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Citizenship Taxation, Globalization and Inequality

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FLORIDA TAX REVIEW

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CITIZENSHIP TAXATION, GLOBALIZATION AND INEQUALITY

by

*Robert T. Kudrle**

ABSTRACT

The U.S alone claims the right to tax its citizens regardless of country of residence.[1] *Other states allow their citizens to forego national taxes if they reside abroad for extended periods; this is residence taxation. Many commentators stress the extraordinary gap between the comprehensiveness of U.S. claims and the long history of wholly inadequate enforcement, pronouncing citizenship taxation infeasible.*[2] *Some have claimed that uniquely intrusive U.S. claims violate customary international law.*[3] *On the other side are those who see citizenship taxation as a tool for greater intra-nation equality within the high-income*

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1. Critics have noted that Eritrea also tries to tax its citizens abroad, but its "diaspora tax" is ad hoc and discriminatory. Robert Rubin, *The State Department Can and Should Stop Eritrea's Illegal "diaspora Tax" in the* US, WASHINGTON EXAMINER, https://www.washingtonexaminer.com/opinion/the-state-department-can-and-should-stop-eritreas-illegal-diaspora-tax-in-the-us [https://perma.cc/TJ4H-3YA2] (last visited May 25, 2021).

2. Reuven S. Avi-Yonah, *The Case Against Taxing Citizens*, TAX ANALYSTS (2010), https://www.taxnotes.com/tax-notes-today-federal/jurisdiction-tax/case-against-taxing-citizens/2010/05/12/wgmz [https://perma.cc/VC84-QQFC] (last visited May 25, 2021).

3. Peter J. Spiro, *Citizenship Overreach*, 38 MICH. J. INT'L L. 167 (2017). Allison Christians, A Global Perspective on Citizenship-Based Taxation, 38 MICH.J. INT'L L. 193 (2016– 2017); . . .

countries[4] *and perhaps as a development measure for poorer countries as well.*[5] *This paper will defend U.S. citizenship taxation and propose policy modifications that balance increased inequality concerns*[6] *with the continuing realities of globalization. The paper first briefly reviews the appropriate goals of international taxation. It then presents a defense of citizenship taxation stressing the contribution of the U.S. environment to the continuing material success of those who subsequently choose to live abroad. Current U.S. policy is then examined in detail, and revisions are suggested both for Americans who wish to retain their citizenship and those who do not. Efforts to collect revenue from both groups have largely failed so far. The reasons for this failure and the measures needed to improve collection are explored at the end of the paper.*

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4. Patrick Driessen, *Beware High-Wealth Tilt in Residency-Based Tax Plans*, https://www.taxnotes.com/tax-notes-today-federal/exemptions-and-deductions/beware-high-wealth-tilt-residency-based-tax-plans/2019/07/03/29jb4 [https://perma.cc/8DGZ-8DH4] (last visited May 20, 2021); Emmanuel Saez & Gabriel Zucman, *Progressive Wealth Taxation*, 2019 Brookings Papers on Econ. Activity 437 (2019).

5. Mihir A. Desai et al., *Sharing the Spoils: Taxing International Human Capital Flows*, 11 Int. Tax Pub. Fin. 663 (Sep. 2004).

6. See, for example, Samuel J. Abrams, *Republicans Take Note: Public Opinion on Inequality Has Shifted*, Am. Enter. Inst. (Jun. 3, 2019), https://www.aei.org/articles/republicans-take-note-public-opinion-inequality-shifted/ [https://perma.cc/MMU2-45ZN].

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I. Introduction

An oft-told tale traces U.S. citizenship taxation to the flight from Civil War service by upper-income Americans.[7] In his rejection of such taxation, Reuven Avi-Yonah characterizes the original tax as "a symbolic gesture" and

> [t]he application of the income tax to nonresident citizens stemmed from a great national crisis in which resident citizens were expected not just to pay tax but also to risk their lives for their country. At the same time, nonresident citizens were likely to be few in number, rich (or else they would not be subject to tax), and suspected of living overseas to avoid both the draft and the tax.[8]

Avi-Yonah argues (inter alia) that the U.S. does not currently face a national emergency and that the tax was from the beginning, and will likely remain, unenforceable because the collection of taxes from non-residents without U.S. property to attach has proven so difficult. This Article takes a contrary view. Modern technology and international agreements have greatly improved the ability to identify those citizens abroad with U.S. tax obligations.[9] Enforcement has yet to be well

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7. Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. Rev. 443 (2007), https://heinonline.org/HOL/Page?handle=hein.journals/nylr82&id=455&div=&collection= [https://perma.cc/NJJ8-5WX9].

8. Avi-Yonah, *supra* note 2, at 3.

9. Robert T. Kudrle, *The New Global Attack on Personal Tax Evasion Using Foreign Investment and the Role of the United States*, 47 Denv. J. Int'l L. & Pol'y 147 (2018–2019); Robert T. Kudrle, *Moves and Countermoves in the Digitization Challenges to International Taxation*, 64 Technol.

developed but could be made far more effective. Moreover, doing so has taken on increased urgency. The recent and probable future development of the American economy suggests ever-increasing market inequality of both income and wealth.[10] While this situation certainly does not constitute an emergency of the magnitude of the Civil War, it poses an unprecedented policy challenge. Facing that challenge will almost certainly require a higher level of redistributive taxation. This, in turn, necessitates a robust defense against expatriation to avoid legislated tax burdens; citizenship taxation should play a role in that defense. On the other hand, millions of low- and middle-income Americans living abroad would benefit from less intrusion by U.S. law and the ability to function more fully under the tax laws of the state in which they reside. Law and policy should serve their interests too.

A. General Concerns About International Taxation

All international taxation faces three broad challenges. First, national policymakers serving the public interest should aim to maximize national economic welfare[11] unless other national goals, particularly autonomy or security, require deviation.[12] Second, international comity suggests a high level of policy reciprocity to maintain good international relations, to avoid double taxation,[13] and to bolster efficient and

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Soc (2021); Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 Fla. Tax Rev. 117 (2014); Young Ran Kim, *Considering Citizenship Taxation: In Defense of FATCA*, 20 Fla. Tax Rev. 335 (2016).

10. A combination of laborsaving innovation, network economies, superstar individuals and superstar firms have generated an economic path that shows no sign of reversing. Confirming literature is voluminous . . . See, for example, David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, Q. J. Econ. 135(2) 645-709. One interpretation of the current Republican political positioning problem is the rhetorical question: what happens to a party beholden to free-market dogma when the market fails to deliver?

11. This would be the sole criterion considered in nearly any international economics textbook.

12. Robert T. Kudrle & Davis B. Bobrow, *U.S. Policy Toward Foreign Direct Investment*, 34 World Polit. 353 (Apr. 1982).

13. "Double taxation" is a shorthand for overlapping international tax obligations that, inter alia, distort markets. In fact, domestic corporate

effective enforcement. These concerns underlie the development of international conventions over the past century.[14] Finally, all tax policy should comport with traditional public finance criteria of fairness, efficiency and administrability.[15]

This Article argues that past U.S. policy of international personal taxation has fallen dramatically short of maximizing national economic welfare. It has allowed hundreds of billions of dollars to be hidden abroad, and it poorly protects against tax-motivated expatriation. While collecting taxes levied on those outside the national territory poses special problems, they could be substantially reduced through determined pursuit—something that has so far been sorely lacking.

B. U.S. Citizenship Taxation: A Brief Sketch

Until late in the 20th century, the U.S. government made only intermittent and largely ineffective attempts to collect taxes on overseas earnings of Americans living either at home or abroad. While taxing residents on their foreign earnings challenged all governments, the problem of taxing non-residents was almost uniquely American due to its global system. Some states that practice residence taxation have attempted to levy taxes at departure from national residence or for some period thereafter, but most late-twentieth century results were discouraging.[16] Attempts to tax persons following their departure have largely failed because mandated payment can be easily ignored when the person owing, and that person's property, are outside the reach of direct national

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taxation in most countries including the U.S. involves double taxation, and, at all events, it is the magnitude of overlapping taxes rather than their number that matters for efficiency (leaving administrative cost aside). Cf. Daniel Shaviro, *Taxing Potential Community Members Foreign Income*, 70 Tax L. Rev. 75, 98 (2016).

14. Michael Graetz & Michael O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 Duke L. J. 1021 (Jan. 1997); Reuven S. Avi-Yonah, *All of a Piece Throughout: The Four Ages of U.S. International Taxation*, 25 Va. Tax Rev. 313 (2005).

15. Reuven S. Avi-Yonah, *The Three Goals of Taxation*. 60 Tax L. Rev. 1 (2006).

16. Joint Comm. on Tax'n, JCX-16- 95, Background and Issues Relating to Taxation of U.S. Citizens Who Relinquish Their Citizenship and Long-term Residents who Relinquish Their U.S. Residency enacted in the 104th Congress 13.

enforcement. This has been the American experience despite legal requirements that all citizens file financial forms every year; a very high percentage of overseas Americans have until recently ignored the requirement with impunity.

The 2010 Foreign Accounts Tax Compliance Act (FATCA) increased discussion of citizenship taxation in the legal literature.[17] This provision of the HIRE[18] (stimulus) legislation obliged foreign financial institutions to report information on all U.S-connected accounts to the IRS on an annual basis under threat of a 30% withholding penalty on all of the institution's U.S. earnings. FATCA did not aim primarily at U.S. citizens living abroad but rather at foreign property earnings of resident Americans with undeclared assets.

The FATCA threat was credible, and cooperation came swiftly because nearly all affected firms necessarily held U.S. assets.[19] The legislation generated immediate cries of coercive unilateralism, but it was soon followed by many inter-governmental agreements with the U.S., an approach that overcame the frequent illegality of direct institutional reporting to the Americans. Some of these agreements included a U.S. pledge to move towards reciprocity as soon as feasible.[20] Fulfilling this pledge was hindered by the fact that American business formation and much financial regulation take place at the state level, and many special interests opposed moves towards reciprocity on various grounds.[21] Federal legislation to provide for the collection and sharing of beneficial

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17. Ruth Mason, *Citizenship Taxation*, 89 S. Cal. L. Rev. 169 (2015); Christians, *supra* note 3; Peter J. Spiro, *Citizenship Overreach*, 38 Mich. J. Int'l L. 167 (2016-2017); Edward A. Zelinsky, *Defining Residence for Income Tax Purposes: Domicile as Gap-Filler, Citizenship as Proxy and Gap-Filler*, 38 Mich. J. Int'l L. 271 (2017); Kim, *supra* note 8.

18. Heroes Earnings Assistance and Relief Tax Act of 2008, H.R. 6081.

19. Kudrle, *supra* note 9, at 152.

20. Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA, FATCA-U.S., Jan. 1, 2013.; U.S. Dep't of the Treasury, Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing FATCA (2016), https://home.treasury.gov/system/files/131/FATCA-Joint-Statement-US-Fr-Ger-It-Sp-UK-2-7-2012.pdf [https://perma.cc/UN5A-796W].

21. Robert Kudrle, *Tax Havens and the Transparency Wave of International Tax Legalization*, 37 U. Pa. J. Int'l L. 1153, 1176 (Jan. 2016).

ownership information on LLCs and corporations in the U.S. finally passed in late 2020.[22]

Other states resisted FATCA as a unilateral imposition but not as a model for cooperative policy. Far from it. National fiscal authorities around the world seeking to uncover hidden foreign accounts had become convinced of the futility of anything short of automatic information exchange.[23] Over the decade following FATCA's passage, a non--U.S. version of automatic international sharing of financial information was almost universally agreed upon under the auspices of the OECD.[24] Although, unlike FATCA, government commitments involving the OECD's Common Reporting Standard (CRS) include no specific penalties for non-compliance, states are at liberty to retaliate against a failure to provide what was agreed upon. The results have been impressive; the OECD claimed in mid-2020 that nearly 100 cooperating countries have found €10 trillion kept by their residents in 84 million offshore accounts.[25]

FATCA and the subsequent efforts elsewhere aimed mainly at the use of secret foreign holdings by residents. But U.S. citizenship taxation highlighted America's unique policy challenge. Because the U.S. taxes all citizens and long-term permanent residents, overseas Americans never escape the legal purview of the IRS. Those continuously living in the U.S. and whose only foreign income, if any, comes from the ownership of real or financial property abroad are the largest group that FATCA affects; this article concerns those persons only insofar as they might decide to live abroad in the future. Nevertheless,

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22. Jay Adkisson, *Congress Passes Corporate Transparency Act to Require Beneficial Ownership Filings For LLCs and Corporations*, Forbes (May 21, 2021), https://www.forbes.com/sites/jayadkisson/2021/01/26/congress-passes-corporate-transparency-act-to-require-beneficial-ownership-filings-for-llcs-and-corporations/ [https://perma.cc/XV6E-WWXQ].

23. Kudrle, *supra* note 9, at 150.

24. *Id.* at 154.

25. OECD, *International Community Continues Making Progress against Offshore Tax Evasion*, Org. of Econ. Coop. and Dev. (May 21, 2021), https://www.oecd.org/tax/transparency/documents/international-community-continues-making-progress-against-offshore-tax-evasion.htm [https://perma.cc/WM99-BVGF].

FATCA exposed the weakness of U.S. collection efforts with Americans and expatriates[26] living abroad.

C. The Arguments Made Here

Current U.S. citizenship taxation for those abroad does not simply levy the same rates at the same income levels as those for resident Americans. Instead, it provides a very generous earned income exclusion for overseas Americans and allows crediting for most or all of the remaining income tax liability. For those who wish to renounce their citizenship, it levies a capital gains tax on "deemed" asset gains above high income and wealth thresholds. In addition, U.S. inheritors of ex-citizens are taxed at the highest estate tax rate. All of this needs to be revised in the service of equity.

This paper makes several arguments:

> First, citizenship taxation should be retained. It serves the U.S. national interest, and its successful pursuit by the U.S. will redound to the benefit of other states as well.
>
> Second, FATCA has exposed the awkwardness of citizenship taxation as it actually applies to most U.S. citizens and long-term permanent residents abroad.
>
> Third, both fairness and administrability would be served by carving out a sphere of residence taxation for many overseas Americans who live in countries with tax systems similar to that of the U.S. while also eliminating subsidies to foreign residence.
>
> Fourth, those who choose to relinquish U.S. citizenship should pay once-for-all compensation rather than facing the two-part exit taxation scheme of current policy.

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26. "Expatriate" takes two meanings in ordinary parlance. It may mean either a current citizen or an ex-citizen living abroad. This paper follows U.S. government usage and contrasts "overseas Americans" with "expatriates."

Fifth, the resources devoted to monitoring the tax compliance of high-income and wealthy Americans should be greatly increased.

Sixth, the U.S. should spearhead further international cooperation to prevent tax escape by the wealthy.

II. A Brief Defense of Citizenship Taxation

Many writers have considered citizenship taxation using elements of traditional public finance criteria.[27] These evaluations come to quite different conclusions largely because the yardsticks for evaluation were originally developed with the implicit assumption that all individuals considered were members of the same well-defined political community. The failure of that assumption leads to myriad disputes between those supporting and attacking citizenship taxation and within those camps as well. When inter-polity migration is at issue, the benefit principle, notions of equity, and considerations of efficiency and administration—seldom clear-cut even within a single polity—become highly contested.

A. The Benefit Principle

Nearly all legal discussions refer to "the benefit principle," a protean concept with a long history. It was adumbrated by Adam Smith (and earlier by Hobbes). Smith's general view of taxation was stated in the Wealth of Nations:

> [t]he subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue [income] which they respectively enjoy under the protection of the state.[28]

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27. Avi-Yonah, *supra* note 2; Kirsch, *supra* note 7; Mason, *supra* note 17; J. Clifton Jr Fleming et al., *Fairness in International Taxation: The Ability-to-Pay Case for Taxing Worldwide Income*, 5 Fla. Tax Rev. 299 (2001).

28. Miranda Stewart, *The Tax State, Benefit and Legitimacy*, Tax and Transfer Pol'y Inst. Aug. 2015 at 14.

This statement certainly foretells the concept of vertical equity in taxation, but it does so by stressing the state's role in making that income benchmark possible. As Miranda Stewart explains, taxation supported "the general benefit of security or prosperity under government."[29] Many later writers construed the benefit principle as a more precise *quid pro quo* and rejected it as reactionary due to its neglect of redistribution.[30] In twentieth-century neoclassical economics, a lack of attention to the foundational contributions of the state, let alone ambiguities about possible identification with more than one polity, allowed the benefit principle to focus on public goods, defined as those that are non-exhaustive and non-excludable.[31] Samuelson[32] and others developed models that treated public goods much like their more familiar exhaustible and excludible counterparts, developing marginal conditions for optimality. But the absence of observable metrics for valuation left both appropriate production levels and actual benefit distributions on the page.[33]

In 1956 Charles Tiebout offered one approach to achieving the right amount and a defensible division of tax support for public goods across payers—one that might seem relevant to international migration.[34] He suggested that personal, geographic mobility could match public goods provision with a willingness to pay for them—bringing "sellers" and "buyers" together. But Tiebout's focus was very narrow: because it dealt with local (intra-national) public goods only, it sidestepped both benefits from the basic functions of government and vertical redistribution. Tiebout's sorting mechanism is always very

---

29. *Id.* at 15.

30. This included the great U.S. public finance luminaries Edward R.A. Seligman and Henry C. Simons.

31. Military defense is a public good because your benefit from it is not diminished by my benefit from it, and it is impossible to keep either of us from experiencing it.

32. Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 Rev. Econ. Stat. 387 (Nov. 1954).

33. In current tax policy, the benefit principle has come to have a rather prosaic meaning: if a person gains a benefit from government that differentially accrues to that person, then additional taxation is warranted, holding other conditions of vertical and horizontal equity constant. This idea is roughly embodied in user fees and special assessments.

34. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J Polit Econ 416 (Oct. 1956).

approximate in application.[35] Far more important for present purposes, its neglect of obligation and distributional issues renders it virtually irrelevant as a general defense of residence taxation despite its occasional use to support international migration with little or no fiscal compensation for the home state.[36]

The legal literature identifies a set of benefits enjoyed by overseas Americans that includes diplomatic protection, the right to vote (since 1986),[37] unimpeded entry into the U.S, the ability to pass U.S. citizenship to children born outside the U.S., and past benefits.[38] When compared with benefits enjoyed by domestic citizens, many commentators find these too meager to warrant citizenship taxation.[39] But the benefit principle, particularly in its earlier and more comprehensive usage, bears on this question because it can embrace past benefits from the environment created by the state that many writers seem to have ignored. Avi-Yonah notes that benefits conferred by U.S. *residency* include "first-class government protection, the rule of law, an outstanding educational system, and the many opportunities of a free market economy."[40] In essence, he asserts that these benefits drop precipitously when the person is no longer a resident.[41] But this is far from obvious. The U.S. provides a highly, perhaps uniquely, propitious environment for the incubation, facilitation and augmentation of market success by individuals. This is human capital support, and it will typically contribute to personal success even after departure from the country. For simplicity, all of this will be called the augmentation effect.

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35. For example, Tiebout employs lump sum taxes to avoid distribution considerations, but local public goods are usually financed by property taxes. Wallace E. Oates, *On Local Finance and the Tiebout Model*, 71 Am. Econ. Rev. 93 (1981).

36. For a view that suggests the relevance of Tiebout to residence taxation, see Reuven S. Avi-Yonah, *And Yet It Moves: Taxation and Labor Mobility in the Twenty-First Century*, 67 Tax L. Rev. 169 (2014).

37. 42 U.S.C. § 1973ff (2000 & Supp. II 2002).

38. Some of these are discussed in Kirsch, *supra* note 7.

39. For example, Avi-Yonah, *supra* note 2, at 7.

40. *Id.*

41. Even Kirsch, perhaps the best known defender of citizenship taxation gives past benefits short shrift: "[a] more tenuous argument can be made based on prior benefits received by citizens abroad." Kirsch, *supra* note 6, at 476.

The augmentation effect provided by the U.S. national environment is difficult to measure, but it is suggested by myriad personal stories and the attraction of areas such as Silicon Valley for young global entrepreneurs.[42] More specific evidence comes from recent findings concerning the most talented young mathematicians in the world. Agarwal et al. found that these persons are up to six times more productive in the U.S. than in other countries of immigration, holding their measured talent as teenagers constant.[43] Unless it is very implausibly assumed that this productivity enhancement falls to nothing with departure from the U.S., such a finding suggests the propriety of some taxation on benefit grounds following departure from residency if the U.S. so chooses.[44]

B. Horizontal and Vertical Equity

Scholarship on competing international taxation standards has also examined them against the criteria of horizontal and vertical equity. The former holds that, all else equal, persons in similar circumstances should face similar taxation. There is virtual unanimity that those living in the U.S. generally gain more contemporaneous benefits from the U.S. government than do those living abroad. This alone suggests the appropriateness of a different level of taxation. As many have pointed out, however, horizontal equity prevails at best only approximately within national states; this is clearly the case of the U.S. For example, observationally identical individuals and families pay very different federal tax bills relative to their real income within the U.S. depending on

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42. The U.S. (along with China) appears to be pulling decisively away from Europe in innovation. According to the Economist, "[o]f the world's 142 listed firms worth over $100bn, 43 were set up from scratch in the past half-century, 27 in America and ten in China. Only one was in Europe: SAP, a German software group founded in 1972." ECONOMIST June 5, 2021.

43. The hand-curated dataset includes career histories of migration and lifetime scientific output of 2,200 International Math Olympiad medalists from more than one hundred countries. Ruchir Agarwal et al., *Why U.S. Immigration Barriers Matter for the Global Advancement of Science* 34, IZA, INST. OF LAB. ECON. (Jan. 2021), https://www.iza.org/publications/dp/14016/why-us-immigration-barriers-matter-for-the-global-advancement-of-science [https://perma.cc/3SG9-VFRW].

44. This approach also supports the taxation of green card holders abroad. Cf. Avi-Yonah, *supra* note 2, at 393.

variations in the cost of living, which may be very large. But vertical considerations swamp horizontal concerns for those with high incomes in any event. For example, the top one percent of families living in the United States received only an estimated 6 cents for every dollar paid in total U.S. taxes in 2012. The federal tax return per dollar for the top one percent in that year was also 6 cents; this had dropped to 2 cents by 2017.[45]

C. Efficiency

The consideration of multiple national jurisdictions makes any straightforward discussion of efficiency as a criterion impossible. This stems from the absence of a fixed group for which to evaluate overall efficiency. In a closed economy, efficiency should be sought because it makes the national pie as large as possible and hence, in principle, allows a general sharing of the resulting benefits. But in a world of internally redistributing sovereign states that do not make substantial side-payments to each other, global efficiency involving migration is a pie in the sky. Unlike the case with trade, where mutual gains are typical, migration involves three notional welfare maximizers: the sending state, the receiving state, and the migrant, each with its own objectives.[46] In particular, a state faced with the prospect of losing tax payments from a high income or wealthy migrant has a strong national interest to make that decision as unattractive as possible. This objective must be constrained by the now universally recognized right of expatriation,[47] but much latitude for policy remains.

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45. Gerald Plante & Scott A Hodge, *The Distribution of Tax and Spending Policies in the United States,* Tax Found. Special Rep. (November 2013), https://files.taxfoundation.org/legacy/docs/SR211.pdf [https://perma.cc/EH8X-UQHY] (last visited May 21, 2021); Scott A Hodge, *Latest CBO Report on Incomes and Taxes Shows that the Federal Fiscal System is Very Progressive*, Fiscal Fact No. 742 Tax Found. (Jan. 2021), https://files.taxfoundation.org/20210125095819/Latest-CBO-Report-on-Incomes-and-Taxes-Shows-that-the-Federal-Fiscal-System-is-Very-Progressive.pdf [https://perma.cc/JR29-VKR5].

46. Some of this complexity is examined in J.A. Mirrlees, *Migration and Optimal Income Taxes*. J. Pub. Econ. 18, 319–341 (1982).

47. Spiro, *supra* note 3.

A 2009 report of the Joint Committee on Taxation comments:

> [t]he Congress does not believe that the Internal Revenue Code should be used to stop U.S. citizens and residents from relinquishing citizenship or terminating residency; however, the Congress also does not believe that the Code should provide a tax incentive for doing so. In other words, to the extent possible, an individual's decision to relinquish citizenship or terminate residency should be tax neutral.[48]

The stated objective seems neither possible, desirable, nor even coherent, regardless of the qualifier "to the extent possible." If an individual responds at all to prices, then taxes and other possible barriers to mobility are very unlikely to affect residence and citizenship the same way. Further, the tax code should aim to maintain revenue that the U.S. regards as appropriately claimed whether or not it affects the individual's behavior. Finally, the U.S. controls only its own taxes, but the differences between those taxes and that of myriad other states influence an individual's incentives to stay or move.

In summary, lifelong benefits resulting from the U.S. environment provide a justification for taxation following departure from residence. The horizontal inequity argument between Americans at home and abroad has some merit but is dominated by vertical equity concerns when the individuals involved have high income and wealth. Tax neutrality is not a useful concept when migration is involved.

D. Mobility to Escape Taxation

Were it effectively enforced, citizenship taxation holds the promise of following high-income and high-wealth individuals across borders to avoid inappropriate tax escape.

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48. Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 110th Congress, at 179 (2009), https://www.jct.gov/publications/2009/jcs-1-09/ [https://perma.cc/VP4B-YASK] (last visited May 21, 2021).

Avi-Yonah claims that

> [w]e should not base a broad rule such as ability-to-pay taxation of nonresident citizens on the relatively few cases of citizens living overseas in countries that have no or low income taxes.[49]

But "relatively few" is a term that could also be applied to the one-tenth of 1% of all households that pay about 20% of all federal income taxes.[50] The riposte, of course, is that only an estimated 5.1 to 9 million U.S. citizens and long-term permanent residents live abroad.[51] Moreover, even though relinquishment of citizenship has increased dramatically in recent years in percentage terms, it still amounts to only a few thousand persons a year, an unknown fraction of whom have high income and wealth. Many giving up citizenship report doing so because of the heavy penalties that FATCA introduced and the consequent sudden necessity of following rules previously ignored. In fact, most overseas Americans owe little or no tax once exclusions and allowances are applied, as explained below. In addition, many "accidental Americans"—Americans through quirks of family or jurisdiction—have reported that only the additional effort and the separation fee keep them American citizens.[52]

The IRS received only 486,640 overseas tax returns in 2016; it is not known how representative that group is of the certainly much larger number with the obligation to file. But those with modest incomes dominate the return distribution: 84% had adjusted gross incomes below

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49. Avi-Yonah, *supra* note 2, at 9.

50. Erica York, *Summary of the Latest Federal Income Tax Data, 2022 Update*, Tax Foundation (Jan. 20, 2022), https://taxfoundation.org/publications/latest-federal-income-tax-data/ [https://perma.cc/B3LH-2KPW].

51. Helen Burggraf, *The Ongoing Mystery of the Missing American Expatriate Numbers*, Am. Expat Fin. News J. (Aug. 2019), https://americanexpatfinance.com/news/item/196-mystery-of-the-missing-american-expatriate-numbers [https://perma.cc/HT9A-9T29] (last visited Jun. 2, 2021).

52. Carmelan Polce, *Tax Filings From Abroad: Research on Non-Resident Americans*, Democrats Abroad (Mar. 2019), https://www.democratsabroad.org/carmelan/tax_filing_from_abroad_2019_research_on_non-resident_americans_and_u_s_taxation [https://perma.cc/T5HR-6U24] (last visited June 2, 2021).

$100,000.[53] Nevertheless, the U.S still cares about the other 16%—and particularly about the 2.8% with incomes above $500,000—as well as many of those with unfiled returns. Some real money and potential revenue are there. Many high incomes are either taxed locally and credited against U.S. liability or partially excluded by U.S. policy, but how much is unknown.

To the extent that high incomes are not taxed abroad, there may be an important impact at home beyond tax loss. As Kirsch has recently argued:

> the creation of a system where significant numbers of U.S. citizens (or even somewhat smaller numbers of athletes, entertainers, or other high-profile citizens) can voluntarily excuse themselves could further undermine the cohesion of American society, creating the The perception that some citizens are exempt from a fundamental obligation of citizenship—the payment of taxes—while others are not. This could be particularly problematic because the individuals avoiding tax would be a self-selecting, high-income group.[54]

Citizenship taxation should be designed to disturb most overseas Americans minimally while maintaining tax revenue from those

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53. Calculated from Scott Hollenbeck & Maureen Kahr, Individual Foreign Earned Income and Foreign Tax Credit, 2016, https://www.irs.gov/pub/irs-soi/soi-a-inic-id2001.pdf [https://perma.cc/LU8Z-2KQ8] (last visited Jun. 14, 2021). In a recent survey of overseas Americans with 602 non-random respondents 67% reported annual incomes of less than $70,000 per year and 44% reported less than $40,000; household income was considerably higher, and tax liabilities are not clear given that a large share of foreign households are based on "love," which presumably often involves mixed citizenship. The data suggest only that many overseas Americans are not rich, but that was not in doubt. Laura Snyder, *Dispelling the Myth of the Wealthy American Expat, or Are Americans Free to Live Outside the United States?*, Paper prepared for Progressive Connexions' 3rd Global Conference Diasporas: An Inclusive Interdisciplinary Conference Prague, Czech Republic 1-2 December, 2019, https://www.progressiveconnexions.net/wp-content/uploads/2019/11/LauraSnyder_draftpaper-ver2.pdf [https://perma.cc/6NHJ-U5FS]. (last visited July 2, 2021).

54. Kirsch, *supra* note 9, at 196.

of atypically high income or wealth. If they choose, most overseas Americans should be allowed to deal almost exclusively with the revenue authority of their residence country when that country has effective personal tax levels comparable to those of the U.S. This leaves those in very low tax jurisdictions or those with high levels of income and wealth for major attention by the IRS.

In a recent discussion of the relative merits of residence and citizenship taxation, Mason adds an argument against the latter that had apparently not been emphasized in the legal literature before: taxation that follows a person regardless of residence might deter someone from becoming a citizen in the first place.[55] This is a certainly a logical possibility,[56] but there are strong reasons for doubting its actual importance. Kim has noted that highly skilled immigrants are turned away in droves by U.S. immigration restrictions despite the fact that their ambitions would likely entail long-term permanent resident status—and hence citizenship taxation liability.[57] More generally, the link between distant future tax levels and present behavior remains uncertain.[58]

E. Administrability

Two dimensions to an administrability criterion stand out for the comparison of citizenship and residence taxation. One stresses the difficulty of classifying persons into the right category. Because citizenship, except in a few cases, is a clear concept, this has been claimed as a strong relative advantage.[59] Residence systems, by their nature, must have rules,

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55. Mason, *supra* note 17, at 227.

56. Robert T. Kudrle, *Expatriation: A Last Refuge for the Wealthy?* 6 Glob. Policy 408 (2015) at 7.

57. Kim, *supra* note 9, at 350.

58. While economists typically assume higher taxation reduces human capital formation, wealth transfer taxation seems to have little efficiency effect. Lily Batchelder, *Estate Tax Reform: Issues and Options*, Tax Notes 637 (Jan. 2009), https://www.taxnotes.com/tax-notes-today-federal/estate-gift-and-inheritance-taxes/estate-tax-reform-issues-and-options/2009/02/03/wkkr [https://perma.cc/D7PU-SWVN].

59. Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 Iowa L. Rev. 1289, 1291 (2011). Long-term permanent U.S. residents, however, are taxed similarly to citizens, and that status has an essentially arbitrary definition that is no simpler than many definitions of residence for taxation purposes.

some of the complex and difficult to administer, to make the necessary distinctions. But the other element of administrability is of far greater practical importance: the capacity to collect the assigned tax liability. Avi-Yonah[60] and many others regard the inability to collect taxes from those outside the national jurisdiction as a sufficient reason for ruling out citizenship taxation. But some residence taxation schemes also involve claims on those outside the home state if only because exit tax payments can be delayed.[61] The distinction between the two approaches may sometimes be one of degree rather than of kind, and the collection problem should not be used to reject appropriately designed citizenship taxation. It points instead to a far more determined approach to collection.

In a world of concentrating income and wealth, international cooperation to assure the payment of tax obligations has risen in priority and shows no sign of abating. An increased U.S. attempt to fight tax escape through migration could increase friction in the short run due to the extraterritorial claims of citizenship taxation. But it will take place in a broader context of increased international tax cooperation that will hasten the overturning of the traditional "revenue rule" that a state need not assist others in the collection on their taxes. This will ultimately benefit all states except tax havens (see section VI *infra*).

III. Salient Problems with the Current System

Current U.S. law concerning the taxation of U.S. citizens abroad and the fiscal consequences of expatriation involve a host of complications, and only a few elements will be considered here. All citizens and long-term permanent residents[62] are subject to the U.S. income tax, whether abroad or at home. But there are two large corrections for those residing abroad that drastically reduce the number of persons with U.S. income tax owing and lower the amount by those who do. Overseas Americans are generally[63] entitled to an earned (labor) income exclusion of $108,700 in 2021 and an additional housing expense allowance

60. Avi-Yonah, *supra* note 2.

61. Desai et al., supra note 5, at 691.

62. Green card holders for eight of the previous 15 years.

63. As Allison Christians has pointed out, words like "generally" are necessary due to the complexity of the legal framework. Christians, *supra* note 3, at 203.

that varies by country.[64] In addition, taxes paid on most foreign source earned income can be credited against U.S. liability.[65] Overseas Americans face the same estate and gift tax regulations as domestic citizens. In 2022, this was $12.06 million (or $24.12 million per couple) in lifetime gifts and taxable estate.[66]

Even those who fully support the principle of citizenship taxation find many problems with its current rules and enforcement; FATCA shined a light on those shortcomings and generated political action. FATCA did not identify all overseas Americans, but it gave the IRS information on a very high percentage of them. Each had always been legally obligated to file a slight variant of Form 1040 as well as form 8938 dealing with non-U.S. assets.[67] The latter reporting requirement, introduced in 1950, aimed mainly to track the overseas financial holdings of U.S. residents. But for those living abroad, form 8938 asked for much of the same information that had been legally required since 1970 on another government tracking system, FBAR (Foreign Bank Account Reporting)[68], which requires annual information from overseas Americans, to be submitted, not to the IRS, but to the Treasury's Financial Crimes Enforcement Network (FinCEN). A former (official government) U.S. Taxpayer Advocate, Nina Olson, decried this uncoordinated redundancy for many years. [69]

FATCA meant that all overseas Americans suddenly confronted reporting requirements that they had previously largely ignored under threat of heavy penalty, and many responded with organized fury. Their

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64. IRS, *About Form 2555, Foreign Earned Income,* Internal Revenue Serv. (2022), https://www.irs.gov/forms-pubs/about-form-2555 [https://perma.cc/A7Z5-6H9E] (last visited January 18, 2022).

65. Kirsch, *supra* note 8, at 126.

66. In 2022, annual gifts beyond $16,000 ($32,000 per couple) per donee count towards the exemption.

67. Allison Christians, *Paperwork and Punishment: It's Time to Fix FBAR*, 76 Tax Notes Int'l 147 (Oct. 2014).

68. Congress enacted the statutory basis for the requirement to report foreign bank and financial accounts in 1970 as part of the "Currency and Foreign Transactions Reporting Act of 1970," which came to be known as the "Bank Secrecy Act" or "BSA" aimed at money laundering. 31 USC 5311—5332, excluding section 5315.

69. Nina Olson, ARC20_PurpleBook.Pdf, https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_PurpleBook.pdf [https://perma.cc/PXP3-K5FU] (last visited May 22, 2021).

complaints and proposals have been well recounted elsewhere.[70] Most of the outcry has come from those who believe that remaining an overseas American should be made less onerous; most would probably support the U.S. adoption of residence taxation. U.S. taxpayers abroad note the additional paperwork and reporting they face by comparison with their domestic counterparts: 40-50 pages of filing and the necessity of between several hundred and several thousand dollars for filing assistance and sometimes draconian penalties for failures to report properly. FATCA has also often created specific problems stemming from the reluctance of some foreign institutions to become embroiled in reporting to the U.S. In addition, operating in two fiscal systems at once generates a number of difficulties: differing rules for tax-advantaged retirement plans; possible liability for heavier U.S. taxation of passive investment income; the complexity of U.S. controlled corporation laws and the 2017 tax changes that increase the complication and expense of operating small businesses; tax problems with the ownership of foreign real estate; heavier taxation of some benefits that fall outside the foreign earned income exclusion[71]; and the problem of calculating everything in dollars, which not only increases complexity but which can make real losses appear as dollar gains.[72] Some who discovered that they held American citizenship and did not want it found that it would cost them several thousand dollars to become former Americans.[73]

Despite the furor over FATCA, the IRS has made no specific increased revenue claims. At all events, the lion's share of any increase was supposed to come, not from Americans abroad, but from hidden

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70. Christians, *supra* note 3; Laura Snyder, *The Criminalization of the American Emigrant*, TAX NOTES FED. (June 29, 2020), https://www.taxnotes.com/tax-notes-federal/foreign-source-income/criminalization-american-emigrant/2020/06/29/2cmth [https://perma.cc/59N5-68EH] (last visited May 28, 2021).

71. This assumes the appropriateness of the exclusion in the first place; see section IV.B *infra*.

72. These and other problems are discussed in Snyder, *supra* note 69.

73. Robert Gouldner, *FATCA Turns 10 . . . And Europe Still Hates It*, TAX NOTES INT'L (Apr. 17, 2020), https://www.taxnotes.com/fatca-expert/fatca/fatca-turns-10-and-europe-still-hates-it/2020/04/17/2cf3l [https://perma.cc/LM9J-9P65] (last visited May 22, 2021).

accounts of the resident population.[74] The IRS had spent nearly $400 million by 2018 trying to match foreign accounts with taxpayer identification numbers without success.[75] The Government also seems to have made no claims of additional revenue from the earlier HEART Act[76] that introduced the current exit tax regime.

Some attacks on the current system of overseas taxation come not from its reporting rules and penalties but from the alleged generosity of its provisions. The earned income exclusion has attracted much criticism. Peroni argued many years ago that it represents a subsidy to U.S. firms and individuals for overseas activity that cannot be justified using standard economic criteria.[77] The Gregg-Wyden tax bill of 2010 would have eliminated it. Although no explanation was offered, the exclusion presumably looked like a tax loophole in legislation aimed at "fairness."[78] The exclusion level of $108,700 in 2021 was in the 86th percentile of the U.S. individual income distribution. In addition, a further reduction is offered for certain housing expenses in excess of 16% and up to 30% of the income exclusion amount.[79]

Those who choose to relinquish their citizenship have, since the HEART Act of 2008, faced an "exit" tax on capital gains "marked to

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74. There are indications that evasion has gone down however, based in part on reduced non-corporate investment holdings in tax havens. Lisa De Simone et al., *Transparency and Tax Evasion: Evidence from the Foreign Account Tax Compliance Act (FATCA)*, 58 J. Acct. Rsch. 105 (2020); Leo Ahrens & Fabio Bothner, *The Big Bang: Tax Evasion After Automatic Exchange of Information Under FATCA and CRS*, 25 New Political Econ. 849 (Sept. 2020).

75. C. Clark, *IRS Spent Nearly $400 Million for Scant Progress in Collecting Overseas Taxes*, Gov't Exec. (July 10, 2018), https://www.govexec.com/management/2018/07/irs-spent-nearly-400-million-scant-progress-collecting-overseas-taxes/149585/ [https://perma.cc/FZZ2-2BWS].

76. Heroes Earnings Assistance and Relief Tax Act of 2008, H.R. 6081, *supra* note 18.

77. Robert Peroni, *Back to the Future: A Path to Progressive Reform of the U.S. International Income Tax Rules*, 51 Univ. Miami L. Rev. 975 (1997).

78. Bipartisan Tax Fairness and Simplification Act of 2011, 112th Cong. § 727 (2011, 2012); Kudrle, *supra* note 55, at 5.

79. IRS, *Determination of Housing Cost Amounts Eligible for Exclusion or Deduction for 2021*, Internal Revenue Serv. (2021), https://www.irs.gov/pub/irs-drop/n-21-18.pdf [https://perma.cc/5X8J-TCWG].

market" on the day previous to their loss of citizenship.[80] In addition, taxation of the expatriate's estate differs from that of a domestic decedent. Instead of the estate being taxed at 40% as is the case for citizen decedents, each U.S. citizen inheritor faces 40% on the portion of the estate he or she receives (less any foreign succession taxes as agreed bilaterally). As discussed further below, however, neither the capital gains, nor the transfer tax element of the current system has been effectively enforced.

IV. A Proposal for Policy Change

A. FATCA as a Watershed

Observers have concluded that until FATCA, the U.S. essentially practiced territorial (residence) taxation for personal income and estate taxes.[81] FATCA introduced dramatic surveillance of the financial situation of Americans abroad; the OECD's follow-on CRS did the same for most of the rest of the world. But transparency on offer does not map to usable information. The IRS and other tax authorities now face a tsunami of data that remains to be mastered.[82] Moreover, this leaves enforcement as a challenge. Section V considers enforcement problems.

The proposal made here aims to free many Americans living abroad from continuous dealing with the IRS while increasing official attention to those whose motivation may be tax escape or, in any event, those from whom significant revenue might be owed in either income or wealth transfer taxes.

Taxation policy changes considered here deal with both ongoing obligations of Americans abroad and the treatment of those who choose to relinquish their citizenship. The former group includes large numbers of those whose foreign stay is intended to be temporary as well

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80. Heroes Earnings Assistance and Relief Tax Act of 2008, H.R. 6081, *supra* note 18.

81. William Byrnes & Robert Munro, *Background and Current Status of FATCA*, SSRN No. ID 2926119 (Mar. 2017); Moreover, as noted below, U.S. estate taxes have often been so easy to avoid that one expert has likened the estate tax to a voluntary contribution. Edward J. McCaffrey, *The Uneasy Case for Wealth Transfer Taxation*, 104 Yale L.J. 283 (1994)

82. Kudrle, *Moves and Countermoves in the Digitization Challenges to International Taxation*, *supra* note 9.

as those who move abroad permanently or least indefinitely. Some of these persons should be given the opportunity to operate entirely under the taxation system of a foreign state if certain conditions hold. This will be called "the soft exit"—one in which citizenship is retained. The second category, "the hard exit," involves loss of citizenship and will include some of those called "Accidental Americans" and others with very tenuous ties to the U.S. national state. Such minimally attached persons should be given an opportunity to become former Americans with little difficulty or expense if they so choose. Otherwise, those severing their ties completely should face taxation that leaves the U.S. whole for both capital gains and estate taxes.

The augmentation effect noted earlier is only one element of what creates an obligation to the United States, but it is an element that should receive more emphasis than it usually has because it bears so clearly on the propriety of taxation. Nevertheless, this justification can be plausibly linked only to those who have spent considerable time in the U.S. as an adult. Citizens who have spent less than three years in the U.S. after their 18th birthday should be able to relinquish citizenship or permanent resident status without any payment to the United States beyond a minor processing fee.[83] These persons have little direct connection with the U.S., are not likely to have benefited economically from the U.S. in any major direct way, and, unless they choose otherwise, are simply foreigners with whom the U.S. should seek good relations.

B. The Soft Exit

Most overseas Americans should be eligible for treatment under the tax laws of their country of residence. Citizens and select aliens who choose to live abroad should be classified by a residence rule and an income and wealth rule. A "select alien" will be defined as someone who has spent at least five of the past fifteen years as a resident alien. This includes

83. The fee, which is now $2,350, should be greatly reduced or eliminated for this group. Robert W. Wood, *U.S. Has World's Highest Fee To Renounce Citizenship*, Forbes (2021), https://www.forbes.com/sites/robertwood/2015/10/23/u-s-has-worlds-highest-fee-to-renounce-citizenship/ [https://perma.cc/VA79-C9HZ] (last visited May 23, 2021).

not just green card holders but some other potentially remunerative-visa holders as well.[84]

The country of residence should be the first screen of eligibility. Many states have effective income tax systems that levy similar or higher rates on the same money incomes at prevailing exchange rates (calculated on either a current or a purchasing power parity basis) as the U.S. does. The Urban Institute/Brookings Joint Center on Taxation notes that the U.S. has a much lower overall tax burden than all other OECD countries except Mexico and Chile, even though nearly all have lower per capita incomes. In addition to higher consumption taxation, they also have higher income tax rates for the same money incomes.[85] Americans living in these countries typically have little U.S. tax liability once foreign crediting has been allowed, and income tax savings is therefore an unlikely motive to live there. Eligible states would include nearly all of the OECD members and perhaps others as well.[86] The exact criteria should consider both income and transfer taxes. Those U.S. citizens and select aliens who reside in ineligible countries should continue to operate entirely within the U.S. tax system.

The shift to foreign state taxation by those eligible would be by request and would be subject to documented foreign residence, which would include how much time a person spends in the residence

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84. Patrick W Martin & Reuven Avi-Yonah, *Tax Simplification: The Need For Consistent Tax Treatment Of All Individuals (Citizens, Lawful Permanent Residents And Non-Citizens Regardless Of Immigration Status) Residing Overseas, Including The Repeal Of U.S. Citizenship Based Taxation* 13 (2013), https://procopio.mindgruve.com/uploads/model/Block/4653/pdf/211/tax-simplification-the-need-for-consistent-tax-treatment-of-all-individuals-residing-overseas-including-the-repeal-of-u-s-2658.pdf [https://perma.cc/DCH7-W89U] The authors cite as examples, E1, E2, O, P, and TN visas.

85. Urban Institute and Brookings Institution Tax Policy Center Briefing Book, *How Do US Taxes Compare Internationally?* Tax Pol'y Ctr., https://www.taxpolicycenter.org/briefing-book/how-do-us-taxes-compare-internationally [https://perma.cc/FQ3W-Q6QG] (last visited May 11, 2021).

86. Dividing residence states in this way is mentioned briefly in Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 Tax L. Rev. 261, 335 (2001).

country—and therefore not in the U.S.[87] Homeland Security can now track entry and exit from the U.S.[88]

Some proposing a complete U.S. shift to residence taxation have suggested a status transition that could involve a mark-to-market assessment of capital gains tax similar to that for those meeting the thresholds for renunciation of citizenship under current law[89]: this now means net assets of $2 million or more and an average federal income tax liability over the past five years of $171,000 (in 2020).[90] But these are very generous exclusion levels that seem never to have been well defended. Instead, all persons shifting to a foreign tax system should pay deemed capital gains tax on the same terms as domestic taxpayers (as is current Canadian practice) unless additional administrative costs suggest a higher minimum level. In addition, the Earned Income Exclusion of $108,700 and the housing allowance provide an indefensible subsidy to foreign economic activity and should be phased out. If those electing foreign residence taxation come back to U.S. residence, their net worth augmentation while abroad should be stepped up accordingly for any future taxation.

Those with very high income and wealth should receive special attention regardless of the state of foreign residence. The augmentation effect of U.S. citizenship is likely especially important for just these persons. Moreover, high income and wealthy persons appear

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87. Documentation now involves a bona fide residence test and a substantial residence test for the foreign earned income exclusion. See IRS, *Tax Guide for U.S. Citizens and Resident Aliens Abroad*, Internal Revenue Serv. (2021), https://www.irs.gov/pub/irs-pdf/p54.pdf [https://perma.cc/REU5-HH5R] (last visited June 2, 2021).

88. Aaron Boyd, *An Inside Look at All the Data CBP Collects About Everyone Crossing U.S. Borders*, Nextgov.com (Sep. 18, 2019), https://www.nextgov.com/emerging-tech/2019/09/inside-look-all-data-cbp-collects-about-everyone-crossing-us-borders/159946/ [https://perma.cc/6KF2-5NVH] (last visited Jun. 15, 2021).

89. Cynthia A. Blum & Paula N. Singer, *A Coherent Policy for U.S. Residence-Based Taxation of Individuals*, VJTL, Vol. 41, No. 3, 2008 (May) 705.

90. IRS, *Instructions for Form 8854,* Internal Revenue Serv. (2020), https://www.irs.gov/instructions/i8854 [https://perma.cc/3XHG-G4HM] (last visited May 23, 2021). This income tax liability level is very generous; it corresponds to over a half million dollars in gross income.

among tax evaders at much higher levels than their numbers.[91] Allowing the rich to opt out of the U.S. tax system would be imprudent given the estimated more than a half-trillion dollars now held secretly offshore.[92] Regardless of the country of residence, citizens and select aliens with either income or net worth that exceeds the 90 percentile of the respective U.S distributions should continue to operate entirely within the U.S. tax system. Depending on the success of future collection efforts at home and abroad—many involving increased international tax cooperation—such limits could be relaxed for those residing in states with sufficiently effective tax systems.

C. The Hard Exit

Devising an appropriate hard exit tax presents both a conceptual and a practical challenge. Is the tax intended to be a deterrent to expatriation, a quid pro quo for departure, a punitive act against unpatriotic citizens or something else? A Senate Committee Report declared that the decision to expatriate should be "tax neutral,"[93] but, as argued earlier, this is a hopelessly ambiguous criterion. A person contemplating expatriation may have a variety of motives, and even the relevant economic motives are only partly controlled by the U.S. government. This article suggests that the appropriate aim of a hard exit tax should be the recovery of both anticipated capital gains and estate tax revenues.

Current law as contained in 26 U.S. Code § 877A taxes unrealized gains of worldwide assets on the day prior to relinquishment of citizenship as well as deemed distributions of realization of IRAs, 529s,

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91. Natasha Sarin & Lawrence H. Summers, *Shrinking the Tax Gap: Approaches and Revenue Potential*, Tax Notes (Nov. 18, 2019), https://www.taxnotes.com/tax-notes-today-federal/compliance/shrinking-tax-gap-approaches-and-revenue-potential/2019/11/18/2b47g [https://perma.cc/EE7Z-B6XL] (last visited May 23, 2021).

92. Zucman's estimates for 2008 implied about $870 billion. See Gabriel Zucman, *Taxing across Borders: Tracking Personal Wealth and Corporate Profits*, 28 J. Econ. Pers. 121 (Nov. 2014). Unimpeded, this would have been much larger now, but FATCA has likely had some (un-estimated) impact. See *supra* note 73.

93. Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 110th Congress, *supra* note 48.

and health savings accounts.[94] This taxation applies to citizens and long-term permanent residents. The latter category is defined as persons who have been green card holders for eight of the 15 years before expatriation.[95] In addition to the $2 million net worth and $171,000 (2020; annually inflation adjusted) income tax liability screens, there is an inflation-adjusted net gain exemption that was $737,000 in 2020. Under specified circumstances, the tax payment can be deferred up to the death of the expatriate with sufficient surety.[96] Finally, a 40% inheritance tax is levied on U.S. inheritors of the expatriate's estate (Section 2801).[97]

The current policy of taxing U.S. beneficiaries rather than the estate of expatriates likely resulted from both the prospective difficulty of collecting revenue from those outside U.S. jurisdiction and the complications of meshing U.S. estate tax treatment with the variety of laws abroad.[98] A cleaner solution would levy a satisfactory tax in the first instance: one that would compensate for the loss of both capital gains and estate taxation.[99] There is ambiguity here, however. A substantial part of what might otherwise be subject to capital gains taxation for citizens under current law is typically and voluntarily locked into an estate so that it can be passed on with a stepped up basis that allows the recipient to receive the legacy without paying tax on previous capital gains. The implicit assumption is that the Treasury will see some future capital gains revenue as inheritors liquidate holdings.

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94. Gary Forster & Brian Page, *Expatriation from the United States: The Exit Tax*, Fla. Bar J. (Nov. 1, 2020) https://www.forsterboughman.com/index.php/component/k2/item/231-expatriation-from-the-united-states-the-exit-tax [https://perma.cc/T3CU-UYF4] (last visited May 23, 2021).

95. IRS, *supra* note 89.

96. Forster & Page, *supra* note 93.

97. § 877A.

98. OECD, *Inheritance Taxation in OECD Countries*, Org. for Econ. Coop. and Dev. (2021), https://www.oecd-ilibrary.org/taxation/inheritance-taxation-in-oecd-countries_e2879a7d-en [https://perma.cc/3SFE-86JC] (last visited May 23, 2021).

99. Heavier litigation than under current law (which is considerable) would focus on the valuation of assets. See Steven Arsenault, *Surviving a Heart Attack: Expatriation and the Tax Policy Implications of the New Exit Tax*, 24 Akron Tax J. (Jan. 2009) at 65, https://ideaexchange.uakron.edu/akrontaxjournal/vol24/iss1/2 [https://perma.cc/GM2P-2P57] .This problem has gone little studied, presumably because the current law has been so laxly enforced.

The current U.S. taxation of both capital gains and transfers may well change, but revenue recovery now implies an immediate and final exit tax on deemed capital gains at standard rates of 15 to 23.8% for most wealth that does not exceed the estate tax exemption.[100] For those above that level, the recovery implication is less clear. By its nature, the estate tax will often be borne well into the future, and the wealth of the expatriate could change considerably in either direction. But the closest feasible assessment for leaving the Treasury whole would be to levy both the capital gains tax and the estate tax on existing wealth at departure. One tax aims at the emigrant's net worth and the other at its change in valuation since basis was established. Inheritors from the expatriate cannot be presumed to be U.S. citizens or to pay much or any future tax to the U.S. government, thus removing a justification for providing them with stepped-up basis. This approach may err in favor of U.S. tax collection, but recovery of taxation forgone rather than punishment is its aim.

The policy suggested here differs greatly from existing official policy (ignoring enforcement). The suggested shift rests on a conclusion that neither the current income tax nor the net worth minima for capital gains taxation is defensible for a hard exit. A tax liability of $171,000 implies a taxable income of more than $600,000, which is in the 99th percentile of the U.S. income distribution. The $2 million wealth figure is at the 94th percentile of the U.S. net worth distribution. If the hard exit tax is to have broad meaning, these minima should be greatly reduced. Just as for the soft exit, a justification for making hard exit taxation more generous than for domestic capital gains taxation needs to be made. Moreover, there is no apparent justification for an untaxed exemption on the deemed asset sale of nearly three-quarters of a million dollars. Finally, the eight-year green card minimum seems excessively generous. Wealth can often be generated quickly; five years would seem more appropriate, and the exit tax should extend to all select aliens, as suggested in the previous section.

The proposal made here front ends all tax obligations, although the liquidity complications of paying the required tax are clearly

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100. This ignores the low-income 0 rate category. IRS, *Capital Gains and Losses*, Internal Revenue Serv., https://www.irs.gov/taxtopics/tc409 [https://perma.cc/XT5Y-5SL6] (last visited Jun. 12, 2021). A 3.8% charge was tacked onto the 20% maximum rate for those with high incomes to help pay for Obamacare.

increased over current policy.[101] In addition, the use of trusts to subvert exit tax policy, already a big problem, needs far greater attention, perhaps as part of a broader rethinking of the role of trusts and their facilitation of tax avoidance in a society increasingly concerned about inequality.[102]

Wealth transfer is one element of current expatriation law that could prove more severe than the proposal made here in some circumstances (if it were successfully enforced) as well as more severe than the current treatment of resident citizens. Citizens can transfer $12.06 million per person or $24.12 million for a married couple without federal estate tax in 2022, and the basis of assets is stepped up in the transfer for income tax purposes. For those relinquishing citizenship, however, the size of the estate is irrelevant, and all proceeds to American inheritors are taxed at the maximum 40% rate from an estate that may have grown largely after expatriation and may already face taxation in the country of immigration.

Senators Warren and Sanders each declared (hard) exit tax innovation as part of their 2020 presidential campaigns.[103] The Warren plan levied a 40% exit tax on those with net assets of 50 million or more.[104] Sanders suggested a 40% tax [105] on net wealth below $1billion and a 60%

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101. This article does not address whether gifts from foreigners to Americans, including those from expatriates, should remain tax-free.

102. These highly complex legal and administrative problems lie beyond the scope of this article. See Yu Hang Sunny Kwong*, Catch Me If You Can—Relinquishing Citizenship for Taxation Purposes After the 2008 HEART Act*, 9 Hous. Bus. & Tax L.J. 411 (2009). The broader trust problem is examined in Bridget J. Crawford's article, *Magical Thinking and Trusts*, 50 Seton Hall L. Rev. 289 (2019).

103. Both candidates also advocated a wealth tax, and that attracted most attention.

104. Jeff Stein, *Analysis: 'A Very Big Experiment:' How Elizabeth Warren Would Try Forcing Billionaires to Pay Her Wealth Tax*, Wash. Post (Feb. 4, 2019), https://www.washingtonpost.com/us-policy/2019/02/04/very-big-experiment-how-elizabeth-warren-would-try-forcing-billionaires-pay-her-wealth-tax/ https://perma.cc/87WS-YBA7].

105. The official Warren discussion is brief; there is more detail on her wealth tax. Warren Democrats propose "a 40% "exit tax" on the net worth above $50 million of any U.S. citizen who renounces their citizenship; and systematic third-party reporting that builds on existing tax information exchange agreements adopted after the Foreign Account Tax Compliance

rate on amounts above that. It is unclear whether the $32 million minimum for his wealth tax would carry over to the exit tax.[106] Neither candidate explained the relation of their proposals to current law, and the Sanders statement does not indicate whether the 60% rate applies to all who exit or merely those whose motive is tax avoidance.[107]

V. Enforcement

Economists such as Saez and Zucman might dismiss enforcement of a radical tax change with international implications as a mere "policy issue,"[108] but policy analysts and lawyers cannot do so. All proposals for change in soft or hard exit taxation bump up against the fact that the U.S. has so far not shown the capacity to enforce any kind of tax on nonresidents or expatriates effectively. Expert commentary relevant to the subject covers three major areas: failures of administration, insufficient resources and inadequate international cooperation.

A. Poorly coordinated administration

FATCA has clearly not yet achieved anything close to effective administration with overseas Americans. It cannot surprise that exit taxation remains inadequate. A major barrier stems from the several agencies involved. The act of expatriation itself lies with the State Department for citizens and with Homeland Security for permanent residents, while

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Act. https://elizabethwarren.com/plans/ultra-millionaire-tax/?ms=WD2021-LB-NATL-GS-US-GEN 123025289733-elizabeth%20warren [https://perma.cc/Z7YX-3UP8] (last visited July 10, 2021).

106. The heading "Tax on Extreme Wealth" on the Sanders website included the following: "[t]he [Bernie Sanders-proposed] wealth tax includes a 40% exit tax on the net value of all assets under US$1bn, and 60% over US$1bn for all wealthy individuals seeking to expatriate to avoid the [proposed] tax." Helen Burggraf, *Concerns over Sanders's Proposed "exit tax as Dems' Prez Primary Field Shrinks to 2*, https://americanexpatfinance.com/news/item/386-concerns-over-sanders-proposed-exit-tax [https://perma.cc/GLK3-UZ28] (last visited May 23, 2021).

107. Early attempts to base exit taxation on motivation were abandoned as un-administrable with the HEART Act. Arsenault, *supra* note 74, at 46-47.

108. Saez & Zucman, *supra* note 4.

the Treasury Department, specifically the IRS, deals with connected tax matters.[109]

Problems begin with uncertain knowledge about who has in fact become an expatriate. Under current law, an expatriating person is required to file Form 8854.[110] This form contains the asset, income and previous tax compliance information necessary to determine whether a person is a "covered expatriate" under Section 877A, a term applied to those who need to pay the exit tax. Unless this form is filed, the IRS is unlikely to know that a person is expatriating, at least until the person is already gone. A detailed study done for the California State Bar published in 2017 suggested a number of steps to coordinate among the relevant agencies.[111] Nearly three years later, or more than a decade after the HEART Act's exit tax was introduced, the Treasury Inspector General for Tax Affairs (TIGTA) largely ratified the California study and concluded, "[w]ithout a centralized compliance effort, Congress's attempts to create disincentives to expatriate via Section 877A will not be effective."[112] This conclusion comes after the discovery of 16,798 persons who did not file Form 8854 over the period 2008-2018 against 24,260 who did. Because the form is required to avoid "covered expatriate" status, all of these negligent persons were liable for the exit tax but did not pay (although many presumably would have been exempt on income or asset grounds if in good tax standing). From a sample of 26 expatriates who did not file, five persons owed more than $6 million; from a sample of 61 who did file, 15 had potential unreported income of more than $17 million. One overall TIGTA conclusion: "[s]ome expatriates with high net worth appear to not be paying their exit tax."[113]

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109. Helen Cheng & Tina Nam, *Proposal to Enhance Implementation, Enforcement of Exit Tax*, Tax Notes (Nov.13, 2017), https://marketing.withersworldwide.com/reaction/emsdocuments/PDFs/PCT/Expatriate_Taxes_Tax_Notes_Helen_Cheng_and_Dina_Nam.pdf [https://perma.cc/AEW3-LG9K] (last visited May 29, 2021).

110. IRS, *supra* note 89.

111. Cheng & Nam, *supra* note 108.

112. Treasury Inspector General for Tax Affairs, *More Enforcement and a Centralized Compliance Effort Are Required for Expatriation Provisions*, Oversight.Gov (Sep. 20, 2020), https://www.oversight.gov/report/tigta/more-enforcement-and-centralized-compliance-effort-are-required-expatriation-provisions [https://perma.cc/E7BM-F63V] (last visited May 24, 2021).

113. *Id.* at 4.

The TIGTA made five recommendations with which the IRS agreed. The IRS should: 1) gain a field in the State Department's Certification of Loss of Nationality (CLN) of the United States (DS-4083) form for the expatriate's Social Security number; 2) establish a communication system to obtain Form 8854 from those expatriates who did not provide it; 3) determine the adequacy of Form 8854 and the recording of information provided; 4) develop procedures for obtaining necessary data fields so that expatriates' liability under 877A can be accurately assessed; and 5) develop a process to determine highest risk expatriate returns for compliance. The TIGTA also noted the low examination rate for expatriates.[114]

B. The Need for Increased Resources

Much further work appears necessary simply to gain required information for the administration of existing hard exit law and to identify areas for special enforcement attention. But IRS's concurring response to three of the five TIGTA recommendations included a caveat about resource availability to perform the agreed tasks. Thus, to an unknowable extent, the difficulties of enforcing the exit tax appear to be part of the larger problem of lack of IRS resources necessary for the effective taxation of overseas Americans as well.

In 2019 Sarin and Summers (the latter a former Secretary of the Treasury) estimated that the 2020 "tax gap," the difference between revenue collections and taxes owed, would amount to 15% of the latter, which implies a loss of $7.5 trillion over the decade 2020-2029.[115] Their straightforward but persuasive analysis suggests that a doubling of the IRS budget would generate an additional $1.1 trillion over that period or a gap reduction of 14.7%. The doubled budget is not historically unprecedented; instead, it would largely revert to previous effective levels. The ratio of the IRS budget to gross collections levels fell by about 45% between 1993 and 2018, and the real enforcement budget by about 25%; the share of returns examined dropped by 45% between 2011 and 2018.[116]

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114. *Id.* at 4.

115. Sarin & Summers, *supra* note 90.

116. The Biden Administration early declared an aim to increase the IRS budget by $80 billion. Section 10301 of the Inflation Reduction Act of 2022, H.R. 5376, signed into law on Aug. 16, 2022, allocates an additional

Sarin and Summers argue that the increased IRS enforcement they advocate would be very progressive because most of the increased revenue would come from high-income taxpayers who account for 70% of the tax gap. They estimate that the percentage of underreporting is more than five times higher for the category of those with $10 million or more per year than for those with less than $200,000 per year. They suggest a three-pronged attack: increasing enforcement and aiming it towards the rich, improving information reporting, and deploying information technology more effectively.[117] Their plan envisions only a slight increase in audit rates overall but a 20% increase for those earning between $1 and $5 million a year, a 33% increase for those between 5 and 10 million and a 50% increase for those above $10 million. They forecast $535 billion more revenue in individual income tax receipts from their budget and organizational changes while they estimate only $17 billion from increased estate taxes and $400 million from increased estate and trust income tax.[118] The latter two very modest numbers reflect the high exemptions for estates and myriad legal avoidance practices.[119]

Sarin and Summers's investigation underlines the importance of greatly increased attention to the taxation of the wealthy and the prudence of not allowing those persons to benefit from any form of residence taxation, at least until the enforcement situation changes very substantially.

C. Greater Unilateral Action to Achieve Foreign Government Cooperation

The 2003 Joint Committee Review's observation that "enforcement of the [exit] tax may not be successful" has proved to be an understated

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$79.9 billion of funding to the IRS over the next ten years, approximately $45.6 billion of which is designated for enforcement.

117. IRS's inadequate IT system has been subject to criticism from many sources including the government's own taxpayer advocate and the Treasury Inspector General for Tax Affairs. Sarin & Summers, *supra* note 90, at 14.

118. *Id*. at 12.

119. A recent OECD study found that tax collection from transfer taxes overall is very limited. It is only 0.5% of tax revenue across the OECD for the 24 of 31 countries that levy and in only four countries does it exceed 1.5%. The U.S figure is 0.57%. OECD, *supra* note 97.

prediction.[120] That lack of success clearly extends to international personal tax collection more broadly. And while exit tax administration may have been hindered by resource constraints as well as poor administration, it is certain that inadequate resources have reduced collection efforts on known tax delinquencies. After acknowledging the TIGTA's account of IRS challenges to locate and contact the taxpayer, to deal with complex tax laws and to navigate tax treaties, a practicing professional's 2019 article on collection from abroad declares: "[j]ust as problematic as of 2014 there were only 39 international revenue officers" (IROs). It concludes: "the IRS is severely understaffed when it comes to identifying and collecting taxes from IDTs [International Delinquent Taxpayers]."[121]

The professional's article outlines the expected chain of enforcement when supported by sufficient resources: the IRO tries multiple times to contact IDT. The IRO then requests a "Customs Hold," which is entered into the Treasury Enforcement Communications System (TECS). This system holds information on an individual's travel to and from the United States and may result in an interview with a Customs and Border patrol officer when the person attempts to enter the U.S. In addition, the same database can be used to locate the IDT and bank accounts used for travel. This system could lead to IDT property in one of six countries with which the U.S. currently has treaties involving Mutual Collections Assistance that, as the Treasury explains, "provide that each country, upon request by the United States, may take whatever actions it would take to collect its own taxes in order to collect on behalf of a treaty partner. This includes the collection of U.S. taxes through the treaty partner's bankruptcy proceedings."[122] But even if the information uncovered does not lead to such a treaty partner, it can help locate places of residence and financial records of the IDT. This process

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120. Joint Committee on Taxation, Review of the Present-Law Tax and Immigration Treatment of Relinquishment of Citizenship and Termination of Long-Term Residency, JCS-2-03 (Feb. 2003).

121. Martin Rosenberg, *When Uncle Sam Crosses the Border: What is in the IRS International Collection Toolbox?*, Greenberg LLP, (Apr.–May, 2019), https://www.jdsupra.com/legalnews/collection-when-uncle-sam-crosses-the-99458/ [https://perma.cc/8UFJ-F257] (last visited May 24, 2021).

122. Hale E. Sheppard, *Assessing Tax Liabilities is One Thing, Collecting Them Abroad is Another: New Case Shows International Reach of the IRS*, 13 J. Tax. 6 (Nov. 2017).

could in turn uncover assets either in a cooperating treaty partner or in the United States.[123] These procedures appear equally applicable whether the revenue pursued is from a present or a former citizen.

The IRS may also employ other channels to gain international cooperation although their efficacy appears uncertain. During a taxpayer audit, the IRS may request foreign bank records and follow noncompliance with a summons. If either the taxpayer or the foreign bank does comply, the IRS can issue a "consent directive" that is transmitted to all foreign banks to release information on the taxpayer. The IRS may also obtain information from countries that are signatory to the Hague Evidence Convention (ratified by 62 countries through 2020) through a letter of request, sometimes used in discovery for a case in the U.S. It involves direct contact across legal authorities without diplomatic intermediation, but "it is up to the receiving country as to whether they honor the letter of request or ignore it."[124]

Since 2017 serious tax delinquency can also lead to passport revocation. The IRS so certifies to the Department of State, which can deny, revoke or limit the person's passport.[125] This will not be effective with those who carry more than one passport, and this is a common practice for just those persons who would be the most revenue-rich targets.[126] And, of course, it cannot be used for expatriates out of tax compliance. For those persons, a ban on travel to the United States would seem entirely appropriate.[127]

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123. See example in *Id*. at 8-9.

124. Martin Rosenberg, *supra* note 120, at 2.

125. Federal Highway Administration, *Fixing America's Surface Transportation Act or the FAST Act,* U.S. Dep't of Transp. (2015), https://www.fhwa.dot.gov/fastact/ [https://perma.cc/CR4B-B6EZ] (last visited May 29, 2021).

126. Ian Young, *Backup Passports and the Case of the Canadian with Eight Citizenships*, S. China Morning Post, https://www.scmp.com/news/world/united-states-canada/article/2077576/case-canadian-eight-citizenships-and-why-worlds-rich [https://perma.cc/4BWF-2WZZ] (last visited Jun. 16, 2021).

127. The so-called "Reed Amendment" to the expatriation legislation of 1986 would have banned everyone expatriating for tax purposes from entering the U.S., but because of drafting problems, it was never implemented or enforced. A 2003 Senate committee study suggested that this penalty should be reserved for those falling afoul of tax obligations connected with their departure. Michael G. Pfeifer, *The Current State of Expatriation* (2014) at 26. https://www

VI. Looking Ahead

Dysfunctional U.S. intra-governmental arrangements connected with global mobility taxation are being improved; the IRS itself can pursue revenue more effectively even with current personnel; and resources should be greatly increased so that currently available avenues for enforcement can be more assiduously explored. A disjunctive improvement in compliance could be achieved by an expansion of cooperation now reflected in the Mutual Collection assistance agreed with only six countries. Yet the U.S. has apparently not vigorously sought additional partners.[128] This may reflect a combination of a low priority for the entire enterprise of collecting taxes from Americans abroad and a failure to take advantage of what could be accomplished even with current cooperators.[129]

Whatever has prevailed in the past, one would expect the current climate of concern about tax evasion and its role in economic inequality to provide a promising environment for further international cooperation. Some states that practice residence taxation also attempt some extraterritorial personal taxation,[130] and the effective collection of those taxes may depend on foreign cooperation. This should not only make more states willing to incorporate explicit tax collection actions into treaties but also to take other measures of legal discretion, such as those noted above, in a cooperative direction. More broadly, most other major states have as much or more to gain from overall evasion reduction involving foreign jurisdictions than does the U.S. For example, Gabriel Zucman's 2014 study estimated that the European fraction of financial wealth hidden offshore as a fraction of total wealth was 2.5 times that of the United States.[131] In addition to revenue loss and a heightened sense of unfairness with its impact on tax morale, there is

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.caplindrysdale.com/assets/htmldocuments/uploads/14701_The%20Current%20State%20of%20Expatriation.pdf [https://perma.cc/UD6P-88DJ].

128. Keith Fogg, *International Collection Efforts by the IRS—Expanding the Number of Treaties in Which We Have Collection Language*, Forbes (Nov. 11, 2018), https://www.forbes.com/sites/procedurallytaxing/2014/11/18/international-collection-efforts-by-the-irs-expanding-the-number-of-treaties-in-which-we-have-collection-language/ [https://perma.cc/Y5US-H9MB] (last visited May 24, 2021).

129. *Id.*

130. Shaviro, *supra* note 13, at 76.

131. Zucman, *supra* note 91, at 140.

an impossible-to-measure but widely believed negative externality from such tax escape: hidden financial influence, both legal and illegal, in the affairs of democratic states.

Keith Fogg of the Harvard Law School, who has worked extensively on IRS international collection efforts, has compared the current U.S. challenge in gaining revenue from beyond its shores to the country's situation under the Articles of Confederation when creditors could not successfully pursue claims across state lines. He urges more enforcement resources but also the prioritization of more cooperative treaty language. "It is time to expand the list of countries with whom we have collection treaties, to make it a regular part of our bilateral treaties or to begin an effort to make cross border collection of taxes a part of a multilateral effort."[132]

Increased cooperation represents a reversal of the traditional "revenue rule," the demise of which has also been advocated by some international development specialists. Private and public corruption plague developing countries, and much of the ill-gotten gain is shifted to high-income states.[133] In addition, there has been some consideration of reviving some version of the "Bhagwati tax," first proposed nearly a half century ago, that envisions a revenue flow to developing home countries by emigrants who earn high incomes abroad. Effectuation of such a scheme would necessarily heavily involve cooperation by the immigrant's employing state.[134] Kovatch has suggested American liberal discovery rules as a model for how the U.S. could provide global leadership in winding down the revenue rule.[135]

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132. Keith Fogg, *International Collection Efforts by the IRS - Expanding the Number of Treaties in Which We Have Collection Language*, Forbes (Nov. 18, 2014), https://www.forbes.com/sites/procedurallytaxing/2014/11/18/international-collection-efforts-by-the-irs-expanding-the-number-of-treaties-in-which-we-have-collection-language/?sh=3bc0e6fc1e08 [https://perma.cc/L78M-7JZE]; See also Jagdish N. Bhagwati, *International Migration of the Highly Skilled: Economics, Ethics and Taxes*, 1 Third World Q. 17 (1979).

133. Samuel D. Brunson, *The U.S. as Tax Haven—Aiding Developing Countries by Revoking the Revenue Rule*, 5 Colum. J. Tax L. 170 (2013).

134. Desai et al., *supra* note 5.,at 7.

135. William J Kovatch, *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, 22 Houst. J. Int. Law 265 (2000).

Personal taxation of overseas Americans has remained an astonishingly under-examined subject. There are no reliable estimates of the number of such persons and only guesses about the size of the "tax gap" that their activity involves. In addition, the collection of data on those giving up citizenship and permanent resident status is seriously incomplete. Who is emigrating and with what apparent or likely motive? Confidentiality concerns must be respected, but without much better data and analyses, policies will continue to be driven largely by inertia.[136]

VII. Summing Up

Human mobility across states is increasing even as skepticism about some aspects of globalization grows. Concern about material inequality within states is also high and growing.

The policy proposals presented here attempt to increase the fiscal grip of the U.S. government on high income and wealth citizens who have benefited from the U.S. national environment while reducing tax interference with most Americans who choose to live abroad. The suggested policies also change the rules for those relinquishing citizenship to recover more fully tax revenue that should have gone to the U.S. Treasury. Revised policies should allow those below the top ten percent of the U.S. citizenry in income and wealth to live and pay taxes as locals in foreign countries with personal tax systems similar to that of the U.S. The very well off and those who reside in low tax jurisdictions should stay in the U.S. system. Any shift to a foreign system should entail mark-to-market capital gains taxation. Relinquishing U.S. citizenship should require the payment of both deemed capital gains and deemed estate taxation without step-up. None of this will be possible unless administration is tightened and enforcement is greatly increased. Truly effective enforcement will require greater international cooperation, but U.S. initiatives should meet success among states striving to reduce tax escape.

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136. For example, although this Article suggested that future tax burdens are unlikely to seriously affect immigration to the United States, evidence on expatriation could cast light on that assumption.