

Michigan Journal of International Law

Volume 38 | Issue 2

2017

Citizenship Overreach

Peter J. Spiro

Temple University Law School

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [International Law Commons](#), [Legislation Commons](#), [Taxation-Transnational Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Peter J. Spiro, *Citizenship Overreach*, 38 MICH. J. INT'L L. 167 (2017).

Available at: <https://repository.law.umich.edu/mjil/vol38/iss2/2>

This Symposium Article is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mjil.repository@umich.edu.

CITIZENSHIP OVERREACH

*Peter J. Spiro**

TABLE OF CONTENTS

I. INTERNATIONAL LAW: A RIGHT NOT TO HAVE	
CITIZENSHIP	173
A. <i>Constraining Citizenship Allocations</i>	174
B. <i>Letting Citizens Go</i>	179
II. U.S. CITIZENSHIP: TOO EASY TO GET, TOO HARD TO	
SHED	182
III. CORRECTING CITIZENSHIP OVERREACH	186
IV. CONCLUSION: AMERICANS ABROAD, LAYING LOW	190

London mayor Boris Johnson was born in New York City in 1964 to British parents. His father studied at Columbia University and subsequently took a job at the World Bank in Washington, D.C. In 1969 the family returned to the United Kingdom where Johnson has lived as a British citizen since. Forty-five years later, he sold his townhouse in London at a hefty profit, only to face a capital gains tax bill from the U.S. Internal Revenue Service. Even though Johnson had not resided in the United States since the age of five, he was still a U.S. citizen by virtue of his birth there, and U.S. citizens are subject to capital gains taxes without regard to place of residence. At first, Johnson sought to renounce his U.S. citizenship without paying the bill. In the end, he relented.¹

Johnson’s story is notable only because he is a public figure. Many so-called “accidental Americans”—those born with U.S. citizenship but lacking meaningful social connections to the United States in adulthood—

* Charles R. Weiner Professor of Law, Temple University Law School. This essay was presented as a paper at the Taxation and Citizenship Conference, University of Michigan Law School, October 9, 2015. My thanks to Reuven Avi-Yonah and Allison Christians for organizing the event.

1. See David A. Graham, *London Mayor Boris Johnson Hates the IRS, Too*, THE ATLANTIC (Feb. 17, 2015), <http://www.theatlantic.com/international/archive/2015/02/boris-johnson-renounces-us-citizenship-tax-bill-mayor-london/385554/>. Johnson indicated that he planned to renounce his U.S. citizenship as part of the deal. See *Boris Johnson Clears Way to Number 10 by Renouncing US Passport*, TELEGRAPH (Feb. 14, 2015), <http://www.telegraph.co.uk/news/politics/conservative/11413801/Boris-Johnson-clears-way-to-Number-10-by-renouncing-US-passport.html>. When he returned to the limelight as a leading exponent of Britain’s exit from the EU there was speculation that he remained a U.S. citizen. See Ylan Q. Mui, *Boris Johnson Won’t Run for British Prime Minister but May Be Able to Run for U.S. President*, WASH. POST (July 1, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/07/01/boris-johnson-wont-be-britains-prime-minister-but-he-could-be-americas-president/>. His renunciation was recently confirmed with the inclusion of his name on a quarterly U.S. Treasury Department list of individuals who have lost their U.S. citizenship. See 82 Fed. Reg. 10185, 10199 (Feb. 9, 2017); Patrick Wintour, *Boris Johnson Among Record Number to Renounce American Citizenship During 2016*, Guardian, Feb. 9, 2017.

face significant tax liabilities notwithstanding the tenuous tie.² At one level, this is nothing new: tax obligations have always applied to citizens abroad. But these obligations were largely honored in the breach. Recent administrative and legislative reforms have ramped up enforcement against U.S. citizens abroad. Some, like Boris Johnson, have managed to square up their tax obligations on the way to cutting the citizenship tie and the prospect of future liabilities. Many others are cowering in the shadows, fearful of being discovered on past noncompliance and thus unwilling to initiate the renunciation process.

The United States is the only country in the world to tax its citizens resident abroad.³ Whatever one thinks of this exceptional approach as a general matter,⁴ it seems least defensible as applied to those who are not Americans in any sociological sense. The unfairness could be corrected through changes to the tax law, carving out from its coverage at least those who never had ties or who have permanently severed ties to the homeland. It could also be corrected through citizenship practice.

Citizenship practices are increasingly situated in the realm of international law. What was once conceded to be in the exclusive

2. See, e.g., Neil Gandal, *Why Does Uncle Sam Hate American Expats?*, WALL ST. J. (Dec. 15, 2014, 6:53 PM), <http://www.wsj.com/articles/neil-gandal-why-does-uncle-sam-hate-american-expats-1418687615>; Amber Hildebrandt, *U.S. FATCA Law Catches Unsuspecting Canadians in Its Crosshairs*, CBC NEWS (Jan. 13, 2014), <http://www.cbc.ca/news/canada/u-s-fatca-tax-law-catches-unsuspecting-canadians-in-its-crosshairs-1.2493864>; Coleen Jaffy, *The Law that Makes U.S. Expats Toxic*, WALL ST. J. (Oct. 10, 2015), <http://www.wsj.com/articles/the-law-that-makes-u-s-expats-toxic-1444330827>; Sophia Yan, *Uncle Sam Says My Swedish Kid Is American*, CNN MONEY (Mar. 11, 2015), <http://money.cnn.com/2015/03/10/pf/taxes/us-expat-kids-citizenship-tax/>.

3. Eritrea is sometimes paired with the United States as another state that imposes tax obligations on its citizens abroad. See, e.g., *End the American Expat Tax*, BLOOMBERG VIEW (April 24, 2015), <https://www.bloomberg.com/view/articles/2015-04-24/end-the-american-expat-tax> (“Does the U.S. really want to share this distinction with Eritrea?”). Eritrea does attempt to impose a 2% “diaspora tax,” but the Eritrea tax has been condemned by no less than the U.N. Security Council for being collected through extortion and other illicit means and for being put to use in destabilizing the Horn of Africa. See S.C. Res. 2023, ¶¶ 10-11 (Dec. 5, 2011); see also Sam Jones, *Diaspora Tax for Eritreans Living in UK Investigated by Metropolitan Police*, THE GUARDIAN (June 9, 2015), <https://www.theguardian.com/global-development/2015/jun/09/eritrea-diaspora-tax-uk-investigated-metropolitan-police> (reporting coercive means used by Eritrean embassy in London to collect the tax). The coupling thus seems inappropriate given the anomaly of the Eritrean case. No other developed economy imposes a worldwide tax on a citizenship basis.

4. See Michael S. Kirsch, *Citizens Abroad and Social Cohesion at Home: Refocusing a Cross-Border Tax Policy Debate*, VA. TAX REV. (forthcoming 2017) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2669543); compare, e.g., Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 169, 177 (2016) (describing citizenship taxation as “out of step” with a globalizing world), with Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1289-91 (2011) (asserting an administrative convenience of citizenship criterion).

discretion of states⁵ has become the target of human rights activism.⁶ Advocates are articulating a right of “access to citizenship” for habitual residents.⁷ A spate of recently proposed and adopted measures allowing for the deprivation of citizenship on security or other grounds has attracted heavy fire.⁸ This activity has been exclusively directed at cases involving the denial or deprivation of citizenship. The critique orients around citizenship as a vehicle for perfecting rights and equality.⁹

Through this optic, citizenship is an unalloyed good and citizenship policy cannot be too generous. That should not be too surprising. For the most part, citizenship now comes at no or low cost, at least from the individual’s perspective. The distinctive obligations of citizenship are few.¹⁰ Citizenship, in most cases, will get you more than it takes. Few countries, for example, maintain once-common mandatory military service policies, and most of those that do will exempt non-resident citizens.¹¹ At the same time that there are no costs associated with citizenship, there are typically some benefits. At the very least, citizens enjoy a right to enter their country,¹² and through citizenship will often have privileged entry rights in other countries.¹³ Citizens are also often entitled to other advantages under domestic law.

5. See, e.g., Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT’L L. 694, 697-98 (2011) [hereinafter Spiro, *A New International Law of Citizenship*].

6. For instance, the Dominican Republic has been condemned for denying citizenship to persons of Haitian ethnicity born in Dominican territory. See, e.g., *We Are Dominican: Arbitrary Deprivation of Nationality in the Dominican Republic*, HUM. RTS. WATCH (July 1, 2015), <https://www.hrw.org/report/2015/07/01/we-are-dominican/arbitrary-deprivation-nationality-dominican-republic>.

7. See Spiro, *A New International Law of Citizenship*, supra note 5, at 717.

8. See, e.g., Matthew J. Gibney, *Should Citizenship Be Conditional? The Ethics of Denationalization*, 75 J. POL. 646, 654-57 (2013) (criticizing UK expatriation measures). France dropped a proposal to strip convicted terrorists of citizenship that had been floated in the wake of the Paris attacks. See *Paris Attacks: Hollande Drops Plans to Strip Nationality*, BBC NEWS (Mar. 30, 2015), <http://www.bbc.com/news/world-europe-35924701>. A new government in Canada has stated its intention to repeal a measure enacted in 2015. Tom Parry, *Liberals Move to Overhaul Rules on Revoking, Granting Citizenship*, CBC NEWS (Feb. 25, 2016), <http://www.cbc.ca/news/politics/john-mccallum-citizenship-act-repeal-bill-1.3463471>. Such proposals have made little headway in the United States. See Peter J. Spiro, *Expatriating Terrorists*, 82 FORDHAM L. REV. 2169, 2180 (2014).

9. See, e.g., James A. Goldston, *Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens*, 20 ETHICS & INT’L AFF. 321 (2006).

10. See generally Peter J. Spiro, *The (Dwindling) Rights and Obligations of Citizenship*, 21 WM. & MARY BILL RTS. J. 899 (2013) [hereinafter Spiro, *The (Dwindling) Rights and Obligations of Citizenship*].

11. See Joshua Hall & Danko Tarabar, *Explaining the Worldwide Decline in Military Conscription: 1970-2010* (W. Va. Univ. Dep’t of Econ., Working Paper Series 15-30, 2015), http://www.be.wvu.edu/phd_economics/pdf/15-30.pdf.

12. See, e.g., International Covenant on Civil and Political Rights art. 12(4), Dec. 19, 1966, 999 U.N.T.S. 171 (“No one shall be arbitrarily deprived of the right to enter his own country.”).

13. Entry and movement rights associated with citizenship are the primary incentive to secure multiple citizenship, especially where a person holding a citizenship with a low level of

So it has been with U.S. citizenship. Taxes aside, U.S. citizenship costs nothing to retain. The burden has been light and benefits clear if not always immediate. Most importantly, U.S. citizenship guarantees the right to enter the United States.¹⁴ That is valuable even for those who have no social ties to the United States or foreseeable plans to relocate there. Avoiding the hassles of having to apply for a visa, even for a tourist trip, is a nontrivial benefit.¹⁵ For those who might take advantage of it for business or education, it might be worth something more.

But, in many cases, those benefits will not be worth anything close to the cost of complying with the new overseas tax regime. In the past, even those who complied often paid only a small price.¹⁶ This was especially true of middle earners, for whom foreign tax credits reduced the bite of U.S. tax exposure.¹⁷ Today, although the magnitude of tax liability remains unchanged, additional reporting requirements have added a significant administrative burden. Enforcement of reporting requirements under the Bank Secrecy Act was dramatically stepped up in the wake of 9/11, with the adoption of heavy penalties for failure to file Foreign Bank Account Reports (FBAR) for accounts with more than \$10,000.¹⁸ In 2010, the Foreign Account Tax Compliance Act (FATCA) added additional reporting requirements for those with overseas assets.¹⁹ These regimes apply equally to citizens resident in the United States and abroad, but fall

associated travel and settlement rights is eligible for a citizenship with a high level of such rights. *See generally* Yossi Harpaz, *Ancestry into Opportunity: How Global Inequality Drives Demand for Long-Distance European Union Citizenship*, 41 J. ETHNIC AND MIGRATION STUD. 2081, 2099 (2015) (demonstrating the correlation between relative mobility rights and an inclination to claim dual citizenship on the basis of descent); Henley & Partners, *Methodology*, QUALITY OF NATIONALITY INDEX, <https://www.nationalityindex.com/#> (ranking the value of nationalities and taking account of the “sheer number of other jurisdictions where one can travel to or settle in while holding a particular nationality”).

14. *See, e.g.*, *Worthy v. United States*, 328 F.2d 386 (5th Cir. 1964).

15. Witness, for example, the recent outcry over the withdrawal of visa waiver privileges for dual nationals of Iran, Iraq, Syria, and Sudan. *See, e.g.*, Robert Mackey, *BBC Journalist Turned Away from Flight to U.S. Because She Was Born in Iran*, N.Y. TIMES, Jan. 19, 2016.

16. *See, e.g.*, OFFICE OF TAX POLICY, U.S. DEP’T OF THE TREASURY, INCOME TAX COMPLIANCE BY U.S. CITIZENS AND U.S. LAWFUL PERMANENT RESIDENTS RESIDING OUTSIDE THE UNITED STATES AND RELATED ISSUES 1 (May 1998), <https://www.treasury.gov/press-center/press-releases/Documents/tax598.pdf> (noting that income exclusions and tax credits “allow[ed] many U.S. citizens or resident aliens who reside abroad to reduce or eliminate their U.S. tax liability”).

17. In 2015, U.S. citizens residing in foreign countries could exclude up to \$100,800 in foreign earned income from U.S. income tax computations. *See* INTERNAL REVENUE SERVICE, TAX GUIDE FOR U.S. CITIZENS AND RESIDENT ALIENS ABROAD (2015), <https://www.irs.gov/pub/irs-pdf/p54.pdf>. The United States has entered into tax treaties with several dozen foreign countries to further reduce the risk of double taxation.

18. *See* USA Patriot Act of 2001, § 353, 115 Stat. 272, 322 (2001); *Report of Foreign Bank and Financial Accounts (FBAR) IRS* (Nov. 30, 2016), <https://www.irs.gov/businesses/small-businesses-self-employed/report-of-foreign-bank-and-financial-accounts-fbar>.

19. *See, e.g.*, Leandra Lederman, *The Use of Voluntary Disclosure Initiatives in the Battle Against Offshore Tax Evasion*, 57 VILL. L. REV. 499, 512 (2012).

more heavily on the external population insofar as they will typically hold accounts in their foreign place of residence. The FBAR/FATCA regime imposed significant accounting costs even on those of relatively modest means.²⁰ Penalties for non-compliance are steep.²¹ FATCA also imposed reporting requirements on foreign financial institutions (FFIs) with U.S. account holders. Faced with the administrative expense of complex FATCA controls, many foreign banks have turned away U.S. customers.²² These FFIs have become adept at identifying U.S. citizens among existing and prospective retail customers, and FATCA has become a dirty word among U.S. citizens abroad.²³ It is especially reviled among those whose connection to the United States is tenuous.

This Article examines international law limitations on the ascription of citizenship and national self-definition. The United States is exceptionally generous in its extension of citizenship. Alone among the major developed states, it extends citizenship to almost all persons in its territory at the moment of birth.²⁴ This birthright citizenship is

20. See, e.g., AMANDA KLEKOWSKI VON KOPPENFELS, *MIGRANTS OR EXPATRIATES? AMERICANS IN EUROPE* 262 (2014) (noting that Americans who may not have any tax liability nonetheless require accounting assistance for the filing of complicated tax forms); Rosie Spinks, *Double Trouble: The Pain of Dual Citizen Expat Taxes*, WALL ST. J., Mar. 29, 2016 (describing the lamentation of a U.S. citizen overseas regarding the fact that she had spent more on accountant fees than she owed in taxes); *Taxation*, AM. CITIZENS ABROAD, <https://www.americansabroad.org/taxation> (“Tax filing from abroad is significantly more costly than domestic tax filing, even when no tax is due.”).

21. See, e.g., James Fallows, *The Fatca Menace!*, THE ATLANTIC, Jan. 2, 2012 (reporting one example in which unintentional reporting error led to large penalty); Jeanne Sahadi, *You’ve Never Seen IRS Penalties Like These*, CNN MONEY, June 4, 2015; TAXPAYER ADVOCATE SERVICE, 2013 ANNUAL REPORT TO CONGRESS 239-41 (2013) (describing the “potentially punitive” nature of tax and listing FATCA as among the “most serious problems” requiring policy revision).

22. See, e.g., DEMOCRATS ABROAD, *FATCA: AFFECTING EVERYDAY AMERICANS EVERY DAY* (Sept. 2014), <http://www.finance.senate.gov/imo/media/doc/Att%20%20Democrats%20Abroad%202014%20FATCA%20Research%20Report1.pdf> (reporting that one in six U.S. citizens abroad faced bank account closure in FATCA’s wake); Siri Srinivas, *‘I Was Terrified We’d Lose All Our Money’: Banks Tell US Customers They Won’t Work with Americans*, THE GUARDIAN, Sept. 24, 2014; Sophia Yan, *Banks Lock Out Americans over New Tax Law*, CNN MONEY, Sept. 15, 2013.

23. See, e.g., Gandal, *supra* note 2; Stu Haugen, *An American Tax Nightmare*, N.Y. TIMES, May 13, 2015.

24. See, e.g., Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* 20 (Alexander T. Aleinikoff & Douglas Klumeyer eds., 2010); see also European Union Democracy Observatory on Citizenship, *Comparing Citizenship Laws: Acquisition of Citizenship*, EUROPEAN UNIV. INST. (2015) [hereinafter EUDO Database], <http://eudo-citizenship.eu/databases/modes-of-acquisition> (providing a searchable database of citizenship laws). Although the *jus soli* approach is unusual among OECD states, it is typical of Western Hemisphere states. See OLIVIER VONK, *NATIONALITY LAW IN THE WESTERN HEMISPHERE: A STUDY ON GROUNDS FOR ACQUISITION AND LOSS OF CITIZENSHIP IN THE AMERICAS AND THE CARIBBEAN* 10-11 (2014) (noting that thirty out of thirty-five Western Hemisphere states have automatic *jus soli* acquisition at birth).

constitutionally protected under the Fourteenth Amendment.²⁵ At the same time that it is generous at the front end, U.S. citizenship is sticky at the back. Termination of citizenship on the individual's part can involve substantial fees.²⁶ Expatriation is contingent on tax compliance and, in some cases, will implicate the recognition of capital gains.²⁷

In other words, it is possible to get stuck in a citizenship one never wanted in the first place. The FATCA experience supplies an unusually fertile case for exploring this under-systematized quadrant at the intersection of citizenship and international law. In light of the continuing obligations of U.S. citizenship, is it possible that the U.S. birthright citizenship and expatriation regimes violate international norms?²⁸

They may. Even in the context of extremely relaxed historical constraints on state nationality practice, there were acknowledged nineteenth century limitations on the extension of citizenship to individuals with insufficient connection to a state—citizenship overclaiming, as it were.²⁹ Naturalization has been understood to have a volitional predicate, that is, citizenship acquired after birth cannot be forced on an individual against her will. Citizenship on the basis of territorial birth has always been accepted as a legitimate basis for extending citizenship even though it involves no choice on the part of the individual to whom citizenship is ascribed. That may reflect notions of the common law relating to nationality, and the assumption that most people lived out their lives in the countries in which they were born. That no longer comports with a world in which mobility has reached unprecedented levels. There is a greater probability than ever before that a person's birthplace will not coincide with the place in which she makes her life. The same can be said of citizenship by descent, through which citizenship can pass automatically on the basis of tenuous social membership ties. The mismatch between citizenship and actual community draws birthright citizenship into question, at least where citizenship obligations follow an individual regardless of place of residence.

25. U.S. CONST. amend. XIV ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside.").

26. See *infra* note 106 and accompanying text.

27. There are substantial barriers to expatriation. See *infra* notes 100-03 and accompanying text.

28. Audrey Macklin explores an analogous situation in which citizenship attribution is problematic from an individual rights perspective. Audrey Macklin, *Sticky Citizenship*, in *THE HUMAN RIGHT TO CITIZENSHIP: A SLIPPERY CONCEPT* 223 (Rhoda E. Howard Hassmann & Margaret Walton-Roberts eds., 2015). Individuals have been denied refugee status where they have the right to citizenship in a third country. North Koreans have been denied refugee status in Canada, for example, because they are entitled to citizenship in South Korea. *Id.* at 230. This difficulty is distinguishable from the U.S. case insofar as the citizenship is being imputed by another state, not imposed by the state whose citizenship is at issue.

29. See *infra* notes 31 and accompanying text.

Part I of this article sketches international law as it has constrained state citizenship practice. Historically, the only limits on state nationality practices involved over-claiming. Those constraints arose in an era in which nationality implicated thick obligations. It was understood that nationality could not be imposed in the absence of connections between individual and state. Volition was a necessary predicate to naturalization; a state could not extend nationality after birth against an individual's will. Practice also established that one state could not diplomatically protect a putative national against another state in the absence of genuine links to the individual. Expatriation, meanwhile, was vigorously contested in the face of nineteenth century migrations to the United States. The history suggests at least a provisional individual right to expatriate.

Part II applies these background norms to current U.S. practice. Absolute birthright citizenship and automatic *jus sanguinis* citizenship may now be problematic from a rights perspective to the extent the regime allocates citizenship to individuals with no social attachment to the United States, associates substantial obligations with external citizenship, and maintains high barriers to expatriation.

To the extent U.S. citizenship practice does compromise individual rights, there are tax fixes and there are citizenship fixes. Part III sets out possible changes to the citizenship regime that could improve the conformity of citizenship and community. Citizenship fixes include opt-in and opt-out mechanisms for birthright citizenship. The better solution may lie in frictionless exit for those with nominal ties to the national community. Though reform is more likely to be accomplished through the tax regime, the moment highlights the over-inclusiveness of U.S. citizenship, which may undermine its utility as a platform for redistribution.

I. INTERNATIONAL LAW: A RIGHT NOT TO HAVE CITIZENSHIP?

The allocation of nationality has long been considered a matter of near-complete sovereign discretion. It is only recently that the denial of citizenship has even been contested under international law. Such challenges are gaining momentum as part of a unified human rights strategy in which citizenship supplies a vehicle to formal legal equality.³⁰ Under the current conventional wisdom, meanwhile, the granting of citizenship cannot be too generous. That is largely because there are few downsides to being a citizen. In most contexts, citizenship implicates few, if any, contingent obligations. To the extent that citizenship poses benefits but no costs, it is unsurprising that the conferral of citizenship has triggered little scrutiny under international law.

That was not always the case. The obligations of nationality, for males at least, historically included military service obligations and robust norms of allegiance. Holding nationality in a state also barred claims against that

30. See Spiro, *A New International Law of Citizenship*, *supra* note 5, at 719-20.

state in international fora.³¹ In a context in which one had material reasons not to hold nationality, the aggressive extension of nationality was sometimes contested.³² The U.S. tax regime in that respect has a back-to-the-future quality. The coupling of expansive birthright citizenship and consequential citizenship obligations sets the stage for interrogating the conferral of citizenship.

This is not to say that the issue was ever very high-profile. Nationality practice was historically insulated from international law, so much so that early theorists of the law of nations barely touched the subject.³³ That reflected the largely sedentary nature of human life. As migration to the New World accelerated through the nineteenth century, nationality issues provoked disputes among states. By far the most important flashpoint related not to the extension of nationality but to the refusal to allow its termination against assertions of a right to expatriation (a history I will recount below).³⁴ With respect to the allocation of nationality, two norms emerged from decentralized international legal process, decoded from disputes between states and their resolution, formal or not. First, naturalization of an individual was contingent on individual consent. Second, for international law purposes at least, a state could not lay claim to an individual in the absence of a “genuine link” between the individual and the state.

A. *Constraining Citizenship Allocations*

The first norm was provoked by the former practice of some Latin American states to extend naturalization by operation of law. Peru, Mexico, and Argentina at points purported to confer nationality automatically on foreigners after a period of residence. Under an 1886 Mexican nationality law, all aliens acquiring real estate in Mexico would automatically become Mexican nationals in the absence of a declaration of retention of original nationality.³⁵ In 1889, Brazil decreed all resident foreigners would become nationals unless they made a declaration to the contrary within six months of the decree.³⁶ European states and the United States protested these measures, primarily concerned with the effect of naturalization on their capacity to exercise diplomatic protection on behalf of their nationals

31. See, e.g., EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 588 (1925) (“[A] person cannot sue his own government in an international court . . .”).

32. See *infra* notes 41-43 and accompanying text.

33. See, e.g., ALFRED M. BOLL, *MULTIPLE NATIONALITY AND INTERNATIONAL LAW* 183 (2007).

34. See *infra* Part IB.

35. See Maximilian Koessler, *Subject, Citizen, National, and Permanent Allegiance*, 56 *YALE L.J.* 58, 75 n.100 (1946).

36. *Brazilian Decree Regulating the Naturalization of Foreigners Residing in the Republic*, reprinted in 81 *BRIT. AND FOREIGN STATE PAPERS* 233 (1889).

in the state of residence.³⁷ To the extent that the naturalizations were recognized as valid, home states would lose the capacity under international law to intervene on behalf of their nationals under the rule that one state could not espouse claims against another state in which a person also held nationality.³⁸ Naturalization might also have resulted in loss of home state nationality under home state law – that is, effect a change of nationality.³⁹ This was important to European states and the United States, which often found themselves pressing claims against Latin American states relating to expropriations and other property harms.⁴⁰

As recounted by mid-century nationality law scholar Paul Weis, arbitral commissions rejected the effect of the automatic naturalization regimes where Latin American states asserted nationality as a defense to claims. Weis concluded that the practice established that “the acquisition of a new nationality must contain an element of voluntariness on the part of the individual acquiring it, that it must not be conferred against the will of the individual.”⁴¹ Likewise, the Harvard Research in International Law observed in 1929 that “the general principle that no state is free to acquire the allegiance of natural persons without their consent is believed to be generally recognized.”⁴² It continued:

If State A should attempt . . . to naturalize persons who have never had any connection with State A, who have never been within its territory, who have never acted in its territory, who have no relation whatever to any persons who have been its nationals, and who are nationals of other states, it would seem that State A would clearly have gone beyond the limits set by international law.⁴³

37. See, e.g., Summary of a Letter from Mr. Blaine, U.S. Sec. of State, to Mr. Adams, U.S. Minister to Brazil, (Feb. 19, 1890), in 3 A DIGEST OF INTERNATIONAL LAW 307, 308 (John Bassett Moore ed., 1906) (noting that, in response to Brazilian law, the U.S. Secretary of State asserted that “[t]o hold that the mere residence of an individual in a foreign country was conclusive evidence of his desire and intention to become one of its citizens would . . . involve an assumption of a most violent character”).

38. See, e.g., BORCHARD, *supra* note 31, at 588.

39. See, e.g., Letter from Mr. Bayard, U.S. Sec. of State, to Mr. Suzzara-Verdi (Jan. 27, 1887), in A DIGEST OF INTERNATIONAL LAW, *supra* note 37, at 714 (noting that the Department of State “frequently declared” that when a citizen of the United States naturalized in another country he was “regarded as having lost his rights as a citizen of the United States”).

40. See BORCHARD, *supra* note 31, ch. 7.

41. See PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 110 (2d ed. 1979); see also H.F. VAN PANHUYS, THE ROLE OF NATIONALITY IN INTERNATIONAL LAW: AN OUTLINE 156 (1959) (“[I]t would be hard to defend that the conferment of nationality on a person who has no connection whatsoever with the State in question may ever produce nationality within the meaning of international law.”).

42. Research in International Law of the Harvard Law School, *The Law of Nationality*, 23 AM. J. INT’L L. 1, 26 (Special Supp. 1929) [hereinafter Harvard Research].

43. *Id.*; see also Int’l Law Comm’n, Rep. on Nationality, Including Statelessness, U.N. Doc. A/CN.4/50/1952, at 8 (1952) [hereinafter Rep. on Nationality] (concluding that “[n]aturalization must be based on an explicit voluntary act of the individual or of a person

The Harvard group's draft treaty on nationality law provided that "a state may not naturalize a person of full age who is a national of another state without the consent of such person."⁴⁴ Some Latin American states persisted in attempting to impose automatic naturalization schemes through the mid-twentieth century; Mexico's law, for example, was only repealed in 1934 and, as late as 1949, Argentina considered enacting a law under which all foreigners resident for longer than two years could avoid naturalization only by leaving the country.⁴⁵

The consent could be tacit, a necessary condition to validating prevailing approaches to the naturalization of minors as well as women. Under nineteenth century practice, in most cases women automatically acquired the nationality of foreign husbands upon marriage.⁴⁶ In that context, the voluntariness of the marriage was taken as a stand-in for consent to naturalization that followed from it.⁴⁷ Children could also be naturalized without their consent upon the naturalization of a parent.⁴⁸ Otherwise, however, non-consensual naturalization was understood to be barred by customary international law.⁴⁹

The "genuine link" norm arose where a state sought to press an international claim of an individual with whom it had no real connection. It was most famously articulated in the International Court of Justice's (ICJ) 1954 decision in the *Nottebohm* case, in which Liechtenstein asserted a claim on behalf of a German-born naturalized citizen against Guatemala,

acting on his behalf"). Brownlie has noted that the "element of deliberate association of individual and State is surely important." Ian Brownlie, *The Relations of Nationality in Public International Law*, 39 BRIT. Y.B. INT'L L. 284, 310 (1963).

44. See also Lester Orfield, *Effects of Dual Nationality*, 17 GEO. WASH. L. REV. 427, 441 (1949) ("[N]o state may confer its nationality upon nationals of another state unless the individual himself asks for such a change of his status.").

45. See Koessler, *supra* note 35, at 75 n.100; Virginia Lee Warren, *Forced Citizenship Is Urged by Peron*, N.Y. TIMES, Jan. 12, 1949.

46. See, e.g., BORCHARD, *supra* note 31, at 593-94; *League of Nations Committee of Experts for the Progressive Codification of International Law, Nationality*, 20 AM. J. INT'L L. 21, 38 (Special Supp. 1926).

47. See *Mackenzie v. Hare*, 239 U.S. 299, 312 (1915); see also CANDICE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE AND THE LAW OF CITIZENSHIP* 64-67 (1998); Leonard Boudin, *Involuntary Loss of American Nationality*, 73 HARV. L. REV. 1510, 1516 (1960).

48. See Harvard Research, *supra* note 42, art. 15 ("[A] state may naturalize a person not of full age, in connection with its naturalization of his parent, without the consent of such person."). Children continue to be subject in most countries to derivative naturalization mechanisms under which they have no say in following a parent's acquisition of citizenship. See, e.g., 8 U.S.C. § 1431 (2000) (providing for the automatic citizenship of a child of a naturalized citizen).

49. See Koessler, *supra* note 35, at 74 ("A general exception to the rule of domestic domain in matters of nationality law is represented by the prohibition of compulsory naturalization, which, according to textual authority, forms part of the prevailing customary international law."); Myres S. McDougal et al., *Nationality and Human Rights: The Protection of the Individual in External Arenas*, 83 YALE L.J. 900, 920 (1974) ("To impose naturalization upon individual persons against their will . . . is incompatible with the commonly accepted principles of international law.").

which had refused to recognize the naturalization and expropriated his property as an enemy alien.⁵⁰ The ICJ denied Liechtenstein's capacity to assert the claim in the absence of pre-existing connections between Nottebohm and the country. "[N]ationality is a legal bond having as its basis a social fact of attachment," the Court observed, finding that it is "a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."⁵¹ The Court was careful to confine the ruling to the international non-effect of the naturalization, refusing to interfere with Nottebohm's status as a citizen for purposes of municipal law so long as it did not infringe on the rights of other states.⁵² But the decision nonetheless vaunted the social aspects of nationality, conceiving it as something more than a formal classification.

Neither of these two norms—the requirements of consent and genuine link—touched on birthright citizenship practices. The two dominant models for ascribing citizenship at birth—on the basis of parentage (*jus sanguinis*) or territorial birth (*jus soli*)—have both been accepted as legitimate criteria for the conferral of citizenship.⁵³ Neither is contingent on individual consent.⁵⁴ Only at the margins have they been challenged. States and commentators have asserted limits to the number of generations that *jus sanguinis* can descend in the absence of individual consent.⁵⁵ Thus, Italian dictator Benito Mussolini's boast that "once an Italian, always an Italian, to the seventh generation" was met with derision.⁵⁶ Leaving aside its application where a parent has expatriated prior to the child's birth, almost all states extend citizenship to the children of citizens born

50. The Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. Rep. 4 (Apr. 6).

51. *Id.* at 23-24.

52. *Id.* at 20; see also Josef L. Kunz, *The Nottebohm Judgment (Second Phase)*, 54 AM. J. INT'L L. 536, 550 (1960).

53. See, e.g., WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 195 (2d. ed. 1884) ("[W]here a difference of legal theory can exist international law has made no choice, and it is left open to states to act as they like."); see also VAN PANHUYS, *supra* note 41, at 160-61; Rep. on Nationality, *supra* note 43, at 7 ("[U]niformity of nationality laws seems to indicate a consensus of opinion of States that conferment of nationality at birth has to be based on either, on *jus soli* or on *jus sanguinis*, or on a combination of these principles.").

54. See, e.g., McDougal et al., *supra* note 49, at 919 ("[T]hese two principles for conferment of nationality at birth disregard human volition. The individual selects neither his parents nor his place of birth.").

55. See, e.g., Harvard Research, *supra* note 42, art. 4; Herbert Hugh Naujoks, *Power of the National State in International Law to Determine the Nationality of an Individual*, 6 TEMP. L.Q. 451, 466 (1931) (applauding the fact that most countries did not allow citizenship by descent beyond the second generation and noting that "[i]t is not desirable that the nationality of a particular state should be acquired by unlimited generations of persons born in the territory of another state and bearing the nationality of the latter under its law"). These calls continue today. See, e.g., Rainer Bauböck, *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, 75 FORDHAM L. REV. 2393, 2426 (2007).

56. See John H. Wigmore, *Domicile, Double Allegiance, and World Citizenship*, 21 U. ILL. L. REV. 761, 764 (1927).

abroad. Extending citizenship on this basis is uncontested.⁵⁷ *Jus soli* is permissively available, limited by international law only with respect to the children of accredited diplomats and populations under hostile occupation.⁵⁸ As with constraints on naturalization, these objections were conceived as infringements on the rights of other states, not the rights of individuals, and as exceptions that proved the rule of state discretion. Otherwise, the ascription of nationality on the basis of territorial birth has gone unchallenged from an international law perspective.⁵⁹

Broad acceptance of *jus sanguinis* and *jus soli* can be explained in doctrinal terms as part of the general principles of international law, prevailing approaches to birth citizenship that date to the dawn of modern nationality and before.⁶⁰ Both can also be processed through the “genuine link” optic.⁶¹ Historically it will have been the case that place of birth, in the vast majority of cases, would have coincided with a life trajectory of social attachment. *Jus soli* derives from feudal understandings of putatively natural social hierarchies in which movement was highly restricted.⁶² Parentage would also have evidenced continuing social connections to a home state, at least in the absence of naturalization in another. (If, for example, Nottebohm had been born in Liechtenstein or born elsewhere to Liechtenstein nationals, Liechtenstein’s right to espouse

57. See Weil, *supra* note 24, at 20 (listing the birth citizenship regimes of 25 states, all of which include some element of *jus sanguinis*). Controversy persists with respect to the practice of some states to discriminate on the basis of gender with respect to *jus sanguinis* rules, once almost universally the case. Discrimination on the basis of sex in nationality practices is internationally prohibited. See Convention on the Elimination of All Forms of Discrimination Against Women art. 9, Dec. 18, 1979, 1249 U.N.T.S. 13. Nonetheless, a number of parties to the convention have reserved from this obligation and persist in nationality practices that discriminate on the basis of sex. See INT’L LAW ASS’N COMM. ON FEMINISM AND INT’L LAW, FINAL REPORT ON WOMEN’S EQUALITY AND NATIONALITY IN INTERNATIONAL LAW 39-40 (2000).

58. See Brownlie, *supra* note 43, at 304-05. On the former, see the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws art. 12, Apr. 13, 1930, 179 League of Nations Treaty Series 89. U.S. law conforms to the exception for the children of diplomats born on U.S. territory, which is understood to be the sole surviving exception to birthright citizenship.

59. Of course, this has come under political attack. See, e.g., Anand Giridharadas, *The Attack on Birthright Citizenship*, N.Y. TIMES, Sept. 1, 2015. Important political theorists have also questioned the ascriptive aspect of birthright citizenship. See generally PETER SCHUCK & ROGERS SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLICY* (1985); AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009).

60. See, e.g., Brownlie, *supra* note 43, at 314. Recognized as a source of international law by the statute of the International Court of Justice, general principles are distinguishable from customary international law insofar as they can be established even in the absence of *opinio juris*—evidence that states are acting out of a sense of legal obligation.

61. Cf. Kunz, *supra* note 52, at 546 (noting that both *jus soli* and *jus sanguinis* involve “some connection” to granting states and stating that “[i]n this sense, we may speak of a wide ‘link’ necessity, as pertaining to the international law actually in force”).

62. See, e.g., SCHUCK & SMITH, *supra* note 59, at 13-17; Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case (1608)*, 9 YALE J. L. & HUMAN. 73, 78 (1997).

the claim after his naturalization would have been considerably stronger.) Those sociological facts obviated any need to introduce a consent element to birthright citizenship. In most cases, there would have been an implied or inchoate consent that would have been realized, with place of birth or lineage serving as a proxy for future social membership.

B. *Letting Citizens Go*

If birthright citizenship was only marginally constrained by international law, a right of exit was more vigorously asserted. In framing a right not to have a particular nationality, expatriation supplies the primary historical terrain. Because expatriation once implicated the clash of state interests, its terms have been better developed. To the extent expatriation is a right, it overtakes discretion regarding conferral of nationality. If citizenship can be shed on a frictionless basis, it mitigates concerns relating to its allocation.

During the nineteenth and early twentieth centuries, expatriation triggered mammoth disputes between the United States and European sovereigns. The typical case involved a person born a subject of a European monarch who emigrated to the United States and naturalized there. Many European states refused to recognize the legitimacy of naturalization under the doctrine of perpetual allegiance (“once a subject, always a subject”).⁶³ Conflict resulted when naturalized Americans returned to visit their homelands only to find themselves pressed into military service. U.S. diplomatic digests from the late nineteenth century are littered with cases in which the United States protested—sometimes at great diplomatic cost—the refusal of other states to recognize the transfer of allegiance.⁶⁴ The “right of expatriation” became a domestic political rallying cry. Triggered by a British treason trial in which the Crown refused to recognize the U.S. naturalization of a subject and denied him procedural privileges extended to foreigners,⁶⁵ an 1868 statute pronounced expatriation to be “a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness.”⁶⁶

In the face of this unsurprisingly persistent U.S. pressure, many important European sovereigns relented, terminating citizenship upon naturali-

63. See Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1420-24 (1997).

64. For examples, see PETER J. SPIRO, *AT HOME IN TWO COUNTRIES: THE PAST AND FUTURE OF DUAL CITIZENSHIP* 11-38 (2016) [hereinafter SPIRO, *AT HOME IN TWO COUNTRIES*].

65. See DAVID SIM, *A UNION FOREVER: THE IRISH QUESTION AND U.S. FOREIGN POLICY IN THE VICTORIAN AGE* 111-12 (2013) (describing the trial of John Warren, a case that provoked a political furor in the United States); see also Summary of a Letter from Mr. Seward, U.S. Sec. of State, to Mr. Adams, U.S. Minister to England, (Jan. 13, 1868), in *A DIGEST OF INTERNATIONAL LAW*, *supra* note 37, at 580 (describing outrage “throughout the whole country, from Portland to San Francisco and from St. Paul to Pensacola”).

66. Expatriation Act of 1868, 15 Stat. 223. See also the Burlingame Treaty between the United States and China, which recognized the “inherent and inalienable right of man to change his home and allegiance.” Burlingame-Seward Treaty art. 5, China-U.S., July 28, 1868.

zation in another country. The United Kingdom adopted this approach on a retroactive basis in 1870.⁶⁷ Some states, such as France, continue to make expatriation contingent on the satisfaction of military service requirements, even for those born with nationality abroad.⁶⁸ Individuals clearly had an interest in expatriation, hence its framing as a right; where denied the capacity to transfer nationality, migrating individuals were caught in the equivalent of turf battles between states as each lay claim to the individual as a potential soldier.⁶⁹ Although expatriation gained traction under the rights banner, it was more like a duty. Naturalization required a complete transfer of affiliation.⁷⁰ Dual citizenship was considered an abomination.⁷¹ To the extent that expatriation was a right, it was a right of states to claim complete dominion over their newly-minted members.⁷²

That was consistent with an international legal backdrop recognizing few individual rights. As human rights gained traction after World War II, the individual right to expatriation was among them. Article 15 of the Universal Declaration of Human Rights provided that “[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”⁷³ The provision was not duplicated in binding follow-up instruments; the International Covenant on Civil and Political Rights and other major human rights instruments include a right to leave a country, not shed its nationality.⁷⁴

67. See SPIRO, *AT HOME IN TWO COUNTRIES*, *supra* note 64, at 18-19; Harvard Research, *supra* note 42, at 48.

68. See, e.g., SPIRO, *AT HOME IN TWO COUNTRIES*, *supra* note 64, at 22-23 (providing examples of the application of this regime).

69. See, e.g., Aristide Zolberg, *The Exit Revolution*, in *CITIZENSHIP AND THOSE WHO LEAVE* 34 (Nancy L. Green & Francois Weil eds., 2007) (describing state anxiety over losing military manpower in allowing expatriation).

70. See, e.g., Letter from Mr. Cass, U.S. Sec. of State, to Mr. Wright, U.S. Minister to Prussia (July 8, 1859), in *A DIGEST OF INTERNATIONAL LAW*, *supra* note 37, at 574 (noting that naturalization constitutes a “new political birth”).

71. See, e.g., Letter from Mr. Bancroft, Envoy Extraordinary and Minister Plenipotentiary of the United States, to Lord Palmerston, Principal Secretary for Foreign Affairs, Great Britain (Jan. 26, 1849), in *53 BRITISH AND FOREIGN STATE PAPERS* 639, 643 (1868) (asserting that states should “as soon tolerate a man with two wives as a man with two countries; as soon bear with polygamy as that state of double allegiance which common sense so repudiates that it has not even coined a word to express it”).

72. See, e.g., Brownlie, *supra* note 43, at 343 (“[I]t is not the case, in light of existing practice, that the *individual* has such a right [to expatriation].”).

73. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15 (Dec. 10, 1948); see also Jane McAdam, *An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty*, 12 *MELBOURNE J. INT’L L.* 27, 28 (2011) (discussing the lead-up to the signing of the Universal Declaration of Human Rights).

74. International Covenant on Civil and Political Rights art. 12(2), Dec. 16, 1966, 999 U.N.T.S. 171 (“Everyone shall be free to leave any country, including his own”); American Convention on Human Rights art. 5(d)(II), Nov. 21, 1969, 1144 U.N.T.S. 143; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(2), Nov. 4, 1950, 213 U.N.T.S. 221. See generally HURST HANNUM, *THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE* (1987).

Nonetheless, a norm against arbitrary bars on expatriation is reflected in contemporary state practice. The 1997 European Convention on Nationality obligates states to permit renunciation by those habitually resident abroad.⁷⁵ The right to leave is clearly better established (a flashpoint of the Cold War era⁷⁶), but, as Dimitry Kochenov observes, “the rights to travel abroad and to expatriate are very difficult to differentiate in practice.”⁷⁷ Weis concluded that under international law, states “should not withhold discharge from its nationality” for individuals who reside abroad where the discharge would not result in the failure to perform specific obligations to the state, including military service obligations.⁷⁸ McDougal, Lasswell, and Chen asserted a right to change nationality given the non-volitional nature of birth citizenship. “The fact that a person possesses a particular nationality at birth, or after birth, should not condemn him in perpetuity to membership in a body politic which may be perceived by him to be more oppressive than protective.”⁷⁹ As with international law’s validation of birthright citizenship through territorial birth and parentage, vindicating a right to expatriation also fits into a “genuine links” logic. In the conventional historical case where an individual migrated permanently from his country of origin, the homeland tie would be deactivated.⁸⁰

To the extent that an individual right of expatriation remains provisional, it may be because there has been little need to put it to work under contemporary conditions. During the mid-twentieth century, state practice facilitated rather than obstructed expatriation, as many states (including the United States) automatically terminated the nationality of individuals who naturalized in another state or who actively maintained another nationality acquired at birth.⁸¹ That practice has more recently dissipated as states come to accept dual citizenship. For many, including the United States, the default position now assumes retention of nationality upon the acquisition or retention of other nationalities.⁸² A contemporary right of

75. European Convention on Nationality art. 8, Nov. 6, 1997, E.T.S. 166.

76. To the extent that citizenship has been coupled with the right to leave, it has been by way of a right to retain citizenship rather than to shed it. See HANNUM, *supra* note 74, at 101-02 (describing the Soviet practice under which individuals would have to renounce citizenship as a condition to the issuance of exit visa).

77. Dimitry Kochenov, *The Right to Leave Any Country Including Your Own in International Law*, 28 CONN. J. INT’L L. 43, 56 (2012).

78. WEIS, *supra* note 41, at 133.

79. McDougal et al., *supra* note 49, at 928-29. The authors also note that “the right to change a nationality is increasingly regarded as a fundamental human right.” *Id.*

80. See Brownlie, *supra* note 43, at 343-44 (applying a principle of effective link to support state duty to recognize right to expatriation).

81. See Harvard Research, *supra* note 42, at 39 (noting the “modern tendency” towards “general recognition” of a right of expatriation).

82. See State Department Cable to U.S. Embassies in London, Seoul, Islamabad, Guatemala, and Nairobi (Feb. 10, 1995) in 72 INTERPRETER RELEASES 1618 (1995) (“It is no longer possible to terminate an American’s citizenship without the citizen’s cooperation.”).

expatriation remains largely untested.⁸³ This may be in part because most states set a low bar to renunciation. More evidently, there is not much reason to terminate citizenship as citizenship “lightens,” in Christian Joppke’s formulation.⁸⁴ In contrast to the nineteenth century, in which the denial of expatriation could result in severe duplicative obligations attendant to nationality, there is now little downside to retaining multiple citizenships in most cases. Obligations distinctive to citizenship are minimal even for territorial residents.⁸⁵ For those resident abroad, the obligations are, for most countries, non-existent; the costs of retaining citizenship are effectively zero. At the same time, there are typically some benefits attached to the status.⁸⁶ The lack of an incentive to expatriate goes a long way to explaining the spotty evidence for the right.

II. U.S. CITIZENSHIP: TOO EASY TO GET, TOO HARD TO SHED

Is U.S. citizenship practice too cloying against this backdrop? Any conclusions are necessarily suggestive and provisional because the practice is so thin. There appear to be no contemporary episodes in which citizenship practice has been challenged for being overly generous. But the U.S. citizenship regime appears at least in tension with historical norms as they map out onto the contemporary global context. The allocation of citizenship in the absence of a genuine link without the possibility of frictionless exit, at least as coupled with nontrivial attendant obligations, may infringe individual rights under international law.

Citizenship practice clearly could violate individual rights in theory. If, as the Harvard Research observed almost a century ago, the United States

83. At the time of the exit tax legislation, there appears to have been a consensus that it conformed to international law. It does not appear that this analysis considered the application to happenstance Americans, however. See JOINT COMM. ON TAXATION, ISSUES PRESENTED BY PROPOSALS TO MODIFY THE TAX TREATMENT OF EXPATRIATION 99-100 (Comm. Print 1995) (concluding that the exit tax conformed with international law, while conceding the “lack of clearly defined, objective standard” and the “inevitab[ility] that debate will continue”); Detlev Vagts, *The Proposed Expatriation Tax – A Human Rights Violation?*, 89 AM. J. INT’L L. 578, 580 (1995) (supposing a “rational connection to the relation between the emigrant and the state”).

84. See generally Christian Joppke, *The Inevitable Lightning of Citizenship*, 51 EUR. J. SOC. 9 (2010).

85. See Spiro, *The (Dwindling) Rights and Obligations of Citizenship*, *supra* note 10, at 913-15 (describing jury duty as the only distinctive obligation of citizenship).

86. These benefits will always include absolute entry rights to the country of citizenship and will often include full political rights, even as an external citizen. See, e.g., Jean-Michel Lafleur, *The Enfranchisement of Citizens Abroad in a Comparative Perspective*, 22 DEMOCRATIZATION 840 (2015). Citizenship may implicate economic rights in that country to the extent that a state constrains ownership and commercial activity by noncitizens. Citizenship in a state may also implicate travel and settlement rights in other countries. Thus, citizenship in an EU member state brings with it the right of free movement in other EU member states. That explains, for example, the large numbers of Latin Americans who have claimed citizenship on the basis of ancestry in Italy and Spain. See DAVID COOK-MARTÍN, *THE SCRAMBLE FOR CITIZENS: DUAL NATIONALITY AND STATE COMPETITION FOR IMMIGRANTS* (2013).

imposed nationality on all residents within 500 miles of the border (or, to make it more tax-rich, those living in London's SW1), the practice would violate international law.⁸⁷ That would be true whether the status was imposed after or at birth; the timing would be inconsequential. The status would be allocated in the absence of either consent or a connection sufficient to justify the imposition, especially insofar as the status implicated costs to the nonconsenting holder. In the traditional framing, the action would comprise a violation of another state's sovereignty. Sovereignty interests might still be implicated today, but individual rights would also clearly enter into the mix.

U.S. citizenship practice triggers some concern against the baseline. With respect to *jus soli* citizenship, an individual garners U.S. citizenship on the basis of birth within the territory of the United States notwithstanding the lack of any connection at birth or after.⁸⁸ Perhaps this is not a problem of consent, as the mother will be in the United States on a voluntary basis in almost all cases (though of course the child will not have consented to the presence). The question then reduces to whether place of birth constitutes a "genuine link" (in the vocabulary of *Nottebohm*) in the absence of any other connection, or whether it ascribes citizenship in an arbitrary fashion.

Arguably, it is arbitrary. Where an individual has no distinctive social, economic, or cultural ties to the United States other than place of birth, it is hard to denominate the person as an "American" as anything but a matter of form. An extreme example would be the phenomenon of "border babies" born to Canadian mothers on the U.S. side of the border, where high-risk pregnancies enjoy better treatment options.⁸⁹ But the argument would apply to Boris Johnson and the many individuals who were born in the United States only to leave in infancy. These are not people who have a "voluntary social connection" to the United States in any meaningful sense.⁹⁰

The same argument can be made with respect to *jus sanguinis* citizenship in some cases. The cultural ties to the United States are more probable under statutory terms—in so-called mixed marriages, citizenship only descends where the citizen parent was physically present in the United States for five years, at least two of which were after the parent turned fourteen⁹¹—but one can pose many common scenarios in which the parental link (either to the United States or to the child) will be thin and the

87. Harvard Research, *supra* note 42, at 26 ("[I]f State A should attempt to naturalize all persons living outside its territory but within 500 miles of its frontier, it clearly would have passed" the limitations on the power of a state to confer nationality).

88. See U.S. CONST. amend. XIV, § 1 ("[A]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."); see also *Vance v. Terrazas*, 444 U.S. 252, 256 (1980) (noting that the government cannot terminate U.S. citizenship acquired at birth except where a citizen intends to relinquish it).

89. See *Border Babies v. the IRS*, THE ECONOMIST, Mar. 5, 2016.

90. Kirsch, *supra* note 4, at 14.

91. Immigration and Nationality Act, 8 U.S.C. § 1401(g) (1994).

person will hardly qualify as American within even the broader conceptions of the identity. For example, the child of an American father and non-citizen mother will have citizenship for life even if the parents divorce when the child is young and the child has no continuing relationship with the father. With citizenship *jus sanguinis*, it is possible to be a U.S. citizen without ever setting foot in the United States.⁹²

The ascription of citizenship in these cases of nominal membership would be of lesser consequence if no obligations attached to the status. Outside the tax regime, the obligations of U.S. citizenship are sufficiently minimal so as not to trigger rights concerns.⁹³ But the burdens of the tax regime are hardly minimal. U.S. law requires all citizens with income over minimal levels to file income tax returns regardless of country of residence.⁹⁴ Tax liabilities may be minimal in many cases as a result of the foreign earned income exemption⁹⁵ and foreign tax credits.⁹⁶ Bilateral tax treaties may further reduce the tax burden of Americans abroad. U.S. tax liabilities may nonetheless be substantial, especially with respect to high earners. Regardless of the tax liability, filing requirements impose preparation costs. Add to the 1040 requirement the recently adopted FBAR and FATCA filing requirements and the burden of U.S. citizenship for those living abroad clearly qualifies as non-trivial.⁹⁷ There are no carve-outs from these filing requirements and tax liabilities for happenstance Americans. The tax obligation may render citizenship “more oppressive than protective,” in McDougal’s articulation.⁹⁸

92. If a parent satisfies the residency requirement, the child’s citizenship is not conditional on the child’s subsequent residency, which had been the case until 1978. *See, e.g., Rogers v. Bellei*, 401 U.S. 815 (1971) (upholding the requirement that a child be physically present for five years between the ages of fourteen and twenty-eight to retain citizenship through descent).

93. Qualifying U.S. citizens who are resident abroad are obligated to register with the Selective Service and would, in theory, be subject to conscription, but this is a trivial obligation given the improbability of a revived draft. U.S. citizens are required to use a U.S. passport when presenting themselves for inspection and admission into the United States. 22 C.F.R. § 53.1 (2007). U.S. persons are subject to criminal liability for certain crimes regardless of where they are committed; examples are the Foreign Corrupt Practices Act and sex tourism crimes. This kind of “nationality jurisdiction” is well-established under international law. *See, e.g.,* Harvard Research, *supra* note 42, at 519 (characterizing nationality jurisdiction as “universally conceded”). U.S. citizenship does provide some benefits to citizens abroad, namely diplomatic protection and consular assistance, though these prerogatives have declined in an era in which rights are located more in personhood than nationality.

94. *See* 26 C.F.R. § 1.1-1(b) (1976); *Cook v. Tait*, 265 U.S. 47 (1924).

95. 26 U.S.C. § 911 (2014).

96. 26 U.S.C. § 901 (2014).

97. *See, e.g.,* Gandal, *supra* note 2. Another provisional international law argument against the FATCA regime and onerous reporting requirements would be that they unfairly discriminate against external citizens. *See* COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, RECOMMENDATION 1650: LINKS BETWEEN EUROPEANS LIVING ABROAD AND THEIR COUNTRIES OF ORIGIN (Mar. 2, 2004), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17195&lang=en> (calling for states to take account of the interests of citizens living abroad).

98. McDougal et al., *supra* note 49, at 928.

The expatriation tax regime does exempt some citizens whose ties to the United States may be thin. The definition of “covered expatriates” does not include those born with dual citizenship who continue to reside in their other state of nationality and who have not been tax resident in the United States more than ten of the previous fifteen years, as well as those who relinquish U.S. citizenship before attaining the age of eighteen-and-a-half and who have not been resident in the United States for more than ten years prior to the date of relinquishment.⁹⁹ However, exemption from the exit tax also requires five years of tax compliance,¹⁰⁰ which means that even nominal citizens will have had to file income tax returns (in most cases) in order to secure the benefits of the exemption where the exit tax would otherwise apply.

Failure to demonstrate back-tax compliance also eliminates income and asset floors to application of the exit tax (average tax liability of \$160,000 over the past five years or \$2 million net worth).¹⁰¹ Moreover, persons continue to be subject to U.S. tax obligations even after relinquishing citizenship if they fail to file an “expatriation statement” (Form 8854) with the Internal Revenue Service.¹⁰² This, in effect, makes tax compliance a predicate to expatriation, or at least a predicate to securing the tax advantage of expatriation. Although tax compliance is not a formal condition to relinquishment of citizenship,¹⁰³ it might as well be.¹⁰⁴

There thus appears no simple way to relinquish citizenship, even where it is acquired in the absence of meaningful social ties and even where a person holds few assets.¹⁰⁵ Renunciation of citizenship also requires the payment of a \$2,350 fee, the world’s highest.¹⁰⁶ Renunciation

99. See 26 U.S.C. § 877A(g)(1)(B) (2014). On some anomalous results under the exception, see Virginia Jekker, *Relinquishing US Citizenship – Exception for a Dual National at Birth*, ANGLOINFO DUBAI (Oct. 1, 2016), <http://blogs.angloinfo.com/us-tax/2016/10/01/relinquishing-us-citizenship-exception-for-a-dual-national-at-birth/>. In both cases, the exemption may apply to some whose ties to the United States are stronger. An individual born in the United States with nominal dual *jus sanguinis* citizenship in another country who relocated to the other country would appear to be exempted from the exit tax after five years of residence in that country.

100. 26 U.S.C. § 877(a)(2) (2014).

101. *Id.*

102. DEP’T OF THE TREASURY, INTERNAL REVENUE SERV., FORM 8854 (2016).

103. The State Department’s Foreign Affairs Manual is careful to instruct consular officers not to inquire into the tax circumstances of individuals seeking to relinquish their citizenship. See U.S. DEP’T OF STATE, 7 FOREIGN AFFAIRS MANUAL 1266 (2015).

104. Under the current regime, it would be possible to retain a kind of tax citizenship after renouncing national citizenship, but this would be a highly undesirable result under which one would shoulder the costs of citizenship yet receive none of the benefits.

105. See, e.g., Phil Hodgen, *The Expatriation Chronicles of an Accidental American*, HODGEN LAW PC (2015) <http://hodgen.com/the-expatriation-chronicles-of-an-accidental-american-episode-1>.

106. See Robert W. Wood, *U.S. Has World’s Highest Fee to Renounce Citizenship*, FORBES, Oct. 23, 2015. The next most expensive renunciation fee is less than half of that charged by the United States – Jamaica’s at \$1,010. *Id.* Some commenters asserted that the 400% fee increase adopted in 2015 violated an individual right to expatriation. The Depart-

can only be executed in person at a U.S. embassy or consulate, which can implicate travel time and expenses.¹⁰⁷ Renunciation requires a social security number, which many “accidental Americans” will lack, adding another level of bureaucratic hassle.¹⁰⁸ In other words, expatriation imposes nontrivial costs in all cases. Barriers to expatriation compound the overreach in the allocation of citizenship.¹⁰⁹ If expatriation were frictionless for happenstance Americans, ascription at birth would be difficult to frame as rights-infringing. Those seeking to shed burdens associated with the status could simply shed the status itself. As it is, many individuals shoulder arbitrarily-imposed costs that they cannot escape without encountering other significant costs.

The rights framing thus implicates both the arbitrary imposition of citizenship and arbitrary barriers to its termination. To the extent that citizenship is arbitrarily extended to an individual, more arbitrary are any conditions to expatriation. In the U.S. context, ascription of citizenship in the absence of social attachment is problematically coupled with high barriers to expatriation.

III. CORRECTING CITIZENSHIP OVERREACH

I do not want to exaggerate the strength of an international norms-based challenge to U.S. citizenship practice as coupled with the tax regime applying to non-resident Americans. The easier solution would be to eliminate, or at least ameliorate, citizenship-based income tax and broaden exceptions to the exit tax for those whose life connection to the United States has never been substantial. The Obama administration proposed a one-time exemption from the exit tax for those born with dual citizenship if they have not resided in the United States since attaining the age of eighteen-and-a-half. Eligibility would have been conditioned on tax compliance during the prior five years as applicable to non-resident aliens, which in many cases would require no filings of any description.¹¹⁰ Other

ment of State rejected these arguments on the grounds that the fee was calculated to cover the cost of servicing the renunciation. *See* Schedule of Fees for Consular Services, 22 C.F.R. § 22 (2015).

107. *See* Renunciation of Nationality, 22 C.F.R. § 50.50 (1996).

108. *See* U.S. DEP'T OF STATE, 7 FOREIGN AFFAIRS MANUAL 1260 (2015).

109. After Ted Cruz discovered that he held Canadian citizenship on the basis of his happenstance birth in Calgary, he was able to renounce it with a simple form and payment of less than \$100. *See generally* Todd J. Gillman, *No, Canada: Ted Cruz Has Formally Shed His Dual Citizenship*, DALLAS MORNING NEWS (June 10, 2014), <http://www.dallasnews.com/news/politics/2014/06/10/no-canada-sen-ted-cruz-has-formally-shed-his-dual-citizenship>. Imagine the political uproar in the United States if the Canadian expatriation scheme mirrored the process in the United States, including the requirement that he have procured a Canadian social security number and then renounced his citizenship in person at the Canadian embassy.

110. *See* DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2016 REVENUE PROPOSALS 283 (2015). The proposal would also condition the exemption on not having held a U.S. passport except for the purpose of entering the United States. *See id.* This would render ineligible those who availed themselves of the con-

tax reforms have been floated to soften the regime as it applies to citizens abroad.¹¹¹

Citizenship practice presents an alternative channel for curbing harsher aspects of the regime. The tax context also supplies a high-profile vehicle for interrogating expansive birthright citizenship, which is typically understood (by progressives, at least) as a no-downside proposition.¹¹² Even without the obvious burdens posed by the tax regime, the extension of citizenship at birth may in some cases offend autonomy values.¹¹³ In other words, even if citizenship implicated no distinctive obligations, its imposition could be problematic in the absence of consent or genuine links, at least where coupled with barriers to expatriation. This context also affords an opportunity to consider how international norms might further constrain citizenship practices.

Over-inclusive elements of U.S. citizenship practice could be corrected at either the front end or the back, that is, by modifying the terms of either birthright citizenship rules or the terms of expatriation.

Rolling back jus soli citizenship. At the front end, the absolute rule of *jus soli* could be qualified to protect against overextension. As conservative opponents of birthright citizenship relentlessly highlight, the U.S. approach is unusually generous (if not quite as unusually as opponents would make it out to be).¹¹⁴ Expansive territorial birth citizenship is permissive, not mandatory; that is, international law clearly does not require it. For purposes of better mapping citizenship onto organic community, the solution is not to make citizenship contingent on the immigration status of the parent, or at least not absolutely so, insofar as children of unauthorized migrants born in the United States often become authentic members of the national community.¹¹⁵ Birth is less likely to evidence a life trajectory for the children of lawful nonimmigrants, who will typically be cycling

venience of travelling on a U.S. passport even if they maintained no other connection to the United States. It might effectively limit the exception to those who had been unaware of their citizenship status prior to the enactment of FATCA.

111. See also Mason, *supra* note 4, at 231-33 (proposing that citizenship be one factor among others in determining taxability).

112. See AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY* 188 (2009) (noting “the precious property of citizenship”); see also BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* 109 (2009) (noting how theorists read citizenship “according to the genre conventions of a popular or modern romance, as a happy-ending love story”).

113. A recent example is posed by a scheme under which the government of the United Arab Emirates has purchased citizenship in the Comoros Islands for the stateless Bidoon of the UAE. The stateless persons have no connection to the Comoros of any kind. See ATOSSA ARAXIA ABRAHAMIAN, *THE COSMOPOLITES* 25-39 (2015); Adam Taylor, *The Controversial Plan to Give Kuwait's Stateless People Citizenship of a Tiny, Poor African Island*, WASH. POST, May 17, 2016.

114. See, e.g., Esther Yu-His Lee, *Trump Says U.S. is Only Country 'Stupid Enough' to Guarantee Birthright Citizenship*, THINKPROGRESS, Aug. 22, 2015. Although no European state has adopted unconditional territorial birthright citizenship, it is prevalent among Western hemisphere states. See *supra* note 24 and accompanying text.

115. See, e.g., Gerald L. Neuman, *Back to Dred Scott?*, 24 SAN DIEGO L. REV. 485 (1987) (reviewing SCHUCK & SMITH, *supra* note 59).

through the United States on a temporary basis as students or employees. (Many of the worst FATCA-era horror stories involve children of legal nonimmigrants such as Boris Johnson.)

U.K. practice points to a fix. Britain's absolute approach to *jus soli*, from which the U.S. practice descended, was rolled back in 1981 to limit birth citizenship to the children of at least one parent holding citizenship or settled status (the British equivalent of permanent residence).¹¹⁶ But the current approach extends citizenship to any person born in the United Kingdom who has been present in the country for the first ten years of his life.¹¹⁷ The rule carves out would-be happenstance citizens (birth tourism would not work under U.K. law); at the same time it includes those who are on a path to social membership. The approach is adequately inclusive while reducing the false positives of absolute *jus soli*.

The constitutional source of the U.S. practice eliminates this as a realistic antidote to citizenship overreach. Even if it were not constitutionally mandated, as some argue,¹¹⁸ putting the absolute rule on the table poses a high risk-low reward proposition. The relatively marginal problem of citizenship overreach is hardly worth sacrificing its inclusive virtues, the administrative convenience of the absolute rule aside.

Rolling back jus sanguinis citizenship. Under current law, citizenship automatically extends to children born outside the United States to a U.S. citizen parent or parents where the parent meets the qualifying criteria. No action is required on the part of the parent to secure citizenship for the child.¹¹⁹

As with territorial birth citizenship, acquisition of citizenship on the basis of descent is thus also non-consensual. To the extent that *jus sanguinis* citizenship is over-inclusive, it could be modified to include either an opt-in or an opt-out possibility. Some countries make *jus sanguinis* citizenship contingent on registration of the child with consular authorities in infancy, an opt-in element.¹²⁰ Parental nonfeasance under a registration

116. British Nationality Act 1981, c. 61 §1 (Eng.).

117. *Id.* § 1(4). The provision allows a maximum ninety days of absence from the country during a ten-year period.

118. See SCHUCK & SMITH, *supra* note 59, at 116-17; see also John C. Eastman, *We Can Apply the 14th Amendment While Also Reforming Birthright Citizenship*, NAT'L REV., Aug. 24, 2015. Bills to limit the extension of citizenship to children of citizens and lawful permanent residents are now routinely introduced in Congress. See, e.g., Birthright Citizenship Act of 2011, S. 723, 112th Cong. § 2(b) (2011).

119. Many parents do secure a "consular report of birth abroad," but the document is for evidentiary purposes only as proof of citizenship, not as a predicate to acquiring the status. See, e.g., Chantal Panozzo, *When American Expats Don't Want Their Kids to Have U.S. Citizenship*, WALL ST. J., Feb. 18, 2015 (noting that some parents hope to avoid a child's identification as citizen by failing to report birth, but that lack of report does not affect citizenship status).

120. See Harald Waldrauch, *Acquisition of Nationality*, in 1 ACQUISITION AND LOSS OF NATIONALITY: POLICIES AND TRENDS IN 15 EUROPEAN COUNTRIES 121, 125 (Rainer Bauböck et al. eds., 2005) (identifying Finland, Sweden, and Denmark as examples of opt-in countries); see also EUDO Database, *supra* note 24.

scheme—not registering the birth of a child who is subsequently situated as a social member of the national community—would be mitigated by other elements of the nationality regime.¹²¹ Or, the United States could innovate an opt-out mechanism under which a child would acquire citizenship except where the parent notified U.S. authorities of a desire not to have citizenship descend, so that the child would be deemed never to have held the status. A final possibility would be to revive the former practice of “election,” under which children born with dual citizenship and resident abroad could choose their other nationality upon reaching adulthood, cancelling U.S. citizenship in the process.¹²² That would have the advantage of extending agency to the individual herself rather than imputing it through the parent.¹²³

Opt-in or opt-out would introduce an element of consent into the *jus sanguinis* regime. *Jus sanguinis* citizenship is extended by statute; the modifications could be undertaken by amendment.¹²⁴ But the change would address only a small component of the problem, if only because citizenship on the basis of parentage is less easily discovered than citizenship on the basis of birthplace. It appears that fewer of those organizing against the external tax regime have acquired citizenship by descent. They are either better able to conceal their U.S. citizenship or unaware of it in the first place. The legislative and administrative effort involved would probably not be worth the gains from adopting a take it/leave it approach to citizenship by descent.

Easy exit. More promising would be a broader facilitation of expatriation for those who are not a part of the national community in terms of social attachment. As described above, exiting citizenship under the current regime is a complicated affair in even the most straightforward cases, always involving a high fee and typically involving several years of tax filings. In cases involving nominal citizenship, these exit requirements lack proportionality. Frictionless expatriation would go a long way to remedying citizenship overreach. For some class of persons, expatriation should be reduced to a no-fee, by-mail filing, and the tax regime should recognize expatriation in these cases without any requirement of prior compliance.

The more difficult question would be how to draw the line on eligibility. For purposes of this paper, we will assume that barriers to exit are justifiable with respect to those who are actual, not merely nominal, mem-

121. Immigration and Nationality Act, 8 U.S.C. § 1431(a) (1994) (extending citizenship automatically to a minor child in the custody of a citizen parent upon entry of the child into the United States as a permanent resident).

122. See generally Richard W. Flournoy, Jr., *Dual Nationality and Election*, 30 *YALE L.J.* 693 (1921) (explaining the election mechanism).

123. This might be constitutionally required. See *Perkins v. Elg*, 307 U.S. 325, 329 (1939) (rejecting the effect of a parent’s naturalization in another country on the child’s status under U.S. nationality law).

124. See *Rogers v. Bellei*, 401 U.S. 815 (1971) (highlighting the nature of *jus sanguinis* citizenship as a matter of statutory grant and legislative discretion). An opt-out mechanism could also apply to *jus soli* citizenship, allowing a statutory patch to overcome the constitutional constraints of the Fourteenth Amendment.

bers of the national community.¹²⁵ Some cases are easily defined, the ones that current law already aims to exempt from some barriers to exit, albeit imperfectly. Those born with dual citizenship who have retained another citizenship and who have not resided in the United States in adulthood would be defined as happenstance citizens whose exit should be unencumbered.

Long-term external residents should also probably be eligible for the easy exit. Some period of continuous absence will typically equate to attenuated homeland ties. This population is prominently represented in the anti-FATCA protests. Assuming the justifiability of the exit tax in some cases,¹²⁶ one could adopt a sufficiently long timeline to minimize strategic behavior, say, twenty years.¹²⁷ After that period of non-residence in the United States, a person holding another citizenship would be entitled to the easy exit.

IV CONCLUSION: AMERICANS ABROAD, LAYING LOW

The U.S. tax regime and FATCA controversy should be interesting to citizenship scholars insofar as it highlights the possible costs of citizenship. I hope it is also interesting to tax scholars insofar as it highlights citizenship as an important moving part in the FATCA picture. The outcry from those holding citizenship outside the United States is in part explained by anomalous tax practices, but also by anomalous citizenship practices. The FATCA episode foregrounds both. The story I have told here situates the citizenship practice in a historical context that enables the interrogation, at least, of the expansive allocation of U.S. citizenship and high barriers to expatriation.

As a practical matter, many U.S. citizens abroad are probably in a crouch, looking to wait things out. Renunciation is for keeps. If FATCA and other onerous aspects of the U.S. tax regime are rolled back, some might regret cutting the tie. They may have thick enough affective ties to sustain citizenship so long as the costs are reasonable. There are also some

125. This proposition enjoys normative and pragmatic support. The normative argument works from the proposition that those who enjoy societal benefits should shoulder societal burdens, including tax obligations. *See* *Cook v. Tait*, 265 U.S. 47 (1924). Practically speaking, if an exit tax did not apply broadly to those with long-term social connections to the national community, many would expatriate for the purpose of avoiding taxes on accumulated capital gains. *See* JOINT COMM. ON TAXATION, *supra* note 83, at 98 (noting one exit tax objective to be to “protect the integrity of the system”). It also resonates in international law. The Universal Declaration of Human Rights, for example, bars only the arbitrary denial of the right to change nationality. In some core cases, imposing an exit tax that in some way replicates a tax imposed on those who do not leave should pass this arbitrariness test. *See id.* at 95-99 (comparing tax obligations of those who leave and those who stay).

126. *See, e.g.,* Alice Abreu, *Taxing Exits*, 29 U.C. DAVIS L. REV. 1087 (1996).

127. To prevent strategic avoidance in cases where high tax liabilities might incentivize planning on even a long timeline, the level of assets triggering the exit tax could be raised after a prolonged period of non-residence. In other words, the exit tax could be redrawn to apply only to genuinely wealthy would-be renunciants after a lengthy period of external residence.

concrete benefits to the status, although those benefits will be low for individuals holding another premium passport. Enforcement remains anemic enough that many will continue to get away with tax non-compliance. Other new hassles—the difficulty in getting a bank account as foreign financial institutions shun U.S. account holders—might be tolerable for the short term. Some individuals no doubt are able to conceal the status for the moment. Others are accreting tax compliance, positioning themselves to cut bait if FATCA takes hold. Renunciations are growing, but they remain a trickle relative to the size of the external citizen population.¹²⁸ That number may spike four or five years from now after would-be renunciant have all their tax ducks lined up.

Others will now think twice about acquiring U.S. citizenship in the first place. Important to the current controversy is the sandbagging element. Those who acquired and retained citizenship decades ago are now taking the hit in peak-earning years. Most would not have seen it coming, complacent in the face of historically lax enforcement of the overseas tax regime. Would-be citizens (and permanent residents) are now on notice. Global elites might now even go out of their way not to give birth on U.S. territory as a matter of strategic citizenship planning (a term that has entered into the transnational lexicon).¹²⁹ That will eliminate some of the unfairness in the current regime. But many will be unable to evade the tag—nonimmigrants for whom the inconvenience of giving birth elsewhere will be onerous and those who will be extended *jus sanguinis* citizenship regardless of place of birth, for example.

If there is a broader lesson here, it is in demonstrating the difficulty of using citizenship as a platform for redistribution. Citizenship as an institution can no longer carry much weight because it no longer represents a distinctive American national community.¹³⁰ Assuming the citizenship regime remains unchanged, the disconnect between status and community will grow more pronounced, which will tend to further undermine the solidarities that citizenship once stood for.

128. According to the IRS, 3,415 Americans renounced in 2014. See Catherine Bosley & Richard Rubin, *A Record Number of Americans Are Renouncing Their Citizenship*, BLOOMBERG BUSINESS, Feb. 10, 2015. This number may represent an undercount. See Robert W. Wood, *IRS and FBI Track Americans Who Renounce Citizenship. Why Is FBI List Longer?*, FORBES, Sept. 21, 2015. One study of external citizens has an upper-end estimate of 7.6 million. See VON KOPPENFELS, *supra* note 20. The State Department recently pegged the external citizen population at 9 million. See U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, *BY THE NUMBERS* (2015), https://travel.state.gov/content/dam/travel/CA_By_the_Numbers.pdf.

129. See, e.g., HENLEY & PARTNERS, *Citizenship Planning: Citizenship of Choice*, <https://www.henleyglobal.com/citizenship-planning/> (last visited Feb. 9, 2017).

130. See generally PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* (2008).