. Even with improvements, however, the tiebreakers do not provide a means to eliminate disputes between multiple countries claiming domicile, because the treaties are only bilateral. By eliminating intent, the proper jurisdictional standard would help eliminate many double taxation problems.

Moreover, a subjective standard may actually result in the evasion of any transfer tax from any country. If both competing countries define domicile using a subjective standard similar to the United States standard, and the individual does not intend to remain indefinitely in either country, she will avoid being taxed altogether. Such a scenario would be likely in the case of an alien who spends winters in Australia and summers in the United States.

Because the many disadvantages of subjective standards outweigh the advantages of flexibility and equity, Congress should eliminate the domicile standard.

B. The Objective Standard of Residence

An objective standard determines an outcome by looking at the facts without any regard to unmanifested intent.[152] Furthermore, the word residence usually connotes a physical connection to a community, such as living there for a fixed period of time, which is an objective determination.[153] The Code's definition of residence for income tax purposes has evolved

---

Austl., art. 5(2), 4 U.S.T. 2264, 2270; Estate Tax Convention, Mar. 3, 1952, U.S.-Fin., art. V(3), 3 U.S.T. 4464, 4469; Estate Tax Convention, Feb. 20, 1950, U.S.-Greece, art. VI(2), 5 U.S.T. 12, 25; Estate Tax Convention, Sept. 13, 1949, U.S.-Ir., art. V(2), 2 U.S.T. 2294, 2299; Estate, Gift, and Inheritance Tax Convention, Apr. 16, 1954, U.S.-Japan, art. V(2), 6 U.S.T. 113, 120-21; Estate Tax Convention, June 13, 1949, U.S.-Nor., art. V(2), 2 U.S.T. 2353, 2357; Estate Tax Convention, Apr. 10, 1947, U.S.-S. Afr., art. V(2), 3 U.S.T. 3792, 3797-98.

152. CALAMARI & PERILLO, *supra* note 96, at 26. An objective manifestation of intent is determined from what a party says and does. Unlike unmanifested intent, manifestations of an individual's intent are satisfactory indicators because they are based on an objective analysis of the facts shown to others. CALAMARI & PERILLO, *supra* note 96, at 26.

153. Reese & Green, *supra* note 97, at 568.

from a subjective standard similar to domicile to an objective standard based on physical presence.

The theory behind basing taxation on physical presence is that those physically present obtain more continuous and significant benefits and protection from the laws and the government than do those not physically present. For this reason, such individuals should contribute proportionately more to the government's maintenance and operation. Although under the current standards an alien could have United States residence for income tax purposes but domicile elsewhere,[154] nothing in the legislative histories indicates that the residence standard for transfer tax purposes must differ from the residence standard for income tax purposes.

Since the origination of the income tax in 1913[155] until 1984, Congress never defined the term residence for income tax purposes. However, the IRS defined residence in 1921[156] for income tax purposes as a subjective standard of physical presence with an intention to stay in the United States.[157] The former subjective standard of residence depended on whether the alien was a mere transient or sojourner in the United States. Living in the United States without any definite intention as to the duration and nature made the alien a resident pursuant to the regulations.[158]

---

154. Bowring v. Bowers, 24 F.2d 918, 921 (2d Cir.), *cert. denied*, 277 U.S. 608 (1928).

155. Revenue Act of 1913, ch. 16, § A, 38 Stat. 114 (repealed 1916).

156. Treas. Reg. § 62 (1921), which on Oct. 23, 1957, became Treas. Reg. § 1.871-2. T.D. 6258, 1957-2 C.B. 368.

157. Treas. Reg. § 1.871-2(b) (1957) stated:

> An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but, if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. . . .

158. Treas. Reg. § 1.871-2(b) (1957). In addition, the regulations created a rebuttable presumption that aliens were nonresidents. Treas. Reg. § 1.871-4(b), (c) (1957). Treas. Reg. § 1.871-4(c)(1) indicated that someone limited to a definite period of time in the United States cannot have a residence absent exceptional circumstances. Later, the IRS issued Rev. Rul. 69-611, 1969-2 C.B. 150, which states that residence in the United States for one year raises the presumption that the alien was a resident for United States income tax purposes. Furthermore, the IRS ruled that temporary visas indicated nonresident status. Rev. Rul. 67-159, 1967-1 C.B. 280; Rev. Rul. 64-285, 1964-2 C.B. 184; *see also* Siddiqi v. Commissioner, 70 T.C. 553 (1978); Escobar v. Commissioner, 68 T.C. 304 (1977), *acq. in result, in part*, 1978-2 C.B.

Despite both standards having a subjective element, the Tax Court stated that the former subjective standard of residence for income tax purposes was not synonymous with domicile.[159] Nevertheless, it was difficult to see how the facts and circumstances approach used by the courts in cases dealing with the former subjective standard of residence for income tax purposes differed from those of domicile.[160]

When Congress convened in 1984,[161] six reasons prompted its decision to change residence for income tax purposes from a subjective to an objective standard. First, it recognized the need for an objective standard to provide guidance to planners. Although Congress knew that an objective standard would impose residency on "true" nonresidents, it thought that the cost of unfairness would be worth the benefits of certainty.[162]

Second, Congress believed that it should tax only aliens whose relationship with the United States was so close that inclusion of worldwide income was appropriate. In so doing, Congress would tax resident aliens on their worldwide income because some were wealthy individuals who resided in the United States only for the benefits of political stability or economic opportunities.[163]

Third, Congress believed that aliens who had entered the United States as permanent residents pursuant to lawful acquisition and possession of a green card should be taxed as United States residents. Its analysis was that because these resident aliens had the same rights as citizens, they should contribute as much to the cost of running the government.[164]

Fourth, Congress thought that an objective test of an individual spending a certain arbitrary amount of time would be sufficient to impose a

---

159. Park v. Commissioner, 79 T.C. 252, 287 (1982), *aff'd without op.*, 755 F.2d 181 (D.C. Cir. 1985); Maclean v. Commissioner, 73 T.C. 1045, 1054 (1980).

160. *See* Schoneberger v. Commissioner, 74 T.C. 1016, 1023 (1980); *Maclean*, 73 T.C. at 1054.

161. After the House of Representatives passed the bill containing the origins of I.R.C. § 7701(b), the Senate did not make any amendments. H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 966 (1984). The Conference Committee followed the House version with few modifications. *Id.* at 967.

162. H.R. REP. NO. 432, 98th Cong., 2d Sess., pt. 2, at 1523 (1984); JOINT COMM. ON TAXATION STAFF, GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, 98th Cong., 2d Sess. 463 (Joint Comm. Print 1984).

163. H.R. REP. NO. 432, *supra* note 162, at 1524-25; JOINT COMM. ON TAXATION STAFF, *supra* note 162, at 465.

164. H.R. REP. NO. 432, *supra* note 162, at 1524; JOINT COMM. ON TAXATION STAFF, *supra* note 162, at 464.

tax.[165] However, certain policies based on international trade and law would result in exceptions.[166]

Fifth, although desiring objectivity, Congress did not want aliens to change their residency status back and forth to accommodate changes in tax planning whims.[167]

Finally, Congress was concerned about compliance and administrative problems of the IRS.[168] In *Park v. Commissioner*,[169] a Korean businessman maintained a presence in the United States for more than twenty years. He owned several U.S. homes, operated businesses in the United States, was socially prominent in the United States, and spent over half of each year in the United States. Although the Tax Court ultimately agreed with the IRS that the taxpayer was a resident, Congress was concerned about the IRS wasting resources on trying to prove that someone living over half his life in the United States was a resident.[170] Congress was not moved, however, by the *Paquette*[171] case, which involved the avoidance of domicile.

There are two tests by which the IRS may deem a taxpayer to have become a resident subject to tax on worldwide income: the green card test, also known as lawful permanent residence,[172] and the substantial presence test.[173] These tests are purely objective; analysts can determine them without regard to unmanifested intent.

The green card test[174] is the easier of the two tests to apply. It simply provides that an individual is a resident if he holds a green card to live in the United States at any time during the calendar year.[175] It derives its nickname from the color of the cardboard on which the United States first

165. H.R. REP. NO. 432, *supra* note 162, at 1524; JOINT COMM. ON TAXATION STAFF, *supra* note 162, at 464.

166. H.R. REP. NO. 432, *supra* note 162, at 1524; JOINT COMM. ON TAXATION STAFF, *supra* note 162, at 464.

167. JOINT COMM. ON TAXATION STAFF, *supra* note 162, at 465.

168. H.R. REP. NO. 432, *supra* note 162, at 1523; JOINT COMM. ON TAXATION STAFF, *supra* note 162, at 463.

169. 96 T.C. 252 (1982), *aff'd without op.*, 755 F.2d 181 (D.C. Cir. 1985).

170. *Id.*

171. Paquette v. Commissioner, 46 T.C.M. (CCH) 1400 (1983); *see also supra* notes 11-12 and accompanying text.

172. I.R.C. § 7701(b)(1)(A)(i).

173. I.R.C. § 7701(b)(1)(A)(ii).

174. I.R.C. § 7701(b)(1)(A)(i). Green cards are on INS Form I-551. 8 C.F.R. § 264.1(b) (1992).

175. I.R.C. § 7701(b)(1)(A)(i).

issued visas.[176] The IRS had previously ruled that green card status was not determinative of residence.[177]

The green card test imposes resident alien status on holders of a green card who rarely come to the United States but who retain their green card status as a hedge against economic or political problems abroad. The policy underlying the test is that an alien should not be able to enter the United States whenever she wishes while avoiding tax on her worldwide income.[178] The green card test is an outward manifestation of intent because, by definition, when the alien obtains the green card she is showing to all that she intends to live permanently in the United States.[179] Therefore, the test is reflective of factual situations.[180]

Although an individual may obtain her green card prior to being present in the United States,[181] her residence does not begin until she is present in the United States.[182] The alien must be present in the United States at least one day each year to maintain a green card.[183] If the alien returns her green card or the State Department appropriates it, the alien is no longer a resident for income tax purposes.[184] Unmanifested intent is irrelevant to green card procedures.

The second and more complicated test is the substantial presence test,[185] which mechanically calculates residence on the various numbers of days an individual is present in the United States. A person is a resident of the United States under the substantial presence test[186] if: (1) physical presence in the United States is at least 31 days during the current calendar year,[187] and (2) computed presence exceeds 183 days, using a formula that counts

---

176. Interview with Glen Keiser, Advisor to the U.S. Consulate, in Tijuana, Mexico (Mar. 9, 1991).

177. Rev. Rul. 76-82, 1976-1 C.B. 192.

178. JOINT COMM. ON TAXATION STAFF, *supra* note 162, at 467.

179. 8 U.S.C. § 1101(a)(20) (1988).

180. *Tax Law Simplification and Improvement Act of 1983*, *supra* note 43, at 371 (statement of representatives from Price Waterhouse, an accounting firm).

181. JOINT COMM. ON TAXATION STAFF, *supra* note 162, at 472.

182. I.R.C. § 7701(b)(2)(A)(ii). But if she is a resident the previous year under the substantial presence test, the presence is continuous. I.R.C. § 7701(b)(2)(A)(iii).

183. 8 C.F.R. § 211.1(b) (1992). However, an alien may obtain a re-entry permit (Form I-327) that will extend the green card's validity for an additional year while the alien is abroad. *See* 8 U.S.C. § 1203 (1988).

184. I.R.C. § 7701(b)(6)(B); *see also* H.R. REP. NO. 432, *supra* note 162, at 1530; JOINT COMM. ON TAXATION STAFF, *supra* note 162, at 471. If, however, the alien stayed in the U.S. anyway, she could satisfy the substantial presence test thereby making her residence continuous. *See* I.R.C. § 7701(b)(2)(A)(iii).

185. I.R.C. § 7701(b)(1)(A)(ii).

186. I.R.C. § 7701(b)(3)(A).

187. I.R.C. § 7701(b)(3)(A)(i).

days present in the current year as one day, days present in the preceding year as one-third of a day, and days present two years prior to the current year as one-sixth of a day.[188]

Suppose an alien is present in the United States for 120 days in year one and 120 days in year two. If she is present in the United States for only 123 days in year three, she is not a resident under the substantial presence test because the formula results in only 183 days.[189] But, if she was present in the United States for 124 days in year three, the formula would yield 184 days,[190] which results in residence.

The substantial presence test is actually much more complicated than shown in the previous example because it allows for numerous exceptions. The "closer connection" exception[191] denies residence if an alien (1) is present in the United States for less than 183 days during the current year, (2) has a closer connection to a foreign country than to the United States, and (3) has his tax home[192] in the foreign country.[193] A *de minimis* exception is designed to avoid the substantial presence test when the alien is in the United States for administrative tasks, such as closing the purchase or sale of a home.[194] In counting the number of days for the substantial presence

---

188. I.R.C. § 7701(b)(3)(A)(ii).

189.

1st year:	120 days x one-sixth	=	20
2nd year:	120 days x one-third	=	40
3rd year:	123 days x 1	=	123
			183 days

Because the total does not exceed 183 days, the alien is not a resident.

190.

1st year:	120 days × one-sixth	=	20
2nd year:	120 days × one-third	=	40
3rd year:	124 days × 1	=	124
			184 days

Here, the total exceeds 183 days and, therefore, the alien would be considered a resident.

191. I.R.C. § 7701(b)(3)(B).

192. I.R.C. § 911(d)(3) defines a tax home and should be read in conjunction with I.R.C. § 162.

193. I.R.C. § 7701(b)(3)(B)(ii). Congress expected that this three-part test would be difficult to meet. H.R. REP. NO. 432, *supra* note 162, at 1524. Toward this goal, Section 7701(b) denies this exception if the alien has an application for adjustment of status pending (I.R.C. § 7701(b)(3)(C)(i)) or has taken other steps to obtain a green card (I.R.C. § 7701(b)(3)(C)(ii)), such as filing a Biographic Information form with the Department of State (a Biographic Information form is Immigration and Naturalization Form G-325A). H.R. REP. NO. 432, *supra* note 162, at 1527; *see also* JOINT COMM. ON TAXATION STAFF, *supra* note 162, at 464-68. Congress also expected the Secretary of the Treasury to require any others claiming nonresident aliens status under the closer connection exception to file statements with the Secretary explaining the facts supporting the alleged status. I.R.C. § 7701(b)(8).

194. This exception excludes days present in the United States for a brief time before arriving in the United States or after leaving the United States if the alien has a closer connection to a

test, Section 7701(b)(5) of the Code excludes days in the United States[195] that the individual is a diplomat,[196] a teacher,[197] a student,[198] a professional athlete competing in a charitable event,[199] or an alien who cannot leave due to a medical condition occurring while in the United States.[200] The final exceptions are two transportation exceptions that do not count days present in the United States when computing the substantial presence test.[201]

Under both tests, however, an alien is a resident only as of the first day that she is present in the United States.[202] An alien may elect residence if she is both present in the United States for thirty-one days and seventy-five percent of the remaining days in the year (starting with the first of the thirty-one days), and if she is a resident the following year pursuant to the substantial presence test.[203]

---

foreign country. I.R.C. § 7701(b)(2)(C)(i); *see also* H.R. REP. NO. 432, *supra* note 162, at 1524, 1529-30; JOINT COMM. ON TAXATION STAFF, *supra* note 162, at 464, 470-71.

195. I.R.C. § 7701(b)(5)(A).

196. I.R.C. § 7701(b)(5)(A)(i). An individual is a foreign governmental-related individual if he is temporarily present in the United States (I.R.C. § 7701(b)(5)(B)) and is a diplomat from a foreign country (I.R.C. § 7701(b)(5)(B)(i)), an employee of an international organization (I.R.C. § 7701(b)(5)(B)(ii)), or a member of the immediate family of either (I.R.C. § 7701(b)(5)(B)(iii)). International organizations are defined in I.R.C. § 7701 (a)(18) and include all international organizations "entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organization Immunities Act (22 U.S.C. §§ 288-288f)." Pursuant to the Vienna Convention on Diplomatic Relations, these people are exempt from transfer taxes on all property except real estate located in the United States. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 39-4, 23 U.S.T. 3245-46.

197. I.R.C. § 7701(b)(5)(A)(ii). A teacher is an alien present in the United States pursuant to the Immigration and Nationality Act (I.N.A.) definition. I.R.C. § 7701(b)(5)(C). The I.N.A. definition of a teacher is found in 8 U.S.C. § 1101(15)(J) (1988); *see also* I.R.C. § 7701(b)(5)(E)(i).

198. I.R.C. § 7701(b)(5)(A)(iii). A student is an alien present in the United States pursuant to the I.N.A. definition. I.R.C. § 7701(b)(5)(D). The I.N.A. definitions of a student are found in 8 U.S.C. § 1101(15)(F), (J), (M) (1988); *see also* I.R.C. § 7701(b)(5)(E)(ii).

199. I.R.C. § 7701(b)(5)(A)(iv).

200. I.R.C. § 7701(b)(3)(D)(ii). If an individual is in the United States for medical treatment for a health condition that arose while she was in this country, those days will not count toward the substantial presence test. I.R.C. § 7701(b)(3)(D).

201. First, exclude days that commuters from Canada or Mexico are employed in the United States. I.R.C. § 7701(b)(7)(B). These aliens are admitted as United States immigrants on a daily basis. 8 C.F.R. § 211.5 (1992). Second, exclude days that the alien is temporarily in the United States while travelling from one point outside the United States to another point outside the United States. I.R.C. § 7701(b)(6)(B). An example of this would be a flight from Canada to South America stopping at John F. Kennedy International Airport in New York. H.R. CONF. REP. NO. 861, *supra* note 161, at 967.

202. I.R.C. § 7701(b)(2)(A).

203. I.R.C. § 7701(b)(1)(A)(iii), (b)(4). There do not appear to be, however, any tax advantages of electing residence status.

If the alien qualifies under either the green card or the substantial presence test the following year, residence is continuous.[204] Furthermore, in her last year of residence, the alien resumes her nonresident status the first day she is no longer in the United States by either test.[205]

Congress was concerned about resident aliens leaving the United States, selling their United States situated assets, and returning to the United States while avoiding tax.[206] Therefore, Section 7701(b) provides that if an alien is a resident for three consecutive years and is a resident in one of the next three years, she will pay taxes in the intervening years at a higher rate.[207]

The main advantage of an objective test is certainty.[208] Objective tests provide certainty to taxpayers, planners, litigators, judges,[209] and the IRS. Furthermore, certainty provides consistency of results.[210] There are, however, several problems with the objective standards contained in Section 7701(b) of the Internal Revenue Code. The substantial presence test is tremendously complex with many mechanical calculations and numerous exceptions. Consequently, many aliens have difficulty understanding and complying with the tax laws.[211] Practitioners can easily plan around the substantial presence test. An individual can avoid passing the substantial presence test by merely staying out of the United States for the requisite number of days. Although objective, the arbitrary standard of 183 days is subject to abuse. Suppose an individual operates a seasonal business during the months of March, April, May, and June, and occasionally stays in the United States for Fourth of July celebrations. If he is in the United States for 122 days the first two years, he can avoid residence by again limiting his stay to 122 days in the third year.[212]

---

204. H.R. REP. No. 432, *supra* note 162, at 1528; JOINT COMM. ON TAXATION STAFF, *supra* note 162, at 469.

205. I.R.C. § 7701(b)(2)(B)(i). If, however, the alien is a resident the following year under either test, the residence is continuous. I.R.C. § 7701(b)(2)(A)(iii).

206. H.R. CONF. REP. No. 861, *supra* note 161, at 967.

207. *See* I.R.C. § 877.

208. *See supra* part III A, and notes 160-61 and accompanying text.

209. Lynch v. Commissioner, 273 F.2d 867 (2d Cir. 1959).

210. *See supra* part III A, and note 161 and accompanying text.

211. *Tax Law Simplification and Improvement Act of 1983*, *supra* note 43, at 328, 329 (statement of representatives from Arnold & Porter, a law firm).

212.

1st year:	122 × one-sixth	=	20.33
2nd year:	122 × one-third	=	40.67
3rd year:	122 days × 1	=	122.00
			183.00 days

See supra notes 189-90 and accompanying text.

Interpretive problems result when the alien excludes days in the United States for medical treatment for a health condition that arose while she was in the United States.[213] The legislative history indicates that this condition may not be pre-existing when entering the United States, but the term pre-existing condition is unclear. Although the regulations state that the individual has a pre-existing condition if she has knowledge of the condition when she enters the United States,[214] the regulations fail to define the term. For example, would it be a pre-existing condition if an alien has a minor heart condition that she knows of when she enters the United States but the condition subsequently worsens to the point that she is hospitalized due to a heart attack? Addressing questions of this type adds further complexity to the substantial presence test. The only guidance available is a congressional report that states "an individual who is in a serious automobile accident shortly before a planned departure date" will not receive medical aid due to a pre-existing medical condition.[215] This aspect of the objective standard fails to advance the policy of certainty.

Another difficulty with the substantial presence test is its inflexibility. If the most extraordinary circumstances do not fit within the rule or one of its exceptions, they are unfairly disregarded.[216] Although some commentators have called for an objective standard of residence for transfer tax purposes similar to the substantial presence test,[217] such a test would cause problems. Would the test be based on the country of residence when an alien died, as with Section 7701(b), or would it be based on a formula involving the number of years the decedent was a United States resident? Furthermore, a substantial presence test would require two layers of analysis: determining which years count and determining which days count to form those years.

There are minor problems with the green card test. An individual may relinquish his green card, but may remain illegally in the United States.[218] Alternatively, a permanent resident who has accumulated great wealth in the United States could relinquish her green card and leave the United States with her assets shortly before death, thereby denying the United States estate tax jurisdiction.

---

213. *See* I.R.C. § 7701(b)(3)(D); *supra* note 200 and accompanying text.

214. Prop. Treas. Reg. § 301.7701(b)-3(c)(2), 52 Fed. Reg. 34,234 (1987).

215. H.R. REP. NO. 432, *supra* note 162, at 1526; JOINT COMM. ON TAXATION STAFF, *supra* note 162, at 466.

216. *See, e.g.*, Nienhuys v. Commissioner, 17 T.C. 1149 (1952). In *Nienhuys*, the decedent, a Dutch citizen who clearly did not intend to remain in the United States, would nevertheless have been a United States resident under the substantial presence test even though he was unable to return to the Netherlands due to Nazi Germany's occupation. *Id.*

217. *See, e.g.*, Fellows, *supra* note 138, at 752.

218. *See, e.g.*, Prop. Treas. Reg. § 301.7701(b)-4 (ex. 3), 52 Fed. Reg. 34,238 (1987).

With collection matters, the Section 7701(b) tests work well for income tax purposes. The payors of United States source income[219] to nonresident aliens must withhold[220] a flat tax of thirty percent.[221] However, it is unclear how such a scheme of withholding would work for the estate tax.

An objective standard for income tax purposes is more revenue neutral than an objective standard for transfer tax purposes. Although Congress estimated that the objective standards of Section 7701(b) would produce approximately ten million dollars in revenue through the income tax,[222] it did not design the objective standard to produce revenue.[223]

Finally, the transfer taxes are a tax on class while the income tax is a tax on mass.[224] Because transfer taxes tax wealth derived from accumulated income, the stakes of each case are higher, which means individuals will be more likely to employ effective estate planning techniques to manipulate an objective standard. For example, an alien could avoid residence for transfer tax purposes by purposefully failing the substantial presence test. Fewer aliens subject to the transfer taxes would hinder the policies of wealth redistribution and tax progressivity.

Objective standards produce mixed results. Although an objective standard similar to the substantial presence test would not work, the green card test causes fewer problems.

C. *The Hybrid Standard of Citizenship*

Under the current scheme of transfer tax jurisdiction, all citizens of the United States, regardless of residence, are liable for transfer taxes on their worldwide assets.[225] It makes no difference whether the decedent owned any assets located within the United States.[226]

The unique aspect of the citizenship standard is that it contains both objective and subjective elements. It is objective to the extent that one can

---

219. I.R.C. § 861(a).

220. I.R.C. § 1441(a).

221. I.R.C. § 871(a).

222. The estimates were for five million dollars in 1984, with ten million dollars for each year thereafter. H.R. REP. NO. 432, *supra* note 162, at 1531; JOINT COMM. ON TAXATION STAFF, *supra* note 162, at 472.

223. *Tax Law Simplification and Improvement Act of 1983*, *supra* note 43, at 160 (statement of Ronald A. Pearlman, Deputy Assistant Secretary (Tax Policy), Department of the Treasury).

224. JOINT COMM. ON THE ECONOMIC REPORT, *supra* note 37, at 691 (testimony of Louis Eisenstein).

225. Treas. Reg. § 20.2031-1(a) (1958) (estate tax); Treas. Reg. § 25.2501-1(a) (1958) (gift tax).

226. The first record of Congress mentioning the citizen/alien or resident/nonresident distinctions is in the Revenue Act of 1921, Pub. L. No. 98, § 62, 42 Stat. 227 (1921).

determine whether the individual satisfies the country's criteria for nationality. It is subjective to the extent that one must have the intent to end or change citizenship in addition to committing expatriating acts pursuant to that country's criteria.[227] Since it is objective to gain and subjective to lose, it is a hybrid standard.

In general, citizenship is the bond that unites a person to a given country, constituting her membership in a particular country and giving her a claim to its protection while subjecting her to its laws.[228] Despite the expansion of protection afforded aliens,[229] citizenship remains central to the very definition of a social and political community.[230] Citizenship is the strongest standard of allegiance, providing "the right to have rights."[231]

The Code does not provide a definition of citizenship and the regulatory definition is not instructive; rather, it merely refers the analyst to the rules for immigration and naturalization.[232] Therefore, one can only ascertain the definition of citizenry by looking at the Constitution, the Immigration and Nationality Acts,[233] and judicial interpretations.

The Constitution provides for citizenship either through birth in the United States or through the naturalization process. In the words of the Fourteenth Amendment, "all persons born or naturalized in the United States . . . are citizens of the United States."[234] Therefore, one's birth in the United States will result in estate tax liability.

Naturalization is the process by which a person, born a citizen of one country, obtains the status of citizenship in another country.[235] Everyone has the right to change one's nationality to the nationality of another willing country.[236] If, for example, a properly naturalized United States citizen visits his original country of citizenship, he is protected by the United States from any punishment by his former country,[237] which could include the imposition of transfer taxes after a sudden death. In granting the conditions of naturalization, a country may often fix the conditions of forfeiture

---

227. *See, e.g.*, Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967).

228. CHARLES G. FENWICK, INTERNATIONAL LAW 301 (4th ed. 1965).

229. This increased protection of aliens from the acts of the individual states finds its roots in the Equal Protection Clause. U.S. CONST. amend. XIV, § 1.

230. Sugarman v. Dougall, 413 U.S. 634 (1973).

231. Trop v. Dulles, 356 U.S. 86, 102 (1958).

232. Treas. Reg. § 1.1-1(c) (as amended in 1974).

233. An alien is negatively defined as anyone who is not a citizen of the United States. 8 U.S.C. § 1101(a)(3) (1988).

234. U.S. CONST. amend. XIV, § 1.

235. FENWICK, *supra* note 228, at 305.

236. FENWICK, *supra* note 228, at 309 & n.54.

237. FENWICK, *supra* note 228, at 308 & n.49.

by either denaturalization or expatriation. And, if denaturalization[238] or expatriation[239] occurs, the country does not have to reinstate citizenship.[240] Although the Constitution mentions naturalization,[241] the Founders left the procedural details to Congress.[242]

Naturalized citizens have all the rights and privileges of native born United States citizens.[243] Even if the statute from which citizenship is derived is later repealed, the individual continues to be a citizen.[244] The most common form of naturalization is through birth outside the United States to a parent[245] or parents[246] of United States citizenship. If an individual fulfills the naturalization requirements,[247] she must affirmatively act to declare allegiance by taking an oath of allegiance to the United States.[248]

---

238. *See* 8 U.S.C. § 1451(a) (1988).

239. *See* 8 U.S.C. § 1481(a) (1988).

240. FENWICK, *supra* note 228, at 306.

241. U.S. CONST. art. I, § 8, cl. 4 empowers Congress "[t]o establish an uniform Rule of Naturalization."

242. *See* Fiallo v. Bell, 430 U.S. 787 (1977); Kleindienst v. Mandel, 408 U.S. 753 (1972); United States v. Ginsberg, 243 U.S. 472 (1917).

243. Schneider v. Rusk, 377 U.S. 163 (1964).

244. Karp, *supra* note 107, § 13.02[2].

245. 8 U.S.C. § 1401(d), (e) (1988) provide for citizenship if an individual is born outside the United States to one parent who is a U.S. citizen and the parent was physically present in the United States for one year. Furthermore, 8 U.S.C. § 1431 (1988) states that if one parent is a citizen while the other parent is an alien, the child becomes a U.S. citizen if, before the child reaches 18 years of age (1) the alien parent becomes a naturalized U.S. citizen while the child is unmarried, or (2) the child resides in the United States pursuant to green card status and does so during the alien parent's naturalization process.

246. 8 U.S.C. § 1401(c) (1988) provides for citizenship if an individual is born outside the United States to parents who were U.S. citizens and one of the parents previously had a U.S. residence.

247. To become a citizen, the alien must:

(1) speak and understand English (8 U.S.C. § 1423(a)(1));

(2) understand the basics of U.S. government (8 U.S.C. § 1423(a)(3));

(3) be of good moral character (8 U.S.C. § 1427(a));

(4) believe in constitutional principles (8 U.S.C. § 1427(a));

(5) have physical residence in the United States for at least five years (8 U.S.C. § 1427(a)(1));

(6) continuously reside in the United States from the date of filing the petition for naturalization until actual admission as a citizen (8 U.S.C. § 1427(a)(2));

(7) possess a green card (8 U.S.C. § 1429); and

(8) be at least 18 years of age (8 U.S.C. § 1445(b)(1)).

248. In addition, 8 U.S.C. § 1448 (1988) states that the individual must pledge:

(1) to support the Constitution of the United States;

(2) to renounce all allegiance to any foreign sovereignty of whom the applicant was previously a citizen;

(3) to support and defend the Constitution and other laws of the United States against all enemies, foreign and domestic;

In addition to providing rules for naturalization, Congress has also legislated rules for denaturalization.[249] However, courts have more closely scrutinized denaturalization rules than naturalization rules. As indicated in a series of cases, once an alien becomes a United States citizen, Congress cannot easily deprive him of that status. The Supreme Court, in *Afroyim v. Rusk*,[250] held that an individual may lose United States citizenship only by renunciation or certain acts. The State Department concluded that Afroyim lost his United States citizenship by voting in a foreign political election, which violated Section 401(e) of the Nationality Act of 1940.[251] In reinstating Afroyim's citizenship, the Supreme Court noted that Congress cannot strip a person of his citizenship in the absence of a voluntary relinquishment on the citizen's part.[252] Thirteen years later, in *Vance v. Terrazas*,[253] the Court defined voluntary relinquishment as an expatriating act accompanied by an intent to terminate United States citizenship.[254]

Congress codified the voluntary relinquishment standard of *Afroyim* and *Terrazas* by detailing seven ways in which an individual may voluntarily relinquish his citizenship.[255] The burden of proof is on the party claiming

(4) to bear true faith and allegiance to the U.S. Constitution and other laws of the United States; and

(5) when required by law, to bear arms on behalf of the United States, to perform noncombat service, or to perform work of national importance under civilian direction.

249. Congress derives its power to provide rules for denaturalization from U.S. CONST. art. I, § 8, cl. 4. *See* Costello v. United States, 365 U.S. 265 (1961).

250. 387 U.S. 253 (1967).

251. Nationality Act of 1940, ch. 876, § 401(e), 54 Stat. 1137, 1168-69. Section 401 was reenacted as § 349 of the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, 267-68. In 1978, Congress eliminated the provision of the Immigration and Nationality Act that dealt with the expatriation of persons who vote in foreign elections. Pub. L. No. 95-432, §§ 2, 4, 92, Stat. 1046, 1046 (1978); *see also* Steven S. Goodman, *Protecting Citizenship: Strengthening the Intent Requirement in Expatriation Proceedings*, 56 GEO. WASH. L. REV. 341, 346 n.22 (1988).

252. *Afroyim*, 387 U.S. at 268.

253. 444 U.S. 252, 263 (1980).

254. *Id.*

255. 8 U.S.C. § 1481(a) (1988) states that an individual may lose his citizenship by voluntarily performing any of the following acts with the intention of relinquishing his U.S. citizenship:

(1) applying and obtaining naturalization in a foreign country;

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign country;

(3) serving in the armed forces of a foreign country, either against the United States or as an officer;

(4) working for a foreign government after either acquiring foreign nationality or taking an oath, affirmation, or declaration of allegiance;

(5) formally renouncing one's citizenship before a U.S. diplomat or consular officer in a foreign country;

(6) during war, making a formal renunciation of nationality in the regulatory prescribed form; or

the individual is no longer a citizen[256] (in nontax cases, it is usually the government) by a preponderance of the evidence,[257] with ambiguities resolved in favor of citizenship.[258]

The termination of citizenship has several consequences. The foremost nontax consequence is statelessness—a person who has been denaturalized lacks the protection of any country in the world.[259] The transfer tax consequence is a loss of United States taxing jurisdiction,[260] which will hinder several policies, such as the redistribution of wealth.[261]

Congress has endorsed the citizenship standard for transfer tax purposes, legislating two provisions that use citizenship as the jurisdictional standard exclusive of the subjective standard of domicile: expatriation to avoid estate tax[262] and denial of the marital deduction for property passing to a noncitizen spouse.[263] Code section 2107[264] prevents expatriation to avoid the estate tax. It deals with the potential abuse when a citizen expatriates herself just before she is about to die to avoid the estate tax.

Previously, if an individual who had been a United States citizen relinquished her citizenship and became a nonresident alien before dying, the IRS could not impose an estate tax on her estate.[265] Although few persons would expatriate to avoid taxes, Congress thought some persons might, and wanted to remove any possible incentive.[266] Rationalizing that "[i]n these

(7) committing treason against or by use of force to overthrow the United States government or by violating laws dealing with conspiracy to overthrow or levy war against the U.S.

256. 8 U.S.C. § 1481(b) (1988).

257. *See* United States v. Matheson, 532 F.2d 809, 818 (2d Cir.), *cert. denied,* 429 U.S. 823 (1976).

258. *See* Kawakita v. United States, 343 U.S. 717, 733 (1952).

259. Afroyim v. Rusk, 387 U.S. 253, 268 (1967).

260. This assumes, of course, that the expatriate is no longer a domiciliary.

261. Just as with the domicile standard, despite the lack of a discernible causal connection, the use of the hybrid standard of citizenship is correlated to the policy of redistribution of wealth. *See The Richest People in America, supra* note 132, at 189.

262. I.R.C. § 2107.

263. I.R.C. §§ 2056(d), 2056A.

264. Section 2107 has a counterpart for the gift tax. I.R.C. § 2501(a)(3)(B) denies the exemption of I.R.C. § 2511(a) that nonresident aliens have on gifts of intangible property located in the United States. Thus, the gift tax applies to expatriates who give stock of United States corporations (I.R.C. § 2511(b)(1)) or the debt of either United States persons (I.R.C. § 2511(b)(2)(A)) or the United States government (I.R.C. § 2511(b)(2)(B)).

265. 1966-2 C.B. 1059; S. REP. No. 1707, *supra* note 90, at 1097. For a case dealing with the IRS's failure to impose an income tax on a tax motivated expatriation prior to the Foreign Investors Tax Act of 1966 (FITA), Pub. L. No. 89-809, 80 Stat. 1539 (1966), see Dillin v. Commissioner, 56 T.C. 228 (1971), *acq.* 1975-2 C.B. 1. In *Dillin,* an expatriated cash method taxpayer avoided income tax by receiving payment after he expatriated himself. *Id.*

266. *Removal of Tax Barriers to Foreign Investment in the United States, supra* note 77, at 21.

cases the wealth of the expatriate generally would have been accumulated in the United States and therefore is properly subject to the regular United States estate tax rates,"[267] Congress wanted to impose the burdens and responsibilities of estate taxation that come with the benefits of citizenship.

Paralleling comparable income[268] and gift[269] tax provisions, Section 2107 imposes different situs rules for the property of a nonresident alien dying within ten years of losing United States citizenship if one of the principal purposes[270] of the loss was the avoidance of United States taxes.[271] In determining the expatriate's gross estate, the provision includes only property situated in the United States, which Section 2107 redefines to include any United States situated property in certain foreign corporations owned by the decedent.[272]

For example, a wealthy United States citizen with a disease leaving her with only three years to live may desire to avoid estate taxes. If she puts all her United States assets into a corporation that is incorporated in a tax haven country and expatriates herself to the tax haven country, Section 2107 will treat her assets as though they were situated in the United States instead of as part of the foreign corporation. Section 2107 does not apply to certain types of expatriates whose loss of citizenship occurs under circumstances where it is unlikely that tax avoidance was a principal purpose.[273] These include some of the methods of expatriation listed in the Immigration and Nationality Act.[274]

---

267. *Removal of Tax Barriers to Foreign Investment in the United States, supra* note 77, at 21.

268. *See* I.R.C. § 877.

269. *See* I.R.C. § 2501(a)(3).

270. The principal purpose standard introduces some subjectivity, which is consistent with the hybrid standard of citizenship.

271. S. REP. NO. 1707, *supra* note 90, at 1097, 1099; 1966-2 C.B. 1059.

272. If the decedent directly owned 10% of the foreign corporation or indirectly owned 50% of the foreign corporation, I.R.C. § 2107(b) treats the estate as including that percentage of the fair market value of the foreign corporation's assets that are situated in the United States.

273. S. REP. NO. 1707, *supra* note 90, at 1098; 1966-2 C.B. 1059. The IRS has the further burden of establishing the reasonable belief that the expatriate's loss of United States citizenship would result in a substantial reduction of estate, inheritance, legacy, and succession taxes. If established, the administrator of the expatriate's estate must carry the burden of proving that the loss of citizenship did not have as one of its principal purposes the avoidance of United States income, estate, or gift taxes. I.R.C. § 2107(a).

274. Immigration and Nationality Act, ch. 12, 79 Stat. 911 (codified as amended at 8 U.S.C. §§ 1101-1525 (1988)). I.R.C. § 2107(d) excludes loss of citizenship due to the provisions of the Act that the Supreme Court has repealed.

At Congressional hearings, interested parties criticized Section 2107 as too harsh.[275] Nevertheless, its citizenship standard works well by limiting planning opportunities. For all practical purposes, unless a person wants to expatriate her assets into a noncorporate form,[276] she must live a long time—ten years—and have patience.

Although legislative history indicates that Section 2107 was not supposed to conflict with treaties,[277] the IRS's interpretation currently overrides United States transfer tax treaty obligations by discriminating against aliens who were formerly citizens. Revenue Ruling 79-152[278] dealt with the income tax counterpart to Section 2107.[279] The IRS ruled that a treaty's savings clause, which allows a country to tax its own citizens however it wants, would allow the IRS to tax because the expatriation provision treats nonresidents as citizens. Even though critics of the ruling argue that the savings clause does not apply to a country's former citizens,[280] the IRS could apply the same rationale to transfer tax treaties. A small change to the expatriation provisions would eliminate the potential override.[281] Congress could merely amend Section 2107[282] to provide that if a United States citizen dies within ten years after losing citizenship and if one of the principal purposes of the expatriation was the avoidance of tax,[283] the individual is still a United States citizen for tax purposes. Because the treaties determine citizenship pursuant to local law,[284] the savings clause would prevent an override.

The second estate tax tool involving citizenship is the denial of the marital deduction for property passing to noncitizen spouses pursuant to Sec-

---

275. *E.g.*, *Removal of Tax Barriers to Foreign Investment in the United States*, *supra* note 77, at 156-57 (statement of representatives from the Association of the Bar of the City of New York, Committee on Taxation).

276. A taxpayer may effectively expatriate her future estate's assets by: (1) obtaining debt obligations of foreign obligors, regardless of where the evidence of indebtedness is located; (2) depositing money in foreign banks; (3) making I.R.C. § 1031 like-kind exchanges of United States real estate for foreign real estate; or (4) obtaining tangible personalty with a foreign situs.

277. S. REP. No. 1707, *supra* note 90, at 1059 (opening remarks of Rep. Wilbur Mills); 1966-2 C.B. 1059.

278. 1979-2 C.B. 237.

279. I.R.C. § 877.

280. *See, e.g.*, Sidney I. Roberts, *Is Revenue Ruling 79-152, Which Taxes an Expatriate's Gain, Consistent with the Code?*, 51 J. TAX'N 204 (1979).

281. Congress legislated that no part of the Foreign Investors Tax Act of 1966 (Pub. L. No. 89-809, 80 Stat. 1539), such as the expatriation provisions, would apply if contrary to a United States treaty obligation. H.R. REP. No. 1450, 89th Cong., 2d Sess. 5 (1966).

282. In the interest of symmetry, Congress would also have to similarly amend I.R.C. § 877 and § 2501(a)(3).

283. The amendment should apply to the income, estate, and gift tax.

284. 1980 Model Treaty, *supra* note 73, art. 3(2).

tions 2056(d) and 2056A of the Code. Unlike Section 2107, Sections 2056(d) and 2056A are based on a domestic estate planning tool—the marital deduction.

The marital deduction was originally created to equate the size of estates in common law property states with those in community property states.[285] In 1981, Congress increased the marital deduction to allow an unlimited deduction for property passing to the surviving spouse, regardless of the property laws of the state.[286] The policy behind the unlimited marital deduction is that the IRS will ultimately receive the estate tax when the survivor dies.[287]

The marital deduction reduces the estate tax liability of the first spouse to die by increasing the survivor's estate. However, the unlimited marital deduction sparked a planning technique whereby the decedent's estate would take a marital deduction for property passing to an alien spouse, who could subsequently leave the United States; the property would then escape United States estate tax completely.[288]

Congress recognized this potential for abuse when legislating the Technical and Miscellaneous Revenue Act (TAMRA) of 1988.[289] It sought to prevent an alien surviving spouse from taking back to her homeland assets of her decedent spouse's estate without paying any tax. This was accomplished by eliminating the marital deduction for property passing to her.[290]

---

285. Since community property states mandate that half of any wealth accumulated belongs to the estate of the nonearning spouse, the earning spouse's estate was only half of what it would be in a common law property state. Congress designed the marital deduction to treat estates in common law property states in a manner identical to those in community property states by allowing the decedent spouse's estate in a common law property state to decrease the gross estate for up to half of any property passing to the surviving spouse. JAMES B. LEWIS, THE MARITAL DEDUCTION 21 (1984).

286. I.R.C. § 2056(a); *see also* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403, 95 Stat. 172, 301 (codified as amended at 26 U.S.C. § 2056 (1988)).

287. STAFF OF JOINT COMM. ON TAX'N, GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, at 233-34 (Comm. Print 1981). There are four elements of a marital deduction. First, there must be a marriage. Rev. Rul. 67-442, 1967-2 C.B. 65. Second, the decedent spouse must pass property to the surviving spouse. I.R.C. § 2056(c). Third, when the decedent dies, she cannot transfer to her spouse property in which her interest may terminate. *See* Shedd v. Commissioner, 237 F.2d 345, 350 (9th Cir. 1956), *cert. denied*, 352 U.S. 1024 (1957). This is the so-called terminable interest rule, which planners can avoid only with a Qualified Terminable Interest Property (QTIP) trust. I.R.C. §§ 2056(b)(7), 2523(f); *see also* Treas. Reg. § 20.2056(b)-1(g) (exs. 1-4) (1958). Fourth, the property must pass in a qualifying method of disposition: either outright ownership, an estate remainder trust (Treas. Reg. § 20.2056(e)-2(b)(1) (1958)), or a power of appointment trust. I.R.C. § 2056(b)(5).

288. Mary S. Gately, *The Effect of ERTA on 'U.S. Domicile' for Estate and Gift Tax Purposes*, 121 TR. & EST. 44, 45 (1982).

289. Pub. L. No. 100-647, 102 Stat. 3342.

290. I.R.C. § 2056(d).

The House of Representatives reasoned that property passing to a surviving alien spouse undercuts the assumption behind the marital deduction of ultimate taxation of the property in the survivor's estate. It stated that the assumption is only valid for surviving alien spouses who remain subject to United States taxing jurisdiction by obtaining United States citizenship or staying in the United States.[291]

The provision denies a marital deduction for property passing to a surviving spouse who is an alien.[292] For example, suppose a United States citizen has a bride from France who obtains a green card to live in the United States. If the husband dies, his estate cannot take the marital deduction. By not allowing the marital deduction, this provision seems harsh in that it may double tax a portion of the couple's property.[293] However, there are several methods of relief,[294] the most prominent method being the use of a Qualified Domestic Trust (QDOT). This technique allows the citizen decedent's estate to take the marital deduction if the property passes to the

291. H.R. REP. NO. 795, 100th Cong., 2d Sess. 592 (1988).

292. I.R.C. § 2056(d)(1). A similar rule denies the marital deduction for gift tax purposes (I.R.C. § 2523(i)(1)), although Congress increased the annual gift tax exclusion from $10,000 to $100,000 for property passing to an alien spouse. I.R.C. § 2523(i)(2). This does not make sense, however, because gifts to the alien at the higher exclusion encourages gifts that are less likely to be subject to United States estate tax. Furthermore, the $100,000 annual exclusion applies only if it would qualify for the marital deduction had the alien spouse been a citizen, such as qualifying under the terminable interest rules. H.R. REP. NO. 247, 101st Cong., 1st Sess. 1430 (1989); SENATE COMM. ON FINANCE, 101ST CONG., 1ST SESS., REVENUE RECONCILIATION ACT OF 1989: EXPLANATION OF PROVISIONS APPROVED BY THE COMM. ON OCT. 3, 1989, at 258 (Comm. Print 1989) (Sen. Lloyd Bentsen, Chairman). I.R.C. § 2523(a) no longer requires that the donor be a United States citizen or resident. TAMRA also allowed an unlimited marital deduction to property in the estate of a nonresident alien, but only when it passed to a surviving citizen. I.R.C. § 2106(a). This equalizes the treatment of a nonresident alien with a citizen spouse to that of a citizen or resident with a citizen spouse. H.R. REP. NO. 795, *supra* note 291, at 593.

293. It is subject to U.S. tax in both his and her estate. It might also be subject to the inheritance tax in France.

294. Among the other methods, I.R.C. § 2013 is a relief provision giving credit for estate and gift taxes paid on the same property within 10 years after the survivor's death. If the decedent had predeceased the survivor by more than two years, the amount of the credit decreases by a percentage based on the number of years. To the extent that the decedent's estate is subject to tax in the survivor's estate, the survivor's estate is entitled to the I.R.C. § 2013 credit regardless of the number of years since the decedent died. I.R.C. § 2056(d)(3).

Also, the marital deduction is allowed (I.R.C. § 2056(d)(4)) if the survivor becomes a United States citizen before the decedent's estate tax return is due and the spouse is a United States resident (recall that Treas. Reg. § 1.20-1(b)(1)'s definition of domicile applies instead of I.R.C. § 7701(b)'s definition of resident for income tax purposes) continuously from the decedent's death until she obtains citizenship. I.R.C. § 2056(d)(4)(A).

surviving alien spouse in a QDOT.[295] If the citizen decedent failed to provide for a QDOT, the provision provides alternative measures.[296]

A valid QDOT has three requirements.[297] First, the QDOT must contain at least one trustee who is either a United States citizen or corporation[298] that has the right to withhold tax from any distribution.[299] Second, the QDOT must meet the conditions prescribed by the IRS to ensure the collection of any QDOT tax.[300] Third, the executor must make the election.[301] If the trust meets these requirements, the QDOT provision classifies events in one of two ways: nontaxable events or taxable events.

Nontaxable events include distributions of income, which are treated as distributions from a trust pursuant to subchapter J of the Code.[302] The

---

295. I.R.C. § 2056(d)(2)(A).

296. Before the decedent's estate tax return is filed, the executor or surviving spouse can transfer (I.R.C. § 2056(d)(2)(B)(i)) or irrevocably assign (I.R.C. § 2056(d)(2)(B)(ii)) the property to a QDOT. Congress wanted all property, probate and nonprobate, passing to an alien spouse to qualify for the marital deduction if the property is transferred or irrevocably assigned to a QDOT before the estate tax return is filed. Furthermore, if the executor or surviving spouse assigns property to a QDOT, but fails to transfer it, the regulations should not allow the marital deduction. H.R. REP. NO. 247, *supra* note 292, at 1430-31; SENATE COMM. ON FINANCE, *supra* note 292, at 258-59. Also, either the executor or the surviving spouse can file a reformation suit to change a trust that does not qualify as a QDOT into a trust that qualifies as a QDOT before the filing of an estate tax return for the decedent. I.R.C. § 2056(d)(5)(A)(ii). Because the provision does not specify who may institute a suit for reformation, presumably either the executor or the survivor may do so.

297. Although the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2228 (codified as amended in scattered sections of 42 U.S.C.), repealed the fourth requirement of all the income going to the alien spouse, the legislative history suggests that a QDOT has to follow the QTIP rules (I.R.C. § 2056(b)(7)(B)(ii)) that require income payable annually. H.R. REP. NO. 247, *supra* note 292, at 1431 n.97. The TAMRA of 1988 required the following for a QDOT: (1) all trustees are United States citizens or United States corporations; (2) the survivor must receive all income, payable on a regular basis; (3) the trust must qualify under the regulations to be promulgated to ensure collection; and (4) the executor must elect to treat the trust as a QDOT. H.R. CONF. REP. NO. 386, *supra* note 77, at 668; *see supra* note 289 for TAMRA cite.

298. I.R.C. § 2056A(a)(1)(A). Therefore, an alien surviving spouse may be a trustee. Pursuant to the 1988 version, this was not possible because all trustees had to be United States persons or corporations. Former I.R.C. § 2056A(a)(1).

299. I.R.C. § 2056A(a)(1)(B).

300. I.R.C. § 2056A(a)(2). The Conference Committee suggests that the regulations require a portion of trust property to be situated in the United States or that the trustee be an institution with substantial United States assets. H.R. CONF. REP. NO. 1104, 100th Cong., 2d Sess. 115 (1988).

301. I.R.C. § 2056A(a)(3).

302. Income is defined in the same manner as I.R.C. § 643(b)'s definition of income, which looks to the terms of the governing instrument and applicable local law. This would include extraordinary dividends or taxable stock dividends that the fiduciary, acting in good faith, allocates to income. However, Congress has given the IRS the opportunity to promulgate regulations defining income. I.R.C. § 2056A(c)(2) states: "Except as provided in regulations, the term 'income' has the meaning given to such term by section 643(b)."

QDOT tax does not apply to any distributions of corpus to the survivor in circumstances of hardship.[303]

Almost every other event is a taxable event.[304] Nonhardship distributions of corpus before the survivor's death are taxable events.[305] In addition, any payment by the QDOT of estate tax on distributions is also taxable.[306] Furthermore, the entire QDOT is subject to tax when the survivor dies, based on the value of the property in the QDOT[307] when the citizen spouse died.[308] Finally, a taxable event occurs when the QDOT terminates.[309]

The IRS taxes the taxable events at the incremental Section 2001 estate tax rates that would have been imposed had the citizen decedent's estate included the distributed amount.[310] The transfer tax regime employs Sections 2056(d) and 2056A as a collection device based on citizenship. The trustee is personally liable for the QDOT tax and may only discharge per-

303. I.R.C. § 2056A(b)(3)(B). The executor must designate a United States citizen or corporation to file all returns and pay all tax. SENATE COMM. ON FINANCE, *supra* note 292, at 260. The hardship exemption replaced the House's idea of an exemption for distributions to health care providers and up to an additional $100,000 of distributions per year. H.R. REP. NO. 247, *supra* note 292, at 1432.

304. Just as a noncitizen survivor can avoid the I.R.C. § 2056(d) denial of the marital deduction by becoming a citizen while maintaining continuous residence after the citizen spouse's death (I.R.C. § 2056(d)(4)), the noncitizen can avoid a QDOT tax on distributions by doing the same before any distributions. I.R.C. § 2056A(b)(12)(a), (b). If taxed QDOT distributions already occurred prior to the survivor becoming a citizen, the survivor may elect to treat those distributions as gifts subject to the gift tax, thereby terminating the threat of any gift tax. I.R.C. § 2056A(b)(12)(C).

305. I.R.C. § 2056A(b)(1)(A).

306. I.R.C. § 2056A(b)(11).

307. I.R.C. § 2056A(b)(1)(B).

308. I.R.C. § 2056A(b)(2)(A)(i).

309. A QDOT terminates when either a trustee ceases to be a citizen or the trust fails to follow the QDOT regulations. *See* I.R.C. § 2056A(b)(9); H.R. CONF. REP. NO. 1104, *supra* note 300, at 114-15; H.R. REP. NO. 247, *supra* note 292, at 1429; SENATE COMM. ON FINANCE, *supra* note 292, at 257.

310. I.R.C. § 2056A(b)(2)(A)(i). The distributed amount includes previously distributed amounts. Furthermore, if a decedent citizen leaves behind multiple QDOTs, the trustee should use the highest rate in the year the citizen dies. I.R.C. § 2056A(b)(2)(C). The trustee should also use this rate if the citizen's rate was not finally determined. I.R.C. § 2056A(b)(2)(B)(i). The Conference Committee expected that a tax is not finally determined if, for example, the statute of limitations for the citizen spouse had not lapsed, or a judicial proceeding regarding his estate tax was pending. The IRS can finally determine a rate through a closing agreement. If the determined rate is less than the highest effective rate, the IRS will refund the difference, with interest. *See* I.R.C. § 2056A(b)(2)(B)(ii); H.R. CONF. REP. NO. 1104, *supra* note 300, at 115. An I.R.C. § 2013 previously paid tax credit will apply to property taxed in the survivor's estate that was subject to the QDOT tax.

sonal liability pursuant to the standard discharge rules.[311] This will result in the trustee using great care when ascertaining the citizenship of the survivor.[312]

When originally drafting Sections 2056(d) and 2056A, Congress did not believe the provisions overrode the nondiscrimination articles of any treaties.[313] At least one treaty partner, Germany, has thought that Sections 2056(d) and 2056A are an override.[314] The Germans argue that Section 2056(d) discriminates against surviving spouses who are foreign citizens in that they must bear the full burden of United States estate tax on the property inherited. They further find the QDOT mitigator of Section 2056A to be a costly and burdensome administrative provision that fails to provide equal treatment to foreign surviving spouses and United States surviving spouses.[315]

The German stance is incorrect while Congress's is correct.[316] The treaty language states that citizens of the other state will not be subject "to

---

311. I.R.C. § 2056A(b)(11). I.R.C. § 2204 requires the trustee to apply for a written determination of tax liability, pay the tax, and post a bond. Furthermore, pursuant to I.R.C. § 6324, a lien lasting for 10 years will attach to the estate of a decedent as if the decedent died on the date of the taxable event. H.R. CONF. REP. No. 1104, *supra* note 300, at 114.

312. Although the trustee of a QDOT will generally not have to withhold tax on distributions of QDOT corpus, she will have to withhold 10% (I.R.C. § 1445) of any distributions of U.S. real property interests (I.R.C. § 897) and 30% of U.S. source income (I.R.C. § 861) if the surviving spouse is a nonresident alien. I.R.C. § 871(a).

313. H.R. REP. No. 795, *supra* note 291, at 593. After discussing that the tax applies to the estate of all decedents, regardless of citizenship, and not to beneficiaries, Congress noted that citizen beneficiaries are not similarly situated with noncitizen beneficiaries because citizens pay estate tax on their worldwide assets. However, if it applies to the beneficiaries, it is illogical for Congress to say that it can discriminate against alien beneficiaries because it was Congress who exempted the alien beneficiaries from estate taxation on their worldwide assets. Congress further ignores that an alien spouse must first pay the QDOT tax to take full title to inherited property while a citizen spouse can inherit property free of the QDOT tax.

314. Because of these provisions, the Bundestag Finance Committee tabled a draft bill required for German ratification of the German-United States Income Tax Convention of 1989. Instead, the Bundestag Finance Committee directed the German Finance Ministry to obtain assurance from the United States that it would negotiate on matters they viewed as discriminatory against German citizens. Hans H. Gattermann, *U.S. Tax Treaty Overrides Are Unacceptable*, 2 TAX NOTES INT'L 1238, 1310 (Dec. 1990). Freidhelm Jacob, Counsellor (Fiscal) at the German Embassy, stated that although the U.S.-F.R.G. Estate Tax Treaty does not contain a nondiscrimination clause, the U.S.-F.R.G. Income Tax Treaty does contain a nondiscrimination clause that applies to all taxes, including the estate tax. John Turro et al., *Stalled U.S.-F.R.G. Treaty Gains Second Look in German Parliament; 'Shadow' Talks Set with Taiwan*, 47 TAX NOTES 1420 (June 18, 1990).

315. Gattermann, *supra* note 314, at 1310.

316. Congress worried, however, that I.R.C. § 2056(d) and § 2056A would conflict with treaty articles that gave domiciliaries of other countries a marital deduction based on the pre-1981 rules, but stated that tax treaties should not frustrate the internal revenue laws of the United States. H.R. REP. No. 247, *supra* note 292, at 1435. Therefore, Congress delayed enactment of

any taxation or any requirement connected therewith which is . . . more burdensome" than that imposed on citizens of the taxing state.[317] Unlike the German transfer tax, which is an inheritance tax on beneficiaries,[318] the QDOT tax's use of the decedent's incremental estate tax rate[319] on the value when the decedent died[320] shows that the QDOT tax is a tax on the estate of the decedent, not the surviving alien. Furthermore, the administrative requirements imposed on the QDOTs are requirements imposed on the estate of the citizen decedent, not the surviving alien.[321]

Sections 2056(d) and 2056A have been further criticized due to their complexity.[322] The complexity, however, results from interaction with other sections, and not with the basic scheme of denying the marital deduction on property passing to noncitizen spouses. Congress has worked to improve this scheme[323] rather than eliminate it, indicating that citizenship oriented collection tools for transfer tax purposes are a trend of the future.

Although there are some potential problems with the citizenship standard, they seem more rectifiable than the problems inherent in some of the tests contained in the objective and subjective standards. Constitutional law does not place much emphasis on citizenship. Other than voting[324] or becoming elected to United States office,[325] which require citizenship, there is no constitutional provision that requires ambassadors, judges, or other governmental officials to be citizens.[326] Accordingly, the Constitution generally protects any person within the United States, citizen or alien, resident

§§ 2056(d) and § 2056A so the Department of the Treasury could renegotiate those treaties that the provisions override.

317. 1980 Model Treaty, *supra* note 73, at art. 10(1).

318. HARVARD LAW SCHOOL, *supra* note 25, at 703 & n.4.

319. I.R.C. § 2056A(b)(2).

320. I.R.C. § 2056A(b)(1)(B).

321. For example, I.R.C. § 2056(d)(2) states that the citizen decedent must pass the property to the alien survivor in a QDOT (I.R.C. § 2056(d)(2)(A)), or the executor of the estate must transfer or assign the property to a QDOT before the estate tax return is due (I.R.C. § 2056(d)(2)(B)).

322. *See, e.g.*, Bernard L. Karr, *New Planning Required for Surviving Spouses Who Are Not U.S. Citizens*, 70 J. TAX'N 140 (1989); Lloyd L. Plaine & Jeffrey W. Munk, *New Estate and Gift Tax Provisions Affecting Alien Residents and Nonresidents*, 14 EST., GIFTS & TR. J. 51 (1989); Henry S. Ziegler, *Practical Planning for the Non-Citizen Spouse*, 129 TR. & EST. 32 (1990).

323. The QDOT provision originated in the Senate in 1988. H.R. CONF. REP. NO. 1104, *supra* note 300, at 114. Congress changed the QDOT provision in the Omnibus Budget Reconciliation Act of 1989 and revised it again in the OBRA of 1990. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388.

324. U.S. CONST. amends. XIV, XV, XXIV, XXVI.

325. The President must be a native United States citizen (U.S. CONST. art. II, § 1, cl. 5), while members of Congress must merely be citizens (U.S. CONST. art. I, § 2, cl. 2 (members of the House of Representatives); U.S. CONST. art. I, § 3, cl. 3 (Senators)).

326. U.S. CONST. art. III.

or nonresident.[327] However, the Supreme Court has stated that taxation based on foreign classifications passes the strict scrutiny standard,[328] thereby satisfying the due process provisions of the Fifth Amendment.[329]

Another potential problem relates to the issue of dual citizens. These are individuals having citizenship in two countries due to birth in one country[330] to parents who are citizens of another country.[331] Although the traditional concepts of international law would give precedence to citizenship in the country of birth,[332] with resultant current revenue shortfalls, Congress is unlikely to relinquish taxing jurisdiction over a United States resident born abroad to United States citizen parents. Furthermore, in *United States v. Matheson*,[333] the Second Circuit ruled that dual citizens are subject to United States tax wherever they reside. Therefore, regardless of a dual citizen's ties to and taxpayer status in another country, her estate is subject to taxes in the United States. Although such a scenario, without the benefit of a tax credit,[334] yields a harsh result, the dual citizen is entitled to double benefits during her lifetime.

Lapsed citizenship poses a potential problem when a decedent, who mistakenly thought she was an expatriate pursuant to the Immigration and Nationality Act (INA),[335] is later deemed a United States citizen through the invalidation of the denaturalizing statute. Although citizens cannot lose their citizenship through the repeal of a naturalization statute,[336] it is possible to regain citizenship through the repeal of a denaturalization statute.[337] In Revenue Ruling 75-357,[338] the IRS ruled that someone whose citizenship was reinstated due to a later found unconstitutional section of the INA was liable for United States transfer taxes as a citizen.[339] Commentators who

---

327. *See* Sam Andrews' Sons v. Mitchell, 457 F.2d 745, 749 (9th Cir. 1972); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

328. Graham v. Richardson, 403 U.S. 365 (1971).

329. Barclay & Co. v. Edwards, 267 U.S. 442, 449-50 (1924).

330. This is commonly known as *jure soli*. *See* FENWICK, *supra* note 228, at 302.

331. This is commonly known as *jus sanguinis*. *See* FENWICK, *supra* note 228, at 302.

332. FENWICK *supra* note 228, at 303.

333. 532 F.2d 809 (2d Cir.), *cert. denied*, 429 U.S. 823 (1976).

334. An estate can receive a credit in the United States through a treaty or I.R.C. § 2014.

335. Immigration and Nationality Act, ch. 12, 79 Stat. 911 (codified as amended at 8 U.S.C. §§ 1101-1525 (1988)).

336. Afroyim v. Rusk, 387 U.S. 253, 264 (1967).

337. In United States v. Lucienne D'Hotelle de Benitez Rexach, 558 F.2d 37, 42 (1st Cir. 1977), the court held that "[t]he rights stemming from American citizenship are so important that, absent special circumstances, they must be recognized even for years past."

338. 1975-2 C.B. 5. Rev. Ruling 70-506, 1970-2 C.B. 1 provides a comparable ruling for income tax purposes pursuant to I.R.C. § 877.

339. Under its authority pursuant to I.R.C. § 7805(b), the IRS decided to apply this ruling without retroactive effect, beginning January 1, 1971.

argue that retroactive taxation is unjustifiably unfair[340] miss the point that these individuals would also be entitled to all benefits of United States citizenship during these years, such as the protection of tax treaties.

Using the hybrid standard of citizenship would not override existing United States transfer tax treaties. Because United States transfer tax jurisdiction extends to all United States citizens and domiciliaries, Congress would merely be removing the word "domicile" from the United States tax scheme. Each United States transfer tax treaty provides for taxation of United States citizens and United States domiciliaries, which each country defines by its local law.[341] Without a United States definition of domicile, these treaties would lose all the revenue derived from the estates of aliens in the United States. But because it would not impose United States transfer taxes on aliens, the hybrid standard of citizenship would not override the nondiscrimination clauses of any treaties.

A large percentage of noncitizens who possess green cards have no desire to become citizens. As this group of people living in the United States continues to rise,[342] the United States will continue to lose transfer tax revenues from those who consider the United States home, but have merely not wanted to deal with the necessary administrative procedures to become citizens. A single hybrid standard of citizenship would relinquish transfer tax jurisdiction over these aliens. Although most of the problems caused by the hybrid standard of citizenship are rectifiable, the inability to tax aliens who live in the United States, but who are not U.S. citizens, remains a problem.

V. The Argument for the Hybrid Standard of Citizenship and the Objective Standard of Green Card Possession

For United States transfer tax purposes, jurisdiction is currently based on the subjective standard of domicile or the hybrid standard of citizen-

340. *See, e.g.*, American Bar Ass'n Sec. of Tax'n, Plan. Comm., *Report on Exercise by the Treasury Department and the Internal Revenue Service of the Authority Granted by Internal Revenue Code Section 7805(b) to Prescribe the Extent to Which Tax Rulings on Regulations Shall Be Applied Without Retroactive Effect*, 42 TAX LAW. 621 (1989); David W. Ball, *Retroactive Application of Treasury Rules and Regulations*, 17 N.M. L. REV. 139 (1987).

341. *See, e.g.*, 1977 Model Treaty, *supra* note 73, art. 1(1); 1980 Model Treaty, *supra* note 73, art. 1(1).

342. *See* Dawn Garcia, *New Look to Immigration: Fewer Aliens Want to Be Citizens*, S.F. CHRON., Mar. 12, 1991, at 1. Furthermore, the number of naturalized citizens decreased from 242,038 in 1988 to 233,777 in 1989. UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE xxxvii (1989).

ship.[343] Congress could easily change jurisdiction to the objective standard of green card possession (lawful permanent residence) or the hybrid standard of citizenship by redefining residence for transfer tax purposes to be the green card standard and legislating away the regulatory definition of domicile as residence.[344] The green card test would plug the loophole where immigrants try to avoid transfer taxes by choosing to obtain green cards, but not citizenship. As a deterrent against illegal aliens[345] entering the United States and avoiding transfer taxes, Congress should impose transfer tax jurisdiction on their worldwide assets.[346]

The strongest argument favoring estate taxation based on citizenship and green card possession is that an individual gaining governmental benefits as a citizen should pay a tax for those benefits.[347] Citizenship is a fundamental right, and a citizen has all the benefits and burdens of citizenship regardless of whether she wants them.[348] Taxation is the price of those benefits. As stated by the Supreme Court in *Cook v. Tait*:[349]

> The basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, nor was not and cannot be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen.[350]

A country such as the United States should be able to tax an individual who derives the benefits of citizenship from the United States. These benefits include voting,[351] holding United States political office,[352] travelling with a United States passport, claiming the protection of United States laws

---

343. I.R.C. § 2001 imposes an estate tax on the gross estate of every decedent who is a citizen or resident of the United States. The gross estate includes the value at the time of the decedent's death of all property, real or personal, tangible, or intangible, wherever situated. I.R.C. § 2031(a) (1988).

344. Because the United States transfer tax treaties refer to domiciliaries, as opposed to residents, a technical addition will have to provide for the definition of domiciliaries to be residents.

345. An illegal alien is an alien who does not have a green card or a temporary visa. 8 U.S.C. §§ 1181, 1184 (1988).

346. While this approach would not affect the majority of illegal aliens, it would affect those who had accumulated assets outside this country.

347. *See* United States v. Matheson, 532 F.2d 809, 819 (2d Cir.), *cert. denied*, 429 U.S. 823 (1976).

348. Sheridan, *supra* note 145, at 231.

349. 265 U.S. 47 (1924).

350. *Id.* at 56.

351. U.S. CONST. amends. XIV, XV, XXIV, XXVI.

352. *See supra* note 325; *see also* T. Alexander Aleinkoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1486 (1986).

overseas, licensing from the Coast Guard to fly the United States flag on her yacht duty free, and claiming the protection of tax treaties.[353]

Other constitutional benefits and burdens of living in the United States apply to all aliens—whether or not they possess green cards—as well as to all citizens. It is unlikely, however, that a holder of a temporary visa would have the same opportunity to take advantage of those benefits that a green card holder would. Those benefits include freedom of speech[354] and some public assistance,[355] such as social security benefits.[356] The burdens include payment of social security taxes[357] and registration for Selective Service.[358]

Of all categories of aliens, green card holders are more similar to citizens than are other categories. Green card holders can remain in the United States indefinitely, just as citizens can.[359] Furthermore, green card holders can work in the United States[360] and receive welfare benefits.[361]

It is difficult for an alien to obtain a green card. In 1989, approximately 2.3 million aliens[362] sought one of the 270,000 green cards available.[363] It is easier to obtain a temporary visa,[364] but it is difficult to trade a temporary visa for a green card.[365]

---

353. United States v. Matheson, 532 F.2d 809, 818 (2d Cir.), *cert. denied*, 429 U.S. 823 (1976).

354. *See* Schneider v. State, 308 U.S. 147 (1939).

355. *See* 45 C.F.R. § 2333.50 (1992).

356. 20 C.F.R. § 422.104 (1992).

357. I.R.C. § 3101.

358. 50 U.S.C. app. § 453 (1988).

359. 8 U.S.C. § 1101(a)(20) (1988) states: The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant, such status not having changed.

360. Tawahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948).

361. Mathews v. Diaz, 426 U.S. 67 (1976). The government may, however, restrict welfare benefits to those resident in the United States for five years, which would preclude those without a green card from obtaining welfare benefits. *Id.*

362. UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 342, at xviii.

363. *See* 8 U.S.C. § 1151(a) (1988).

364. The United States has an open-door policy on other types of visas because they are good for the economy. UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 342, at xxxii.

365. To change from nonpermanent visa status to lawful permanent resident status, one of the 270,000 green cards must first be available. UNITED STATES DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES IMMIGRATION LAWS: GENERAL INFORMATION 20 (1989). In addition, the applicant must:

(1) be inspected and either admitted or paroled into the United States;

(2) be the beneficiary of an approved petition (I-130 or I-140);

(3) have not worked in the United States without INS permission after January 1, 1977; and

(4) file an application on Form I-485.

Once an alien obtains a green card, she can easily obtain United States citizenship. In 1989, the Immigration and Naturalization Service accepted ninety-eight percent of the petitions filed for naturalization.[366] Possession of a green card is a prerequisite for obtaining citizenship.[367]

Citizenship and green card possession provide objective criteria for transfer tax jurisdiction that are simple to understand and apply. The subjective relinquishment element of citizenship is a hazard with which planners and other attorneys can easily live. Although commentators have criticized objective tests for allowing sophisticated individuals to manipulate their affairs,[368] under this proposed standard such individuals cannot avoid citizenship by any method short of expatriation. Two factors mitigate the expatriation problem. The first is the general reluctance of individuals to relinquish their citizenship.[369] The potential marginal wealth to be derived from expatriation rarely exceeds allegiance to the United States. The second is the ten-year antiexpatriation provision of Section 2107, which allows avoidance only through patience.[370]

Emigration might cause problems in collecting the estate tax from the estate of a former green card holder. A long-time green card holder, expecting to die, could relinquish her green card and return to her country of citizenship to avoid taxation. However, Congress could avoid this problem by subjecting green card holders to Section 2107.[371] If an individual relinquishes her citizenship or her green card, her accumulated wealth in the United States will remain with her no matter where she lives.[372]

The hybrid and objective standards produce both certainty and fairness. Because the analyst can objectively determine if an individual has citizenship or holds a green card, it is certain. Because the tests tax individuals

---

The difficulty of changing status can be seen in the fact that only 27,874 nonpermanent visa holders obtained green cards in 1989. UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 342, at 8.

366. The INS denied only 5200 of the 227,692 petitions received. UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 342, at 90.

367. 8 U.S.C. § 1429 (1988). Furthermore, another prerequisite for citizenship—continuous residence in the United States from the date of filing the petition for naturalization until actual admission as a citizen (8 U.S.C. § 1427(a)(2) (1988))—is generally only possible to fulfill through holding a green card.

368. *See* Williams, *supra* note 41, at 1021.

369. Since Congress passed I.R.C. § 2107 in 1966, there have been no reported cases involving an I.R.C. § 2107 issue.

370. *See supra* notes 262-84 and accompanying text.

371. Treating aliens as citizens would avoid any conflicts with discrimination articles in treaties. *See Tax Law Simplification and Improvement Act of 1983*, *supra* note 43, at 353 (statement of attorney Marshall J. Langer).

372. Sheridan, *supra* note 145, at 234.

based on the benefits they can obtain, it is fair. Although this dual standard does not provide flexibility, it is worth the advantages.[373]

Jurisprudential reasons further support the hybrid standard of citizenship as a sound standard. Because the legal issues surrounding domicile and the substantial presence test arise only in tax cases, the United States always argues for expansive interpretations to increase its jurisdiction. The United States has often litigated citizenship issues, arguing for a restrictive definition[374] in order to strip individuals of their citizenship. Conversely, in tax disputes, the United States will argue for an expansive definition of citizenship in order to increase its taxing jurisdiction.[375] With the United States having to argue each side of the citizenship standard at one time or another, the law will likely develop in a more logical manner. A similar analysis would apply to the green card test. Furthermore, consistency with the jurisdictional standard for income tax purposes will aid the development of the standard. Because the green card test may not require physical presence in a single year, but requires some presence over the course of several years, it is a better standard of jurisdiction for transfer tax purposes than for income tax purposes.

The introduction of the green card test would require Congress to revise further the marital deduction provisions for property passing to alien surviving spouses.[376] In general, this revision would deny the marital deduction for property passing from the estate of a decedent citizen or green card holder to a spouse who is neither a citizen nor a green card holder. Making green card holders subject to Section 2107 of the Code would avoid the potential expatriation of surviving spouses who hold green cards.

Citizenship and green card possession standards have some use as collection tools. For example, the estate tax on QDOT distributions is similar to the withholding tax of thirty percent[377] on payments of United States source income[378] to nonresident aliens.[379]

The hybrid standard of citizenship or the objective standard of green card possession is the proper jurisdictional standard for international trans-

373. *See* H.R. REP. NO. 432, *supra* note 162, at 1523; JOINT COMM. ON TAXATION STAFF, *supra* note 162, at 463.

374. The exception would be treason cases, where the United States will claim citizenship and then show that the acts were against that citizenship. *See* Kawakita v. United States, 343 U.S. 717 (1952).

375. *See* United States v. Matheson, 532 F.2d 809, 811 (2d Cir.), *cert. denied*, 429 U.S. 823 (1976).

376. I.R.C. §§ 2056(d), 2056A.

377. I.R.C. § 1441.

378. I.R.C. § 861(a).

379. I.R.C. § 871(a).

fer tax purposes. Because green card holders are more similar to citizens than are any other aliens, taxing them as residents supports many of the policies an international transfer tax jurisdiction should embrace. The technical amendments to coordinate the standards with other provisions would be worth the effort.

VI. Conclusion

For transfer taxes, the United States currently imposes a dual international jurisdictional standard—domicile or citizenship. Although the citizenship standard, a hybrid that contains elements of both subjective and objective tests, is satisfactory, the subjective standard of domicile has made the law difficult to apply for planners and litigators. An objective standard such as the substantial presence test of Section 7701(b) of the Internal Revenue Code is deficient due to its mechanical nature, but the objective standard of the green card test is efficient. Congress should maintain the citizenship standard, but replace the regulatory definition of domicile with a green card test. Although this change will necessitate some technical corrections, it will advance policies for taxes in general and policies unique to both transfer taxes and international taxes.