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Defining Residence for Income Tax Purposes: Domicile as Gap-Filler, Citizenship as Proxy and Gap-Filler

Edward A. Zelinsky
Cardozo School of Law, Yeshiva University

DEFINING RESIDENCE FOR INCOME TAX PURPOSES: DOMICILE AS GAP-FILLER, CITIZENSHIP AS PROXY AND GAP-FILLER

*Edward A. Zelinsky**

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INTRODUCTION

In this paper, I place the United States' adherence to citizenship-based taxation in the context of the states' tax systems. Forty-one states impose general income taxes on the worldwide incomes of their respective residents.[1] These state tax systems are important repositories of experience that confirm the administrative benefits of citizenship-based taxation. Domicile today plays an important role in state tax systems as a gap-filler when more objective statutory residence laws fail to assign any state of residence to the taxpayer. Citizenship is an administrable proxy for domicile and serves a similar gap-filling role in the taxation of individuals whose income and activities straddle national boundaries.

For income tax purposes, most states today define residence as either domicile (the traditional definition) or as statutory residence, typically formulated as an individual's satisfaction of an objective test such as 183 days spent in the state.[2] In contrast to the relatively objective nature of statu-

* Morris and Annie Trachman Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University.

1. WALTER HELLERSTEIN, KIRK J. STARK, JOHN A. SWAIN & JOAN M. YOUNGMAN, STATE AND LOCAL TAXATION: CASES AND MATERIALS 373 (10th ed. 2014) [hereinafter STATE AND LOCAL TAXATION].

2. *Id.* at 379-82.

tory residence laws, the fact-intensive domicile inquiry focuses upon the taxpayer's intent to return to the taxing state and his permanent allegiance to that state, rather than his immediate physical presence in the state.[3] As the domicile inquiry is factually complex, it is both manipulable by the taxpayer and difficult for the tax collector to enforce. The contemporary domicile standard is best understood as a gap-filler invoked by the states when the more objective test of statutory residence fails to assign the taxpayer to any state of residence.

The states' difficulties enforcing domicile-based taxation highlight the administrative benefits of citizenship-based taxation. As long as residence is understood for tax purposes in terms of domicile, citizenship is an efficient proxy for such domicile. The states' experience defining residence supports the United States' citizenship-based approach to federal income taxation. Under the Internal Revenue Code, citizenship serves as an administrable proxy for domicile and fulfills the same gap-filling function played by domicile under the states' income taxes.

I. Some Preliminary Observations

As a preliminary matter, I would observe that the conventional narratives used to denigrate citizenship-based taxation do not impress me. The alleged uniqueness of the United States' worldwide taxation of its citizens' incomes does not embarrass me.[4] The United States is also unusual in the strength of its protections for religious liberty[5] and free speech. I do not apologize for that uniqueness either.

Moreover, when one looks at the cases in the English-speaking world, U.S. law is not as unique as some suggest. When residence is defined, explicitly or implicitly, as domicile, the outcomes are typically similar to those that citizenship-based taxation achieves in a more efficient manner.[6]

I am equally unimpressed by the alleged horror stories of U.S. citizens renouncing their citizenships because of U.S. income tax burdens.[7] In the context of the millions of U.S. citizens living abroad, the 3,417 U.S. citizens who renounced U.S. citizenship in 2014 is a relative handful of individuals

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3. *See infra* notes 21-40 and accompanying text.

4. *Cf.* Jacqueline Bugnion, *Concerns About the Taxation of Americans Resident Abroad,* 148 Tax Notes 861, 862 (2015) ("The United States is the odd man out with this attitude."); Teri Sprackland, *London Mayor to Relinquish U.S. Citizenship,* 146 Tax Notes 963 (2015) ("Only the United States, apart from Eritrea, taxes all its citizens . . . .").

5. *See, e.g.*, EEOC v. Abercrombie & Fitch Stores, 135 S. Ct. 2028 (2015) (protecting the right of a practicing Muslim to wear a headscarf in the prospective workplace); Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (holding that tighter restrictions on sign advertising church are content-based regulations which violate the First Amendment); *see also* John T. Noonan, Jr., The Lustre of Our Country: The American Experience of Religious Freedom 9 (1998) ("The American experience has lighted up the skies.").

6. Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship As an Administrable Proxy for Domicile,* 96 Iowa L. Rev. 1291-93 (2011) [hereinafter Zelinsky, *Citizenship and Worldwide Taxation*].

7. *See, e.g.*, Bugnion, *supra* note 4, at 862.

who elected to surrender U.S. citizenship.[8] I also confess that anecdotes about Boris Johnson leave me unimpressed.[9]

The Civil War origins of citizenship-based taxation,[10] while of historic interest, similarly tell us nothing about the value *vel non* of citizenship-based taxation today. Legal rules often persist because they serve purposes originally unintended by their authors.[11] Citizenship-based taxation is one of these.

Finally, the difficulty of collecting income tax from many U.S. citizens who live abroad is not, by itself, reason to abandon the effort to tax them. It is also difficult to collect income tax from the domestic cash economy, including illegal activity. That difficulty, however, does not lead us to abandon the effort to reach this hard-to-tax cash income.

II. The Persistence of Residence-Based Income Taxation

Instead of these premises, I start from the proposition that residence-based income taxation is and will continue to be a permanent part of international and U.S. domestic tax systems. Some argue that we should move to source-based taxes for active business income and for easily allocable income such as real estate rents.[12] Justice Ginsburg, in her recent dissent in *Wynne*,[13] argues that the U.S. Supreme Court is forcing the states toward such source-based income taxation by requiring, as a constitutional matter, that states of residence offer credits to their respective residents for income taxes paid to the states of source.

Yet, even if source-based taxation predominates, we will continue to need residence-based taxation for passive income such as interest, dividends, royalties, capital gains from stocks and bonds, and other forms of income derived from these kinds of mobile intangible investments.

8. Sprackland, *supra* note 4, at 963. Moreover, "there were only 483 individuals who gave up their U.S. citizenship during the quarter ending June 30, 2015." Andrew Velarde, *Theories for Expatriation Numbers Abound, but Answers Elusive,* Tax Notes Today 174-1 (2015).

9. *See* Robert Goulder, *Should London Mayor Boris Johnson Pay U.S. Taxes?,* Forbes (Jan. 26, 2015), www.forbes.com/sites/taxanalysts/2015/01/26/should-london-mayor-boris-johnson-pay-u-s-taxes/.

10. *See generally* Reuven S. Avi-Yonah, *The Case Against Taxing Citizens* 3) (Univ. of Mich. Law Sch. Law & Economics Working Paper No. 12, 2010) ("Citizenship-based taxation of Americans living overseas began during the Civil War.").

11. Alexander M. Bickel, The New Age of Political Reform: The Electoral College, The Convention and The Party System 3-4 (1968) ("We have, of course, many institutions and arrangements that, as they function, no longer conform to the original scheme, and we have bent most of them quite effectively to the purposes of our present society. . . .").

12. *See, e.g.*, Fadi Shaheen, *International Tax Neutrality: Reconsiderations*, 27 Va. Tax Rev. 203, 205 (2007) (proposing "source-based taxation").

13. Comptroller of the Treasury of Maryland v. Wynne, 135 S. Ct. 1787, 1813 (2015) (Ginsburg, J., dissenting).

The maxim *mobilia sequuntur personam*,[14] while typically deployed talismanically, nevertheless corresponds in the income tax context to an important truth: even if source-based taxation becomes dominant, we will still need residence-based taxation for interest, dividends, royalties, capital gains from stocks and bonds, and other similar kinds of passive income generated by intangible investments. If these forms of highly mobile, intangible income were to be taxed only on the basis of source, it would be easy for individuals to avoid taxation by moving their intangible properties to low- and no-tax jurisdictions. Without residence-based taxation of intangible incomes, an individual could transfer his stocks, bonds, bank accounts, patents and other intellectual property to a custodian in a low- or no-tax jurisdiction and thereby avoid any significant tax on the income generated by these forms of highly-mobile, intangible property.[15] To avoid this scenario, tax systems must allocate investment income such as dividends, interest, and royalties to the jurisdiction in which the investor resides.

III. Defining Residence: Domicile v. Statutory Residence

Once it is granted that residence-based income taxation will persist in one form or another, we must define residence for tax purposes. Traditionally, residence meant domicile, an individual's permanent home looking at all of the facts and circumstances reflecting an intention to return. Most U.S. states that impose an income tax declare that those domiciled in the state are residents for tax purposes, taxable by the state of residence on their worldwide incomes.[16]

Over time, most U.S. states also concluded that, for tax systems, domicile is too subjective to be the sole criterion for residence for income tax purposes. The result has been the emergence of what in the domestic U.S. context have come to be called "statutory residence" laws.[17]

Under this more mechanical approach to residence, the fact-intensive domiciliary test for residence is paralleled statutorily by simultaneously defining residence for income tax purposes using limited, relatively objective criteria. The objective criteria for statutory residence are typically the number of days spent in the state, whether an individual has a home in the

14. Indiana Dep't of State Revenue v. Bethlehem Steel Corp., 639 N.E.2d 264, 268 (1994) ("The long-established rule for taxing tangible property, *mobilia sequuntur personam*, held that such property followed the person of the owner. Under this rule, the owner's place of domicile had the sole authority to tax his personal property.").

15. *See generally* Edward A. Zelinsky, *Apportioning State Personal Income Taxes to Eliminate the Double Taxation of Dual Residents: Thoughts Provoked by the Proposed Minnesota Snowbird Tax,* 15 Fla. Tax Rev. 533, 540-41 (2014) [hereinafter Zelinsky, *Apportioning State Personal Income Taxes*].

16. For an example, consider Conn. Gen. Stat. §§ 12-701(a)(1) (defining a resident as an individual "domiciled in" Connecticut or an individual who "maintains a permanent place of abode in" Connecticut and is present in Connecticut "more than one hundred eighty-three days of the taxable year") and §§ 12-701(a)(19) and 701(a)(20) (defining a Connecticut resident's "Connecticut adjusted gross income").

17. Zelinsky, *Apportioning State Personal Income* Taxes, *supra* note 15, at 543-45.

state, or a combination of such limited and objective factors.[18] To date, no state has been willing to exclusively rely upon the more mechanical rules of statutory residence to the exclusion of the facts-and-circumstances test of domicile.

Michigan's income tax statute is illustrative. For Michigan income tax purposes, the term "resident" means an individual domiciled in the state:

> "Domicile" means a place where a person has his true, fixed and permanent home and principal establishment to which, whenever absent therefrom he intends to return, and domicile continues until another permanent establishment is established. . . . If an individual lives in this state at least 183 days during the tax year . . . he shall be deemed a resident individual domiciled in this state.[19]

Michigan's statute reflects all of the themes of contemporary state income tax law with respect to defining residence: An individual domiciled in Michigan is a resident for income tax purposes. Domicile is an individual's permanent home. Domicile entails the fact-based determination whether an individual "intends to return" to Michigan, regardless of his current presence *vel non* in the Wolverine State. Independently of her domicile status, an individual is objectively "deemed a resident" for tax purposes in any year she lives in Michigan for "at least 183 days."[20]

The reasons for the dual definition of state residency for income tax purposes – domicile or statutory residence – start with revenue: if there are two chances to tax an individual as a resident, the tax collector is more likely to succeed with one of these approaches. On a more principled basis, both the traditional concept of domicile and more objective statutory residence laws have their respective strengths and limitations and, thus, complement each other.

IV. Domicile: Manipulable, Difficult to Enforce

The sprawling, fact-based nature of the concept of domicile makes it manipulable by the taxpayer and difficult to enforce by the tax collector. Under a system of self-assessment, the subjective manipulability of the test of domicile leads some – likely many – individuals to play with the tax collector a game of "catch me if you can." There is a vast literature, indeed a thriving industry, advising clients how to situate their respective domiciles in low-tax states like Florida and Nevada.[21] The facts-and-circum-

18. *See supra* note 16 and accompanying text; *see also* State and Local Taxation, *supra* note 1, at 379-82.

19. Mich. Comp. Laws § 206.18(1)(a) (1967).

20. Mich. Comp. Laws § 206.18(1)(a) (1967).

21. *See, e.g.*, Andrew Berger, *Florida Domicile: Steps to Establishing It and Pitfalls to Beware*, Fla. Condo & Hoa Law Blog (Aug. 31, 2012), http://www.floridacondohoalawblog.com/2012/08/articles/estate-tax/florida-domicile-steps-to-establishing-it-and-pitfalls-to-beware/; Layne T. Rushforth, *Establishing Legal Domicile in Nevada*, The Rushforth Firm (May 21, 2014), http://rushforth.net/pdf/domicile.pdf.

stances quality of the domicile inquiry makes that inquiry intrinsically unwieldy and difficult for the tax collector to enforce.

Consider, for example, the decision of Maryland's Court of Special Appeals in *McDermond v. Comptroller of the Treasury*.[22] Mr. McDermond resided in Maryland and worked as an executive for Under Armour. Mr. McDermond moved to the Netherlands in 2006 to supervise Under Armour's European operations. When he relocated to the Netherlands, Mr. McDermond did not sell his Baltimore home but instead leased it to his brother. When Mr. McDermond returned to Baltimore for business trips in 2006 and 2007, he stayed "in hotels or temporary housing."[23] "In preparation for his move to the Netherlands, McDermond sold his car, closed his Maryland bank accounts, and moved some of his furniture and many of his personal possessions to the Netherlands."[24] He acquired a Dutch driver's license but abandoned his effort to speak to Dutch.

On his trips back to Baltimore, Mr. McDermond attended his church in Baltimore. He continued to contribute to that church while he lived in the Netherlands. While living in the Netherlands, Mr. McDermond told the Baltimore jury commissioner that he was a nonresident living abroad. This resulted in the government (not Mr. McDermond himself) cancelling his status as a Maryland voter. However, while employed by Under Armour in the Netherlands, Mr. McDermond renewed his Maryland driver's license. The license renewal form included a certification under penalties of perjury that he was a Maryland resident.

In an apparent effort to bolster Mr. McDermond's claim to be a nonresident of Maryland, Under Armour amended the written terms of his employment. Originally, Mr. McDermond and Under Armour contemplated a two-year assignment in Europe. Subsequently, Under Armour stated that it expected Mr. McDermond to remain abroad indefinitely. For the tax year in question (2007), Mr. McDermond spent ninety-nine days in the United States. Of these, forty were working days in Baltimore while the remaining days in the United States were nonworking days. In 2008, Mr. McDermond's European assignment for Under Armour ended and he returned to Maryland to continue to work for Under Armour.[25]

On these facts, Maryland's Comptroller, Maryland's Tax Court, and the Circuit Court for Baltimore City concluded that Mr. McDermond was domiciled in Maryland in 2007 and, as a Maryland resident, owed Maryland taxes for that year on his worldwide income.[26] Maryland's Court of Special Appeals agreed, observing that an individual's domicile is "his true, fixed, permanent home, habitation and principal establishment, with-

22. McDermond v. Comptroller of the Treasury, No. 1299, 2015 Md. App. LEXIS 412 (Md. Ct. Spec. App. July 9, 2015).

23. *Id.*, at *3.

24. *Id.*

25. *Id.*, at *8.

26. *Id.*, at *9-*10.

out any present intention of removing therefrom, and to which place he has, whenever he is absent, the intention of returning."[27]

The appeals court concurred with the Maryland Tax Court that, notwithstanding the amendment of the nominal term of Mr. McDermond's employment, Under Armour and Mr. McDermond anticipated that he would be abroad in the Netherlands for only two years.[28] In fact, that is what happened as Mr. McDermond stayed and worked in the Netherlands for twenty-two months. Four other factors, according to the appeals court, supported the finding that Mr. McDermond was domiciled in Baltimore in 2007: namely, his retention of a Maryland driver's license, his "failure to make any social, civil, or other connections in the Netherlands," his attendance at his Baltimore church when he returned to the United States, and his "failure to affirmatively cancel his Maryland voter registration."[29]

What is striking about the *McDermond* case is how typical it is. Indeed, the appeals court thought *McDermond* so unexceptional that the court consigned its *McDermond* decision to the judicial purgatory of "unreported" opinions, not citable as precedent. The state courts churn out fact-based domicile tax decisions like *McDermond* on a regular basis.[30] These cases reflect the sprawling, fact-based nature of the domicile inquiry; the continuing efforts of taxpayers to manipulate that facts-and-circumstances inquiry to avoid paying state income taxes on the basis of domiciliary residence; and the states' difficulties enforcing the subjective standard of domicile.

The uncertainties of the fact-and-circumstances test of domicile are confirmed by the efforts of the states to codify that test. Those codification efforts result in laundry lists of factors that provide no more certainty about the domicile inquiry than does the case law.

Kansas's regulations, for example,[31] identify a variety of facts to be considered in determining an individual's domicile. These facts include where the individual, her spouse, or her children attend school,[32] and where they "regularly participate in sporting events, group activities, or public performances."[33] However, the Kansas regulations caution that none of these enumerated facts is determinative[34] and that "any other fact" may be "relevant to the determination" of a person's domicile.[35]

27. *Id.*, at *12 (quoting Shenton v. Abbott, 178 Md. 526, 530, 15 A.2d 906 (1940)).

28. *Id.*, at *17-*18.

29. *Id.*, at *18-*19.

30. *See, e.g.*, Cause v. Dep't of Revenue, 2015 Or. Tax LEXIS 148 (Or. T.C. Nov. 19, 2015); George v. Dir. of Revenue, St. Tax Today, Nov. 23, 2015 (Del. Tax App. Bd. Nov. 17, 2015); Morgan L. Holcomb & John Mule, *Persistence of Residence,* St. Tax Today, Aug. 30, 2012 (discussing residence determinations in state courts); Zelinsky, *Apportioning State Personal Income* Taxes, *supra* note 15, at 542 n.31 (collecting domicile tax cases).

31. Kan. Admin. Regs. § 92-12-4a(b)(7) (2009).

32. Kan. Admin. Regs. § 92-12-4a(b)(7)(P) (2009).

33. Kan. Admin. Regs. § 92-12-4a(b)(7)(R) (2009).

34. Kan. Admin. Regs. § 92-12-4a(b)(7) (2009).

35. Kan. Admin. Regs. § 92-12-4a(b)(7)(S) (2009).

Maine similarly declares that "no single factor" determines a person's domicile.[36] Among the myriad facts which are potentially relevant are the location of an individual's "fraternal, social or athletic memberships" as well as "the location of a church or other house of worship of which [an individual is] a member."[37] Also potentially relevant to Maine's domicile inquiry is where an individual keeps her pets.[38]

In the same vein, the Cooperative Agreement on Determination of Domicile promulgated by the North Eastern States Tax Officials Association[39] identifies as relevant to the determination of an individual's domicile such vague factors as the individual's "overall living pattern or life style." These unwieldy documents do not reflect a failure of draftsmanship. Rather, they confirm the inherently sprawling nature of the fact-based domicile inquiry. Determining an individual's "true, fixed and permanent home"[40] is an inherently messy enterprise. Individuals can accordingly manipulate the domicile standard while tax collectors find that subjective standard difficult to enforce.

V. The States' More Objective Statutory Residence Laws

In contrast to the unwieldy, facts-and-circumstances quality of the law of domicile, the states' more objective statutory residence laws are both easier for the taxpayer to avoid and for the state to enforce. A law like Michigan's leads to a relatively straightforward inquiry: Was the taxpayer in the state on 183 days during the taxable year? If so, she is deemed a resident for income tax purposes, subject to state taxation on her worldwide income.[41] If not, the tax collector can still assert that the taxpayer is domiciled in-state and, therefore, taxed as a resident on that alternative basis.

The dual definition of state residence resembles those states' traffic laws that include both an objective speed limit (*e.g.*, 65 miles per hour) and a more subjective prohibition on "unsafe" driving. At 70 miles per hour, the driver violates the objective limit. At 60 miles per hour, the driver complies with it. However, even at 60 miles per hour, the driver may be driving unsafely if, for example, the weather and visibility are poor. This, however, is a more subjective, fact-dependent inquiry than looking at the car's speed.

Similarly, a statutory residence test like Michigan's requires the relatively focused, mechanical inquiry whether the taxpayer is in-state for at least 183 days of the year. The taxpayer who does not trigger that test may

36. *Maine Revenue Service Provides Guidelines on Residency Status for Income Tax Purposes*, St. Tax Today, Dec. 28, 2015.

37. *Id.*

38. *Id.*

39. *Northeastern States Tax Officials Association Releases Cooperative Tax Agreement*, St. Tax Today, Nov. 4, 1996.

40. Mich. Comp. Laws § 206.18(1)(a) (1967).

41. Mich. Comp. Laws § 206.18(1)(a) (1967).

still be taxed as a resident if he is deemed to be domiciled in Michigan. As the legion of cases like *McDermond* establish, domicile is a factually messy inquiry into the taxpayer's intent to return, considering all of the facts and circumstances.

VI. The Persistence of Domicile

Given the rise of statutory residence rules, the manipulability of the traditional standard of domicile, and the states' difficulties enforcing that subjective, fact-based standard, why do the states continue to define residence as domicile for income tax purposes?

There is undoubtedly an element of inertia in the states' continued use of the concept of domicile to define residence for income tax purposes. Domicile is the traditional way of defining residence. As the states developed their statutory residence laws, they initially adopted those laws to supplement, rather than replace, the fact-based definition of residence as domicile.[42] The historic definition of residence as domicile was already on the books and was deeply embedded in practice and case law.[43] Moreover, the dual definition of residence for state income tax purposes—domicile or statutory residence—bolsters states' revenues by giving a state two chances to classify any individual as a resident, subject to state taxation on his worldwide income.

Benefits-based justifications can also be advanced for defining residence as domicile, but these justifications are not persuasive.[44] The essence of domiciliary status is an individual's long-term intent, as reflected in all of the facts and circumstances, to return to the jurisdiction in which she is domiciled. An individual currently living elsewhere, the argument might run, benefits presently from the public services which maintain the jurisdiction of domicile for her eventual return.[45]

The problem with this benefits-based argument is that the domiciliary resident who lives outside her state of domicile is, on a day-to-day basis, receiving her most salient public services in the state where she currently lives, not the state of domicile to which she ultimately intends to return. In comparison with the benefits received from the state in which she presently lives, the public services derived from her state of domicile are deferred and attenuated. These future benefits are not a convincing basis for justifying income taxation today by the state of domicile, in comparison with income taxation by the state providing her benefits currently.

An alternative characterization is that a domiciliary resident currently living elsewhere should pay tax to her state of domicile as a form of prepayment for the benefits she will receive when she eventually returns there.[46] However, when she returns, she will then pay resident income tax

42. *See* Tamagni v. Tax Appeals Tribunal, 695 N.E.2d 1125, 1128 (N.Y. 1998).

43. *Id.*

44. Zelinsky, *Citizenship and Worldwide Taxation*, *supra* note 6, at 1314-23.

45. *Id.* at 1315-16.

46. *Id.*

for the benefits she is then receiving. There is no reason the domiciliary resident living in another state should pay tax twice, once today as a prepayment for future benefits and once again in the future for benefits received when she actually returns to the state of domicile.

When an individual moves to a new state, she is not required to pay an entrance fee to compensate the state for its prior operations during the years before the new resident relocated there. There is no reason that a domiciliary resident of this state should be required to pay the equivalent of that entrance fee in the form of resident-based income taxes during the years she lives elsewhere.

Another potential argument for defining residence as domicile for income tax purposes is that domicile represents a foundational relationship with the state to which the individual will eventually return.[47] According to this argument, Mr. McDermond was a member of the Maryland polity while he lived in the Netherlands and, hence, should be taxed as a member of that polity.

This a plausible argument in terms of the nation-state: i.e., Mr. McDermond's prime political membership remained in the United States while he lived abroad. However, the relationships of U.S. citizens to their respective states are today not robust. Few U.S. citizens today believe that it is psychologically or politically significant when they move from State A to State B or attach great meaning to a political affiliation with one state as opposed to another.[48]

VII. Domicile as Gap-Filler

The best argument today for defining residence for income tax purposes as domicile is that domicile is a default setting, a gap-filler to make sure that everyone is a taxpaying resident somewhere. Statutory residence laws, with their relatively bright lines, are easier for the government to enforce, but also easier for some (particularly affluent) taxpayers to avoid. The traditional theory is that everyone has a domicile and, thus, must be a taxpaying resident somewhere. Domicile today serves as a gap-filler when more mechanical statutory residence rules are under-inclusive.

Suppose, for example, that a tax-conscious retiree spends part of the year at his home in Michigan and part of the year at his house in New Mexico. New Mexico's objective test of statutory residence is 185 in-state days during the year.[49] Suppose that this retiree is careful to live for 180 days in each of these two states, spending the remaining five days of the year elsewhere. Under these circumstances, neither state can assert statutory residence against this individual since he only lives in either state for 180 days, just short of the mechanical criteria for statutory residence. If statutory residence were the only basis for asserting resident status for income tax purposes, this retiree would owe no residence-based state in-

47. Zelinsky, *Apportioning State Personal Income Taxes*, *supra* note 15, at 559-60.

48. *Id.*

49. N.M. Stat. Ann. § 7-2-2S (2014).

come taxes anywhere, since he would not be a resident of either Michigan or New Mexico.

Specifically, this individual would owe no state taxes on his dividends, interest, royalties, and capital gains from stocks and bonds since such passive investment income generated by intangible assets is taxed by the state of residence[50]—and this individual would have no state of residence if residence were only defined in objective statutory terms. Moreover, under federal law, no state could tax this individual's pension, 401(k), or individual retirement account (IRA) distributions since only the state of residence can tax retirement distributions[51] and this individual carefully conducts his affairs to avoid classification as a statutory resident in the two states in which he owns homes.

In this example, the concept of domicile fills the gap left by statutory residence laws. For income tax purposes, domicile assigns a state of residence to this retiree on the basis of facts-and-circumstances indicating a permanent intention to return.

There is, in this setting, the danger that the concept of domicile, in practice, will overtax this individual if both New Mexico and Michigan claim to be his state of domicile and both tax his worldwide income on the basis of residence.[52] We should, in such cases of dual residence, develop rules requiring the apportionment of the dual resident's income between his two states of residence.

However, for present purposes, the critical point is that the U.S. states persist in using domicile as an alternative test of residence for income tax purposes. While the continuing use of domicile may in part be attributable to inertia, tradition, and revenue considerations, domicile also plays a gap-filling role when taxpayers keep their in-state presence below the mechanical threshold triggering statutory residence.

Domicile as gap-filler is a diminution of domicile's historically dominant role in defining residence. Before the rise of statutory residence rules, domicile was the traditional definition of residence.[53] Statutory residence laws were originally adopted to supplement, rather than subordinate, domicile as the criterion for residence for income tax purposes.[54] Characterizing domicile as filling the gaps left by objective statutory residence rules demotes domicile to the status of junior partner, in practice secondary to the statutory residence laws originally envisioned to support the traditional concept of domicile.

However, despite the difficulties of enforcing the test of domicile, the gap-filling function of that test has proved compelling. Consequently, few states have eschewed domicile as an alternative, subjective basis for assert-

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50. Zelinsky, *Apportioning State Personal Income Taxes*, *supra* note 15, at 540-41.

51. 4 U.S.C. § 114 (2015).

52. Zelinsky, *Apportioning State Personal Income* Taxes, *supra* note 15, at 542-43.

53. Tamagni v. Tax Appeals Tribunal, 695 N.E.2d 1125, 1128 (N.Y. 1998) (discussing the history of New York's statutory residence law).

54. *Id.*

ing residence for income tax purposes – despite the manipulability and unwieldy nature of the subjective domicile inquiry.

VIII. Citizenship as a Gap-Filling Proxy for Domicile

In sum, most states have retained the sprawling, fact-based concept of domicile for state income tax purposes rather than making objective statutory residence laws the exclusive tests of residence. This suggests that, under a residence-based income tax system, the federal government, looking at the states' experience, would similarly decline to define residence in purely mechanical terms and would instead insist on a gap-filling definition of residence, like domicile, to apply when objective definitions of residence prove under-inclusive.

In fact, the federal government takes this dual definition approach when it identifies when an alien is a U.S. resident for tax purposes and, thus, taxed by the United States on his worldwide income. Emulating the states, the Internal Revenue Code promulgates an objective test of an alien's physical presence in the United States. This mechanical test of an alien's substantial physical presence is analogous to the states' statutory residence laws. Also emulating the states, the Code supplements this test of physical presence with the domicile-like criterion of "permanent residence."[55] An alien who triggers either of these rules is taxed by the United States as a resident on his worldwide income.

Section 7701(b)(1)(A)(ii) of the Internal Revenue Code[56] is a federal analogue to the states' statutory residence laws. Section 7701(b)(1)(A)(ii) eschews any inquiry into intent, facts, or circumstances and instead establishes an objective test of an alien's residence for income tax purposes, a test denoted in the Code as "substantial presence." The federal test of "substantial presence" is not precisely like state statutory residence laws because an alien's "substantial presence" in the United States is based on her physical presence in the United States measured over a three-year period, not a single year.[57] Nevertheless, § 7701(b)(1)(A)(ii) resembles state statutory residence laws as a relatively focused, objective effort to assess noncitizens' residence in the United States on the basis of a mechanical test of physical presence rather than more subjective, facts-and-circumstances inquiries about an individual's intent and ultimate location.

Alternatively, if a noncitizen flunks the objective test of substantial presence but holds "permanent resident" status under U.S. immigration law, he is subject to taxation on his worldwide income as a U.S. resident. This statutory pattern for aliens resembles the states' dual income tax definitions of residence. Just as the states take two bites of the residence apple, the Code has two alternative tests for taxing an alien on his worldwide income. If an alien triggers either of these tests, he is deemed to be a U.S. resident, taxed by the United States on his worldwide income.

55. I.R.C. § 7701(b)(1)(A)(i) (2015).

56. I.R.C. §§ 7701(b)(1)(A)(ii)–(b)(3) (2015).

57. I.R.C. § 7701(b)(3)(A) (2015).

However, there is an important difference between the Code and the states' tax systems: rather than asking whether the alien taxpayer is domiciled in the United States, § 7701(b)(1)(A)(i)[58] uses an objective proxy for domicile, namely, whether the alien holds a "green card." Thus, under the Code, permanent residence status under federal immigration law serves a gap-filling function analogous to domicile in the state law context. If an alien's physical presence in the United States falls below the threshold identified by the substantial presence test, the alien's green card nevertheless subjects him to U.S. taxation on his worldwide income.[59]

For income tax purposes, an alien's green card serves as an administrable proxy for his U.S. domicile. An individual who is a permanent U.S. resident for immigration law purposes is implicitly deemed domiciled in the United States for federal income tax purposes even if, in the short-run, his physical presence in the United States is not "substantial" under the objective test of § 7701(b)(1)(A)(ii). Immigration status is an objective, domicile-like gap-filler, taxing as a U.S. resident an alien who falls short of the mechanical substantial presence test.

Against this background, let us now play a thought game: Suppose that Congress, heeding the critics of citizenship-based taxation, were to consider expanding § 7701(b)(1)(A)(ii) to make its objective "substantial presence" test applicable not just to aliens but to citizens as well. Looking at the states' income tax definitions of residence and at the Code's similar, two-definition approach to the tax status of aliens, it is unlikely that Congress would make the substantial presence test (or any similar mechanical test of physical presence in the United States) the sole criterion for imposing worldwide income taxation. Rather, the states' experience and the current version of § 7701(b)(1)(A) pertaining to aliens suggest that Congress would augment any mechanical test of physical residence with a parallel test of domicile, or something like domicile.

For a U.S. citizen, the analogue to an alien's immigration law status as a permanent resident is the citizen's citizenship. Thus, by this thought game, we wind up with the status quo. As the states' experience demonstrates, domicile as a factually unwieldy definition of residence for income tax purposes is manipulable by the taxpayer and is difficult for the states to enforce. Domicile is nevertheless a useful, gap-filling approach to residence for income tax purposes since mechanical tests of residence can also be manipulated and can be under-inclusive. Citizenship (like permanent resident status) is an efficient proxy for domicile. Thus, the states' experience buttresses the United States' citizenship-based approach to income taxation. Citizenship is an efficient, administrable proxy for domicile.

Just as statutory residence laws can be under-inclusive, citizenship can be over-inclusive as a proxy for domicile. However, U.S. citizenship-based income taxation is abated through many devices such as credits for foreign

58. I.R.C. § 7701(b)(1)(A)(i) (2015).

59. I.R.C. § 7701(b)(1)(A)(i) (2015).

income taxes,[60] the generous exclusion from gross income for foreign earned income and for housing allowances,[61] and treaty provisions to avoid double taxation.[62] In light of these devices, U.S. citizenship serves the same gap-filling function as does state domiciliary status, taxing the relatively affluent U.S. citizen when he does not pay income tax to the nation in which he currently resides.

I thus confess that, just as I am unimpressed by stories about Boris Johnson or by complaints that U.S. citizenship-based taxation is *sui generis,* the self-serving pleadings of U.S. citizens living abroad leave me unconvinced. If a U.S. citizen makes less than the amount of income excluded by § 911 or pays creditable income taxes to his country of residence at a rate equal to or exceeding his U.S. tax rate, this citizen pays no income tax to the United States. U.S. citizenship-based taxation is gap-filling, requiring U.S. income tax payments only when a relatively well-paid U.S. citizen pays no tax where he lives.

The most compelling example of over-inclusiveness is the so-called "accidental" U.S. citizen who does not know and cannot realistically be expected to know that she is a U.S. citizen, subject to worldwide income taxation. The Internal Revenue Code already contains provisions which facilitate the renunciation of U.S. citizenship by such accidental citizens.[63] It is possible that these provisions should be expanded further.

On balance, however, citizenship is an administrable proxy for domicile and serves the same gap-filling function as does domicile in the states' income tax systems. Other nations' residence-based income tax systems confront factually unwieldy determinations of residence similar to the messy, fact-intensive tax controversies routinely decided by the U.S. state courts on the subject of domicile.[64] The U.S. system of citizenship-based taxation eliminates these sprawling controversies, replacing the factually subjective domicile inquiry with the bright line rule of citizenship.

Moreover, among those who advance a benefits theory of citizenship taxation,[65] the right to return to the United States is frequently cited as the most important benefit of a U.S. passport. This argument suggests that U.S. citizens who reside abroad for extended stays view the United States as a permanent location to which they will some day return. The right of return indicates permanent allegiance. Hence, U.S. citizenship again proves to be a reasonable proxy for U.S. domicile.

60. I.R.C. § 901 (2015).

61. I.R.C. § 911 (2015).

62. *See, e.g.*, U.S. Treasury, United States Model Income Tax Convention of November 15, 2006, art. 4(3) (containing provisions to assign a single state of residence to dual residents); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains art. 24, U.S.-U.K., July 24, 2001, S. Treaty Doc. No. 107-19 (2002).

63. I.R.C. § 877(c) (2015) (special relief for certain dual citizens and minors).

64. Zelinsky, *Citizenship and Worldwide Taxation*, *supra* note 6, at 1324-42.

65. *Id.* at 1345.

Conclusion

The states' difficulties enforcing domicile-based taxation highlight the administrative benefits of citizenship-based taxation. As long as residence is understood for tax purposes in terms of domicile, citizenship is an efficient proxy for such domicile. The states' experience defining residence supports the United States' citizenship-based approach to federal income taxation. Under the Internal Revenue Code, citizenship is an administrable proxy for domicile and serves the same gap-filling function played by domicile under the states' income taxes.