

# Uncle Sam Wants ... Who?

## A Global Perspective on Citizenship Taxation

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### Abstract

*Across the globe, banks are flagging accounts with indicia indicating their owners may be “US Persons,” making it possible for the United States to enforce its taxation of nonresident citizens extraterritorially for the first time in history. The indicia method constitutes a mining expedition for US Persons carried out by foreign banks and governments. Establishing a tax jurisdiction in this manner is unprecedented and has significant practical and normative consequences. In the case of so-called “accidental Americans,” it violates one of the most fundamental and universally- acknowledged tenets of taxpayer rights, namely, the right to be informed about what the law requires. Third party indicia-searching should be universally rejected as a means of identifying a taxpayer population. Instead, the United States itself is responsible for cataloguing, informing, and educating its global population of taxpayers. Those who don’t belong in the system should be allowed to opt out without cost.*

### Table of Contents

Introduction .....	1
I. The Accidental American: Origin and Implications .....	3
A. Tina’s Story .....	3
B. Law’s Intent: the “US Person” .....	6
C. Law’s Reach after FATCA .....	12
1. Physical Presence .....	14
2. Citizenship .....	15
3. Legal Permanent Residence .....	20
II. Between Law and Practice: Injustice.....	22
A. Ignorance .....	23
B. Obscurity of Principles .....	24
C. Administrative Neglect .....	27
III. Citizenship-Based Taxation Rejected .....	27
Conclusion .....	31

### INTRODUCTION

Financial reporting rules adopted by the US Congress in 2010 inadvertently exposed an unofficial category of taxpayer: the

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“accidental American.” An accidental American is a person who lives most or all of her life outside the United States unaware that she is subject to US income taxation solely because she is a US citizen by birth.<sup>1</sup> To discover one’s accidental American status is to wake up to a shocking realization that one has failed to fulfill annual income tax and financial reporting requirements, with serious civil and criminal law implications. Up until 2010, most accidental Americans never woke up to their status and its consequences. Instead, most lived out their entire lives undetected and ignored by the US tax authorities. Everything changed with the adoption of the Foreign Account Tax Compliance Act (FATCA).

FATCA reversed a century-long status quo under which the US nominally claimed a tax jurisdiction it could not enforce against a population it could neither identify nor control. It did so the only way such an extraordinary claim could be enforced: by applying economic pressure to compel the assistance of foreign institutions and foreign governments in the task. This Article contends that the international cooperation brought about by FATCA to enforce taxation on accidental Americans represents an unprincipled break from a global consensus regarding appropriate limits to the state’s jurisdiction to tax. The acquiescence of other states to this breach portends serious consequences for the rule of law and for the rights of those affected by the new status quo.

Part I begins by analyzing the population of taxpayers claimed 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 explores the implications for US lawmakers as well as US relations with the international community of states. Part III rejects the current US jurisdictional claim as legally, normatively, and practically indefensible, and argues for reforms that would improve the fairness and efficiency of US law while ensuring its sustainability in light of evolving global tax cooperation norms. The Article concludes that while contemporary US political reality suggests that the legal reforms necessary to achieve these goals are unlikely in the near term, incremental regulatory reforms are both necessary and plausible.

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<sup>1</sup> 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. US citizenship is conferred automatically by birth in a variety of circumstances, discussed *infra*.

## **I. THE ACCIDENTAL AMERICAN: ORIGIN AND IMPLICATIONS**

In a presentation to an audience assembled to discuss taxpayer rights in November of 2015, I introduced “Tina,” a Canadian citizen and resident who is also an accidental American.<sup>2</sup> Tina’s story is helpful for understanding how it is that accidental Americans come to be, and why their very existence represents both a normative and a practical failure of law. Accordingly, this section recounts the main features in Tina’s story to explain how and to what extent FATCA enables citizenship-based taxation. It then explores how and to what extent citizenship-based taxation continues to be unenforceable despite FATCA, and why both enforcement and non-enforcement of citizenship-based taxation via FATCA are objectionable.

### **A. TINA’S STORY**

In brief, Tina is a person nearing retirement age who recently received a letter from her bank informing her that, in accordance with FATCA, the bank undertook a review of their files and discovered a piece of paper indicating that she was born in the United States.<sup>3</sup> Accordingly, the bank sought to inform Tina that it would be reporting her account information to the Internal Revenue Service (IRS) unless she could prove she was not in fact a US Person for US tax purposes.<sup>4</sup>

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

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<sup>2</sup> Allison Christians, *Understanding the Accidental American: Tina’s Story*, 80 Tax Notes Int’l 833 (Dec. 7, 2015). “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-border 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.

<sup>3</sup> Indicia-searching is performed pursuant to IRC § 1471 and regulations thereto.

<sup>4</sup> 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. IRC § 1471; 26 CFR 1.1471-4(c)(5)(iv)(B)(2)(i) through (vii); Model Intergovernmental Agreement.

security number or passport, she had never voted in an American election, did not follow US politics or legal conventions beyond passing familiarity gleaned from local news media, and considered herself Canadian all her life. Tina is, in short, the quintessential accidental American.

Like many accidental Americans do, Tina then learned from an accountant that unless she at some point renounced or relinquished her US citizenship, she is a US person with annual tax and financial reporting obligations.<sup>5</sup> To her knowledge, Tina had not relinquished or renounced her citizenship. Even if she does so now, she will continue to be a US Person for tax purposes until she demonstrates five years of compliance with US tax law and undertakes certain documentary requirements for exit.<sup>6</sup>

The immediate problem for compliance is that Tina has not planned her financial life with US tax law in mind. US tax law is complex by any measure, but it is especially so when applied to foreign assets and income items. Had Tina understood that US law would apply to her in advance, she would have made different financial choices over the years. For example, she would have scrupulously avoided certain kinds of pooled investment vehicles (i.e., mutual funds), to avoid punitive taxes and interest charges.<sup>7</sup> She might have even taken drastic steps such as putting all of her assets in the name of her non-US spouse. She did not make those choices, however, and by the time FATCA alerted 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 US 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.<sup>8</sup> However, proper advice and planning is extremely expensive. Moreover, even if, failing to obtain proper advice, Tina was nominally subject to enormous fines, penalties, and interest, she would be immune to collection by the IRS because she is a citizen of Canada, and all of her assets and income

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<sup>5</sup> IRC § 7701(a)(30).

<sup>6</sup> IRC § 877A.

<sup>7</sup> IRC § 1291 *et seq* (PFIC).

<sup>8</sup> *See, e.g.*, Hugh Ault & Brian Arnold, *COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS*; Avi-Yonah, *International Tax as International Law; Canada-US Tax Convention*. While the US 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 US will relieve double taxation, including in the case of citizens.

are located there.<sup>9</sup> Tina is likely unaware of her rights, but probably would not risk falling afoul of the government of the United States even if she was so aware.

Tina's story demonstrates that the United States lacks control over accidental Americans precisely because this population resides permanently outside the territory, under the control of another sovereign authority.<sup>10</sup> Despite its claimed authority over accidental Americans, the ability of the United States to reach across borders to coerce their obedience to its rule is limited. Accordingly, this ability has never been exercised effectively.

For this reason, citizenship-based taxation looks like an antiquated policy in the context of a world of increasing cross-border mobility.<sup>11</sup> Up until 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 US citizenship. Tina's experience demonstrates that FATCA has made it possible 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.

Instead, as FATCA comes closer to implementation in practice, it reveals ever more clearly that the gulf between the jurisdiction claimed and that which can be enforced is permanent, and fatal to the legitimate exercise of authority. The fact that even a comprehensive extraterritorial rule like FATCA does not close this gulf demonstrates that taxing nonresidents on a worldwide basis cannot be a legitimate act by a state. Even so, propped up by

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<sup>9</sup> See Canada-US Convention Art. XXVIA. The impossibility of collection may assist her in coming to a negotiated settlement with the IRS, were Tina aware of her right to appeal and negotiate and able to afford adequate professional advice.

<sup>10</sup> See IRC § 7701(a)(1)(30)(A), (b)(1)(A) ("US Person" includes 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 US 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. IRC § 871 et seq. This distinction can cause some confusion and is discussed more fully below.

<sup>11</sup> See Ruth Mason, *Taxing Citizenship*, 89 S. Cal. L. R. (2015); Reuven S. Avi-Yonah, *The Case Against Taxing Citizens*, University of Michigan Law School Law & Economics Working Papers. Paper 12 (2012) (arguing that taxation on the basis of citizenship has no place in today's globalized society).

history, politics, and sentiment, the US jurisdictional claim remains a policy that is not easily dislodged.

Understanding how the United States defines its population of taxpayers thus 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 in faulty implementation.<sup>12</sup> We may begin to explore the difficulty by reviewing the framework of the US tax jurisdiction and analyzing its rapidly changing scope under FATCA.

### **B. LAW'S INTENT: THE "US PERSON"**

To understand how someone like Tina can even exist 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. In respect of the US 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 generally<sup>13</sup> imposes income taxation on four groups of people:<sup>14</sup>

1. People who reside in the territory (as assessed by periods of physical presence);<sup>15</sup>
2. Citizens;<sup>16</sup>
3. People who are lawfully entitled to reside permanently in the territory (green card holders);<sup>17</sup> and

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<sup>12</sup> As in many cases, an argument can be made that law rarely if ever perfectly fulfills its own intentions: all rules are flawed and all implementation involves problems of under- and over-inclusion and tradeoffs between accuracy and fairness, among other issues. As a result, scholars and policymakers often remark that the perfect should not be the enemy of the good: if we wait for law to be perfect in design and implementation there can be no law at all. However, law's administrability is measured in degrees

<sup>13</sup> The complexity of the US tax code is such that it has become habitual to attach the word "generally" to virtually every statement of legal principle in US 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.

<sup>14</sup> The word "person" includes certain legal entities under US tax law. 26 USC 7701(a)(1). 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.

<sup>15</sup> 26 USC 7701(b)(3).

<sup>16</sup> IRC § 7701 (a)(1)(30)(A).

<sup>17</sup> IRC §7701 (a)(1)(30)(A), (b)(1)(A).

4. People who are not described above but who earn income from US sources.<sup>18</sup>

Together, groups 1 through 3 are referred to as “US Persons.”<sup>19</sup> Individuals described in group 4 are referred to as nonresident aliens or foreign persons.<sup>20</sup> US Persons are generally taxed on a worldwide basis—all income, from whatever source derived, while foreign persons are generally subject to US tax only on their US-source income.<sup>21</sup>

It should be immediately clear that individuals who fall into categories 1 and 4 are readily accessible to tax law enforcement efforts by the United States. This is because the state controls either the person receiving the income or the person paying the income, or both.<sup>22</sup> In the case of people who reside within the territory, the United States has control by virtue of its normal control over the territory as a matter of sovereign rule. 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. This power explains why most countries with income tax systems impose comprehensive taxation on the basis of an individual’s sustained presence within the jurisdiction, regardless of nationality.<sup>23</sup> Worldwide taxation of residents is therefore a common practice.

In the case of people who do not reside in the territory but who earn income from US sources (category 4 above), the United States can similarly coerce obedience to its tax laws by virtue of its control over either the payors of the income or the property generating the income.<sup>24</sup> With respect to the former, withholding

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<sup>18</sup> IRC §7701(b).

<sup>19</sup> IRC §7701(a)(30).

<sup>20</sup> IRC §7701(b)(1)(B).

<sup>21</sup> US Persons are taxed on all income from wherever derived. IRC § 61. Nonresident aliens are generally subject to US federal tax on income that is effectively connected to a trade or business in the United States and on certain fixed or determinable annual or periodic income from US sources. IRC §§ 871, 872, 897.

<sup>22</sup> 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.

<sup>23</sup> See Ault & Arnold, *supra* note 8.

<sup>24</sup> Thus for nonresidents’ income from items such as stocks, bonds, licenses, and the like, the US (like most countries), imposes obligations to report and withhold taxation at source. IRC §1441. However, where the source of the income is fixed in place, for example in the case of real property, the United States generally

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. Where reporting and withholding is not mandated by law, and property is not easily seized, the power of the state to compel compliance dissolves. In such cases, the state loses its power to tax consistently. The power over the payor and the property explains why most countries with income tax systems impose taxation on nonresidents on the basis of source.<sup>25</sup>

The power of the state to compel compliance with respect to the remaining two categories (2 and 3 above) is inherently inconsistent. It is markedly reduced where the conditions relevant to taxation in the other two categories are also 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.<sup>26</sup> It can similarly assert its rule over US-source income as to citizens and green-card holders who earn income from US sources.

The same cannot be said of non-US source income earned by nonresident citizens and green card holders. As to these individuals, consistent US taxation is virtually impossible without dedicating an inordinate amount of administrative resources, including that of other countries at their own expense.<sup>27</sup> It is for this reason that the vast majority of the world eschews the taxation of nonresidents on foreign income, even if they are citizens or nationals.<sup>28</sup> Taxation based solely on legal status is necessarily haphazard and therefore violates established norms of fairness.<sup>29</sup>

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allows nonresident taxpayers to self-report. This makes sense because nonpayment can be cured by asset seizure.

<sup>25</sup> See e.g. Ault & Arnold *supra*.

<sup>26</sup> 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 taxing 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 is embracing US-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*, 7 January 2015, at <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 non-residents based on their legal status, which virtually no country exercises, including China.

<sup>27</sup> See, e.g., Susan Morse, *Ask for Help, Uncle Sam: The Future of Global Tax Reporting*, 57 Villanova L. Rev. 529 (2012).

<sup>28</sup> 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

Even though it lacks the physical control associated with residence and source-based taxation, some opportunities arise for the United States to enforce its tax jurisdiction on certain nonresidents with non-US source income. For example, the IRS appears to have broad powers to seize the bank deposits of many nonresident US Persons through the global banking system, even if such individuals never directly interact with the US economy.<sup>30</sup>

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does this to finance ongoing war, and had been denounced by the United States, Canada, and the United Nations for the practice. United Nations Security Council Resolution 2023,

<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”).

Some countries, including Finland, Hungary, Spain, and Turkey, have “clinging” residency rules that in general terms treat nonresident citizens as tax resident for a specified time period, sometimes with exceptions for treaty countries or a showing of real ties to another jurisdiction. See

<http://www.vero.fi/en->

[US/Individuals/Moving\\_away\\_from\\_Finland/Finnish\\_citizens\\_and\\_the\\_3year\\_rule%2817511%29](http://www.vero.fi/en-US/Individuals/Moving_away_from_Finland/Finnish_citizens_and_the_3year_rule%2817511%29) (Finland); <http://eoi-tax.org/jurisdictions/HU#agreements> (Hungary);

[http://www.ey.com/Publication/vwLUAssets/International\\_tax\\_alert\\_-\\_19\\_January\\_2012\\_-](http://www.ey.com/Publication/vwLUAssets/International_tax_alert_-_19_January_2012_-)

[\\_Spain\\_reduces\\_its\\_tax\\_haven\\_blacklist/\\$FILE/EY\\_tax\\_news\\_2012012408.pdf](http://www.ey.com/Publication/vwLUAssets/International_tax_alert_-_19_January_2012_-_Spain_reduces_its_tax_haven_blacklist/$FILE/EY_tax_news_2012012408.pdf) (Spain);

<http://www.kpmg.com/global/en/issuesandinsights/articlespublications/taxation-international-executives/turkey/pages/income-tax.aspx> (Turkey). Other countries, notably Italy and France, treat non-resident citizens as permanent tax residents if they move to certain listed jurisdictions. See

[http://www.agenziaentrate.gov.it/wps/file/Nsilib/Nsi/Documentazione/Fiscality+internazionale/Black+list/Black+list+in+vigore+dal+19+febbraio+2002/Decreto+Ministeriale+del+4+maggio+1999/dm+4\\_5\\_99.pdf](http://www.agenziaentrate.gov.it/wps/file/Nsilib/Nsi/Documentazione/Fiscality+internazionale/Black+list/Black+list+in+vigore+dal+19+febbraio+2002/Decreto+Ministeriale+del+4+maggio+1999/dm+4_5_99.pdf) (Italy);

<http://www.legimonaco.mc/305/legismclois.nsf/db3b0488a44ebcf9c12574c7002a8e84/a7ab7aa3f21e31c3c1257c5a002f1824> (France treats nonresident citizens as permanent tax residents if they move from France to Monaco, per a treaty between the two nations).

<sup>29</sup> Horizontal equity is perhaps the most obvious fairness norm that is violated by an arbitrarily-applied tax law. *Contra*, see Michael Kirsch, *21st Century Taxation of Americans Abroad: Citizenship-based Taxation vs. Residence-Based Taxation*, 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).

<sup>30</sup> The IRS may generally seize financial assets held by US banks, subject to a 21-day notice period. 26 USC 6331, 6332, 7401; 26 CFR 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. 26 USC 6861; see *United States v Stonehill*, 702 F.2d 1288 (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 Civ. 2016 (RPP) (S.D.N.Y. 1993). This would suggest that a deposit in a foreign branch could be seized indirectly by imposing the levy on a US branch of the same bank,

Moreover, the United States could physically seize a person who makes herself available to seizure, such as by physically crossing in to 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 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.<sup>31</sup> Even if the law is effectively unenforceable, many US Persons will at least attempt to comply once they know that compliance is expected.

Similarly, 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,<sup>32</sup> registration at an embassy or consulate for travel or other purposes, or registration to vote are neglected opportunities for taxpayer information and education. For 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 residence outside the United States must seek

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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, Tax Management Portfolio 637-2d (2006, as periodically updated), note 770. The IRS may enforce a levy on deposits held by a foreign branch of a US bank if the IRS specifies its intent to do so in its notice of levy on the US bank, which it may so specify if the IRS "believes that the taxpayer is within the jurisdiction of a US court" and the foreign branch possesses deposits of the taxpayer. Reg. § 301.6332-1(a)(1). US Persons are within the jurisdiction of a US court by virtue of 26 USC 7701(a)(39) ("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 US bank to seize deposits from its foreign branch where it "believes" a US Person is involved. It is not clear what belief means as applied to the IRS.

<sup>31</sup> The mere articulation of 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, as discussed more fully *infra*.

<sup>32</sup> The parents of a child they believe to be a US citizen who is born abroad can obtain a certificate of "consular registration of birth abroad of a citizen of the United States of America," so long as their belief is valid. 22 CFR 50.7. The certificate is obtained by 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.

re-entry permits after one year and renew every two years thereafter in order to preserve their status.<sup>33</sup>

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 and identifies as such, and never enters US territory, and the green card holder who stays abroad permanently without meeting documentary requirements, are less likely candidates for coerced extraterritorial enforcement of the US 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 US law enforcement unless they were also descriptively covered in the residence or source categories. To the extent such individuals complied with US tax law, they did so on a purely voluntary basis.<sup>34</sup> Statistical assessment of nonresident tax filings suggest that volunteerism was the exception rather than the rule.<sup>35</sup>

Accordingly, before FATCA was enacted, the US tax jurisdiction was unequally enforceable across the four categories of taxpayer. For those taxed on the basis of source or residence, the jurisdiction has been enforceable, that is, capable of being fairly

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<sup>33</sup> See USCIS, Maintaining Permanent Residence, <http://www.uscis.gov/green-card/after-green-card-granted/maintaining-permanent-residence>.

<sup>34</sup> This is still true after FATCA because unenforceability remains a systemic problem for the US 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 US Persons. If that is so, FATCA's main impact may in future be judged as an exercise in introducing little but fear to the US 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.

<sup>35</sup> See, e.g., Ruth Mason, *supra* note 11; National Taxpayer Advocate Reports. 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 and Michel R. Stein, *FBAR Enforcement-Five Years Later*, 10 J. Tax Prac. & Proc. 23 (2008-2009); Eschrat Rahimi-Laridjani, *FBAR-Where We Are and How We Got There*, 8 J. Tax'n Fin. Products 25 (2009-2010).

applied as a matter of administrative capacity. For those taxed on the basis of legal status, however, the enforceability of the tax jurisdiction has 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 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 US tax jurisdiction does not align with the US tax jurisdiction as defined by statute. Instead, FATCA made some people more likely to be visible to the IRS as US Persons whether they belong in that category or not, as a matter of law, while structurally ignoring other people who are in fact US 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 US Persons throughout the world.<sup>36</sup> In so doing, for the first time in US history, the United States is cataloguing a globally dispersed population of nonresident US Persons. But it is doing so in a way that is guaranteed to be both inconsistent and unfair.<sup>37</sup>

FATCA accomplishes its cataloguing function with a two-step classification system involving a list of indicia and a self-certification process. These two steps are buttressed by a requirement that "relationship managers" make assumptions about US Person status by using facts known to them that may be (but are not necessarily) relevant to determining that status. The

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<sup>36</sup> 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.

<sup>37</sup> This point is driven home by US lawmakers themselves, in the context of proposing specific reforms to just one aspect of citizenship tax namely, the harsh rules for expatriation as applied to permanent nonresidents who happened to acquire US citizenship at birth but have never acted upon that status in a meaningful way. See Joint Committee on Taxation, DESCRIPTION OF CERTAIN REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 2016 BUDGET PROPOSAL 289 (Sept 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 underinclusive" and noting that "It is ... difficult to imagine any sort of subjective test that could be administered consistently and fairly" across this population.").

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.

Perhaps surprisingly, FATCA's identification method does not align with the statutory construction of the US Person population described above. The misalignment is evident when comparing the three US Person categories to the FATCA indicia meant to alert financial institutions to the possible existence of a US Person. The misalignment continues to the verification phase, where taxpayers are asked to furnish various negative proofs of their status as US 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 US taxation and financial reporting requirements on nonresidents.

FATCA has financial institutions searching for US Persons by looking for the following "indicia" of status:

1. account holder is identified as a US citizen or resident;
2. birthplace in the United States;
3. a US telephone number;
4. a US residence or mailing address;
5. standing instructions to transfer funds to a US based account;
6. Indications of a power of attorney over the account to a person with a US address;
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 US Person, and must monitor its accountholders for possible changes in circumstances.<sup>38</sup>

Other than the first factor on the list, the FATCA indicia do not align with the three categories of US Person as defined by § 7701.

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<sup>38</sup> 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. 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. 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.

None of the other indicia—even birthplace in the United States—is incontrovertible evidence of such status.<sup>39</sup>

### **1. Physical Presence**

As described above, the first category of US Person 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 US tax laws.

The test for this category of US Person for tax purposes is an objective quantitative measurement, namely, days spent in the United States.<sup>40</sup> The greatest advantage of this bright line test is its certainty: with little room for ambiguity, humans are always present in a given place, and one place only.<sup>41</sup> 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.

Discovering US 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 would 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

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<sup>39</sup> The complexity associated with actually 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.

<sup>40</sup> Substantial presence is defined in terms of physical presence exceeding a number of days calculated under a weighted formula. 26 USC 7701(b)(3).

<sup>41</sup> 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.

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 probably that someone who lists a US address as their residence in a non-US bank's account records is in fact present at that address for some significant number of days in the year. Similarly, a US 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 US mailing address seems more attenuated. As to the nonresident accountholder herself, having a US-based power of attorney might be explained by having a child who immigrated to the United States, which says nothing about her own status.<sup>42</sup> The power of attorney on a non-US 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.<sup>43</sup>

## 2. Citizenship

“Citizens” are the second category of US 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 her birthplace in the United States. The first of these indicia confirms the voluntary nature of the nonresident citizen's acquiescence to her status. Announcing oneself as a US citizen to a non-US bank seems to be the clearest indication that the accountholder is in fact a US citizen and therefore a US Person for tax purposes.<sup>44</sup>

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<sup>42</sup> This could be common among non-citizen residents of neighboring Canada, for instance.

<sup>43</sup> 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 purposes of childbirth in the nearest hospital.

<sup>44</sup> This is probably most often accomplished by opening the account with a US 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 US citizen should be interpreted as knowledge of one's obligations to file income tax returns in the

Birthplace in the United States, however, highlights a major difficulty in imposing citizenship taxation. A person born within the territory of the United States is usually entitled to birthright citizenship, with few exceptions.<sup>45</sup> That is why Tina is automatically a citizen, without any independent action on her part or that of her parents. However, the definition of a citizen in US law is complex and is subject to widespread misunderstanding by those who receive the status by birthright but have never lived permanently in the country.<sup>46</sup> Moreover, citizenship can be changed by the individual through relinquishment<sup>47</sup> or

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United States. *See e.g.* JCT *supra* 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 US passport (other than for departing the United States) might be considered blameless for not having complied with U.S. citizenship-based tax obligations.”).

<sup>45</sup> *U.S. v. Wong Kim Ark*, 164 U.S. 644 (1898); Expatriation Act of 1907; Exceptions apply to the children of diplomatic officers and others; in addition the rules for US territories and possessions are myriad and complex. See 8 USC 1101(a) (22); US State Department Foreign Affairs Manual, “Acquisition of US Nationality in US Territories and Possession,” 3 January 2013 online: < <http://www.state.gov/documents/organization/86756.pdf>>.

<sup>46</sup> For example, common beliefs include that citizenship must be accepted or activated by the individual and that birth does not confer citizenship automatically but requires application by a parent. The potential for misunderstanding is increased in the case of those born abroad because the application has changed over time for this group. 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.” US Constitution, Art 1 §8 cl. 4; 8 USC §1251 details the extent to which state jurisdiction may apply. 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 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 (USCIS) the agency directly responsible for administering the Immigration and Nationality Act. USCIS 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 *PBS Newshour*, “Obama’s immigration executive actions on hold until legal challenge resolved”, 28 May 2015 online: <http://www.pbs.org/newshour/bb/obamas-immigration-executive-actions-hold-legal-challenge-resolved/>; USCIS, “Executive Actions on Immigration”, accessed 29 July 2015 online: <http://www.uscis.gov/immigrationaction>.

<sup>47</sup> See generally, US State Department Foreign Affairs Manual, “Loss and Restoration of US Citizenship,” 19 December 2014 online: < <http://www.state.gov/documents/organization/109065.pdf>>; 8 USC 1481-1489 (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 (generally), or committing an act of treason).

renunciation.<sup>48</sup> In the past, it was possible for a person to relinquish her citizenship automatically upon naturalization in another country.<sup>49</sup> However, the US Supreme Court rejected this position and reinstated citizenship once thought lost.<sup>50</sup> Today, the individual must display intent in order to lose citizenship status.<sup>51</sup>

The interplay of these immigration rules with taxation on the basis of citizenship is subject to intense debate and certainly exceeds any scope of common wisdom.<sup>52</sup> In the past, expatriation would have automatically negated a person's citizenship status for tax purposes; at present, it does not.<sup>53</sup> Indeed, the definition of citizen for tax purposes is potentially circular in the application.<sup>54</sup> 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, as mailing address is to substantial presence, birthplace is to citizenship. In a vast majority of cases, a person

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<sup>48</sup> 8 USC 1481(a)(5), (a)(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 USCIS. 8 CFR 340.2; Order Granting Order for Permanent Injunction, *Gorbach v. Reno*, 2001 WL 34145464 (February 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. 8 USC Sec. 340(a), 66 Stat. 260 (1952), 8 U.S.C. Sec. 1451 (a). See *Kungys v. United States*, 485 U.S. 759 (1988); *Johannessen v. United States*, 225 U.S. 227 (1912); *Polites v. United States*, 364 U.S. 426 (1960); *Knauer v. United States*, 328 U.S. 654 (1946); *Fedorenko v. United States*, 449 U.S. 490 (1981).

<sup>49</sup> *Savorgnan v. United States et al.*, 338 U.S. 49 (1950), *Rogers v. Bellei*, 401 U.S. 815 (1971).

<sup>50</sup> *Vance v. Terrazas*, 444 U.S. 252 (1980).

<sup>51</sup> *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Vance v. Terrazas*, 444 U.S. 252 (1980). However, see 8 USC 349(b) for rebuttable presumptions. See also U.S. Department of State Foreign Affairs Manual Volume 7—Consular Affairs § 1200 Appendix B.

<sup>52</sup> 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.

<sup>53</sup> 26 USC 877A, 7701(a)(50). Specifically, the American Jobs Creation Act of 2004 “created a disparity between expatriation for nationality purposes and expatriation for tax purposes.” ABA Section of Taxation, Letter to IRS Commissioner requesting Guidance for Tax Status of Certain Expatriates, March 2, 2015.

<sup>54</sup> ABA Section of Taxation, Letter to IRS Commissioner requesting Guidance for Tax Status of Certain Expatriates, March 2, 2015, at 9-10 (discussing the interplay of 26 USC 877A(g)(3) with 8 USC 1481).

born in the United States is probably still a US 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 US Persons who are also birthright citizens, namely, those born or adopted abroad with claims to citizen status by virtue of their parentage.<sup>55</sup> 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.<sup>56</sup> However, that is the relatively easy case. With one citizen parent, birth abroad is less straightforward; it depends on the date of birth and typically involves some analysis of physical residence.<sup>57</sup> The list of rules and exceptions is long. Like Tina,

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<sup>55</sup> United States Constitution, Amendment 14; INA 301(a),301(b), 302, 304-307; *United States v. Wong Kim Ark* (1898) 169 US 649; 8 USC 1401; 8 CFR 322.

<sup>56</sup> 8 USC 1401 (c).

<sup>57</sup> 8 USC 1401 (including within the definition of a US citizen at birth, *inter alia* “(c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person; (d) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States; (e) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person; and (g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a

many individuals who obtain citizenship through a parent are accidental Americans, unaware of the tax consequences attending to the citizenship status conferred upon them at birth.

US 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 US Persons regarding their significant tax obligations. The same is now occurring in respect of advising individuals as to their US citizenship status through parentage.

Even as the citizenship tax compliance industry establishes itself, however, many persons who might be US 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, the Joint Committee 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."<sup>58</sup> That volitional quality still exists, depending on the circumstances of birth (and appetite for concealment). 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 US tax obligations may be easily remedied by simply renouncing their citizenship.<sup>59</sup> These newly

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member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date; and (h) a person born before noon (Eastern Standard Time) May 24, 1934, outside the limits and jurisdiction of the United States of an alien father and a mother who is a citizen of the United States who, prior to the birth of such person, had resided in the United States.").

<sup>58</sup> JCT *supra* at 288.

<sup>59</sup> 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. IRC §§ 877A, 7701(a)(50). Tax compliance is complicated by the need to obtain a social

awoken accidental Americans, compelled by circumstances or conscience to confront the expansive US 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 US citizens born abroad, namely immigrants who acquired their citizenship status by naturalization.<sup>60</sup> This group is fundamentally unlike birthright citizens in that naturalization is a voluntary undertaking. Yet for the most part, a naturalized citizen who moves away from the United States looks to a financial institution exactly like a US citizen born abroad: virtually undetectable without personal knowledge.

It seems at least debatable whether the United States truly seeks to draw in the population of US citizens born elsewhere, given that the FATCA indicia are in no way designed to expose them. Yet this kind of line-drawing is a source of systemic unfairness. 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 US parent instead, she may never be forced to confront this legal regime even if she is in fact a US citizen, whether by birth or by choice. If all of citizens are US Persons by legal definition, systemically creating differences in the enforcement of the tax law seems problematic.

### **3. Legal Permanent Residence**

Finally, and also missing completely from FATCA's indicia search, are the third category of US Persons, namely, green card holders. Like those born abroad with access to US 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

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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.

<sup>60</sup> Wex Legal Encyclopedia "Naturalization" <https://www.law.cornell.edu/wex/naturalization>; 8 USC 1421; See also INA at 101, 313-316, 332-334; See also, the USCIS Policy Manual Volume 12, Part 2, online: < <http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartD.html>>.

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.<sup>61</sup> 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 government. For example, after acknowledging that the United States considers green card holders to be US Persons, the Canada Revenue Agency advises against identifying as such to Canadian financial institutions.<sup>62</sup>

This seems difficult to square with the notions of voluntariness. 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 US taxation as any nonresident citizen, and in many cases more so. Taxing non-residents solely on the basis of their legal status is again difficult to view as just in the application, when 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 US Person.<sup>63</sup> Each type of indicia requires distinct forms of documentary negative proofs of US Person status. These proofs range from a certificate of loss of nationality and a certificate of non-US Person status,<sup>64</sup> to proof of

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<sup>61</sup> Although it differs in the lack of need for a certificate of loss of nationality to prove non-US status, thus avoiding the circular timing problem posed by 26 USC 877A and 7701(a)(50).

<sup>62</sup> CRA, Information for individuals with accounts with Canadian financial institutions, at <http://www.cra-arc.gc.ca/tx/nnrstdnts/nhncdrprtng/ndvdl-eng.html> (“I hold a U.S. green card. How does this affect my tax residency? 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.”).

<sup>63</sup> 26 CFR 1.1471-4(c)(5)(iv)(B)(2)(i) through (vii).

<sup>64</sup> Required if the relevant indicia is birthplace in the United States. 26 CFR 1.1471-4(c)(5)(iv)(B)(2)(ii) (Documentation to be retained upon identifying US

‘foreign’ citizenship (government-issued ID that evidences foreign citizenship),<sup>65</sup> to “Proof of claim of foreign status,”<sup>66</sup> which may include a certificate of residence from a foreign tax authority, a government-issued identification (driver’s license), or an approved similar certificate.<sup>67</sup> In practice it is easier for institutions to apply one type of documentary proof, namely, a self-certification of US status or non-US status (W9 and W8BEN, respectively).<sup>68</sup> 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 US Person status. The certificate of loss of nationality proves that a person lacks US citizenship, but is silent as to other US Person status. Instead, the proofs are again more or less weak proxies. The key to FATCA, and therefore to comprehensive US income taxation of US 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 US Persons thus does not eliminate arbitrary enforcement of citizenship-based taxation at all. It merely shifts the goalposts.

## II. BETWEEN LAW AND PRACTICE: INJUSTICE

Imperfectly integrated over 100 years, the architecture of taxation and citizenship in the United States is best described as Escher-like, if not Kafkaesque. It involves two legal structures imperfectly coupled 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.

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indicia); 1.1471-3(c)(3) (withholding certificates); 1.1471-3(c)(5)(i)(B) (evidence of foreign citizenship).

<sup>65</sup> Required where the relevant indicia is designation as a citizen or resident or birthplace in the United States, 26 CFR 1.1471-4(c)(5)(iv)(B)(2)(i) and (ii).

<sup>66</sup> Required where the relevant indicia is a US address or telephone number, or US power of attorney. 26 CFR 1.1471-4(c)(5)(iv)(B)(2)(iii)-(v), (vi).

<sup>67</sup> 26 CFR 1.1471-3(c)(5).

<sup>68</sup> As described in 26 CFR 1.1471-3(c)(3).

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 its subjects. 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 US Persons, some will no doubt incorrectly identify as US Persons, while other will incorrectly self-identify as non US Persons. This will unearth a globally dispersed subpopulation of persons incorrectly identified as US 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 US Persons—false negatives.

All false positives will be subjected to automatic reporting of their financial accounts to the IRS, and some may even be subject to US taxation as if they were US Persons, even if they are not. 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 US lawmakers to adopt this policy. The first of these is that “US 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 US 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, US Persons who are resident in the United States appear unmoved by the plight of the non-resident taxpayer population, perhaps especially with respect to birthright citizens. Resident US 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 US citizenship. Conventional wisdom aligns with the idea of volition: that citizenship is a status agreed to rather than conferred.

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 US 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 US 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 US citizenship it is even less intuitive than citizenship itself.

Worldwide taxation, to the extent it is even popularly understood, is associated with residence rather than citizenship around the world. Citizenship-based taxation is an anomaly known to and understood well only by a subset of US tax law experts. Moreover, resident US 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 US persons, changing to residence-based 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.

## **B. OBSCURITY OF PRINCIPLES**

It is universally understood that everyone has the right to know what the law is.<sup>69</sup> In practical terms, most U.S. legal doctrines and texts are routinely accessible to virtually anyone who cares to read

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<sup>69</sup>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 (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 discussion, see J L Huffman, "Retroactivity, the Rule of Law, and the Constitution," *Ala L Rev*, 1999.

them.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> Certainly, sovereign nations have overtly and publicly rejected intrusion by other states, and claimed the exclusive right to rule over their territories and peoples without interference.<sup>73</sup> The principle of non-intervention holds constant as a

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<sup>70</sup> 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. [Tax Analysts lawsuit for APAs and competent authority agreements]; *See, e.g.*, Eleonor Kristoffersson and Pasquale Pistone, *General Report*, in *Tax Secrecy and Tax Transparency: the Relevance of Confidentiality in Tax Law 3* (2013) (explaining limits to public disclosure of taxpayer information and to access or use of taxpayer information gathered by a government). In the United States, the Freedom of Information Act (Hereinafter, “FOIA”) governs public access to certain government actions and documents. 5 U.S.C. § 552 (enacted in 1966 and providing that “any person has a right, enforceable in court, of access to Federal agency records,” subject to enumerated exceptions and exclusions). Other countries have similar legislation; in Canada, the relevant statute is the Access to Information Act (R.S.C., 1985, c. A-1); in Europe, national legislation varies and may be broadly governed by the European Convention on Human Rights, the Convention on Access to Official Documents, and the United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998).

<sup>71</sup> 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.

<sup>72</sup> 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 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.

<sup>73</sup> Allison Christians, “Sovereignty, Taxation, and Social Contract,” *Minnesota Journal of International Law*, 2008.

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.<sup>74</sup> 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.

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 US immigration and nationality laws over the years. As a rule, banks and other financial institutions lack competence to make determinations about US citizenship; the same is true for other governments. Nevertheless, the US has deputized these institutions and governments to make inquiries and collect certifications.

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.

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<sup>74</sup> For example, it seems counter-intuitive 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.

### C. ADMINISTRATIVE NEGLECT

From this observation it follows that it is the state that holds the duty to inform all of its subjects that it considers them subject to its laws, 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 if the consequence for furnishing that information automatically involves retroactively-applied obligations and onerous processes and fees to leave.

On this score, the United States falls far short. The IRS has acknowledged its own failure to inform and educate nonresident US persons about their tax obligations.<sup>75</sup> The National Taxpayer Advocate agrees, and attributes a great deal of noncompliance with US tax law to lack of administrative effort.<sup>76</sup> More recently, TIGTA confirms that the attention paid by the IRS to nonresident US Persons is appropriately characterized as neglect.

### III. CITIZENSHIP-BASED TAXATION REJECTED

In the context of citizenship-based taxation, American exceptionalism now amounts to a perpetuation of injustice. In many respects and perhaps surprisingly, the injustice could be easily remedied by legislators and in some cases administrators. But such action would require discarding some heavy emotional baggage in a political climate that is likely too frail to sustain radical reform. As a result, incremental steps are necessary.

To make citizenship-based taxation fair requires at minimum a rational approach to defining the US Person category. This is the responsibility of the state rather than the individual. Tax law scholars uniformly agree that justice in taxation demands equal treatment of equally-resourced taxpayers and different treatment of differently-resourced taxpayers.<sup>77</sup> But any justice inquiry is futile

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<sup>75</sup> See Tiffanie N. Reker, David C. Cico and Saima S. Mehmood, *Taxpayer Experience of Individuals Living Abroad: Services Awareness, Use, Preferences, and Filing Behaviors* 1, 24 (2012) (demonstrating lack of awareness of nonresident US Persons regarding FBAR and tax filing obligations, because the IRS ceased sending information by post).

<sup>76</sup> Nina Olsen, *The Role of the National Taxpayer Advocate Service in Protecting Taxpayer Rights and Ensuring a Fair and Just Tax System* (video), Jul. 2, 2015, at [http://www.ctf.ca/CTFWEB/EN/Conferences\\_Events/2015/Recordings/15PD-MTL\\_Video.aspx/](http://www.ctf.ca/CTFWEB/EN/Conferences_Events/2015/Recordings/15PD-MTL_Video.aspx/) (noting the lack of IRS resources dedicated to informing nonresident US Persons of their US tax and FBAR obligations).

<sup>77</sup> See, e.g., Ventry and Thorndike, eds., *TAX JUSTICE: THE ONGOING DEBATE* (2002); J. Clifton Fleming, Jr., Robert J. Peroni & Stephen E. Shay, *Fairness in International Taxation: The Ability-to-Pay Case for Taxing Worldwide Income*, 5 FL. TAX REV. 299 (2001); Nancy Kaufman, *Fairness and the Taxation of*

until the threshold category of taxpayer is defined in a principled way.<sup>78</sup> If the state cannot defend its categorization, we by definition lack the inputs necessary to formulate rules that can be considered just.

To know one's status as a US 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 unfair. Never having availed themselves of citizenship, ignorant of the increasing obligations tied to their status, there is no opportunity for withdrawal from US citizenship without both retroactive tax compliance and payment of significant exit fees.<sup>79</sup> Despite its good intentions to make the tax system more fair, FATCA has instead become a "gotcha" with life-altering financial impact on a population that does not even register in most accounts of what fairness requires in taxation.

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 both an explanation of the consequences of continuing US 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.

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*International Income*, 29 LAW & POL'Y IN INT'L BUS. 145 (1998); Joseph M. Dodge, *Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles*, 58 TAX L. REV. 399 (2005).

<sup>78</sup> Allison Christians, *Drawing the Boundaries of Tax Justice*, in QUEST FOR TAX REFORM: THE CARTER COMMISSION 50 YEARS LATER, Kim Brooks, ed. (Carswell, 2013).

<sup>79</sup> 26 USC 877A(g)(3); 7701(a)(50).

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 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 US to identify its citizens as a jurisdictional matter, and to inform this population of their obligations, arises when official determinations are made 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.<sup>80</sup> An adult seeking a current US passport knows she is a citizen because she has asked for and received official verification of that status from the United States itself. Beyond that, the analysis quickly deteriorates.<sup>81</sup>

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<sup>80</sup> 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. Not applying this same rule to the acquisition of citizenship itself prevents a particular injustice in the case of an individual who has developmental or cognitive difficulties that prevent 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 UNDHR Article 15(2) (“No one shall be ... denied the right to change his nationality.”). 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. See Isaac Brock Society, Human Rights Complaint on behalf of ALL \*U.S. Persons Abroad\* has now been submitted, at <http://isaacbrocksociety.ca/2014/07/28/human-rights-complaint-on-behalf-of-all-u-s-persons-abroad-has-now-been-submitted/>.

<sup>81</sup> 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.

The implications for citizenship-based taxation seem clear: it should not be the job of an individual to identify herself as a US Person for tax purposes by virtue of a citizenship conferred upon her. If, like Tina, she 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 US 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 it is key to ensuring that individuals cooperate with the tax authority.<sup>82</sup> When the tax jurisdiction is global, so too must be taxpayer education efforts.<sup>83</sup>

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.<sup>84</sup> To date, no prospective renunciant has yet challenged the State Department in its attempt to impose this fee as a condition to expatriation. Such a challenge would be appropriate.

Of course there will be those who seek to abuse the tax system by exiting by 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-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

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<sup>82</sup> National Taxpayer Advocate Report 2014; 2013.

<sup>83</sup> Christians, *Regulating Tax Return Preparers* (2014).

<sup>84</sup> UNDHR Article 15(2) (“No one shall be ... denied the right to change his nationality.”).

failed policy, but it is better than the alternative. Unwilling citizens, including those who have never sought a passport for themselves, should not be forced into US fiscal citizenship.

## CONCLUSION

Ignorance of the law excuses no one. At the same time, as Bentham reminds us, a government is a tyranny that punishes individuals for disobeying laws as to which it kept them ignorant.<sup>85</sup> This situation is unfolding today as the United States dramatically expands the enforcement of its tax jurisdiction over a globally dispersed population, after a century of neglect and apparent indifference. The irregularity of enforcement itself casts into question the legitimacy of the United States to exert its authority over this dispersed population as a normative matter.<sup>86</sup> But beyond imbalanced enforcement, failing to meaningfully inform its subjects of their status and resulting obligations to the United States visits damage upon the rule of law as a legitimate exercise of state power.<sup>87</sup>

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. By relying on individuals themselves to know how they are defined in US law and to understand the consequences of that definition, citizenship-based taxation, buttressed 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. The probability and the consequences for systemic error in both false positives and false negatives is a regulatory quagmire. It is also objectionable as a matter of fundamental legitimacy in lawmaking.

There are ready alternatives for the United States to exercise its power to tax nonresidents. The main such approach is to impose

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<sup>85</sup> Jeremy Bentham, *THE WORKS OF JEREMY BENTHAM*, Vol. 5 at 547 (1834) ("We hear of tyrants, and those cruel ones: but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he had kept them from the knowledge of.").

<sup>86</sup> See, e.g., H Kelsen, *PURE THEORY OF LAW* 46-50 (1967); John Finnis, *NATURAL LAW AND NATURAL RIGHTS* 250 (1979).

<sup>87</sup> Legitimacy in some form is understood to precede an obligation of obedience to authority. See, e.g., John Rawls, *A THEORY OF JUSTICE* 343 (1971) ("[A]cquiescence in, or even consent to, clearly unjust institutions does not give rise to obligations").

source-based withholding taxes on all nonresident persons, reserving worldwide taxation for residents. Virtually all other countries interpret the limits of their respective taxing jurisdictions this way, and for good reason. Switching to residence-based taxation is often proposed by advocates but widely considered a political non-starter. The unequal enforceability of taxation across a global taxpayer population of US Persons, altered but not eliminated by FATCA, achieves *de facto* residence-based taxation for some but not others.

Given the 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 US 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 a right to exit. Upon learning of their status and the obligations attendant thereto, these citizens are entitled as a matter of right 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 do otherwise is to engage in the kind of action Bentham, and the American colonies themselves, once labeled as tyranny.