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A Global Perspective on Citizenship-Based Taxation

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A GLOBAL PERSPECTIVE ON CITIZENSHIP-BASED TAXATION

*Allison Christians**

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INTRODUCTION

Financial reporting rules adopted by the U.S. Congress in 2010 inadvertently exposed an unofficial category of U.S. taxpayer to the world: the “Accidental American.” An Accidental American is a person who lives most or all of her life in a country other than the United States, unaware that she is subject to U.S. income taxation solely because she is a U.S.

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citizen.¹ Some Accidental Americans are even unaware of the fact of their U.S. citizenship. Countries that are home to many Accidental Americans may be insufficiently aware of the implications to themselves of this population, even as they accept obligations to assist the United States in carrying out the new regime. Despite being a virtually invisible population in the past, Accidental Americans are now coming to realize that they are in a serious predicament as a result of a series of poorly considered tax policy decisions by the United States and by their own home country governments in response.

To discover one's Accidental American status is to wake up to the shocking realization that one has failed to fulfill mandatory annual income tax and financial reporting requirements of what one may consider a foreign jurisdiction. This occurs even when one is fully compliant with all the laws in the country in which one lives and works. For the countries in which Accidental Americans live, and are often also citizens, the awakening reveals an intrusive anomaly on the regulatory landscape: an extraterritorial claim of a foreign jurisdiction over a significant population that lies beyond its sovereign control.

Before 2010, it is likely that relatively few Accidental Americans were alerted by third parties to their status and its consequences, and most governments were largely insulated from any obligations regarding the exceptional jurisdiction claimed by the United States. Citizenship-based taxation was generally understood and adhered to by well-advised professionals who moved around the world, especially within the employ of U.S.-based multinationals.² Conversely, the phenomenon appears to have been virtually unheard of by many individuals who lived permanently outside of the United States.³ Even today, an explanation of the automatic applica-

1. The term Accidental American is a colloquial one, conceived by individuals who discovered themselves to be in the position described or something similar. As such, the definition of the term presented here may not accord with all permutations of the term as understood in popular consciousness. U.S. citizenship is conferred automatically by birth in a variety of circumstances, including birth in the geographical territory and birth to a U.S. citizen parent. These circumstances are discussed *infra* Part I.

2. See, e.g., Cynthia Blum & Paula N. Singer, *A Coherent Policy Proposal for U.S. Residence-Based Taxation of Individuals*, 41 VAND. J. TRANSNAT'L L. 705, 717 (2008) ("Whether overseas citizens are tax compliant may depend on such factors as whether they are employed by a U.S. employer, their degree of sophistication and financial resources, and their willingness to be compliant absent IRS monitoring; yet these factors are unrelated to any consideration of fairness in taxing a particular individual."). Many "expats" developed overseas networks and nongovernmental organizations to share experiences and participate in U.S. political efforts. See, e.g., REPUBLICANS OVERSEAS, <http://republicansoverseas.com> (last visited Feb. 9, 2017); DEMOCRATS ABROAD, <http://democratsabroad.org> (last visited Feb. 9, 2017); THE ASSOCIATION OF AMERICANS RESIDENT OVERSEAS (AARO), <https://www.aaro.org> (last visited Feb. 9, 2017).

3. See, e.g., Amber Hildebrandt, *U.S. FATCA Tax 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> (discussing the unanticipated reach of U.S. tax law to Canadian citizens born in Canada to dual citizen parents). Multiple anecdotal accounts of Accidental Americans may be found at websites and in social media forums dedicated to this phenomenon. See, e.g., *Liberty and Justice for All*

tion and consequences of U.S. citizenship appears to come as a surprise to those who obtained citizenship by birthright, or who conferred the status upon their children, without realizing or acting upon it.⁴

Foreign governments that are tax treaty partners have likely developed some working knowledge of U.S. citizenship-based taxation over the years. However, having never been called upon to take any action that would require more intensive consideration, it appears that foreign tax authorities had, at best, a superficial understanding of the implications of citizenship-based taxation on their own citizenry.⁵ This state of broad obliviousness changed dramatically when, in 2010, the United States adopted the Foreign Account Tax Compliance Act (FATCA).⁶

While perhaps aiming primarily at U.S. residents using foreign accounts to hide themselves from the view of the IRS, FATCA is inflicting damage on many Accidental Americans who were not trying to hide anything at all. It may not have been intentional on the part of its drafters,⁷ but it now seems apparent that a main impact of FATCA has been to

United States Persons Abroad, THE ISAAC BROCK SOCIETY, <http://isaacbrocksociety.ca/> (last visited Feb. 9, 2017); *A Gathering Place for People Fighting FATCA, FBAR, and U.S. Citizenship-Based Taxation*, MAPLE SANDBOX, <http://maplesandbox.ca/> (last visited Feb. 9, 2017).

4. See, e.g., Lynne Swanson, *OMG! IRS Wants Me!*, MAPLE SANDBOX (July 10, 2014), <http://maplesandbox.ca/2014/omg-irs-wants-me/>

I am hearing more and more reports of people having their OMG (“Oh My God”) Moment where they are hearing for the first time that they may be required to file U.S. tax returns. You are experiencing one of the most terrifying, confusing and disorienting moments that you will ever have in your life. The range of emotions you are feeling are so difficult to manage that you are having difficulty responding.

Elizabeth Thompson, *Baby Girl Drawn into CRA-IRS Information Sharing Controversy*, iPOLITICS (Apr. 14, 2016), <http://ipolitics.ca/2016/04/14/baby-girl-drawn-into-cra-irs-information-sharing-controversy/> (reporting that the Canadian citizen parents of an 8-month-old were

astonished recently to receive a letter from the TD Bank where they had opened an account for their daughter, calling on their daughter to either fill in forms attesting to the fact she was not a U.S. person or risk having her bank account information sent to the CRA to be shared with the IRS.

5. The experience of Canadian lawmakers in grappling with an intergovernmental agreement to implement FATCA in Canada is illustrative. See Charlie Feldman, *Parliamentary Practice and Treaties* 9 J. PARLIAMENTARY & POL. L. 585, 605-19 (2015).

6. Hiring Incentives to Restore Employment Act (HIRE), Pub. L. No. 111-147, §§ 501-531, 124 Stat. 71 (2010) (codified in scattered sections of the Internal Revenue Code).

7. For instance, a lengthy article discussing the rationale for FATCA, authored by a self-identified insider, begins with the proposition that “U.S. taxpayers have been hiding income overseas for years” without defining the term “U.S. taxpayer” (which is not a defined term) and without ever mentioning citizenship-based taxation. J. Richard Harvey, Jr., *Offshore Accounts: Insider’s Summary of FATCA and Its Potential Future*, 57 VILL. L. REV. 471, 473 (2012). The article suggests that the direct focus of FATCA was on the use by high net worth U.S.-resident individuals of anonymous or unidentified accounts in specified countries, especially Switzerland and Lichtenstein, with the express goal of hiding their identities from the tax authorities. *Id.* at 476-79.

reverse the century-long status quo of unenforceable citizenship-based tax. Prior to FATCA, citizenship-based taxation imposed nominal obligations on a vast, globally dispersed population that is not even officially identified by the United States.⁸ Accordingly, some citizens voluntarily complied while most did not, with apparently no reprisal for those who simply opted out.⁹ FATCA reversed this situation by applying economic sanctions to compel the assistance of foreign institutions, and ultimately foreign governments, in the task of identifying and controlling the population of U.S. citizens not living in the United States, all under the guise of catching tax evaders.

This Article contends that, with regard to individuals who reside permanently outside of the United States, the global assistance sought under FATCA to enforce U.S. income taxation solely on the basis of citizenship violates international law. It argues that insisting upon foreign cooperation with the FATCA regime, under threat of serious economic penalties, is inconsistent with universally accepted norms regarding appropriate limits to the state's jurisdiction to tax, while also being normatively unjustified. Accordingly, FATCA should be rejected by all other nation states to the extent it imposes any obligations with respect to individuals who permanently reside outside of, and have no economic ties to, the United States.¹⁰

8. U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-898, 2010 CENSUS: COUNTING AMERICANS OVERSEAS AS PART OF THE DECENNIAL CENSUS WOULD NOT BE COST-EFFECTIVE, 1-2, 4-6 (Aug. 19, 2004), <http://www.gao.gov/new.items/d04898.pdf> (stating that "the precise number of overseas Americans is unknown," that counting this population would be "a monumental task that would introduce new resource demands, risks, and uncertainties to an endeavor that was already facing a variety of difficulties," including the difficult and costly problem of locating and obtaining cooperation from the targeted population and then verifying U.S. citizenship, and therefore recommending that the U.S. Census Bureau not include this population in the 2010 Census); *Frequently Asked Questions: Will 2010 Census Apportionment Population Counts Also Include Any Americans Overseas?*, U.S. CENSUS BUREAU <https://ask.census.gov/faq.php?id=5000&faqId=981> ("Private U.S. citizens living abroad who are not affiliated with the Federal government (either as employees or their dependents) will not be included in the overseas counts."); see also Reuven S. Avi-Yonah, *The Case Against Taxing Citizens*, 58 TAX NOTES INT'L 389 (2010) (discussing the GAO report and concluding that "We have no idea how many U.S. citizens live overseas"). The decision not to count nonresident citizens continues for future census planning. U.S. CENSUS BUREAU, 2020 CENSUS OPERATIONAL PLAN: A NEW DESIGN FOR THE 21ST CENTURY 125 (Nov. 2015), <http://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan.pdf> (including within the planning for the 2020 Census only those nonresident U.S. citizens who are "U.S. military and federal civilian employees stationed or deployed overseas and their dependents living with them"). The failure to count nonresident citizens in the census has led to lawsuits in the past, since a principal purpose of including nonresident citizens in census is to allocate congressional seats to the several states. For a discussion, see Susanna Groves, *Americans Abroad: U.S. Emigration Policy and Perspectives*, in DIASPORAS, DEVELOPMENT, AND GOVERNANCE 239, 242-43 (Abel Chikanda et al. eds., 2015).

9. This conventional wisdom is oft-repeated among tax experts and is implied in observations about the general lack of compliance with foreign financial asset reporting noted by Harvey and others. See Harvey, *supra* note 7, at 473.

10. The legality and justification of FATCA with respect to its impact on individuals who reside within the United States is beyond the scope of this article. In prior work, I have argued that it would be appropriate for the United States to request assistance in improving

To make the international law case against foreign enforcement of FATCA with respect to individuals whose only tie to the United States is the accident of their birth, this article proceeds in three parts. Part I begins by analyzing the population of taxpayers defined by the United States in law compared to that which it actually reaches in practice, and between these the phenomenon of the Accidental American. Part II demonstrates why the gulf between the law on the books and the law in practice created by citizenship-based taxation is incapable of being closed, barring the extensive assistance of other states against their own interests and in violation of globally recognized tax norms. Part III, therefore, rejects the current U.S. jurisdictional claim as inconsistent with international law. It acknowledges that contemporary U.S. political reality virtually excludes the possibility that the United States would adopt necessary legal reforms in the near term. It concludes that in no case are foreign lawmakers or courts obligated to accept or enforce FATCA to the extent its effect is to subject their own residents to U.S. citizenship-based taxation.

I. THE ACCIDENTAL AMERICAN: ORIGIN AND IMPLICATIONS

In a presentation to an audience assembled to discuss taxpayer rights some time ago, I introduced “Tina,” a Canadian citizen and resident who is also an Accidental American.¹¹ Tina’s story is helpful for understanding how it is that Accidental Americans come to be, why their existence represents both a normative and a practical failure of law, and why enforcing U.S. claims against them would violate international law. Accordingly, this section recounts the main features of Tina’s story to explain how and to what extent FATCA enables the United States to enforce citizenship-based taxation on those who permanently reside outside of, and have no economic ties or allegiances to, the United States. It explores how, and to what extent, citizenship-based taxation continues to be unenforceable despite FATCA, and why international law principles conflict with FATCA in both design and implementation.

A. *Tina’s Story*

In brief, Tina¹² is a Canadian resident nearing retirement age who recently received a letter from her Canadian bank informing her that, in

tax compliance by U.S. residents with respect to their foreign income, in line with global standards and on a reciprocal basis. See Allison Christians, *Putting the Reign Back in Sovereign*, 40 PEPP. L. REV. 1373, 1406-10 (2013).

11. Allison Christians, *Understanding the Accidental American: Tina’s Story*, 80 TAX NOTES INT’L 833 (2015) (transcript); see also McGill Tax, *Understanding the Accidental American: Tina’s Story*, YOUTUBE (July 5, 2016), <https://www.youtube.com/watch?v=0kQ2AQKiA4w>.

12. “Tina” is a composite of individual experiences that have been related to me by persons sharing common characteristics and circumstances. I have chosen to develop this composite, rather than refer to the actual experiences of any one individual, both to protect the confidentiality of those upon whom Tina is based as well as to present the issues facing Accidental Americans as a group in as accurate and comprehensive a way as possible. In thus compiling the experiences of Accidental Americans, I have compared notes with cross-bor-

accordance with FATCA, the bank undertook a review of their files and discovered a piece of information indicating that she was born in the United States.¹³ Accordingly, the Canadian bank sought to inform its Canadian account-holder that it would be reporting her Canadian account information to the Internal Revenue Service (IRS) unless she could prove she was not in fact a U.S. Person for U.S. tax purposes.¹⁴

Tina was surprised and dismayed by the letter because, while she did happen to have been born in the United States, it was while her Canadian parents were exchange students. As a result, Tina only spent the first six months of her life there. Without a social security number or passport, she had never voted in an American election, nor did she follow U.S. politics or legal conventions beyond passing familiarity gleaned from local news media, and Tina considered herself Canadian all her life. Tina was, in short, the quintessential Accidental American.

Like many Accidental Americans, Tina then learned from an accountant that unless she had at some point renounced or relinquished her U.S. citizenship, she was a U.S. person with annual tax filing and asset disclosure obligations.¹⁵ To her knowledge, Tina had not relinquished or renounced her citizenship. Even if she did so now, she would continue to be a U.S. Person for tax purposes until she demonstrated five years of compliance with U.S. tax law and undertook certain documentary requirements for exit.¹⁶

der tax practitioners to assess the accuracy of common features and claims. Accordingly, my account of Tina's experience reflects an anecdotal perspective of an emerging phenomenon. Since originally presenting Tina's story, I have been contacted by several individuals who assert that they are also in Tina's situation.

13. Indicia-searching is performed pursuant to I.R.C. § 1471 (2010) and regulations thereto.

14. Upon the discovery of indicia, financial institutions must seek certification as to status and report specified information with respect to reportable accounts to the IRS under FATCA; the reporting is made to foreign governments under certain intergovernmental agreements. See I.R.C. § 1471 (2010); 26 C.F.R. § 1.1471-4(c)(5)(iv)(B)(2); See Agreement between the Government of the United States of America and the Government of [FATCA Partner] to Improve International Tax Compliance and to Implement FATCA [hereinafter Model 1A IGA], at <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Reciprocal-Model-1A-Agreement-Preexisting-TIEA-or-DTC-6-6-14.pdf>; Agreement Between the Government of the United States of America and the Government of Canada to Improve International Tax Compliance through Enhanced Exchange of Information under the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, 27 June 2014 [hereinafter Canada-U.S. IGA], <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Canada-2-5-2014.pdf>.

15. See I.R.C. § 7701(a)(30) (2014).

16. See I.R.C. §§ 877(a)(2)(c); 877A(g)(4); Form 8854, Initial and Annual Expatriation Statement; Matthew Morris, *FATCA and the Road to Expatriation*, 149 TAX NOTES 691 (Nov. 2, 2015) (explaining that under § 877(a)(2)(c), an individual will not consider to have expatriated until Form 8854 is filed, which requires certification under penalty of perjury of compliance with U.S. income tax and information return responsibilities for the preceding five tax years).

The immediate problem for compliance was that Tina had not planned her financial life with U.S. tax law in mind. U.S. tax law is complex by any measure, but it is especially so when applied to what it defines as foreign assets and foreign income items—matters that are, to many Accidental Americans, completely local, ordinary, and uncontroversial until the United States becomes involved.

Had Tina understood that U.S. law would apply to her in advance, she would have made vastly different financial choices over the years. For example, she would have almost certainly scrupulously avoided certain kinds of plain vanilla pooled investment vehicles (i.e., mutual funds), because the U.S. taxes and interest charges that apply to non-U.S. forms of these basic investments typically wipe out any returns and can even eat into principal.¹⁷ She might have even taken drastic steps such as placing all of her assets in the name of a non-U.S. spouse. Some of these choices would have disadvantaged her economically or made her financially very vulnerable. She may have nevertheless chosen them over the more dire consequences attending to her life as a U.S. person. She was never alerted to the need to make those choices, however, and, by the time FATCA caused her bank to indirectly alert her to the issues, it was far too late to make changes without incurring enormous costs.

The reality for someone like Tina is that in all probability, with proper advice and planning, she would owe virtually no U.S. tax at any point in her life. This is primarily because she lives in a high-tax country that, under all international standards and practices, as well as under a treaty with the United States has the primary right to tax her income.¹⁸ However, proper advice and planning is extremely expensive. It also requires realizing in advance that one needs legal advice.

Moreover, even if, failing to obtain proper advice, Tina was nominally subject to U.S. fines, penalties, and interest, she would be immune to collection by the IRS. This is because she is a citizen and resident of Canada and all of her assets and income are located there.¹⁹ Absent an express undertaking to the contrary (which Canada had never given prior to FATCA), Canada had no obligation to lend assistance to foreign jurisdictions to collect foreign tax debts in such circumstances.²⁰

17. See I.R.C. §§ 1291-1298.

18. See, e.g., HUGH AULT & BRIAN ARNOLD, *COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS* 431-32 (2010); REUVEN AVI-YONAH, *INTERNATIONAL TAX AS INTERNATIONAL LAW* 28-29 (2007); J. Clifton Fleming, Jr., Robert J. Peroni & Stephen E. Shay, *Two Cheers for the Foreign Tax Credit, Even in the BEPS Era*, 91 *TUL. L. REV.* 1, 3 (2016); Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, U.S.-Can., arts. XXIV, XXVIA, Sept. 26, 1980, T.I.A.S. No. 11087 [hereinafter *Canada-U.S. Convention*]. While the United States retains the right to tax its citizens in accordance with domestic law, the Convention respects the primary right of the source state to tax and provides that the United States will relieve double taxation, including in the case of citizens.

19. See *Canada-U.S. Double Tax Convention*, *supra* note 18, art. XXVIA.

20. This reflects the common law “revenue rule,” which is observed by both the United States and Canada, as well as many other countries. See discussion *infra* Part III.B.

The fact that the IRS is not entitled to assistance in collection from the Canadian Revenue Authority (CRA) with respect to Tina might assist her in coming to a negotiated settlement with the IRS. However, Tina is likely unaware of her rights to appeal and negotiate, and in respect of U.S. collection against her in Canada. Even if she were aware, she might face a major obstacle in the form of affordability of adequate professional advice. Finally, even if she managed to overcome the obstacles of both awareness and resources, Tina would probably not wish to risk falling afoul of the government of the United States.

These observations suggest that the United States cannot legally enforce its claims against Tina by physical force or by seizure in a foreign territory unless Canada grants its express permission and directly aids in the effort. Yet, Tina's position relative to the United States has now become a subject of Canadian law, since Canada has agreed to implement FATCA under an intergovernmental agreement with the United States.²¹

Canada made this agreement because, as written, FATCA would penalize Canadian financial institutions that did not force affected Canadian residents like Tina to give up either their rights in Canadian law or their access to normal financial services in Canada.²² Canadian financial institutions reasonably sought to be released from the legal risks in Canada attendant to enforcing this choice, and the economic risks in the United States attending to non-enforcement.²³ The Canadian Government responded accordingly by agreeing to implement FATCA, despite early admonitions from former Finance Minister Jim Flaherty that highlighted the fundamental incompatibility of the regime with international laws respecting the right of jurisdictions to regulate beyond their territorial borders.²⁴

As a result, even though Tina is a permanent Canadian resident and citizen whose income is entirely Canadian-sourced and held in Canadian financial accounts, Canada has responded to economic pressure from the United States to treat her as a U.S. person for U.S. tax purposes. The

21. Agreement Between the Government of Canada and the Government of the United States of America to Improve International Tax Compliance through Enhanced Exchange of Information under the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, U.S.-Can., Feb. 4, 2014 (Enhanced International Information Reporting provisions).

22. I.R.C. § 1471(a) (imposing withholding on financial institutions that do not comply with information requirements); I.R.C. § 1471(b)(1)(F)(i) (requiring financial institutions to obtain waivers of any rights in foreign law that would otherwise prevent such institutions from disclosing personal information to third parties, or to close accounts where such waiver requests are refused).

23. For a review of internal correspondence and public records attending the adoption of the Intergovernmental Agreement in Canada, see Allison Christians, *While Parliament Sleeps: Tax Treaty Practice in Canada*, 10 J. PARLIAMENTARY & POL. L. 15, 30-37 (2016).

24. Jim Flaherty, *Letter on Americans in Canada*, FINANCIAL POST (Sept. 16, 2011), <http://business.financialpost.com/news/read-jim-flahertys-letter-on-americans-in-canada> ("FATCA has far-reaching extraterritorial implications. It would turn Canadian banks into extensions of the IRS. . ."). For a detailed description of the Canadian Parliament's enactment of the Canada-U.S. Intergovernmental Agreement, see Feldman, *supra* note 5, at 605-18.

result of this decision is to subject Tina's financial life to a level of intrusive scrutiny that cannot be applied to other Canadian residents under Canadian law without the intervention of a judge.²⁵ This type of scrutiny could not be similarly applied to Tina under U.S. law were she and her accounts located in the United States.²⁶ The additional financial surveillance includes requiring Canadian financial institutions to furnish bulk account and asset information to the tax agency on the U.S.-defined population of U.S. persons in Canada.²⁷

Tina's story demonstrates two truths about taxing on the basis of citizenship or legal status alone. First: that the United States lacks control over the target population precisely because these individuals permanently reside under the control of another sovereign authority. Second: taxing individuals resident in other countries can only be achieved if the other sovereign authorities directly assist in the task, which requires expressly overriding their own laws.²⁸ Both of these observations suggest that the United States has no legitimate claim on the global community with re-

25. See Income Tax Act, R.S.C. 1985, c. 1 § 231.2(2) (Can.) (conditioning the Minister's authorization to require third parties to disclose information relating to one or more unnamed persons upon the prior authorization of a judge). The compulsion of a foreign state to enable its officials to act against individuals resident in the territory in manners not consistent with the law of that territory appear inconsistent with the law prohibiting foreign compulsion, which holds that states "may not require a person . . . to do an act in another state that is prohibited by the law of that state." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 441 (AM. LAW INST. 1986).

26. In its intergovernmental FATCA agreements, the U.S. Treasury promises no more than to seek appropriate legislative authorization that would allow it to fully reciprocate with its FATCA partners, because current U.S. law authorizes financial institutions to disclose only specific and very limited tax information to the IRS. See I.R.C. § 6041-6050W (listing information concerning transactions with other persons); see also Canada-U.S. IGA, *supra* note 14, art. 6:

The Government of the United States acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange with Canada. The Government of the United States is committed to further improve transparency and enhance the exchange relationship with Canada by pursuing the adoption of regulations and advocating and supporting relevant legislation to achieve such equivalent levels of reciprocal automatic information exchange.

27. Income Tax Act, R.S.C. 1985, c. 1 §§ 263-269 (outlining enhanced international information reporting for U.S. FATCA).

28. I.R.C. §§ 7701(a)(30)(A), (b)(1)(A) (2014) (defining "U.S. Person" to include citizens, legal permanent residents, and actual residents, as defined by physical presence). Legal permanent residents who no longer live in the United States are not entitled to return to live and work in the country but must undertake biannual documentation requirements and may be denied entry on grounds they have abandoned their status. However, under current law a green card holder remains a U.S. person for tax purposes until she meets specified exit documentation requirements and pays exit fees where applicable. Contrary to popular wisdom, legal permanent resident status does not expire, although the green card evidencing such status does and must be renewed every ten years. Like most other countries, the United States also imposes taxation on income earned from domestic sources by foreign persons. See *generally* I.R.C. § 871 (2015). This distinction can cause some confusion and is discussed more fully below.

spect to enforcement of citizenship taxation, whether via FATCA or otherwise.

Citizenship-based taxation is not only incompatible with international legal standards on taxation, but it is an antiquated policy in the context of a world of increasing cross-border mobility.²⁹ Until the passage of FATCA in 2010, the policy was unenforced and effectively unenforceable as to millions of individuals who lived their entire lives in other countries but happened to have U.S. citizenship.³⁰ Tina's experience demonstrates that FATCA has created a legal method for the United States to reach across sovereign borders to identify some of these previously unknown tax subjects. But FATCA does not enable the United States to coerce all nonresident citizens to submit to its tax jurisdiction, nor does it entitle the United States to assistance in enforcement from other countries.

Instead, as FATCA comes closer to full implementation in practice, it reveals ever more clearly that the gulf between the jurisdiction claimed and that which can be enforced is permanent, fatal to the legitimate exercise of authority, and incompatible with international law. The fact that even a comprehensive extraterritorial rule like FATCA cannot close the compliance gulf is one reason why taxing nonresidents on a worldwide basis cannot be a legitimate act by a state.³¹ Propped up by history, politics, ill-formed sentiments of patriotism and widespread indifference to the affected population, the claim upon nonresident citizens remains a policy that is not likely to be dislodged by U.S. lawmakers.³² It will fall to courts around the world to determine whether the U.S. position can be supported in law.

29. See Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L.R. 169, 187-96 (2016) (outlining the vastly different relationships states have with their residents versus with their nonresident citizens); Reuven S. Avi-Yonah, *The Case Against Taxing Citizens*, 58 TAX NOTES INT'L 389, 389 (2010) (stating that "[i]n a globalized world, citizenship-based taxation is an anachronism that should be abandoned").

30. Mason, *supra* note 29, at 177 ("Problems stemming from citizenship taxation have grown with the affected population, and citizenship taxation seems ever more out-of-step with a world in which countries increasingly recognize, and even encourage, dual and multiple citizenship"); Avi-Yonah, *supra* note 29, at 389 (stating that "[c]itizenship-based taxation . . . is in practice unadministrable"); Blum & Singer, *supra* note 2, at 705 (2008) (calling for a change to residence-based taxation on grounds that the administration of citizenship-based taxation "is too difficult and expensive for taxpayers and the IRS"). As discussed *supra* note 7, the fact of the inadministrability of citizenship-based taxation is implied by official and academic accounts regarding the general noncompliance of U.S. persons with obligations to report non-U.S. financial accounts.

31. See, e.g., Leandra Lederman & Ted Sichelman, *Enforcement as Substance in Tax Compliance*, 70 WASH. & LEE L. REV. 1679, 1679-81 (2013) (stating that "[i]t is well known that the government's complete failure to enforce a law can nullify that law" and that "an unenforced law is tantamount to no law at all"). Lederman and Sichelman make a convincing argument that perfect enforcement is not required (and may not necessarily be beneficial) for law to be legitimate, but that deliberately tailored selective enforcement may be just under specified conditions. The conditions they describe are not met in the case of the enforcement of citizenship taxation, since the information requisite to deliberation is unavailable to the tax authority, as demonstrated herein.

32. See, e.g., Mason, *supra* note 29, at 182-83.

Understanding how the United States defines its population of taxpayers requires a confrontation with a long-standing capacity problem that has created a significant gulf between the law on the books and the law in action. This gulf begins with faulty design and unfolds inevitably into faulty implementation. We may begin to explore the difficulty by reviewing the framework of the U.S. tax jurisdiction and analyzing its rapidly changing scope under FATCA.

B. *Law's Intent: the "U.S. Person"*

To understand how a status like Tina's can arise is to come to terms with a gap that always exists between what is written down in law and what can actually be carried out in practice. With respect to U.S. tax law jurisdiction, a very large gap arises from an inherently flawed scope of rule and develops erratically according to the state's ability to enforce it. The framework itself is simply stated. The United States generally³³ imposes income taxation on four groups of people:³⁴

1. People who reside in the territory (as assessed by periods of physical presence);³⁵
2. Citizens;³⁶
3. People who are lawfully entitled to reside permanently in the territory (green card holders);³⁷ and
4. People who are not described above but who earn income from U.S. sources.³⁸

Together, people described in categories 1 through 3 are referred to as "U.S. Persons."³⁹ People described in category 4 are referred to as nonresident aliens or foreign persons.⁴⁰ U.S. Persons are generally taxed on a worldwide basis—all income, from whatever source derived, while foreign persons are generally subject to U.S. tax only on their U.S.-source income.⁴¹

33. The complexity of the U.S. tax code is such that it has become habitual to attach the word "generally" to virtually every statement of legal principle in U.S. tax law. For every rule there is a list of exceptions, and for every exception there are yet more exceptions. Accordingly, the discussion herein is of a general nature, and important exceptions and exceptions to the exceptions have been ignored for reasons of expediency.

34. The word "person" includes certain legal entities under U.S. tax law. I.R.C. § 7701(a)(1) (2014). However, this Article focuses on the taxation of individuals and not entities or other legal arrangements such as trusts. Accordingly, all references to the taxation of people herein are intended to refer to the taxation of individuals.

35. I.R.C. § 7701(b)(3) (2014).

36. I.R.C. § 7701 (a)(30)(A) (2014).

37. I.R.C. § 7701 (a)(30)(A), (b)(1)(A) (2014).

38. I.R.C. §§ 7701(b)(1)(B), 871, 872, 897 (2014).

39. I.R.C. § 7701(a)(30) (2014).

40. I.R.C. § 7701(b)(1)(B) (2014).

41. U.S. Persons are taxed on all income from wherever derived. I.R.C. § 61 (1984). Nonresident aliens are generally subject to U.S. federal tax on income that is effectively

Categories 1 and 4 represent the global practice of virtually all countries that use income taxation as a source of revenue, and for good reason.⁴² Individuals who fall into categories 1 and 4 are universally accessible to tax law enforcement efforts by the taxing state. This is because with respect to these two categories, the state virtually always controls either the person receiving the income or the person paying the income, or both.⁴³

In the case of people who reside within the territory, the state has control by virtue of its normal control over the territory as a matter of sovereign rule.⁴⁴ Subject to constitutional and perhaps international human rights restrictions, the sovereign state may use its coercive power to compel compliance with its tax laws, using the credible threat of seizure of property or the person.⁴⁵ This power explains why most countries with income tax systems—including the United States—impose comprehensive taxation on the basis of any individual’s sustained presence within the jurisdiction, regardless of nationality.⁴⁶ Worldwide taxation of residents (who are typically identified as such by factors such as physical presence within or significant socio-economic contacts with a geographic territory) has been accepted as normatively justified by legal scholars and experts over the entire life of the modern income tax, is a common practice around the world, and has even been described as customary law.⁴⁷

connected to a trade or business in the United States and on certain fixed or determinable annual or periodic income from U.S. sources. *See* I.R.C. §§ 871, 872, 897 (2015).

42. For discussion and comparative analysis of national practices, see generally AULT & ARNOLD *supra* note 18; AVI-YONAH, *supra* note 18; ERNST & YOUNG, WORLDWIDE PERSONAL TAX AND IMMIGRATION GUIDE (2016-17), [http://www.ey.com/Publication/vwLUAssets/Worldwide_Personal_Tax_and_Immigration_Guide_201617/\\$FILE/Worldwide%20Personal%20Tax%20and%20Immigration%20Guide%202016-17.pdf](http://www.ey.com/Publication/vwLUAssets/Worldwide_Personal_Tax_and_Immigration_Guide_201617/$FILE/Worldwide%20Personal%20Tax%20and%20Immigration%20Guide%202016-17.pdf).

43. This is not to suggest that enforcement is easy or straightforward; the volume of legislation and jurisprudence associated with the administration of the law demonstrate that it is neither. Rather the claim here is simply that the sovereign state’s coercive power over a territory is understood to enable its ability to enforce tax laws on those present within the territory, regardless of how they come to be there. This accords with general principles of international jurisdiction. *See, e.g.*, ALFRED M. BOLL, MULTIPLE NATIONALITY AND INTERNATIONAL LAW 291 (2007) (“The vast majority of individuals’ obligations to states do not correspond to, or follow, nationality, but accrue to all persons. This reflects the primacy of the territorial jurisdiction and power of the state.”).

44. The justification for asserting the right to tax nonresidents on domestic-source income is that by voluntarily accessing the domestic market, the nonresident creates an economic nexus with the state. *See, e.g.*, Mason, *supra* note 29, at 178-79 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 411 cmt. c (AM. LAW INST. 1987)) (stating that “under internationally accepted principles, the state can tax the [nonresident] person’s income only if it arises in the state’s territory”). The nexus to the earner of U.S.-source income is the reason why the statutory language of FATCA ties its requirements to nonresidents who are investors in the United States.

45. *See generally* A.R. Albrecht, *The Taxation of Aliens Under International Law*, 29 BRIT. Y.B. INT’L L. 145 (1952) (explaining theoretical justifications and historical practices of states in the taxation of foreign persons).

46. *See* AULT & ARNOLD, *supra* note 18, at 431-32.

47. The significance of this characterization is discussed *infra* in Part III.

In the case of people who do not reside in the territory but who earn income from U.S. sources (category 4), the United States can similarly compel obedience to its tax laws by virtue of its control over either the payors of the income or the property generating the income.⁴⁸ With respect to the former, withholding ensures that the coercive power of the state is evenly applied to all the subjects of the tax. With respect to the latter, the power of the state to seize property ensures uniform application.⁴⁹ The enforceability of source-based taxation, supported over the years by its fundamental justification on normative grounds, explains why source-based taxation enjoys the same widespread acceptance around the world as residence-based taxation.⁵⁰

Where reporting and withholding is not mandated by law, and property is not easily seized, however, the power of the state to compel compliance dissolves. In such cases, the state loses its autonomous power to tax consistently. For this reason, the power of the state to compel compliance with respect to the remaining two categories (2 and 3 above) is inherently inconsistent. Where these categories overlap with the conditions relevant to taxation in categories 1 and 4, the state can enforce its claim using coercive power as necessary. But this capacity is eliminated where the conditions relevant to taxation in the other two categories are absent. Thus, as to either citizens or green card holders, the United States can easily assert its rule if the citizen or green card holder is also physically present within the territory, on the same basis as described above.⁵¹ It can similarly assert

48. Thus, for nonresidents' income from items such as stocks, bonds, licenses, and the like, the United States (like most countries) imposes obligations to report and withhold taxation at source. I.R.C. § 1441 (2014). However, where the source of the income is fixed in place, for example in the case of real property, the United States generally allows nonresident taxpayers to self-report. This makes sense because nonpayment can be cured by asset seizure.

49. For a classic explanation, see Edward S. Stimson, *Jurisdiction to Tax Income*, 22 CORNELL L. REV. 487, 488 (1937) (examining jurisprudence regarding the taxing rights of the several United States in respect of each other and concluding that “[t]he state having power over the property which is the source of the income or over the payor of the income can, by seizure of the property or corporeal suasion of the payor, withhold a portion of the income; and the state having power over the person receiving the income can force him to pay”).

50. See AVI-YONAH, *supra* note 18, at 8-12; Mason, *supra* note 29, at 178-79; Allison Christians, *Drawing the Boundaries of Tax Justice*, in THE QUEST FOR TAX REFORM CONTINUES: THE ROYAL COMMISSION ON TAXATION FIFTY YEARS LATER 63-65 (Kim Brooks ed., 2013) [hereinafter Christians, *Drawing the Boundaries*]; AULT & ARNOLD, *supra* note 18, at 431-32. Countries typically reduce or eliminate source-based tax on certain passive income items in the case of a treaty. In such cases, the country of residence is typically expected to tax such items, and may be aided by the source country by the exchange of tax information. See, e.g., ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), MODEL CONVENTION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL arts. 10-13, 26 (2014), [hereinafter OECD MODEL CONVENTION] <http://www.oecd.org/ctp/treaties/2014-model-tax-convention-articles.pdf> (providing the maximum rates for withholding at the source for specified passive income items and mechanisms for information exchange, respectively).

51. The distinction between worldwide taxation (which refers to the practice of taxing all income from whatever source derived) and residence-based taxation (which refers to tax-

its rule over U.S.-source income as to citizens and green card holders who earn income from U.S. sources.

The same cannot be said of non-U.S. source income earned by nonresident citizens and green card holders, however. As to this income, consistent enforcement of U.S. taxation is virtually impossible without enlisting the aid of other countries at their own expense.⁵² It is for this reason that the vast majority of the world eschews the taxation of nonresidents on their foreign income, even if they are citizens or nationals.⁵³ Likely the most oft-cited exception to this rule is Eritrea, which attempts to tax its nonresident citizens permanently at a flat rate of 2% of worldwide income. It does this to finance ongoing war, and has been denounced by the United States, Canada, and the United Nations for the practice.⁵⁴

Put another way, other than in the case of Eritrea, which has been prevented from accomplishing its aims by the United States itself, no foreign country routinely asserts the right to tax U.S. residents on their U.S.-source income.⁵⁵ Yet, the United States claims the permanent right to tax foreign income earned by foreign residents on the basis of their citizenship alone.⁵⁶ For almost one hundred years, this claim was simply unenforceable except as to individuals who voluntarily complied either on their own behalf or in the case of U.S.-based companies with respect to their employees. This lack of enforcement may be explained by the state's inherent lack of sufficient unilateral control over nonresidents who lack economic ties or activities in the territory.

ing a category of persons based on where they live) has caused some confusion in public discourse over the taxation of citizens. For example, the New York Times erroneously reported in early 2015 that China was embracing U.S.-style citizenship-based taxation by enforcing “a little-known and widely ignored regulation: Citizens and companies must pay domestic taxes on their entire worldwide incomes, not just on what they earn in China.” Keith Bradsher, *China Wants Taxes Paid by Citizens Living Afar*, N.Y. TIMES (Jan. 7, 2015), <http://mobile.nytimes.com/2015/01/08/business/international/china-starts-enforcing-tax-law-for-citizens-working-abroad.html>. This conflated worldwide taxation of residents, which many countries exercise, with worldwide taxation of nonresidents based solely on their legal status as citizens, which virtually no country, including China, exercises.

52. See generally Susan C. Morse, *Ask for Help, Uncle Sam: The Future of Global Tax Reporting*, 57 VILL. L. REV. 529 (2012).

53. Some countries, including Finland, Hungary, Spain, and Turkey, have “clinging” residency rules that in general terms treat nonresident citizens or nationals as residents for tax purposes for a specified time period, sometimes with exceptions for treaty countries or a showing of real ties to another jurisdiction. See OECD, RULES GOVERNING TAX RESIDENCE, <http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/tax-residency/> (last updated Nov. 18, 2016) (providing an overview of the tax residency rules of the mentioned jurisdictions, among others).

54. S.C. Res. 2023, ¶ 11 (Dec. 5, 2011), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S%20RES%202023.pdf> (“Eritrea shall cease using extortion, threats of violence, fraud and other illicit means to collect taxes outside of Eritrea from its nationals or other individuals of Eritrean descent.”).

55. Mason, *supra* note 29, at 172.

56. For a detailed explanation, see *id.* at 179-82.

Even though it lacks the physical control associated with residence and source-based taxation, some opportunities may arise for the United States to enforce its tax jurisdiction on certain nonresidents with non-U.S. source income. For example, the IRS appears to contemplate having broad powers to seize the bank deposits of certain nonresident U.S. Persons through the global banking system, even if such individuals never directly interact with the U.S. economy.⁵⁷ Certainly, the United States could physically seize a person who makes herself available to seizure, such as by physically crossing into the territory or presenting herself at an embassy or consulate and identifying herself as a citizen or green card holder. Less drastically, the United States could opt instead to use such interactions as an opportunity to provide nonresident citizens and green card holders with information and express expectations as to compliance with its tax laws.⁵⁸ Even if the law is effectively unenforceable, many U.S. Persons will at least attempt to comply once they know that compliance is expected.

Although it does not currently do so, the United States could use other interactions it has with nonresident citizens and green card holders as opportunities to articulate its intention to tax them. The citizen's application for passport renewal, registration of the birth of a child abroad,⁵⁹ registration at an embassy or consulate for travel or other purposes, or

57. The IRS may generally seize financial assets held by U.S. banks, subject to a 21-day notice period. I.R.C. §§ 6331, 6332, 7401 (2015); 26 C.F.R. §§ 301.6332-3, 301.7401-1. The commissioner may seize assets "without delay" if he fears the taxpayer plans to move assets to avoid seizure. I.R.C. § 6861; *see also* *United States v. Stonehill*, 702 F.2d 1288, 1292 (9th Cir. 1983). The IRS takes the position that a levy on one branch of a bank is effective against funds held in all branches of the bank if the bank's internal account system allows one branch to freeze accounts across all branches. *See, e.g., Bank Leumi Trust Co. v. Klein*, No. 92-CV-2016, 1993 WL 403967, at *12 (S.D.N.Y. Oct. 7, 1993). This would suggest that a deposit in a foreign branch could be seized indirectly by imposing the levy on a U.S. branch of the same bank, provided the internal controls allow cross-branch freezing of accounts. However, this position is subject to disagreement. For a discussion, see STEVEN R. MATHER & PAUL H. WEISMAN, *FEDERAL TAX COLLECTION PROCEDURE – LIENS, LEVIES, SUITS AND THIRD PARTY LIABILITY (PORTFOLIO 637) IV(C)(3)(c)(1)* (2016), Bloomberg BNA. The IRS may enforce a levy on deposits held by a foreign branch of a U.S. bank if the IRS specifies its intent to do so in its notice of levy on the U.S. bank, which it may so specify if the IRS "believes that the taxpayer is within the jurisdiction of a U.S. court" and the foreign branch possesses deposits of the taxpayer. 26 C.F.R. § 301.6332-1(a)(1). U.S. Persons are within the jurisdiction of a U.S. court by virtue of I.R.C. § 7701(a)(39) (2014) ("If any citizen or resident of the United States does not reside in (and is not found in) any United States judicial district, such citizen or resident shall be treated as residing in the District of Columbia for purposes of any provision of this title relating to—(A) jurisdiction of courts, or (B) enforcement of summons."). This suggests that even where cross-branch freezing of accounts is not available the IRS could in effect force a U.S. bank to seize deposits from its foreign branch where it "believes" a U.S. Person is involved. It is not clear what belief means as applied to the IRS.

58. The mere articulation of the law's expectations may be sufficient to compel some level of compliance even where coercive power is absent. Compliance seems especially likely if the individual expects to have future interactions with or within the United States, such as green card holders that expect to return to the United States.

59. The parents of a child they believe to be a U.S. citizen who is born abroad can obtain a certificate of "consular report of birth abroad of a citizen of the United States of America," so long as their belief is valid. 22 C.F.R. § 50.7. The certificate is obtained by

registration to vote seem like neglected opportunities for taxpayer information and education. In regards to the green card holder, the opportunity to exert the tax jurisdiction arises even more regularly. The individuals' application for permission to re-enter the United States as a permanent resident is a ready opportunity. Green card holders who take up temporary residence outside the United States must seek re-entry permits in order to preserve their status.⁶⁰

Where the individual's general intent to return to the territory prompts her to fulfill documentary requirements, the nonresident green card holder seems, perhaps counter-intuitively, more accessible to enforcement efforts (and may even be more willing to comply) than a nonresident citizen like Tina, whose only tie to the jurisdiction arises from the accident of birth. In contrast, the citizen who never comes forward to identify as such, and never enters U.S. territory, and the green card holder who stays abroad permanently without meeting documentary requirements, are less likely candidates for unilateral extraterritorial enforcement of the U.S. tax jurisdiction.

Thus, on its face, the tax law applies equally to all individuals who are citizens or green card holders whether they choose to acknowledge that status or not. However, prior to the enactment of FATCA at least, both categories of individuals were often beyond the reach of U.S. law enforcement unless they were also descriptively covered in the residence or source categories. To the extent such individuals complied with U.S. tax law, they did so on a purely voluntary basis.⁶¹ Statistical assessment of nonresident tax filings suggest that volunteerism was the exception rather than the rule.⁶²

providing proof of the birth, adequate proof of the identity and nationality, paying a fee, and waiting for the consular to validate all of the information provided.

60. See *Maintaining Permanent Residence*, U.S. CITIZENSHIP AND IMMIGR. SERV., <http://www.uscis.gov/green-card/after-green-card-granted/maintaining-permanent-residence> (last updated Feb. 17, 2016).

61. This is still true after FATCA because unenforceability remains a systemic problem for the U.S. tax jurisdiction, not least owing to IRS resource constraints. Since it is not clear how, or how well, the IRS can (or intends to) enforce the law on all of the individuals exposed to it through FATCA, it is possible that citizenship-based taxation remains a paper tiger for many nonresident U.S. Persons. If that is so, FATCA's main impact may in future be judged as an exercise in introducing little but fear to the U.S. diaspora. That in itself is grounds for concern from a normative perspective. The concern increases if the result of fear is that many people will try to comply with an impossibly complex legal regime at heavy personal expense relative to either the tax revenues or the legal principles at stake, while those the law actually intended to reach continue to thwart the rightful application of the law to them.

62. See, e.g., Harvey, *supra* note 7, at 473 (stating that prior to FATCA, U.S. persons "were on the honor system" in terms of reporting non-U.S. financial accounts, and that "it would appear many U.S. taxpayers with offshore accounts have not been very honest"); Mason, *supra* note 29, at 219. This is also the case for financial reporting obligations, which are not tax obligations but are administered by the IRS with similar (but not identical) scope as the tax jurisdiction. See, e.g., Steven Toscher & Michel R. Stein, *FBAR Enforcement-Five Years Later*, 10 J. TAX PRAC. & PROC. 37, 37-38 (2008); Eschrat Rahimi-Laridjani, *FBAR—Where We Are and How We Got There*, 8 J. TAX'N FIN. PRODUCTS 29, 29-30 (2009).

Before FATCA was enacted, the U.S. tax jurisdiction was therefore unequally enforceable by design across the four categories of taxpayer. For those taxed on the basis of source or residence, consistent with global tax norms and widespread practice, the jurisdiction has been enforceable, that is, capable of being broadly applied as a matter of administrative capacity. For those taxed on the basis of legal status alone, however, the enforceability of the tax jurisdiction depended almost entirely on the individual's own knowledge and willingness to be subject to the tax. Living within or earning income from sources within the territory generally made worldwide taxation of citizens and green card holders possible. Living beyond the territory conversely made enforcement largely subject to the individual's inclination to be included in the jurisdiction.

FATCA changed this status quo but it did not eliminate it. This is because FATCA's approach to identifying persons subject to the U.S. tax jurisdiction does not align with the U.S. tax jurisdiction as defined by statute. Instead, FATCA has made some people more likely to be visible to the IRS as U.S. Persons whether they belong in that category or not, as a matter of law, while structurally ignoring other people who are in fact U.S. Persons as the law defines the term. In this respect, Tina's story diverges from other Accidental Americans by virtue of the geographic circumstances of her birth.

C. *Law's Reach after FATCA*

FATCA engages the world in a quest to reveal to the United States all significant financial assets held by U.S. Persons throughout the world.⁶³ In so doing, for the first time in U.S. history, the United States is cataloguing a globally dispersed population of nonresident U.S. Persons. But, it is doing so in a way that is guaranteed to be both inconsistent and unjust. This point was driven home by U.S. lawmakers themselves, in the context of proposing specific reforms to the harsh rules for expatriation as applied to permanent nonresidents who happened to acquire U.S. citizenship at birth but have never acted upon that status in a meaningful way.⁶⁴

FATCA accomplishes its cataloguing function with a two-step classification system involving a list of indicia and a self-certification process.⁶⁵ These two steps are buttressed by a requirement that "relationship managers" make assumptions about U.S. Person status by using facts known to

63. "Significant" because of the nominal thresholds. "Nominal" because banks need not observe the thresholds, and anecdotal information suggests that they are not doing so, possibly because it introduces noncompliance risk owing to currency fluctuations and account aggregation problems, among other issues.

64. See JOINT COMM. ON TAX'N (JCT), DESCRIPTION OF CERTAIN REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 2016 BUDGET PROPOSAL, 289 (Comm. Print 2015) (acknowledging that any attempt to address obvious injustices in the treatment of permanently nonresident citizens who seek to expatriate "may be either overbroad or under-inclusive" and noting that "[i]t is . . . difficult to imagine any sort of subjective test that could be administered consistently and fairly across this population").

65. 26 C.F.R. §§ 1.1471-4(c)(5)(iv)(B)(2)(i) - (vii).

them that may be (but are not necessarily) relevant to determining that status.⁶⁶ The combination of these steps leads to the kind of letter received by Tina to inform her of her status, seek confirmation, and describe the consequences.

FATCA's identification method does not align with the statutory construction of the U.S. Person population described above. The misalignment is evident when comparing the three U.S. Person categories to the FATCA indicia meant to alert financial institutions to the possible existence of a U.S. Person. The misalignment continues to the verification phase, where taxpayers are asked to furnish various negative proofs of their status as U.S. Persons, as Tina was asked to do. By examining the identification and verification processes, we begin to get a sense of the population actually being targeted by FATCA to enforce U.S. taxation and financial reporting requirements on nonresidents.

FATCA has financial institutions searching for U.S. Persons by looking for the following "indicia" of status:⁶⁷

1. Account holder is identified as a U.S. citizen or resident;
2. Birthplace in the United States;
3. A U.S. telephone number;
4. A U.S. residence or mailing address;
5. Standing instructions to transfer funds to a U.S. based account;
6. Indications of a power of attorney over the account to a person with a U.S. address; or
7. A "care of" or hold mail address as the sole address.

In addition, where indicia are not present, a "responsible officer" must certify as to any knowledge of an account holder's status as a U.S. Person, and must monitor its accountholders for possible changes in circumstances.⁶⁸

Other than the first factor on the list, the FATCA indicia do not align with the three categories of U.S. Person as defined by I.R.C. § 7701. None

66. 26 C.F.R. § 1.1471-4(c)(5).

67. 26 C.F.R. § 1.1471-4(c)(5).

68. To ensure compliance with FATCA, a financial institution must designate a "responsible officer" who must represent to the best of her knowledge that "no formal or informal practices or procedures were in place to assist account holders in the avoidance of FATCA." T.D. 9610, Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities (Apr. 8, 2013) at Part V.C.5(e) (explaining revisions to regulations under I.R.C. § 1471). After making initial certifications, the responsible officer of the participating foreign financial institution (FFI) will also need to periodically certify to the IRS that she conducted periodic reviews of the FFI's compliance with due diligence, withholding, and reporting obligations under the FFI agreement. *Id.* The responsible officer may be required to provide certain factual information and to disclose material failures with respect to the participating FFI's compliance with any of the requirements of the FFI agreement. *Id.*

of the other indicia—even birthplace in the United States—is incontrovertible evidence of such status.⁶⁹

1. Physical Presence

As described above, the first category of U.S. Persons defines those who physically reside in the United States, regardless of their citizenship or nationality. Conventional wisdom suggests that FATCA is primarily intended to find the foreign accounts of this group: the imagined target is the quintessential American tax evader who intentionally and purposefully sets up a numbered bank account in a jurisdiction that is willing to shield its account holders from detection for the purpose of evading U.S. tax laws.

The test for this category of U.S. Person for tax purposes is an objective quantitative measurement, namely, days spent in the United States.⁷⁰ The greatest advantage of this bright line test is its certainty: with little room for ambiguity, humans are at any given time always present in one place, and one place only.⁷¹ We might therefore expect at least some of the FATCA indicia to line up with the substantial presence rules in some way. However, it is fairly easy to see why physical presence is not among the FATCA indicia at all. A brief examination illustrates why this is so.

Discovering U.S. Person accountholders who meet the substantial presence test would involve analyzing financial trails of personal travel records. For example, banks might search disbursements in various jurisdictions as recorded in bank-issued debit or credit card records. Besides being highly invasive, since all accounts worldwide would have to be analyzed, this would almost certainly be an expensive and overwhelming administrative task. Moreover, it seems obvious that if counting days was accomplished by analyzing spending records, determined tax evaders would change their behaviors to avoid detection. Unscrupulous issuers of debit and credit cards might rise to the challenge; noncash alternatives such as bitcoin might also get a boost from such a policy. Substantial presence is something that the federal government can reliably accomplish only by itself, with border controls. It is not something a bank can (or probably should) accomplish with financial records.

Accordingly, none of the FATCA indicia directly expose physical presence: instead, FATCA introduces proxies for the substantial presence test. An individual's listed residence or mailing address likely comes closest to representative as a proxy—it seems probable that someone who lists a U.S. address as their residence in a non-U.S. bank's account records is in

69. The complexity associated with charging financial institutions with assessing citizenship status is arguably why self-certification was chosen as the only viable option for assembling the nonresident citizen population, even though this is fundamentally unjust.

70. Substantial presence is defined in terms of physical presence exceeding a number of days calculated under a weighted formula. I.R.C. § 7701(b)(3) (2014).

71. Living in a border town poses a ready exception to objective certainty; figuring out what a “day” means to the IRS is perhaps less obvious to the casual observer but no less a source of potential ambiguity in the calculation.

fact present at that address for some significant number of days in the year. Similarly, a U.S. telephone number or standing transfer instructions in bank records provide less direct but at least some reason to believe that a person has some kind of ongoing physical presence in the United States.

A power of attorney with a U.S. mailing address seems more attenuated. As to the nonresident accountholder herself, having a U.S.-based power of attorney might be explained by having a child who immigrated to the United States, which says nothing about her own status.⁷² The power of attorney on a non-U.S. Person's account might lead not to the accountholder but to the power of attorney herself, who may in the future control the foreign account. Birthplace is of course unrelated to substantial presence other than in the year of birth.⁷³

2. Citizenship

"Citizens" are the second category of U.S. Person described above. Only two of the indicia have any direct bearing on one's status as a citizen, namely, the account holder's identification as such, and birthplace in the United States. The first of these indicia confirms the voluntary nature of the nonresident citizen's acquiescence to this status. The second speaks to a major knowledge gap with serious consequences.

Announcing oneself as a U.S. citizen to a non-U.S. bank seems to be the clearest indication that the accountholder is in fact a U.S. citizen and therefore a U.S. Person for tax purposes. Such an "announcement" is probably most often accomplished by opening the account with a U.S. passport as the primary identification document, but it might also be accomplished by mentioning one's status as such to a bank manager in passing. However, this is not to say that announcing oneself as a U.S. citizen should be interpreted as knowledge of one's obligations to file income tax returns in the United States: the opposite appears to be the case for many Accidental Americans.⁷⁴

Birthplace in the United States on the other hand highlights a clear difficulty in imposing citizenship-based taxation. A person born within the territory of the United States is usually entitled to birthright citizenship, with few exceptions.⁷⁵ That is why Tina is automatically a citizen, without

72. This could be common among non-citizen residents of neighboring Canada, for instance.

73. While it might seem intuitive to assume that a person born in the United States likely resided in the United States for at least some period after birth, this is not necessarily the case. A frequently cited example is the prevalence of border towns where, in the past, residents of Canada freely passed into the United States for the purpose of childbirth in the nearest hospital. *See, e.g.*, Derek Lundy, *Stanstead: A Town on the Border*, CANADIAN GEOGRAPHIC (July 1, 2010), <https://www.canadiangeographic.ca/article/stanstead-town-border>.

74. *See, e.g.*, JCT, *supra* note 64, at 289 ("An individual who has been a dual citizen since birth and who has neither been tax resident in the United States as an adult nor held a U.S. passport (other than for departing the United States) might be considered blameless for not having complied with U.S. citizenship-based tax obligations.")

75. *See* U.S. v. Wong Kim Ark, 169 U.S. 649, 688, 703, 709 (1898); *see also* Expatriation Act of 1907, 34 Stat. 1228, 1229 (1907). Exceptions apply to the children of diplomatic of-

any independent action on her part or that of her parents. However, the definition of a citizen in U.S. law has not been static, and it appears often misunderstood by those who receive the status by birthright but have never lived permanently in the country. For example, commonly expressed among the global birthright diaspora are beliefs that citizenship must be accepted or activated by the individual and that birth does not confer citizenship automatically, but requires application by a parent.⁷⁶ The potential for misunderstanding is only further increased in the case of those born abroad to a U.S. parent, as the rules for citizenship have changed over time for this group.⁷⁷

Moreover, citizenship can generally be changed by the individual through relinquishment⁷⁸ or renunciation.⁷⁹ In the past, it was possible for a person to relinquish her citizenship automatically upon naturalization in

ficers and others. In addition, the rules for U.S. territories and possessions are myriad and complex. *See* 8 U.S.C. § 1101(a)(22); *see also* U.S. DEP'T OF STATE, 7 FOREIGN AFFAIRS MANUAL § 1120 (2013), <https://fam.state.gov/fam/07fam/07fam1120.html>.

76. These observations were made to the author and are anecdotal. Discussions I have had with U.S. tax and immigration lawyers over the past six years confirm that differences of opinion, misunderstandings, and incorrect assumptions and beliefs about how citizenship is obtained are widespread among the Accidental American community.

77. Immigration and citizenship law in the United States flows from the constitutionally articulated power of the federal government to “establish a uniform Rule of Naturalization.” U.S. CONST. art. I, § 8, cl. 4; *see also* 8 U.S.C. § 1251 (detailing federal rules and standards regarding deportable aliens). These rules have been periodically reformed and revised according to political and social circumstances. The Patriot Act of 2001 is the most recent comprehensive legislative reform. Pub. L. No. 107-56, 115 Stat. 272 (2001). Moreover, the law is subject to agency and judicial interpretation and application. The Department of Homeland Security, established in 2002, oversees all matters involving immigration and naturalization and is the parent agency of the United States Citizenship and Immigration Services (U.S.C.I.S.), the agency directly responsible for administering the Immigration and Nationality Act. U.S.C.I.S. issues memoranda, administrative decisions, and generalized guidance. In addition, President Obama recently sought to alter legislated outcomes by recourse to his plenary executive power, but his efforts are currently subject to judicial review. *See, e.g.*, U.S. CITIZENSHIP & IMMIGR. SERVS., EXECUTIVE ACTIONS ON IMMIGRATION (2015), <http://www.uscis.gov/immigrationaction>; *Obama's Immigration Executive Actions on Hold Until Legal Challenge Resolved*, PBS NEWSHOUR (May 28, 2015, 6:30 PM), <http://www.pbs.org/newshour/bb/obamas-immigration-executive-actions-hold-legal-challenge-resolved>.

78. *See generally* U.S. DEP'T OF STATE, 7 FOREIGN AFFAIRS MANUAL: LOSS AND RESTORATION OF U.S. CITIZENSHIP § 1200 (2014); 8 U.S.C. § 1481 (stating that relinquishing acts include becoming naturalized in a foreign state after age 18, making an oath of allegiance to a foreign state after age 18, serving in the armed forces of a foreign state under certain circumstances, or committing an act of treason).

79. *See* 8 U.S.C. §§ 1481(a)(5)-(6), 1488 (laying out procedures required to renounce); *Perkins v. Elg*, 307 U.S. 325, 334 (1939) (“Expatriation is the voluntary renunciation or abandonment of nationality and allegiance.”). Citizenship acquired through misrepresentation may also be judicially revoked under recommendation of the U.S.C.I.S. *See* 8 C.F.R. § 340.2; *see also* Order Granting Permanent Injunction, *iGorbach v. Reno*, No. 98-CV-0278, 2001 WL 34145464 (W.D. Wash. Feb. 14, 2001) (entering order pursuant to *Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000)). Further, if a person held any reservations to the oath taken when becoming a citizen or committed any fraud relating to the taking of citizenship, citizenship may be revoked through an administrative process. *See* *Kungys v. United States*, 485 U.S. 759, 761–62 (1988); *Fedorenko v. United States*, 449 U.S. 490, 505-18 (1981); *Polites v.*

another country.⁸⁰ However, the U.S. Supreme Court rejected this position and reinstated citizenship once thought lost.⁸¹ The beneficiaries of this decision were officially notified of neither their reinstatement nor the tax consequences thereof. Today, the individual must generally display intent in order to lose citizenship status.⁸² One pernicious outcome of this rule is that individuals who lack the capacity to renounce will be “trapped” in their citizenship.⁸³ The inability to renounce citizenship inevitably forces the caregivers and guardians of such individuals to permanently comply with U.S. taxation rules, at great expense, and for no justified policy reason.⁸⁴ This outcome seems patently unjust by any measure, yet it is an inescapable result of permanently tying taxation to citizenship.

The interplay of immigration rules with taxation on the basis of citizenship is subject to intense debate and certainly exceeds the scope of common wisdom among the permanently nonresident population of birth-right citizens.⁸⁵ In the past, expatriation would have automatically negated a person’s citizenship status for tax purposes; at present, it does not.⁸⁶ In-

United States, 364 U.S. 426, 427-28 (1960); *Knauer v. United States*, 328 U.S. 654, 656, 669 (1946); *Johannessen v. United States*, 225 U.S. 227, 233-34 (1912).

80. See *Savorgnan v. United States et al.*, 338 U.S. 491, 505-06 (1950) (holding that the plaintiff had lost her American citizenship by applying for and obtaining Italian citizenship followed by residence abroad).

81. *Vance v. Terrazas*, 444 U.S. 252, 253 (1980) (holding that the government must prove intent to surrender U.S. citizenship and not just the voluntary commission of an expatriating act).

82. *Terrazas*, 444 U.S. at 253; *Afroyim v. Rusk*, 387 U.S. 253, 255, 259, 264 (1967). However, see 8 U.S.C. § 1481(b) for rebuttable presumptions. See also U.S. DEP’T OF STATE, 7 FOREIGN AFFAIRS MANUAL § 1200 app. B (2012).

83. A person that seeks to relinquish citizenship must proclaim her specific intent to engage in the expatriating act; such an act therefore cannot be undertaken by another, such as a parent or guardian. See 8 U.S.C. § 1481(a) (individuals will lose their U.S. citizenship only by “voluntarily performing any of the following acts with the intention of relinquishing United States nationality”); DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL, ch. 12-1 (2011) (outlining the evolution of U.S. rules limiting the ability to expatriate); SIGAL R. BEN-PORATH & ROGERS M. SMITH, VARIETIES OF SOVEREIGNTY AND CITIZENSHIP, 107-08 (2013) (explaining the evolution of U.S. jurisprudence and legislation surrounding the requirement of intent for the relinquishment of citizenship). For a first-person account of this issue, see Hildebrandt, *supra* note 3 (describing the difficult choices facing the Canadian citizen parents of a 40-year old developmentally disabled son, born in Canada while his parents were U.S. citizens, who cannot renounce his citizenship; the financial accounts built up to provide for his ongoing care are subject to reporting and taxation in the United States despite being exempt from taxation in Canada and directly contributed to by the Canadian government as part of a registered disability savings plan).

84. Hildebrandt, *supra* note 3.

85. To my knowledge, no court has considered whether the United States has the authority, as a matter of law, to annually impose personal tax and reporting obligations on individuals who are neither citizens nor residents, solely by virtue of their failure to file documentary obligations imposed by regulation.

86. I.R.C. §§ 877(a)(2)(c), 877A, 7701(a)(50)(A) (2014). Specifically, the American Jobs Creation Act of 2004 “created a disparity between expatriation for nationality purposes and expatriation for tax purposes.” See Letter from Armando Gomez, Chair, Am. Bar Ass’n

deed, the definition of citizen for tax purposes is potentially circular in the application.⁸⁷ These complications attending to birthright citizenship are sufficiently detailed and specific to the individual that they create legal uncertainty that is not answered in the tax law, let alone in FATCA indicia.

Accordingly, mailing address is to substantial presence as birthplace is to citizenship. In a vast majority of cases, a person born in the United States is probably still a U.S. citizen today. On the other hand, for some not insignificant portion of this population, subsequent action may have negated that status at some point, making the two categories imperfect proxies.

At the same time, the FATCA indicia structure completely ignores an entire population of U.S. Persons who are also birthright citizens, namely, those born or adopted abroad with claims to citizen status by virtue of their parentage.⁸⁸ To the extent that such persons also display indicia connected to substantial presence, FATCA may enable effective regulation. Absent such factors, FATCA creates a class of underground citizens—those who have never explored or acknowledged their citizenship in meaningful ways but who, assuming their circumstances were known to the United States, would in all likelihood be regarded as citizens by birth.

This status is complicated, however, and it is worth noting what FATCA leaves aside by necessity. A person born outside the United States to two citizen parents, one of whom has been resident in the United States, is typically understood to be a citizen at birth.⁸⁹ However, that is the relatively easy case. With one citizen parent, birth abroad is less straightforward; it may depend on the date of birth and typically involves some analysis of physical residence.⁹⁰ The list of rules and exceptions is long. Like Tina, many individuals who obtain citizenship through a parent are Accidental Americans, unaware of the tax consequences flowing from the citizenship status conferred upon them at birth.

U.S. immigration laws are, like the tax laws, a maze of complex and sometimes contradictory-seeming rules and exceptions, with layers of confusion added by sequential reforms and revisions. Since FATCA's enactment, an extremely profitable compliance industry has arisen to advise millions of newly emerging potential U.S. Persons regarding their signifi-

Section of Taxation, to John Koskinen, Comm'r, Internal Revenue Serv., requesting Guidance on the Tax Status of Certain Expatriates, 2 (Mar. 2, 2015) (on file with the American Bar Association), <http://www.americanbar.org/content/dam/aba/administrative/taxation/policy/030215comments.authcheckdam.pdf>.

87. See Letter from Armando Gomez, *supra* note 86, at 9-10 (discussing the interplay of I.R.C. § 877A(g)(3) and 8 U.S.C. § 1481).

88. See U.S. CONST., amend. XIV, § 1; 8 U.S.C. § 1401; 8 C.F.R. § 322.2.

89. See 8 U.S.C. § 1401(c).

90. *Id.* (providing a detailed description of the circumstances under which citizenship is attained at birth).

cant tax obligations.⁹¹ The same is now occurring in respect of advising individuals as to their U.S. citizenship status through parentage.⁹²

Even as the citizenship tax compliance industry establishes itself, however, many persons who might be U.S. Persons by virtue of birthright citizenship may not wish to claim this status. In recent analysis of proposed tax law changes concerning certain nonresident citizens by the Obama administration, the Joint Committee on Taxation noted that birthright citizenship is inconsistent with the democratic principle that “a citizen’s decision to remain a citizen, and an immigrant’s decision to become a citizen, have been thought of as entirely volitional.”⁹³ That volitional quality still exists, depending on the circumstances of birth (and appetite for concealment).⁹⁴ Being born abroad, some birthright citizens can escape the wrong, avoiding scrutiny by simply keeping silent. Others, like Tina, cannot.

Even if concealment is possible, some birthright citizens may come forward of their own volition for the express purpose of renouncing, in an effort to be free of worry going forward. Some will do so under the mistaken impression that the United States cannot realistically intend to impose financial punishments on them given their ignorance that their birthright conferred obligations upon them. Others still may come forward under the mistaken impression that their U.S. tax obligations may be easily remedied by simply renouncing their citizenship.⁹⁵ These newly awoken Accidental Americans, compelled by circumstances or conscience to confront the expansive U.S. tax jurisdiction, often come to find that ridding themselves of a citizenship they never voluntarily sought is a tremendously expensive and time-consuming effort.

In the same category as birthright citizens born abroad are other U.S. citizens born abroad, namely immigrants who acquired their citizenship status by naturalization.⁹⁶ This group is fundamentally unlike birthright citizens in that naturalization is a voluntary undertaking. Yet, for the most

91. Author’s observation, confirmed in discussion with U.S. immigration specialists within and outside the United States.

92. Author’s observation, confirmed in discussion with U.S. international tax compliance specialists within and outside the United States.

93. JCT, *supra* note 64, at 288.

94. Except where the individual is deemed to lack capacity to renounce, as discussed *supra* note 83 and accompanying text.

95. Under current law renunciation of citizenship is not only subject to consular visits and fees, but it is ineffective to end citizenship-based taxation unless accompanied by proof of tax compliance over five years. I.R.C. §§ 877(a)(2)(c); 877A, 7701(a)(50) (2014); I.R.S. Form 8854, Initial and Annual Expatriation Statement, <https://www.irs.gov/pub/irs-pdf/f8854.pdf>; *see generally* Morris, *supra* note 16. Tax compliance is complicated by the need to obtain a social security number in order to file a tax return. Obtaining a social security number is itself an administrative process that may take as long as a year to complete.

96. *See generally* 8 U.S.C. § 1421; *Naturalization*, WEX LEGAL ENCYCLOPEDIA, <https://www.law.cornell.edu/wex/naturalization> (last visited Feb. 9, 2017); *see also* *Citizenship & Naturalization*, 12 USCIS POL’Y MANUAL, <http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartD.html> (last updated Aug. 3, 2016).

part, a naturalized citizen who moves away from the United States looks to a financial institution exactly like a U.S. citizen born abroad: virtually undetectable without personal knowledge. It therefore seems at least debatable whether the United States truly seeks to draw in the full population of U.S. citizens born elsewhere, given that the FATCA indicia are in no way designed to expose them.

This kind of line-drawing is a source of systemic unfairness.⁹⁷ Someone like Tina, born in the United States, is exposed by FATCA as a presumed citizen: whether she now fits that definition or not, she must confront a legal quagmire. This forces her to verify her immigration status, deal with citizenship-based taxation, and deal with renunciation if that becomes a necessity. If Tina had been born outside the territory to a U.S. parent instead, she might never have been forced to confront this legal regime even if she is in fact a U.S. citizen, whether by birth or by choice. If all U.S. citizens are U.S. Persons by legal definition, systemically creating differences in the enforcement of the tax law with drastically different consequences seems problematic from a normative perspective.

3. Legal Permanent Residence

Finally, and also missing completely from FATCA's indicia search, are the third category of U.S. Persons, namely, green card holders. Like those born abroad with access to U.S. citizenship, green card holders might be discovered through FATCA if they have substantial presence-related indicia. In addition, FATCA's first indicia, identification as a resident, may include some green card holders to the extent that such persons understand the green card to treat them as effectively resident for tax purposes, or if they used their green card to open a bank account and the bank catalogued that action as an indication of residence. However, a green card might be an unusual form of identification with which someone would open an account outside the United States.

In law, discarding a green card is equivalent to citizenship termination in terms of documentation requirements and tax impact.⁹⁸ In practice, the nonresident green card holder, like the nonresident naturalized citizen, may have the most flexibility to discard her status without meeting these requirements, and without further consequences, so long as she remains outside the territory and removes assets from the reach of the IRS. She may even be encouraged to effectively discard this status by her home

97. Horizontal equity is perhaps the most obvious fairness norm that is violated by an arbitrarily-drawn line, where the consequences of falling on one side or the other are as extreme as they are in the case of the U.S. Person category. *Contra* Michael Kirsch, *21st Century Taxation of Americans Abroad: Citizenship-Based Taxation vs. Residence-Based Taxation*, YOUTUBE (May 2, 2014), <https://www.youtube.com/watch?v=RMiAMc4NLxA> (arguing that the substantive merits of status-based taxation are independent of any administration or enforcement difficulties).

98. Although it differs in the lack of need for a certificate of loss of nationality to prove non-U.S. status, thus avoiding the circular timing problem posed by I.R.C. §§ 877(a)(2)(c); 877A, 7701(a)(50) (2014). See discussion in Morris, *supra* note 16.

government. For example, after acknowledging that the United States considers green card holders to be U.S. Persons, the Canada Revenue Agency advises against identifying such status to Canadian financial institutions.⁹⁹

This seems difficult to justify. After all, a green card holder, like a naturalized citizen and unlike a birthright citizen, voluntarily chose to interact with the United States. It seems appropriate to presume that individuals in this category have at least as much reason to know about U.S. taxation as any nonresident citizen, and in many cases more so. A law on the books that calls for taxing nonresidents solely on the basis of their legal status is again difficult to view as just in the application, when in practice FATCA systemically excludes green card holders from detection.

To be sure, as mere proxies to a status in law that is potentially complex, indicia are not an end of themselves but a prompt to verification. Thus, for each of the indicia, the financial institution must seek a specific sort of documentary proof from the accountholder as to her status as a U.S. Person.¹⁰⁰ Each type of indicia requires distinct forms of documentary negative proofs of U.S. Person status. These proofs range from a certificate of loss of nationality and a certificate of non-U.S. Person status,¹⁰¹ to proof of ‘foreign’ citizenship (government-issued ID that evidences foreign citizenship),¹⁰² to “Proof of claim of foreign status,”¹⁰³ which may include a certificate of residence from a foreign tax authority, a government-issued identification (driver’s license), or an approved similar certificate.¹⁰⁴ In practice it is easier for institutions to apply one type of documentary proof, namely, a self-certification of U.S. status or non-U.S. status (W9 and W8BEN, respectively).¹⁰⁵ Anecdotal evidence suggests that this method is the one typically employed.

Like the indicia, none of these documentary proofs provides conclusive evidence that a person has or lacks U.S. Person status. The certificate of loss of nationality proves that a person lacks U.S. citizenship, but is

99. See, e.g., *Information for Individuals with Canadian Financial Institutions*, CAN. REVENUE SERV., <http://www.cra-arc.gc.ca/tx/nrsdnts/nhncdrprtng/ndvdl-eng.html> (last modified Dec. 23, 2014)

Q: “I hold a U.S. green card. How does this affect my tax residency?”

A: “If you are a green card holder (that is, a lawful permanent resident of the U.S.), the U.S. considers you to be a U.S. resident. However, if you are a resident of Canada for tax purposes and do not hold U.S. citizenship, you should not identify yourself as a U.S. person to your Canadian financial institution.”

100. See 26 C.F.R. §§ 1.1471-4(c)(5)(iv)(B)(2)(i)-(vii).

101. This is required where the relevant indicia is the birthplace in the United States. See 26 C.F.R. § 1.1471-4(c)(5)(iv)(B)(2)(ii) (Documentation to be retained upon identifying U.S. indicia); 26 C.F.R. § 1.1471-3(c)(3) (withholding certificates); 26 C.F.R. § 1.1471-3(c)(5)(i)(B) (evidence of foreign citizenship).

102. This is required where the relevant indicia is the designation as a citizen or resident or birthplace in the United States. See 26 C.F.R. §§ 1.1471-4(c)(5)(iv)(B)(2)(i) and (ii).

103. This is required where the relevant indicia is a U.S. address or telephone number, or U.S. power of attorney. See 26 C.F.R. §§ 1.1471-4(c)(5)(iv)(B)(2)(iii)-(v), (vi).

104. See 26 C.F.R. § 1.1471-3(c)(5) (_____ certificates).

105. As described in 26 C.F.R. § 1.1471-3(c)(3).

silent as to other U.S. Person status. Instead, the proofs are again more or less weak proxies. The key to FATCA, and therefore to comprehensive U.S. income taxation of U.S. Persons as defined in law, is still the individual's decision to comply, in the form of self-certification as to legal status. FATCA's amazingly complex regime to detect U.S. Persons thus does not eliminate arbitrary enforcement of citizenship-based taxation at all. It merely shifts the goalposts.

II. BETWEEN LAW AND PRACTICE

Imperfectly integrated over 100 years, the architecture of taxation and citizenship in the United States is best described as Kafkaesque. It involves two legal structures imperfectly stapled together, with ongoing statutory, administrative, and judicial interpretations, revisions and reforms in each system creating new complexities and challenges for understanding and implementation of the other. Understanding how these two systems work together is a daunting task for practitioners in each field, with precious few spanning the two fields for an integrated practice. Merging one legal system with another and then applying it on a global basis creates intriguing problems for comparative law scholars, but in practice it means that status-based taxation simply cannot work properly either in theory or in fact. The result for individuals is chaos, and inevitable injustice in application.

Accordingly, the gulf between the law on the books and the law in action is in large part explained by a combination of three factors: ignorance on the part of taxpayers, obscurity of key legal principles (especially citizenship), and neglect on the part of the tax administration. Despite these three factors, FATCA's mechanism for identifying tax subjects allows the United States to impose claims on some people that it never knew to exist, let alone to be subject to its laws. But it does so arbitrarily, by design, and in contravention of the purported reach of the tax law. The perverse effects make status-based taxation seem indefensible by any measure.

A. *Ignorance*

The first of these perverse effects is an over- and under-inclusive citizenship category by design. When financial institutions ask their accountholders to self-certify as U.S. Persons, some will no doubt incorrectly identify as U.S. Persons, while others will incorrectly self-identify as non U.S. Persons. This will unearth a globally dispersed subpopulation of persons incorrectly identified as U.S. Persons, which we might refer to as false positives. At the same time, it will also unearth a globally dispersed subpopulation of persons who are in fact U.S. Persons—false negatives. These errors carry serious consequences to the individuals involved as well as to the integrity of the tax system as a whole.

First, all false positives will be subjected to automatic reporting of their financial accounts to the IRS, and some may even be subject to U.S.

taxation as if they were U.S. Persons, even if they are not.¹⁰⁶ At the same time, the false negatives will not be so reported, and therefore face much less likelihood of being taxed by a country which actually would claim them as taxpayers if they had properly self-certified.

Two commonly-held misconceptions appear to have led U.S. lawmakers to adopt self-certification as a viable threshold to taxation. The first of these is that “U.S. Person” is an intuitively obvious status because citizenship is an intuitive status. The second is that taxation is an intuitively obvious conclusion that flows naturally from one’s status as a U.S. Person. Neither principle holds in fact. Beyond the impossibility of even enforcement of the law as written, ignorance is very clearly a valid excuse for noncompliance on the part of a significant and globally dispersed population.

On the whole, U.S. Persons who are resident in the United States appear unmoved by the plight of the nonresident taxpayer population, perhaps especially with respect to birthright citizens. Resident U.S. citizens sometimes appear to disparage the possibility that individuals could be ignorant of their citizenship status and the tax obligations that appear to some to naturally flow from that status. Yet, among members of the global birthright diaspora, many do not understand the involuntary nature of U.S. citizenship. Conventional wisdom aligns with the idea of volition: that citizenship is a status agreed to rather than conferred.¹⁰⁷

Since citizenship as a category defies intuitive grasp, the only persons who have incontrovertible knowledge of their status are those whose status has been confirmed by the U.S. government itself. This is usually accomplished by the act of issuing a passport or by allowing the individual to register to vote. Even a parent’s registration of one’s birth is not sufficient.

Accordingly, while citizenship status is *de jure* a matter of U.S. legal precepts, it is *de facto* a product of official acknowledgement of that status. This observation leads to the next: citizenship-based taxation also legally flows from citizenship status by virtue of statutory precepts, yet this feature of U.S. citizenship it is even less intuitive than citizenship itself.

Worldwide taxation, to the extent that it is even popularly understood, is associated with residence rather than citizenship around the world.¹⁰⁸ Citizenship-based taxation is an anomaly known to and understood well only by a subset of U.S. tax law experts. Moreover, resident U.S. persons are not really taxed on the basis of their citizenship alone. They are, along with all resident non-citizens, subject to tax primarily because their presence in the territory makes them susceptible to enforcement of law in general. For this vast majority of U.S. persons, changing to residence-based

106. Reporting of accounts with U.S. indicia will occur automatically pursuant to the Canada-US intergovernmental agreement and treaty, as implemented in the Canadian Income Tax Act. See Canada-U.S. IGA, *supra* note 14.

107. Author’s observation from interaction with Accidental Americans and tax compliance experts.

108. REUVEN AVI-YONAH, *supra* note 18, at 5, 22-24; Mason, *supra* note 29, at 178-79; Christians, *Drawing the Boundaries*, *supra* note 50, at 59-63.

taxation would have no impact whatsoever. For those not resident in the territory, the fact that an obscure and anomalous law applies to them is anything but obvious.¹⁰⁹

B. *Obscurity of Principles*

It is universally understood that everyone has the right to know what the law is.¹¹⁰ In practical terms, most U.S. legal doctrines and texts are routinely accessible to virtually anyone who cares to read them.¹¹¹ This is at least in part because of the efforts of scholars like Erwin Griswold, who, in 1938, called for an act requiring publication of all federal administrative rules and regulations, in order to ensure that every citizen would be duly informed about what the law says.¹¹² Yet, something has been overlooked along the way: namely, that publication may not be enough notice if those subject to the law do not realize that they are so subject.

Living within a territory under a government presumably provides sufficient notice to the individual that the law of that land governs her actions.¹¹³ Certainly, sovereign nations have overtly and publicly rejected

109. Blum & Singer, *supra* note 2, at 718 (advocating for the United States to abandon citizenship-based taxation in favor of residence-based taxation on grounds that the latter “is more likely to correspond to an individual’s ability to comply and the IRS’s ability to monitor compliance and which reduces the potential for overlapping taxation”).

110. Conventions against the retroactive application of law reflect the normative strength of the principle and its implicit inclusion in constitutional law. *See, e.g.*, *Eastern Enterprises v. Apfel*, 524 U.S. 498, 499, 502, 539-50 (1998) (holding that the retroactive impact of the Coal Act resulted in a taking of private property in violation of the Fifth Amendment; in concurring opinions, Justice Kennedy concluded that the Act’s retroactive effects violated the Fifth Amendment’s Due Process Clause but not the Takings Clause, while Justice Thomas thought it might violate the *Ex Post Facto* Clause of Article I, § 9, cl. 3, even if not the Takings Clause). For a general discussion, see J. L. Huffman, *Retroactivity, the Rule of Law, and the Constitution*, 51 ALA. L. REV. 1095 (1999).

111. This is not to imply that reading results in understanding. In addition, some legal or quasi-legal sources are not available to the public pursuant to policies involving confidentiality.

112. *See generally* Erwin N. Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198 (1934). Griswold’s forceful arguments for the obvious need of government to reveal the law to its subjects culminated in the adoption of the Federal Register Act.

113. This is generally consistent with international law accounts of the jurisdiction to tax based on the theories of social contract and of sovereignty, even though both theories are insufficiently theorized in tax literature. For a discussion, see MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 21-23 (2007). Whether such law is legitimate or not is a distinct question. Here, the point is merely that by living within the territory, the individual is gradually exposed to the fact that the law in that place governs her actions and that the laws of other places will govern her if she goes to or interacts with those other places. She gains this exposure through family, neighborhood, community, culture, and education, so that the government’s duty to inform the individual of her basic status as a subject of the law is considerably diminished relative to the individual that is not exposed to these inputs. In the particular case of taxation, the norms of residence-based and source-based jurisdiction reflect these general intuitions in the sense that states normally impose their power to tax only on persons who make themselves subject to the jurisdiction (usually through prolonged presence or the maintenance of personal, family, and economic

intrusion by other states, and claimed the exclusive right to rule over their territories and peoples without interference.¹¹⁴ The principle of non-intervention holds constant as a theoretically supportable idea about where individuals may expect to find sources of authority over their lives. This is so even if global political and economic interdependence make exclusive sovereign autonomy factually impossible.

An intuitive authority relationship between the individual and the state does not similarly arise extraterritorially. It is not clear by what basis individuals may be expected to inform themselves of all of the possible laws of other states that might apply to them, by virtue of such things as the circumstances of their birth or lineage.¹¹⁵ Further, it is not clear what theory applies to explain one state's right to punish the infractions of its own domestic rule by the residents of another state, much less why the second state should assist in carrying out this purpose.¹¹⁶

For those outside the territory, the question of one's legal status depends on facts and circumstances at the time of birth, choices made throughout one's life, and the state of play of various iterations of U.S. immigration and nationality laws over the years. As a rule, banks and other financial institutions lack competence to make determinations about U.S. citizenship; the same is true for other governments. Nevertheless, with FATCA, the U.S. has deputized these institutions and governments to make inquiries and collect certifications.

ties) and only on income sources that have some kind of identifiable economic connection to the jurisdictions, such that they can be said to have "arisen" there. *See, e.g.*, Stimson, *supra* note 49, at 155, 159 (exploring the international legal justification for the taxation of alien residents and the domestic property of alien nonresidents); NUSSBAUM, *supra*, at 90-99 (same).

114. *See* Allison Christians, *Sovereignty, Taxation and the Social Contract*, 18 MINN. J. INT'L L. 99, 105-06 (2009).

115. For example, it seems counterintuitive to expect individuals to intuitively recognize the need to consult the various legal doctrines of the foreign country or countries of their parents' birth, or that of their grandparents, in order to determine whether these countries might view them as subject to tax and other regulatory obligations. It seems much more intuitive to expect individuals to consult the laws of foreign jurisdictions for purposes of seeking recognition of their citizenship, where they sought such citizenship for purposes of potential migration.

116. To expect otherwise may conflict with the principle that "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 403 (AM. LAW INST. 1986). In comments to this provision, the American Law Institute (ALI) notes that "links of territoriality or nationality . . . while generally necessary, are not in all instances sufficient conditions for the exercise of such jurisdiction." *Id.* § 403 cmt. a. Even if the exercise of citizenship-based taxation is reasonable, which I contend it is not, the cooperation of other jurisdictions is not assured, as the ALI also notes that in cases of conflicting exercise of jurisdiction, "when an exercise of jurisdiction by each of two states is not unreasonable, but their regulations conflict," each state must evaluate the interests of both states, consult with the other state when possible, and when the other state "has clearly a greater interest," should "defer, by abandoning its regulation or interpreting or modifying it so as to eliminate the conflict." *Id.* § 403 cmt. e.

No normative principle justifies these expectations and consequences. The contrary must be true: a single nation-state that, at odds with the rest of the world, purports to exercise an obscure set of rules globally on a class of people it alone defines defies the intuition of both other states and the individuals who form the class. The jurisdictional claim therefore warrants both explanation and meaningful communication initiated by the state, rather than the other way around. The basic principle is only intensified as the complexity surrounding membership status and the obligations attached to membership increase, as both certainly have in the United States over the past several years.

C. *Administrative Neglect*

From the above observations it follows that it is the state that holds the duty to inform all those subject to its law that it considers them so subject, and that it accordingly demands fidelity beyond its territorial reach. It cannot be the duty of the individual to inform the state that she is subject to its law. This seems an especially important principle where the consequence for furnishing the necessary information automatically involves retroactively-applied obligations and onerous processes and fees to leave.¹¹⁷

Ongoing efforts by the IRS to regulate tax return preparers illustrates the extent to which lawmakers and administrators appear virtually oblivious to the international reach of the U.S. tax jurisdiction. Following a U.S. District Court of Appeals decision, *Loving v. IRS*,¹¹⁸ which struck down a mandatory registration regime for paid tax return preparers, the IRS announced that the same regime would instead be offered as a voluntary program.¹¹⁹ However, the program explicitly fails to extend to the globally dispersed population of U.S. taxpayers. For instance, the private test administration vendor contracted by the IRS to administer competency tests for tax return preparers only provides these services in locations within the United States, despite having a global network of locations upon which it could potentially draw.¹²⁰ With a globally dispersed U.S. Person popula-

117. In the context of rules that disallow renunciation of citizenship by a guardian on behalf of a person that is found to lack the capacity to do so, as described *supra* notes 83-84, the claimed jurisdiction is even more suspect.

118. 742 F.3d 1013 (D.C. Cir. 2014).

119. National Taxpayer Advocate Nina Olson noted that the regulation is needed because evidence is mounting that tax preparers are engaged in rampant error and fraud. Nina Olson, *The Role of the National Taxpayer Advocate Service in Protecting Taxpayer Rights and Ensuring a Fair and Just Tax System*, CANADIAN TAX FOUNDATION (July 2, 2015), http://www.ctf.ca/CTFWEB/EN/Conferences_Events/2015/Recordings/15PDMTL_Video.aspx (noting the lack of IRS resources dedicated to informing nonresident U.S. Persons of their U.S. tax and FBAR obligations).

120. IRS, INTERNAL REVENUE SERVICE REGISTERED TAX RETURN PREPARER TEST: CANDIDATE INFORMATION BULLETIN 3 (Apr. 16, 2012), <https://www.irs.gov/pub/irs-utl/rtrp-candidateinfobulletin.pdf>; *IRS Releases Specifications for Registered Tax Return Preparer Test*, IRS (Sept. 6, 2011), <https://www.irs.gov/uac/irs-releases-specifications-for-registered-tax-return-preparer-test>; see also Allison Christians, *Regulating Tax Preparers: A Global*

tion, this oversight is significant. In an annual report to Congress regarding pressing issues for the administration of U.S. tax law, Nina Olson argued that regulating return preparers is vitally necessary owing to very low understanding about the U.S. tax system within the United States.¹²¹ There is reason to expect even less understanding in other countries. The remoteness of the nonresident population increases their risk of exposure to fraud and incompetence, yet the IRS appears unwilling to expend the resources necessary to serve the full population of U.S. Persons.

III. CITIZENSHIP-BASED TAXATION REJECTED

The foregoing discussion demonstrates why the United States cannot unilaterally enforce worldwide taxation strictly on grounds of citizenship on individuals who reside permanently in other countries. The only way for the United States to accomplish this goal is by receiving extensive assistance from other countries in, at the latter's expense, identifying their own residents (including their own nationals and citizens) as subjects of a foreign state.¹²²

In (intentionally or not) designing FATCA to force foreign intermediaries and ultimately governments to identify its nonresident citizen population for the first time in history, the United States is demanding an entirely unprecedented scope of assistance from other nations. For another country to agree to lend such assistance with respect to their own nationals and residents is controversial and unwarranted for at least two reasons having to do with international law. First, to lend such assistance is to significantly depart from an otherwise globally accepted standards surrounding the bases for and limits of a jurisdiction to assert a right to tax. Second, to lend such assistance is to ignore a breach of the principle of nonintervention among sovereign states.

These departures from international law are not justified to meet the ends of citizenship-based taxation—certainly, no justifications have been put forward for public debate among nations.¹²³ Accordingly, the United

Problem for the IRS, 75 TAX NOTES INT'L 391, 391-92 (2014) [hereinafter Christians, *Regulating Tax Preparers*].

121. Olsen, *supra* note 119, at 1 (“[F]ew taxpayers today can confidently say they understand the tax code or even that they have correctly computed their tax liabilities.”).

122. The following discussion is silent with respect to the duty of other nations to voluntarily accept the task of enforcing FATCA with respect to U.S. residents. As noted above, in prior work I have suggested that such enforcement would be justified if certain conditions, involving principles of reciprocity and comity of nations, are met. See *generally* Christians, *supra* note 10. Such principles would be met where the United States to agree to implement the common reporting standard developed by the OECD as described *infra* text at note 150. To date, the United States has not done so. See *CRS by Jurisdiction*, OECD, <https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/> (last updated Jan. 17, 2017) (listing the 101 jurisdictions that have agreed to the common reporting standard to date).

123. Ignoring these departures from precedent and principle creates uncertainty for future international tax relations, since no justifications have been made by the United States or any of its FATCA partners. Some observers may point to general principles supporting tax

States should abandon citizenship-based taxation in the face of its many violations of law as well as norms of justice. However, other countries are not required to wait for reform by U.S. lawmakers. Instead, they may decline to provide information in furtherance of U.S. citizenship-based tax law in cases involving their own residents and nationals.¹²⁴

This action would not be unprecedented: the United States has, in the past, reformed a regime that was similarly viewed as incompatible with international tax standards and extraterritorial in scope, after being met with appropriate international and national pressure.¹²⁵ That situation, involving an effort by one state (California) to require global reporting of profits by certain entities doing business in the jurisdiction, serves as precedent for a global restraint in the enforcement of FATCA on non-US residents because it draws multiple parallels with citizenship-based taxation including the international law violations raised herein.¹²⁶

The dual prongs of the international law case against the foreign enforcement of citizenship-based taxation through FATCA are discussed in turn, however a preliminary note of context is in order. The discussion that

information exchange among countries as the justification for countries to accede to FATCA but that is true only with respect to its application to U.S. residents, since global tax information exchange standards followed by the rest of the world are explicitly based on residence and not citizenship. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN TAX MATTERS 6-7, 13 (2014), <https://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-account-information-common-reporting-standard.pdf> [hereinafter, COMMON REPORTING STANDARD] (explaining that the FATCA regime “deviates” from the global standard because of the U.S. exercise of citizenship-based taxation, and setting out model language for bilateral agreements to exchange tax information only with respect to persons who are identified as resident in the relevant jurisdictions).

124. While many countries have already undertaken to enforce FATCA within their jurisdictions by means of an intergovernmental agreement, these agreements are, with few exceptions, signed in furtherance of existing treaty obligations regarding the exchange of information, which are subject to internal public policy restrictions. *See, e.g.*, Canada-U.S. IGA, *supra* note 14 (agreeing to certain terms of information exchange pursuant to the existing Canada-U.S. Double Tax Convention). The information exchange provisions of all U.S. treaties follow the U.S. Model Tax Convention, which states that the treaty partners will exchange information that is relevant to the tax administration. U.S. Model Convention (2015), art. 26, at para 1. Such exchange is subject to a broad condition, however: the obligation to transfer information does not impose any obligation to supply information “the disclosure of which would be contrary to public policy (ordre public).” *Id.* at para. 3. The United States itself has, presumably under this provision, expressed its intention not to furnish information pursuant to its undertaking in any IGA where the U.S. Treasury deems that doing so would violate internal U.S. conditions respecting taxpayer confidentiality. For a discussion, see Allison Christians, *Interpretation or Override? Introducing the Hybrid Tax Agreement*, 80 TAX NOTES INT’L 51, 52-53 (Oct. 5, 2015). It would be consistent with the underlying treaties for other countries to exercise the same prerogative, restricting information transfers with respect to their own residents under the longstanding and universally accepted policy that residence is the proper basis for worldwide taxation of individuals.

125. See *infra* Part A, describing global resistance, including threat of retaliation, to California’s worldwide unitary method for income allocation involving multinationals, which resulted in conciliatory domestic law reforms.

126. See *infra* Part C.

follows confines itself to certain general principles of international law, and does not attempt to analyze how a particular country's courts might analyze the issues presented. At the same time, it draws heavily on U.S. international legal principles and sources on grounds that U.S. understanding of international law respecting the enforcement of extraterritorial obligations may be relevant in a dispute surrounding the foreign enforcement of citizenship-based taxation.

A. Violation of Customary Law

As outlined in Part I, the residence and source principles are so widely understood as the foundations of income taxation as a viable tax in the context of a world of economic, social, and political integration, they may constitute customary international law. Whether this is an accurate description is the subject of ongoing academic debate that does not appear to have been resolved by courts. It will likely be tested, even if only implicitly, in the application of FATCA to individual cases, because, to the extent it acts as a mechanism to implement worldwide taxation by one state of the residents and citizens of another, FATCA sets states up to violate these international law principles to the detriment of their own peoples.¹²⁷ As a clear deviation from global tax norms, citizenship-based taxation of nonresidents, as enforced by FATCA, does not create legitimate obligations on the part of other states.¹²⁸

127. And in some cases, their own tax expenditures. The current taxation by the United States of income associated with non-U.S. trusts is illustrative: these rules entitle the United States to a portion of the contributions made directly by foreign governments to the registered education and disability savings schemes of their own nationals and residents. For a discussion, see Letter from American Institute of CPAs to U.S. Dep't Treasury, *Proposed Tax Relief for Various United States and Canadian Equivalent Purpose Deferred Tax Savings Plans* (Mar. 4, 2016), <https://www.aicpa.org/Advocacy/Tax/DownloadableDocuments/2016-03-04-comments-on-proposed-tax-relief-us-can-equivalent-purpose-def-tax-savings-plans.pdf>.

128. Contemporary scholarship notes that "the 'sovereignty' of states has . . . become understood to be reflected in and constrained by rules of jurisdiction which define the limits of the powers of coexisting 'sovereigns', in particular, the scope of regulatory authority of states in international law." Alex Mills, *Rethinking Jurisdiction in International Law*, 84 BRIT. Y.B. INT'L L. 187, 194 (2014). This view is associated with contemporary understanding regarding the relationship between states operating in a fundamentally cooperative international society. See, e.g., Cees Peters, ON THE LEGITIMACY OF INTERNATIONAL TAX LAW 35 (2013). It is a view that has been adopted, if implicitly, by the OECD. See OECD, REPORT ON HARMFUL TAX PRACTICES 15 (1998) ("Countries should remain free to design their own tax systems as long as they abide by internationally accepted standards in doing so"); Edwin van der Bruggen, *State Responsibility Under Customary International Law in Matters of Taxation and Tax Competition*, 29 INTERTAX 115, 116 (2000) (exploring the OECD's efforts to frame the rights of jurisdictions to use tax rules that inflict harm on others). Accordingly, the classic-positivist view of statehood, which ascribes no limits to the tax jurisdiction other than that set by the state itself, is rejected to the extent it implies any duty on the part of other countries in respect of their own taxpayers). For some examples of the classic view, see Stanley S. Surrey, *Current Issues in the Taxation of Foreign Corporate Investment*, 56 COLUM. L. REV. 815, 817 (1956) (stating that "the assertion of jurisdiction is essentially a matter of national policy and national attitudes" not restricted by law); Martin Norr, *Jurisdiction to Tax and International Income*, 17 TAX L. REV. 431, 431 (1962) (stating that "[n]o rules of international law exist to limit the extent of any country's tax jurisdiction" and that "a country is free

In order to proceed with the argument that other states are free to decline to enforce U.S. citizenship-based taxation with respect to their own nationals and residents, the problem of possible acquiescence must be confronted. That is, the United States has statutorily claimed its right to tax citizens for the entirety of the life of the income tax.¹²⁹ Moreover, it has included clear language in its double tax treaties preserving these rights.¹³⁰ If residence and source constitute customary law, any resistance to citizenship-based taxation on grounds of its incompatibility with international norms and standards might seem impossible in a world that has tacitly accepted the persistent position of the United States in claiming this right. To overcome this issue requires a closer look at the doctrines of customary law and persistent objection.

Customary international law is characterized by two fundamental elements: states uniformly comply with it (sometimes referred to as the objective element), and they do so out of a sense of legal obligation (sometimes referred to as the subjective element).¹³¹ The role of each of these requirements in determining whether something is a customary law is the subject of extensive analysis in the international law literature.¹³²

While customary law may be considered binding on states, there is an exception for so-called “persistent objectors,” or states that, before a practice develops into a rule of general law, “persistently and openly” dissent from the rule.¹³³ The argument thus may be advanced that the United States is a persistent objector to the residence and source principles as evidenced by its long-standing statutory claim of jurisdiction over citizens regardless of residence or source. It is not clear, however, whether claim-staking with only minimal and sporadic enforcement in the case of nonresidents is sufficient to constitute persistent objection. Whether a claim that persists in law but also faces the impossibility of unilateral enforcement for

to adopt whatever rules of tax jurisdiction it chooses”); Harold Wurzel, *Foreign Investment and Extraterritorial Taxation*, 38 COLUM. L. REV. 809, 812, 814 (1938) (stating that “taxing power stems from sovereignty and sovereignty is omnipotence” and denying the existence of “anything in the written or unwritten law of nations” to limit the jurisdiction to tax, based on the lack of any such articulation by international tax law scholars and policymakers to that date).

129. As described by Mason, *supra* note 29, at 182; *see also* Surrey, *supra* note 128, at 815 (“From the very start of the modern income tax the United States has asserted jurisdiction to tax on the basis of two factors—citizenship and source of income.”).

130. *See, e.g.*, U.S. Model Double Tax Convention art. 1, para. 4 (stating that “this Convention shall not affect the taxation by a Contracting State of its residents . . . and its citizens”).

131. *See, e.g.*, INT’L LAW ASS’N COMM. ON FORMATION OF CUSTOMARY (GEN.) INT’L LAW, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW (LONDON CONFERENCE) 7 (2000); Michael Byers, *Introduction: Power, Obligation, and Customary International Law*, 11 DUKE J. COMP. & INT’L L. 81, 83 (2001).

132. Customary international law is described as binding even on those states that had no part in forming it, “because they choose to acknowledge its obligatory character.” INT’L LAW ASS’N COMM. ON FORMATION OF CUSTOMARY (GEN.) INT’L LAW, *supra* note 131, at 30.

133. *Id.* at 4, 27.

most of its existence can fulfill the requirements associated with persistent objection appears to be a matter that has not been addressed by courts.

The right to tax on the basis of citizenship is sometimes described as arising from the international recognition of the state's prescriptive or legislative jurisdiction based on nationality, which is said to reflect "ideas of individual subjectivity to sovereign power."¹³⁴ According to this view, state regulatory power derives from the relationship between the individual as a subject and a sovereign, and therefore travels with the individual wherever she may go.¹³⁵ However, nationality-based obligations are in conflict not only with more contemporary views that volition of the individual is necessary to create a link to a state, but also with other explicitly undertaken duties of states, such as to guard against discrimination on the basis of nationality.¹³⁶

Thus, even if the international community (or a court) were to acknowledge the right of the United States to unilaterally extend its jurisdiction over citizens, the consequences for other countries are not clear. One state's asserted "right" to tax beyond the internationally agreed standard, even if acknowledged as within the scope of its sovereign reach, does not by itself outline the duties of other states to yield, thus "subject[ing] their nationals willingly to other states' jurisdiction."¹³⁷ Even if the United States has a right to tax individuals based on their nationality or citizenship, it does not automatically follow that other states are obligated to locate individuals who may be U.S. citizens for the sole purpose of making

134. Mills, *supra* note 128, at 196. The other main jurisdictional basis is territoriality, which is said to "reflect the intimate connection between territorial control and statehood in international law." *Id.*

135. See, e.g., *id.* at 198. This view, sometimes called the "active personality principle," explains why a state may regulate the conduct of its nationals regardless of their territorial location, for example as in the case of the U.S. Foreign Corrupt Practices Act. See, e.g., Adefolake Adeyeye, *Foreign Bribery Gaps and Sealants: International Standards and Domestic Implementation*, 15 *BUS. L. INT'L.* 169, 178 (2014). However, international law scholars note that the power to regulate nationals extra-territorially is typically reserved to serious crimes. See, e.g., Mills, *supra* note 128, at 198. While Mills acknowledges citizenship-based taxation as an exception to this rule, he offers no theoretical, normative, or legal justification therefor. *Id.*

136. See, e.g., Mills, *supra* note 128, at 206 (citing the law of the European Union and the European Convention on Human Rights as well as investment treaties as possible sources of conflict).

137. BOLL, *supra* note 43, at 303. That rights imply correlative duties is indisputable, but the question is which duties are implied by which rights. See, e.g., ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 69 (1971) (stating that "a claim of 'right' can only make sense if the claimant is asserting implicitly that others have a 'duty' to allow or accede to this claim"). In the context of citizenship-based taxation, the United States is making a claim that it has a right to legislate within its competence free from interference from other states. This claim is implicitly a claim that other states, in acknowledging that right (by treaty or otherwise), agree not to interfere with attempts by the United States to enforce its own jurisdiction. However that agreement in no way implies the further agreement that other states have a duty to assist the United States in legislating where it is unable to do so alone.

the United States aware of their existence so that it can begin taxing them.¹³⁸

Instead, doubt as to the obligations of other states arises owing to past U.S. practice. Before FATCA, the United States never asserted that other countries owed it a positive duty to identify U.S. taxpayers among their own populations. In fact, the United States has actively sought to prevent other countries from taxing their own nationals or former nationals who became U.S. residents, describing the taxation of a person “elsewhere domiciled and elsewhere a citizen” as “internationally void,” and finding a right to appeal to the U.S. State Department for diplomatic assistance to prevent such taxation where the other state attempted to extract the taxes due by turning to the taxpayer’s relatives.¹³⁹ In the case of nonresident dual nationals, at least, a U.S. request for a foreign government to implement FATCA is a request to facilitate the opposite of what the State Department apparently believes to be within the sovereign right of other nations.

Beyond this particular example, it is clear that residence and source are the universally accepted factors to link a person or her property to a territory for tax purposes, and that the superior claims of residence and source demonstrate the weakness of the citizenship-based taxation claim by comparison.¹⁴⁰ To the extent that residence and source-based taxation constitute customary international law, we may thus conclude from his-

138. This question of a state’s duty to respond to the asserted tax rights of another is a novel one that does not fit neatly within the existing scholarship on the limits of the jurisdiction to tax in international law. The scholarship has mainly focused on identifying and explaining the boundaries of the sovereign power, rather than identifying and explaining the scope of potential duties among sovereigns to each other when it comes to taxation. For a discussion, see Christians, *supra* note 114, at 105-06.

139. J.B. MOORE, *A DIGEST OF INTERNATIONAL LAW*, Vol. III, 691-92 (describing the U.S. State Department’s rejection of the right of Turkey to impose taxation on a former Turkish citizen and resident who located to the United States, and stating that “an attempt to execute [such taxation] by penalties on the relatives of the party taxed gives the [party] taxed a right of appeal for diplomatic intervention to the Government to which he owes allegiance”). This is consistent with the individual’s right to diplomatic protection in regards to their status as multiple nationals. See, e.g., BOLL, *supra* note 43, at 301; see also Peter J. Spiro, *Embracing Dual Nationality*, in *DUAL NATIONALITY, SOCIAL RIGHTS AND FEDERAL CITIZENSHIP IN THE U.S. AND EUROPE: THE REINVENTION OF CITIZENSHIP* 22-26 (2002).

140. Mills, for example, argues that “individual autonomy is increasingly recognized as playing an important role in questions of jurisdiction,” and that rather than nationality alone being sufficient to claim a person as subject to the state, “the practice of states instead supports the idea that a jurisdiction may be based on a flexible combination of both territorial and personal connecting factors,” as I suggest would be the case for residence- and source-based taxation, as described *supra* at note 51. See Mills, *supra* note 128, at 207. The argument that residence is entitled to more weight than nationality in taxation accords with the same principle in general theories of sovereignty and jurisdiction. See, e.g., BOLL, *supra* note 43, at 290-93 (outlining the “presumption that jurisdiction is first and foremost territorial” and explaining that, given the fact that multiple nationality is increasingly common around the world, if nationality were the primary basis for the exercise of jurisdiction over persons, significant and irresolvable international law problems would result; instead, nationality relies on a connection with territoriality as the basis for jurisdiction).

tory, practice, and theory that citizenship-based taxation is not customary law, and that it is incompatible with customary law when applied to non-residents. To the extent that residence and source are not customary international law, we may conclude from history, practice, and theory that citizenship-based taxation has an even weaker claim to positive affirmation by other states.

Citizenship-based taxation is not only different than residence and source based taxation, but it interferes with those jurisdictions that base their taxing power on residence and source. Rejecting citizenship-based taxation as it applies to the residents of other countries would thus reject what may be a violation of customary international law while simultaneously according with the view that a states' right to tax is generally accepted as not exclusive but conjunctive—it must be exercised in a way that minimally interferes with the regulatory processes and goals of other states. This idea accords with the international law principle of nonintervention, as discussed in the next section.¹⁴¹

B. *Violation of Principle of NonIntervention*

The rightful claim of the state over revenues (through taxation or otherwise) has been a matter of vigorous public debate throughout the history of the nation state.¹⁴² Involving, as it does, an assertion of one jurisdiction as against all others in the international society of states, any claim of one state to a superior right to tax seems fundamentally incompatible with a world in which people and resources are subject to equally compelling jurisdictional claims.¹⁴³ The clash of jurisdictions on income tax matters has traditionally been resolved through diplomatic means. But in the case of FATCA, an additional element has been introduced, namely: economic

141. See, e.g., F. A. MANN, *FURTHER STUDIES IN INTERNATIONAL LAW* 4 (1990) (stating that “[s]ince every State enjoys the same degree of sovereignty, jurisdiction implies respect for the corresponding rights of other States”). The principle of nonintervention is a limit on the extraterritorial enforcement of law, which has been viewed by some scholars as “the prime regulator of the exercise by a state of its freedom in fiscal regulation.” A. H. Qureshi, *The Freedom of a State to Legislate in Fiscal Matters Under General International Law*, 41 *BULL. INT’L FISC. DOC.* 14, 21 (1987); see also NUSSBAUM, *supra* note 113, at 16, 19 (confirming Qureshi’s view as broadly held).

142. See, e.g., Joseph A. Schumpeter, *The Crisis of the Tax State* (1918), in *INTERNATIONAL ECONOMIC PAPERS*, No. 4, (Stolper, Turvey & Henderson eds., Stolper & Musgrave trans., 1953)

In some historical periods the immediate formative influence of the fiscal needs and policy of the state on the development of the economy and with it on all forms of life and all aspects of culture explains practically all the major features of events; in most periods it explains a great deal and there are but a few periods when it explains nothing.

143. See, e.g., CEDRIC RYNGAERT, *JURISDICTION IN INTERNATIONAL LAW: UNITED STATES AND EUROPEAN PERSPECTIVES* 21 (2007) (“The term ‘extraterritorial jurisdiction’ is often used to condemn the long arm of US law. . . The United States are perceived to champion a geographically almost unlimited application of their own ‘exceptional’ legislation, a perception which is stoked by US unilateralism in world politics. . .”).

penalties to induce nonresidents and ultimately foreign governments to accede to the unilateral demand of the United States for information respecting U.S. Persons as defined in U.S. tax law.

The United States has offered scant justification for imposing this threat of economic penalty on all the nations of the world. Instead, it is clear that the penalty is imposed on the strength of its exclusive power over the global currency of last reserve. However, applying economic pressure on foreign states to achieve national aims is a clear violation of the principle of nonintervention, which holds that every sovereign state must be entitled to regulate without undue interference by other states.

That principle is embodied in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations. The resolution was adopted by the U.N. General Assembly in 1970 without a vote, indicating consensus and alignment of all UN members, including the United States.¹⁴⁴ The resolution states that no state has the right to intervene in the internal or external affairs of other states, and that all forms of interference or attempted threat, including economic threats, are in violation of international law.¹⁴⁵ Further, the resolution states that “[n]o State may use or encourage the use of economic . . . measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.”¹⁴⁶ The prohibition against force is thus not limited to physical threats but extends to any coercive action and even the encouragement of such action.

The right of states to nonintervention is perhaps the most straightforward and familiar principle attending to the general concept of sovereignty as a status formed in international law. It has been described as “one of the most potent and elusive of all international principles.”¹⁴⁷ An extensive literature has developed in both international law and political theory (among other disciplines) that explores the limits of nonintervention in the context of violations of globally accepted principles and norms.¹⁴⁸ Consis-

144. See, e.g., ALAN VAUGHAN LOWE, *INTERNATIONAL LAW* 100 (2007).

145. G.A. Res. 2625 (XXV), annex, *Declarations on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations* (Oct. 24, 1970) [hereinafter, U.N. Declaration on International Law Principles] (the Preamble explains that “strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace with one another,” since intervention violates the Charter and creates “situations which threaten international peace and security”).

146. *Id.* ¶ 1.

147. LOWE, *supra* note 144, at 104.

148. See, e.g., A. V. Lowe, *International Law Issues Arising in the “Pipeline” Dispute: the British Position*, 27 GERMAN Y.B. INT’L L. 54, 56 (1986) (“Arguments in favour of a presumption of a legality for extra-territorial legislative jurisdiction have been so widely and heavily criticised on grounds of legal principle and logic that it would be difficult to rest any claim upon the presumption alone.”); see also A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act*, 75 AM. J. INT’L L. 263 (1981); MANN, *supra* note 141, at 26.

tent among the various accounts of foundational international legal principles and theories of justice is the observation that even in cases of human rights violations, some of which have been extreme, states have engaged in forcible intervention and economic sanction only “in a very small number of cases.”¹⁴⁹

To date there appears to have been no international debate on the justification for the use of economic pressure to compel worldwide acceptance of FATCA, and with it the enforcement of citizenship-based taxation on residents and nationals of other countries. The fact that states have rights to independence and self-determination obviously does not mean that one state can actually stop another from interfering with it as a practical matter, but it does give grounds for principled legal resistance where necessary to protect the state and its people from external harms. National courts would be justified in invoking such principles to restrict the application of FATCA to their own residents.

At the very least, other governments need not tacitly accept citizenship-based taxation by embedding enabling principles in international consensus documents, as the OECD recently did in its articulation of a “common reporting standard,” the global version of FATCA.¹⁵⁰ In the common reporting standard, the OECD has adopted a global regime for the gathering and exchange of tax information among countries that is fundamentally premised on the residence principle.¹⁵¹ Yet, the OECD has included birthplace as a relevant data point to be collected and exchanged by all countries.¹⁵² Birthplace is irrelevant to the residence principle and is of practical interest primarily to the United States.¹⁵³ The inclusion of birthplace as a tax-relevant data point is even more aggravating given that the United States is not a party to the Common Reporting Standard and has indicated its ongoing intention not to join the regime.¹⁵⁴

149. NUSSBAUM, *supra* note 113, at 256-57.

150. See, e.g., Kristen Parillo, *U.S. Position on OECD Standard Problematic for Trusts and Funds*, 148 TAX NOTES 727, 727-28 (Aug. 17, 2015) (explaining the relationship between FATCA and the common reporting standard).

151. See OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN TAX MATTERS 29-31 (2014), <http://www.oecd.org/ctp/exchange-of-tax-information/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters-9789264216525-en.htm>.

152. *Id.* § 2, para. 2.

153. Possibly Eritrea as well, though its claims have been impeded by other states. See *supra* note 54.

154. See, e.g., Parillo, *supra* note 150, at 727-28 (outlining the Treasury’s official position that since the common reporting standard “would not have happened . . . were it not for FATCA,” the failure of the United States to sign on to the standard should be accepted by the international community, and that the United States is committed to bilateral information exchange on its own terms); OECD, AEOI: STATUS OF COMMITMENTS (July 26, 2016), <http://www.oecd.org/tax/transparency/AEOI-commitments.pdf> (excluding the United States from its list of jurisdictions that have committed to the common reporting standard and stating in a footnote that “[t]he United States . . . is undertaking automatic information exchanges pursuant to FATCA,” that it acknowledges “the need . . . to achieve equivalent levels

Relatedly, and also conspicuously absent from public discourse on FATCA, is a discussion regarding the purpose of subjecting nonresident individuals to an extensive global disclosure regime if the ultimate taxation thereof typically will be frustrated by other international laws. Frustration is likely because even in the event the United States assesses taxes, interest, or penalties on a non-resident, no foreign government is under an obligation to lend assistance in collecting such amounts from its own resident citizens. This observation may flow from the nonintervention principle laid out above, but it is also captured in the so-called “revenue rule.”

In brief, the revenue rule holds that “[o]ne nation does not take notice of the revenue laws of another.”¹⁵⁵ Despite occasional calls to abandon the revenue rule by some scholars,¹⁵⁶ the law is consistent with the principle of nonintervention and abandoning it would require careful analysis of the potential negative as well as positive effects. The OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters includes provisions for assistance in collection that would circumvent the revenue rule as to certain taxpayers and transactions.¹⁵⁷ The United States entered a reservation on this provision when it signed the treaty in 1989, and has signed but not ratified the 2010 Protocol without altering its reservations.¹⁵⁸

In the context of the revenue rule, the entire exercise of FATCA when applied to permanent residents of other countries appears to be legally futile if it does not also create enforceable obligations on the part of the targeted population. Receiving asset and income information about its citizens residing in another jurisdiction will help the United States create tax assessments, but it does not necessarily entitle the United States to seize

of reciprocal automatic information exchange with partner jurisdictions,” and that it has “a political commitment” to adopt the necessary regulations to do so).

155. *Planche v. Fletcher*, (1779) 99 Eng. Rep. 164, 165; *see also* *Holman v. Johnson* (1775) 98 Eng. Rep. 1120, 1121 (“No country ever takes notice of the revenue law of another.”).

156. *See, e.g.*, Samuel D. Brunson, *Accept This as a Gift: Unilaterally Enforcing Foreign Tax Judgments*, 146 *TAX NOTES* 541, 543 (2015) (advocating that the United States abandon the revenue rule so as to end its ability to aid or abet tax evasion by foreign nationals).

157. *See* The Multilateral Convention on Mutual Administrative Assistance in Tax Matters, *entered into force* June 1, 2011, S. TREATY DOC. NO. 2012 112-5, E.T.S. No. 127, [hereinafter MAATM], <http://www.oecd.org/ctp/exchange-of-tax-information/ENG-Amended-Convention.pdf>.

158. *See* STAFF OF THE JOINT COMM. ON TAX’N, 113TH CONG., EXPLANATION OF PROPOSED PROTOCOL AMENDING THE MULTILATERAL CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS 3 (2014).

Ratification of the protocol is not intended to alter the reservation of rights or declarations of understanding that the United States made when it ratified the existing convention in 1991 [T]he United States reserved the right not to provide (1) assistance for taxes imposed by possessions, political subdivisions, or local authorities of other parties to the convention; (2) tax collection assistance; or (3) assistance in serving documents (except the service of documents by mail). The reservations are reciprocal; to the same extent that the United States will not provide assistance, other parties need not assist the United States.

assets (or ultimately persons) in the foreign territory. To conclude otherwise appears to fly squarely in the face of the U.N. Declaration on Principles of International Law, as well as general principles of justice.¹⁵⁹

There is no outward indication that the lawmakers behind FATCA intended to bring about a radical departure from the principles of non-intervention and sovereign authority over a territory. If a radical departure from these principles was or is being sought, an international discussion on the merits of such a policy shift would appear to be a necessary prerequisite to actions that lead in this direction. It is difficult to imagine that the lack of equal reciprocity, which has characterized the information flow in U.S. intergovernmental agreements on FATCA to date, would similarly be acceptable in the context of collection enforcement.¹⁶⁰

Other countries are under no obligation to accept and facilitate an asymmetrical international tax system, in which the United States imposes demands on other governments that are inconsistent with both international legal standards and the principle of nonintervention.¹⁶¹ As evidenced by the international embrace of the common reporting standard, most agree with the idea that nations should share tax-relevant information in order to maintain the integrity of residence-based taxation.¹⁶² However, the extension of information sharing to expose previously unsuspecting taxpayers to the United States government by virtue of their presumed citizenship alone is a unique feature of the U.S. tax system that is not consistent with that goal. The following part suggests that there is precedent for other countries to respond to this inconsistency with appropriate concern and pressure.

C. Precedent for International Response

In the mid 1980s, the state of California faced a concerted global backlash against a tax practice viewed as impermissibly extraterritorial in

159. See generally PETER DIETSCH, *CATCHING CAPITAL: THE ETHICS OF TAX COMPETITION* 167-87 (2015) (exploring the boundaries of acceptable state tax practices consistent with principles of fundamental justice, including the membership principle and the right to self-determination).

160. See, e.g., Parillo, *supra* note 150, at 728 (explaining that “U.S. law currently doesn’t require U.S. financial institutions to collect some of the information that foreign financial institutions are required to collect under FATCA and the CRS,” and that the Obama administration has been unsuccessful in achieving necessary reforms to date despite promises made in intergovernmental FATCA agreements).

161. See, e.g., Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 115, 130 (2005-2006) (stating that “[w]hen a state violates international law, there is generally no expectation that all states will band together to punish the violator. Rather, states affected by the violation may choose to take some sort of retaliatory action”).

162. *CRS by Jurisdiction*, *supra* note 122 (listing 101 jurisdictions that have committed to the common reporting standard).

scope¹⁶³ as well as inconsistent with international tax norms.¹⁶⁴ The rule at issue was California's "worldwide unitary method," which required certain businesses in California to measure their corporate income for tax purposes according to a formula that required tax-relevant information to be collected from global affiliates and disclosed to California's tax authority.¹⁶⁵

Like citizenship-based taxation, California's regime required taxpayers to annually submit disclosures of their income and assets on a global basis.¹⁶⁶ Unlike citizenship-based taxation, the state regime then applied a formula under which only the California-source portion of such income would be subject to taxation by the state.¹⁶⁷ Yet nations around the world aligned together in vehement opposition to California's regime as it applied to their own resident companies, ultimately compelling California to restrict its jurisdiction to its territory.

The arguments for and against California's regime as applied to non-resident taxpayers parallel many of those raised in defense of and against citizenship-based taxation. For example, California advanced the argument that, as a matter of jurisdictional sovereignty, it should be entitled to design its own tax policy free from interference by other jurisdictions.¹⁶⁸ Proponents of the system expressed their belief that an alternative tax design would lead to tax avoidance—in that case, the alternative being the arms' length standard employed by the United States and most of its trad-

163. Statement of Allen Wallis, FINAL REPORT OF THE WORLDWIDE UNITARY TAXATION WORKING GROUP (Aug. 31, 1984), reprinted in 24 TAX NOTES 1043, 1063 (Sept. 10, 1984) [hereinafter, UNITARY TAX GROUP REPORT] (stating that "the unitary tax method leads inevitably to extraterritorial and double taxation" and "allows a state to reach beyond its borders and tax higher profits earned elsewhere"). Wallis further expounded his view that "the unitary tax method is contrary to international practice" by making the case that arms' length transfer pricing should be viewed as an international standard owing to widespread practice and "years of effort" by all the OECD member nations." *Id.*

164. The U.S. Treasury convened a task force to "examine the taxation problem in its broadest aspects, as regards multinational corporations, whether foreign or domestic . . . and the implications . . . on our international relationships . . . as well as on states' revenues and states' rights." *Id.* at 1043, 1047.

165. The regime is a key component of combined reporting and formulary apportionment, which is a method of allocating income across the members of a group of controlled or affiliated companies. Combined reporting and formulary apportionment, while in common usage across the several states, is an alternative to the arm's-length method, which is favored for federal corporate income tax purposes by the United States as well most of its major trading partners. For an overview of the regime and a contemporary argument in favor of continuing jurisdictional limits on tax information reporting, see generally Todd Roberts & Joel Walters, *In Defense of Water's-Edge Reporting*, TAX NOTES INT'L. 885 (Sept. 5, 2016).

166. See CALIFORNIA FRANCHISE TAX BOARD, CALIFORNIA'S CORPORATION TAXES-FREQUENTLY ASKED QUESTIONS 2 (2003), <https://www.ftb.ca.gov/forms/misc/1083.pdf> (explaining that California's unitary method formula "takes into account . . . worldwide property, payroll, and sales factors").

167. *Id.* (explaining that the business income of a unitary business is "divided and assigned to California by means of an apportionment formula").

168. UNITARY TAX GROUP REPORT, *supra* note 163, at 1046 ("[T]he states believe that they should be free from federal interference in establishing their fiscal systems.").

ing partners.¹⁶⁹ They further defended compliance burdens faced disproportionately by non-US based taxpayers on grounds that it is more difficult to get accurate information from them.¹⁷⁰ Finally, California argued that alternative methods of taxation are not necessarily international standards because in practice, jurisdictions do not implement them uniformly.¹⁷¹ All of these arguments ultimately proved insufficient to support California's regime in the face of widespread opposition from the international community, yet very similar arguments are advanced in support of citizenship based taxation.¹⁷²

Conversely, constituents who sought reform of California's regime expressed concerns regarding the likelihood of over- and under-taxation, the vast complexity and even "bewildering" nature of the rules as they applied to non-US taxpayers, the likelihood for interference with international trade and investment flows, and the disproportionate compliance costs for, and other impacts on, non-US based taxpayers as compared to those based in the United States.¹⁷³ All of these arguments apply equally to the application of citizenship-based taxation to nonresidents. Indeed, the arguments are strongest in the case of Accidental Americans, who for reasons beyond their control are included in a tax system they consider foreign, in contrast to the multinationals whose exposure to the California tax system came about because they voluntarily sought to access the market.

The positions taken in respect of California's tax system are particularly instructive, even if not dispositive about the limits of the state's jurisdiction to tax.¹⁷⁴ The parallels with citizenship-based taxation affirm some of the grounds for other states to resist citizenship-based taxation on grounds of incompatibility with both global tax standards and the principle of non-intervention. At the same time, important differences between the affected constituencies may explain some of the reasons why such resistance has not yet materialized, and may be unlikely to materialize.

One glaring distinction should be noted, since it seems to have been key to achieving reforms. In the case of California's worldwide unitary tax, multiple heads of state from key trading partners voiced uniformly strong objections, pointing out the perceived interference with their own jurisdic-

169. *Id.* at 1046.

170. *Id.*

171. *Id.* at 1048.

172. *See generally* Mason, *supra* note 29 (reviewing the arguments in favor of citizenship based tax).

173. UNITARY TAX GROUP REPORT, *supra* note 163, at 1046-48 (describing foreign-based multinationals objections to the compliance burdens of California's system, including especially the "need to translate their entire foreign operations into U.S. currency and to conform them to U.S. accounting rules"). This burden in particular is replicated for nonresident citizens as to their entire financial lives, a hardship that is compounded by their fewer resources and access to competent professionals at affordable cost compared to multinationals that expressly sought to do business in California.

174. As discussed below, rather than press the issue in litigation, California undertook to voluntarily resolve the issues through legislative reform.

tions and threatening retaliation in the form of sanctions.¹⁷⁵ Similarly, global business interests railed in unison against California's system, calling for federal intervention to "provide adequately for the international pressures" should the state fail to remedy the situation.¹⁷⁶ A working group was formed to study the broad domestic and international impacts of California's regime on US international relations as well as states' revenues and rights.¹⁷⁷ The working group convened multiple meetings and included multiple stakeholders, who deliberated at length over the competing interests at stake.¹⁷⁸

There has been no similar international outcry by foreign officials, no concerted determination to retaliate on behalf of their own resident taxpayers, in the case of citizenship based taxation. No working group has been convened to study the issues attending to how FATCA enforces citizenship taxation of nonresidents, and no public meetings have been held among officials and those impacted by the laws to discuss and deliberate the international implications, revenues, and rights involved.

The reason for the disparate reaction of the international community in these two cases appears obviously related to the resources of the respective affected constituencies. Major multinational firms were the aggrieved parties in the case of the California worldwide unitary system. They understandably acted in their own interests, and they sought the assistance of governments to further their cause.¹⁷⁹ In contrast, citizenship taxation impacts individuals of varying means, with less ability to marshal the forces of their governments to rally on their behalf in the face of overwhelming pressure to comply.¹⁸⁰

Ultimately, under pressure from within the state, by other states, by business groups, and by the federal government,¹⁸¹ California amended its laws in response to complaints from the international community that its

175. See UNITARY TAX GROUP REPORT, *supra* note 163, at 1063 (noting "sharp criticism from all of our major trading partners," with the Secretary of State stating that "few issues have provoked so broad and intense a reaction from foreign nations" and that the United States received diplomatic notes from fourteen OECD countries and the OECD itself, "all protesting against the application of the unitary tax method to their companies").

176. STATEMENT BY THE BUSINESS REPRESENTATIVES ON THE WORLDWIDE UNITARY TAXATION WORKING GROUP, May 1, 1984, *reprinted in* 24 TAX NOTES 1043, 1065 (Sept. 10, 1984).

177. UNITARY TAX GROUP REPORT, *supra* note 163, at 1047.

178. *Id.* at 1047, 1051.

179. For example, those seeking reform of California's system called for "special emphasis" regarding the economic effects attendant to furthering a system that is universally reviled by foreign investors. See, e.g., *id.* at 1063.

180. Foreign governments face pressure not only from the United States, but also from their own financial institutions, which sought to alleviate legal uncertainties and economic pressures on themselves by working to ensure uniform application of the U.S. regime under the supervision and sanction of their governments. For a discussion, see Christians, *supra* note 23, at 32-35.

181. Much of the concern within the United States focused on whether California's regime interfered with US foreign commerce and foreign policy interests. UNITARY TAX GROUP REPORT, *supra* note 163, at 1047 (quoting Treasury Secretary Regan that "the effects

claimed jurisdiction was extraterritorial in scope and incompatible with global legal standards.¹⁸² Accordingly, the potential international law violations were not ultimately addressed by any courts. Similar issues arising today in the case of global enforcement of citizenship-based taxation on non-U.S. residents are, in contrast, largely being neglected by the international community and left to the courts to adjudicate. Since judicial intervention is a costly and time-consuming process, it is at least worthwhile considering whether there are incremental reforms that would alleviate the harms currently being inflicted in service of citizenship-based taxation by FATCA.

D. Incremental Reform

In many respects, and perhaps surprisingly, the main faults of citizenship-based tax could be easily remedied by legislators and in some cases administrators.¹⁸³ But such action would require discarding some heavy emotional baggage surrounding fairness, patriotism, and migration in a political climate that is likely too frail to sustain radical reform. As a result, incremental steps are necessary to move citizenship-based taxation toward the customary law principles of residence and source jurisdiction.

This requires, at minimum, a rational approach by the United States to clearly define citizenship for tax purposes within the U.S. Person category. It is absurd to condition compliance with the tax law on the individual's prior consultation with an immigration attorney whose ultimate assessment may not even bring certainty without the intervention of a wholly distinct federal agency. Simply put, clearly defining the taxpayer is the responsibility of the state that seeks to impose the category — not the individual so characterized and certainly not a third party, be it a private sector financial intermediary or a foreign government. To hold otherwise is to subject individuals to a gross unfairness of uncertainty that can only be resolved by engaging counsel in two fields of law in another country.

of the use of the worldwide unitary method may interfere with the foreign commerce of the United States, so this becomes a matter of vital federal interest.”).

182. California's officials and members of the business community preferred a negotiated outcome obtained by consensus to a hierarchically imposed solution. *UNITARY TAX GROUP REPORT*, *supra* note 163, at 1047 (stating that “[t]he decision on federal legislation reflected a shared view by both the state and business members of the Working Group that a cooperative voluntary approach based on consensus offered the best choice of obtaining a solution to the difficult problems before the Group”); Statement of James R. Thompson, *reprinted in* *UNITARY TAX GROUP REPORT*, *supra* note 163, at 1066 (“This is a responsible effort to make sure that state tax policies will be conducive to harmonious international economic relations.”).

183. Perhaps less straight-forwardly, U.S. courts could choose to step in (especially in regards to the plight of Accidental Americans) by inverting the reasoning put forth in the case of *Lucienne D’Hotelle*, which left room for a future court to prevent citizenship-based taxation on equity grounds in cases involving nonresident citizens who do not know about or voluntarily accept their status as U.S. citizens. *United States v. Lucienne D’Hotelle De Benitez Rexach*, 558 F.2d 37, 42 (1st Cir. 1977) (stating that judicial precedent supporting citizenship-based taxation might “shift markedly” were it “used to compel payment of taxes by all persons who mistakenly thought themselves to have been validly expatriated”).

Tax law scholars uniformly agree that justice in taxation demands equal treatment of equally-resourced taxpayers and different treatment of differently-resourced taxpayers.¹⁸⁴ But, any justice inquiry is futile until the threshold category of taxpayer is defined in a principled way.¹⁸⁵ If the state cannot explain and defend its own categories, it is difficult to see why the state should nevertheless be justified in applying rules and exacting punishment for noncompliance. Further, it is unclear why other states should accede to demands backed by sanction to apply such an injustice to their own nationals and residents. Clearly defining what the law requires, including from whom it demands compliance, are the responsibility of the lawmaker, not the subject of the law, and not a third party.

To know one's status as a U.S. citizen, and to understand the tax consequences that flow from that status, is to access a complex common law regime that is as deep and mysterious to the outsider as the tax law is to those not passionately dedicated to mastery of the subject. Both systems are sufficiently complex that a person who draws conclusions without extensive research, and preferably the advice of counsel in both fields, is almost certain to make mistakes, some with serious consequences.

Yet, FATCA is currently compelling millions of individuals to draw just such conclusions. Moreover, it is compelling them to do so instantly or face adverse consequences including heavy financial penalties and loss of basic financial services. Finally, it is doing so for the purpose of exposing such persons to retroactive tax compliance obligations and penalties.

For individuals around the world currently discovering their potential citizenship like Tina did, by virtue of a letter of inquiry and demand from their local community bank, this outcome is disastrous and seems unjust. Never having availed themselves of the benefits of U.S. citizenship, ignorant of the increasing obligations tied to their status, they have no opportunity for withdrawal from U.S. citizenship without both retroactive tax compliance and payment of significant exit fees.¹⁸⁶ FATCA was arguably enacted with good intentions, namely, to make the tax system more fair. In the implementation, however, FATCA instead introduces unfairness to

184. See generally *TAX JUSTICE: THE ONGOING DEBATE* (Joseph J. Thorndike & Dennis J. Ventry, Jr. eds., 2002) (explaining the distinct theories of like treatment of equally-resourced taxpayers as horizontal equity and different treatment of differently-resourced taxpayers as vertical equity and analyzing these concepts as the normative foundations of just taxation); see also J. Clifton Fleming, Jr., Robert J. Peroni & Stephen E. Shay, *Fairness in International Taxation: The Ability-to-Pay Case for Taxing Worldwide Income*, 5 *FLA. TAX REV.* 299, 301-15 (2001) (discussing horizontal and vertical equity in the international context); Nancy H. Kaufman, *Fairness and the Taxation of International Income*, 29 *L. & POL'Y INT'L BUS.* 145, 153 (1998) (same); Joseph M. Dodge, *Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles*, 58 *TAX L. REV.* 399, 400, 461 (2005) (examining the notions of horizontal and vertical equity as key elements of taxation in accordance with ability to pay, and why ability to pay is a normatively justified rationale for taxation while benefits theory fails to satisfy normative requirements).

185. See Christians, *Drawing the Boundaries*, *supra* note 50, at 53, 57.

186. I.R.C. §§ 877(a)(2)(c); 877A(g)(3); 7701(a)(50) (2014).

many: a “gotcha” with life-altering financial impact on a population that is invisible in most discussions about the normative goals of taxation.¹⁸⁷

Citizenship-based taxation thus seems, at minimum, susceptible to mistake-making on a massive scale. At worst, it seems designed to create conditions for injustice. A series of scenarios now exist under which the United States ought to offer to Accidental Americans both an explanation of the consequences of continuing U.S. citizenship and a one-time option to start over or, in the extreme, to exit the status all together, without penalty and with minimum compliance costs.

The need for explanation and opt-out are an unfortunate and undesirable outcome of adherence to the fundamentally flawed policy of taxing on the basis of citizenship in an increasingly globalized economy. Allowing a “fresh start” without penalty—including an opportunity to restructure financial investments to avoid owning assets that run afoul of penalty and interest regimes designed to disgorge all returns—would be an appropriate minimum response to the pleas of Accidental Americans.

The best approach is obviously to abandon taxation on the basis of legal status alone and rely on the existing alternatives in use by the United States and the rest of the world, namely, residence and source. But, if the United States insists on continuing to tax on the basis of legal status, explanation, fresh start, and opt-outs are critical components to ensure justice is possible in the implementation.

The proper time for the United States to identify its citizens as a jurisdictional matter, and to inform this population of their obligations, arises when official determinations are made by the U.S. government itself with respect to the rights citizens hold to the exclusion of others. Registration to vote in an election and issuance of a passport are two likely candidates.¹⁸⁸ An adult seeking a current U.S. passport knows she is a citizen

187. Christians, *Drawing the Boundaries*, *supra* note 50, at 72-74.

188. The fact that a parent can obtain a passport on behalf of a child necessitates a second condition with respect to passports that the individual be able to comprehend the consequences of her actions. This would align the acknowledgement of citizenship with the termination thereof, pursuant to immigration and nationality laws that prohibit anyone from expatriating unless they are an adult that is capable of understanding citizenship as a status and the consequences of renouncing or relinquishing that status. *See supra* note 83. Not applying this same rule to the acquisition of citizenship itself presents a particular injustice in the case of an individual who has developmental or cognitive difficulties that prevents meaningful understanding of citizenship and thus prevents termination of status. Under current law, such a person is permanently bound to the United States and cannot exit the nationality. This situation appears to violate the fundamental right that all humans have to change their nationality. *See* G.A. Res. 217 (III)(A)(15)(2), Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights] (“No one shall be . . . denied the right to change his nationality.”). The right to expatriate was first recognized by Congress in 1868. Preamble to the Act of July 27, 1868, 15 Stat. 223 (1868) (“[T]he right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness.”); *see also* WEISSBRODT & DANIELSON, *supra* note 83, ch. 12-1; BEN-PORATH, *supra* note 83, at 107-08. To my knowledge, the United States has never been challenged for violating this rule to date. However, a grassroots group of nonresident citizens has filed a claim at the United Nations that includes this issue among its charges. *Human Rights Complaint on Behalf of All U.S. Persons Abroad Has Now Been Submitted*,

because she has asked for and received official verification of that status from the United States itself. Beyond that, the analysis quickly deteriorates.¹⁸⁹

The implications for citizenship-based taxation are clear: it should not be the job of an individual to identify herself as a U.S. Person for tax purposes by virtue of a citizenship conferred upon her.¹⁹⁰ If, like Tina, one is not known to the United States to be a citizen because she has never sought that recognition, she should not be subjected to retroactive taxation and information reporting compliance obligations, to penalties, or to a fee to exit. Instead, she should be left alone. Without official recognition of her status as a citizen, the United States Embassy is not coming to her rescue, she receives no services, she has no right to entry, and she is not in any meaningful way a U.S. Person.

Conversely, if she makes herself known by applying for recognition of that status, the United States may apply its extraordinary tax and information reporting obligations attending to that status, but only on a prospective basis, and only on condition that it meaningfully informs her of these obligations. Taxpayer education is key to proper and fair administration of the tax laws and to ensuring that individuals cooperate with the tax authority.¹⁹¹ When the tax jurisdiction is global, taxpayers are entitled to global notification and outreach by the tax authority.¹⁹²

The taxation of individuals solely on the basis of a citizenship that they have no absolute right to decline seems beyond justification under any normative theory. But even if citizenship-based taxation can be justified, it must, at minimum, depend on the informed consent of the subject, coupled with the opportunity to decline membership without penalty or fee. The imposition of a fee to renounce expressly appears to violate the fundamental right that everyone has to leave their nationality.¹⁹³ To date, no prospective renunciant has yet challenged the U.S. Department of State in its attempt to impose this fee as a condition to expatriation. Such a challenge would be appropriate.

ISAAC BROCK SOCIETY (May 21, 2015), <http://isaacbrocksociety.ca/2014/07/28/human-rights-complaint-on-behalf-of-all-u-s-persons-abroad-has-now-been-submitted/>.

189. This does not solve the systemic under-inclusion of birthright citizens born abroad, naturalized citizens, and legal permanent residents. There does not appear to be a ready solution to this problem.

190. *Contra, e.g.,* BOLL, *supra* note 43, at 293 (stating that “[t]he reality of multiple nationality emphasizes that it is the individual who has to beware of being subject to the requirements of more than one state. Should more states decide to tax their nationals’ income on the basis of nationality, for example, one might imagine that many multiple nationals would choose to renounce multiple nationality in favour of single nationality”). However, in making this claim, Boll does not consider the significance of ambiguity and ignorance as to citizenship status nor the role of conditions limiting the right to renounce including prior tax compliance, payment of fees, and the mental capacity of the renunciant.

191. See TAXPAYER ADVOCATE SERV., 2013 ANNUAL REPORT TO CONGRESS 51, 55 (2013).

192. See Christians, *Regulating Tax Preparers*, *supra* note 120, at 391.

193. See Universal Declaration of Human Rights, *supra* note 188.

Of course, there will be those who seek to abuse the tax system through artifice—that is true no matter the design or intentions. But that is not an excuse to violate basic principles of justice and fairness for a global population of essentially innocent victims of an antiquated and ill-administered policy.

Accordingly, citizenship-based taxation appears to require a fresh start approach, and a one-time opt-out for nonresident citizens, at the very least in the case of those who obtained citizenship by birth. This is an extreme and unfortunate result for a failed policy. Possibly it is better than the alternative: continued enforcement by all the world of a policy that violates international law as well as basic principles of justice. Unwilling citizens, including those who have never sought a passport for themselves, should not be forced into U.S. fiscal citizenship.

CONCLUSION

The United States is engaged in a project to dramatically expand the enforcement of its tax jurisdiction over a globally dispersed population, after a century of neglect and apparent indifference. It is currently doing so with the acquiescence and assistance of other countries. But other countries should not submit to this flawed policy. Instead they should acknowledge that it deviates from fundamental international tax norms and virtually universal practices, it violates the core international law principle of nonintervention, and it compels states to visit unnecessary harms upon their own populations.

Failing to meaningfully identify its global taxpayer population and explain its extraterritorial claims over their financial lives, the United States cannot reasonably impose its jurisdiction upon nonresidents from afar; it certainly should not expect the world to unquestioningly assist it in this extraordinary task. By relying on individuals themselves to know how they are defined in U.S. law and to understand the consequences of that definition, citizenship-based taxation, enforced by FATCA's self-certification system, violates the taxpayer's right to know what the law is. The result is arbitrary exposure and punishment of some individuals who might in reality have no substantive connection to the United States, while purposefully neglecting others who do, all at the hands of foreign institutions and foreign governments. The probability and the consequences for systemic error in both false positives and false negatives is a regulatory quagmire, while objectionable as a matter of fundamental legitimacy in lawmaking.

Finally, the enabling of citizenship-based taxation via FATCA is simply incompatible with the fundamental principles of residence and source, concepts so integral to the international tax law system that they have come to be understood by globally respected academics as expressions of customary law. There are ready alternatives for the United States to exercise its power to tax nonresidents consistent with how virtually all other countries interpret the limits of their respective taxing jurisdictions. Incremental changes could move the United States in the direction of the rest

of the world, toward principles that are capable of being enforced without unduly interfering in the internal affairs of other countries.

However, the world need not wait for the United States to make necessary reforms. Citizenship-based taxation is inconsistent with international tax law principles, and FATCA as applied to non-U.S. residents is a violation of the international principle of nonintervention. States need not acquiesce to these deviations from the global consensus and in violation of international law; instead, they may reasonably refuse to apply FATCA to their own resident populations. Indeed, there is a ready template for how states should behave toward the United States, in the OECD's common reporting standard for tax information gathering and exchange. This standard adopts a global version of FATCA that is compatible with and based on the fundamental international tax law principles of residence and source. Consistent with the practice of the rest of the world, the common reporting standard could be applied on the basis of residence and source to the United States in the same manner as all other countries have accepted it.

Given the potential for abuse of basic rights that occurs when a state dispenses punishment despite excusable ignorance, no other state should be willing to assist in effectuating the injustice that must follow from the U.S. effort to tax nonresidents on a worldwide basis. The international community would be justified to, at minimum, insist that the United States catalogue its own taxpayer population, inform this population of its status, and educate it of the attendant obligations, before turning to other countries to assist in the task. Cataloguing and informing should take place through deliberate expressions of consent to be governed, such as the issuance of a passport or the registration to vote from abroad. Relatedly, the tax system is global; so too must be the administration's education efforts and guidance as to the interpretation of the law in all of the circumstances it purports to regulate.

Finally, there seems to be little alternative but to allow nonresident birthright citizens to opt out of their citizenship without penalty and without administrative hassle. The extraordinary tax claims made by the United States upon its citizens at the very least implies that those who obtain that status without their informed consent have an absolute right to exit. Upon learning of their status and the obligations attendant thereto, these citizens must be entitled to leave without being compelled to produce paperwork, engage in interviews, endure punishment for past tax or information reporting noncompliance, or pay a fee, as current law requires. To demand otherwise is to engage in the kind of action the American colonies themselves once labeled as tyranny and viewed as intolerable. No other state should be compelled under economic pressure to facilitate such a regime.