Yeshiva University, Cardozo School of Law
LARC @ Cardozo Law

Articles | Faculty Scholarship

5-2011

# Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile

Edward A. Zelinsky

Follow this and additional works at: https://larc.cardozo.yu.edu/faculty-articles

Part of the Jurisdiction Commons, Taxation-State and Local Commons, Taxation-Transnational Commons, and the Tax Law Commons

# Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile

*Edward A. Zelinsky*[*]

*ABSTRACT: The United States' worldwide taxation of its citizens is less different from international, residence-based norms than is widely believed and is sensible as a matter of tax policy. An individual's citizenship is an administrable, if sometimes overly broad, proxy for his domicile, his permanent home. Both citizenship and domicile measure an individual's permanent allegiance rather than his immediate physical presence. Because citizenship and domicile resemble each other, and because other nations often define residence for tax purposes as domicile, the U.S. system of citizenship-based taxation typically reaches the same results as the residence-based systems of these other nations, but reaches these results more efficiently by avoiding factually complex inquiries about domicile.*

*In contrast, the traditional justification of U.S. citizenship-based taxation, the putative benefits of such citizenship, is not persuasive. In this context, three models of U.S. citizenship are relevant, namely, the minimalist model, the psychological model, and the Tiebout/purchase model. None of these models justifies the worldwide taxation of U.S. citizens on a benefits basis. Rather, such taxation is persuasive because of administrative considerations, i.e., the close resemblance of domicile and citizenship that makes the latter an administrable proxy for the former.*

I. INTRODUCTION .......... 1291

II. AN OVERVIEW OF U.S. CITIZENSHIP-BASED TAXATION OF INDIVIDUALS .......... 1293

III. THREE THEORIES OF CITIZENSHIP .......... 1303

* Morris and Annie Trachman Professor of Law at the Benjamin N. Cardozo School of Law of Yeshiva University. For comments on earlier drafts, I thank Prof. Reuven S. Avi-Yonah; Prof. Mitchell Engler; Prof. J. Clifton Fleming, Jr.; Aaron Zelinsky, Robina Fellow at the Yale Law School; and Doris Zelinsky. For research assistance, I thank Rowan Liu and Damien Fortune of the Cardozo Class of 2011.

A. *THE MINIMALIST MODEL* .......... 1303
B. *THE PSYCHOLOGICAL MODEL* .......... 1310
C. *THE TIEBOUT/PURCHASE MODEL* .......... 1311

IV. IMPLEMENTING CITIZENSHIP-BASED TAXATION .......... 1313

V. CITIZENSHIP-BASED TAXATION AND BENEFITS .......... 1314

VI. ADMINISTRABILITY, RESIDENCE, AND CITIZENSHIP .......... 1323
A. *OVERVIEW* .......... 1323
B. *CANADA'S RESIDENCE-BASED TAXATION* .......... 1325
C. *AUSTRALIA'S SYSTEM OF RESIDENCE-BASED TAXATION* .......... 1329
D. *THE UNITED KINGDOM'S RESIDENCE-BASED TAXATION* .......... 1332
E. *SUMMARY* .......... 1341

VII. QUALIFICATIONS, OBJECTIONS, AND CONCERNS .......... 1342
A. *SHOULD RESIDENCE FOR TAX PURPOSES BE DEFINED AS DOMICILE?* .. 1342
B. *SHOULD NATIONS CONTINUE TO TAX THEIR CITIZENS ON THEIR WORLDWIDE INCOMES?* .......... 1344
C. *WHAT IF AN INDIVIDUAL'S DOMICILE AND CITIZENSHIP ARE DIFFERENT?* .......... 1344
D. *WHAT ABOUT CASES IN WHICH AN INDIVIDUAL'S CITIZENSHIP ISN'T SO CLEAR?* .......... 1345
E. *DOESN'T THE CODE FORFEIT THE ADMINISTRABILITY BENEFITS OF CITIZENSHIP-BASED TAXATION IN § 911?* .......... 1346
F. *IN THE TIEBOUT CONTEXT, AM I DEMANDING AN UNATTAINABLE LEVEL OF POLICY COHERENCE, GIVEN THE REALITIES OF POLITICAL COMPROMISE?* .......... 1347
G. *WHAT ABOUT DUAL CITIZENS?* .......... 1347
H. *ISN'T IT INCONSISTENT FOR THE UNITED STATES TO TAX ITS CITIZENS WORLDWIDE ON THE BASIS OF THEIR CITIZENSHIP, BUT TO TAX RESIDENT ALIENS WORLDWIDE ON THE BASIS OF THEIR U.S. RESIDENCE?* .......... 1348
I. *ISN'T IT HARD, OR IN MANY CASES, IMPOSSIBLE, TO ENFORCE INCOME TAXATION AGAINST U.S. CITIZENS RESIDING ABROAD?* .......... 1348

VIII. CONCLUSION .......... 1349

## I. INTRODUCTION

Alone among the nations of the world,[1] the United States taxes its citizens' incomes and assets on a worldwide basis. In contrast, other nations tax individuals on their global incomes and holdings only if such individuals reside in these nations. The scholarly consensus holds that U.S. citizenship-based taxation is an aberration and an error and that the United States should accordingly not tax U.S. citizens who live abroad.[2]

I disagree with this consensus on both counts. The United States' worldwide taxation of its citizens is less different from international, residence-based norms than is widely believed and is sensible as a matter of tax policy. An individual's citizenship is an administrable, if sometimes overly broad, proxy for his domicile, his permanent home. Both citizenship and domicile measure an individual's permanent allegiance rather than his immediate physical presence. Because citizenship and domicile resemble each other, and because other nations often define residence for tax purposes as domicile, the U.S. system of citizenship-based taxation typically reaches the same results as the residence-based systems of these other nations, but reaches these results more efficiently by avoiding factually complex inquiries about domicile.

Supporting my argument is an international analysis of cases in which other countries (Canada, Australia, and the United Kingdom) tax their residents' worldwide incomes on the basis of domicile and reach results similar to the outcomes obtained by a citizenship-based tax system. However, the U.S. citizenship-based system obtains these results more efficiently by focusing on citizenship rather than making factually intensive inquiries about domicile.

I further dissent from the traditional justification of U.S. citizenship-based taxation, namely, the putative benefits of such citizenship. In this context, three models of U.S. citizenship are relevant, the minimalist model, the psychological model, and the Tiebout/purchase model. None of these models justifies the worldwide taxation of U.S. citizens on a benefits basis. Rather, such taxation is persuasive because of administrative considerations, i.e., the close resemblance of domicile and citizenship that makes the latter an administrable proxy for the former.

For the vast majority of U.S. citizens who reside within the country, there is no practical difference between citizenship-based and residence-based taxation. However, for U.S. citizens who live abroad, the difference

---

1. VICTOR THURONYI, COMPARATIVE TAX LAW 290 (2003) ("The U.S. is virtually alone in taxing all its citizens on their worldwide income . . . .").

2. *See, e.g.*, Reuven S. Avi-Yonah, *The Case Against Taxing Citizens*, 127 TAX NOTES 680, 680 (2010) ("In a globalized world, citizenship-based taxation is an anachronism that should be abandoned.").

can often be significant. Focusing on these nonresident citizens illuminates the strengths and weaknesses of the case for citizenship-based taxation.

Parts II–IV of this Article provide the framework for assessing the United States' citizenship-based taxation of individuals on their worldwide incomes and assets. Part II describes the two bases for the exercise of jurisdiction to tax, source and political allegiance, and then outlines the framework by which the United States implements taxation premised on political allegiance via citizenship-based taxation of individuals on their worldwide incomes and holdings. Central to this citizenship-based framework are provisions of the Internal Revenue Code—credits and exclusions—that abate citizenship-based taxation, as well as provisions that tax certain former citizens more heavily than other nonresident aliens.

Part III of this Article distinguishes between three different conceptions of U.S. citizenship: the minimalist model, the psychological model, and the Tiebout/purchase model. Although there are other ways to approach citizenship, these three conceptions of citizenship provide the most productive vantages for assessing the benefits of citizenship in the tax context. The minimalist conception of U.S. citizenship, most prominently propounded by Professor Bickel, emphasizes that relatively few legal rights flow from U.S. citizenship as such. The psychological model highlights the intangible emotional and symbolic value of a U.S. citizen's membership in a proud and historic political community. The Tiebout/purchase model of U.S. citizenship conceives of citizenship as a public service that a citizen purchases through his tax payments.

Part IV of this Article discusses the practical effects on nonresident U.S. citizens of the Code's current provisions. Through its system of credits, deductions, exclusions, and nondeductibility, the Code may tax otherwise similarly situated U.S. citizens in radically different fashions depending upon the amounts and kinds of taxes imposed by the nations in which such nonresident citizens live—even though these U.S. citizens all receive the same benefits of citizenship.

Against this background, Part V assesses citizenship-based taxation, in theory and as implemented, in terms of the public benefits received by citizens, the traditional defense of citizenship-based taxation. In this Part, I conclude that, as a theoretical matter, neither the minimalist theory of citizenship nor the psychological model of citizenship supports a benefits rationale for taxing U.S. citizens' worldwide incomes and assets. Minimal benefits do not justify maximal taxation.

Although the Tiebout/purchase model provides more theoretical ballast for citizenship-based taxation, that model (like the other two) is undercut in practice by the method in which the United States implements citizenship-based taxation, in particular, taxing nonresident citizens differently for the same benefits of citizenship depending upon the kinds and amounts of taxes assessed by the nations in which such citizens live. It is

unpersuasive to justify worldwide taxation on the basis of the benefits of citizenship and then in practice tax in radically different fashion different citizens for the same benefits.

In Part VI, I turn to administrability as a criterion of tax policy. Under this heading, citizenship-based taxation proves to be an enforceable (if sometimes overbroad) proxy for the more difficult to administer standard of domiciliary residence. Thus, the compelling argument for citizenship-based taxation is not the traditional benefits rationale, but the attractiveness of citizenship as an administrable proxy for domicile under a residence-based system of taxation. Domicile and citizenship both focus upon permanent allegiance rather than immediate physical presence and thus resemble each other. Because other nations often define residence for tax purposes as domicile, i.e., the taxpayer's permanent home, the United States' policy of citizenship-based taxation is not the "outlier in the international community"[3] it is often thought to be, as citizenship is an administrable marker for such domicile. Indeed, when residence for tax purposes is defined as domicile, residence-based and citizenship-based taxation converge, with citizenship-based taxation reaching similar outcomes more efficiently than does residence-based taxation, which requires factually intensive inquiries into domicile. To demonstrate this point, I examine cases from Canada, Australia, and the United Kingdom.

In Part VII, I anticipate and respond to potential criticisms of my defense of citizenship-based taxation. In the final analysis, the United States' system of citizenship-based taxation reaches results similar to those obtained under residence-based taxation, but reaches those results more efficiently by avoiding factually complex inquiries about taxpayers' domiciles.

## II. AN OVERVIEW OF U.S. CITIZENSHIP-BASED TAXATION OF INDIVIDUALS

There are two bases on which nations may exercise the jurisdiction to tax: source and political allegiance.[4] Under the heading of source, a nation taxes in rem income or assets located ("sourced") within its borders regardless of where the owner of such income or assets lives. On a theoretical level, source-based taxation reflects the claim of the nation in which income arises or assets are held that such nation provides the benefits

---

3. Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443, 445 (2007).

4. REUVEN S. AVI-YONAH, DIANE M. RING & YARIV BRAUNER, U.S. INTERNATIONAL TAXATION: CASES AND MATERIALS 18–20 (2d ed. 2005) ("[T]wo bases of jurisdiction to tax are . . . residence and source based taxation . . . ."); Ruth Mason, *Tax Expenditures and Global Labor Mobility*, 84 N.Y.U. L. REV. 1540, 1543 (2009) ("When individuals work outside the state where they reside, international law acknowledges the entitlement of both the work, or 'source,' state and the 'residence' state to tax them.").

within its territory that protect such income or assets.[5] On a pragmatic level, source-based taxation reflects the practical ability of the nation in which income or an asset is located to impose tax before such income or asset is remitted to the owner abroad.

Jurisdiction based on political allegiance is in personam in nature and is premised not on the source of income or assets but upon the political allegiance of the taxpayer who owns such income or assets. Nations other than the United States define political affiliation for tax purposes on the basis of residence and accordingly tax their residents on a worldwide basis without regard to the source of such residents' incomes or assets and without regard to such residents' citizenships. Most cognoscenti in this area judge the country of residence as better positioned than the country of source to assess an individual's overall capacity to pay tax on a progressive basis, since the residence jurisdiction exercises in personam authority over the taxpayer and can require him to aggregate and report her entire income from all sources. Typically, a resident will keep much of her assets and earn much of her income in the country in which she resides. Since the taxpayer lives in that nation, she is most amenable to enforcement action there. By contrast, the source nation lays claim only to the part of a taxpayer's income arising within the territory of that nation. Insofar as a tax system seeks to tax an individual on her overall ability to pay considering all her sources of income and wealth, residence-based taxation on worldwide income and assets is more compelling than is source-based taxation.

Consider, for example, *A*, a resident of country *X*, who owns and rents out a condominium in country *Y*. As the source country in which the rent arises, *Y* has an in rem claim to tax on the basis of the services it provides to *A*'s condominium, located within *Y*'s borders. On a practical level, *Y* has the initial ability to tax that rent by, for example, imposing an obligation on *A*'s tenant to withhold tax from his rent payment and send such withheld tax to *Y*'s tax department.[6] If necessary, *Y* can collect unpaid taxes by foreclosing on *A*'s condominium located within *Y*'s territory.

---

5. Jeffrey M. Colón, *Changing U.S. Tax Jurisdiction: Expatriates, Immigrants, and the Need for a Coherent Tax Policy*, 34 SAN DIEGO L. REV. 1, 11 (1997) ("The theoretical basis for source and trade or business taxation is that the United States has provided the benefits that generated the income."); Steven A. Dean, *More Cooperation, Less Uniformity: Tax Deharmonization and the Future of the International Tax Regime*, 84 TUL. L. REV. 125, 144 n.79 (2009) (maintaining that taxation by source country "rests in part on the Lockean notion that governments earn the right to collect tax revenues by providing the services that make the creation of the underlying income possible"); J. Clifton Fleming, Jr., Robert J. Peroni & Stephen E. Shay, *Fairness in International Taxation: The Ability-To-Pay Case for Taxing Worldwide Income*, 5 FLA. TAX REV. 299, 307 n.13 (2001) (stating that source-based taxation "is often rationalized as a benefits-based charge imposed by the source country").

6. *See, e.g.*, I.R.C. § 1441(a) (2006) (stating that "all persons, in whatever capacity acting" must "deduct and withhold" from U.S. source payments payable to "any nonresident alien individual or of any foreign partnership").

On the other hand, *Y* is poorly positioned to assess *A*'s overall ability to pay if *A* has income from other countries. Suppose that, in addition to his rental income from *Y*, *A* works in and thus has earned income from *X* where he resides, and has a second, rent-producing condominium in country *Z*. Under these circumstances, most tax mavens conclude that *X*, the country in which *A* resides, has the strongest claim to tax *A*'s overall income and is in practice best positioned to assess *A*'s overall ability to pay tax. By virtue of its in personam contact with *A*, *X* can best demand and pool information about all of *A*'s income from *X*, *Y*, and *Z*,[7] and can most effectively enforce its revenue laws against *A*. *Y* and *Z*, in contrast, are capable of assessing only the part of *A*'s income arising within their respective borders.

For most taxpayers, the jurisdiction of source and the jurisdiction of residence are the same, since such individuals earn and invest their incomes in the same nations in which they reside. On the other hand, when an individual owes political allegiance to one nation but derives income or holds assets in another, both countries have jurisdiction to tax the same item.

Taking a unique position,[8] the United States defines the political allegiance for tax jurisdiction in terms of an individual's citizenship, regardless of his residence.[9] With a succinctness rare in the tax law, the Treasury Regulations articulate that all U.S. citizens, whether they live within the country or not, are subject to U.S. taxation on their worldwide incomes: "In general, all citizens of the United States, wherever resident, and all resident alien individuals are liable to the income taxes imposed by the Code whether the income is received from sources within or without the United States."[10]

---

7. *See, e.g.*, Reuven S. Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 TEX. L. REV. 1301, 1311–12 (1996) ("[D]istributional concerns can be effectively addressed only in the country of residence."); Fleming, Peroni & Shay, *supra* note 5, at 328 ("The ability-to-pay principle requires foreign-source income of U.S. residents to be included in the U.S. tax base to the same extent as U.S.-source income."); Robert A. Green, *The Future of Source-Based Taxation of the Income of Multinational Enterprises*, 79 CORNELL L. REV. 18, 29 (1993) ("The source country taxes only a fraction of a taxpayer's total worldwide income, thus violating the ability-to-pay principle. In addition, the source country does not base the rate of tax on the taxpayer's total income, thus violating the progressivity principle. Indeed, the source country generally does not even attempt to determine the taxpayer's total income."); *id.* at 60 ("Residence-based taxation . . . enable[s] governments to continue to rely on income taxation as a cornerstone of a redistributive fiscal policy."); Mason, *supra* note 4, at 1600 ("[T]he residence state usually has the best access to information about the taxpayer. States' personal jurisdiction over their residents facilitates collection of tax information about their worldwide income.").

8. Though I argue *infra* that U.S. citizenship-based taxation is not as unique as it first appears since citizenship resembles domicile.

9. In limited fashion, the United States deploys the residence principle for tax purposes, taxing on a worldwide basis aliens who reside in the United States. Such taxation of resident aliens is not controversial.

10. Treas. Reg. § 1.1-1(b) (as amended in 1974).

With comparable directness, the Internal Revenue Code extends the reach of the federal estate tax globally to "all [of the decedent's] property, real or personal, tangible or intangible, wherever situated."[11] Less elegantly, the Treasury Regulations define a deceased citizen's gross estate as encompassing his worldwide assets, even if the citizen resided abroad: If a decedent "was a citizen or resident of the United States at the time of his death," then his gross estate includes "the total value" of his statutorily enumerated interests.[12] Since October 16, 1962, this "total value" has included "real property situated outside the United States."[13]

The regulations under the gift tax similarly indicate that that levy reaches all gratuitous transfers anywhere in the world made by all citizens, regardless of whether such citizens live within or without the United States: "The [gift] tax applies to all transfers by gift of property, wherever situated, by an individual who is a citizen or resident of the United States . . . ."[14]

When it enters into income tax treaties with other nations, the United States preserves its right to tax its citizens, regardless of where such citizens reside or from where they derive their incomes. For example, under Article I(4) of the United States Model Income Tax Convention of November 15, 2006,[15] the United States (as well as the other signatory to the model treaty) reserves, with minor exceptions, the right to tax the income of its citizens and former citizens as if the treaty had not been entered into, i.e., on a worldwide basis irrespective of the citizen's residence. So too, in the estate and gift tax context, the United States by treaty preserves its right to tax the assets of its deceased citizens and former citizens, regardless of the location of those assets or the residence of the deceased citizens. For example, in Article I of the 2004 protocol to the U.S.–French estate tax treaty,[16] the United States reserves the right to tax the estates and gifts of its citizens and former citizens as if there were no treaty between the two nations.

While the baseline of U.S. tax law is the worldwide taxation of U.S. citizens without regard to their respective residences, this policy is abated in important respects. Indeed, as I shall argue below,[17] these abatements, however meritorious they may be on other grounds, are in practice inconsistent with the traditional tax policy justification of citizenship-based

11. I.R.C. § 2031(a).

12. Treas. Reg. § 20.2031-1(a) (as amended in 1965).

13. *Id.*

14. Treas. Reg. § 25.2501-1(a)(1) (as amended in 1983).

15. UNITED STATES MODEL INCOME TAX CONVENTION OF NOVEMBER 15, 2006 art. I(4) (2006) [hereinafter MODEL INCOME TAX CONVENTION], *available at* http://www.irs.gov/pub/irs-trty/model006.pdf.

16. Protocol Amending the Convention Between the United States of America and the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates, Inheritances, and Gifts, U.S.-Fr., Dec. 8, 2004, http://www.gpo.gov/fdsys/pkg/CDOC-109tdoc7/pdf/CDOC-109tdoc7.pdf.

17. *See* discussion *infra* notes 141–51 and accompanying text.

taxation, namely, the public benefits stemming from U.S. citizenship, since these abatements result in different nonresident citizens paying significantly different taxes for the same benefits of U.S. citizenship.

In the income tax setting, the most important abatements of the United States' worldwide taxation of its citizens are the credit for foreign income taxes and the exclusion from gross income of personal service income earned abroad. The income tax credit[18] is among the most discussed provisions of the Internal Revenue Code.[19] The dollar-for-dollar credit is available both to U.S. citizens and to resident aliens to the extent they pay foreign income taxes on foreign-source income at or below the rate at which the United States taxes such income. By using the foreign income tax credit, the United States, as the nation of the taxpayer's political allegiance, surrenders the tax it would otherwise collect from a citizen or resident with foreign-source income to the foreign-source jurisdiction from which the income is derived.

To see the operation of the foreign income tax credit, suppose a highly simplified example in which *A*, a U.S. citizen, is in a 30% federal income tax bracket and earns $100 from renting his condominium in Country *X*. If *X* has no income tax, *A*, on her federal return, reports this rental income as part of her worldwide income and pays $30 of such income to the federal fisc. If, on the other hand, *X* also imposes income taxes on *A* at a 30% bracket, *A* pays a $30 income tax to *X*, the source jurisdiction, and then credits that $30 paid against the tax *A* would otherwise owe to the United States. The result is no net payment by *A* to the U.S. Treasury. If, in contrast, *X* imposes income taxes on *A* at a 20% bracket, *A* pays a $20 tax to *X*, takes a credit on her federal tax return for that $20 income tax payment, and thereby pays a net tax to the United States of $10 on her rental income from her condominium located in *X*.[20] The conventional view is that the credit for foreign income taxes prevents double taxation by giving the source jurisdiction the priority to tax.[21]

The Code's credit for foreign income taxes stands in sharp contrast with the Code's treatment of other foreign taxes. U.S. taxpayers can only deduct for U.S. income tax purposes foreign taxes paid in connection with their

18. I.R.C. §§ 901–908 (2006).

19. *See, e.g.*, AVI-YONAH, RING & BRAUNER, *supra* note 4, at 310.

20. There are a variety of controversies surrounding the foreign tax credit, including "cross-crediting," that is, the use of tax credits derived from high tax payments to one foreign country to shelter from U.S. income tax liability income earned in a low-tax foreign country. Am. Bar Ass'n Section of Taxation, *Report of the Task Force on International Tax Reform*, 59 TAX LAW. 649, 756–57 & nn.265–70 (2006). Despite the importance of these controversies in other contexts, they do not illuminate the topic of this Article, namely, the propriety of citizenship-based income taxation. Hence, in the text and examples in this Article, these controversies can, in the interests of simplicity, safely be ignored.

21. *Id.* at 678 n.26.

trade, business, or investment activities.[22] They can also deduct foreign real property taxes unrelated to trade, business, or investment income.[23] All other foreign taxes are neither deductible nor creditable for U.S. income tax purposes. Thus, for example, foreign sales taxes are neither deductible nor creditable for U.S. income tax purposes.[24]

If a U.S. taxpayer is subject to the alternative minimum tax ("AMT"),[25] he is subject to yet another set of rules that deny deductibility[26] to all taxes paid to foreign governments except for those constituting expenses of producing income. The AMT also ties the credit for foreign income taxes to the taxpayers' AMT liability.[27]

As I discuss below,[28] the Code's disparate treatment of different kinds of foreign taxes produces different U.S. tax liabilities for different U.S. citizens depending upon the nature and amount of tax assessed by the nations in which those citizens live and earn their respective incomes. These divergent tax liabilities cannot be squared with the benefits rationale for citizenship-based taxation, since all nonresident U.S. citizens receive the same benefits of U.S. citizenship while paying different U.S. taxes (or sometimes no U.S. taxes) for those benefits.

In addition to the credit for foreign income taxes, the second major modification of the U.S. policy of taxing its citizens' worldwide incomes is the exclusion under § 911[29] for certain nonresident citizens' personal service incomes earned abroad and for such nonresident citizens' "housing cost amount(s)." In 2011, a U.S. citizen[30] satisfying the nonresidence criteria of § 911 may elect to exclude[31] from his annual gross income up to $92,900[32] of income earned abroad from performing personal services,[33] including personal services rendered in connection with self-employment. In addition or instead, nonresident U.S. citizens qualifying under § 911 may

22. I.R.C. § 164(a) (flush language).

23. *Id.* § 164(a)(1). U.S. taxpayers can also forsake the credit for foreign income taxes and instead deduct such foreign taxes for U.S. income tax purposes. *Id.* § 164(a)(3). However, such deductibility will rarely prove preferable to the credit.

24. Treas. Reg. § 1.164-3(f) (1964).

25. I.R.C. §§ 55–59.

26. *Id.* §§ 56(b)(1)(A), 164.

27. *Id.* § 59(a).

28. *See infra* text accompanying notes 35–64.

29. I.R.C. § 911. For a description of the early history leading to § 911 in its current form, see Renée Judith Sobel, *United States Taxation of Its Citizens Abroad: Incentive or Equity*, 38 VAND. L. REV. 101, 119–47 (1985).

30. The § 911 exclusion may also apply to the income of a resident alien. *See* I.R.C. § 911(d)(1)(B).

31. *Id.* § 911(a)(1).

32. Rev. Proc. 2010-40, 2010-46 I.R.B. 663, § 3.19.

33. I.R.C. § 911(b)(1)(A), (d)(2).

exclude (or deduct) from their gross incomes some or all of their foreign housing expenses.[34]

The § 911 exclusion from gross income applies if a U.S. citizen has a "tax home"[35] abroad and either "has been a bona fide resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year"[36] or has "during any period of 12 consecutive months [been] present in a foreign country or countries during at least 330 full days in such period."[37] Thus, the § 911 exclusion is only available to nonresident citizens, unlike the foreign tax credit that is available to all U.S. citizens, resident and nonresident, with foreign-source income. Moreover, the § 911 exclusion (unlike the credit) does not depend upon the U.S. citizen's payment of any income tax to the source jurisdiction. Consequently, income covered by § 911 is often taxed neither by the nation in which it is earned nor by the United States as the jurisdiction of the citizen's political allegiance.[38]

The conventional justification for § 911 is that it facilitates the ability of U.S. citizens to work abroad. However, as we shall see,[39] that argument, whatever its plausibility as a matter of economic policy, is incompatible with the benefits rationale for citizenship-based taxation. In particular, the § 911 exclusion (like the Code's provisions relative to the crediting, deductibility, and nondeductibility of different foreign taxes) can in practice result in nonresidents who receive the same benefits of U.S. citizenship while paying radically different U.S. taxes.

The § 911 exclusion does not apply[40] for purposes of the tax on self-employment income.[41] As a general rule, the federal self-employment tax,

---

34. *Id.* § 911(a)(2), (c). In addition, if an employee lives abroad in an employer-provided camp because the employee works "in a remote area," the Code deems this camp "to be part of the business premises of the employer." *Id.* § 119(c). That characterization of the camp as the employer's business premises, in turn, generally enables the employee to exclude from his gross income meals that the employer furnishes at this camp as well as the value of the employee's use of the camp's lodging facilities. *Id.* § 119(a), (c).

35. *Id.* § 911(d)(1), (3).

36. *Id.* § 911(d)(1)(A).

37. *Id.* § 911(d)(1)(B).

38. For purposes of § 911, income must be earned within the borders of a sovereign nation to be excluded from the U.S. citizen's gross income. Treas. Reg. § 1.911-2(h) (1985) (stating that, for purposes of § 911, "foreign country" "includes any territory under the sovereignty of a government other than that of the United States"). Thus, income earned by a U.S. citizen in Antarctica is not excluded under § 911 because the United States recognizes no nation's sovereignty over Antarctica. Arnett v. Comm'r, 473 F.3d 790, 797–99 (7th Cir. 2007). Similarly, § 911 does not exclude from gross income the earnings generated by a U.S. citizen in international waters since no nation exercises sovereignty over such waters. Clark v. Comm'r, 95 T.C.M. (CCH) 1265, 1268–69 (2008).

39. *See* discussion *infra* Part V.

40. I.R.C. § 1402(a)(11).

41. *Id.* §§ 1401–1403.

like the federal income tax, applies to U.S. citizens on a worldwide basis.[42] Thus, self-employed U.S. citizens who reside abroad and qualify for the § 911 income tax exclusion must pay self-employment tax on their earnings.[43] However, the United States has "totalization" agreements with twenty-four nations.[44] Under these agreements,[45] U.S. citizens or residents who work abroad pay self-employment taxes on their earned income to the countries in which they work rather than to the United States. Consequently, pursuant to the totalization arrangement, these citizens or residents accrue social security benefits from the foreign countries in which they work and to which they pay self-employment taxes, rather than from the United States.[46] Absent such a totalization agreement, self-employed U.S. citizens or residents who work in foreign nations pay federal self-employment tax on their foreign-source earned income.[47]

As a general rule,[48] a U.S. citizen or resident employed outside the United States by "an American employer"[49] pays FICA[50] taxes on his salary. This rule is subject to many exceptions. These exceptions include totalization arrangements under which the U.S. citizen–employee pays social security taxes to the foreign nation in which he works and consequently accrues social security benefits under that nation's system. Another important exception allows certain foreign affiliates of U.S. parents to join the U.S. social security system.[51] In that case, the U.S. citizen employed by such a foreign affiliate pays FICA taxes on his salary. Section 911 does not apply to FICA taxes.[52] Thus, absent an applicable totalization agreement, a

---

42. Rev. Rul. 55-172, 1955-1 C.B. 98. The part of this Revenue Ruling relative to § 911 has been reversed by § 1402(a)(11). However, the remainder of the Ruling remains good law—i.e., a self-employed citizen's earned foreign income is subject to U.S. self-employment tax. Indeed, § 1402(a)(11), which suspends § 911 for self-employment tax purposes, makes sense only if foreign-source income is subject to self-employment taxes, a position the IRS recently affirmed. Internal Revenue Serv., *Self-Employment Tax for Businesses Abroad*, TAX NOTES TODAY, July 31, 2009, *available at* 2009 TNT 146–47.

43. Internal Revenue Serv., *supra* note 42.

44. *U.S. International Social Security Agreements*, SOCIAL SECURITY ONLINE, http://www.ssa.gov/international/agreements_overview.html (last visited Mar. 1, 2011).

45. *See* 42 U.S.C. § 433 (2006) (providing the statutory basis for these totalization agreements).

46. *See, e.g.*, Agreement Between the United States of America and the Republic of Poland on Social Security, U.S.-Pol., art. VI, ¶ 4, Apr. 2, 2008, http://www.ssa.gov/international/Agreement_Pamphlets/Poland.html#agreement ("A self-employed person who resides within the territory of a Party shall be subject to the laws of only that Party.").

47. *See* Internal Revenue Serv., *supra* note 42.

48. I.R.C. § 3121(b)(B) (2006).

49. This term is defined for FICA purposes in *id.* § 3121(h).

50. Social security taxes are assessed pursuant to the provisions of the Code denoted as the Federal Insurance Contributions Act. Hence, the acronym "FICA." *Id.* §§ 3101–3128.

51. *Id.* § 3121(l).

52. Section 911 exempts only from the taxes established by subtitle A of the Internal Revenue Code. The FICA tax is established by subtitle C of the Code. *See* Rev. Rul. 92-106,

U.S. citizen employed abroad by a U.S. employer pays FICA taxes on wage income even if that income is excluded from gross income for income tax purposes.

Just as the Code provides a dollar-for-dollar income tax credit for foreign income taxes paid by a U.S. citizen, the Code, subject to certain limits,[53] furnishes a credit against the federal estate tax for "any estate, inheritance, legacy, or succession taxes actually paid to any foreign country in respect of any property situated within such foreign country."[54] Thus, when a U.S. citizen dies owning property located abroad, U.S. estate taxation is abated on account of foreign death taxes paid on such property. Like the income tax credit for foreign taxes (which is available to both resident and nonresident citizens of the United States), the credit for foreign death taxes applies to the estates of deceased U.S. citizens whether they resided at home or abroad. Also like the foreign income tax credit, the estate tax credit avoids double taxation by ceding primary tax jurisdiction to the source nation in which the deceased citizen owned her assets.

Although the credits for foreign income and death taxes and the § 911 exclusion abate the federal taxation of U.S. citizens, other provisions of the Code point in the opposite direction and extend citizenship-based taxation to include certain former citizens even though they are currently nonresident aliens. For specified former citizens who expatriated before June 17, 2008, § 877 establishes, for federal income tax purposes, a ten-year transition period following such expatriation. During such period, a former citizen may be taxed as if he were still a U.S. citizen,[55] i.e., on his worldwide income, or may be taxed under special rules which treat as U.S.-source income certain items which nonresident aliens generally do not report as U.S.-source income.[56]

In 2008, Congress amended the Code to replace the ten-year transition period of § 877 with immediate income taxation of certain expatriating citizens' unrealized appreciation. In particular, for a "covered expatriate"[57] who relinquishes U.S. citizenship on or after June 17, 2008, new Code

---

1992-2 C.B. 258 (holding that all of the wages earned abroad by a U.S. resident for a U.S. employer are "wages for FICA purposes," even though some of those wages are excluded from income taxation by § 911).

53. I.R.C. § 2014(b).

54. *Id.* § 2014(a). There is no equivalent credit for foreign gift taxes paid by a U.S. citizen.

55. *Id.* § 877(g)(1). This provision is generally triggered for any year during which a former U.S. citizen spends more than 30 days in that year in the United States if that year occurs during the ten-year period following his loss of U.S. citizenship.

56. *Id.* § 877(d).

57. Heroes Earning Assistance & Relief Tax Act of 2008, Pub. L. No. 110-245, § 301, 122 Stat. 1624, 1642 (codified at I.R.C. § 877A(g)(1) (Supp. II 2008)). In general, covered expatriates are former U.S. citizens meeting certain income or net-worth tests. The IRS has provided administrative guidance on § 877A in the form of I.R.S. Notice 2009-85, 2009-45 I.R.B. 598.

§ 877A imposes the obligation upon expatriation to pay immediate income tax on the unrealized appreciation of many of the former citizen's assets.[58] In the alternative, the former citizen who is a "covered expatriate" can defer such tax if she provides to the IRS security which it deems adequate to ensure that tax will actually be paid on the disposition of the former citizen's assets.[59]

In the estate tax context, Code § 2107 provides a special rule if a former citizen dies within the ten-year transition period established in § 877. In particular, during such transition period, the gross estate of a deceased former resident covered by § 877 includes the value of a foreign corporation's stock to the extent that the deceased former citizen had a significant interest in such corporation and the corporation owns assets located in the United States.

In 2008, at the same time that Congress decreed that expatriation will cause the immediate income taxation of a "covered expatriate['s]" unrealized appreciation, Congress augmented the estate taxes due on the death of such an expatriate. In particular, new Code § 2801 requires a U.S. citizen or resident receiving property on account of the death of a "covered expatriate" to pay an estate tax on such property unless the deceased expatriate's estate pays tax on such property.

Section 2801 also applies to gifts received by U.S. citizens and residents from "covered expatriate(s)" by requiring such citizens and residents to pay taxes on such gifts. In addition, former citizens still covered by the ten-year transition period of § 877 owe U.S. gift taxes on gifts made within that transition period of certain U.S. and foreign securities, which other noncitizens can transfer free of U.S. gift taxes.[60]

For example, if *A*, a French citizen with no ties to the United States, gives shares of Microsoft to his children who are also French citizens, no U.S. gift tax is levied on this transfer, even though the gifted shares are of a U.S. corporation. If, however, the French citizen is a former U.S. citizen who makes his gift to his French offspring during the ten-year transition period established in § 877, he owes gift tax on the transfer. If the former U.S. citizen is a "covered expatriate" and his children receiving Microsoft shares are themselves U.S. citizens or residents, these donee–children owe U.S. gift taxes by virtue of new § 2801.

It has long been established that the U.S. Constitution permits the federal government's worldwide taxation of nonresident U.S. citizens. In *Cook v. Tait*,[61] the taxpayer was a U.S. citizen who was domiciled in Mexico and who derived his income from property located in Mexico. In upholding

58. I.R.C. § 877A(a).

59. *Id.* § 877A(b).

60. *Id.* §§ 2501(a)(3), (5), 2511.

61. 265 U.S. 47 (1924).

the income tax assessed by the federal government, the Supreme Court distinguished between the taxing authority of the various states of the Union, "limited by" their respective "borders," and the taxing authority of the federal government, subject to "no such limitation."[62] In sustaining the federal income taxation of a nonresident citizen's Mexican-source income, the Court emphasized "that government by its very nature benefits the citizen and his property wherever found."[63]

Although *Cook* provides constitutional underpinning for the federal government's citizenship-based taxation, as we shall see,[64] the benefits rationale of that decision proves unpersuasive, both in theory and as implemented by the provisions of the Internal Revenue Code that tax different U.S. citizens different amounts for the same benefits of U.S. citizenship.

## III. THREE THEORIES OF CITIZENSHIP

In this Part, I identify three conceptions of U.S. citizenship that help to evaluate the propriety of citizenship-based taxation. Some commentators describe citizenship in terms different from those identified in these three models.[65] Whatever the value of these alternative conceptions of citizenship in other contexts, for the issue explored in this Article—the propriety of taxing on the basis of citizenship—these three models are the useful approaches to citizenship and the benefits defense of citizenship-based taxation.

### A. *THE MINIMALIST MODEL*

For Professor Bickel, a minimalist conception of U.S. citizenship both describes the reality of U.S. law and embodies a normatively desirable state of affairs: "[H]appily," Professor Bickel wrote, "the concept of citizenship

---

62. *Id.* at 55–56.

63. *Id.* at 56.

64. *See* discussion *infra* notes 141–53 and accompanying text.

65. For example, Professor Bosniak observes that "[i]n the civic republican tradition, *citizenship* names a state of active engagement in the life of a polity." Linda Bosniak, *Denationalizing Citizenship*, *in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 237, 241 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001). Professor Shklar writes of "citizenship as standing." JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 14 (1991). Professor Rosenfeld addresses citizenship from a variety of perspectives. For example, he contrasts the individual-based concept of "liberal" citizenship with more group-oriented "republican" citizenship. Professor Rosenfeld similarly compares "modern universal equal citizenship" with "differentiated citizenship" and draws a distinction between "functional citizenship" and "identitarian citizenship." Finally, he contrasts "horizontal citizenship" with "vertical citizenship." MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY 212–36 (2010). Whatever the value in other contexts of these and other theories of citizenship, they are not helpful for the subject of this Article, the propriety *vel non* of citizenship-based taxation.

plays only the most minimal role in the American constitutional scheme."[66] Prior to the adoption of the post-Civil War Amendments, the U.S. Constitution "contained no definition of citizenship and precious few references to the concept altogether."[67] Citing the First and Second Amendments, Professor Bickel noted that "the Bill of Rights throughout defines rights of people, not of citizens."[68] Thus, "the original Constitution presented the edifying picture of a government that bestowed rights on people and persons, and held itself out as bound by certain standards of conduct in its relations with people and persons, not with some legal construct called citizen."[69]

Professor Bickel's minimalist argument has venerable origins. During the administration of John Adams, Albert Gallatin criticized the Alien Friends Act as violating noncitizens' rights under the Fifth Amendment.[70] That amendment, Gallatin observed, protects all persons, not just citizens, from deprivations of "life, liberty, or property, without due process of law."[71]

Moreover, according to Professor Bickel, the post-Civil War Amendments and the Supreme Court's immediate response to one of them in the *Slaughter-House Cases*[72] confirmed the U.S. Constitution's extension of rights to persons, citizens and noncitizens alike. At first blush, those amendments seem to increase the import of citizenship under the Constitution. The Fourteenth Amendment overruled *Dred Scott*[73] by declaring, inter alia, that "[a]ll persons born . . . in the United States" are citizens and thereby bestowed citizenship upon former slaves and their offspring.[74] The Fourteenth Amendment also prohibited the states from "abridg[ing] the privileges or immunities of citizens of the United States," while the Fifteenth Amendment guaranteed citizens the right to vote regardless "of race, color, or previous condition of servitude."

Nevertheless, these provisions made citizenship less central to the revised constitutional order than first appears for, at the same time that the Fourteenth Amendment confirmed the citizenship of former slaves, it extended "equal protection of the laws" and "due process of law" to "any person." Through the nineteenth century and into the twentieth, many

---

66. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 33 (1975).

67. *Id.* at 35.

68. *Id.* at 36 (quoting the First and Second Amendments on "the right of the people peaceably to assemble" and "the right of the people to keep and bear arms").

69. *Id.*

70. GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 250 (2009). The Alien Friends Act was technically titled "An Act Concerning Aliens." Ch. 58, 1 Stat. 570 (1798).

71. WOOD, *supra* note 70, at 250 (quoting U.S. CONST. amend. V).

72. 83 U.S. (16 Wall.) 36 (1872).

73. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

74. The Thirteenth Amendment abolished slavery. U.S. CONST. amend. XIII.

states permitted aliens to vote.[75] In the *Slaughter-House Cases*, the U.S. Supreme Court advanced a distinctly minimalist conception of the rights flowing from U.S. citizenship and the Fourteenth Amendment's privileges and immunities clause.[76] The U.S. Supreme Court in *McDonald v. City of Chicago* has recently reaffirmed the *Slaughter-House Cases* and their minimalist construction of the privileges and immunities of U.S. citizenship.[77]

The net result of extending equal protection and due process rights to all "person[s]" while reading narrowly the rights of citizens under the privileges and immunities clause, Professor Bickel wrote, is that "[r]esident aliens are under the protection of our Constitution substantially no less than citizens . . . ."[78] For Professor Bickel "the traditional minimal content of the concept of citizenship"[79] is to be applauded:

> A relationship between government and the governed that turns on citizenship can always be dissolved or denied. Citizenship is a legal construct, an abstraction, a theory. No matter what the safeguards, it is at best something given, and given to some and not to others, and it can be taken away. It has always been easier, it always will be easier, to think of someone as a noncitizen than to

75. PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP 187 (1998) ("[A]liens enjoyed the franchise in various American states during the nineteenth century . . . ."); Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271, 273 (2000) ("Alien suffrage in the United States existed in the Colonization period and continued through the early part of the twentieth century. During the nineteenth century, at least twenty-two states and territories gave voting rights to aliens." (footnote omitted)).

76. Reflecting the prevailing consensus, Professor Burns recently characterized the *Slaughter-House Cases* as embodying a "pinched construction of national citizenship." JAMES MACGREGOR BURNS, PACKING THE COURT 189 (2009). Similarly, Professor Jackson describes the *Slaughter-House Cases* as "subvert[ing] the potential of the Fourteenth Amendment to fully establish the primacy of national citizenship in defining people's rights in the United States." Vicki C. Jackson, *Citizenship and Federalism*, *in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES, *supra* note 65, at 127, 131; *see also* Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 (2001) ("There were indeed a core set of fundamental freedoms that the People aimed to affirm in the Fourteenth Amendment's Privileges or Immunities Clause . . . ."). There are, however, commentators who look upon the *Slaughter-House Cases* more favorably. *See, e.g.*, William J. Rich, *Why "Privileges or Immunities"? An Explanation of the Framers' Intent*, 42 AKRON L. REV. 1111, 1118 (2009) (advancing "a more charitable view of the *Slaughter-House* framework").

77. McDonald v. City of Chicago, 130 S. Ct. 3020, 3031 (2010) (plurality opinion) ("We therefore decline to disturb the *Slaughter-House* holding."); *id.* at 3084 (Stevens, J., dissenting) ("[T]he original meaning of the [Privileges and Immunities] Clause is not as clear as [the petitioners] suggest—and not nearly as clear as it would need to be to dislodge 137 years of precedent."); *cf. id.* at 3083 (Thomas, J., concurring) ("This history confirms what the text of the Privileges and Immunities Clause most naturally suggests: Consistent with its command that '[n]o State shall ... abridge' the rights of United States citizens, the Clause establishes a minimum baseline of federal rights . . . .").

78. BICKEL, *supra* note 66, at 48.

79. *Id.* at 51.

> decide that he is a nonperson, which is the point of the *Dred Scott* case.[80]

Although Professor Bickel articulated this minimalist understanding of U.S. citizenship over a generation ago, contemporary commentators adhere to this understanding today. Professor Bosniak, for example, writes that, under U.S. law, "[c]itizenship, it turns out, is *not* actually 'the right to have rights,' despite the conventional wisdom. In many situations, only personhood is required."[81] Even those who are normatively skeptical of the minimalist model of U.S. citizenship acknowledge that it accurately describes the law today. For example, Professor Schuck, a prominent voice concerned about the "devaluation of citizenship,"[82] acknowledges that, as a matter of positive law, "the liberal, minimalist conception of citizenship celebrated by Bickel [is] dominant in American law."[83]

In the judicial realm, the seminal statement that aliens enjoy the same Fourteenth Amendment right to equal protection as citizens is *Yick Wo v. Hopkins*.[84] In that case, San Francisco applied its ordinance to prohibit Yick Wo, a resident alien, from operating his laundry business in that city while other persons, U.S. citizens, were permitted to conduct such businesses. This arbitrary application of municipal law, the Court held, violated the Fourteenth Amendment which, by virtue of the Equal Protection Clause, protects "all persons within the territorial jurisdiction [of the United States], without regard to any differences of race, of color, or of nationality."[85] As a constitutional matter, Yick Wo, a "subject[] of the emperor of China,"[86] had the same right to earn his livelihood in San Francisco as a U.S. citizen.

---

80. *Id.* at 53. Professor Bickel's normative critique of citizenship-based rights today resonates in discussion about European Union citizenship. *See, e.g.*, Willem Maas, *Unrespected, Unequal, Hollow?: Contingent Citizenship and Reversible Rights in the European Union*, 15 COLUM. J. EUR. L. 265, 267 (2009) ("Any discussion of citizenship and the rights flowing from it must recognize the inherent instability of entitlements and obligations. The rights and duties attached to citizenship can change, often quite rapidly, for any number of reasons. Even the status of citizen itself is subject to all manner of contingencies, exceptions, and reversals, as historical and contemporary examples demonstrate. Not only the empirical realities but also the normative foundations of citizenship are always in flux.").

81. *See, e.g.*, LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 117 (2006) ("[A]ll aliens in the United States, including the undocumented, formally enjoy most fundamental rights, including due process rights in criminal proceedings, expressive and associational rights, basic economic liberties such as contract and property rights, and even the right to attend public school.").

82. SCHUCK, *supra* note 75, at 164, 192.

83. *Id.* at 173.

84. 118 U.S. 356 (1886).

85. *Id.* at 369.

86. *Id.* at 368.

Similarly confirming the irrelevance of citizenship for most[87] rights under the U.S. Constitution is *Graham v. Richardson*.[88] In that case, the Supreme Court held that resident aliens have the same entitlement to welfare benefits as citizens because "an alien as well as a citizen is a 'person' for equal protection purposes."[89]

The minimalist conception of U.S. citizenship was recently endorsed in *Boumediene v. Bush*.[90] In *Boumediene*, a five-justice majority held that, as a procedural matter, an alien held at Guantanamo Bay, Cuba, can, under the U.S. Constitution, file a petition for habeas corpus to challenge the legality of his incarceration by U.S. forces. For the *Boumediene* majority, the issue posed in that case was whether "noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty" can apply for a writ of habeas corpus from a federal court.[91] Answering that question in the affirmative, the Court observed that "the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens."[92] It did not matter that Mr. Boumediene lacked U.S. citizenship. Despite his status as an alien, he was, as a procedural matter, entitled to challenge his incarceration via a habeas corpus petition.[93] Under the U.S. Constitution, citizenship is not a prerequisite for the right to seek judicial review of the legality of one's confinement.

The minimalist conception of U.S. citizenship is reflected in the Restatement of the Law (Third) of Foreign Relations Law of the United States, which confirms that aliens within the jurisdiction of the United States enjoy the rights embodied in the Constitution. Although certain constitutional rights are "expressly reserved for citizens,"[94] as to all others, "[a]n alien in the United States is entitled to the guarantees of the United States Constitution."[95] Echoing Professor Bickel, the Restatement's comment reiterates that "[t]he Bill of Rights of the United States Constitution (Amendments I–X) declares the rights of persons, not of citizens only"[96] and that "[t]he principal provisions of the Fourteenth

---

87. But not all. *See, e.g.*, Ambach v. Norwick, 441 U.S. 68, 69 (1979) (holding that there is no equal protection violation when New York denies public-school teacher certification to "aliens who are eligible for United States citizenship but who refuse to seek naturalization").

88. 403 U.S. 365 (1971).

89. *Id.* at 375.

90. 553 U.S. 723 (2008).

91. *Id.* at 770.

92. *Id.* at 743 (citation omitted).

93. *Id.* at 771. On the substance of his challenge, the *Boumediene* Court carefully avoided discussion of the ultimate merits of Mr. Boumediene's legal objections to his detention.

94. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 722(1) (1987).

95. *Id.*

96. *Id.* cmt. a.

Amendment safeguarding individual rights against violation by the States also prescribe rights of persons, not only of citizens."[97]

In the context of this minimalist conception of U.S. citizenship, consider again the Court's observation in *Cook* that a citizen who resides abroad and whose property is located outside the United States receives benefits from the federal government. Precisely what citizenship-based benefits did Mr. Cook receive while he resided in Mexico? In an influential analysis, T. H. Marshall divided citizenship into civil, political, and social rights.[98] By the civil aspects of citizenship, Marshall meant "the rights necessary for individual freedom—liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice."[99] For Marshall, "the political element" of citizenship is "the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body."[100] Finally, for Marshall, the most prominent of the social rights of citizenship pertain to "the educational system and the social services" available to the members of society.[101]

Under Marshall's framework, Mr. Cook, in political terms, at that time lacked the most basic political right—the right to vote—because Mr. Cook did not reside in any state and thus had nowhere he could cast a U.S. ballot. Since 1986,[102] a nonresident U.S. citizen, like Mr. Cook, has had the right to cast an absentee ballot in federal elections in the state which he "was domiciled before leaving the United States,"[103] though a U.S. citizen who has never established a domicile in a particular state still has nowhere to cast a ballot in U.S. elections.

In terms of civil rights, Mr. Cook (like any contemporary U.S. citizen living abroad) could, if necessary, have called on the United States for formal diplomatic protection, including representation in international negotiations or arbitration. Mr. Cook could also have requested of the United States less formal consular assistance or, at the other extreme, military protection, including evacuation by United States forces. The United States may or may not have granted any such requests for assistance. Mr. Cook merely had the right to ask. Other than that, Mr. Cook's civil

---

97. *Id.*

98. T.H. MARSHALL & TOM BOTTOMORE, CITIZENSHIP AND SOCIAL CLASS 8 (1992).

99. *Id.*

100. *Id.*

101. *Id.* Professor Rosenfeld suggests that Marshall's "social rights" today more aptly "may be defined as welfare rights." ROSENFELD, *supra* note 65, at 221.

102. In 1986, Congress adopted, and the President signed, the Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (codified as amended at 42 U.S.C. §§ 1973ff to -6 (2006)). Under the Act, a U.S. citizen living in Mexico is an "overseas voter," since that term is not to be taken literally but instead encompasses any U.S. citizen "who resides outside the United States." *Id.* § 1973ff-6(5).

103. *Id.* § 1973ff-6(5)(C).

rights as a Mexican resident were defined by Mexican law, as is true today of a U.S. citizen living in a foreign nation.

As a U.S. citizen, Mr. Cook had the right to return to the United States. An alien lawfully admitted to the United States for permanent residence does not have quite the same right in this respect as a citizen. For example, a permanently resident alien can be removed, i.e., deported, if he commits certain crimes.[104] A citizen committing these crimes faces punishment, but not expulsion. A permanent resident alien is effectively required to return to the United States after spending 180 days abroad.[105] Mr. Cook, as a U.S. citizen, faced no such requirement. Nevertheless, in significant measure, a lawful permanent resident, while an alien, has a right to reside within the United States similar to the residence right of a citizen.

In social terms, Mr. Cook lived at a time when the welfare state was nascent. However, in contemporary terms, there are few significant U.S. social benefits to which Mr. Cook would be entitled today while living in Mexico. Unemployment insurance and Medicaid, for example, are state-run programs to which Mr. Cook would have had no entitlement, as he had no state of residence. If the contemporary Mr. Cook is self-employed or works for a U.S. employer, he accrues U.S. social security benefits, since the United States and Mexico have not entered into a totalization arrangement.[106] If, however, Mr. Cook instead were to reside in any of the twenty-four nations with which the United States has such arrangements, he would not pay U.S. social security taxes or accrue U.S. benefits. Rather, in such a case, he would pay tax to and accrue retirement benefits from the social security system of the nation in which he resided, rather than from the U.S. social security system. The United States currently has totalization agreements with most European nations, as well as Canada, Japan, Australia, South Korea, and Chile.[107]

In short, the citizenship-based benefits enjoyed by Mr. Cook and other U.S. citizens resident abroad are limited. As I discuss below,[108] these minimal benefits make it difficult to justify worldwide taxation of such citizens' assets and income under a benefits theory of taxation. Minimal benefits do not justify maximal taxation.

---

104. 8 U.S.C. § 1227(a) (2006) (listing crimes that make "[a]ny alien . . . in and admitted to the United States . . . deportable" and thus removable from the United States "upon the order of the Attorney General"); *see also* Demore v. Kim, 538 U.S. 510, 513 (2003) (upholding the constitutionality of the detention of removable permanent resident aliens "for the brief period necessary for their removal proceedings").

105. 8 U.S.C. § 1101(a)(13)(C) (listing conditions under which a permanent resident alien shall be "regarded as seeking an admission into the United States for purposes of the immigration laws," including "absen[ce] from the United States for a continuous period in excess of 180 days").

106. *U.S. International Social Security Agreements*, *supra* note 44.

107. *Id.*

108. *See* discussion *infra* Part V.

### *B. The Psychological Model*

To others, a minimalist conception of U.S. citizenship misses the larger point: U.S. citizenship is not merely a "legal construct"[109] but, rather, constitutes psychologically and symbolically valuable membership in a historic and important polity, the United States of America. From this perspective, the relevant issue is not the legal rights tied to citizenship but, rather, the intangible, but quite real, psychological and symbolic value of belonging to the American community. Professor Schuck captures the underpinnings of this model when he writes of the "psychological dimension" of citizenship,[110] "the emotional and symbolic attractions of identifying as" an American.[111] In the same vein, Professor Bosniak observes that "in psychological or cultural terms, the term *citizenship* is invoked to refer to an experience of identity and solidarity that a person maintains in collective or public life."[112]

Consider again in this context Mr. Cook. From a psychological perspective, the significance of Mr. Cook's U.S. citizenship is not the minimal package of tangible legal benefits which flow from that citizenship but, rather, the intangible pride engendered by such citizenship: The boast *civis Americanus sum*[113] is symbolically valuable, irrespective of the limited legal rights which derive from that status.

This is a popular and widespread conception of U.S. citizenship, as can be affirmed by anyone who has ever watched naturalized citizens swear allegiance to their new home country. True, such new citizens thereby attain the unrestricted[114] right of permanent residency in the United States and the right to vote. However, few who watch such citizenship ceremonies can doubt the immense psychological value of full membership in the American polity.[115]

However, the question remains: Does the compelling psychological value of U.S. citizenship justify citizenship-based taxation on worldwide

---

109. BICKEL, *supra* note 66, at 53.

110. Peter H. Schuck, *Citizenship in Federal Systems*, 48 AM. J. COMP. L. 195, 207 (2000) (emphasis omitted).

111. Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGR. L.J. 1, 10 (1989), *reprinted in* IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA 58 (William Rogers Brubaker ed., 1989).

112. Bosniak, *supra* note 65, at 241.

113. The Roman phrase was *civis Romanus sum*, most famously quoted by President Kennedy in his speech on June 26, 1963, at the Rudolph Wilde Platz in West Berlin. John F. Kennedy, President of the United States, Remarks at the Rudolph Wilde Platz, Berlin (June 26, 1963), *available at* http://www.jfklibrary.org/Asset-Viewer/oEX2uqSQGEGIdTYgd_JL_Q.aspx ("Two thousand years ago the proudest boast was 'civis Romanus sum.' Today, in the world of freedom, the proudest boast is 'Ich bin ein Berliner.'").

114. On the more constrained right of a lawful permanent alien to reside in the United States, see *supra* notes 104–05 and accompanying text.

115. Schuck, *supra* note 110, at 243.

income and assets? The answer, as I discuss below,[116] is "No," since there is no necessary connection between the intangible symbolic benefits of U.S. citizenship and the United States' global taxation of its citizens. The latter does not follow from the former.

### C. *THE TIEBOUT/PURCHASE MODEL*

The Tiebout model of public finance is one of the truly seminal ideas of the twentieth century, an idea that has had a pervasive impact in many areas of legal and economic scholarship.[117] The Tiebout model conceives of political jurisdictions as competing among themselves in the marketplace for residents and capital. Each competing jurisdiction, e.g., every municipality in a metropolitan region, offers a package of public services at a price in the form of the taxes levied by that jurisdiction. The relationship between a political jurisdiction and its prospective and current residents is the relationship of seller and purchaser. The jurisdiction sells services. Residents purchase those services via their tax payments. Households and firms, continually assessing their locational choices, sort themselves into different jurisdictions, depending upon their respective service and tax preferences. The ability of existing residents and businesses to emigrate to adjacent jurisdictions disciplines political decisionmakers, who must concern themselves with the possibility that excessive taxes or unattractive services will cause individuals and firms to depart for neighboring communities with lower taxes or more appealing services.

The Tiebout test of a government service is the test of the marketplace. In this model, public services have no intrinsic value. They are worth whatever taxpayers are willing to pay for them through their respective tax payments. The classic Tiebout setting is the metropolitan area within which myriad municipalities provide mobile households and businesses multiple options in terms of tax and public-service packages.

Despite its enormous impact in other areas, the Tiebout model has had no influence on the citizenship literature. Indeed, in large measure, that literature is implicitly anti-Tiebout in its orientation, bemoaning those jurisdictions that make citizenship available for sale.[118] As Professor Schuck puts it, "Americans simply do not think of their polity as a mere club—a

116. *See* discussion *infra* notes 137-40 and accompanying text.

117. *See, e.g.*, Edward A. Zelinsky, *Tax Incentives for Economic Development: Personal (and Pessimistic) Reflections*, 58 CASE W. RES. L. REV. 1145, 1148 (2008).

118. *See, e.g.*, T. Alexander Aleinikoff & Douglas Klusmeyer, *Plural Nationality: Facing the Future in a Migratory World*, *in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES, *supra* note 65, at 63, 84 ("The Caribbean islands of Dominica, Grenada, and Saint Kitts–Nevis offer second passports for investments ranging from $50,000 to $250,000 without requiring any enduring residential or familial ties. The selling of nationality unquestionably cheapens its value as a form of allegiance. . . . Nationality should not become a commodity that individuals can purchase to further their business or personal interests.").

transitory affiliation affording easy entry and exit for purely instrumental reasons with few strings attached."[119] In contrast, from a Tiebout perspective, citizenship is a public service like any other, which individuals freely purchase (and change) with their tax payments "for purely instrumental reasons."[120]

Professor Abreu rejects measures like new Code § 877A, which, by making expatriation more costly, impair "personal autonomy":

> Whether the price of expatriation is high enough depends on the values of each individual. For most Americans, losing their U.S. citizenship is too high a price to pay for any tax savings. For such people, as for Justice Holmes, the tax costs of U.S. citizenship are worth the civilization it buys. For others, the tax costs of U.S. citizenship are too high. [Prior] law maximize[d] the personal autonomy of taxpayers by allowing them to decide whether the price of expatriation—loss of citizenship—is too high. By respecting the change in status wrought by expatriation, the tax system allows individuals to decide whether the benefits of U.S. citizenship are worth its costs.[121]

From this perspective, the core approach of the Tiebout model may be applied to the taxes and services offered by nation–states, including citizenship. From this vantage, citizenship is a public service like any other, which the individual values through his tax payments. If an individual's current citizenship is not worth the tax price he pays for it, the individual can seek an alternative, more affordable citizenship.

Certain features of current law can be understood as reflecting this Tiebout/purchase view of U.S. citizenship. In particular, if a minor who has resided in the United States for ten or fewer years renounces his U.S. citizenship upon the attainment of majority, he is not taxed under Code § 877A as a "covered expatriate."[122] The Code thus gives this individual a purchase-type choice to continue as a U.S. citizen at the price of U.S. taxation of his worldwide income or to eschew U.S. citizenship as not worth the tax cost to him. However, as I discuss below,[123] the current system of citizenship-based taxation is in practice difficult to defend in Tiebout terms since different citizens face radically different prices for the same benefits of citizenship and because mobility among nations and nationalities is in practice far more limited than is mobility among municipalities.

---

119. Schuck, *supra* note 110, at 240.

120. *Id.*

121. Alice G. Abreu, *Taxing Exits*, 29 U.C. DAVIS L. REV. 1087, 1157–58 (1996).

122. I.R.C. § 877A(g)(1)(B)(ii) (2006).

123. *See* discussion *infra* Part VI.A.

## IV. IMPLEMENTING CITIZENSHIP-BASED TAXATION

As a final preliminary to evaluating the United States' citizenship-based taxation of individuals, we must explore the Code's implementation of such taxation. Recall, in this context, that the Code currently prescribes three different income tax treatments for the foreign taxes paid by U.S. citizens and residents. Foreign income taxes levied against foreign-source income are fully creditable against U.S. income taxes to the extent such foreign taxes are equal to or less than the U.S. taxes assessed against such foreign-source income.[124] All foreign taxes paid in connection with trade, business, and investment activity are deductible for U.S. income tax purposes, as are foreign real property taxes.[125] Other foreign taxes, such as general sales taxes levied by foreign nations, are neither creditable nor deductible.[126] As a result of this disparate treatment of different foreign taxes, otherwise similarly situated U.S. citizens who reside abroad pay different U.S. taxes depending upon the types and amounts of the taxes levied by the countries in which they live and earn their incomes.

To take another simplified example, consider in this context three U.S. citizens, *A*, *B*, and *C*, who reside respectively in countries *X*, *Y*, and *Z*. *A*, *B*, and *C* each has total income of $100, derived totally from sources within the country of her residence. *A*, *B*, and *C* are each in the 30% bracket for U.S. income tax purposes. *X* finances its government by an income tax assessed at a 30% bracket, while the government of *Y* levies a property tax and *Z* uses a general sales tax to pay for their public services. To keep the math simple, let us further suppose that *B* pays $30 of property tax to *Y* and that *C* pays $30 in sales tax to *Z*.

As a matter of law, *A*, *B*, and *C*, as U.S. citizens, are all subject to U.S. income taxation of their respective worldwide incomes. In practice, however, the Code treats *A*, *B*, and *C* quite differently. At one extreme, *A* pays no U.S. income tax since her $30 income tax payment to *X* is totally credited against, and thus eliminates, her federal income tax obligation. At the other end of the spectrum, *C* pays $30 to the federal fisc on her income of $100 since *C* receives neither a credit nor a deduction for her $30 sales tax payment to *Z*. In between is *B*, who, after deducting her $30 property tax payment to *Y*, pays $21 of income tax to the federal Treasury.[127]

If *A* or *B* is subject to the AMT,[128] *B* loses the deduction for her property tax payments unless these are connected with business or with the

124. I.R.C. §§ 901–990.

125. *Id.* § 164(a).

126. Treas. Reg. § 1.164-3(f) (1964).

127. After deducting her $30 property tax payment, *B* has taxable income of $70 which, at a 30% tax bracket, yields a federal tax liability of $21.

128. I.R.C. §§ 55–59 (amended after 2006 at scattered subsections).

production of income, while *A*'s credit for foreign taxes is tied to her AMT liability.

Further complications ensue if a U.S. citizen's income qualifies for the § 911 exclusion.[129] Suppose, for example, that *D* and *E*, both nonresident U.S. citizens, live in the same foreign nation, *Q*. Let us further assume that both *D* and *E* have income of $100 from *Q* sources, that both of them are in the 30% bracket for U.S. income tax purposes, and that *Q* finances its government services with a 30% sales tax. However, suppose that, while they are otherwise similarly situated, *D*'s $100 income stems from employment by a foreign corporation and qualifies for the § 911 exclusion, while *E*'s income is from investments and thus does not qualify for the § 911 exclusion. In that case, *D* pays no federal income taxes because of the exclusion, while *E* pays federal income tax of $30.

## V. CITIZENSHIP-BASED TAXATION AND BENEFITS

Against the background established in the last three Parts, we can now assess the merits of the United States' practice of taxing on the basis of citizenship, with a particular focus on the United States' policy of taxing its nonresident citizens on their respective worldwide incomes and assets. In this Part, I evaluate citizenship-based taxation in terms of the benefits associated with U.S. citizenship. Governmentally furnished benefits are a traditional consideration for tax policy and, as we have seen,[130] is the rationale of *Cook*. However, upon examination, the benefits rationale for citizenship-based taxation proves unpersuasive, both in theory and in practice. The most significant civil and social benefits extended by the U.S. polity are tied to U.S. residence, not to U.S. citizenship.

The strongest benefits argument for citizenship-based taxation is one with which citizenship mavens are most uncomfortable, namely, the Tiebout/purchase characterization of citizenship as a public service purchased through tax payments. However, even that approach cannot be squared with the current system, which in practice charges different tax prices (often radically different tax prices) for the identical benefits of U.S. citizenship, depending upon the level and kinds of taxes assessed by the nation in which a U.S. citizen resides and earns his income.

Quantifying government benefits is an inherently subjective process. Nevertheless, the minimalist model of U.S. citizenship undermines the benefits defense of citizenship-based taxation. If there is "minimal content [to] the concept of [U.S.] citizenship,"[131] the limited legal benefits stemming from U.S. citizenship cannot, as a theoretical matter, justify the

129. *Id.* § 911 (amended 2007).

130. *See supra* notes 61–63 and accompanying text.

131. BICKEL, *supra* note 66, at 51.

taxation of a citizen's worldwide income. Minimal benefits do not justify maximal taxation.

It is instructive in this context to contrast the U.S. legal rights of a nonresident U.S. citizen with the U.S. legal rights of a resident alien. In only one area does a nonresident U.S. citizen currently possess significantly more rights than does a resident alien. In particular, a nonresident citizen today usually possesses the political right to vote in federal elections. However, in the context of social and civil rights, the resident alien, by virtue of his physical presence within the territorial jurisdiction of the United States, possesses substantially weightier U.S. legal rights than does the nonresident U.S. citizen. While there is no easy metric for balancing political rights against social and civil rights, the minimal legal rights accorded to a U.S. citizen as such undermine a benefits rationale for taxing that citizen on his worldwide income and assets.

Using Marshall's framework,[132] in political terms, at the time of *Cook*, neither a nonresident citizen nor a legal alien had significant U.S. political rights since neither could vote in U.S. elections. A resident alien falls outside the protection of the Fifteenth Amendment and thus lacks any constitutional entitlement to vote. By the time of *Cook*, virtually all states which had earlier extended the franchise to aliens had withdrawn it.[133] That is where matters stand today: Resident aliens do not vote in U.S. elections.

When *Cook* was decided, a U.S. citizen living abroad, since he is typically not a citizen of any state, usually[134] had nowhere to vote in U.S. elections. However, since 1986, a nonresident citizen has had the right to cast an absentee ballot in federal elections "in the last place in which [he] was domiciled before leaving the United States."[135] Thus, today a nonresident U.S. citizen has the right to vote in federal elections in the state in which he used to be domiciled.

On the other hand, in terms of civil rights, a resident alien receives significantly greater benefits from the U.S. polity than does a U.S. citizen living abroad. The nonresident citizen has the right to ask for assistance,

---

132. T.H. Marshall, it will be recalled, divided citizenship rights into political, social, and civil rights. *See* MARSHALL & BOTTOMORE, *supra* note 98, at 8.

133. *Cook v. Tait*, 265 U.S. 47, was decided in 1924. By then, the franchise had been restricted throughout the nation to citizens. *See* Harper-Ho, *supra* note 75, at 282 ("1928 marked the first national election 'in which no alien in any state had the right to vote' in national, state or local elections.").

134. Before 1986, a U.S. citizen residing abroad might have been able to vote in a particular state by virtue of being domiciled in that state. However, before the enactment of the Uniformed and Overseas Citizens Absentee Voting Act, U.S. citizens residing abroad typically could not vote because there was no "State wherein they reside[d]." U.S. CONST. amend. XIV, § 1.

135. 42 U.S.C. § 1973ff-6(5)(C) (2006). A nonresident U.S. citizen who was never domiciled in any state still cannot vote in U.S. elections because there is no state in which she can cast her ballot.

which the federal government may (or may not) furnish. In contrast, a resident alien receives a full panoply of civil rights, including the protection of his person and property by the U.S. legal system and the guarantees embodied in the Bill of Rights. The equivalent civil rights of a nonresident U.S. citizen stem from the nation in which he resides, not from the United States.

Similar observations apply in the context of social rights: The social rights of a resident alien derive from the United States while a nonresident citizen receives few, if any, social rights from the United States. If there is no totalization agreement between the United States and the foreign nation in which a nonresident U.S. citizen lives, such citizen will accrue U.S. social security benefits in consideration for his self-employment or FICA taxes, provided that he is self-employed or he works for a U.S. or other employer covered by the U.S. social security system. Otherwise, a nonresident citizen has no significant claims for social benefits from the United States. On the other hand, a resident alien is entitled to a full range of social services provided by the federal government and the states, including public education for his children and welfare benefits such as unemployment compensation and income assistance.

In sum, the extensive civil and social rights of U.S. residents (citizens and aliens alike) may justify taxing such residents' worldwide incomes under a benefits theory. However, as the minimalist model of citizenship cautions, the benefits accruing to citizenship as such are limited and provide a weak theoretical basis for taxing the worldwide incomes of nonresident citizens. Minimal rights do not justify maximal taxation.

A benefits justification for citizenship-based taxation is equally problematic under the psychological model of citizenship that focuses upon the intangible symbolic value of U.S. citizenship. Most of us feel great pride in our U.S. citizenship. It is, however, hard to characterize that pride as a "benefit" justifying taxation. We also feel great pride from other associations in our lives, e.g., our connections with our religious and heritage communities and with our alma maters. No one suggests that these institutions can impose involuntary tax-type payments to compensate for these psychological benefits. Why should the federal government?

The obvious distinction between the federal government and these other pride-engendering institutions is that the government provides collective services that require taxes to prevent freeloading on those services. This distinction, however, merely restates the observation the government provides public services. And that observation, in turn, runs back into the reality that the public benefits received by nonresident U.S. citizens from the federal government are minimal. Nonresident citizens cannot freeload on most U.S. public services because they do not receive such services.

There is, in short, a disconnect between the premise that U.S. citizenship engenders intangible psychological and symbolic benefits and

the assertion by the federal government of tax jurisdiction over nonresident citizens' worldwide incomes and assets. Why should pride in U.S. citizenship lead to worldwide taxation? There is no persuasive answer to this question. In syllogistic terms, the major premise—the emotional value of identification as a U.S. citizen—requires a minor premise connecting it to the asserted conclusion—worldwide taxation of U.S. citizens' incomes and assets. The absence of a compelling minor premise leaves the syllogism incomplete.

Under a benefits theory of taxation, the most compelling argument for citizenship-based taxation derives from the Tiebout/purchase model of citizenship as a government service purchased by tax payments. Unlike the minimalist and psychological models of citizenship, the Tiebout model does not require a decision about the nature of public benefits, i.e., whether the benefits of citizenship are minimal or are essentially psychological in nature. Rather, under the Tiebout/purchase approach, the federal government states the price of citizenship—worldwide taxation of the citizen's income and estate—and each individual assesses for himself whether the tangible and intangible benefits of U.S. citizenship are worth the price. If not, a current citizen will expatriate while a prospective citizen will elect against naturalization. Each will decide for herself. Neither can object to the worldwide taxation of her income or assets if she voluntarily makes the choice that U.S. citizenship is worth the stated price.

At its core, the Tiebout theory of citizenship is love-it-or-leave-it, a theory that eschews overarching assessments of the benefits of U.S. citizenship. Rather, a Tieboutian approach simply requires each citizen to assess for herself the subjective, personal value of her citizenship relative to its tax cost.

As we have seen,[136] citizenship mavens generally disfavor a conception of citizenship as a public service that can be freely bought and sold. However, as we have also seen, the Tiebout/purchase concept of citizenship is today reflected in Code § 877A, which allows certain U.S. citizens who have resided in the United States for ten or fewer years to elect against U.S. citizenship without thereby becoming "covered expatriate[s]" for U.S. tax purposes.[137] This election furnishes these citizens a Tiebout-type choice to pay the tax price of continuing U.S. citizenship or to forfeit that citizenship as not worth the tax cost to them.

Although in theory the Tiebout model of citizenship provides the strongest benefits rationale for citizenship-based taxation of an individual's global income and assets, for two reasons, that model does not in practice justify citizenship-based taxation in its present incarnation. First, the Code currently implements the Tiebout model poorly. Depending upon the

---

136. *See supra* notes 117–19 and accompanying text.

137. I.R.C. § 877A(g)(1)(B)(ii) (Supp. II 2008).

nature and amount of the taxes assessed by the nations in which they respectively live and derive their incomes, two nonresident citizens may pay radically different U.S. taxes for the same citizenship benefits. Second, U.S. citizens typically lack the mobility between jurisdictions, i.e., between different countries, which underpins the Tiebout model.

As we have seen, a U.S. citizen, *A*, who resides in a foreign country that relies on an income tax will typically pay little or no U.S. income tax because the foreign tax *A* pays on foreign-source income is credited against *A*'s U.S. income tax liability on a dollar-for-dollar basis. In contrast, a U.S. citizen, *B*, who resides in a nation that finances public activity through a general sales tax (or other similarly nondeductible levy) will pay U.S. income taxes at the full rate, since *B*'s foreign sales tax payments are neither deductible nor creditable for U.S. income tax purposes. The benefits of U.S. citizenship are the same for these two individuals despite the radically different tax prices assessed for those benefits by the federal Treasury. In Tiebout terms, there is no rationale for this discrepant pricing of the benefits of U.S. citizenship since the benefits are the same for both citizens, and thus both should confront the same price.

In some contexts, it may be appropriate for governments to charge different prices to persons receiving different kinds and different quantities of public services. For example, public finance economists often recommend user fees when feasible, such as public water system charges based upon the amount of water each consumer uses.[138] Another classic case is a special assessment levied against homeowners when public sidewalks are installed in front of their respective houses.[139] In these cases, it may be appropriate to charge some persons more and some persons less (or not at all) for a particular public function since some persons receive more benefits from the service and should accordingly defray more or all of the cost.[140]

However, in Tiebout terms, the different tax prices the Code assesses against different nonresident citizens are random in nature, unrelated to the

---

138. *See, e.g.*, DAVID N. HYMAN, PUBLIC FINANCE: A CONTEMPORARY APPLICATION OF THEORY TO POLICY 367 (4th ed. 1993) ("Creative use of user charges as an alternative to tax financing improves the efficiency of use of productive resources and lowers the annual tax bills of citizens.").

139. JOAN YOUNGMAN, LEGAL ISSUES IN PROPERTY VALUATION AND TAXATION: CASES AND MATERIALS 26 (2006) ("[S]pecial assessments . . . are imposed to cover the cost of public improvements, such as sidewalks or street lighting."); Robert E. Deyle & Mary Kay Falconer, *Revenue Options for a Risk-Based Assessment of Developed Property in Hurricane Hazard Zones*, 18 J. LAND USE & ENVTL. L. 299, 310 (2003) ("Improvements that are typically financed using special assessments are street paving, sidewalk and gutter construction, and street lighting.").

140. There may be countervailing distributional considerations in these cases if the polity wants to assist low-income households by subsidizing their consumption of utilities or by subventing their homeownership. No such distributional concern justifies the discrepant tax price the Code charges different U.S. citizens for the same benefits of citizenship.

nature or cost of the benefits such citizens receive from the federal government. Rather, those tax prices vary depending upon the nature and level of taxes assessed by the countries in which such nonresident citizens live, even though all of these citizens receive the same benefits of U.S. citizenship. Under the Tiebout model, there is no rationale for this haphazard price discrimination.

The Code's discrepant tax treatment of different nonresident citizens is equally troubling from the perspective of those who think of the tangible and intangible benefits of U.S. citizenship as objectively ascertainable and as weighty. Consider that discrepant treatment from the vantage of one who rejects Professor Bickel's argument that the benefits of U.S. citizenship are minimal and instead characterizes those benefits of citizenship as substantial. If the tangible or intangible benefits of U.S. citizenship (or both) are weightier than the Bickel argument indicates, it is anomalous that one nonresident citizen receives these hefty benefits while making no contribution to the federal treasury (since his U.S. income taxes are totally offset by the credit for foreign income taxes) while another nonresident citizen receives these benefits of citizenship at the cost of full U.S. taxation (since the foreign taxes he pays are neither deductible nor creditable).

There may be persuasive reasons for the Code's current treatment of different foreign taxes, i.e., the crediting against U.S. income tax liability of foreign income taxes paid on foreign-source income, the income tax deductibility of foreign property taxes and foreign taxes associated with income producing activities, and no federal income tax deduction or credit for other foreign taxes such as general sales taxes. The foreign tax credit, for example, is usually defended as facilitating international trade and capital flows by eliminating double income taxation.[141] Foreign tax mavens often talk about the need for tax rules that encourage "capital import neutrality"[142] or "capital export neutrality."[143] The § 911 exclusion of foreign earned income is often justified as "intended to promote economic growth."[144]

---

141. *See, e.g.*, Fleming, Peroni & Shay, *supra* note 5, at 328 (indicating that the foreign tax credit "mitigate[s] international double taxation of U.S. residents' foreign-source income").

142. Am. Bar Ass'n Section of Taxation, *supra* note 20, at 683 & n.38; James R. Hines, Jr., *Reconsidering the Taxation of Foreign Income*, 62 TAX L. REV. 269, 273 (2009).

143. Am. Bar Ass'n Section of Taxation, *supra* note 20, at 681–82 & nn.35–37; Hines, *supra* note 142, at 272.

144. Arnett v. Comm'r, 473 F.3d 790, 795 (7th Cir. 2007); *see also* Sobel, *supra* note 29, at 111 ("[Section 911] was hailed . . . as an incentive for employment abroad."); David D. Stewart, *Expatriate Taxation Harms U.S. Competitiveness, Panelists Warn*, 127 TAX NOTES 1430, 1431 (2010) ("Americans working in overseas operations are more likely to buy U.S. goods and services and to increase U.S. exports."); Webster Beary, Note, *Section 911: The Foreign Earned Income Inclusion? Using* Clark v. Commissioner *To Demonstrate How Courts Have Improperly Narrowed the Scope of Section 911*, 62 TAX LAW. 897, 907 (2009) ("One of the legislative purposes for enacting section 911 was to make United States businesses more competitive overseas.").

However meritorious these arguments for the Code's current rules may (or may not) be, the net result of those rules is a pattern of differential taxation of nonresident citizens, which in practice undermines the argument for worldwide taxation of U.S. citizens on the basis of the putative benefits of citizenship. Identical benefits should mean identical taxation, or at least reasonably identical taxation. However, under the Code, U.S. nonresident citizens pay radically different taxes for the same benefits of citizenship. It is accordingly unpersuasive to view the Code in its current form as creating a Tiebout market for citizenship when no consistent or coherent tax price is charged in that market.

The second practical problem with a Tiebout justification of the United States' worldwide taxation of its nonresident citizens is the lack of mobility between nations; most U.S. citizens cannot make the locational choices among nations required under the Tiebout model. A critical assumption of the Tiebout model is that a taxpayer can, with relative ease, move between different jurisdictions in search of a congenial package of taxes and services. The classic case satisfying this assumption is the affluent suburbanite who, with relatively small transaction costs, can choose from among different communities in the metropolitan area to find the most appealing tax and service package.

This, however, is not a realistic view of citizenship in the modern world.[145] Whatever the future may hold, at present, it is unconvincing to analogize individuals' mobility among municipalities (the prototypical Tiebout setting) to the limited ability of individuals in practice to change their respective nationalities. Without mobility among nations similar to mobility among cities, the Tiebout model of citizenship fails, as that model justifies the stated tax price of U.S. citizenship—worldwide taxation—only if U.S. citizens voluntarily choose their respective citizenships.

In the final analysis, the benefits rationale for citizenship-based taxation is unpersuasive. That rationale has been part of our constitutional tradition since *Cook*. However, it does not survive scrutiny in light of the minimal legal benefits associated with U.S. citizenship; the absence of a convincing link between the psychological utility of citizenship and worldwide taxation; the lack of mobility among nations, which precludes active shopping among alternative citizenships; and the divergent tax prices the Code currently assesses different citizens for the same benefits of citizenship.

In a recent defense of citizenship-based taxation,[146] Professor Kirsch offers a different perspective: "[C]itizens abroad receive significant benefits from holding citizenship."[147] In assessing the propriety of the United States'

145. Mason, *supra* note 4, at 1564 ("Tiebout posited a situation in which people could move freely, for example between local communities within the United States. But significant legal and economic barriers prevent free human migration." (footnote omitted)).

146. Kirsch, *supra* note 3, at 443.

147. *Id.* at 478.

worldwide taxation of nonresident citizens, Professor Kirsch contends, "the fact that other citizens might receive greater benefits is not directly relevant."[148] Moreover, "a benefits analysis generally does not dictate the proper level of income-based taxation. Rather, it merely determines whether sufficient grounds exist for exercising some kind of tax jurisdiction."[149]

In addition, Professor Kirsch argues, "it is reasonable to conclude that the retention of U.S. citizenship reflects a self-identification with the population of the United States (or the belief that the benefits of citizenship are worth the tax cost)."[150] Thus, in terms of the three models of citizenship, Professor Kirsch concludes that the U.S. practice of global citizenship-based taxation is warranted, as the benefits of citizenship are not minimal but "significant"; nonresident citizens identify psychologically and symbolically with the United States by retaining their respective citizenships; and, in Tiebout terms, U.S. citizens can expatriate if they decide for themselves that U.S. citizenship is not worth the cost of worldwide taxation.

Although an important contribution to the debate, this analysis ultimately proves unpersuasive. In terms of the minimalist model of U.S. citizenship, a nonresident U.S. citizen receives the bulk of her social and civil rights from the nation in which she resides, not from the United States. When assessing these rights, the instructive comparison is between the nonresident U.S. citizen who receives her social and civil rights largely from the nation in which she lives and the resident alien who, by virtue of her presence within the boundaries of the United States, receives ample social and civil rights from the United States. This comparison bolsters the characterization advanced by Professor Bickel, and those who preceded and followed him, that the benefits associated with U.S. citizenship are minimal. Under the U.S. legal system, most rights flow to "persons" resident within the territorial jurisdiction of the United States, not to citizens as such.

It is, moreover, revealing that Professor Kirsch, while extolling the "significant" benefits of U.S. citizenship, himself ultimately concludes that those benefits do not justify the worldwide taxation of U.S. citizens. Rather, he argues that the benefits accruing to nonresident U.S. citizens establish the minimal jurisdictional contacts necessary for the United States to tax such nonresident citizens. However, no one suggests otherwise. The controversial issue is the level of taxation, i.e., whether the United States should, as a matter of policy, tax nonresident citizens' worldwide incomes and assets. As to that question, Professor Kirsch agrees that the benefits of U.S. citizenship cannot provide an answer but "merely determine[] whether

148. *Id.*

149. *Id.*

150. *Id.* at 481.

sufficient grounds exist for exercising some kind of tax jurisdiction"[151] over nonresident citizens.

To justify the worldwide taxation of U.S. citizens, Professor Kirsch invokes the psychological benefits of U.S. citizenship and the Tiebout-type ability of U.S. citizens to expatriate if they view as inordinate the tax cost of U.S. citizenship.[152] The symbolic and emotional benefits of U.S. citizenship, which Professor Kirsch quite aptly labels as self-identification, are quite real. However, the question remains: Do the intangible, psychological benefits derived by a nonresident citizen from his identification with the United States justify global taxation of that nonresident citizen? As a logical matter, the answer is "No." There is a missing link between the major premise—the psychological benefits of U.S. citizenship—and the asserted conclusion—worldwide taxation of U.S. citizens. Why does the latter stem from the former? I respectfully suggest that Professor Kirsch (or anyone else) cannot supply the missing minor premise in this syllogistic chain.

Professor Kirsch also invokes the Tiebout line of argument: Given the option of expatriation, the nonresident's retention of his U.S. citizenship reflects his subjective "belief that the benefits of [such] citizenship are worth the tax cost."[153] Of the potential benefits rationales for citizenship-based taxation, this is the most plausible, since it eschews any effort to assess objectively the value of U.S. citizenship. Rather, if a citizen retains his U.S. citizenship while abroad, he thereby signals his subjective assessment that the advantages to him of that citizenship outweigh its tax cost in the form of worldwide taxation of his income and assets.

Despite its theoretical appeal, for the two reasons discussed above, this rationale in practice proves unpersuasive. First, expatriation isn't that easy. Second, the tax cost currently assessed by the United States for U.S. citizenship may be radically different for two nonresident U.S. citizens even though they receive the same benefits of citizenship.

Although Professor Kirsch's argument helps to clarify the terms of debate, it does not deter from my conclusion: For a persuasive defense of citizenship-based taxation, we must look elsewhere than the traditional benefits rationale; although that rationale is the received wisdom, it does not withstand scrutiny. In the next Part, I advance a defense of citizenship-based taxation by focusing upon the way in which other nations often define residence for tax purposes as domicile, an individual's permanent home. Domicile resembles citizenship, as both involve permanent allegiance even in the face of long-term absence. Citizenship thus proves to be an administrable proxy for domiciliary residence, a proxy that reaches tax

151. *Id.* at 478.

152. Professor Kirsch discusses these under the ability-to-pay rubric, although I think it more compelling to classify these as arguments premised on public benefits. In the end, however, this difference does not matter.

153. Kirsch, *supra* note 3, at 481.

results similar to the outcomes of residence-based taxation when residence is defined as domicile. However, citizenship-based taxation reaches those results more efficiently, without the fact-intensive inquiries often necessary to determine an individual's domicile. Moreover, given the resemblance of citizenship and domicile, the U.S. practice of citizenship-based worldwide taxation is not quite the international outlier it first seems.

## VI. ADMINISTRABILITY, RESIDENCE, AND CITIZENSHIP

### A. *OVERVIEW*

As noted earlier, tax mavens often invoke ability-to-pay considerations to justify the worldwide taxation of an individual's income and assets by the nation in which she resides. The country in which an individual lives exercises in personam jurisdiction over that individual. In addition to such personal jurisdiction, the nation of her residence is often the country in which an individual works (at least in significant part), earns some (often much) of her investment income, and maintains some (often much) of her assets. By virtue of her presence in the country of her residence, that country, the argument goes, is best positioned to measure and tax an individual's overall capacity to pay by aggregating her worldwide income and assets and by enforcing against this resident the taxation of her aggregate income and assets. These ability-to-pay considerations, combined with the substantial public benefits the nation of residence provides to its residents, underpin the near universal practice of worldwide income taxation by the nation in which an individual lives.

At first blush, this argument for residence-based taxation leaves no room for a defense of citizenship-based taxation. If residence-based taxation of worldwide income and assets is the proper way to measure and tax an individual's overall ability-to-pay and if such residence-based taxation correctly reflects the governmental benefits bestowed on individuals by virtue of their respective residences, it is the nation in which a U.S. citizen lives which should tax her worldwide income and holdings. If a U.S. citizen lives abroad, it follows from this argument, the nation of residence, rather than the United States, is best positioned to assess such citizen's ability to pay by aggregating and taxing her worldwide income and assets. Moreover, the nation in which an individual lives is also properly compensated for the public benefits it provides to its residents by taxing globally such residents' income and assets.

However, there is a compelling administrability argument for citizenship-based taxation: Citizenship is an administrable proxy for domicile, an individual's permanent home. Many nations, implicitly or expressly, define residence for tax purposes as domicile rather than physical presence during the tax year. When residence is defined as domicile, residence-based taxation and citizenship-based taxation overlap; domicile

resembles citizenship since both emphasize permanent allegiance rather than immediate physical presence. An individual may be domiciled in a particular nation on the basis of his long-term affiliation with that nation even if he is physically absent from that nation for prolonged periods, just as he may be a citizen of a nation from which he has long been absent. In such cases, the permanent allegiance of domicile resembles the permanent allegiance of citizenship.

Citizenship is accordingly an administrable proxy for domicile, a proxy which, while sometimes overinclusive, obviates the need for fact-intensive determinations of permanent residence. Thus, citizenship-based taxation makes sense as a matter of enforceability; citizenship, as a marker for domicile, implements residence-based taxation in an administrable manner. From this vantage, citizenship-based taxation proves to be closer to residence-based taxation than first appears to be the case, since citizenship and domicile resemble each other by embodying permanent allegiance to a particular nation even in the absence of immediate physical presence in that nation.

To explore this defense of citizenship-based taxation as an administrable proxy for domicile-based taxation, I examine and compare the tax definitions of residence utilized by three English-speaking nations, Canada, Australia, and the United Kingdom.[154] Four themes emerge from this international inquiry. First, the definition of residence for tax purposes typically takes one of four alternative forms. For tax purposes, residence status is usually triggered automatically by a fixed quantum of physical presence in a particular nation, usually 183 days in the year. In addition, residence is also often defined in tax contexts subjectively, in terms of less physical presence augmented by additional factors connecting an individual to the country in question. Moreover, residence for tax purposes is frequently characterized in terms of "ordinary residence" in a particular nation. Finally, residence for tax purposes is also often, implicitly or expressly, defined as domicile, an individual's permanent home.[155] Second, these concepts—residence, ordinary residence, domicile—often vary in meaning among different tax systems. Sometimes these variations in meaning are subtle; sometimes they are quite pronounced. There is consequently divergence among residence-based income tax systems, even

154. However, the issues posed by residence-based income taxation are not limited to English-speaking nations. *See, e.g.*, lawhawk, *Bar Rafaeli Gets Tax Deal from Israel*, A BLOG FOR ALL (Feb. 12, 2010, 10:20 AM), http://lawhawk.blogspot.com/2010/02/bar-rafaeli-gets-tax-deal-from-israel.html (discussing an income tax compromise between Israel and supermodel Bar Rafaeli).

155. The states of the United States, in their respective tax systems, typically define "residence" using these concepts, i.e., physical presence for a majority of the year, less physical presence augmented by other factors, and domicile. *See, e.g.*, CAL. REV. & TAX. CODE § 17014 (West 2010); N.Y. TAX LAW § 605(b)(1) (McKinney 2009); TENN. CODE ANN. § 67-2-101(5) (West 2010).

when the tests of residency for tax purposes are formulated in nominally identical terms. Third, determining residence for tax purposes is a fact-intensive inquiry, particularly when residence is defined not as a fixed quantum of physical presence in a specific nation but, rather, as physical presence supplemented by other circumstances, as "ordinary" residence, or as domicile. In such contexts, residence status is manipulable by the (potential) taxpayer and costly for the tax collector to monitor and enforce. Fourth, the outcome in many cases is the same whether the criterion for taxation is residence defined as domicile or citizenship. Both domicile and citizenship focus upon permanent allegiance rather than immediate physical presence. Because residence is often a fact-intensive, potentially manipulable inquiry, citizenship, as a proxy for domicile, provides a more administrable approach to the taxation of an individual's worldwide income and assets than does domicile.

In short, citizenship-based taxation is not an alternative to residence-based taxation but, rather, provides a more enforceable approach to worldwide taxation when residence means domicile. Since both citizenship and domicile measure permanent allegiance rather than immediate physical presence, citizenship-based taxation reaches similar results as domicile-based taxation, but reaches those results more efficiently, without factually intensive determinations of an individual's domicile, i.e., his permanent home.

### B. *CANADA'S RESIDENCE-BASED TAXATION*

Reflecting the international norm, Canada's Income Tax Act ("ITA") imposes worldwide taxation on all residents of Canada without regard to Canadian citizenship.[156] Consequently, a nonresident Canadian citizen pays Canadian income tax only on her Canadian-source income,[157] unlike a nonresident U.S. citizen who is liable for U.S. taxes on his worldwide income.[158] A resident of Canada who ceases to reside in that country is subject to a "deemed disposition" regime similar to new § 877A[159] since her abandonment of residence (even if she remains a Canadian citizen) terminates Canada's taxation of her worldwide income.

156. Income Tax Act, R.S.C. 1985, c. 1, § 2(1) (stating that tax is imposed on the income "of every person resident in Canada at any time in the year"); *id.* § 3(a) (stating that "income" includes income "from a source inside or outside Canada"); *see also* Canada Customs and Revenue Agency, IT-221R3 (Consolidated) ¶ 1 (Dec. 21, 2001) ("A person who is resident in Canada during a taxation year is subject to Canadian income tax on his or her worldwide income from all sources.").

157. R.S.C. 1985, c. 1, § 2(3) (indicating that a nonresident pays tax on "taxable income earned in Canada"); *see also* Canada Customs and Revenue Agency, IT-221R3 ¶ 1 ("Generally, a non-resident person is only subject to Canadian income tax on income from sources inside Canada.").

158. Subject to the credit for foreign income taxes and the § 911 exclusion.

159. R.S.C. 1985, c. 1, § 128.1(4)(b).

The ITA does not define Canadian residence. The ITA does instruct that a person is a Canadian resident for tax purposes if she is "ordinarily resident" in Canada.[160] The ITA also "deem[s]" certain persons to be Canadian residents.[161] These deemed residents include individuals serving abroad in Canada's military forces,[162] individuals acting in foreign countries as ambassadors and other "servant[s] of Canada,"[163] and the dependent children of these individuals employed abroad by Canada.[164] The ITA also "deem[s]" an individual to be a Canadian resident in any particular year under an automatic physical-presence test, namely, if the individual "sojourn[s] in Canada in the year" for a total of "183 days or more."[165]

This statutory scheme has given rise to caselaw and administrative pronouncements under which a particular individual's status as a Canadian resident *vel non* for income tax purposes is "determined on a case by case basis after taking into consideration all of the relevant facts."[166] Chief among these fact-sensitive decisions is the Supreme Court of Canada's opinion in *Thomson v. Minister of National Revenue*.[167]

Mr. Thomson was a Canadian citizen.[168] Upon his retirement, he initially spent little time in Canada and kept no home there. Subsequently, in deference to his wife's desire to be closer to family and friends, Mr. Thomson started spending summers in Canada. In 1935, he built a home in New Brunswick. However, he never spent 183 days in Canada in any year. Consequently, Mr. Thomson could not be classified as a Canadian resident for tax purposes by virtue of his physical presence alone.[169]

Mr. Thomson spent most of the year at "his chief abode at Pinehurst, North Carolina . . . an expensive dwelling."[170] He also spent "a month or two at Belleair, Florida"[171] annually. While he was in the United States, Mr. Thomson's Canadian dwelling was closed, "except the quarters of a housekeeper and wife which [were] open the year around."[172] "[A]t all three places," i.e., New Brunswick, North Carolina, and Florida, Mr.

160. *Id.* § 250(3).
161. *Id.* § 250(1).
162. *Id.* § 250(1)(b).
163. *Id.* § 250(1)(c)(i).
164. *Id.* § 250(1)(f).
165. *Id.* § 250(1)(a).
166. Canada Customs and Revenue Agency, IT-221R3 (Consolidated) ¶ 4 (Dec. 21, 2001).
167. [1946] S.C.R. 209 (Can.).
168. *Id.* at 213 (Kurwin, J.).
169. *Id.* at 216, 219, 231.
170. *Id.* at 222 (Rand, J.).
171. *Id.*
172. *Id.*

Thomson "indulge[d] himself as an addict of golf, to which he devote[d] most of his time and a substantial part of his money."[173]

In the context of Mr. Thomson's follow-the-sun[174] lifestyle, the Supreme Court of Canada, with one judge dissenting, upheld the position of the Canadian tax authorities that Mr. Thomson was a Canadian resident and thus taxable by Canada on his worldwide income. The various judges' opinions all emphasize that, when an individual, like Mr. Thomson, is physically present in Canada for less than 183 days in any year, his status as a Canadian resident *vel non* for tax purposes entails a facts-and-circumstances inquiry:

> The gradation of degrees of time, object, intention, continuity and other relevant circumstances, shows, I think, that in common parlance "residing" is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter. In one case it is satisfied by certain elements, in another by others, some common, some new.[175]

*Thomson* would not have arisen under a citizenship-based tax system since Mr. Thomson was always a Canadian citizen and would thus have been subject to worldwide Canadian taxation if Canada taxed on that basis. *Thomson* thus highlights the efficiency of administering citizenship-based taxation as compared to residence-based taxation. Under a system of citizenship-based taxation, cases like *Thomson* do not occur, since citizens are automatically subject to taxation on their respective worldwide incomes. There is thus no need under such a system for the tax authorities to delve into the taxpayer's lifestyle, nor can the taxpayer arrange his affairs to minimize the appearance of residence under a system of citizenship-based taxation.

The opinion of the Tax Court of Canada in *Gaudreau v. The Queen*[176] more recently illustrated the fact-based nature of residence determinations and the administrative difficulties inherent in such determinations. *Gaudreau* also indicates that residence for tax purposes is often understood as domicile and that domiciliary taxation resembles citizenship-based

173. *Id.*

174. The reference is not to The Beatles' "I'll Follow the Sun," but, rather, to *Follow the Sun*, the 1951 movie with Glenn Ford portraying the golf champion Ben Hogan. FOLLOW THE SUN (Twentieth Century Fox Film Corp. 1951).

175. *Thomson*, [1946] S.C.R. at 224; *see also id.* at 232 ("[E]ach case must be determined after all of the relevant factors are taken into consideration . . . .").

176. 2004 TCC 840, [2005] 1 C.T.C. 2701 (Can.).

taxation because domicile and citizenship are both measures of permanent allegiance rather than short-term physical presence.

Mr. Gaudreau was a Canadian citizen. An engineer, Mr. Gaudreau worked for his employer in Egypt from September 1996 until April 2000. During this period, Mr. and Mrs. Gaudreau maintained in Ontario a furnished home that Mrs. Gaudreau had inherited from her parents. While in Egypt, they did not rent their Ontario home, which Mrs. Gaudreau used occasionally while her husband stayed in Egypt. In Egypt, Mr. and Mrs. Gaudreau "rented a semi-furnished apartment on a yearly basis." Among his continuing contacts with Canada, Mr. and Mrs. Gaudreau's adult children lived there and Mr. Gaudreau maintained Canadian bank accounts. Mr. Gaudreau made one short return visit to Canada during the four years he was employed in Egypt and intended to retire to Canada after completing his assignment in Egypt.

Citing *Thomson* and the factual nature of residence determinations, the court held that Mr. Gaudreau, while employed and physically present in Egypt, remained "ordinarily resident" in Canada and thus subject to Canadian income taxation on a worldwide basis. According to the court, the facts indicated that Mr. Gaudreau "and his wife left Canada on a temporary basis only." Mr. Gaudreau did not "give up his ties with Canada": "[A] person's temporary absence from Canada does not necessarily lead to a loss of Canadian residence . . . even if close personal and economic ties are maintained in Canada."[177] Like *Thomson*, *Gaudreau* is a fact-intensive case. Also like *Thomson*, *Gaudreau* would not have arisen if Canada, like the United States, imposed worldwide income taxation on its nonresident citizens, since Mr. Gaudreau, like Mr. Thomson, remained at all times a Canadian citizen.

However, *Thomson* and *Gaudreau* differ in the tests of residence each applied. Mr. Thomson spent much of each year in Canada at his home there. Residence in *Thomson* was a matter of his annual physical presence in Canada. That presence fell short of the 183 days necessary for automatic residence but was sufficiently substantial so that, when augmented by other factors, Mr. Thomson was a resident of Canada for tax purposes on a facts-and-circumstances basis. Mr. Gaudreau, in contrast, briefly returned to Canada once in four years. Otherwise, he was in Egypt. While phrased in statutory terms as "ordinary residence," the concept of residence implicitly underpinning *Gaudreau* is the concept of domicile, that is to say, the taxpayer's permanent home.

Though Mr. Gaudreau had no significant physical presence in Canada for four years, the Canadian court nevertheless characterized his stay in Egypt as "temporary" and thus consistent with his status as a Canadian resident. Mr. Gaudreau can only be considered as "ordinarily" resident in Canada for this extended period if residence is understood as domicile, i.e.,

177. *Id.* at 2716.

"permanent residence,"[178] in the nation to which an individual "is most closely related"[179] despite his physical absence from that nation. If Egypt was only Mr. Gaudreau's "temporary" home, Canada must have been his permanent home.

*Gaudreau* indicates that, when residence is defined as domicile, residence-based taxation resembles citizenship-based taxation. When residence is understood as an individual's domicile (as it implicitly was in *Gaudreau*), the focus shifts from the individual's physical presence in any particular year to the nature of his long-term allegiance. Mr. Gaudreau's retention of his Canadian citizenship was an administrable proxy of this permanent allegiance. Despite his four-year presence in Egypt, Mr. Gaudreau viewed Canada as his permanent home. Domiciliary residence in a case like *Gaudreau* proves citizenship-like, since the key inquiry in such a case is not annual physical presence, but long-term commitment.

In short, Canadian law embodies alternative tests of residence: an automatic physical-presence test (residence per se if an individual spends 183 or more days in Canada); a subjective physical-presence test (residence based on the totality of the circumstances, including physical presence); "ordinary" residence; and, by implication, domicile. Especially in its latter three incarnations, residence is an inescapably fact-intensive inquiry. Citizenship is an administrable proxy for domicile—permanent allegiance even in the absence of immediate physical presence—and thus obviates the need for extensive factual inquiry. A Canadian system of citizenship-based taxation would with greater efficiency have obtained the same results in *Thomson* and *Gaudreau*, since both Mr. Thomson and Mr. Gaudreau retained their respective Canadian citizenships.

### C. AUSTRALIA'S SYSTEM OF RESIDENCE-BASED TAXATION

The concept of domicile, implicit in the Canadian tax notion of ordinary residence, is explicit in Australian tax law. Like Canada, Australia taxes its residents on a worldwide basis, i.e., on income "derived directly or indirectly from all sources, whether in or out of Australia."[180] For these purposes, Australia's tax statute, somewhat tautologically, defines as an Australian resident "a person . . . who resides in Australia."[181] In addition, the Australian statute provides that a person is an Australian resident:

---

178. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 211 cmt. i (1987).

179. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18 cmt. a (1971).

180. *Income Tax Assessment Act 1997* (Cth) s 6-5(2).

181. *Income Tax Assessment Act 1936* (Cth) s 6; *see also Income Tax Assessment Act 1997* (Cth) s 995-1 ("In this Act . . . Australian resident means a person who is a resident of Australia for the purposes of the *Income Tax Assessment Act 1936*.").

> (i) whose domicile is in Australia, unless the Commissioner is satisfied that his permanent place of abode is outside Australia;
> (ii) who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that his usual place of abode is outside Australia and that he does not intend to take up residence in Australia.[182]

The Australian tax statute, like its Canadian counterpart, thus declares an individual physically present in Australia for 183 days in the year to be an Australian resident for tax purposes for that year. However, the Australian 183-day rule is a presumption of residence that can be rebutted if the individual has "his usual place of abode . . . outside Australia."[183] Also like its Canadian counterpart, the Australian tax law classifies a person physically present in Australia for less than 183 days to be an Australian resident if supplemental factors indicate that the person "resides in Australia."[184]

The Canadian court implicitly applied the concept of domicile in *Gaudreau* by finding Mr. Gaudreau's four-year stay in Egypt to be "temporary" and thereby viewing Canada as his permanent home. In contrast, the Australian tax statute expressly defines domicile as a form of Australian residence, triggering worldwide income taxation. There is, however, considerable tension within the Australian statute, as an individual domiciled in Australia can nevertheless satisfy the Australian tax commissioner "that his permanent place of abode is outside Australia."[185] Since domicile is an individual's permanent home, it is not readily apparent how a person domiciled in Australia can have a permanent home elsewhere, although the Australian statute acknowledges this possibility.

Unsurprisingly, the Australian courts and tax authorities confronting this statutory scheme emphasize (like their Canadian peers) the fact-intensive nature of determinations of residence. As Australia's Commissioner of Taxation has declared, under the Australian tax statute, "it is not possible to provide conclusive rules for determining the residency status of individuals leaving Australia temporarily. . . . The weight to be given

182. *Income Tax Assessment Act 1936* (Cth) s 6(1). In addition, an individual is deemed an Australian resident for tax purposes if he is (1) covered by Australia's Superannuation Act 1990, (2) an "eligible employee" under Australia's Superannuation Act 1976, or (3) a spouse or child under the age of sixteen of such an individual. *Id.*

183. *Id.*

184. *Id.*; *see also Comm'r of Taxation v Ex'rs of Estate of Subrahmanyam*, [2001] 189 ALR 666 (discussing a taxpayer who is "a resident of Australia in the ordinary sense" despite having no domicile in Australia and being present in Australia for less than half of the year).

185. *Income Tax Assessment Act 1936* (Cth) s 6(1) (defining "resident or resident of Australia" (internal quotation marks omitted)).

to each factor will vary with individual circumstances of each case and no single factor is conclusive."[186]

Instructive in this context is the decision of the Federal Court of Australia in *Federal Commissioner of Taxation v Applegate.*[187] Mr. Applegate was an Australian lawyer who had been born in Australia[188] and apparently was an Australian citizen.[189] He agreed to open an office for his Sydney-based law firm in Vila, New Hebrides. In November 1971, Mr. and Mrs. Applegate (who was pregnant) surrendered their apartment in Australia and rented a home in Vila. Mr. Applegate obtained admission to the New Hebrides bar and "left no assets in Australia, but he retained his membership in Australia of the Hospitals Contribution Fund."[190]

Originally, the Applegates had intended for their child to be born in New Hebrides, but they instead elected for Mrs. Applegate to return to Sydney for the child's birth. Subsequently, when Mr. Applegate's health deteriorated, he decided that the tropical climate in New Hebrides was bad for him. The Applegates accordingly returned to Sydney for good in September 1973, earlier than they had originally expected. The issue in *Applegate* was whether Mr. Applegate was an Australian resident while in New Hebrides and thus taxable by Australia on the non-Australian income Mr. Applegate earned while employed abroad. Mr. Applegate acknowledged that his domicile remained Australia while he worked and lived in New Hebrides. However, he argued, on these facts it was his "clear intention . . . [to] reside outside Australia permanently but not indefinitely,"[191] and he came back to Australia sooner than expected only because of unanticipated health problems. Consequently, though Australia was his domicile, Mr. Applegate was not an Australian resident for tax purposes while in New Hebrides since he had his "permanent place of abode" in Vila. Hence, Mr. Applegate maintained, as a nonresident of Australia, he was not liable for Australian income taxes on the non-Australian income he earned in New Hebrides.

The Australian courts agreed, threading their way through the circuitous statutory path under which Mr. Applegate could be domiciled in Australia, but still have his "permanent place of abode" in New Hebrides.

---

186. Australian Taxation Office, IT 2650, *available at* http://www.austcham.org.sg/LinkClick.aspx?fileticket=1ZXNErG%2Fa9s%3D&tabid=198; *see also Estate of Subrahmanyam*, 189 ALR at 672 ("[I]n deciding whether the taxpayer was a resident of Australia in the ordinary sense of those words it was necessary for [the Administrative Appeals Tribunal] to have regard to all identifiable facts relevant to the question.").

187. [1979] 27 ALR 114.

188. *Id.* at 120 (noting that the taxpayer had told the Commissioner, "I have never claimed to have abandoned my domicile of origin" in Australia).

189. The court never mentions Mr. Applegate's citizenship. However, he was born in Australia and thus appears to have been an Australian citizen. Australia's rule for birth-based citizenship is currently codified at *Australian Citizenship Act 2007* (Cth) s 12.

190. *Applegate*, 27 ALR at 118.

191. *Id.* at 120 (internal quotation marks omitted).

Confronting the tension in the Australian tax statute, Judge Fisher acknowledged that "[i]t would amount to a contradiction in terms to suggest that an independent person could be domiciled in Australia but with his permanent residence outside Australia, if permanent bears its ordinary meaning."[192] Consequently, Judge Fisher construed the statutory term "permanent place of abode" to mean something less than permanent, "the taxpayer's fixed and habitual place of abode. It is his home, but not his permanent home."[193] Thus, Mr. Applegate was not an Australian resident while practicing law and living in New Hebrides. Though he was domiciled in Australia for that period, his home in New Hebrides was sufficiently "fixed and habitual" to make Mr. Applegate a nonresident of Australia.

For present purposes, it is not critical whether *Applegate* was decided correctly.[194] It is, however, important that *Applegate* would not have arisen if Australia, like the United States, taxed the worldwide incomes of its citizens.[195] This again highlights the comparative administrative efficiency of enforcing citizenship-based taxation. Such taxation obviates the need for fact-intensive inquiries into resident status. Citizenship is an enforceable proxy for domicile, as both are categories of permanent allegiance to a particular nation even in the face of physical absence from that nation.

Mr. Applegate conceded that Australia remained his domicile while he and his family lived in New Hebrides. However, similarly situated taxpayers may not be so forthcoming since domicile, in the conventional sense of the taxpayer's permanent home, may entail a fact-intensive inquiry that would impede the tax collector's efforts. Citizenship, by way of contrast, is a more easily determined status and thus makes the tax more readily enforceable.

### D. *THE UNITED KINGDOM'S RESIDENCE-BASED TAXATION*

The United Kingdom's tax law also deploys the terms "resident," "ordinarily resident," and "domicile," but differently than do the tax laws of Australia and Canada. Indeed, the United Kingdom's approach to residence-based taxation highlights the variation among residence-based tax systems, as well as the similarities of domicile and citizenship.

---

192. *Id.* at 127.

193. *Id.* at 128.

194. I would note the difficulty of construing "permanent place of abode" in § 6(1)(a)(i) of Australia's Income Tax Assessment Act 1936 to mean "fixed and habitual place of abode," as § 6(1)(a)(ii) of the Act utilizes the virtually synonymous phrase "usual place of abode." The more natural reading is that "permanent" in § 6(1)(a)(i) means "more than usual," i.e., more than fixed and habitual. On the other hand, I am sympathetic to the situation of the judges in *Applegate* who confronted a statute that was problematic even by the standards of the tax law.

195. This assumes that Mr. Applegate was a citizen of Australia, which I think is likely. *See supra* note 189 and accompanying text.

Instructive in this context is *Reed v. Clark*.[196] The taxpayer in *Clark* was Dave Clark of the Dave Clark Five.[197] The issue addressed in *Clark* was Mr. Clark's status as a resident *vel non* for U.K. income tax purposes for the tax year 1978–1979.[198] Mr. Clark was a British citizen. He was domiciled in the United Kingdom and was both "resident" and "ordinarily resident" in the United Kingdom before and after the tax year 1978–1979. However, for that particular year, Mr. Clark lived in the Los Angeles area and made a quick trip to Toronto and New York. He did not spend a single day during the year 1978–1979 in the United Kingdom.

Mr. Clark claimed that he was not a U.K. resident for 1978–1979 and thus owed no U.K. income tax on his non-U.K.-source income for that tax year. The U.K. tax agency, H.M. Revenue and Customs ("HMRC"), countered that Mr. Clark was a U.K. resident for 1978–1979 and thus owed U.K. income tax on his worldwide income for that year, including the income earned outside the U.K. in 1978–1979. Mr. Clark prevailed.

Mr. Clark was unmarried. He lived in the United Kingdom with his mother and nephew in a London house he had given to his parents in 1964 as the Dave Clark Five experienced their initial success. Mr. Clark also rented an apartment in London. While he lived in California, this rented apartment was left empty despite the efforts of Mr. Clark's real-estate agents to sublet it. While Mr. Clark was in the United States, he kept in touch by telephone with his secretary and accountant in the United Kingdom who "looked after" Mr. Clark's "business interests in the United Kingdom."[199]

The relevant U.K. statute imposed income tax on:

> [T]he annual profits or gains arising or accruing—
>
> (i) to any person residing in the United Kingdom from any kind of property whatever, whether situated in the United Kingdom or elsewhere, and
>
> (ii) to any person residing in the United Kingdom from any trade, profession or vocation, whether carried on in the United Kingdom or elsewhere . . . .[200]

---

196. [1985] STC 323, 58 T.C. 528.

197. Among the iconic recordings of the Dave Clark Five is "Catch Us If You Can." On their face, at least, the lyrics of this song are not addressed to HM Revenue and Customs.

198. The taxable year for purposes of the U.K. income tax starts on April 6 and ends on the following April 5. Thus, the tax year at issue in *Clark* went from April 6, 1978, through April 5, 1979. Income Tax Act, 2007, c. 3, § 4(3).

199. *Reed*, 58 T.C. at 534.

200. Income and Corporation Taxes Act, 1970, c. 10, § 1(a)(i)–(ii), sch. D (repealed 1992). Substantively equivalent terminology today appears as sections 6 and 269 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"). Income Tax (Trading and Other Income) Act, 2005, c. 5, §§ 6, 269. ITTOIA section 6 provides that a U.K. resident owes U.K. income tax on "profits" from any trade, profession or vocation "wherever . . . carried on." *Id.* § 6. With an exception for U.K. residents taxed on the remittance basis, ITTOIA section 269

The worldwide taxation of U.K. residents' incomes was augmented by the statutory command that any British subject who had his "ordinary residence" in the United Kingdom was subject to worldwide U.K. income taxation if such subject had "left the United Kingdom for the purpose only of occasional residence."[201]

The *Clark* court started with the uncontroversial premise that "where a person resides is essentially a question of fact and degree."[202] While "a taxpayer may reside [in the U.K.] although physically absent from this country for the whole year . . . each case must depend on its own facts."[203] In this case, "[the taxpayer] was not residing in the United Kingdom in the tax year 1978–79. For the whole of that year his home and place of business were in Los Angeles. In my view on the primary facts that conclusion is inescapable."[204]

Moreover, the court held, Mr. Clark's one-year residence in the United States was not "occasional" within the meaning of the U.K. tax statute.[205] Rather, "there was a distinct break in the pattern of the taxpayer's life . . . for just over a year" as he lived and worked in the Los Angeles area for the year, "mostly in one fixed place of abode," and "did not visit [the United Kingdom] at all."[206] On these facts, Mr. Clark, though domiciled in the United Kingdom and ordinarily resident in the United Kingdom before and after his year in the United States, had not "left the United Kingdom for the purpose only of occasional residence broad."[207] Accordingly, Mr. Clark was a nonresident of the United Kingdom for income tax purposes for the year 1978–1979, even though he was both domiciled and ordinarily a resident there. Mr. Clark thus owed no U.K. income tax on his non-U.K.-source income for that tax year.

At one level, *Clark* buttresses the characterization of U.S. citizenship-based taxation as an international "outlier."[208] If the United Kingdom followed the United States' policy of taxing its nonresident citizens' worldwide incomes, Mr. Clark, a British citizen since birth, would have owed

---

similarly provides that a U.K. resident is taxable on the "[p]rofits" both of a domestic "UK property business" and the "[p]rofits of an overseas property business." *Id.* § 269.

201. Income and Corporation Taxes Act, 1970, c. 10, § 49 (repealed 1992). The current version of this statute provides that any "individual [who] was both UK resident and ordinarily UK resident" is treated "as UK resident" for income-tax purposes for periods during which such "individual remains outside the United Kingdom for the purpose only of occasional residence abroad." Income Tax Act, 2007, c. 3, § 829.

202. *Reed*, 58 T.C. at 544.

203. *Id.* at 547.

204. *Id.*

205. *Id.* at 556.

206. *Id.*

207. *Id.*

208. Kirsch, *supra* note 3, at 445.

U.K. income tax on his worldwide income in 1978–1979.[209] Instead, *Clark* implements a concept of residence as short-term presence, irrespective of longer-term affiliation. Though domiciled on a permanent basis in London and though "ordinarily resident" there, Mr. Clark was not a U.K. resident for tax purposes for the single U.K. tax year he spent in the United States.

*Clark* also highlights the variation that exists within residence-based income tax systems. Had *Clark* been either a Canadian or an Australian case, it would have been decided the other way. Mr. Clark admitted that he was ordinarily resident in the United Kingdom. Under Canadian standards, this admission would have made Mr. Clark a U.K. resident for 1978–1979 despite his total absence from the U.K. during that tax year. Under Canadian law, an individual "ordinarily resident" in Canada is a resident for tax purposes.[210]

Mr. Clark also admitted that he was domiciled in the United Kingdom. Under Australian tax law, that domicile would have created a presumption of residence for tax purposes,[211] a presumption which Mr. Clark could not have overcome as a result of his abode in the Los Angeles area. Under the Australian tax statute,[212] Mr. Clark's California home would not have surmounted the presumption of residence status, whether such home was assessed under the literal terms of the Australian tax statute ("permanent place of abode") or under the more forgiving judicial standard applied in *Applegate* ("fixed and habitual place of abode").

There are no U.K. statutory definitions of the tax terms "resident," "ordinarily resident," and "domicile." As an administrative matter, HMRC, consistent with *Clark*, defines these as short-term, intermediate, and permanent residence, respectively, and, also consistent with *Clark*, construes these as three independent categories. Thus, according to HMRC, an individual is a U.K. resident for tax purposes if either she is physically present "in the UK for 183 days or more in the tax year" or, if her physical presence in the UK is less than this, but she "keep[s] connections in the UK such as property, economic interests, available accommodation and social activities."[213] Hence, according to HMRC, an individual can trigger U.K. residence status for tax purposes either under a per se physical-presence test of 183 days in the year or under a facts-and-circumstances test for residence.

Although "residence" for U.K. tax purposes is a matter of annual status, HMRC indicates that "ordinary residence" requires more, namely, that an individual's U.K. presence "has a settled purpose," which, even if it is "for

209. Subject to credits for foreign income taxes paid and any applicable exclusions like § 911. Income Tax Act, 2007, c. 3, § 911.

210. Income Tax Act, R.S.C. 1985, c. 1 § 250(3).

211. *Income Tax Assessment Act 1936* (Cth) s 6.

212. *Id.*

213. HER MAJESTY'S REVENUE & CUSTOMS, RESIDENCE, DOMICILE AND THE REMITTANCE BASIS 82 (2010), *available at* http://www.hmrc.gov.uk/cnr/hmrc6.pdf.

only a limited period . . . has enough continuity to be properly described as settled."[214] In addition, ordinary residence requires that an individual's U.K. presence is "part of the regular and habitual mode of . . . life for the time being."[215] An individual who comes to the "UK for three years or more" is deemed to "have established a regular and habitual mode of life."[216] Thus, as a rough approximation, a single year in the United Kingdom may be sufficient to establish U.K. residence for that year, while three years is required for "ordinary residence." Per *Clark*, an individual may be ordinarily resident in the United Kingdom but not resident for a particular year in which he is abroad.

Finally, HMRC defines the taxpayer's domicile in conventional terms as his "permanent home."[217] In *Clark*, the fact that Mr. Clark was domiciled in the United Kingdom was irrelevant to his status as a resident *vel non* for the tax year 1978–1979. In short, the three categories—resident, ordinarily resident, domicile—are, for U.K. tax status, independent of each other, as demonstrated by Mr. Clark, who was not resident in the United Kingdom for the tax year 1978–1979 though he was ordinarily resident in the United Kingdom and was domiciled there.

The British tax system consequently applies the concepts of residence, "ordinary residence," and "domicile" differently than do the Australian and Canadian tax systems. To see these differences, compare *Gaudreau*, *Applegate*, and *Clark*. Mr. Gaudreau was gone from Canada for a longer period (four years) than Mr. Clark was absent from the United Kingdom (one year). Nevertheless, Mr. Gaudreau was deemed to be a Canadian resident for tax purposes for the four years in question because he was "ordinarily resident" in Canada and was in Egypt only "temporarily." In contrast, Mr. Clark was not a U.K. resident for his single year abroad, even though he was ordinarily resident in the United Kingdom. While in Canada an "ordinary" resident is automatically a Canadian resident for tax purposes, in the United Kingdom it is possible to be, like Mr. Clark, ordinarily resident but not a resident in a particular year.

Mr. Applegate was presumptively an Australian resident for income tax purposes because he was domiciled in Australia and overcame that presumption only by demonstrating that Vila was his "fixed and habitual place of abode." On the other hand, Mr. Clark's U.K. domicile was irrelevant to his status as a resident *vel non* for income tax purposes for 1978–1979. Someone domiciled in Australia is presumptively a resident of that country for income tax purposes. In contrast, an individual may be domiciled in the

214. *Id.* at 9.

215. *Id.* (emphasis omitted).

216. *Id.*

217. *Id.* at 76.

United Kingdom, like Mr. Clark, but that fact is irrelevant to his status as a U.K. resident *vel non* for income tax purposes.

In contrast, the concept of "domicile" plays a critical role under the U.K. inheritance tax[218] and under the U.K.'s "remittance" system for taxing foreign-source income. The Inheritance Tax Act 1984 ("IHTA 1984") taxes "transfer(s) of value" while the "transferor" is alive, i.e., gifts,[219] as well as "transfers on death."[220] These inter vivos and testamentary transfers are taxed on a worldwide basis if the transferor is domiciled inside the United Kingdom.[221]

Under the "remittance" system of taxing foreign-source income, an eligible U.K. resident may elect to defer U.K. taxation on certain "foreign income"[222] until such income is actually "received in the United Kingdom."[223] A U.K. resident can defer tax on qualifying foreign income under the remittance system only if such resident either is not ordinarily resident in the United Kingdom[224] or is not domiciled in the United Kingdom.[225] Thus, an individual with qualifying foreign-source income cannot defer U.K. tax on such income under the remittance system if she simultaneously triggers all three independent categories of the U.K. tax law, i.e., residence, ordinary residence, and domicile.[226]

The fact-intensive nature of the domicile inquiry—Where is the taxpayer's permanent home?—is reflected in *Civil Engineer v. Inland Revenue Commissioners*.[227] In that case, the taxpayer, a civil engineer, was born in England and worked there from 1949 until 1960.[228] He then moved to Hong Kong where he worked, first as an employee, then through his own "extremely successful" "consulting practice."[229] During his thirty years in Hong Kong, the taxpayer sometimes visited England and at times owned

218. Inheritance Tax Act, 1984, c. 51.

219. *Id.* § 3(1).

220. *Id.* § 4(1).

221. *Id.* § 6(1). The statute actually states this proposition in the negative, i.e., transferors "domiciled outside the United Kingdom" pay no tax on the transfer of "[p]roperty situated outside the United Kingdom." Under certain circumstances, the IHTA 1984 deems certain long-term residents of the United Kingdom and certain formerly domiciled persons to be domiciled in the United Kingdom. *Id.* § 267(1).

222. Income Tax (Trading and Other Income) Act, 2005, c. 5, § 832.

223. *Id.* § 832(1).

224. *Id.* § 831(2), (4).

225. *Id.* § 831(2), (3).

226. A good summary of the remittance system of deferral is found in HER MAJESTY'S REVENUE & CUSTOMS, *supra* note 213, at 31.

227. [2002] STC (SCD) 72 (U.K.).

228. *Id.* at [5].

229. *Id.*

property there. In 1990, he returned to England, bought a house in Sussex, and made non-U.K. gifts in Jersey and Guernsey.[230]

The taxpayer claimed that these non-U.K. gifts fell outside the scope of the U.K. inheritance tax since he had shifted his domicile from England to Hong Kong.[231] The U.K. tax authorities countered that the taxpayer had, since birth, maintained his domicile in the U.K. and that this domicile was unchanged at the time of these gifts, despite the taxpayer's long-term residence in Hong Kong.[232] Consequently, as inter vivos transfers by an individual domiciled in the United Kingdom, the 1990 transfers were subject to U.K. inheritance taxation.

Special Commissioner Jones agreed with the government, defining the question in factual terms, namely, whether the taxpayer "inten[ded] to remain permanently or indefinitely in Hong Kong"[233]:

> It is common knowledge that many British people worked in Hong Kong during the British lease for their working lives intending to retire to England or Scotland, thus retaining their domicile of origin in one of those countries. The taxpayer seems no different. His daughters were educated in England, he paid annual visits to England, and eventually he returned and bought a house in England and as far as I know has lived there since 1990. In the absence of positive evidence of a different intention, I am unable to find that he had ever established a domicile of choice in Hong Kong.... Accordingly, I find that he was domiciled within the United Kingdom at the time of the two transfers on 23 April 1990.[234]

The outcome in *Clark* is quite different from the result that would have occurred in a factually equivalent case involving a U.S. citizen, as a U.S. citizen would have paid U.S. income taxes while living abroad for the year, as did Mr. Clark.[235] However, the denouement in *Civil Engineer* parallels the U.S. result on these facts. A nonresident U.S. citizen is subject to U.S. taxation on his gifts, even if the donor-citizen's physical presence in the United States has been minimal or nonexistent.[236] Similarly, the taxpayer in *Civil Engineer* paid U.K. transfer tax on his 1990 gifts by virtue of his U.K. domicile, despite his intermittent physical presence in the U.K. for the preceding thirty years. In this context, U.S. citizenship-based taxation again resembles residence-based taxation when residence is defined as domicile.

230. *Id.* at [7].
231. *Id.* at [8].
232. *Id.*
233. *Id.* at [9].
234. *Id.* at [12].
235. Subject to the foreign income tax credit and the § 911 exclusion.
236. Treas. Reg. § 25.2501-1(a)(1) (as amended in 1983).

Both citizenship and domicile entail permanent allegiance even in the absence of physical presence. Consequently, in cases like *Civil Engineer*, citizenship is an administrable proxy for domicile. Having been born in England, the taxpayer in *Civil Engineer* was apparently a British citizen.[237] Thus, in his case, a citizenship-based tax system would reach the same result as did a domicile-based system, though the citizenship-based system more efficiently obtains this outcome in an objective, enforceable fashion without the need for fact-intensive determinations of domicile, i.e., the taxpayer's permanent home.

Consider finally the *Jarndyce*-like litigation involving the U.K. tax status of Mr. Robert Gaines-Cooper. The protracted *Gaines-Cooper* litigation highlights the factually intensive nature of the domicile inquiry and the consequent efficiency of using citizenship for tax purposes instead.

Mr. Gaines-Cooper, a successful entrepreneur, was born in England and is a British citizen.[238] His extensive business activities took place both within and without the United Kingdom and included property development in Canada,[239] plastics manufacturing in the Seychelles,[240] several businesses in California,[241] and a medical-products venture based in Italy.[242] His peripatetic lifestyle involved much international travel;[243] homes in the United Kingdom,[244] in the Seychelles,[245] in California,[246] and in Switzerland;[247] as well as a relatively brief marriage centered in California[248] and a subsequent marriage to a woman from the Seychelles who emigrated to the United Kingdom.[249]

237. Persons born in the United Kingdom are themselves British citizens as long as one parent is a British citizen or an individual "settled in the United Kingdom." British Nationality Act, 1981, c. 61, § 1(1)(b). The taxpayer in *Civil Engineer* was born in England. *Civil Engineer*, [2002] STC (SCD) 72, at [5].

238. Gaines-Cooper v. Comm'rs for HM Revenue & Customs, [2006] UKSPC SPC00568 [11], *available at* http://www.bailii.org/uk/cases/UKSPC/2006/SPC00568.html, *aff'd*, [2007] EWHC (Ch) 2617, *available at* http://www.bailii.org/ew/cases/EWHC/Ch/2007/2617.html, *aff'd sub nom.* The Queen on the Application of Davies v. Comm'rs for HM Revenue & Customs, [2010] EWCA (Civ) 83, *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2010/83.html.

239. *Id.* at [19].

240. *Id.* at [20]–[22].

241. *Id.* at [30]–[31].

242. *Id.* at [39]–[47].

243. *Id.* at [92]–[108].

244. *Id.* at [13], [34]–[36], [48]–[50], [68].

245. *Id.* at [22]–[24].

246. *Id.* at [32].

247. *Id.* at [66].

248. *Id.* at [32].

249. *Id.* at [56]–[66].

Against this complicated factual background,[250] HMRC maintained that, for the relevant years, Mr. Gaines-Cooper was domiciled in the United Kingdom, ordinarily resident in the United Kingdom, and a resident of the United Kingdom. He disagreed on all three counts. In three different proceedings, HMRC prevailed on all points.[251]

The initial opinion of the Special Commissioners pivots on the unsurprising assertion that an individual's domicile depends upon "the totality of the evidence."[252] In reviewing that evidence, the Commissioners wrote, there is a presumption that an individual's "domicile of origin persists."[253] In weighing all of the relevant evidence, it is probative of Mr. Gaines-Cooper's domicile that he "always retained his British citizenship."[254] Assaying the voluminous evidence, the Special Commissioners concluded that Mr. Gaines-Cooper had "not discharged the burden of proving to us that he abandoned his domicile of origin in England."[255] Accordingly, for tax purposes, the Commissioners concluded, Mr. Gaines-Cooper was still domiciled in England.[256]

In similar fashion, the Special Commissioners noted that the concept of residence for tax purposes is not defined statutorily and depends upon "all the facts of the case."[257] On the complicated facts of Mr. Gaines-Cooper's life, the Commissioners concluded, he "was resident in the United Kingdom" for the years in question[258] and was "ordinarily resident" there as well.[259]

If ever there were a case demonstrating the administrative advantages of citizenship-based taxation, it is *Gaines-Cooper*. With great effort in a factually complicated setting, the Special Commissioners achieved the same result a citizenship-based system would have reached far more efficiently: There was no factual doubt that Mr. Gaines-Cooper was born a British citizen and remained one for the years in question.

250. It takes the opinion of the Special Commissioners 104 paragraphs to describe the facts of Mr. Gaines-Cooper's life. *See id.* at [5]–[108].

251. The Queen on the Application of Davies v. Comm'rs for HM Revenue & Customs, [2010] EWCA (Civ) 83, [112], [113], [123], *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2010/83.html; Gaines-Cooper v. Comm'rs for HM Revenue & Customs, [2007] EWHC (Ch) 2617, [65], *available at* http://www.bailii.org/ew/cases/EWHC/Ch/2007/2617.html; Gaines-Cooper v. Comm'rs for Her Majesty's Revenue & Customs, [2006] UKSPC SPC00568, [192], *available at* http://www.bailii.org/uk/cases/UKSPC/2006/SPC00568.html.

252. *Gaines-Cooper*, [2006] UKSPC SPC00568, at [120]–[121], [132], [139].

253. *Id.* at [115], [117].

254. *Id.* at [141].

255. *Id.* at [147].

256. *Id.*

257. *Id.* at [165].

258. *Id.* at [168], [184].

259. *Id.* at [190].

The subsequent opinion of the Chancery Division upheld the decision of the Special Commissioners, emphasizing "the lengthy and meticulous way" in which the Commissioners arrived at their conclusions about Mr. Gaines-Cooper's domicile, residence, and ordinary residence.[260] The Chancery opinion, reinforcing the teaching of the Special Commissioners, emphasizes "that a person's domicile of origin is particularly 'adhesive.'"[261] Mr. Gaines-Cooper was born and thus originally domiciled in the United Kingdom. This, the Chancery Division indicated, made it difficult for him to overcome the presumption that he remained domiciled in the United Kingdom. This line of thought raises the question: Given the "adhesive" nature of a person's original domicile, why not for tax purposes simply use the more easily determined status of citizenship to reach the same result?

Finally, the *Gaines-Cooper* saga played out a third time in the Court of Civil Appeal with the observation again being made that, on questions of residence, "so much depends on facts and their evaluation."[262] In contrast, factually complicated cases like *Gaines-Cooper* do not arise under citizenship-based taxation.

### *E. SUMMARY*

*Gaudreau* and *Civil Engineer* highlight the resemblance between citizenship-based and residence-based taxation when residence is implicitly (as in *Gaudreau*) or explicitly (as in *Civil Engineer*) defined as domicile, the taxpayer's permanent home. Both domicile and citizenship are measures of long-term permanent allegiance rather than short-term physical presence. Consequently, the outcomes in tax cases will often be the same whether in personam jurisdiction to tax on a worldwide basis is asserted in terms of an individual's citizenship or in terms of her domiciliary residence.

Determining domicile—the taxpayer's permanent home—is often a factually daunting challenge, as is demonstrated by *Gaines-Cooper*. Consequently, in tax cases, citizenship is an administrable proxy for domicile. From this vantage, the U.S. system of citizenship-based taxation is closer than is generally recognized to other nations' residence-based tax systems: When residence is defined for tax purposes as the taxpayer's domicile, citizenship-based and residence-based taxation converge, but citizenship-based taxation reaches these similar results more efficiently by eliminating the need for factually intensive inquiries about domicile.

---

260. Gaines-Cooper v. Comm'rs for HM Revenue & Customs, [2007] EWHC (Ch) 2617, [65], *available at* http://www.bailii.org/ew/cases/EWHC/Ch/2007/2617.html.

261. *Id.* at [29].

262. The Queen on the Application of Davies v. Comm'rs for HM Revenue & Customs, [2010] EWCA (Civ) 83, [112], [113], [123], *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2010/83/html.

## VII. QUALIFICATIONS, OBJECTIONS, AND CONCERNS

In this final Part, I anticipate nine potential objections to and concerns about my analysis and acknowledge some necessary qualifications.

### A. *SHOULD RESIDENCE FOR TAX PURPOSES BE DEFINED AS DOMICILE?*

Consider initially the argument that residence for tax purposes should be defined short of domicile. According to this argument, the other three definitions of residence—an individual's physical presence in any year, less physical presence augmented by other factors, and "ordinary" residence—more properly implement the benefits and ability-to-pay rationales for residence-based taxation than does domicile. If domicile is an ill-suited definition of residence for tax purposes, citizenship ceases to serve a valuable proxy function as an administrable marker for such domicile.[263]

Consider, in this context, *Civil Engineer*. In that case, the taxpayer, a British citizen, lived in Hong Kong for roughly thirty years and was, during that period, physically present in the United Kingdom only intermittently. In this setting, the taxpayer's non-U.K. gifts were subject to U.K. inheritance tax because the taxpayer was found to be domiciled in the United Kingdom.

If domicile—the taxpayer's permanent home—is properly deemed to establish residence for tax purposes, then it is compelling to view this taxpayer's British citizenship as an administrable proxy for his British domicile. However, the argument would go, the taxpayer's domicile is not a sensible basis for taxing this individual in the United Kingdom. In terms of public benefits, it was Hong Kong, rather than the United Kingdom, which provided the taxpayer with his social and civil rights during the thirty years he worked in Hong Kong. In ability-to-pay terms, the taxpayer was for three decades physically present primarily in Hong Kong, where he undertook the bulk of his income-producing activity. Consequently, Hong Kong, not the United Kingdom, was best positioned to assess the taxpayer's worldwide ability to pay and to enforce its tax laws against him.

In short, the argument goes, in a case like *Civil Engineer*, domicile is an overly broad definition of residence for tax purposes. For an extended period abroad, an individual's connection with his nation of domicile may be too tenuous to justify taxation there under either a benefits or an ability-to-pay rationale. If domicile is an inappropriate basis for asserting residence-based tax jurisdiction, citizenship ceases to be a useful proxy for such domicile.

---

263. *See, e.g.*, Avi-Yonah, *supra* note 2, at 680 ("[Domicile] is a very imperfect proxy [for citizenship], and we already have an administrative basis . . . in the physical presence rule."); Reuven S. Avi-Yonah, *The Case Against Taxing Citizens* 9–10 (Univ. of Mich. Law Sch., Pub. Law & Legal Theory Research Paper Series, Working Paper No. 190, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1578272#%23 (stating that the "domicile standard is hard to administer" although "physical presence is perfectly administrable").

Although there are countervailing facts in *Civil Engineer*,[264] the larger point has validity. When, as in *Civil Engineer*, an individual spends most of his working career abroad in a single nation, that nation has a stronger benefits justification for taxing him than does his more remote nation of domicile. In such cases of prolonged presence abroad, the nation in which an individual is physically present is also better placed than is his country of domicile to enforce taxation of the individual's worldwide income. While this individual intends eventually to return to his nation of domicile, for the (extended) meanwhile, the country in which he currently resides can better enforce its tax laws upon him and provides the social and civil benefits he receives from the public sector.

However, in other cases, domicile is the best of the possible definitions of tax residence. Consider again the facts of *Clark*. Mr. Clark, a British citizen domiciled in the United Kingdom, spent a single year in the United States. The United States provided public services to Mr. Clark for that entire year and thus, in benefits terms, had a strong claim for residence-based taxation for that year.[265] On the other hand, in terms of tax administration, the United Kingdom was better positioned to enforce its tax laws against Mr. Clark than was the United States. In terms of tax administration, Mr. Clark's twelve-month sojourn in the United States was figuratively a blink of the eye. He apparently had no significant assets in the United States, nor did he have any significant contact with the United States before or after his single year of residence in California.

Enforcing the tax law is often an arduous and protracted process. Given Mr. Clark's lifestyle and connections to the United Kingdom, HMRC was better positioned to enforce tax obligations upon him than was the IRS. Hence, in *Clark*, the nation of domicile, the United Kingdom, was better able to enforce worldwide taxation than was the United States.

In sum, domicile is often a plausible and frequently a compelling definition of residence for tax purposes. Like many legal categories, domicile may be overly broad in particular tax settings (e.g., *Civil Engineer*) while being appropriate in others (e.g., *Clark*). Given its utility in many instances, nations will continue to use domicile as a definition of tax residence. As long as they do, citizenship is an administrable proxy for such domicile.

---

264. The taxpayer made these gifts as he was leaving Hong Kong and relocating to the United Kingdom. Civil Engineer v. Inland Revenue Comm'rs, [2002] STC (SCD) 72, [7].

265. However, Mr. Clark in fact arranged his presence between the United Kingdom and the United States so that, for tax purposes, he was a resident of neither nation. Reed v. Clark, [1985] STC 323, 58 T.C. 528.

### B. *SHOULD NATIONS CONTINUE TO TAX THEIR CITIZENS ON THEIR WORLDWIDE INCOMES?*

In the tax policy community, no question engenders greater controversy today than whether nations should continue to tax their residents on their worldwide incomes. In this debate, important voices contend that nations should tax only on a source basis, i.e., should tax only the income arising within their respective territories.[266] There are, this argument goes, both practical and theoretical reasons why nations should tax only income and assets located within their respective borders. For tax purposes, a nation need not determine who its residents are when it does not levy worldwide taxation against those residents.

This debate is largely conducted in terms of corporations. Nevertheless, the arguments for limiting taxation to each nation's respective territory are often applicable to individuals as well as corporations. If worldwide taxation of individual residents is thrown overboard, citizenship-based taxation goes over the gunnels also, at least to the extent such citizenship-based taxation is justified along the lines argued here, as a proxy for domiciliary residence.

There are two rejoinders to this argument. First, the switch to solely source-based taxation hasn't happened. As long as nations continue to tax their residents' worldwide incomes and assets and as long as residence is defined for tax purposes in terms of the taxpayer's domicile, citizenship serves as an administrable proxy for such domicile. Second, most who advocate that nations restrict the reach of their tax systems to their respective borders except from this territorial limit highly mobile, passive income such as bank account interest and patent royalties.[267] A nation that taxes its residents worldwide only on such passive income must still determine who, for tax purposes, its residents are. Citizenship could still serve as an administrable marker for domicile under a system which taxes only residents' passive incomes on a worldwide basis.

### C. *WHAT IF AN INDIVIDUAL'S DOMICILE AND CITIZENSHIP ARE DIFFERENT?*

Consider cases in which an individual's nation of domicile and her nation of citizenship are different. Citizenship is a compelling proxy for domicile in cases like *Gaudreau, Civil Engineer,* and *Applegate* because in those settings the taxpayers all intended to return ultimately to the nations of which they were citizens. However, the argument would run, in other settings, citizenship and domicile diverge, e.g., the retiree who remains a U.S. citizen even as she plans to spend the rest of her life on an island in the Caribbean. In such cases, the argument goes, citizenship fails as a proxy for domicile. In this vein, Professor Avi-Yonah, in a published critique of an

---

266. *See, e.g.*, Hines, *supra* note 142, at 291.

267. *Id.* at 269, 275–80 (opposing residence-based taxation of "active foreign business income").

earlier draft of this paper, argues that "citizenship is a poor proxy for domicile."[268]

Whenever an objective marker (e.g., citizenship) replaces a more subjective, fact-sensitive legal category (e.g., domicile), there will, in particular cases, be instances of over- and underinclusiveness. It is typically a matter of judgment whether, in such settings, the benefits of administrability engendered by the objective category outweigh the category's costs in the form of particular cases being decided differently than they would have been under the more subjective, individualized classification. I conclude that the benefits derived from the enforceability of a citizenship standard for worldwide taxability outweigh what I suspect are the relatively few cases in which that standard reaches the wrong result, that is to say, the comparative handful of cases in which a taxpayer's domicile is a nation other than the country of her citizenship.

Consider again the retiree planning to live for the remainder of her life on a Caribbean island while retaining her U.S. citizenship. At first blush, this looks like a case in which citizenship and domicile diverge. On a second look, matters are more complicated and suggest that this individual may be domiciled in the United States. There is a reason this hypothetical retiree retains her U.S. citizenship rather than becoming a citizen of the nation in which she resides. Perhaps, the retiree remains a U.S. citizen merely to avoid the immediate taxation that her expatriation would trigger under § 877A.

However, more may be going on than this. By remaining a U.S. citizen, the retiree is making the classic Tieboutian choice that the tangible and psychological benefits of such citizenship justify the personal tax cost to her in the form of worldwide taxation. Among the benefits retained via her U.S. citizenship is the right to return to the United States if the retiree's individual circumstances change or if the environment in which she is living becomes less attractive. Retaining that right of return buttresses the view that the United States remains her nation of domicile, despite her plans to reside in the Caribbean nation indefinitely. If so, the retiree's U.S. citizenship turns out to be a good proxy for her domicile after all.

In sum, while there may be particular cases where citizenship fails as a proxy for domicile, I suspect that those cases are relatively uncommon and ultimately do not undermine the administrability gains derived from citizenship-based taxation.

### D. *WHAT ABOUT CASES IN WHICH AN INDIVIDUAL'S CITIZENSHIP ISN'T SO CLEAR?*

An important premise of my argument is that it is easier to determine an individual's citizenship than his domicile. There are, of course, cases in which a particular individual's citizenship is a matter of dispute.[269] However,

268. Avi-Yonah, *supra* note 2, at 683.

269. *See, e.g.*, Scales v. INS, 232 F.3d 1159 (9th Cir. 2000).

in the vast majority of cases, U.S. citizenship is an easily determined status while domicile is a fact-intensive category, more manipulable by the taxpayer and harder for the tax collector to ascertain and prove.

### E. DOESN'T THE CODE FORFEIT THE ADMINISTRABILITY BENEFITS OF CITIZENSHIP-BASED TAXATION IN § 911?

Yes. Critical to the § 911 exclusion of foreign earned income are the fact-intensive concepts of an individual's "tax home"[270] and an individual's "bona fide" residence.[271] Under § 911, a U.S. citizen can exclude his foreign-source earned income if the citizen's "tax home is in a foreign country"[272] and if the citizen "has been a bona fide resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year."[273] The Treasury regulations under § 911 specify that an individual's tax home is "located at his regular or principal (if more than one regular) place of business or, if the individual has no regular or place of business because of the nature of the business, then at his regular place of abode in a real and substantial sense."[274]

Section 911 does not exclude unearned income, nor does it exclude foreign-source earned income in excess of the statutory ceiling.[275] Nevertheless, as to foreign-source earned income under the § 911 ceiling, that provision requires the subjective, fact-intensive determinations of residence ("regular place of abode"), which citizenship-based taxation otherwise makes unnecessary.

The administrability costs of § 911 buttress the opposition of those who would repeal that provision. Those enforcement costs are, for supporters of § 911, a reasonable price to pay for an otherwise desirable tax provision. For present purposes, it is unnecessary to decide which side in this debate is correct. Congress's decision in § 911 to reintroduce under that provision subjective determinations of residence does not negate the administrability benefits of citizenship as an enforceable proxy for domicile outside the § 911 context.

---

270. I.R.C. § 911(d)(1) (2006).

271. *Id.* § 911(d)(1)(A).

272. *Id.* § 911(d)(1).

273. *Id.* § 911(d)(1)(A). In lieu of satisfying the bona-fide-resident test, a U.S. citizen (or resident) with his tax home abroad may instead qualify for the § 911 exclusion by satisfying an objective physical-presence test, namely, "330 full days" abroad in a twelve-month period. *Id.* § 911(d)(1)(B).

274. Treas. Reg. § 1.911-2(b) (1985).

275. In 2010, the ceiling was $91,500. Rev. Proc. 2009-50, 2009-45 I.R.B. 617, § 3.28.

### F. *In the Tiebout Context, Am I Demanding an Unattainable Level of Policy Coherence, Given the Realities of Political Compromise?*

Consider the reality of compromise in an imperfect world. I have argued that the strong theoretical appeal of a Tiebout justification for citizenship-based taxation—the U.S. citizen determines for herself that the benefits of citizenship are worth the tax cost to her—is undermined in practice by the different tax prices the U.S. tax system assesses different citizens for the same benefits of citizenship. Depending upon the nature and amount of the taxes levied by the nation in which a nonresident citizen lives and earns her income, she may pay to the U.S. Treasury full U.S. taxes on her worldwide income, no U.S. taxes, or some amount of U.S. taxes in between.

At one level, this should surprise no one. The tax laws pursue sundry purposes because of, inter alia, political compromise and multiple, often conflicting, policy goals. It should thus astonish no one that the Code effectuates the Tiebout model imperfectly. The Code implements most policies imperfectly. We live in an imperfect world.

Fair enough. Nevertheless, at some point a policy becomes so attenuated in implementation that it ceases to be legitimately compromised and is instead ignored. That is the case with the Code's implementation of citizenship-based taxation along Tiebout lines. If the Code exacted from different nonresident citizens somewhat divergent tax prices for their respective U.S. citizenships, that divergence could be rationalized as a reasonable accommodation of competing policies. However, the Code today straddles the entire gamut, charging some nonresident U.S. citizens nothing (because foreign tax credits, the § 911 exclusion, or both eliminate all federal income tax liability) while subjecting other nonresident citizens to full U.S. taxation (because these nonresidents live in and derive their incomes from nations that finance government through taxes which are neither creditable nor deductible). These different tax prices for U.S. citizenship bear no relation to the costs or benefits of the services the U.S. government provides its nonresident citizens.

Even if many, perhaps most, nonresident U.S. citizens fall in the middle of the spectrum in terms of their federal tax payments, it is unpersuasive to defend the United States' taxation of nonresidents' worldwide incomes in Tiebout terms and then, in random fashion, charge different citizens radically different prices for the same benefits of citizenship. Those differences may (or may not) make sense in terms of other policies, but they undermine any Tiebout justification for the Code's approach to citizenship-based taxation.

### G. *What About Dual Citizens?*

In a world where citizenship-based taxation were to become widespread, what would happen to dual citizens? The same thing that happens today

when an individual is a resident of more than one nation: The dual resident is either (1) taxed by both nations in which he resides, or (2) the two nations must agree as to which has primary jurisdiction to tax the dual resident. For example, the U.S. model income tax treaty contains tie-breaking rules that determine which of the two signatory nations has primary jurisdiction to tax the income of an individual who resides in both nations.[276] These tie-breaking rules could easily be applied and adapted to a world of citizenship-based taxation to determine which nation has primary jurisdiction to tax a person who is a citizen of more than one country.

### *H. Isn't It Inconsistent for the United States To Tax Its Citizens Worldwide on the Basis of Their Citizenship, but To Tax Resident Aliens Worldwide on the Basis of Their U.S. Residence?*

There is indeed some tension in taxing a U.S. citizen on her worldwide income and assets regardless of her residence abroad while taxing a resident alien on his global income and assets by virtue of her residence in the United States. In the former case, residence is treated as irrelevant while, in the latter case, residence is treated as controlling. However, upon examination, there is less tension here than first appears to be the case. An alien is subject to worldwide U.S. income tax either if she satisfies a physical presence test[277] or if she has attained the status of "permanent legal resident."[278] That voluntarily acquired status is a statement of domicile, a declaration by the alien that the United States is her permanent home. The logic of U.S. taxation of an alien by virtue of her "green card" is the same as the logic of taxing a U.S. citizen on a worldwide basis by virtue of her citizenship: Like citizenship, permanent resident status is an administrable marker that the alien's domicile—her permanent home—is the United States.

### *I. Isn't It Hard, or in Many Cases, Impossible, To Enforce Income Taxation Against U.S. Citizens Residing Abroad?*

This is Professor Avi-Yonah's principal objection to my argument: "[T]he taxation of nonresident citizens is unadministrable."[279] We all agree that administrability is an important value. Indeed, it is the value underlying my argument that citizenship-based taxation is more efficiently enforceable than residence-based taxation when a taxpayer's residence is defined as his domicile.

---

276. MODEL INCOME TAX CONVENTION, *supra* note 15, at art. (I)4, para. 3.

277. I.R.C. § 7701(b)(1)(A)(ii), (b)(3).

278. *Id.* § 7701(b)(1)(A)(i).

279. Avi-Yonah, *supra* note 2, at 684.

Tax policy requires trading off competing values, concerns and objectives. The U.S. tax system taxes the interest earned in the foreign bank accounts of U.S. taxpayers, even though enforcing such taxation is difficult.[280] The U.S. tax system similarly demands that self-employed taxpayers report their incomes, though enforcing that demand is also often arduous.[281] If administrability were the sole criterion, we would tax in neither of these settings. Administrability, however important, is not the only consideration in the design of a tax system.

Taxing on the basis of U.S. citizenship makes the Code more administrable by eliminating factually intensive inquiries about residence in general and about domicile in particular. There indeed remain important hurdles to implement the taxation of nonresident citizens. On balance, however, such citizenship-based taxation is more rational and more consistent with international norms than is widely believed to be the case.

## VIII. CONCLUSION

The received wisdom about federal taxes and U.S. citizenship—the benefits of U.S. citizenship justify worldwide taxation of such citizen's income and assets—is unpersuasive. The legal rights associated with U.S. citizenship are minimal. The psychological benefits of U.S. citizenship are significant for most of us, but, as a logical matter, do not justify the worldwide taxation of nonresident U.S. citizens. In theory, the Tiebout model justifies the worldwide taxation of U.S. citizens under a love-it-or-leave-it theory: Any U.S. citizen who finds the tax cost of U.S. citizenship inordinate can expatriate. In practice, however, U.S. citizens typically lack the mobility between nations necessary to make expatriation a practical alternative. Moreover, the Code taxes different U.S. citizens differently for the same benefits of U.S. citizenship.

While the traditional benefits rationale for the worldwide taxation of U.S. citizens is not compelling, such taxation can be justified in terms of administrability. An individual's U.S. citizenship is an objective, enforceable proxy for his U.S. domicile.

Both the benefits and ability-to-pay justifications for taxation point to worldwide taxation by the nation in which an individual resides. The country in which an individual lives provides his basic social and civil rights. Moreover, the nation of residence is typically best positioned to aggregate

---

280. *See, e.g.*, Martin A. Sullivan, *Economic Analysis: U.S. Citizens Hide Hundreds of Billions in Cayman Accounts*, 103 TAX NOTES 956 (2004).

281. *See, e.g.*, TREASURY INSPECTOR GEN. FOR TAX ADMIN., SEMIANNUAL REPORT TO CONGRESS: OCTOBER 1, 2007 THROUGH MARCH 31, 2008, at 10 (2008), *available at* http://www.treasury.gov/tigta/semiannual/semiannual_mar2008.pdf ("Self-employment tax is estimated to make up about $39 billion (72 percent) of underreported employment taxes, or 11 percent of the total gross tax gap, making it one of the largest components of the tax gap.").

and assess an individual's worldwide income and assets and to enforce its tax laws against him.

However, residence is typically a fact-intensive inquiry, often manipulable by the taxpayer, frequently difficult for the tax collector to enforce. When residence is defined as domicile, citizenship serves as an administrable marker for such domicile, since both citizenship and domicile focus upon permanent political allegiance rather than immediate physical presence. From this vantage, U.S. citizenship-based taxation resembles other nations' residence-based taxation when those other nations define residence as domicile, and the U.S. system of citizenship-based worldwide taxation is not the outlier it is often thought to be. Moreover, such global citizenship-based taxation reaches similar results more efficiently by obviating the need for factually intensive inquiries into domiciliary residence.

For many reasons, a legal rule may persist after its initial rationale has ceased to be compelling. One good reason for the persistence of an old rule is that it serves a new, if as yet unrecognized, function. The United States' traditional policy of taxing its citizens on their worldwide incomes and assets is such a rule. The traditional benefits rationale for citizenship-based taxation has ceased to be compelling. However, by serving as an administrable proxy for an individual's domicile, citizenship-based taxation makes sense in the twenty-first century.