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by

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ABSTRACT

Inspired by Ruth Mason's recent article, Citizenship Taxation, *which reaches a general conclusion against citizenship taxation, this Article also questions citizen taxation under the same normative framework, but with a particular focus on efficiency and administrability, and takes a much less critical stance towards the merits of citizenship taxation. First, neither citizenship taxation nor residence-based taxation can completely account for the differences between residents' and nonresidents' ability to pay taxes under the fairness argument. Second, the efficiency argument, that citizenship taxation may distort both Americans' and non-Americans' citizenship decisions, is not convincing. The American citizenship renunciation rate is not particularly serious compared to other countries, and it is U.S. immigration law, not U.S. tax law, that should be blamed for obstructing highly skilled and educated immigrants. Third, despite enforcement difficulties abroad under the administrative argument, determining residence by considering all facts and circumstances in residence-based taxation would be worse than the bright-line citizenship criterion in citizenship taxation.*

After discussing the competing normative arguments on citizenship taxation, this Article aims to defend the administrability of citizenship taxation in conjunction with new reporting obligations. Individual taxpayers' obligations to file Foreign Bank Account Reports (FBAR) or report under the Foreign Account Tax Compliance Act (FATCA) are not seriously onerous. The fact that citizenship taxation along with FBAR and FATCA enhances global transparency further supports the case for citizenship taxation.

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INTRODUCTION

Is citizenship taxation by the United States a bad policy? The ongoing debate over this question reveals that many scholars believe that it is. In her recent article, *Citizenship Taxation*,[1] Ruth Mason reached a general conclusion against the merits of citizenship taxation from a U.S. perspective based on the normative framework of fairness, efficiency, and administrability. This Article evaluates citizenship taxation under the same normative framework, but with a particular focus on efficiency and administrability, which leads to a much less critical stance towards the merits of citizenship taxation.

Part I briefly discusses the fairness argument on citizenship taxation, focusing on the social obligation theory and the ability-to-pay principle.[2] This Article emphasizes that neither citizenship taxation nor residence-based taxation can completely account for the differences between residents' and nonresidents' ability to pay taxes. Since the fairness analysis does not provide adequate grounds to determine whether citizenship taxation is a good or bad policy, more extensive analysis on the efficiency and administrability of citizenship taxation are required to evaluate citizenship taxation.

Part II discusses the efficiency argument, examining whether citizenship taxation would distort nonresident Americans' citizenship decisions by encouraging them to renounce their U.S. citizenship.[3] By providing the first comprehensive empirical research on comparing renunciation rates in various countries, this Article argues that nonresident Americans' citizenship renunciation rate is not particularly serious when compared to that of other countries. Another efficiency argument against citizenship taxation is that it also distorts non-Americans' immigration decisions by discouraging them from becoming green-card holders or naturalizing.[4] However, what makes it difficult for wealthy and highly skilled foreigners to

1. Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 169 (2016).
2. *Id.* at 187.
3. *Id.* at 175, 223–27.
4. *Id.* at 227–30.

immigrate to the United States is not citizenship taxation or U.S. tax law in general, but U.S. immigration law.

Part III discusses the administrability argument. Citizenship taxation has been criticized as difficult to enforce on nonresident citizens abroad. However, countries with residence-based taxation also face difficulties in enforcing their tax laws abroad with respect to dual-residency or offshore assets and accounts. Moreover, residence-based taxation confronts an additional hurdle on top of enforcement difficulties: determining the residence of the individuals. Determining residence by considering all facts and circumstances creates problems beyond enforcement difficulties. The facts-and-circumstances test itself contains inherent problems when compared to a bright-line test. But even if the countries with resident-based taxation "win" in the tax dispute on residency, enforcement difficulties on those individuals' offshore assets would still remain. In this regard, the bright-line citizenship criterion is definitely a virtue. Three South Korean cases illustrate how serious the problem of determining residence can be under residence-based taxation.

In response to the discussion inspired by Mason on the competing normative arguments of citizenship taxation, this Article further aims to defend the administrability of citizenship taxation in conjunction with the Foreign Bank Account Reports (FBARs) and the Foreign Account Tax Compliance Act (FATCA). The debate on citizenship taxation was recently reignited when its critics condemned the new obligations to file FBARs and FATCA as an excessive compliance burden for nonresident citizens created by the Bank Secrecy Act.[5] Thus, although Mason's argument on the administrability prong is not primarily about FBAR and FATCA, more general criticisms of citizenship taxation necessarily also imply criticism of FBAR and FATCA, which were presumably enacted to administer citizenship taxation more effectively. However, this Article argues that the current compliance burden imposed on nonresident citizens by FBARs and FATCA is not onerous because the rules have been improved through various exceptions and substantially high reporting threshold amounts.

In addition to the merits of citizenship taxation generally, Part IV discusses the merits of FATCA specifically. The opponents of FATCA claim that FATCA is a bold manifestation of the "fiscal imperialism" of the United States, forcing foreign financial institutions to serve as agents of the Internal Revenue Service (IRS) to raise U.S. revenue.[6] The criticism has continued even after the U.S. government committed to enter into Intergovernmental Agreements (IGAs) in an attempt to address those concerns.[7] Nonetheless, FATCA has significant merits, not only as a

5. *See, e.g.*, Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117, 122 (2014); Reuven S. Avi-Yonah, *The Case Against Taxing Citizens*, 58 TAX NOTES INT'L 389, 394 (May 3, 2010).

6. Joshua D. Blank & Ruth Mason, *United States National Report on Exchange of Information* 4–5 (N.Y.U. Law & Econ. Research Paper No. 14-22, 2014), http://papers.ssrn.com/abstract=2481080 (citing, among others, Andrew F. Quinlan, *FATCA and US Fiscal Imperialism Threaten to Sink Global Economy*, THE DAILY CALLER (Mar. 19, 2013, 1:30 A.M.), http://dailycaller.com/2013/03/19/fatca-and-us-fiscal-imperialism-threaten-to-sink-global-economy/).

7. *See, e.g.*, Allison Christians, *The Dubious Legal Pedigree of IGAs (and Why It Matters)*, 69 TAX NOTES INT'L 565 (Feb. 11, 2013); Peter Menyasz, *Canadian IGA with*

means to enforce citizenship taxation, but also as a means to fight offshore tax evasion. FATCA together with the OECD's Automatic Exchange of Information (AEOI) paved the way for drastically improving global cooperation on sharing tax information. Thus, in considering whether the merits of FATCA outweigh the demerits, tax scholars should consider not only the U.S. taxpayers' compliance burden imposed by FATCA, but also its positive impact on global efforts to combat offshore tax evasion. This Article then contests the concern that FATCA exposes taxpayers' private information to potential abusive use by foreign tax authorities. In conclusion, if FATCA makes the world better off by enhancing global transparency on tax information, then this may serve as another support for citizenship taxation, as well as an example of constructive exceptionalism.

I. FAIRNESS: FOCUSING ON THE ABILITY-TO-PAY PRINCIPLE

There are three representative theories under the fairness prong that justify citizenship taxation: consent theory, benefit theory, and social obligation theory.[8] This Part briefly examines the first two theories, and then discusses the social obligation theory, with a focus on the ability-to-pay principle.

First, consent theory argues that taxing nonresident citizens is justified because retaining citizenship represents consent to such taxation. However, this theory is criticized based on the argument that paying citizenship taxation does not represent meaningful consent.[9] Assuming that mere retention of citizenship by nonresident Americans represents their consent to pay citizenship taxation is a logical leap as not only taxation but also many other privileges and obligations are at stake in maintaining a particular citizenship.

Second, benefit theory attempts to justify citizenship taxation as an obligation of nonresident citizens in return for the benefits they receive from the government. Given that not only the U.S. Supreme Court[10] but also the courts of foreign countries, such as that of South Korea,[11] endorse the benefit theory, the benefit theory seems to be at least intuitively appealing. However, critics disagree and demonstrate that there are other policy reasons to grant such benefits to nonresident citizens.[12] I also criticize the benefit theory because the relationship between government benefits and taxation is more than a mere matter of quid pro quo. Indeed, modern income taxes calculate the amount of tax by the taxpayers' ability to pay, not by the benefits they receive.[13] Edward Zelinsky, who supports citizenship taxation because of its bright-line test, conceded that the benefit theory

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U.S. on FATCA Faces Constitutional Challenge in Court, INT'L TAX MONITOR (BNA) (Nov. 14, 2014).

8. Mason, *supra* note 1, at 187–211.
9. *Id.* at 187–89.
10. Cook v. Tait, 265 U.S. 47, 56 (1924).
11. Seoul Administrative Court [Seoul Admin. Ct.], 2012Guhap9437, Aug. 14, 2013, *aff'd*, Seoul High Court [Seoul High Ct.], 2013Nu27359, Jan. 9, 2015, *vacated*, Supreme Court [S. Ct.], 2015Du1243, Feb. 18, 2016, *remanded to* Seoul High Ct., 2016Nu324, Feb. 7, 2017, *appeal docketed*, S. Ct., 2017Du244, Mar. 16, 2017 (S. Kor.) [hereinafter Shipping Magnate Admin. Case].
12. Mason, *supra* note 1, at 189–96.
13. *Id.* at 196.

does not justify citizenship taxation because "minimal benefits do not justify maximal taxation."[14]

Benefit theory could further be criticized because it does not provide a transcendent theoretical justification for citizenship taxation, but instead it conveniently justifies certain tax positions, whether for citizenship taxation or for residence-based taxation, taken by tax authorities or the courts ex post. For example, if the court decides to tax a person as a citizen or a resident on either citizenship taxation or residence-based taxation, it could explain such taxation by claiming that such citizen or resident has been benefitting from society. If the court decides not to tax her, it could reason that the benefit was too minimal to justify taxation. The fact that the court of South Korea, which adopts residence-based taxation, endorses the benefit theory strongly suggests that the benefit theory is not inherently related to citizenship taxation.[15]

Third, social obligation theory provides that, as a member of American society, nonresident citizens also have an obligation to contribute taxes according to their ability to pay. The underlying assumption of this theory is that people have an obligation to pay taxes to support the members of the society to which they belong in accordance with their ability to pay taxes, which should be measured by their worldwide income.[16]

Critics argue that the social obligation theory best defends citizenship tax among the three traditional theories used to assess fairness.[17] However, opponents of citizenship taxation criticize this theory because, although citizenship would generally be a good proxy for national community membership, it would not be a good proxy when citizens reside abroad. Furthermore, even if we assume that nonresident citizens are included in that community, the current regime would violate the ability-to-pay principle.[18] Due to the different factors affecting the ability to pay, such as difference in the standard of living or amenities between places, "it would be fairer to calculate a person's ability to pay by reference to the place where she lives rather than to the place where she holds her citizenship."[19] If we are to tax residents and nonresidents alike despite the differences across countries, we should "actually tax them alike," which would require the repeal of the foreign-earned income exclusion and the allowance of unlimited foreign tax credits, including foreign consumption taxes, as well as the implicit taxes and subsidies to compensate the differences.[20] Therefore, opponents of citizenship taxation would imply that citizenship is a worse criterion than residence to measure the ability to pay.[21]

Even residence-based taxation does not, however, completely account for the differences between resident and nonresident taxpayers that affect their ability to pay. To illustrate, consider the case of Korea, which uses residence-based taxation for individuals, and its three citizens, *A*, *B*, and *C*. *A* resides in Korea and has never

14. *Id.* at 195 n.168; Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1309 (2011).
15. *See infra* text accompanying notes 74–75.
16. Mason, *supra* note 1, at 196–97.
17. *Id.* at 197.
18. *Id.* at 197–210.
19. *Id.* at 208.
20. *Id.* at 209–10.
21. *Id.* at 211.

left there. *B* is a student studying in the United States only for the past three years. *C* is a U.S. green-card holder, residing in the U.S only for the past three years. *A* has only Korean-source income, while *B* and *C* have both Korean-source and U.S.-source income. *A* and *B* are residents for Korean tax purposes, while *C* is a nonresident for Korean tax purposes. Remember that even under residence-based taxation, once an individual is determined to be a resident her worldwide income is subject to taxation. Therefore, *A*'s and *B*'s worldwide income is subject to Korean tax, whereas *C*'s Korean-source income is subject to Korean tax.

Table 1

	Residence status	**Income**	**Citizenship tax**	**Residence-based tax**
A	Citizen & resident (never left Korea)	Korean source	Worldwide income (Korean source)	Worldwide income (Korean source)
B	Citizen & resident (studying in the U.S. for past 3 yrs.)	Korean source + U.S. source	Worldwide income (Korean source + U.S. source)	Worldwide income (Korean source + U.S. source)
C	Citizen & nonresident (obtained U.S. green-card 3 yrs. ago)	Korean source + U.S. source	Worldwide income (Korean source + U.S. source)	Korean source income only

As shown in Table 1, although *A* and *C* reside in different countries, citizenship taxation taxes *A* and *C* alike by subjecting their worldwide income to Korean tax. Residence-based taxation obviously taxes *A* and *C* differently—for *C*, only Korean source income is subject to Korean tax. However, residence-based taxation taxes *A* and *B* alike under the same principle applicable to residents, although the factors affecting *B*'s ability to pay are different from those affecting *A* for the past three years. In fact, *B* and *C* have been affected by the same factors for the past three years.

In other words, under the ability-to-pay principle *B* and *C* ought to be taxed alike, while *A* should be taxed differently, but neither citizenship taxation nor residence-based taxation achieves this result. In the above example, residence-based taxation may account for the difference between *A* and *C*, but it fails to account for the similarity between *B* and *C*. On the other hand, citizenship taxation may account for the similarity between *B* and *C*, but it fails to account for the difference between *A* and *C*.

Therefore, even residence-based taxation does not completely account for the differences between resident and nonresident taxpayers that affect their ability to pay. Given that both citizenship-based and residence-based taxation have flaws in accounting for ability to pay, it is unfair to blame the former and praise the latter under the same ability-to-pay principle.[22] More importantly, the analysis under the

22. If the differences in the living standard, amenities, or social goods and services are quantifiable, it is particularly unfair to draw such conclusion without undertaking

fairness prong does not support either citizenship taxation or residence-based taxation entirely. As a result, although Mason discusses the fairness concern more thoroughly than the other two concerns throughout her paper, the fairness analysis does not provide critical grounds to forgo citizenship taxation. Thus, whether citizenship taxation is a good or bad policy depends more on the analysis under the efficiency and the administrability prongs. The next two Parts explore the other two prongs more deeply.

II. EFFICIENCY

A. Whether Citizenship Taxation Distorts Americans' Choices

Commenters against citizenship taxation criticize its efficiency, arguing that citizenship taxation distorts Americans' citizenship decisions, particularly focusing on nonresident Americans. For example, Mason asserts that "citizenship taxation encourages nonresident Americans to renounce their U.S. citizenship purely for tax reasons."[23] However, she also concedes that "citizenship is inelastic" and "citizenship taxation has not precipitated mass renunciations of citizenship."[24]

Then, a key question about the distortion of nonresident Americans' citizenship decisions is how serious the renunciation problem is among nonresident Americans and to what extent citizenship taxation distorts their citizenship decision. In this regard, the renunciation rate of the diaspora population would be insightful indicia regarding the nonresidents' distortion problem.[25] Empirical data on the volume of renunciation and diaspora population of the United States and comparable countries are necessary for this purpose.

This quantitative comparison may not be a perfect tool to explain how serious each country considers a marginal increase or decrease of renunciation. There would be a number of factors to be considered to explain the renunciation problem even qualitatively, such as whether the country allows dual citizenship, how strong are national sentiments attached to citizenship, whether and to what extent renunciation is treated as immoral and/or illegal, and so on. However, such qualitative analysis embracing all such factors is beyond the scope of this Article. The quantitative analysis of this Article represents a good start to understanding the renunciation problem more empirically.

1. Loss of Nationality

First, I selected countries (as shown in Table 2 below) as comparable among major trading partners of the United States in various regions. I tried to include as many as possible of the OECD member states. However, I excluded several

empirical studies or drawing on existing data to compare the extent to which citizenship and residence criteria account for the differences.

23. Mason, *supra* note 1, at 226.

24. *Id.* at 227.

25. A blog posting containing research by a nongovernmental organization (NGO) inspired me to embark on the extended empirical analysis. *See* Eric, *Comparing Renunciation Rates Around the World*, ISAAC BROCK SOC'Y (May 23, 2012), http://isaacbrocksociety.ca/2012/05/23/comparing-renunciation-rates-around-the-world/.

countries because they were not categorized as "high-income countries" by the World Bank (WB)[26] or because there was no reliable official data on the loss of nationality.[27] I added Hong Kong to the list because, although it is not a member of the OECD, it is categorized as among "high-income countries" by the WB,[28] and official data on the loss of nationality is available.

Before analyzing the statistics, I must note a couple of points. All countries except the United States have a residence-based taxation system. Singapore, Taiwan, and South Korea impose conscription on all male citizens.[29] The statistics of Japan,[30]

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26. THE WORLD BANK, MIGRATION AND REMITTANCES FACTBOOK 2011 (2d ed. 2011), https://openknowledge.worldbank.org/handle/10986/2522. After I selected my sample using the 2011 version, the 2016 version was released in late Dec. 2015, in which twelve new countries are re-categorized as "high-income countries." I decided to continue to use the 2011 version for my study in order not to disrupt already completed work.

I compared the United States with developed and high-income countries in order to control for many variables. Obviously, citizens in under-developed countries, economically or politically, would have different motivations for renouncing citizenship and different opportunities to migrate freely to foreign countries. I excluded Chile, Mexico, and Turkey based on this criterion.

27. I excluded Canada, Israel, New Zealand, and Australia because official statistics on the loss of nationality is not available.

Among European countries, I excluded France and Luxembourg because official statistics on the loss of nationality is only available for one year—2008 for France and 2011 for Luxembourg. I also excluded Germany, Italy, Austria, Czech Republic, Portugal, Switzerland, Norway, Iceland, and Spain because official statistics on the loss of nationality are not available. *See* Maarten Peter Vink & Ngo Chun Luk, *Mapping Statistics on Loss of Nationality in the EU: A New Online Database* (CEPS Paper in Liberty & Security in Europe No. 76, 2014), https://www.ceps.eu/publications/mapping-statistics-loss-nationality-eu-new-online-database.

For the statistical data on the loss of nationality of European countries (from Belgium to the U.K.) between 2008 and 2012, I mostly use the statistical data from the European Office of Statistics (Eurostat), available at *Loss of Citizenship by Sex and New Citizenship*, EUROSTAT, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_lct &lang=en (last visited Feb. 15, 2017), rather than using the national statistics of each country. However, for Hungary and Finland, I use the statistical data as reported by national sources in EU member states. Vink & Luk, *supra*, at 18.

Some of the Eurostat data is reprinted in a report by the Center for European Policy Studies. *See id.* at 17. Data for the year 2013 is available at the Eurostat website as well as at European Union Democracy Observatory on Citizenship, *Statistics on Loss of Citizenship - Data*, EUDO CITIZENSHIP, http://eudo-citizenship.eu/statistics-on-loss-data/?stype=2&stat=0 (last visited Feb. 15, 2017). When the two data are in conflict, I use the Eurostat data.

28. THE WORLD BANK, *supra* note 26.

29. *The World Factbook: Military Service Age and Obligation*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/fields/2024.html (last visited Feb. 15, 2017).

30. There are two categories of Japanese loss of nationality—the first is *kokuseki ridatsu* (国籍離脱), where a dual citizen, whether by birth or by naturalization, surrenders her Japanese citizenship to resolve dual-citizenship status, and the second is *kokuseki soshitsu* (国籍喪失), where a Japanese citizen acquires a foreign citizenship but did not resolve the dual-citizenship status so that she (involuntarily) loses her Japanese citizenship. *See* MINISTRY OF JUSTICE (法務省), NATIONALITY Q&A (国籍 Q&A) Q12, http://www.moj.go.jp/MINJI/minji78.html#a12 (last visited Feb. 17, 2017) (Japan).

South Korea,[31] and Hong Kong[32] include more than one category of expatriates.

Table 2: Loss of nationality per year (2008–2015)

	2008	2009	2010	2011	2012	2013	2014	2015
Belgium	73	59	43	54	55	41	N/A	N/A
Croatia	1,694	1,352	1,231	1,442	1,051	537	N/A	N/A
Denmark	359	404	417	291	308	346	N/A	N/A
Estonia	29	115	123	101	119	145	N/A	N/A
Finland	67	52	38	79	110	92	N/A	N/A
Greece	7	45	27	20	N/A	N/A	N/A	N/A
Hong Kong	159	170	186	204	214	241	249	243
Hungary	87	78	97	154	115	186	N/A	N/A
Ireland	N/A	32	24	30	32	38	N/A	N/A
Japan	798	837	763	880	973	1,147	1,502	1,439
Netherlands	293	291	361	355	440	479	N/A	N/A
Poland	428	281	354	310	315	95	N/A	N/A
Singapore	1,200	1,200	1,200	1,200	1,200	1,200	1,200	1,200
Slovakia	182	182	260	351	334	N/A	N/A	N/A
Slovenia	31	32	13	35	37	N/A	N/A	N/A
S. Korea	20,439	22,011	22,865	22,797	18,464	20,090	19,472	17,529
Sweden	N/A	3	5	2	6	6	N/A	N/A
Taiwan	780	844	838	740	722	680	652	759
U.K.	585	567	596	491	604	598	N/A	N/A
U.S.	221	742	1,534	1,781	932	3,000	3,415	4,279

Sources in footnote.[33]

31. Korean law is similar to that of Japanese law. The statistics on the loss of nationality include two categories: *kwukchuk itahl* (국적이탈) and *kwukchuk sangsil* (국적상실), which correspond to the two Japanese categories, respectively. *See Statistics on Nationality* (국적통계추이), STATISTICS KOREA, http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1760 (last visited Feb. 17, 2017) (S. Kor.).

32. There are also two categories of loss of citizenship in Hong Kong: (i) declaration of change of nationality; and (ii) renunciation of nationality, which also corresponds to the two Japanese and Korean categories, respectively. *See, e.g., Annual Report 2012*, IMMIGR. DEP'T, http://www.immd.gov.hk/publications/a_report_2012/en/ch3/index.htm#c_3_9 (last visited Feb. 17, 2017).

33. Hong Kong: *Annual Report 2011*, IMMIGR. DEP'T, http://www.immd.gov.hk/publications/a_report_2011/en/ch3/index.html#b9 (last visited Feb. 17, 2017); *Annual Report 2012*, *supra* note 32; *Annual Report 2013*, IMMIGR. DEP'T., http://www.immd.gov.hk/publications/a_report_2013/en/ch3/index.html#c9 (last visited Feb. 17, 2017). For data of 2014 and 2015, see *Chinese Nationality*, IMMIGR. DEP'T, http://www.immd.gov.hk/eng/facts/naturalisation-nationality.html (last updated Feb. 15, 2016). For data for earlier years, see Eric, *supra* note 25.

Chart 1, on the next page, depicts data for the key countries in Table 2; it includes countries either whose data is available throughout the relevant research years (2008–2015) or whose absolute number of renunciations exceeds 500 in any given year.

Japan: MINISTRY OF JUSTICE (法務省), TRENDS IN THE NUMBER OF APPLICANTS FOR NATURALIZATION PERMIT (帰化許可申請者数等の推移), http://www.moj.go.jp/MINJI/toukei_t_minj03.html (last visited Feb. 27, 2017) (Japan). The number includes two cases—first, a Japanese person who is a dual citizen and voluntarily relinquishes his or her Japanese citizenship, and second, a person who is stripped of citizenship by the government due to the citizen's inaction in resolving his or her dual-citizenship status.

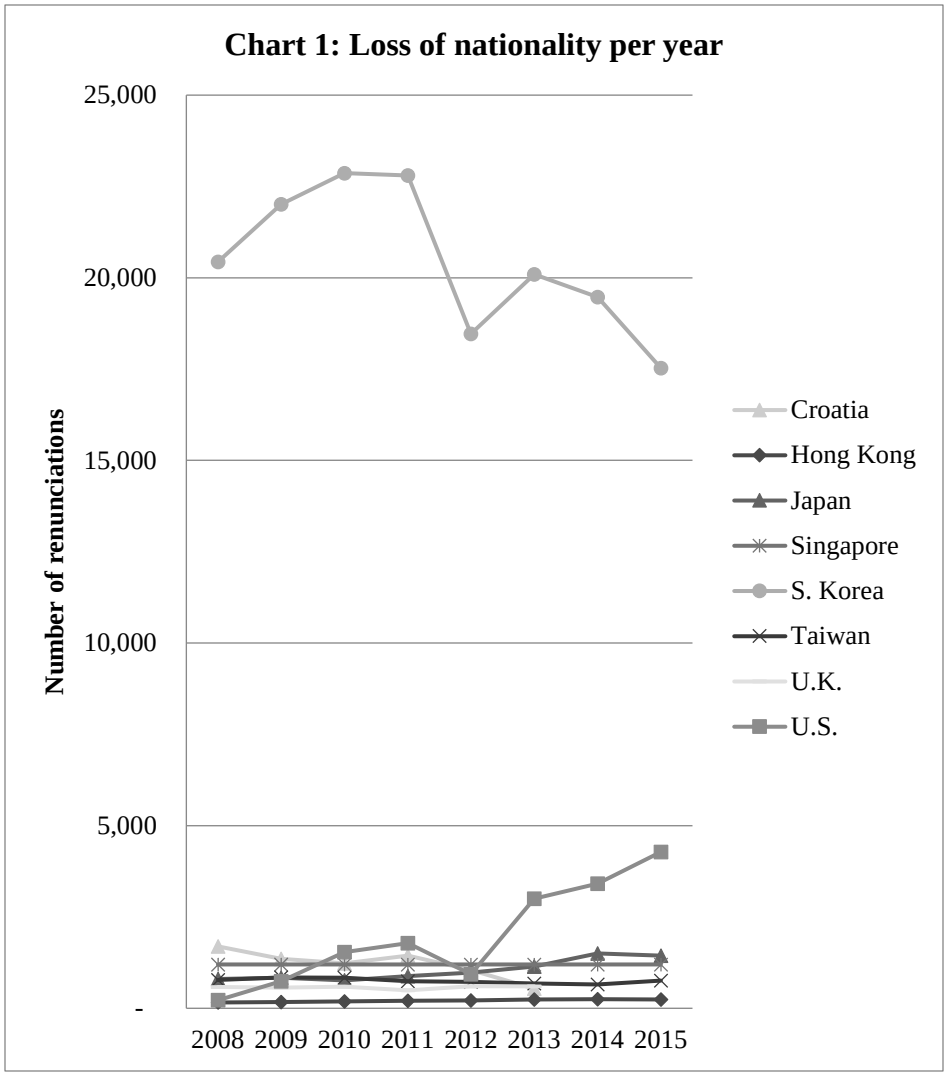
Singapore: As for Singapore, there are no official statistics available for each year, but the official transcript of the parliamentary proceedings provides that "[a]n average of 1,200 Singaporeans renounced their citizenship each year from 2007 to 2011." *Granting Citizenship and Permanent Residency Status*, PARLIAMENT OF SINGAPORE (Feb. 28, 2012), http://sprs.parl.gov.sg/search/topic.jsp?currentTopicID=00076969-WA&currentPubID=00076980-WA&topicKey=00076980-WA.00076969-WA_7%2Bid-5eaef9f3-0369-4ad9-8f98-6ac24eb907b6%2B#. I rely on this information and assume the same numbers for the years 2012 through 2015.

South Korea: KOREA IMMIGRATION SERVICE, MINISTRY OF JUSTICE, KIS STATISTICS 2014, at 62 (2015); *Statistics of Nationality*, STATISTICS KOREA (2016), http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1760 (last visited Feb. 17, 2017) (S. Kor.).

Taiwan: *Statistical Yearbook of Interior (內政統計年報), 2.07 Loss of the R.O.C. Nationality*, MINISTRY OF INTERIOR: DEPARTMENT OF STATISTICS, http://sowf.moi.gov.tw/stat/year/elist.htm (last updated Mar. 2016) (Taiwan).

United States: I extracted the relevant data for the United States from quarterly reports published by the Treasury and IRS. *Quarterly Publication of Individuals, Who Have Chosen to Expatriate*, FEDERAL REGISTER, https://www.federalregister.gov/quarterly-publication-of-individuals-who-have-chosen-to-expatriate (last visited Feb. 17, 2017).

Other countries: For information regarding source of data for the other countries listed, see *supra* notes 26–28 and accompanying text.



Although the absolute numbers of renunciations in other countries are quite stable, the number of renunciations in the United States has been fluctuating. Michael Kirsch's observation of the U.S. statistics on citizenship renunciation from 1991 through 2013 provides more insight into understanding this recent fluctuation. Kirsch explains that approximately 600 people per year lost their U.S. citizenship from 1991 through 2001,[34] and then the number increased to approximately 800 per year until 2005.[35] However, the number decreased to approximately 200 per year in 2006 through 2008, and then dramatically increased in 2009 through 2011, resulting

34. Kirsch, *supra* note 5, at 182 n.294.
35. *Id.* at 182.

in 742 losses in 2009, 1,534 in 2010, and 1,781 in 2011.[36] Kirsch explains that the increase in this period could be related to the UBS scandal[37] and the subsequent Offshore Voluntary Disclosure Initiative (OVDI) by the IRS to enforce citizenship taxation and FBAR more effectively.[38] The number briefly decreased to 932 in 2012, and then dramatically increased to 3,000 in 2013, which may be related to the imminent implementation of FATCA.[39] After Kirsch's research period, citizenship renunciation slightly increased to 3,415 in 2014, and further increased to 4,279 in 2015 and to 5,409 in 2016.[40]

Although U.S. citizenship renunciation has gradually increased since 2008, the United States was not an outlier until 2013. The absolute number was similar to that of other countries until 2013. However, the spike in 2013 ranked the United States second highest, although the gap between the first (South Korea) and the second highest is still significant, as shown in Table 2 and Chart 1. Again, however, in order to understand how serious the recent renunciation problem is among nonresident Americans, it is necessary to look into the ratio of expatriates relative to diaspora population.

2. Diaspora Population

It is hard to obtain comprehensive and consistent data on the population of nonresident citizens of various countries. Among various data on the similar concepts as nonresident citizens, I found that data on the diaspora population is likely the most available data for this analysis.

It is also hard to obtain and choose year-by-year statistics on the diaspora population of various countries. Relying on national statistics is not a proper method. First, not every country provides such statistics. Second, even though several countries do so, the methodology, such as the definition of diaspora population, varies across countries, rendering country-to-country comparison of the numbers essentially meaningless. Thus, I use the consolidated data published by the United Nations (UN) and the World Bank (WB) as of 2010 and 2013,[41] except Taiwan,[42] to

36. *Id.* at 182–83.

37. *See infra* text accompanying note 92.

38. Kirsch, *supra* note 5, at 185.

39. *Id.* at 183–84. The final regulations for FATCA, released in January 2013, set the effective date of the 30% of FATCA withholding tax on certain payments as of January 1, 2014. However, it was subsequently delayed until July 1, 2014. *Summary of FATCA Timelines*, IRS, https://www.irs.gov/Businesses/Corporations/Summary-of-FATCA-Timelines (last updated Jun. 2, 2016).

40. *See supra* note 33 (information regarding United States).

41. For UN data as of July 2010, see UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, POPULATION DIVISION, TRENDS IN INTERNATIONAL MIGRANT STOCK: THE 2013 REVISION-MIGRANTS BY DESTINATION AND ORIGIN tbl.7 (2013). For UN data as of July 2013, see *id.* at tbl.10.

For WB data as of October 2010, see THE WORLD BANK, *supra* note 26. For WB data as of 2013, see *Bilateral Migration Matrix* 2013, WORLD BANK (2013), https://www.worldbank.org/en/topic/migrationremittancesdiasporaissues/brief/migration-remittances-data.

42. For Taiwan, I use the WB's data in 2000, available at *Global Bilateral Migration| World DataBank*, WORLD BANK, http://databank.worldbank.org/data/reports.as

create Table 3. I observed the trajectory of the diaspora population for additional years and found that the number of diaspora population is quite stable.[43]

Table 3: Diaspora population in 2010 and 2013

	UN 2010	WB 2010	UN 2013	WB 2013
Belgium	476,497	455,000	518,951	530,401
Croatia	728,005	753,900	757,903	888,219
Denmark	239,886	259,600	252,435	265,529
Estonia	175,010	169,500	186,281	191,205
Finland	300,656	329,500	308,420	314,075
Greece	844,241	1,210,300	903,714	1,000,137
Hong Kong	754,629	719,300	788,568	784,079
Hungary	491,198	462,700	527,429	570,188
Ireland	737,036	737,200	771,572	782,838
Japan	828,991	771,400	882,123	1,012,924
Netherlands	947,080	993,400	998,666	1,008,742
Poland	3,357,408	3,102,600	3,662,384	3,882,994
Singapore	290,534	297,200	303,394	282,213
Slovakia	314,576	520,100	349,279	592,292
Slovenia	150,692	132,000	158,076	171,331
South Korea	2,474,689	2,078,700	2,594,382	2,604,888
Sweden	308,688	317,900	335,762	352,002
Taiwan	475,693	475,693	475,693	475,693
U.K.	4,826,530	4,468,300	5,178,027	5,151,142
U.S.	2,734,962	2,423,600	2,979,930	3,167,905

3. Renunciation Rates

Table 4 and Chart 2 show a rough estimate comparing renunciation rates per 100,000 diaspora populations in 2010 and 2013. It demonstrates that the U.S. renunciation rate is not in the top-tier. The top three countries are South Korea, Singapore, and Taiwan, all of which require mandatory military service. In the 2010 U.N. data, the U.S. renunciation rate is only 6% of the Korean rate, 13.6% of the

px?source=global-bilateral-migration# (last visited Feb. 17, 2017), because neither the UN nor the WB provides data on the Taiwanese diaspora population since the early 2000s. I did not rely on the national statistics of Taiwan for consistency; the number contained in the national statistics (1,837,000 in 2014) is significantly different from that of the UN or the WB, which is a commonly observed error gap between national data and international organizations' data.

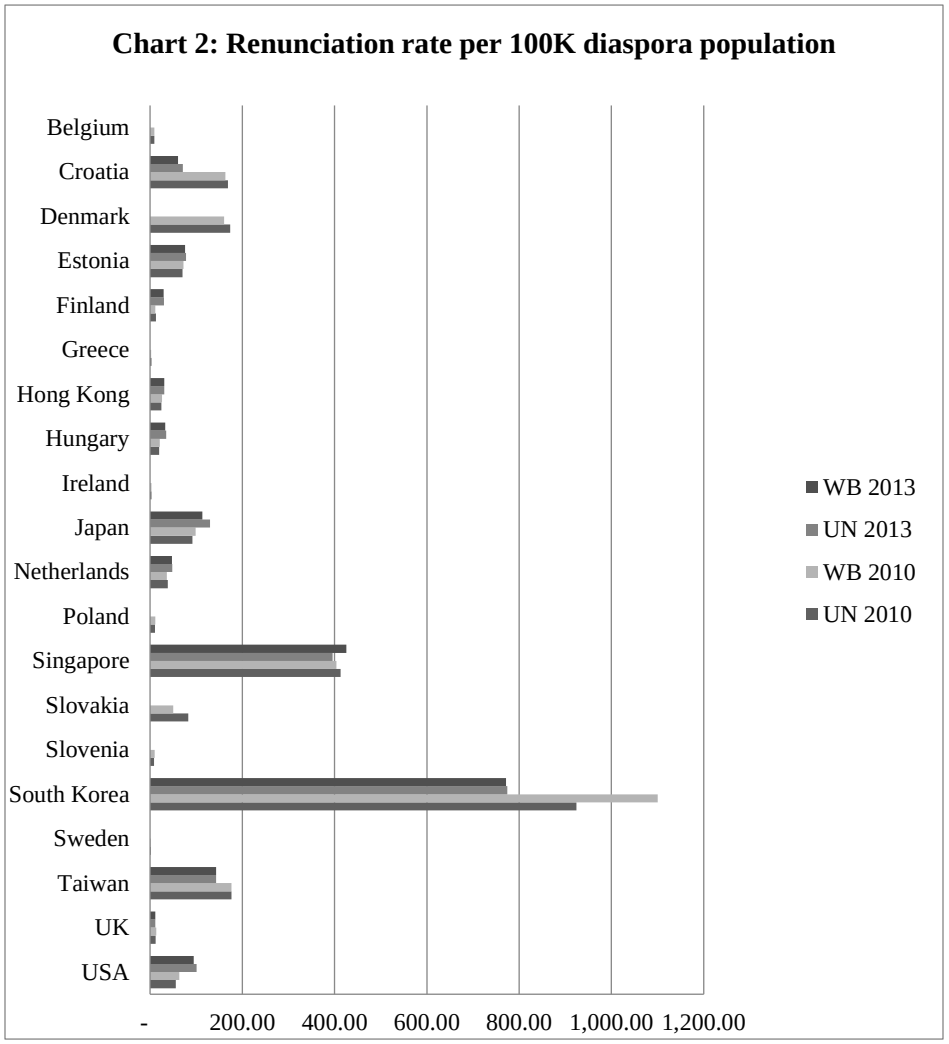
43. For example, the UN Development Programme provides data for 1990 and 2000 as well. *See* UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, POPULATION DIVISION, *supra* note 41, at tbls.1 & 4.

Singaporean rate, and 31.8% of the Taiwanese rate. Moreover, if I substitute the number of the U.S. diaspora population with 6,320,000 for year 2010, which is the unofficial estimate from the U.S. Department of State,[44] the U.S. renunciation rate drops further to 24.27, which is only 2.6% of the Korean rate, 5.9% of the Singaporean rate, and 13.8% of the Taiwanese rate. The U.S. rate increased significantly in 2013, but it is still 13% of the Korean rate, 25.5% of the Singaporean rate, and 70.4% of the Taiwanese rate.

Table 4: Renunciation rate per 100K diaspora population in 2010 and 2013

	UN 2010	WB 2010	UN 2013	WB 2013
Belgium	9.02	9.45	N/A	N/A
Croatia	169.09	163.28	75.34	64.29
Denmark	173.83	160.63	N/A	N/A
Estonia	70.28	72.57	120.25	117.15
Finland	12.64	11.53	29.83	29.29
Greece	3.20	2.23	N/A	N/A
Hong Kong	24.65	25.86	30.56	30.74
Hungary	19.75	20.96	35.27	32.62
Ireland	3.26	3.26	N/A	N/A
Japan	92.04	98.91	130.03	113.24
Netherlands	38.12	36.34	47.96	47.48
Poland	10.54	11.41	N/A	N/A
Singapore	413.03	403.77	395.53	425.21
Slovakia	82.65	49.99	N/A	N/A
Slovenia	8.63	9.85	N/A	N/A
South Korea	923.95	1,099.97	774.37	771.24
Sweden	1.62	1.57	N/A	N/A
Taiwan	176.16	176.16	142.95	142.95
U.K.	12.35	13.34	11.63	11.69
U. S.	56.09	63.29	100.67	94.70

44. This number is based on the unofficial estimates from the U.S. Department of State in late 2011. *See 8.7 Million Americans (Excluding Military) Live in 160-Plus Countries*, ASS'N AM. RESIDENT OVERSEAS, https://www.aaro.org/about-aaro/8m-americans-abroad (last visited Apr. 2, 2017).



Thus, although it has been reported that the number of renunciations by U.S. citizens has been increasing dramatically due to the recent FATCA and FBARs reporting requirements, it is nowhere as serious as those of other countries with military draft systems.

One might argue that Table 4 is like comparing apples and oranges because what motivates renunciation varies across the countries. However, each individual who ended up denouncing citizenship also has his or her own rhetoric. A young South Korean man who is not married with $150,000 of annual income may be inclined to renounce his Korean citizenship not only because he wants to avoid the mandatory military service but also because he does not like the 38% marginal

income tax rate applicable to his $150,000 annual income,[45] which would be subject to 28% marginal tax rate in the United States.[46]

Truly, we lack empirical studies on the specific motivation of renunciation. Moreover, Table 4 is not enough to assess the extent of the distortion caused by citizenship taxation because there are no statistics available on the volume of citizens' decision to choose American citizenship over other citizenship, despite citizenship taxation. However, given that the U.S. renunciation rate among the diaspora population is not relatively significant, we would be better advised not to jump to the conclusion that citizenship taxation distorts nonresident Americans' citizenship decisions in some economically meaningful way.

B. Whether Citizenship Taxation Distorts Non-Americans' Decision

One of the new contributions of Mason's article is its discussion of efficiency as it relates to the immigration decision by non-Americans. Mason argues that citizenship taxation distorts non-Americans' inbound migration decisions and puts the United States at a competitive disadvantage in attracting marginal migrants.[47] While acknowledging that taxation is not a primary reason for immigration for most people, Mason focuses on a smaller group of potential—or "marginal"—migrants with wealth and high skills who can choose where to migrate as a relevant population for evaluating the efficiency of citizenship taxation. She argues, "[W]hereas the impact of citizenship taxation on overall migration patterns is likely to be small, the effect of citizenship taxation may be nevertheless important to the extent that it affects decisions of highly desirable migrants."[48]

However, even for those marginal migrants' decision, citizenship taxation is not as significant as Mason claims.[49] Mason's argument makes sense in light of its ceteris paribus assumption—i.e., if all else is equal, citizenship tax may distort the marginal migrants' citizenship decision—and one of the important assumptions is that the U.S. immigration law has a policy to "attract and retain" the wealthy and highly skilled migrants.[50] However, I am skeptical about that assumption, and agree with Yale-Loehr & Hoashi-Erhardt who argued that "U.S. immigration law is not designed to prefer permanent residence for the highly skilled."[51] After 9/11, the United States narrowed the window of opportunity for inbound migration even to marginal migrants.[52] Most of those marginal migrants start their professional careers

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45. Sodeukse beob [Income Tax Act], Act No. 15-33, Jul. 15, 1949, *amended by* Act No. 12169, Jan. 1, 2014, art. 55 (S. Kor.).

46. Rev. Proc. 2014–61, § 3.01, 2014–47 I.R.B. 860.

47. Mason, *supra* note 1, at 227–30.

48. *Id.* at 223.

49. Mason admits that the empirical data is mixed. *Id.* at 223 n.302.

50. *Id.* at 229.

51. *Id.* at 229–30 n.340.

52. *See generally* Julia Funke, *Supply and Demand: Immigration of the Highly-Skilled and Educated in the Post-9/11 Market*, 48 J. MARSHALL L. REV. 419 (2015); Michele R. Pistone & John J. Hoeffner, *Rethinking Immigration of the Highly-Skilled and Educated in the Post-9/11 World*, 5 GEO. J. L. PUB. POL'Y 495 (2007).

For example, before 9/11, many skilled workers with PhD degrees were able to work at the federal or state government, or do research at an institute with I.R.C. § 501(c) status, in which case their H-1B work visas were not subject to annual quota. AUSTIN T.

in the United States under nonimmigrant status, such as an H-1B worker, rather than through permanent residency. The quota for H-1B visas for both skilled and nonskilled workers is only 65,000 per year; it used to be 195,000 before 9/11.[53] If the application number exceeds the quota, the U.S. Citizenship and Immigration Services (USCIS) conducts a computer-generated random-selection lottery. The recent data shows that 51% of H-1B petitions for year 2015 were rejected in the USCIS Lottery.[54] And the odds get worse: 64% of petitions were rejected for year 2016 and 2017.[55] Given the narrow entrance gate afforded to those seeking to use their "high skills" in the United States, there is little room for them to worry about tax issues when they have less than a 40% chance of getting a work permit.[56]

More importantly for our purposes, a significant number of highly skilled immigrants spend years in the United States as nonimmigrants—such as F1 students and J1 trainees—before they even apply for a work visa or residency status. A foreign student or trainee is treated as a resident for tax purposes, subject to worldwide taxation by the U.S. tax authorities, after five years of staying in the United States.[57] A trainee may also be treated as a U.S. resident for tax purposes if she has been a trainee or a student for any two calendar years during the preceding six calendar years.[58] That means, contrary to Mason's assumption that the prospect of worldwide taxation factors significantly into marginal migrants' decision to become green-card holders or naturalized citizens, a significant number of marginal

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FRAGOMEN, JR., ET AL., H-1B HANDBOOK § 1:19 Section 3 (2013 ed.). However, after 9/11, positions at the government and/or at government-sponsored institutions are no longer available to foreigners in practice because of the newly imposed status requirement of citizen or green-card holder. Therefore, those highly skilled workers now have to get an offer from private companies, or participate in the lottery, and the odds of winning the H-1B lottery have decreased.

53. Pistone & Hoeffner, *supra* note 52, at 497. An additional 20,000 of H-1B visas are reserved for master's degree holders. For details about the H-1B visa and its cap, see *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, USCIS, https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models (last updated Mar. 15, 2017).

54. Roy Maurer, *51% of FY 2015 H-1B Petitions Rejected in USCIS Lottery: Employers Now Playing the Waiting Game*, SOC'Y FOR HUM. RESOURCE MGMT. (Apr. 14, 2014), http://www.shrm.org/hrdisciplines/safetysecurity/articles/pages/2015-h1b-petitions-rejected-uscis-lottery.aspx.

55. USCIS received nearly 233,000 H-1B petitions during the filing period for fiscal year 2016, and 236,000 petitions for fiscal year 2017. Both numbers include petitions filed for master's degree holders. *USCIS Completes the H-1B Cap Random Selection Process for FY 2016*, USCIS, https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2016 (last updated Apr. 13, 2015); Sara Ashley O'Brien, *High-Skilled Visa Applications Hit Record High—Again*, CNN MONEY (Apr. 12, 2016, 9:29 P.M.), http://money.cnn.com/2016/04/12/technology/h1b-cap-visa-fy-2017/. The odds are calculated by dividing the number of petitions of a relevant year by the total number of H-1B visas per year (i.e., 85,000).

56. Once they immigrate to the United States and become a green-card holder or naturalized citizen, then the distortion, with respect to maintaining citizenship or permanent resident status, may matter. But such distortion applies to natural-born citizens equivalently.

57. I.R.C. § 7701(b)(5)(A), (E)(ii).

58. I.R.C. § 7701(b)(5)(A), (E)(i).

migrants have already been subject to worldwide taxation by the time they apply for permanent residency or naturalization. Worldwide taxation just happens at some point during their stay in the United States even when the United States does not afford them the rights and privileges of citizenship or permanent residency, and even before they obtain an H-1B work visa in many cases.

In addition, although Mason distinguishes marginal migrants from the majority migrants who are not wealthy or highly skilled workers so that "taxes are not an important factor in decisions about where to reside,"[59] taxes would not be of much importance for marginal migrants, either. There might be various considerations other than tax that influence the decision to immigrate to the United States, including women's low socioeconomic status, racial discrimination, and political disagreement. Let us consider the case of Google founder Sergey Brin, who is comparable to Elon Musk whom Mason gives as an example of a marginal migrant.[60] Brin's father immigrated to the United States because of the anti-Semitic practices by the Communist Party of the Soviet Union.[61] Given that Brin's family came to America with exit visas, I assume that Sergey was naturalized along with his parents when he was a minor. Putting aside the young Sergey's thought about the naturalization, would Sergey's father have decided differently if he had made a fortune, as his son eventually did, when he was about to be naturalized? I doubt it.

Therefore, I would be hesitant to conclude that citizenship taxation discourages inbound immigration of wealthy and highly skilled people and puts the United States at a disadvantage in attracting them. What makes wealthy and highly skilled immigration to the United States difficult is not the U.S. tax law but is, instead, U.S. immigration law.

III. ADMINISTRABILITY

A. Determining Residence May Be a Worse Problem

With respect to the administrability argument, I am sympathetic to the general criticism of citizenship taxation about enforcement difficulties abroad. In order to address enforcement concerns, several commenters have proposed diverse alternatives. Brainard Patton, Jr., argues for a pure residence-based taxation system that applies the same substantial presence test that exists under current law in order to determine whether a resident is subject to worldwide taxation.[62] However, this theory is criticized for not corresponding to the ability-to-pay principle, because many Americans abroad who would not meet the substantial presence test could still

59. Mason, *supra* note 1, at 222.

60. *Id.* at 175. Mason gave Sergey Brin as an example of a marginal migrant in her early draft when I first drafted this Article. Although she changed that example to Elon Musk in her final draft, I find Brin's example more intriguing and maintain the example here.

61. Mark Malseed, *The Story of Sergey Brin*, MOMENT (Feb. 2007), http://web.archive.org/web/20130121055147/http://www.oldsite.momentmag.net/moment/issues/2007/02/200702-BrinFeature.html.

62. Brainard L. Patton, *United States Individual Income Tax Policy as It Applies to Americans Resident Overseas: Or, If I'm Paying Taxes Equal to 72 Percent of My Gross Income, I Must Be Living in Sweden*, 1975 DUKE L. J. 691, 730–32 (1975).

maintain their membership in the national community.[63] A more modified residence-based taxation system is commonly asserted, under which citizenship is one factor and the nexus between the taxpayer and the state is considered more substantially.[64] However, no matter how modified the residence-based taxation system is, residence, unlike citizenship, naturally requires consideration of all facts and circumstances.[65] Factors to be considered not only include objective facts, such as the number of days physically spent in a country, but also more subjective circumstances, such as how strong the ties are between the taxpayer and the state. Citizenship would of course be considered as a factor even in the residence-based taxation. Thus, it is not clear to me how the "modified" residence-based taxation, which considers citizenship as a factor, could address problems in the "pure" residence-based taxation.

Furthermore, what proposals to move from a citizenship taxation system to a (modified) residence-based taxation system may have missed is the observation that, if the United States retreats from citizenship taxation and adopts (modified) residence-based taxation, the larger problem may be resource-intensive disputes over residency, which should be resolved before enforcement. Currently, the United States rarely challenges its citizens' residency statuses, whereas the countries with residence-based taxation are heavily involved in time-consuming, costly tax disputes with high net-worth individuals with dual residency.[66]

The following South Korean cases illustrate how serious the problem of determining residence can be under a residence-based taxation system in the real world. South Korea defines a tax resident as a person who has either a residence or domicile for a year or longer in Korea.[67] Residence is determined by the objective facts and circumstances of the living arrangements, such as household family

63. Mason, *supra* note 1, at 231.

64. *Id.* at 231–33.

65. For example, historically the definition of "resident alien" in the Internal Revenue Code (Code) relied on subjective factors, such as their economic and other interests in the United States until the Code adopted the substantial presence test to determine whether such alien was present 183 days during the tax year and the two preceding years, using a simple formula in Section 7701(b). Even after adopting the substantial presence test, the Code allows a "closer connection" exception in Section 7701(b)(3)(B), which considers various factors, such as the taxpayer's permanent home, family, personal belongings, social relationship, financial or business activities, driver's license, jurisdiction to vote, and registered residence. CHARLES H. GUSTAFSON ET AL., TAXATION OF INTERNATIONAL TRANSACTIONS: MATERIALS, TEXT, AND PROBLEMS 44–45 (4th ed. 2011).

66. For example, the two biggest recent tax cases dealing with the income tax of individual taxpayers in South Korea are residency disputes involving a shipping magnate and a copper magnate. *See* Mu-hyun Cho, *NTS to Go After Offshore Tax Dodgers*, KOREA TIMES (Feb. 14, 2013), http://www.koreatimes.co.kr/www/news/biz/2013/02/123_130472.html.

67. Sodeukse boeb [Income Tax Act], Act No. 33, Jul. 15, 1949, *amended by* Act. No. 9785, Jul. 31, 2009, art. 1(1)(i) (S. Kor.) before 2009; Sodeukse boeb [Income Tax Act], Act No. 33, Jul. 15, 1949, *amended by* Act. No. 9897, Dec. 31, 2009, art. 1-2(1)(i) (S. Kor.) on or after 2010. After several high-profile tax cases relating to residence, Korea tightened the residence rule in December 2014 by amending the definition of resident to be person who has either residence or a domicile for 183 days or longer in Korea.

residing in Korea and domestic assets.[68] If a person has a domicile in Korea for a year or longer in two consecutive taxable years, she is deemed to have a domicile in Korea for a year or longer.[69] In the early 2010s, Korean tax authorities have challenged three magnates, arguing that they are Korean residents for tax purposes. All of them are high profile cases, making a new record for the highest tax assessment amount in Korean history. However, even in early 2017, the cases were still pending, and the court opinions are divided.

The first case involves Hyuk Kwon, a shipping magnate, who is the owner of the Cido Group. In the 1990s, Kwon established Cido Shipping Co., Ltd., and affiliates in the Cido Group in various countries, including South Korea, Japan, Hong Kong, Liberia, and the Cayman Islands. The structure of the Cido Group involves complicated multi-layered ownership using paper companies in tax havens, all of which are effectively controlled by Kwon by way of registering the stock ownership under a third party's name. Kwon has been a Korean citizen and used to be a Korean tax resident, but he became a Japanese tax resident in 1994, and Japanese tax authorities taxed him as a Japanese tax resident until 2005. However, in 2011, on the grounds that Kwon was a Korean tax resident, the Korean tax authorities issued a Notice of Tax Assessment for the period of year 2006 through 2010 of about 240 million in U.S. dollars to Kwon for individual income tax and of about 115 million in U.S. dollars to a company established in Hong Kong for corporate income tax.[70]

An interesting point of the shipping magnate case is that Kwon and his family generally did not spend more than 183 days in South Korea during the relevant taxable years, as shown in Table 5 below. Nonetheless, Korean tax authorities argued that, despite such numbers, the tax residence of Kwon and his family was South Korea, because both their main base of living and economic activities were in South Korea. First, their main base of living was South Korea

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68. Sodeukse beob sihaengryung [Enforcement Decree of the Income Tax Act], Presidential Decree No. 155, Aug. 5, 1949, *amended by* Presidential Decree No. 22034, Feb. 18, 2010, art. 2(1) (S. Kor.).

69. Sodeukse beob sihaengryung [Enforcement Decree of the Income Tax Act], Presidential Decree No. 155, Aug. 5, 1949, *amended by* Presidential Decree No. 21887, Dec. 15, 2009, art. 4(3) (S. Kor.). This provision is a modified 183-day rule, doubling up the relevant period to two years rather than one year for a typical 183-day test. Therefore, if a person stays around 183 days per year in Korea for two consecutive years, which is a year or longer for two consecutive years, she is deemed to have a domicile in Korea. However, to comply with the amendment to the definition of "tax resident" in the Income Tax Act, discussed at *supra* note 67, the Enforcement Decree revised the relevant provision, so that now if a person has a domicile in Korea for 183 days or longer for two consecutive years, she shall be deemed to have a domicile in Korea for 183 days or longer. *See* Sodeukse beob sihaengryung [Enforcement Decree of the Income Tax Act], Presidential Decree No. 155, Aug. 5, 1949, *amended by* Presidential Decree No. 26067, Feb. 3, 2015, art. 4(3) (S. Kor.).

70. More technically, Korean tax authorities argued that Kwon's deemed dividend income rising from the paper company in Hong Kong should be taxed by South Korea under the controlled foreign corporation rule in Article 17(1) of the Adjustment of the International Taxes Act. Shipping Magnate Admin. Case, *supra* note 11; Seoul Central District Court [Dist. Ct.], 2011Gohap1291, Feb. 12, 2012, *rev'd* Seoul High Ct. [Seoul High Ct.], 2013No874, Feb. 21, 2014, *aff'd* S. Ct., 2014Do3411, Feb. 18, 2016 (S. Kor.) [hereinafter Shipping Magnate Crim. Case].

because: (i) their registered residence has been in South Korea since 1992; (ii) their domicile has been in Seoul, South Korea, since 2004, and they surrendered the Japanese residence in 2006; (iii) both Kwon and his wife served as high-level officers in affiliates of the Cido Group located in South Korea; and (iv) the family almost never visited medical facilities offshore but instead visited Korean hospitals more than a hundred times between 2001 and 2010. Second, their main base of economic activities was South Korea because: (i) Kwon controlled the Cido Group at one of the affiliate's offices in Seoul, South Korea, since 2004; (ii) the family transferred 100% of the shares in the Cido Group and their real estate located in Korea to a paper company, called Melbo International Investment Ltd. (Melbo), in 2006 and 2007; in substance the shipping magnate holds 100% shares of Melbo; (iii) Kwon and his wife hold multiple credit cards and financial accounts in South Korea; and (iv) Kwon holds multiple golf resort memberships in South Korea.

Table 5: Number of days that the Kwons were present in Korea[71]

Year	**Kwon**			**Wife**			**Son**		**Daughter**	
	Korea	Japan	Hong Kong	Korea	Japan	Hong Kong	Korea	Japan	Korea	Japan
2003	166	199	-	203	162	-	21	-	-	-
2004	150	200	6	287	78	-	247	119	69	0
2005	139	201	3	282	83	-	365	-	104	0
2006	135	192	2	217	76	-	352	-	12	0
2007	197	123	37	222	87	17	241	26	42	6
2008	104	161	100	157	132	77	95	-	38	6
2009	128	159	65	154	153	58	-	-	70	0
2010	128	156	78	153	143	69	123	-	70	0

The lower-level courts of Korea agreed with the tax authorities both in criminal and tax cases.[72] However, it was not certain whether the Supreme Court of Korea would affirm the lower courts' decisions because the holdings in other cases were divided, as discussed below. On February 18, 2016, the Supreme Court of Korea vacated and remanded the tax case to the Appellate Court, which was appealed again and is still pending at the Supreme Court in early 2017. However, the Supreme Court of Korea opined in dicta in the tax case decision that Kwon was a tax resident during the relevant tax years; and on the same day, it affirmed the criminal case, treating Kwon as tax resident, and therefore finding him guilty of offshore tax evasion.[73]

Before moving to the second case, it is noteworthy that the court relied on the benefit theory in the shipping magnate case. The court held Kwon was tax resident based on the facts and circumstances test. It held that when determining the

71. Shipping Magnate Admin. Case (Seoul Admin. Ct. decision), *supra* note 11, at 31.

72. *See e.g.*, Editorial, *Punishing Tax Evaders*, KOREA HERALD (Feb. 15, 2013), http://www.koreaherald.com/view.php?ud=20130215000557.

73. Shipping Magnate Admin. Case (S. Ct. decision), *supra* note 11, at 3; Shipping Magnate Crim. Case (S. Ct. decision), *supra* note 70, at 3.

facts and circumstances of the living arrangement, not only the location of the household family and assets should be considered but also "the purposes of the tax system, the location of his or her economic activities to create values as a member of the society and the location where he or she benefit from the welfare system."[74] Given that both U.S. Supreme Court and Korean courts endorse the benefit theory, the judiciary, regardless of the tax rule on the taxation of nonresidents' income, are likely to hold in favor of the tax authorities if they find that the alleged taxpayer seems to benefit from the society. Hence, the benefit theory is not inherently limited to a particular position on the taxation of nonresidents' income.[75]

The Korean tax authorities next bashed Yong-Keu Cha, a copper magnate who acquired the largest copper mining company in Kazakhstan.[76] Cha was an employee of Samsung, which had managed the Kazakhstani copper mining company since 1994. Cha acquired the interest in the mining company held by Samsung in 2004, and then exited by initial public offering at the London Stock Exchange in 2005, making capital gains of about 870 million in U.S. dollars. He was even listed as one of the world's billionaires by *Forbes* in 2007 and 2008.[77] In 2011, Korean tax authorities assessed him for a tax of about 140 million in U.S. dollars. As with the shipping magnate, the tax authorities argued that the copper magnate was a Korean resident for tax purposes. However, in January 2012, the tax tribunal in the National Tax Service disagreed with the tax authorities, particularly relying on the fact that Cha stayed in Korea for only about a month per year. This holding was so inconsistent with the precedent on deemed domiciliary that it gave rise to the rumor that Cha was implicated in the secret funds scandal of Samsung, which had to use its significant influence over the tax authorities to close the case.[78] Although the case was buried because the tax authorities did not appeal to the courts, it shows how complicated and unpredictable the fiercely contested question of residence can become.

Courts are divided in the third example, which involved a toy magnate.[79] Jong-Wan Park has established toy-manufacturing companies in South Korea and has exported toys manufactured in factories in South Korean and China to Ty Inc. in the United States. In late 1990s, Park established offshore sales companies in Hong Kong, and also established paper companies in the British Virgin Islands, Labuan (Malaysia), and other tax havens to shift profits from the companies in Hong

74. Shipping Magnate Crim. Case (Seoul Central Dist. Ct. decision), *supra* note 70, at 26.

75. *See supra* text accompanying notes 10–15.

76. National Tax Service [NTS], Juk-bu2011-0335, Dec. 23, 2011 (S. Kor.)

77. *The World's Billionaires: #754 Yong Keu Cha*, FORBES.COM (Mar. 8, 2007, 6:00 PM), http://www.forbes.com/lists/2007/10/07billionaires_Yong-Keu-Cha_LIEA.html; *The World's Billionaires: #843 Cha Yong-Keu*, FORBES.COM (Mar. 5, 2008, 6:00 PM), http://www.forbes.com/lists/2008/10/billionaires08_Cha-Yong-Keu_LIEA.html.

78. Kim Sang-Jo, Editorial, *What Is the Truth of Yong-Keu Cha, the Copper Magnate? (구리왕 차용규의 진실은?)*, HANGUK ILBO (Aug. 12, 2014), http://news.khan.co.kr/kh_news/khan_art_view.html?artid=201408122059575&code=990100 (S. Kor.).

79. Seoul Admin Ct. [Admin. Ct.], 2012Guhap29028, Jun. 13, 2014 (S. Kor.), *appeal docketed*, Seoul High Ct., 2014Nu6236, Aug. 5, 2014 [hereinafter Toy Magnate Admin. Case]; Seoul Central Dist. Ct. [Dist. Ct.], 2011Gohap119, Feb. 9, 2012, *rev'd* Seoul High Ct., 2012No594, June 27, 2014, *appeal docketed*, S. Ct., 2014Do9026, Jul. 18, 2014 (S. Kor.) [hereinafter Toy Magnate Crim. Case].

Kong. During the relevant taxable years from 1999 through 2008, Park obtained a U.S. green card in July 1997, surrendered it in July 2000, and then obtained permanent resident status of Singapore in 2009, but he also maintained his registered residence in Korea until 2009 and lives in Korea with his wife to this day.[80] Park has always spent more than 183 days in South Korea during the relevant tax periods, as shown in Table 6.

Table 6: Number of days that Park was present in Korea[81]

Year	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Number of days in Korea	282	311	332	319	297	323	322	314	294	341

Korean tax authorities imposed about 186 million of tax (in U.S. dollars) and also charged Park with criminal tax evasion. Given that Park always stayed longer than 183 days in Korea, facts seemed more favorable to the tax authorities than those in the shipping magnate case (except for the years 1999 and 2000 during which he was a dual resident by holding a green card and this tie could be broken in favor of either of the contracting states under the U.S.-Korea tax treaty). However, Park was found "not guilty" in the District Court's criminal case in February 2012—because the court determined that Park was not a Korean tax resident.

It was uncertain whether the court would maintain the same position in the upper-level courts for Park because after the District Court's criminal decision for the toy magnate, the upper-level courts had held against the shipping magnate in both criminal and administrative cases in 2013 through early 2014. Subsequently on June 13, 2014, however, the Administrative Court rendered its decision for the toy magnate, holding that Park was not liable for tax as a resident in 1999 and 2000 when he held a green card.[82] However, on June 27, 2014, just two weeks after the Administrative Court's decision, the Appellate Court found Park guilty in the criminal case, sentencing him to three years in prison and to pay fines of about 22 million in U.S. dollars. The criminal case is pending at the Supreme Court of Korea and the tax case is pending at the Appellate Court. The Supreme Court is expected to deliver its final opinion on the series of the tax residence cases, probably in line with its dicta in the shipping magnate case, but no one knows when it will be.

Obviously, the holding of the toy magnate case is at odds with that of the shipping magnate case. Because of the inconsistent decisions by the tax authorities and the courts, the top tax law firms involved in these cases profited handsomely, and the copper magnate wisely ended his dispute at the tribunal level. Losing the tax residence cases was so critical to the tax authorities, because no matter how abusive the tax planning of the taxpayer and the structure of his or her offshore business are,

80. Park's wife also obtained a green card in 1997 and became naturalized in 2002. Toy Magnate Admin. Case (Seoul Admin. Ct. decision), *supra* note 79, at 11-15; Toy Magnate Crim. Case (Seoul Central Dist. Ct. decision), *supra* note 79, at 2-6.

81. Toy Magnate Crim. Case (Seoul Central Dist. Ct. decision), *supra* note 79, at 6.

82. Toy Magnate Admin. Case (Seoul Admin. Ct. decision), *supra* note 79, at 62.

the tax authorities cannot challenge the substantive aspects if they lose on the threshold issue of residence. The Korean government modified the rules on tax residence, but a meaningful change was made only to the number of days spent in Korea, which was tightened from a year per two-year period to 183-days per year.[83] Other factors relating to the facts and circumstances test are illustrated in the regulations, but those are still not as clear as the criterion of citizenship, and therefore should be eventually resolved at the court.

Countries with residence-based taxation also have a difficult time enforcing the tax liability of the residents with respect to their offshore assets and accounts. However, as observed in the three Korean cases, such enforcement problem is often not even addressed at all when the tax authorities lose on the question of residency in court. Determining the residency status is so critical in administering residency-based taxation that governments should divert its limited resources from enforcement to defining and litigating residence. Given this reality, Edward Zelinsky's argument that one of the principal virtues of citizenship taxation is its bright line makes more sense.[84]

B. Is the Compliance Burden Actually Onerous?

What opponents of citizenship taxation particularly concentrate on, in terms of administrability, seems to be the recent reporting obligation imposed by FBARs and FATCA. I am just as sympathetic to nonresident citizens, who are subject to arguably onerous reporting requirements with the risk of severe penalties. However, to be more precise, it is the FBAR obligation that makes nonresident citizens subject to onerous reporting requirements, not FATCA. FBAR indeed imposes reporting obligation to U.S. taxpayers for their foreign financial accounts exceeding $10,000.[85] However, the IRS has provided the OVDI that a U.S. taxpayer can utilize to avoid criminal sanctions for the failure to report the existence of, and income earned on, a foreign account on tax returns as well as for the non-filing of the FBAR. In exchange for avoiding criminal sanctions, taxpayers will generally be subject to a 27.5% penalty on the highest aggregate value of their undisclosed offshore assets.[86] In addition, for non-willful violators, IRS provides Streamlined Filing Compliance Procedures (SFCP), a program that was expanded in 2014 to cover a broader spectrum of U.S. taxpayers residing abroad and to provide penalty relief.[87] Therefore, nonresident citizens who no longer have a strong economic and social connection with the United States or happenstance Americans are no longer likely to be subject to the severe FBAR penalties.

Unlike FBAR, FATCA compliance burden falls mainly on foreign financial institutions (FFIs) and other foreign entities receiving payments from U.S. sources by requiring them to identify American accountholders and report information about their accounts on an annual basis to the IRS.[88] Individuals are not generally required

83. *See supra* text accompanying notes 67–69.
84. Mason, *supra* note 1, at 174; Zelinsky, *supra* note 14.
85. 31 U.S.C. § 5314(a) (2016); I.R.M. 4.26.16.1(1).
86. Scott D. Michel et al., *U.S. Offshore Account Enforcement Issues*, 16 J. TAX PRAC. PROC. 65, 79–80 (2014).
87. *Id.* at 82–84.
88. *Id.* at 86.

to report their offshore accounts under FATCA. However, individual taxpayers with an interest in any "specified foreign financial assets" are required to attach a disclosure statement (Form 8938, Statement of Specified Foreign Financial Assets) to their income tax returns if the aggregate value of such assets is generally greater than $50,000.[89] Moreover, if the taxpayer is living abroad, the threshold amount is significantly higher than $50,000, ranging from $200,000 to $600,000.[90] It is hard to believe that taxpayers holding foreign accounts over those threshold amounts should be treated the same as the average Joe and Jane, who opponents of citizenship taxation and FATCA seek to protect from onerous reporting requirements of their offshore assets. Considering the thresholds, FATCA does not seem to impose unbearably onerous burden on ordinary nonresident Americans.

IV. FATCA: MERITS AND CONCERNS

The discussion thus far was inspired by Mason's article, following the traditional normative framework of citizenship taxation. However, recent debates about citizenship taxation are, in many ways, motivated by newly enacted reporting obligations to administer citizenship taxation more effectively. International discourse that severely condemns the new reporting obligations and the U.S. international tax policy also encourages the debate over FATCA and citizenship taxation. Thus, this Part goes further than the normative framework and aims to defend the Foreign Account Tax Compliance Act (FATCA), especially in conjunction with citizenship taxation.

A. Merits: Enhancing Global Transparency

FATCA and FBAR rules have significant merits as a means to fight offshore tax evasion. After going through the LGT Bank affair[91] and the UBS scandal,[92] the

89. *See* I.R.C. § 6038D; Reg. § 1.6038D–1(a)(1). A higher reporting threshold applies to U.S. persons who are overseas residents and joint filers. Reg. § 1.6038D–1(a)(2).

90. Treas. Reg. § 1.6038D-2(a)(3), (4). Those filing a return other than a joint return file Form 8938 only if the total value of their specified foreign assets is more than $200,000 on the last day of the tax year or more than $300,000 at any time during the year; those filing a joint return file Form 8938 only if the value of their specified foreign asset is more than $400,000 on the last day of the tax year or more than $600,000 at any time during the year.

91. In February 2008, Heinrich Kieber, a former employee of LGT Truehand, a trust company affiliated with LGT Bank in Liechtenstein and owned by the Liechtenstein royal family, stole customer data and provided it to tax authorities throughout the EU and to the IRS under a newly enacted "whistleblower" provision. *See* Lynnley Browning, *Banking Scandal Unfolds Like a Thriller*, N.Y. TIMES (Aug. 15, 2008), http://www.nytimes.com /2008/08/15/business/worldbusiness/15kieber.html.

92. Since 2001, the United States has implemented a qualified intermediary system (QI) to ensure proper tax enforcement on foreign portfolio investors with respect to U.S. source income arising from investment in U.S. equity and debt securities. However, the QI system turned out to have been abused when the famous whistleblower Bradley Birkenfeld exposed the tax avoidance strategies of UBS for their U.S. customers in 2007. Non-U.S. persons investing through foreign financial institutions under a QI agreement could enjoy anonymity with the IRS as well as a more favorable withholding tax than U.S.

European Union (EU) and the United States, the two most important voices in the international tax policy community, realized that they were vulnerable to offshore tax evasion and were losing enormous tax revenues as a result. They also realized that they had not fully caught up with the techniques utilized by offshore vehicles to "round-trip" or circulate funds.[93] In addition, the global financial crisis in 2007 caused by the reckless practices of certain financial institutions offered an opportunity to implement a more active regulatory policy.[94] The financial crisis also triggered a global discussion regarding overall transparency in the financial industry, from which a new regime for international taxation has emerged to overcome the limits of the old regime that allowed the exchange of information (EOI) only upon request. The OECD's AEOI and the U.S. FATCA are two important developments, but FATCA plays a more important role.

First, FATCA provided critical momentum to the OECD's embarkation on the AEOI project and the G20's endorsement of it as "the new single global standard."[95] With the success of the revised Convention on Mutual Administrative Assistance in Tax Matters (MAC) along with the enactment of FATCA in 2010, AEOI has met with widespread political support since 2012. In February 2014, the OECD released the Common Reporting Standard (CRS) for AEOI on "financial account," which is modeled on FATCA,[96] followed by the full and comprehensive

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taxpayers. Taking note of these advantages, UBS advised U.S. taxpayers to establish foreign shell entities, which then opened offshore accounts with UBS and claimed the same advantages of anonymity and favorable withholding rate. After Birkenfeld revealed this scheme, UBS entered into a deferred prosecution agreement with the United States, under which it agreed to pay a fine of $780 million and to release the identities of approximately 300 accountholders to the Department of Justice. Reg. §1.1441–1; Itai Grinberg, *The Battle over Taxing Offshore Accounts*, 60 UCLA L. REV. 304, 325–26 (2012); Michel et al., *supra* note 86, at 70; Blank & Mason, *supra* note 6, at 2–3.

93. Round-tripping is used to describe a tax evasion scenario through which taxpayers siphon off their funds to an entity established in a tax haven and then reinvest those funds in the domestic capital market. *See e.g.*, Michelle Hanlon et al., *Taking the Long Way Home: U.S. Tax Evasion and Offshore Investments in U.S. Equity and Debt Markets*, 70 J. FIN. 257 (2015).

94. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (U.S); Directive 2011/61, of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, 2011 O.J. (L 174).

95. Stephanie Soong Johnston, G-20 Endorses OECD's Common Reporting Standard for Automatic Information Exchange, 2014 TAX NOTES TODAY 37-5 (Feb. 25, 2014); Angel Gurría, OECD Secretary-General, The Fight Against Tax Fraud and Tax Evasion: Towards a New Global Standard on Automatic Exchange of Tax Information: Remarks Delivered at the EU Informal ECOFIN–Lithuanian Presidency (Sept. 14, 2013), http://www.oecd.org/ctp/exchange-of-tax-information/thefightagainsttaxfraudandtaxevasiontowardsanewglobalstandardonautomaticexchangeoftaxinformation.htm; *OECD Delivers New Single Global Standard on Automatic Exchange of Information*, OECD (Feb. 13, 2014), http://www.oecd.org/tax/exchange-of-tax-information/oecd-delivers-new-single-global-standard-on-automatic-exchange-of-information.htm.

96. Rick Mitchell of Bloomberg BNA explains, "the CRS is modeled on the U.S. FATCA but has some key differences." Rick Mitchell, *Switzerland Signs OECD Agreement on Automatic Tax Information Exchange*, DAILY TAX REP. (BNA), Nov. 20, 2014, at I-3. *See*

report of the "Standard for Automatic Exchange of Financial Account Information in Tax Matters" (the Standard) in July 2014. The CRS calls on governments to obtain detailed account information from their financial institutions and to exchange that information automatically with other jurisdictions on an annual basis.[97] The rationale behind the CRS is to generate advantages arising from "process simplification, higher effectiveness and lower costs for all stakeholders concerned."[98] The first AEOI among the early group of 54 countries will begin by September 2017, and the subsequent group of 47 countries, including Switzerland, is "expected to follow in 2018."[99]

Second, FATCA facilitates multilateral implementation of AEOI by creating an extensive network with more than 100 countries in the world, at the center of which is the United States.[100] As of February 23, 2017, 96 countries—including major trading partners as well as tax secrecy jurisdictions, such as Bermuda, British Virgin Islands, Cayman Islands, Isle of Man, Guernsey, Panama, Hong Kong, and Singapore—have signed IGAs with the United States. Seventeen countries, including China, have initiated IGAs, and a couple of other countries are in discussions with U.S. authorities about entering into IGAs. Thus, other countries may add their network to the U.S. network to complete the multilateral network. In addition, FATCA spurred similar legislation in various jurisdictions. For example, the U.K. launched legislation, so-called "son of FATCA," to require AEOI among U.K. Crown Dependencies and British Overseas Territories with respect to U.K. accountholders on an annual basis.[101] France has also enacted similar legislation, aiming at offshore trusts having French resident settlors or beneficiaries only.[102] In May 2013, sixteen EU member states requested to adopt AEOI using FATCA as a new global standard.[103] All such FATCA-like legislations and agreements are

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also Rick Mitchell, *Practitioner Sees Possible Negative Effect on Banks as U.S. Hesitates on Global Standard*, DAILY TAX REP. (BNA), Oct. 30, 2014, at I-4.

97. OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL INFORMATION IN TAX MATTERS 230 (2014), http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/standard-for-automatic-exchange-of-financial-information-in-tax-matters.htm.

98. *Id.* at 11.

99. *AEOI: Status of Commitments*, OECD, http://www.oecd.org/tax/transparency/AEOI-commitments.pdf (last updated Feb. 23, 2017); *Switzerland Takes Important Step to Boost International Cooperation Against Tax Evasion*, OECD (Nov. 19, 2014), http://www.oecd.org/tax/switzerland-takes-important-step-to-boost-international-cooperation-against-tax-evasion.htm.

100. Michel et al., *supra* note 86, at 88. The current IGA status can be checked at *IGA Status*, TAX NOTES, http://www.taxnotes.com/FATCA-expert/IGA-status (last updated Feb. 23, 2017).

101. Blank & Mason, *supra* note 6, at 6 n.30 (citing John McCann & Angela Nightingale, *Tax Information Sharing, The Rise of "FATCA-esque" Agreements*, AIMA J., no. 94, Q1 2013, at 71, https://www.aima.org/journal/aima-journal-q1-2013.html). In order to minimize additional compliance burden, the reporting mechanism in this legislation is almost the same as that of FATCA, except that this legislation does not enforce 30% withholding tax upon violation. *Id.* at 6–7. The U.K. intends to expand this legislation to other jurisdictions beyond Crown Dependencies. *Id.* at 7.

102. Because of its limited scope, it has been called a "mini FATCA." McCann & Nightingale, *supra* note 101, at 72.

103. Blank & Mason, *supra* note 6, at 7.

expected to be integrated into the platform of AEOI arranged by the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum).

Third, FATCA, together with FBARs and AEOI, caused Switzerland to abandon its Bank Secrecy Law and cooperate to provide tax information of its bank customers to the customers' residence countries. In August 2013, the U.S. Department of Justice (DOJ) and Swiss governments announced a special voluntary disclosure initiative aimed at Swiss banks other than 14 banks under criminal investigation.[104] The initiative, called the DOJ Swiss Bank Program, would enable a participating Swiss financial institution to avoid criminal prosecution upon disclosure of detailed information and the payment of civil monetary penalties. As of January 27, 2016, DOJ has entered into Non-Prosecution Agreements with 78 Swiss banks under the Swiss Bank Program.[105] Beginning in June 2014, Swiss banks participating in the Program began to provide exhaustive information on U.S. accounts to the DOJ and the IRS.[106]

Fourth, FATCA applies to the extended category of financial institutions, which include not only the traditional banking industry but also alternative investment vehicles, such as private equity funds, hedge funds, real estate investment trusts, collective investment vehicles, and trusts,[107] which enjoyed secrecy and less rigorous regulations by using offshore structures. Therefore, greater transparency from such alternative investment vehicles will soon become mandated.

In conclusion, despite the demerits of excessive extraterritorial enforcement due to citizenship taxation, FATCA paved the way for the revolution toward global transparency on tax information. In determining whether the merits of FATCA outweigh the demerits, one should consider not only the U.S. taxpayers' compliance burden but also the global efforts to combat offshore tax evasion and the subsequent accomplishment of transparency on tax information.

B. Concerns: Tax Privacy and Protection from Abuse

In the preceding part, I argue that although the recent debate on citizenship taxation is largely motivated by the concerns about the administrative burden caused by FATCA, the compliance burden by FATCA on individual taxpayers is not particularly onerous. Criticism of citizenship taxation and FATCA is also outweighed by the merits of FATCA, which leads the trend of EOI along with the OECD's AEOI.

Although FATCA and AEOI seem to have become an irrevocable path in international tax policy, it nonetheless continues to be subject to criticism based on the concern that taxpayers' private information transmitted to foreign tax authorities via FATCA and EOI may be misused for nontax purposes by foreign governments. Setting aside the international discourse, the United States has not ratified any tax

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104. Joint Statement Between the U.S. Department of Justice and the Swiss Federal Department of Finance (Aug. 29, 2013), http://www.justice.gov/iso/opa/resources/7532013829164644664074.pdf.

105. *Swiss Bank Program*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/tax/swiss-bank-program (last updated Feb. 6, 2017).

106. Michel et al., *supra* note 86, at 73–74.

107. *See* Reg. § 1.1471–5(e)(4)(i)(C).

treaties or protocols since 2010 due to Senator Rand Paul's consistent objection to EOI clauses, on the grounds of tax privacy concerns, due process, and the Fourth Amendment.[108] In July 2015, Senator Paul even filed a lawsuit with six other plaintiffs in the U.S. District Court for the Southern District of Ohio (the Crawford case) to challenge the constitutionality of FATCA; the lower court dismissed the claims but an appeal of the dismissal is now pending at the Sixth Circuit.[109]

Such criticism is not directly related to the debate on citizenship taxation. However, considering that the recent discourse on FATCA is much focused on tax privacy and due process, it is worth discussing a couple of points of such arguments in defense of FATCA.

First, opponents of FATCA and EOI value tax privacy—privacy that prohibits a government from publicly releasing any taxpayer's tax-related information[110]—as a basic right protected by constitutions of many countries, such that being required to tender the information to foreign governments violates such right. However, governments do not disclose a taxpayer's information via EOI to the public but instead share information with other governments that may have tax jurisdiction over that taxpayer. Purely domestic tax information is not subject to EOI. Among the information that domestic tax authorities have obtained or may obtain, only information that has "foreign indicia" connecting the taxpayer to the requesting country is subject to EOI.[111] For a taxpayer with such foreign indicia, it is reasonable to be subject to multiple tax administrative powers of countries with which she has nexus.

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108. Robert Goulder, *Litigating FATCA: Rand Paul and Financial Privacy*, FORBES (Sept. 16, 2015, 10:36 AM), http://www.forbes.com/sites/taxanalysts/2015/09/16/litigating-fatca-rand-paul-and-financial-privacy/. While executive agreements, such as tax information exchange agreements, do not require Senate approval, tax treaties and protocols require the advice and consent of the Senate under Article II of the U.S. Constitution. In practice, most income tax treaties have been approved by unanimous consent of the Senate, without which the treaty would be subject to a full day debate and possible filibuster. H. David Rosenbloom & Richard L. Reinhold, Panel Discussion at the USA Branch of the International Fiscal Association Summer Meeting (July 16, 2014) (on file with the author). Thus, as long as Senator Rand Paul [R-KY] objects to the EOI clause following the new global standard, it is unlikely that the United States will ratify any tax treaty in the near future.

109. Crawford v. U.S. Dep't of the Treasury, No. 3:15-CV-250, 2016 WL 1642968, at *1 (S.D. Ohio. Apr. 26, 2016), *appeal docketed*, No. 16-3539 (6th Cir. May 23, 2016); William R. Davis & Andrew Velarde, *Sen. Paul Files Lawsuit Challenging FATCA*, 2015 TAX NOTES TODAY 135-3 (July 15, 2015); Goulder, *supra* note 108.

110. Joshua D. Blank, *In Defense of Individual Tax Privacy*, 61 EMORY L. J. 265, 267 (2011).

111. For example, FATCA requires FFIs to report accounts held by an individual with U.S. indicia as follows: (i) designation of the accountholder as a U.S. citizen or resident; (ii) a U.S. place of birth; (iii) a current U.S. residence address or U.S. mailing address (including a U.S. post office box); (iv) a current U.S. telephone number (regardless of whether such number is the only telephone number associated with the accountholder); (v) standing instructions to pay amounts from the account to an account maintained in the United States; (vi) a current power of attorney or signatory authority granted to a person with a U.S. address; or (vii) an "in-care-of" address or a "hold mail" address that is the sole address the FFI has identified for the accountholder. Reg. § 1.1471–4(c)(5)(iv)(B). For U.S. indicia for entities, see Reg. § 1.1471–3(e)(4)(v)(A).

In *Crawford*, however, Senator Paul and the plaintiffs seem to understand the definition of tax privacy a bit differently. In the petition, they argue that "FATCA eschews the privacy rights enshrined in the Bill of Rights in favor of efficiency and compliance by requiring institutions to report citizens' account information to the IRS even when the IRS has no reason to suspect that a particular taxpayer is violating the tax laws," thereby violating the Fourth Amendment.[112] In other words, they argue that (even if the information is not disclosed publicly) third-party reporting by foreign financial institutions to the IRS (and sharing such information with foreign governments) violates the Fourth Amendment.[113] However, such interpretation of tax privacy is unfounded in law and is otherwise unconvincing. Unless they challenge all third-party reporting requirements, such as Form 1099 by domestic financial institutions, as unconstitutional, there is no reason to distinguish the third-party reporting requirement of foreign institutions from that of domestic ones, at least under the Fourth Amendment, because both serve to accomplish the same goal of administering the U.S. income tax.

They also attack the new EOI system as releasing too much tax information to foreign countries even in the absence of any suspicious activity. Before filing the lawsuit, Senator Paul argued that while the existing U.S.-Swiss tax treaty requires EOI to be "necessary for carrying out the provisions of the present Convention or for the prevention of tax fraud or the like . . . ,"[114] the pending protocol allows EOI as long as it "may be relevant for carrying out the provision of this Convention or to the administration or enforcement of the domestic laws concerning taxes . . ."[115] In short, Senator Paul argues the pending protocol requires disclosure when relevant rather than when necessary, and thus would no longer require that the severity of the case be equivalent to tax fraud or the like.

The problem with Senator Paul's argument is that it contradicts the well-established position of the United States relating to the standard of EOI. The Code sets the domestic standard for the disclosure of information by allowing IRS summons when it "may be relevant or material to the inquiry."[116] Article 26 of the OECD Model Tax Convention on Income and on Capital used to contain a necessity standard for EOI until it changed to the foreseeable relevance standard in 2003.[117]

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112. Verified Complaint for Declaratory and Injunctive Relief at 2, Crawford v. U.S. Dep't of the Treasury, (S.D. Ohio. July 14, 2015) (No. 15-250), 2015 WL 4571443.

113. Goulder, *supra* note 108.

114. Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, Oct. 2, 1996, U.S.-Switz., art. 26(1), S. Treaty Doc. No. 105-8, 1996 WL 903835.

115. Protocol Amending Tax Convention with Swiss Confederation, U.S.-Switz., S. Treaty Doc. No. 112-1, 1996 WL 34543052 (letter of transmittal, Jan. 26, 2011).

116. *See* I.R.C. § 7602.

117. Model Tax Convention on Income and on Capital: Condensed Version, art. 26(1) (2000) ("The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention . . . ."). It was amended by the OECD Model Tax Convention on Income and on Capital: Condensed Version, art. 26(1) (2003) ("The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention . . . .").

The U.S. Model also changed its standard for EOI from necessity to relevance in 1996, which parallels the domestic standard.[118]

In addition, governments do not exchange taxpayers' information via EOI beyond the scope protected by the constitution of both the requesting and requested countries. Tax authorities may legitimately access not only tax returns filed by taxpayers annually but also taxpayers' financial information that is necessary or relevant, whatever the standard is, for the purposes of proper tax administration. Such access to the taxpayer's information conforms to "a taxpayer's reasonable expectations of privacy."[119]

Second, opponents of FATCA and EOI argue that an EOI system removes a country's unilateral control over its own tax policy, resulting in the forfeiture of sovereign autonomy.[120] Although such argument has withered since the U.S. government entered into IGAs with other countries, it was strongly asserted by Canadian opponents of FATCA when the IGA Implementation Act included in Bill-31 was debated in Canadian Parliament.[121]

However, a government's control over its tax policy is more severely harmed when a country segregates itself from the global community and loses the ability to enforce effectively its own tax laws against its taxpayers with interests in foreign jurisdictions. Given that people who have resources to use offshore accounts and/or structures are more likely to be in high tax brackets,[122] blocking the EOI may favor those people and reduce the fairness of the society's taxing practices.[123] When

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118. U.S. Model Income Tax Convention, Sept. 20, 1996, art. 26(1), https://www.irs.gov/pub/irs-trty/usmodel.pdf ("The competent authorities of the Contracting States shall exchange such information as may be relevant for carrying out the provisions of this Convention . . . ."). *See* Technical Explanation, U.S. Model Income Tax Convention of September 20, 1996, ¶ 26(1), https://www.irs.gov/pub/irs-trty/usmtech.pdf (explaining, "This Article provides for the exchange of information between the competent authorities of the Contracting States. The information to be exchanged is that which is relevant for carrying out the provisions of the Convention or the domestic laws of the United States or of the other Contracting State concerning the taxes covered by the Convention. Previous U.S. Models, and the OECD Model, refer to information that is 'necessary' for carrying out the provisions of the Convention, etc. This term consistently has been interpreted as being equivalent to 'relevant,' and as not requiring a requesting State to demonstrate that it would be disabled from enforcing its tax laws unless it obtained a particular item of information. To remove any potential misimpression that the term 'necessary' created a higher threshold than relevance, the Model adopts the term 'relevant.'"). The language of Article 26(1) of the U.S. Model Income Tax Convention of November 15, 2006, https://www.irs.gov/pub/irs-trty/model006.pdf, is the same as that of the U.S. Model Convention of 1996.

119. Grinberg, *supra* note 92, at 339 n.121.

120. *See*, e.g., Hillis v. Canada (Att'y Gen.), [2015] F.C. 1082 (Can.); Marni Soupcoff, *Ottawa Is Violating Our Constitutional Rights in Order to Help the U.S. Collect Taxes*, CAN. CONST. FOUND. (Aug. 14, 2014), http://theccf.ca/ottawa-is-violating-our-constitutional-rights-in-order-to-help-the-u-s-collect-taxes/.

121. *Hillis*, [2015] F.C. 1082 at ¶¶ 35–39. The *Hillis* case was the first case to challenge the legal authority and constitutionality of the IGA and AEOI thereunder. The Federal Court of Canada held that the collection and automatic exchange of information under the IGA is legally authorized by the IGA and relevant Canadian income tax law, and is not inconsistent with the U.S.-Canada tax treaty. *Id.* at ¶ 9.

122. Blank, *supra* note 110, at 347.

123. Grinberg, *supra* note 92, at 359.

people lose confidence in a government's "equitable treatment enforcement" among taxpayers, their tax morale may be negatively affected and the extent of voluntary tax compliance may decrease.[124] Low tax morale in a society triggers higher rates of tax evasion,[125] such that tax administration, including collection, becomes more costly and less effective.

Third, while driving to adopt AEOI as the new global standard, the Global Forum and the OECD have been working to guarantee the trustworthiness and competence of the participating countries' EOI activities in general. Now EOI upon request is available only to those countries that ensure proper use of the information for legitimate tax purposes, with each jurisdiction to be assessed and rated with respect to its compliance with the international standard of transparency and EOI on request by a "peer review system" under the auspices of the Global Forum.[126] Countries that have not passed a peer review are not entitled to EOI.[127]

In addition, the concern that FATCA and EOI could be abused by authoritarian regimes for political purposes carried more weight under the old EOI-upon-request regime than under the new FATCA or AEOI regime. This is because a "request" made by an authoritarian government sends a signal of anomaly or an implication that such government wants to use the investigatory power of the requested state; on the other hand, an AEOI is automatic, as its name suggests, and therefore does not depend on the purposes of the foreign country.[128]

Therefore, the right question to ask with regards to FATCA and tax privacy is not whether tax authorities may, or should, exchange tax information under

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124. Tax morale is defined as "the 'intrinsic motivation' of citizens to cooperate with the state by paying taxes." Blank, *supra* note 110, at 333. Tax morale is said to be "affected by factors such as citizens' perceptions of other citizens' compliance and by perceptions of the government's trustworthiness and competence." Grinberg, *supra* note 92, at 355. *See also* James Alm & Benno Torgler, *Culture Differences and Tax Morale in the United States and in Europe*, 27 J. ECON. PSYCHOL. 224, 228 (2006); Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453, 1477 (2003).

125. Blank, *supra* note 110, at 334.

126. The peer reviews take place in two phases: Phase 1 reviews the legal and regulatory framework and Phase 2 reviews the implementation of such framework in practice. During the review process, the object country receives evaluations with respect to ten essential elements. Upon completion of the two-phase review, the country receives an overall rating of "compliant," "largely compliant," "partially compliant," or "non-compliant." The Global Forum has completed more than 250 reviews, and the reviews are still ongoing. More than 90 jurisdictions have changed, or proposed to change, their domestic laws to implement recommendations from the Global Forum. The Global Forum commenced a new round of review starting in 2016. OECD, GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES, TAX TRANSPARENCY, 2016 REPORT ON PROGRESS 13–21 (2016), http://www.oecd.org/tax/transparency/GF-annual-report-2016.pdf; OECD, GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES, TAX TRANSPARENCY, 2014 REPORT ON PROGRESS 24–32 (2014), http://www.oecd.org/tax/transparency/GFannualreport2014.pdf.

127. The revised MAC declares that it will not admit countries without either proper domestic law in place or a monitoring and sanctioning system; the peer review assessment and its high standard are thus likely to be maintained in the AEOI system as well. Grinberg, *supra* note 92, at 381.

128. *Id.* at 380 n.250.

FATCA, but whether the procedure offers sufficient protection from abuse, and, if not, then how to improve the procedure. A comprehensive discussion about the details of the protective measure has not yet been done among the policy makers, scholars, and practitioners, and would be beyond the scope of this Article.

The extent of protective measure we should offer to taxpayers with respect to their tax information subject to the new AEOI and FATCA is difficult to determine. It is even more difficult because there is no established global policy on an adequate protective measure for tax information subject to the existing EOI upon request. Some might simply argue that we should provide the same extent of protection offered under the old EOI-upon-request regime to the new AEOI and FATCA protocols. However, I argue that the protective measures for the new AEOI and FATCA should be different. As with the old EOI-upon-request regime, opportunities for appeal and judicial review should be available, including an opportunity to raise objections to EOI based on improper purposes and bad faith, such as political retaliation. In addition, ex ante data protection measures available under domestic law, such as advance notice to taxpayers, and the opportunity to quash IRS summonses served to third-party record keepers,[129] should also be available. In this regard, the EU has articulated a right for data subjects to access information and obtain "the rectification, erasure or blocking of data" in case of any inaccuracies.[130] However, it is doubtful whether such ex ante measures should be available to information subject to the AEOI and FATCA. Although appropriate protective measures are necessary, insisting on the strict application of ex ante protection would significantly harm the effectiveness of the AEOI and FATCA. Considering that the information subject to AEOI and FATCA are mostly accounts in financial institutions, and that financial institutions have obtained consent from their customers to report their information to local foreign tax authorities while preparing for implementing FATCA and AEOI, taxpayers are given a sort of ex ante notice through third-party record keepers. Therefore, ex post reporting to relevant taxpayers by tax authorities, which opens the opportunity to appeal and judicial review, would be adequate protective measures in this case.

C. A Case for American Exceptionalism

Another concern about citizenship taxation and FATCA is that they are hard to justify as a case for American exceptionalism.[131] Indeed, FATCA was an outlier in the international tax administrative measures in the beginning, but now it has

129. I.R.C. §§ 7609, 7602(c).

130. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L. 281) art. 12, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML. The Directive 95/46/EC applies broadly to personal data and is not limited to tax data, but the European discourse on protecting tax data in connection with FATCA relies on this Directive as the legal framework. *See* Gianluca Mazzoni, The Interaction Between FATCA and Data Privacy (Oct. 2015) (unpublished manuscript, presented at Taxation and Citizenship Conference, Univ. of Mich. School of Law) (on file with author).

131. *See e.g.*, Avi-Yonah, *supra* note 5, at 389; Bernard Schneider, *The End of Taxation Without End: A New Tax Regime for U.S. Expatriates*, 32 VA. TAX REV. 1, 3 (2012).

become a popular policy adopted more globally.[132] United States citizenship taxation is still an extraordinary policy for taxing nonresident citizens, even after FATCA became popular.[133] However, as Mason noted, "uniqueness of U.S. citizenship taxation . . . is not enough to condemn it."[134] Furthermore, American exceptionalism could be blamed only if "it creates problems whose costs . . . outweigh the benefits."[135] In the previous parts, I compared citizenship taxation and residence-based taxation to demonstrate that citizenship taxation and FATCA could be more beneficial to the U.S. than residence-based taxation, which could keep citizenship taxation from being unduly blamed as an example of American exceptionalism.

The criticism that citizenship taxation is an example of the American exceptionalism is distinguished from traditional normative arguments on citizenship taxation, because it is not simply limited to a particular tax policy but relates to broader international issues, where other countries have not been comfortable with the U.S. insisting on its own unilateral policy. Such criticism could be a serious threat to citizenship taxation and FATCA, as it would incite a more general international repulsion. Therefore, it is necessary to defend the case of citizenship taxation and FATCA on the meta-level of American exceptionalism, without being proud of it, by thinking about the dynamics between the U.S. unilateral approach and a multilateral approach.

An interesting discussion is going on in the field of state surveillance and the right to privacy. In the digital era, governments could more easily access personal information that is now converged in the cloud. The international discourse has been skewed by European countries to the position that it is necessary to establish an international standard on internet surveillance by adopting a multilateral instrument.[136] However, Stephen Schulhofer opposes the international common ground of right to privacy, arguing not only that "a multilateral approach would be bad for Americans" but also that a parochial approach is better for all human beings.[137] He warns about "the dangers of multilateralism" in three prongs.[138] First, in the international negotiation where there are wide gaps among countries in their commitment to privacy, the agreement will eventually be set somewhere between the most and the least rigorous positions of the players—i.e. regression to the mean.[139] Second, even within the developed and democratic countries, the way in which the policy has been developed varies, so that the emphasis is often given to different points, which makes reaching a common ground quite difficult—i.e., institutional dynamics may be an obstacle.[140] Finally, an international agreement usually provides only the minimum standard as a floor, but once such a floor is incorporated in the domestic law system, the ceiling, such as constitutional

132. *See supra* text accompanying notes 95–103.

133. Kirsch, *supra* note 5, at 206.

134. Mason, *supra* note 1, at 38.

135. Michael S. Kirsch, *Citizens Abroad and Social Cohesion at Home: Refocusing a Cross-Border Tax Policy Debate*, VA. TAX REV. (forthcoming 2017), http://papers.ssrn.com/abstract=2669543.

136. Stephen Schulhofer, *An International Right to Privacy? Be Careful What You Wish For*, 14 INT'L J. CONST. L. 238 (2016).

137. *Id.* at 239–40.

138. *Id.* at 254–59.

139. *Id.* at 254–55.

140. *Id.* at 255–57.

safeguards, tends to descend, influenced by the international accord as a momentum—i.e., the floor and ceiling merge.[141]

Although there are some points where I disagree with Schulhofer, especially whether a multilateral approach to the AEOI would be beneficial to the rest of the world, Schulhofer's concerns regarding relying solely on the multilateral approach offer insight about FATCA and the newly emerging AEOI system as well. That is, the U.S. having its own measure, i.e., FATCA, could "exert a stronger upward pull on global norms."[142] Even though the OECD and other countries benchmarked the U.S. FATCA when adopting son of FATCA[143] and CRS as a multilateral instrument for AEOI,[144] there is no guarantee that such international instruments are as effective and sophisticated as what the United States adopts by itself and provide sufficient procedural justification or protective measures. Most importantly, CRS does not impose sanctions—e.g., thirty percent withholding tax—in case of noncompliance. So far, FATCA is the only device that can enforce global AEOI and indeed has incited other countries to join the AEOI system.

Another example of FATCA leading the global norm of international tax with a higher standard is that there has been no comprehensive international tax policy on investment funds, substantively or procedurally, because none of the multilateral instruments in international tax, including various OECD models, has yet included investment funds, such as private equity or hedge funds, in their scope.[145] Even the OECD's final Base Erosion and Profit Shifting (BEPS) Action plan on tax treaty benefits failed to conduct meaningful discussion about such investment funds.[146] However, FATCA has included investment funds in the definition of financial institutions and made them subject to its reporting obligation. It was by far the first decent international tax policy on investment funds to enhance transparency, although it is limited to the procedural matter. It is not certain, however, how robustly the CRS or son of FATCA will do the same on investment funds.

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141. *Id.* at 257–59.

142. *Id.* at 240.

143. *See supra* text accompanying notes 100–103.

144. *See supra* text accompanying notes 95–99.

145. *See e.g.*, OECD, *The Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles*, *in* MODEL TAX CONVENTION ON INCOME AND ON CAPITAL 2010 (FULL VERSION), at R(24) (2012), http://www.oecd-ilibrary.org/content/chapter/9789264175181-117-en.

146. In 2014, when the OECD released its interim report on the BEPS Project, it recognized various problems, such as treaty entitlement of non-collective-investment-vehicle (CIV) funds and noted that further work is needed. *See* OECD, PREVENTING THE GRANTING OF TREATY BENEFITS IN INAPPROPRIATE CIRCUMSTANCES 18 (2014), http://www.oecd-ilibrary.org/content/book/9789264219120-en. However, the discussion failed to reach a conclusion before the final report was released in October 2015, and ultimately the OECD did not again offer any policy consideration regarding investment funds. OECD, PREVENTING THE GRANTING OF TREATY BENEFITS IN INAPPROPRIATE CIRCUMSTANCES, ACTION 6—2015 FINAL REPORT 15 (2015), http://www.oecd-ilibrary.org/taxation/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-action-6-2015-final-report_9789264241695-en.

In this regard, Reuven Avi-Yonah's argument for constructive unilateralism resonates.[147] Avi-Yonah criticizes the recent trend in the international tax proposals, which urge the United States to follow other countries' tax policy, such as territorial tax system or patent box regime; he argues that in many cases the United States unilaterally leading international tax reform could be better for "the interest of both the U.S. and of other countries."[148] While he praised FATCA as an example of constructive unilateralism, which leads to "the most extensive multilateral agreement in tax matters," such as MAC and AEOI, he offers citizenship taxation as a counter-example due to its difficulty of enforcement.[149] However, FATCA and citizenship taxation are two sides of the same coin. More precisely, FATCA is a means to accomplish the policy aim of citizenship taxation. I do not find a legitimate reason why the United States should follow other countries as an end when it could move unilaterally as a means. If FATCA would be considered an example of constructive unilateralism, citizenship taxation should get credit for launching it.

CONCLUSION

This Article argues that citizenship taxation is actually good policy. Both citizenship-based and residence-based taxation have flaws in accounting for ability to pay in the fairness argument. With respect to efficiency, it is not clear that citizenship taxation actually distorts nonresident Americans' citizenship decisions more seriously than that of other countries' citizens. Furthermore, the argument about the distortion of non-Americans' immigration decisions is less convincing because what makes it difficult for wealthy and highly skilled immigrants to immigrate to the United States is not citizenship taxation but immigration law.

As to administrability, a bright line of citizenship criterion is definitely a virtue. Three Korean cases illustrate that determining residence under residence-based taxation could be a worse problem than enforcing citizenship taxation abroad. FBARs and FATCA, which were introduced to improve compliance of citizenship taxation, were in the beginning onerous burden for nonresident citizens. However, the rules have been improved to reduce the compliance burden, particularly for nonresident citizens. In addition, despite the demerits of excessive extraterritorial enforcement due to citizenship taxation, FATCA and FBARs played an important role in implementing AEOI and knocking down Swiss banks' secrecy policy. The fact that FATCA, FBAR, and U.S. citizenship taxation make the world better off by enhancing transparency would be another case for citizenship taxation as well as for constructive American exceptionalism.

147. Reuven S. Avi-Yonah, *Constructive Unilateralism: US Leadership and International Taxation* (Univ. of Mich. Pub. Law Research Paper No. 463, 2015), http://papers.ssrn.com/abstract=2622868.

148. *Id.* at 1.

149. *Id.* at 9, 10.