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Henry Ordower
Saint Louis University - School of Law

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Henry Ordower¹

Rules governing admission of immigrants to stable, developed countries vary widely among countries, yet wealthy and highly educated immigrants receive favorable admission decisions from immigration authorities more frequently than do conflict and economic refugees. Wealthy individuals tend to receive quick and favorable admission decisions even if they differ ethnically, racially and religiously from the majority populace.² As preferred immigration destination countries limit the number of immigrants they will admit -- the U.S. certainly does --, admissions are likely to follow a hierarchy based on expectations that certain immigrants will contribute significantly to the economy and welfare of the destination country in a manner that distinguishes him or her from other applicants for admission.³ Admission standards and practices also may favor some applicants over others on the basis of race, religion, and country of origin.⁴ Immigration has changed the face of many economically developed countries and introduced a diversity of cultures into formerly homogeneous monocultures.⁵

¹ Professor of Law, Saint Louis University School of Law; A.B. Washington University, M.A., J.D. The University of Chicago. Published in Hermann Remsperger, Volker W. Wieland, Michael Sachs, and Theodor Baums eds., *Zentralbanken, Währungsunion und stabiles Finanzsystem: Festschrift für Helmut Siekmann* 637 (Duncker und Humblot Berlin, 2019). A revised and expanded exploration of this general topic will appear as *Immigration, Emigration, Fungible Labor and the Retreat from Progressive Taxation* in Peter Harris and Dominic De Cogan, ed., *Tax Justice and Tax Law: Understanding Unfairness in Tax Systems*, ch. 8, 133 (Oxford, Hart Publishing forthcoming 2020).

² *Leila Adim*, *Between Benefit and Abuse: Immigrant Investment Programs*, 62 *Saint Louis U. L. Rev.* 121 (2017), *Allison Christians*, *Buying In: Residence and Citizenship by Investment*, 62 *Saint Louis U. L. Rev.* 51 (2017).

³ The U.S. historically has maintained a family based immigration system as its principal method for legal, permanent immigration under 8 U.S.C. §1151 et seq. The statute also includes other categories of immigrants with lower priority including exceptional individuals, those with critical skills and education and certain unskilled workers but not seasonal workers. Categories other than family immigration are “merit-based.” USCIS, *Green Card Eligibility Category 1* available at <https://www.uscis.gov/greencard/eligibility-categories>. There is also a category for diversity immigration but within the category candidates are scored on the merit criteria.

⁴ In the U.S., categories of immigrants have become less predictable during the Trump administration, as President Trump overtly has sought to sub-classify immigrants by racial, religious and ethnic limitations within the various classes. Early in his presidential tenure, President Trump sought to impose a ban on immigration from predominantly Muslim countries. *U.S. Department of Homeland Security*, *Executive Orders on Protecting the Homeland*, available at <https://www.dhs.gov/executive-orders-protecting-homeland> (last visited December 3, 2018).

⁵ Sweden, for example. *Hans-Ingvar Roth /Fredrik Hertzberg*, *Tolerance and Cultural Diversity in Sweden* 10, European Union Institute, Robert Schuman Centre for Advanced Studies, *ACCEPT PLURALISM 7th Framework Programme Project* (2010) (available at

Conflict zones and weak economies drive immigration from those areas to wealthier and more stable areas. At the same time, high taxes and regulation fuel emigration from wealthy stable economies to lower tax, less regulated jurisdictions. Labor flight to lower tax jurisdictions historically has not been prevalent because rendition of services has been location dependent. However, the rapid growth of technology has made many industries independent of the location of their service providers.⁶ Cross-border competition for some labor has grown. While top scientists and medical professionals have been in demand since at least the early years of the 20th century, demand for technology expertise has accompanied growing international reliance on technology. The emergence of English as a common, international language has removed linguistic barriers to international commerce and individuals with technical training and expertise are able both to work remotely and relocate. Competition in many realms has become international and less developed countries which have devoted their limited resources to educating and training their citizens to develop that expertise and skill are concerned about losing those they have educated to other countries that might offer higher salaries and better living circumstances.⁷

This paper explores the role that taxation plays in the movement of people and capital. Part I addresses the relationship between taxes and retention of capital, including tax incentives for capital investment, shifting tax burdens from capital to labor, and rules preventing the escape of capital from its current taxing jurisdiction. Part II considers how taxes supplement immigration policy to attract capital currently outside the jurisdiction. Part III contemplates whether taxes play any significant role in attracting⁸ or retaining skilled labor.⁹ Part IV looks at taxes and tax

https://www.academia.edu/664630/Tolerance_and_Cultural_Diversity_in_Sweden). And further in Sweden on the failure to integrate and cultural misunderstanding: *Paulina de los Reyes*, ed., *Om välfärdens gränser och det villkorade medborgarskapet: Rapport av Utredningen om makt, integration och strukturell diskriminering*, 2006 Statens Offentliga Utredningar (Public Investigations of the State) 37 (Title translation: Concerning the limits of welfare and conditional citizenship: Report on the investigation of power, integration, and structural discrimination) (author's translation).

⁶ Call centers for product support or marketing are obvious examples and many technological services often lend themselves to remote contact between clients and providers.

⁷ E.g. *Yariv Brauner*, *Brain Drain Taxation as Development Policy*, 55 *Saint Louis U L J* 221 (2010); *Matthew Lister*, *A Tax-Credit Approach to Addressing Brain Drain*, 62 *Saint Louis U LJ* 63 (2017). Cuba, for example, trains many, high quality medical professionals and contracts to supply medical professionals to other Latin American countries while paying low wages and retaining payments in excess of the salaries. *Shasta Darlington*, *Cuba Is Pulling Doctors From Brazil After 'Derogatory' Comments by Bolsonaro*, *The New York Times* (Nov. 14, 2018) available at <https://www.nytimes.com/2018/11/14/world/americas/brazil-cuba-doctors-jair-bolsonaro.html>.

⁸ *Pierre-Régis Dukmedjian/Nadejda Girleanu*, *Luxembourg Offers Tax Incentives to Attract Highly Skilled Employees*, *Tax Notes* (Dec. 6, 2018), available at <https://www.taxnotes.com/worldwide-tax-daily/employment-taxes/luxembourg-offers-tax-incentives-attract-highly-skilled-employees/2018/12/06/2816b>.

trends and identifies how they disadvantage or benefit fungible, frequently immigrant labor.¹⁰ Part V concludes that capital tax rate competition seems unlikely to prevent capital flight as it inquires whether anti-immigration and anti-immigrant public sentiment has contributed to the shift of tax burdens from capital to labor.

I. Retaining Rich People and their Capital.

As global competition for capital increased in the latter decades of the 20th century, the steeply progressive income taxes with high maximum rates of tax characteristic of developed countries during the middle years of the 20th century yielded to systems with moderate or flat progression and moderate maximum rates of tax.¹¹ Taxes also have tended to increase on less mobile income from labor and to decrease on more mobile income from property.¹² Periodic wealth taxes and gift and estate taxes on the transmission of wealth similarly have declined or disappeared.¹³ Such changes in rates and tax structures may discourage wealthy individuals from emigrating and settling in lower taxed countries or transferring their income producing personal property to low taxed jurisdictions.¹⁴

Decline in maximum rates of tax and occasionally complete disappearance of taxes on transmission of wealth have limited impact on funding of governmental services and public benefits. While steeply progressive taxes are associated historically with public benefits and welfare states, even confiscatory taxes on the wealthiest residents are unlikely to yield sufficient revenue to maintain extensive governmental functions and services. The general populace must

⁹ Supra note 7 for literature examples.

¹⁰ Defined and discussed infra in part IV.

¹¹ OECD Tax Database available at <http://www.oecd.org/tax/tax-policy/tax-database.htm#pit>.

¹² Id.

¹³ In 1976 estates in excess of \$600,000 were subject to estate tax but in 2018 estates become taxable only in excess of \$10,000. Section 2010 of the Internal Revenue Code of 1986, as amended (the “Code”), 26 U.S.C. §2010 (exemption from tax). In the following sections of the Code will be referred to as I.R.C. § followed by a number. The maximum estate tax rate in the U.S. for example declined from 77 percent of taxable estates in excess of \$10 million in 1976 to 40 percent of taxable estates in excess of \$11 million. I.R.C. §2001. Sweden repealed its inheritance tax in early 2005, retroactively to December 17, 2004 (source available at http://www.arvsskatt.nu/index.php?page_id=22&lang_id=1) and its wealth tax in December 2007 retroactively to January 1, 2007. Ekonomifakta, Förmögenhetsskatt (available at <http://www.ekonomifakta.se/sv/Fakta/Skatter/Skatt-pa-fastigheter-och-formogenhet/Formogenhetsskatt/>). Sweden is unusual among OECD members in not having an inheritance or estate tax. Sveriges Riksdag, Motion 2013/14:Sk403 Arvsskatt och förmögenhetsskatt (October 3, 2013) (available <http://www.riksdagen.se/sv/Dokument-Lagar/Forslag/Motioner/mot-201314Sk403-Arvsskatt-oc-H102Sk403/>).

¹⁴ For some taxpayers decreased rates of tax are not sufficient. The U.S. experience suggests that taxpayers seek to avoid even very low taxes. *Henry Ordower*, *The Culture of Tax Avoidance*, 55 *Saint Louis U L J* 47 (2010).

provide the revenue to fund the demands of modern governments.¹⁵ The policy supporting steeply progressive and high income tax rates and taxes on transmission of wealth at death served primarily to level disparities between wealthier and poorer residents and limit the growth and maintenance of a privileged and dominant class in the society.¹⁶ Perceptions of worthiness of tax objects also changed during the last decades of the 20th century. Increasing capital mobility challenged the commonly-held view that income from labor should not be disfavored in taxation relative to income from capital¹⁷ and arguments prevailed holding that capital is more productive than labor so should be taxed at a lower rate than labor is taxed.

As exceptional as the U.S. is in taxing its citizens, residents, and domestic corporations¹⁸ on their income from all sources worldwide,¹⁹ it is not uniquely burdened with the problem of wealthy taxpayers shifting capital and sometimes themselves to jurisdictions imposing a smaller tax burden on them. Worldwide taxation makes the shift of income somewhat more difficult than it might be in a territorial tax country. Despite worldwide taxation, the U.S. generally cedes primary taxing jurisdiction for income produced outside the U.S. to the country where the income is produced through a credit for foreign taxes.²⁰ If the foreign taxes are lower than the U.S. tax, the U.S. captures a tax amount equal to the difference between the higher U.S. tax and the foreign tax credited.²¹

To avoid U.S. tax, U.S. investors have two choices – one lawful, one not. The lawful choice is to relinquish U.S. citizenship or, for non-citizen residents, the right to reside in the U.S. The unlawful choice has been to secrete investments in foreign jurisdictions with strong bank secrecy laws so that income and wealth remains hidden outside U.S. taxing jurisdiction free from U.S. tax.

Investors also may operate businesses through or invest in domestic or foreign corporations and defer individual tax on the income until the individual shareholder receives distributions or sells the corporate shares. A peculiarity of the U.S. tax system permanently eliminates the individual tax on gain but not dividends if the shareholder dies before selling the corporate shares. A decedent's property receives a new, fair market value tax basis at the owner's death.²² A foreign

¹⁵ *Sven-Olof Lodin*, Swedish Tax Reforms 1971-77 – Why So Many?, 56 Acta Universitatis Stockholmiensis Studia Juridica Stockholmiensia 177, 183 (1977).

¹⁶ *Walter J. Blum /Harry Kalven, Jr.*, The Uneasy Case for Progressive Taxation, 19 The U.Chi. L. Rev. 417, 487 (1952)

¹⁷ *Andrew W. Mellon*, TAXATION: THE PEOPLE'S BUSINESS 56-8 (New York 1924).

¹⁸ Corporate residence for U.S. tax purposes follows place of incorporation rather than seat of management. I.R.C. §7701(a)(4).

¹⁹ I.R.C. §61 (defining gross income as all income from whatever source derived). Treas. reg. §1.1-1 (worldwide taxation).

²⁰ I.R.C. §901 (foreign tax credit).

²¹ I.R.C. §904 (limitation to U.S. tax on the income).

²² I.R.C. §1014.

corporation also permits the deferral of the U.S. corporate level income tax. Even if its shareholders are U.S. persons, a foreign corporation is not subject to U.S. taxing jurisdiction except on that portion of its income from U.S. sources or effectively connected with its conduct of a U.S. trade or business.²³ Most distributions of foreign source income of the foreign corporation to its U.S. owners become taxable in the U.S.²⁴

The U.S. has deployed an array of complex anti-avoidance rules to prevent taxpayers from exploiting corporate limitations on U.S. taxation of foreign source income. Some income of controlled foreign corporations (CFC)²⁵ is taxable to the corporation's U.S. shareholders²⁶ if the use of the foreign corporation to earn the foreign source income serves no logical business purpose. Thus, passive investment income as well as sales and service income unrelated to the CFC's country of incorporation²⁷ trigger the inclusion to the shareholders as if the CFC were a tax transparent entity similar to a partnership.²⁸ U.S. persons who invest in foreign investment companies may defer inclusion of the foreign investment company's income but when they sell their interests in the foreign company or receive distributions, the gain does not enjoy preferential rates on capital gains and the gains and dividends become subject to an interest charge.²⁹ A decedent's estate does not get a new basis in foreign investment company shares so

²³ I.R.C. §881 (fixed and determinable periodic income); I.R.C. §882 (effectively connected income).

²⁴ Recent change in the U.S. tax rules by the unnamed tax act commonly referred to as the Tax Cuts and Jobs Act of 2017, Pub. L. 115-97 (Dec. 22, 2017) ("TCJA"), permitting some distributions from foreign corporations to their domestic corporate U.S. owners to remain permanently free from the U.S. income tax do not apply to distributions to individuals. I.R.C. §245A (providing a 100 percent dividends received deduction for distributions to domestic corporations which are U.S. shareholders. A U.S. shareholder is defined as shareholder who owns, directly or by attribution, 10 percent of the voting or value interests in the corporation. I.R.C. §951(b)). Further changes made by the TCJA have layered new complexity to limit deferral of income from intangible property (I.R.C. §951A (global intangible income) and I.R.C. §250 (foreign derived intangible income) and related party transactions (I.R.C. §59A (base erosion alternative tax).

²⁵ I.R.C. §957 (defining CFC as a corporation in which U.S. shareholders, defined supra note 24, own more than half the voting power and share value).

²⁶ Under I.R.C. §951(b), U.S. shareholder is a term of art and refers to a shareholder who owns ten percent of the voting rights or value of the CFC.

²⁷ Foreign base company income is subpart F income under I.R.C. §952 included to the shareholders under I.R.C. §951(a). I.R.C. §954(a) (foreign base company income).

²⁸ I.R.C. §951(a). Inclusion of CFC income is not fully transparent. Subpart F income that would have been capital gain to the corporation does not retain its character as capital gain to the U.S. shareholders.

²⁹ I.R.C. §1291 (income from a passive foreign investment company defined in I.R.C. §1297). A taxpayer may avoid the unfavorable effect of these rules by electing to include the income of the foreign company in U.S. income annually. I.R.C. §1295 (qualified electing fund); I.R.C. §1293 (inclusion of prorata share of qualified electing fund income).

the estate's beneficiaries remain subject to the interest charge on the increase in value of the investment in the foreign investment company.³⁰ U.S. corporations converting to foreign corporations to avoid U.S. taxation on their foreign source income are subject to the anti-inversion provisions³¹ subjecting them to continuing taxation of their income in the U.S.

The unlawful option of concealing income and income producing assets in a low tax, bank secrecy jurisdiction came under intense attack with the enactment of the Foreign Accounts Tax Compliance Act (FATCA) in 2010.³² That legislation imposed substantial penalties on U.S. taxpayers who failed to disclose their foreign accounts and pay tax on their income from those accounts. That act also sanctioned foreign financial institutions accepting accounts from U.S. taxpayers not reported to U.S. taxing authorities by preventing them from participating in U.S. programs, including reduced withholding on investments in the U.S., a feature important to the institution's underlying non-U.S. investors.

Despite the U.S.'s exceptionalism in imposing worldwide taxation, U.S. persons historically valued their status as citizens and permanent residents of the U.S. The U.S. no longer may rely on its citizens and residents wishing to continue to be citizens and residents. Stable governments and developed banking and communication systems in low tax jurisdictions make U.S. citizenship or the right to reside permanently less compelling than they once were. Expatriation for wealthy individuals has become an alternative to continued citizenship or residence when it diminishes the individual's tax burden substantially.³³ High net worth individuals' sources of income have globalized. U.S. source income remains taxable in the U.S. even after expatriation but foreign source income is not. Some income follows the residence of its owner and becomes foreign source following expatriation. Unrealized gain on corporate stock, bonds, collectibles, gemstones, and artwork would have been U.S. source if realized and recognized before a U.S. person's expatriation. If recognition is deferred until after expatriation, its source shifts to the new residence of the owner³⁴ and it becomes free from U.S. tax.

In countries with territorial taxation and the U.S. with its worldwide taxation, legislatures have designed tax rules to discourage change of residence or expatriation and retain tax revenue by subjecting some or all of the taxpayer's income to tax following change of residence or expatriation. Legislation takes the form of either a continuation tax or an exit tax. The U.S. has

³⁰ I.R.C. §1291(e).

³¹ I.R.C. §7874 (taxing all or part of a foreign entity's income in the U.S. either as if it were a U.S. entity or under a continuation tax follow expatriation of the entity).

³² 124 Stat. 71, Pub. L. 97-117 (2010).

³³ The IRS publishes a list of expatriating individuals quarterly. The numbers of expatriates moderated somewhat in 2018. IRS, Quarterly Publication of Individuals, Who Have Chosen To Expatriate, as Required by Section 6039G, 83 FR 58321 (11/19/18). *Henry Ordower, The Expatriation Tax, Deferrals, Mark to Market, the Macomber Conundrum and Doubtful Constitutionality*, 15 Pitt Tax Rev 1, 6 (2017).

³⁴ I.R.C. §865 (personal property sourced at residence).

used both. A continuation tax imposes an obligation on the taxpayer to pay tax on some or all of the taxpayer's income following the change of the taxpayer's residence or citizenship.³⁵ Most continuation taxes have durational limits, commonly five or ten years. The U.S. tax had a ten year durational limit.³⁶ An exit tax imposes a single incident of taxation on the taxpayer's deferred income or unrealized gain at the moment of expatriation.³⁷ Payment of all or part of the tax may be deferred if the taxpayer assures payment of the tax through a bond or a third party payer of the income to the taxpayer through withholding.³⁸ Tax administration also has the power to certify seriously tax delinquent individuals to the Department of State for revocation or denial of issuance of the individual's passport³⁹ and for certain non-residents aliens, tax clearance is a condition for exiting the U.S.⁴⁰

II. Investors and Investor Immigrants.

Tax on investment income from U.S. sources by non-citizen, non-resident taxpayers is collected through a withholding tax of thirty percent of the gross payment.⁴¹ Double tax treaties often reduce that rate of tax on interest, dividends, and other investment income. To encourage foreign investors to invest in U.S. government and corporate debt, the U.S. reduced the rate of the

³⁵ *Ordower*, supra note 33, at 7. Sweden has a continuation tax under which it taxes some expatriates on income from personal property for ten years following change of residence. 3 ch. 19 § Inkomstskattlag (Svensk författningssamling [SFS] 1999:1229) (Swed.) (taxing Swedish citizens and permanent residents who leave Sweden on income from capital). Similarly, Germany has a ten-year continuation tax based on tax avoidance intent as described in *Daniel Gutmann, La lutte contre "l'exil fiscal": du droit comparé à la politique fiscale*, Le Cercle des fiscalistes (May 24, 2012), <http://www.lecercledesfiscalistes.com/publication/la-lutte-contre-l'exil-fiscal-du-droit-compare-a-la-politique-fiscale/234>.

³⁶ I.R.C. §877(d)(2).

³⁷ *Alice G. Abreu, Taxing Exits*, 29 U.C. Davis L. Rev. 1087 (1996) (analyzing various proposals to counteract the tax loss from expatriation with the income tax and the transfer tax systems).

³⁸ I.R.C. §877A (expatriation tax). The French expatriation tax was determined to violate the E.U. treaty when applied to a French national moving within the E.U. but possibly not when relocating to Switzerland. Code général des impôts (Tax Code) art. 167a (Fr.) (as in effect in 1999). The European Court of Justice in Case C-9/02, *Hughes de Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie*, 2004 E.C.R. I-2452, ECLI:EU:C:2004:138, but in *Christian Picart v Ministre des Finances et des Comptes publics*, C-355/16, ECLI:EU:C:2018:184, the ECJ determined that the 1999 E.U.-Switzerland agreement on free movement of persons doesn't preclude France from imposing exit tax on the unrealized gains of taxpayer who moved to Switzerland but was not engaged in a trade or business there.

³⁹ I.R.C. §7345 (certification under section 32101 of the FAST Act, Pub.L. 114-94 (2015) enacted as a revenue offset).

⁴⁰ I.R.C. §6851(d), IRS, Departing Alien Clearance (Sailing Permit), available at <https://www.irs.gov/individuals/international-taxpayers/departing-alien-clearance-sailing-permit>.

⁴¹ I.R.C. §871 (tax on fixed, determinable, annual or periodic income).

withholding tax to zero while retaining the rule that a foreign investor otherwise does not file a U.S. tax return or pay a tax on that U.S. source income.⁴²

State and local governmental units have offered a variety of direct and tax subsidies to induce the enterprises planning to build a facility in the U.S. to choose a specific locale. The practice of tax subsidy competition has generated a robust bidding process among states and localities in the U.S. often with questionable returns to the locality in exchange for considerable loss of tax revenue. The subsidies often do not require a permanent commitment from the enterprise and occasionally leave the locality with an ongoing facilities' burden after the enterprise ceases its operations there.⁴³

Some low tax jurisdictions have competed actively for investor capital by offering bank secrecy and low or no income tax on the earnings of non-residents. The OECD targeted these jurisdictions as engaging in harmful tax practices in a 1998 initiative⁴⁴ leading to increased transparency and information sharing by the targeted jurisdictions. A second initiative on base erosion and profit shifting (BEPS) has continued the effort to achieve greater transparency with uniformity in tax rules to prevent arbitrage especially through use of hybrid structures.⁴⁵

Such international efforts to limit tax competition may have motivated investors to become immigrants seeking the most favorable living and investment bases rather than simply moving capital. An emerging international competition issue has focused on "golden" visas and money laundering and similar concerns surrounding their issuance.⁴⁶ Rather than offering tax or direct subsidies for investment, countries with golden visa regimes expedite the immigration process for investors who bring substantial investment capital to the receiving country.

Investor immigrants invest designated minimal amounts in the receiving country in exchange for the privilege to enter and reside there.⁴⁷ Some Caribbean island states even exchange immediate

⁴² I.R.C. §871(h) added by section 127 of Pub. L. 98-369 (Deficit Reduction Act of 1984).(1984).

⁴³ *Henry Ordower*, *Les Impôts Relatifs aux Investissements Étrangers aux États-Unis d'Amérique* (observations générales), 1996-2 *Revue Internationale de Droit Economique* 185 (1996).

⁴⁴ *Gabriel Makhlouf*, *Current Status of OECD's Harmful Tax Practices Initiative* A statement by the Chairman of the OECD's Committee on Fiscal Affairs (2002) available at <http://www.oecd.org/general/searchresults/?q=unfair%20tax%20competition&cx=012432601748511391518:xzeadub0b0a&cof=FORID:11&ie=UTF-8>.

⁴⁵ OECD, *Base Erosion and Profit Shifting* (updated frequently) available at <http://www.oecd.org/tax/beps/>.

⁴⁶ For example, *Ceylan Yeginsu*, *What Are Britain's 'Golden Visas,' and Why Are They Being Suspended?*, *The New York Times* (Dec. 6, 2018) available at <https://www.nytimes.com/2018/12/06/world/europe/uk-golden-visa-suspended.html> (expressing concern about Russian oligarchs' use of the British program for money laundering).

⁴⁷ Adim, *Between Benefit and Abuse*, supra note 2, *Christians*, *Buying In*, supra note 2.

citizenship for a fee rather than an investment commitment.⁴⁸ The amounts and industries in which the investments must be made are not uniform among countries. Economically developed countries like the U.S. require a larger investment commitment than do countries looking to capture international capital to assist the country's lagging economic development.⁴⁹ Several countries also provide investor immigrants with temporarily favored tax treatment.⁵⁰ Others are low tax jurisdictions that welcome investors from high tax jurisdictions who may wish to avoid or evade taxes in their home countries by changing their residence or even citizenship to avoid home country taxes.⁵¹ Investor immigrants are desired and desirable. They do not take jobs from long term residents or citizens and their investments may create jobs. Competition among countries for investor immigrants is robust.

Investor immigrants to the U.S. are subject to general U.S. taxing jurisdiction under the U.S. worldwide taxation system when they become U.S. residents. Immigration is only practical from a taxing perspective for investors subject to taxes equal to or higher than U.S. taxes in the country from which they are emigrating, since all their income becomes subject to U.S. tax with a credit for foreign taxes. Where their emigration jurisdiction has lower taxes than the U.S., investor visas are desirable only from non-tax perspectives – opportunities, lifestyle, safety, etc. As investors they enjoy the tax advantages currently favoring capital over labor in the U.S., including the absence of any social security tax on income from capital,⁵² preferential rates for net capital gain and dividends,⁵³ deferral of inclusion in income of appreciation in the value of their property,⁵⁴ rapid tax recovery of many capital expenditures,⁵⁵ and a deduction of twenty percent of the income from the conduct of a trade or business in the U.S.⁵⁶

III. Educated and Skilled Labor.

1. Skilled immigrants. Countries also tend to welcome individuals with specific skills in a variety of fields as immigrants or temporary workers. The U.S. has many immigration priority programs for educated and skilled workers.⁵⁷ Jobs for individuals with skills or training often

⁴⁸ Adim, *supra* note 2, at 122.

⁴⁹ *Christians*, *supra* note 2, at 57.

⁵⁰ *Id.* at 51 (discussing Italy's new program, and comparison with Portugal, Malta, Ireland).

⁵¹ See discussion of FATCA legislation in the U.S., *supra* note 32, and the harmful tax competition and BEPS initiatives of the OECD, *supra* notes 44 and 45,

⁵² I.R.C. §3101 (6.2 percent tax on wages); I.R.C. §1401 (tax on self-employment income).

⁵³ I.R.C. §1(h) (maximum rate on net capital gains and dividends).

⁵⁴ I.R.C. §1001 (gain from sale or other disposition of property).

⁵⁵ I.R.C. §168(k) (bonus depreciation).

⁵⁶ I.R.C. §199A (qualified business income deduction). Added by TCJA, the deduction violates principles of horizontal equity by favoring individuals who are business owners over employed individuals.

⁵⁷ For example, USCIS, H-1B Specialty Occupations (available at <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-model>).

pay better than jobs in the immigrant's country of origin. Like investor immigrants, skilled immigrants are subject to the general taxing jurisdiction of the U.S. on their worldwide income. Unlike investor immigrants, skilled immigrants receive payment for services and do not enjoy the advantages of the current U.S. preference for income from capital. Since their visa status is job dependent, they cannot convert their status into independent contractors who might capture the new twenty percent deduction for income from the conduct of a trade or business.⁵⁸ They must pay social security taxes but, for those with high demand skills, wages are likely to exceed the social security earnings cap so they will not pay social security tax on all wages.⁵⁹ Employers may be able to offer various deferred compensation arrangements and, for some occupations provide non-taxable benefits including housing and meals.⁶⁰ High wages may give the workers the opportunity to accumulate disposable income for investment enabling the workers to become investors.

2. Skilled emigrants. Economically developing countries educate promising young citizens at government expense to develop an indigenous pool of skilled and educated workers. Those individuals are among the most desired candidates for immigration to economically developed countries where their skills also are needed. Salaries higher than what they would receive in their home country and better opportunities for family members are seductive despite any privileges their education might afford them at home. Emigration thwarts home country plans for those individuals to fulfill important societal roles and move the country's development. Preventing them from emigrating as controlled economies like Cuba and the former Soviet Union did raises human rights concerns. But these privileged individuals have consumed considerable amounts from limited national wealth to become who they are. Repayment in some manner may be appropriate.⁶¹ Other countries impose a special fee or tax requiring an emigrant to repay all or part of the cost or value of the education or training as an exit tax or a continuation tax following emigration.⁶²

⁵⁸ I.R.C. §199A (qualified business income), *supra* note 56.

⁵⁹ I.R.C. §3101. In 2018, wages in excess of \$128,400 are free from the social security tax. Those who never become permanent residents are unlikely to draw any benefits under the social security system.

⁶⁰ I.R.C. §119 (exclusion from gross income of meals and lodging provided for the convenience of the employer).

⁶¹ In the U.S., the military offers programs to pay for education for individuals if they are willing to commit to serve for several years following degree completion. For example, *U.S. Army, Earn Your Degree Through ROTC*, available at <https://www.goarmy.com/benefits/education-benefits/earn-your-degree-through-rotc.html>.

⁶² There is considerable academic literature on this topic: *Tito Boeri/Herbert Brucker/Frederic Doquier/Hillel Rapoport*, eds. *BRAIN DRAIN AND BRAIN GAIN THE GLOBAL COMPETITION TO ATTRACT HIGH-SKILLED MIGRANTS* (Oxford, 2012); *Gillian Block/Michael Blake*, *Debating Brain Drain May Governments Restrict Emigration?* (Oxford, 2015); and literature cited *supra* note 7.

IV. Fungible Labor and other Authorized and Unauthorized Immigrants. Many jobs require limited skills and training. The workers are substantially fungible. While unskilled jobs require some training -- even specialized training in many instances --, the necessary skills are relatively easy to learn and the shift from one unskilled job to another carries a low retraining cost. Unlike skilled and educated workers, fungible workers receive limited amounts of nontaxable fringe benefits. Most are subject to wage taxes on all their income because they do not earn more than the social security tax ceiling. They spend the bulk of their income on necessities so they have little ability to accumulate wealth. In countries with value added taxes, substantially all the workers' income are subject to value added as well as the wage taxes. Fungible workers make up the bulk of the taxpaying public, bear the burden of paying for government,⁶³ and are affected most profoundly as tax burdens shift from capital to labor.

Included in the pool of fungible labor are immigrants other than those who are investors or have special skills. Developed economies tend to limit the number of immigrants each year -- admitting far fewer than the number of individuals wanting admission. The U.S. admits under a system of priorities generally favoring family members of those already in the U.S.,⁶⁴ and some under a diversity lottery-based system.⁶⁵ Once immigrants reside in the U.S., their incomes are subject to the income tax, wages to social security and Medicare taxes, and they pay state consumption taxes -- sales and use -- when they use the income to buy the items necessary for living. Economically developed countries also tend to have economic refugees from less developed economies whose residence in the country is without official authorization.

In the U.S. low wage earners qualify for a negative income tax⁶⁶ on their earned income.⁶⁷ The credit is substantial⁶⁸ but as the taxpayer's income increases, the credit rapidly phases-out.⁶⁹ The credit does not help unemployed individuals and the phase-out effectively imposes an additional 21 percent tax on increases in wages in the phase-out range. Taxpayers lose the credit if they have income from capital exceeding a low threshold, thus discouraging any accumulation of wealth by low income individuals.⁷⁰ Fear of IRS examination may discourage taxpayers from

⁶³ *Supra*, note 15 and accompanying text.

⁶⁴ USCIS, Green Card Eligibility Categories available at <https://www.uscis.gov/greencard/eligibility-categories>, *supra* note 3 and accompanying text.

⁶⁵ USCIS, Green Card Through the Diversity Immigrant Visa Program, available at <https://www.uscis.gov/greencard/diversity-visa>.

⁶⁶ I.R.C. §32 (inflation adjusted, refundable credit designed originally to balance the social security tax).

⁶⁷ I.R.C. §32(c)(2) (wages plus self-employment income).

⁶⁸ I.R.C. §32(b)(as much as 45 percent of the taxpayer's earned income not exceeding \$14,570 in 2019 if the taxpayer has 3 or more qualifying children).

⁶⁹ *Id.* The phase-out is 21.06 percent of each dollar over \$24,820 for married taxpayers filing jointly. See Rev. Proc. 2018-57, available at <https://www.irs.gov/pub/irs-drop/rp-18-57.pdf>, for a full set of credit and phase-out tables.

⁷⁰ I.R.C. §32(i)(2) (threshold amount in 2019 is \$3600, see *id.* Rev. Proc. 2018-57).

claiming the credit since such taxpayers are examined more frequently than taxpayers with much greater incomes.⁷¹ Taxpayers who do not have social security numbers are ineligible for the credit even if they have alternate taxpayer identification⁷² and otherwise meet the qualifications for the credit. Thus, unauthorized workers may pay social security and income taxes but may not claim the earned income credit.

In many societies, there are tasks that citizens and permanent residents are reluctant to perform. The tasks are not difficult to learn and often do not require knowledge of the country's language. In some countries without a domestic sub-class of workers,⁷³ limited and temporary immigration may provide workers to fill those occupations. In the U.S., for example, migrant farm workers mostly from Mexico and Central America handle much harvest work and in the Gulf States, temporary, non-citizen workers make up the majority of the work force without gaining rights of residence or citizenship.⁷⁴ Unauthorized immigration provides an additional supply of fungible workers.

Unauthorized immigrants are subject to deportation at any moment and have little hope of gaining authorized status. Unless they secure false papers or alternative taxpayer identification,⁷⁵ unauthorized immigrants may not accept work in the formal economy of their country of residence. They participate primarily in the informal economy in which they receive payment for their services or goods they sell in cash or in barter goods and services. Generally they have to accept payments for their services at rates substantially below the formal economy market rate.⁷⁶ Such service value discounts are necessary to entice service recipients to use

⁷¹ Paul Kiel/Jesse Eisinger/*ProPublica*, The Golden Age of Rich People Not Paying Their Taxes, *The Atlantic* (DEC 11, 2018) available at <https://www.theatlantic.com/politics/archive/2018/12/rich-people-are-getting-away-not-paying-their-taxes/577798/>.

⁷² The U.S. issues individual taxpayer identification numbers (ITIN) on request to individuals not authorized to work in the U.S. but who have income to report in the U.S. IRS, Instructions for Form W-7 (<https://www.irs.gov/pub/irs-pdf/iw7.pdf>).

⁷³ India, for example, has a domestic sub-class in the Dalit group even though the Indian constitution provides equality of status and opportunity. Constitution of India, Preamble and Art. 14, available at https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf. See generally, Dalit Solidarity, available at <https://www.dalitsolidarity.org/dalits-and-untouchability.html>.

⁷⁴ For example, in Qatar more than 80 percent of the work force is non-Qatari. Ben Hubbard, That Punishing Blockade? 'We've Moved On,' Qatar Says, *The New York Times* (Dec. 19, 2018) available at <https://www.nytimes.com/2018/12/19/world/middleeast/qatar-blockade-goods.html>.

⁷⁵ *Supra* note 72, U.S. taxpayer identification, for example.

⁷⁶ The informal (or underground economy) operates primarily in cash outside the banking system and government regulation. Workers are paid at below market rates and have no little or no job protection. See, generally, *International Labour Organization*, More than 60 per cent of the

unauthorized workers' services rather than those offered in the formal market. Unauthorized workers frequently find employment in occupations in which supplies of authorized workers are inadequate or in which authorized workers do not wish to participate. Many unauthorized workers are in household occupations where their employer is in need of the services but is unwilling or unable to pay formal market rates. The payments generally would yield no tax deduction for the employer so payments in cash outside the formal economy are not of any consequence.⁷⁷

Many unauthorized workers without tax identification do not report their income for income tax purposes. Failure to report income poses risks of both civil and criminal penalties since their obligation to report and pay taxes is independent of immigration status. If they were authorized workers, the incomes of many would lie below the threshold at which an income tax otherwise might be payable⁷⁸ but, in most instances, a wage-based social security tax would be payable. In the U.S. such low income workers if authorized to work in the U.S. might qualify for the earned income credit.⁷⁹ Thus, they are disadvantaged relative to authorized workers both in wage levels and access to a low wage tax benefit. While many unauthorized immigrants may not pay an income tax, they do pay consumption taxes⁸⁰ and excise taxes as they consume and indirectly pay property taxes in their housing rent.

V. Conclusion: Tax Shift from Capital to Labor: Does Immigration Matter?

Taxation plays a role in immigration and emigration and seems to drive some decisions to migrate from high to low tax jurisdictions. Capital mobility and labor immobility argue in favor of decreasing taxes on capital to prevent capital flight even if the decrease means shifting tax burdens to labor. Decreased taxes on capital, however, do not guarantee that capital will not flee. Another jurisdiction may offer still lower taxes and generate conditions for tax decrease competition, depriving the taxing jurisdiction of needed revenue. A race to the bottom on capital taxes enhances disparities between wealthy and poor residents and is unlikely to benefit

world's employed population are in the informal economy (Apr 8, 2018), available at https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_627189/lang--en/index.htm.

⁷⁷ Homecare workers for children, infirm and aged individuals, for examples, generally non-deductible in any event as a personal expense under I.R.C. §262 or offering a tax credit less valuable than the lower wages in the informal economy even in those instances in which a credit is available. I.R.C. §21.

⁷⁸ The income tax system of each developed economy does not tax incomes that fall below a minimum amount. That amount differs from country to country. In the U.S., the standard deduction under I.R.C. §63 currently is \$12,000 so that incomes less than that amount are not taxable. In Germany, a subsistence minimum must remain free from the income tax under the Constitutional Court's decision BVerfE 82, 60, 85 (May 29, 1990, 1st Senat).

⁷⁹ Supra note 66 and accompanying text. I.R.C. §32.

⁸⁰ The US has no national consumption tax but most of the states of the U.S. have retail sales taxes.

developed economies. Growth of a privileged class undercuts longstanding commitments in advanced democracies to equality and equal opportunity.

Other methods to stop capital flight are appealing. FATCA⁸¹ in the U.S. to prevent concealment of wealth offshore, continuation and expatriation taxes, robust transfer pricing limitations that allocate and tax income where it is produced all prevent the shift of income to low tax jurisdictions and deprive movement of capital and people of anticipated tax benefits. Formulary apportionment of worldwide income properly allocating income among jurisdictions might even eliminate the benefit of artificial income shifting without having to compromise longstanding policies concerning distribution of tax burdens.⁸²

Ability to pay as a fundamental principle of taxation and resulting redistribution of wealth through strong welfare systems that provide for the needs of all remain as compelling today as they were when many economically developed countries chose to impose steeply progressive taxes. Yet the focus on competing for capital resources seems to have supplanted principles of fairness and ability to pay and resulted in increasingly flat or regressive taxation. Tax rate competition for capital seems a doubtful strategy heading toward a zero tax on capital income and raises the question of whether something else motivates countries to shift tax burdens from capital to labor.

During the period in which tax rates at the top have declined, estate taxes decreased or disappeared and regressive wage and value added taxes became more central to revenue production, there also has been growing pressure on economically developed countries to accept immigrants from economically weak and developing countries. In many instances the newer immigrants look different and may follow different religions and cultural customs from those of the populace of the destination country. Perhaps those differences cause the citizenry of the destination country to be less welcoming to that immigrant population, less committed to redistribution of wealth when the distributees differ from the distributors, less willing to share their wealth with an unfamiliar immigrant population and more willing to accept less progressive taxation making the immigrant population pay for its own welfare consumption even if the loss of progressivity affects many citizens and long term residents adversely as well.

At times immigrants may be perceived to consume a disproportional share of public assistance as they integrate, fail to integrate, or are prevented from integrating into their new country.⁸³ In

⁸¹ Supra note 32 and accompanying text.

⁸² *Henry Ordower*, Utopian Visions toward a Grand Unified Global Income Tax, 14 Fla. Tax Rev. 361 (2013).

⁸³ *Moritz Marbach/ Jens Hainmueller/Dominik Hangartner*, The Long-Term Impact of Employment Bans on the Economic Integration of Refugees (August 1, 2018). Stanford-Zurich Immigration Policy Lab Working Paper No. 17-03; Stanford University Graduate School of Business Research Paper No. 17-72; Forthcoming in Science Advances. Available at SSRN: <https://ssrn.com/abstract=3078172> or <http://dx.doi.org/10.2139/ssrn.3078172> concludes

welfare states where the fundamental decision to use high taxes to fund broad public assistance was made many years earlier for a homogeneous society, resentment of immigrants who differ but draw those benefits may be unsurprising.⁸⁴ As demand for entry and assistance from diverse cultural groups grows, resentment and concomitantly anti-immigrant political presence has become increasingly vociferous even when not politically successful.⁸⁵ Perhaps the shift of taxes from capital to labor is also about cultural diversification – a question bearing examination.

concerning the temporary ban on refugee employment in Germany: “[a] marginal social cost analysis for the study sample suggests that this employment ban cost German taxpayers about 40 million Euros per year, on average, in terms of welfare expenditures and forgone tax revenues from unemployed refugees.”

⁸⁴ During development of the Swedish welfare state, the population was almost wholly white and Christian. *Roth/Hertzberg*, supra note 5, at 11 (well over half the foreign born in Sweden were Scandinavians and the rest almost exclusively while European).

⁸⁵ *BBC News*, Europe and nationalism: A country-by-country guide (September 10, 2018), available at <https://www.bbc.com/news/world-europe-36130006> (showing penetrations of the anti-immigrant parties in recent European elections).