



Taxation of Americans Abroad in the 21st Century: Citizenship-Based Taxation vs. Residence-Based Taxation

John Richardson – CitizenshipSolutions.ca

The United States is the only industrialized country which requires its citizens who live outside the United States to pay taxes on their world income to the United States. This is referred to as U.S. “citizenship-based taxation”. Included in “citizenship-based taxation” (“CBT”) is a collection of “reporting requirements” and threats of penalties, that have made U.S. citizenship incompatible with a global world. The problem is exacerbated because of both: The enhanced enforcement of rules of taxation that are widely perceived as punitive and unfair and a definition of U.S. citizenship that mandates taxation based on “legal status” rather than “voluntary connection” to the United States. The realities of globalization, world citizenship and effects that “citizenship-based taxation” have on the economies of other nations, necessitates that the U.S. adopt the “world standard” of residence based taxation (“RBT”).

Introduction – A map of the world



Most school children are introduced to the concept of nations and different political entities through a map of the world. Maps are used to reinforce the concepts that the world is composed of many different countries and that each country has the sovereign right to make and enforce laws that apply within that country. International law is (in large part) based on the assumption that the rights of any given country end at the borders of that country.

It has been said that, “taxes are the price we pay for civilization”. All countries impose levy taxes on those who reside in that particular country. The United States of America is the only advanced country of the world that claims the right to levy taxes on the residents of other countries. The moral foundation of this “claim of right” is unclear. For the most part, the “legal claim of right” to tax the residents of other nations is the claim that:

Under the laws of the United States of America, U.S. citizens are required to pay taxes to the U.S., regardless of where they live in the world, and on all income they receive anywhere in the world. In other words, in addition to claiming the right to tax those who are “U.S. residents”, the U.S. claims the right to tax U.S. citizens. The U.S. claims the right to “tax U.S. citizens” in all its international tax treaties.

In practice, this has severe effects on U.S. citizens who wish to live outside the U.S. (making it very difficult) and on the countries where those U.S. citizens may reside (in effect imposing a tax on that country based on the fact of allowing a U.S. citizen to live in that country).

U.S. Taxation means more than taxes – It includes significant “information reporting” requirements

As one (presumably Canadian) blogger writes:

“The United States is the only developed country in the world that subjects its nonresident citizens to complex, ongoing, multiple, and frequently meaningless financial reportbacks. Recent new enforcement initiatives threaten to exacerbate the already onerous burdens imposed by longstanding American exceptionalism. The resulting current situation is fraught with uncertainty, inconsistency, and anxiety. The listing below annotates material selected on the basis of interest, quality, and/or significance. The circumstances faced since 2011 by hundreds of thousands of beset residents and citizens of Canada inform the scope of this effort.”ⁱ

In 2011 the Obama administration began an aggressive tax enforcement campaign against U.S. citizens abroad. Anecdotal evidence (and filing statistics) suggest that only a small percentage of Americans abroad were aware of U.S. citizenship-based taxation. The twin problems of “enforcement” and “awareness” (or lack thereof) continue.

What does citizenship-based taxation really mean? The Context and a starting question

“What if you were born in California but moved to New York early in life. You live and work and pay taxes in New York for 30 years and one day you find out you were supposed to ALSO file and pay taxes to California, because you were born there and never formally renounced your residency! You are a California Tax Evader! Since you didn't report your New York bank account to California authorities, they are going to confiscate your assets! You have been paying full taxes and complying with New York law, but sorry buddy, you were born in California and therefore must report and pay taxes to your birth state until you renounce California residency. Oh and renouncing will cost you tons of money and California will threaten to never let you set foot across state lines if you do it. Oh, and your adult children are also facing personal bankruptcy; since you were "Californian" your children are also officially "Californian" until they renounce. Your entire family is destroyed and your New York born wife wants a divorce. Finally, New York banks decide they will no longer let Californians have a bank account with them because the reporting requirements for you people are just too expensive. And California banks won't let you have an account with them either (although they still consider you a resident), because you no longer have an address there. You may therefore have no bank account, no retirement plan, no investments, no credit card, no life.

This grotesque illustration is not at all far fetched. It is EXACTLY what US citizens are facing, if they have for any reason decided live outside of the US. US citizens who have lived outside of the states for decades, who are citizens of another country, who have paid taxes and abided by all laws, are now being pursued and persecuted in a breath-taking witch hunt.

Let me put it another way.

Mitt Romney's parents were Italian immigrants. After they started living, working, and paying taxes in the USA should they have to keep on paying Italian taxes too? Should Italy have the power to confiscate their house because they didn't send a report of their US banking activity to Italy? Should Mitt be considered an Italian citizen, be subject to Italian reporting and taxes, just because his parents were born there? Should he face total confiscation of his life assets because he misunderstood or didn't even know about a reporting requirement? Should he have to hire an expensive Italian tax lawyer fill in annual reports to another country or face prison threats? That is exactly what US law does to its citizens abroad, it is absolutely outrageous and unacceptable.

Although FATCA tried to target tax havens and tax cheats, the unfortunate truth is that the real tax criminals are by far the minority of people impacted by this law.

Millions of innocent law abiding people around the world are having their lives, families, marriages destroyed. Living in stress and uncertainty, sleepless nights, afraid the IRS man will knock on their door. Many DO NOT OWE US TAXES but must spend thousands hiring international experts to regularize their situation and file. Every US expat I know is now warning everyone they can to divest from US assets. The number of renunciations in 2012 is going to be unprecedented and

The insular imperialistic view of the US has gone too far, and guess what, people are going to start to invest elsewhere.”ⁱⁱⁱ

A 2012 comment from an article in the Washington Times.

“The simple fact is that we are a migratory species. People have emigrated and will continue to emigrate so long as governments can be held accountable to their claims of being free. What if all immigrants—Chinese, Latin Americans, Europeans, etc. were held to the same rules as citizens of the US? What if they had to continue to pay taxes to their countries of origin. Imagine Cubans being required to pay taxes to the dictatorship of Cuba, or the few lucky ones who escape North Korea being forced to pay taxes to North Korea. The US policy of hounding US emigrants is not in the spirit of being “the most free country in the world.”ⁱⁱⁱⁱ

A comment on Forbes Magazine article - May 2014

Analysis - Taxation, citizenship, and citizenship-based taxation

The U.S. is the only developed country in the world that, under the guise of what it calls “citizenship-based taxation”, claims the right to impose taxes:

1. On people who do NOT live in the United States; and
2. On income and assets that are in NO way associated with the United States.

The U.S. claims this right of taxation based on its tradition of “citizenship-based taxation” – that is the right to tax its citizens on their world income, wherever those citizens may live in the world.

Pursuant to the U.S. Constitution – Those born in the U.S. are U.S. citizens

For example:

Under U.S. law, a person born in the U.S., to two citizens of India (who were temporarily in the U.S. as students), who then returned to India at the age of 6 months, is required to pay taxes to the U.S. for as long as that person is a U.S. citizen. These taxes are based on the person’s world income and NOT restricted to taxes on income or assets associated with the U.S.

U.S. “citizenship-based taxation” has made the America of today into a country where the *“outcomes of one’s life are largely determined by the circumstances of one’s birth”*.

The origins of U.S. citizenship-based taxation – Born as punishment and continued by tradition

The United States began the practice of taxing its citizens abroad during the U.S. Civil War. Historians report that citizenship-based taxation was intended to be a punishment for those who left the United States (some things never change) to avoid serving in the Civil War.^{iv}

“Some” constitutional considerations and citizenship-based taxation

The constitutionality of citizenship-based taxation was considered by the Supreme Court of the United States in the 1924 decision of **Cook v. Tait**.^v In this decision, Justice McKenna, writing for the court, held that the U.S. could levy taxes on its citizens residing outside the United States, because the U.S. government *“by its very nature, benefits the citizen and his property wherever found”*. Leaving aside the accuracy of this highly questionable assumption, it’s clear that the world of 1924 is very different from the world of 2014. At a minimum the differences include:

1. U.S. taxation is far more complex, includes a number of “information returns” and operates as a mechanism to ensure that U.S. citizens abroad “live the American way” when they are living outside the United States;
2. U.S. tax policy is at least as much about social policy as revenue raising;

3. It is far more common for people to travel and live (either permanently or temporarily) outside the United States; and
4. It is very common for people to be citizens of more than one country.

Citizenship-based taxation or residence-based life control?

In the 1819 decision of *McCulloch v. Maryland*, U.S. Chief Justice John Marshall, wrote that:

“The power to tax is the power to destroy”.^{vi}

Under the U.S. Internal Revenue Code, all U.S. citizens, regardless of where they live in the world, are required to abide by the same Internal Revenue Code. For example, a U.S. citizen living in Sweden is required to abide by the same rules as a U.S. citizen living in Sacramento.

At first blush this sounds fair. After all, shouldn't all U.S. citizens be required to obey the same tax code? Maybe or maybe not. As former Canadian Justice Brian Dickson, one commented:

“The true interests of equality may require differentiation in treatment”.^{vii}

The U.S. tax code penalizes all things foreign and punishes all investments that allow for tax deferral. “Foreign” is defined in relation to the U.S. This means that all banks located in Canada are foreign. Furthermore, all retirement planning in Canada is based on the principle of tax deferral. Investments that are based on the principle of “tax deferral” will be not be advantageous for U.S. citizens in Canada. In fact from a tax perspective they are “toxic”.

The most notorious example of “anti-deferral” tax rules applied to U.S. citizens abroad are the PFIC (“Passive Foreign Investment Company”) rules. These rules are generally understood to mean that U.S. citizens abroad will be severely punished for investing in many non-U.S. based investment products (including mutual funds) in their country of residence.^{viii}

Therefore, for U.S. citizens living in Canada:

1. Every aspect of their lives is, (from a U.S. perspective) foreign; and
2. The U.S. tax code will punish the foreign aspects of their lives, in general and retirement planning in particular.

This is the result of the equal application of U.S. tax laws to ALL U.S. citizens, regardless of where they live. What comes to mind is the principle that:

“The law in its majestic equality prohibits both the rich and the poor from sleeping on the park bench!”^{ix}

Is this Citizenship-based taxation or residence-based life control?

From a practical perspective the U.S. tax code imposes a tyranny of reporting requirements on U.S. citizens abroad and disables them from retirement planning in their country of residence. What the U.S. calls “citizenship-based taxation”, is in reality “residence-based life control”. It has made U.S. citizenship an extreme liability for those who desire the flexibility of living outside the U.S.

In 1996 James Dale Davidson writing in “**The Sovereign Individual**”^x (page 287) noted that:

“Unless there is an astonishing and most radical change in policies, the successful investor or entrepreneur in the Information age will pay a lifetime penalty of tens of millions, hundreds of millions, or even billions of dollars to reside in countries with the fiscal policies like those that have enjoyed the highest living standards during the twentieth century.

Absent, a radical change the penalty will be the highest for Americans. The United States is one of just three jurisdictions on the planet that impose taxes based on nationality rather than residence. The other two are the Philippines, a former U.S. colony, and Eritrea, one of whose exiled leaders fell under the spell of the IRS during its long rebellion against Ethiopian rule. Eritrea now imposes a nationality tax of 3 percent. While this is a pale imitation of U.S. rates, even that burden makes Eritrean citizenship a burden during the information age. Current law makes U.S. citizenship even a larger liability. The IRS has become one of America’s leading exports. More than any other country, the United States reaches to the corners of the earth to extract income from its nationals.

If a 747 jetliner filled with one investor from each jurisdiction on earth touched down in a newly independent country, and each investor risked \$1000 in a start-up venture, in the new economy, the American would face a far higher tax than anybody else on any gains. Special, penal taxation of foreign investment, exemplified by the so-called PFIC taxation, plus the U.S. nationality tax, can result in tax liabilities of 200 per cent or more on long term assets held outside the United States. A successful American could reduce his total lifetime tax burden as a citizen of any of more than 280 other jurisdictions on the globe.

The United States has the globe’s most predatory, soak-the-rich tax system. Americans living in the United States or abroad, are treated more like assets and less like customers than citizens or any other country.

...

Holding a U.S. passport is destined to become a major drawback to realizing the opportunities for individual autonomy made possible by the information revolution. Being born an American during the industrial revolution was a lucky accident. Even in the early stages of the Information Age, it has become a multi-million dollar liability.

To see how great a liability, consider this comparison. Under reasonable assumptions, a New Zealander with the same pre-tax performance as the average of the top 1% of American taxpayers would pay so much less in taxes that the compounding of his tax savings alone would make him richer than the American ever would ever be. At the end of a lifetime, the New Zealander would have \$73 million more to leave to his children or grandchildren. And New Zealand is not even a tax haven.”

If this is “Old News”, why is it only becoming an issue today?

Prior to 2011, U.S. citizenship-based taxation was not subject to scrutiny because it was not enforced. This changed in 2011 (perhaps part of the “Change we can believe in principle”) when the Obama administration began to enforce citizenship-based taxation against U.S. citizens abroad with a vengeance.^{xi} 2011 was only the beginning. The 2011 enforcement campaign was only a prologue to FATCA – legislation designed to enforce citizenship-based taxation - by enlisting banks around the world in a hunt for people born in the U.S.

FATCA – Coming to a bank near you – July 1, 2014

In March of 2010, the United States Congress enacted the “HIRE Act”. Like many U.S. laws, this law came (to use the words of a tax scholar) with “*an apple pie filling and a poison crust*”. The “apple pie filling” was the attempt to create incentives to restore **domestic** employment. The “poison crust” was that it included an **unrelated piece of legislation** called the:

Foreign Account Tax Compliance Act – commonly referred to as FATCA.

In its simplest terms, FATCA^{xii} is a tool to enforce United States citizenship-based taxation worldwide. To put it simply FATCA commands (under the threat of extreme sanction) non-U.S. financial institutions (banks, trust companies, hedge funds, brokerage companies, insurance companies, and some non-U.S. corporations) to:

1. At their expense search for U.S. citizens in their country; and
2. Turn the identity of those U.S. persons over to the U.S. Internal Revenue Service.

Those banks who do not participate in the “FATCA Hunt” for U.S. citizens abroad will be subject to a “FATCA Sanction”.^{xiii} The sanction is as follows:

What is the “FATCA Sanction” for failure to comply? Those non-U.S. banks who do NOT agree to help the U.S. identify any U.S. citizens resident in their country, will have 30% of U.S. dollar payments to those banks confiscated. Hence, the “incentives” for the banks to hunt U.S. citizens (those with a U.S. birthplace) for the IRS are enormous.

In practice the U.S., under the guise of “citizenship-based taxation” is subjecting its **citizens** abroad to a reign of terror.^{xiv} For many, their physical health^{xv} and emotional health^{xvi} have

suffered. Few Americans abroad have known of the U.S. practice of citizenship-based taxation. Furthermore, because they live outside the U.S., their lives and retirements assets are foreign and almost certainly based on tax deferral. For those Americans abroad the tax consequences of U.S. citizenship can be emotionally and financially crippling.

Who exactly is a U.S. citizen?

U.S. citizenship law is complicated and has changed over the years. That said, the 14th Amendment of the U.S. constitution mandates that “those born or naturalized in the U.S. have the “legal status” of U.S. citizens”.^{xvii} Although “birth or naturalization in the U.S.” is NOT the only way to have the “legal status” of being a “U.S. citizen”, it is the most common way.

For (at least) those “born in the U.S.”, citizenship is NOT a matter of choice. People cannot choose where they are born. Place of birth is always an accident. People can however choose where they want to live and (in general) can choose to become citizens of other nations.

Place of birth is an accident. **How then, in the 21st century, can one’s life be determined by an accident of birth?** In fact, the moral foundation of human rights law is that people should not be classified based on “immutable characteristics” – characteristics over which they have no control. As Dr. King in his deeply moving and famous “I have a dream” speech spoke:

“I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their character. I have a dream today”.^{xviii}

Today, many of those who became United States citizens by virtue of their birth:

“Have a dream that they and their children, will one day live in a world, where they will not be taxed according to the circumstances of their birth, but by the residence of their choice”.

Toronto – Conference on U.S. Citizenship-based taxation – May 2, 2014

On May 2, 2014, the first ever conference on U.S. citizenship-based taxation took place on the campus of the University of Toronto. The conference featured a debate between Dr. Bernard Schneider (who opposes citizenship-based taxation) and Professor Michael Kirsch (who supports citizenship-based taxation). Both Dr. Schneider^{xix} and Professor Kirsch^{xx} have authored a leading paper on this topic. **There was general agreement that a discussion of U.S. citizenship-based taxation necessitated a discussion of (at least) the following two issues:**

1. Whether it is appropriate to use citizenship as a criterion for the imposition of taxes under any circumstances (can the U.S. levy taxes on its non-resident citizens on income that is not earned in the U.S.?); and
2. If the U.S. can levy taxes on its citizens who do NOT live in the U.S., are there limits to how far this taxing power can extend? At what point does something cease to be a tax and become a directive of “life control”? (In addition, at the present time, the U.S.

assumes the right to tax its citizens abroad to such an extent that it amounts to a tax on the country where the U.S. citizen resides.)

I was the moderator of this fascinating debate. Significantly, both scholars seemed to agree that (with respect to the second question) the practical application of U.S. citizenship-based taxation was excessive and unworkable. In other words, if U.S. citizenship-based taxation can be justified at all, the current U.S. rules of U.S. citizenship-based taxation are too onerous and excessive in their reach. (Those who doubt or don't understand the practical reality of U.S. citizenship-based taxation are advised to reread the opening paragraphs in the Introduction to this paper.)

This conclusion is not surprising, given that U.S. citizenship-based taxation in practice results in:

- U.S. citizens abroad being subjected to significant double taxation (Social Security taxes in some countries)
- U.S. citizens abroad being subjected to taxation on things that are exempt from tax in their country of residence (example the principal residence)
- U.S. citizens abroad being disabled from effective retirement planning if they live outside the United States (the prohibition on foreign mutual funds, life insurance policies, etc.)
- U.S. tax rules being used as a mechanism to control the activities of its citizens abroad (for example U.S. citizens who marry non-U.S. citizens are subjected to problematic tax consequences)
- U.S. citizens abroad being subject to "reporting requirements" that impose limitations on their professional mobility (the requirement to report on non-U.S. business partners)
- U.S. citizens who relinquish their citizenship are potentially subject to "Exit Taxes" on assets acquired with money earned in their country of residence
- The effect of taxing U.S. citizens abroad, is that capital is siphoned from their country of residence to the U.S. To put it another way: to tax the U.S. citizen abroad, is to tax the country in which he lives.^{xxi}

Where the scholars disagreed, was on the first question:

Is it appropriate to use citizenship as a criterion for levying taxes at all?

When considering the appropriateness of using "citizenship" as a criterion for levying taxes one must ask the question:

What is it about citizenship that makes it an appropriate criterion to impose taxes?

Is the "legal status" of being a citizen sufficient? Is there a difference between the "legal status" of being a citizen and the "voluntary engagement" that is required by "true citizenship"? The "legal status" of being a citizen may NOT be voluntary. But, the voluntary engagement required by "citizenship" is voluntary.

The legal status of “citizen” vs. the voluntary engagement of “citizenship”

There is a difference between the “legal status” of being a citizen and the voluntary engagement with the community that is required for “citizenship”. To put it another way: Citizenship involves more than the “legal status” of being a citizen. As President Obama said in his 2013 State Of The Union Address:

*“We are citizens. It’s a word that **doesn’t just describe our nationality or legal status**. It describes the way we’re made. It describes what we believe. It captures the enduring idea that this country only works when we **accept certain obligations** to one another and to future generations; that our rights are wrapped up in the rights of others; and that well into our third century as a nation, it remains the task of us all, as citizens of these United States, to be the authors of the next great chapter in our American story”^{xxii}*

It is clearly true that many people born in the U.S. and NOT living in the U.S., have the “legal status” of being a citizen, but have not accepted the voluntary engagement that is required for meaningful “citizenship”.^{xxiii} The story of London Mayor Boris Johnson (who was born in the U.S.) is a case in point.

Does the “legal status” of being a citizen justify imposing taxes on a person who does NOT live in the country?

The U.S. currently takes the position that the “legal status” of being a citizen is sufficient to impose taxes on a person who does not live in the U.S. Some of those with the legal status of U.S. citizen were born in the U.S. (making them 14th amendment citizens) and some were born outside the U.S. (making them citizens by an Act of Congress). There are many categories of people born in the U.S.

Those Born In The U.S. – 14th Amendment Citizenship

The vast majority of U.S. citizens acquired U.S. citizenship because they were born in the U.S. The U.S. is aggressively taking the position that the following types of people, born in the U.S., but residents in other countries, with no economic connection to the U.S. are required to pay taxes to the U.S.:

- A. **Border babies:** Those who were born in the U.S. and returned to Canada within months. (If their parents were Canadian citizens those border babies (who were dual citizens from birth) can renounce their U.S. citizenship without paying an Exit Tax. If their parents were U.S. citizens (meaning the children were not a dual citizens from birth) they are NOT permitted to relinquish U.S. citizenship without being subject to the Exit Tax.)

B. Children born in the U.S. who permanently left the U.S. with their parents as children (before reaching the age of majority) and who never returned to the U.S. They have never worked in the U.S. and have no connection to the U.S.

Members of Group A or Group B do not have and have never had a “voluntary connection” to the U.S. that could convert their “legal status” of citizens to the “voluntary acceptance” of the obligations of “citizenship”. Their birth in the U.S. and their moving from the U.S. were the results of decisions made by their parents. It’s hard to see how the “legal status” of being a U.S. citizen, is sufficient to require the payment of taxes to the U.S. Surely a demonstration of a “voluntary connection” to the U.S. should be required before an obligation to pay taxes is triggered.

If the “legal status” of citizenship is sufficient to trigger tax obligations to the U.S., then U.S. citizenship is a form of 21st century slavery.

U.S. nationality law has changed over the years, but ...

In the past, U.S. nationality law has included provisions which resulted in the automatic loss of U.S. citizenship for those in the circumstances described in Categories A and B above. This was reflected in the old S. 350^{xxiv} of the Immigration and Nationality Act (which has been repealed) and S. 349 of the Immigration and Nationality Act prior to its 1986 amendments.^{xxv} The general principle was that children who:

- acquired U.S. citizenship as children; and
- subsequently left the U.S., and
- did nothing to assert a VOLUNTARY connection to the U.S.,

would lose their U.S. citizenship. This was a clear recognition that “citizenship” was more than a “legal status” and required a “voluntary affirmation of citizenship” and/or “connection” to the community.

For this reason, I submit that the problems of Americans abroad, may be more rooted in the laws of citizenship than the law of tax.

Those born outside the U.S.

C. In certain cases, the children of U.S. citizens who are born outside the U.S. are considered to be U.S. citizens. Examples include (but are not limited to), those born in Switzerland to U.S. parents. U.S. laws for the transmission of citizenship from U.S. citizen parents to children born abroad, have a long and complicated history. In fact – “American Citizens Abroad”^{xxvi} – was founded to facilitate the acquisition of U.S. citizenship for children born abroad to U.S. citizen parents.

Interestingly, U.S. nationality law once had a provision which resulted in the automatic loss of U.S. citizenship, for children who were born outside the U.S. and acquired U.S. citizenship through a U.S. citizen parent. The old S. 352 of the Immigration and Nationality Act^{xxvii} required the child to establish residence in the United States by the age of 23 or lose U.S. citizenship. The establishment of residence was considered to be evidence of a VOLUNTARY connection to the U.S.

Once again, we see that the problem is largely the “law of citizenship”. U.S. citizenship law no longer reflects that the assumption that “citizenship” requires a voluntary connection to the community.

There was a time when U.S. nationality law was (in part) based on the principle that citizenship required an affirmative, conscious, deliberate, voluntary connection to the U.S.

The consequence of the older U.S. nationality law, where citizenship required a “voluntary” connection to the U.S. is that:

The children described in Categories A, B and C above, would have been required to take affirmative steps to voluntarily establish a U.S. connection, in order retain their U.S. citizenship. Absent this voluntary connection they would automatically have lost their U.S. citizenship.

U.S. citizenship law of the past: The voluntary affirmation and connection to the U.S. was required to retain U.S. citizenship. One would lose U.S. citizenship without the voluntary affirmation – an “citizenship opt in”

The repeal of Sections 350 and 352 and the amendment of S. 349 of the Immigration and Nationality Act, mean that, it is NO longer a requirement that the children described in Categories A, B and C, affirm a connection to the U.S. to retain U.S. citizenship. Absent an “relinquishing act”, the circumstances of birth will be sufficient to establish (under U.S. law) citizenship and a lifetime of tax obligations.

U.S. citizenship law of the present. A relinquishing act is now required to terminate U.S. citizenship – an “citizenship opt out” (with all the horror of Exit Taxes that can entail)

Rather than being required to voluntarily connect with the U.S., the current law (S. 349 of the Immigration and Nationality Act) requires that one take voluntary steps to relinquish U.S. citizenship. Failure to relinquish U.S. citizenship means that one is responsible for paying U.S. taxes until the time of voluntary and intentional relinquishment of U.S. citizenship.

For those with the “legal status” of U.S. citizens abroad, the evolution from the “opt in model” to the “opt out model” reflects a principle that citizenship is defined more in terms of

a “legal status” (conferred by birth) than a “voluntary acceptance” of citizenship. This is neither desirable nor consistent with a world of increased mobility and multiple citizenships.

Consider the following recent comment on this issue:^{xxviii}

“For those who had no choice of where or to whom they were born, surely there should be an “opt-into” US citizenship if the facts permit rather than an “opt-out” of US (or any other country’s) citizenship. Anything else is ENTRAPMENT. I find that very punitive.”

D. U.S. citizens who moved to other nations as young adults (not forced to move with their families), have developed their careers outside the U.S., married, had children and raised their families outside the U.S., done their financial and retirement planning outside the U.S., never had an economic connection to the U.S., and whose lives are have become citizens of their countries of residence.

Many in this group may have left the U.S. under unclear circumstances. Some may have left the U.S. with the intention of returning, some with no thoughts on whether they would return, and some with the clear intention of never returning. Regardless of their intention when leaving the U.S., many gradually become citizens (in a legal and voluntary sense) of their new countries and gradually lost any connection to the U.S. that they may have had.

Members of this group (especially in Canada and Western Europe) fully consider themselves to be primarily citizens of their new countries and no longer U.S. citizens. **Example: “You know you are Canadian when you start rooting for Canada over the U.S. in hockey.”**

Relinquishing acts – How to lose U.S. citizenship – S. 349 of the Immigration and Nationality Act

Once upon a time, the U.S. would “strip citizens” of their U.S. citizenship for voluntarily becoming naturalized citizens of another country. Like many aspects of U.S. nationality law, this was considered to be a “punitive measure”.

Prior to the U.S. Supreme Court decisions in *Afroyim*^{xxix} and *Terrazas*^{xxx}, S. 349 of the Immigration and Nationality Act^{xxxi}, mandated an automatic loss of U.S. citizenship for those who became citizens of another country. S. 349 now clarifies that, U.S. citizens who become citizens of another country, will lose their U.S. citizenship **only if they intended to relinquish their U.S. citizenship by becoming naturalized citizens of the second country**. In other words, U.S. citizens have the right to NOT (absent their consent) be stripped of their U.S. citizenship even if they maintain neither ties nor “connection” to the U.S. This is another example of the twin principles that:

1. U.S. citizenship has become less and less dependent on the existence of a “voluntary” connection to the U.S.; and
2. U.S. citizenship being more of a status imposed on the individual, than a status chosen by the individual. (Although the 14th Amendment may have been motivated by a desire to “end slavery” it is now interpreted as a mechanism to “create slavery”.)

To put it another way: U.S. citizenship has become less “something that one chooses to voluntarily connect to” and more something “one is through an accident of birth, chosen for”. This is of huge significance because the U.S. (under the guise of citizenship-based taxation) attempts to control the lives of its citizens living abroad.

E. U.S. citizens who move outside the U.S. for short periods of time with the full expectation and understanding that they are returning to the U.S. They live outside the U.S. as Americans and typically neither become citizens of their country of residence, nor disconnect from the U.S. In other words, they are truly “**U.S. citizens** abroad”. Their situation is very different from those described in Categories A, B, C and D. They have more than the “legal status” of being U.S. citizens. **They have a voluntary connection to the U.S.**

It is reasonable to assume that those in Category E are true “U.S. citizens abroad”. They are people who although they live outside the U.S., have clear “legal” and “voluntary connection” to the U.S.

Citizenship-based taxation and a voluntary connection to the U.S.

It is clear that many of those with the “legal status” of U.S. citizen (Categories A, B, C, and D) do NOT have the “voluntary” (or any other) connection to the U.S. that could possibly justify U.S. taxation.

“Voluntary connection” to the U.S. as a necessary but NOT sufficient condition for the taxation of Americans abroad

Is “citizenship-based taxation” justified even with respect to Americans abroad who DO have a voluntary connection (Category E) to the U.S. It’s hard to see the justification. No other country imposes taxes on its citizens abroad. Americans abroad already pay taxes in their country of residence. No scholar has ever explained exactly what it is about a “voluntary” connection to the U.S. that justifies taxation. Life is full of “voluntary connections” that do NOT require the payment of taxes. What is it about a “voluntary connection” (by way of citizenship) to the U.S. that means Americans abroad should be taxed at all, or (worse yet) taxed according to the same rules as U.S. residents?

Nobody has ever offered a satisfactory answer. The closest rationale that can be discerned is the idea that:

1. All Americans have to pay taxes to the U.S.
2. U.S. citizens, regardless of where they live are Americans.

Therefore, U.S. citizens regardless of where they live have to pay taxes to the U.S.

The following observation from an attendee of the 2014 Toronto forum is interesting.^{xxxii}

“@Polly, about the thinking of the Ivy League types re US CBT. Judging from some of the ‘academic’ papers justifying CBT, and a part of the presentation/s at the recent ACA Foundation event, I believe that a large part of this is not logical. It is not dispassionate. It is not academic though it is masked or presented as such (although some don’t even bother to include robust sources or even footnote their statements – or are entirely self referential). It appears to me to be infected with the homelander mindset and brainwashing, whose worldview underpinnings and base assumptions mostly goes unexamined even by those that consider themselves to be rational researchers and scholars. It appears to be like a religion – they’ll argue about the more arcane details, but like a fish who doesn’t notice the water, or a person who takes air for granted, they do not know what they do not know, nor acknowledge the need to question what they have automatically ingested/inhaled simply by being part of the US homeland. It is working for them, so that they take for granted as being evidence of good. Most undergrads would never have been allowed to graduate if their work was as shoddy as some of the work produced by the CBT and FATCA apologists (like this one http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969123.)

Even one who seemed to understand the hardships, and repeatedly said they were ‘sympathetic’ (vs. empathetic) was eager to propose possible patches or fixes – without understanding that those only put another small bandage on part of the several big festering sores that CBT creates for those suffering abroad.

A fix for the issue of those whose disability grants and benefits and RDSPs are being claimed extraterritorially as US taxable – solely because they had a US parent, or a US birthplace, would always run the risk of disqualifying someone, and imposing yet another huge and punitive administrative burden and hurdle to surmount for any relief – because the patches are always designed based on the base presumption that first and foremost, no matter what the cost to those affected, the US must spare more thought and efforts and resources to guard against the imaginary legions seeking to ‘evade’ US taxes and masquerading as those suffering from the burden – no matter how unlikely. And the US dedicates NO effort to look at those it punishes for no reason and no gain.

Which becomes ludicrous in the context of some of these proposed fixes, but they always think that legions of billionaire tax evaders are hiding amongst those minding our own business outside the US – and apparently homelander are willing to inflict ANY and all amounts of abuse of those living abroad in their paranoid quest for legendary tax evaders – even in instances where the likelihood of any US tax being assessed or owed is zero or minimal. Like with the Canadian RDSP, RESP, etc. The academics should be aware that we have already paid a full set of taxes in Canada, and we have our own legal oversight and tax system that makes it more unlikely (though possible) that we will owe the US too.”

Conclusion:

First: If the practice of taxing “U.S. citizens living outside the U.S.” is to continue, it must distinguish between the “legal status” of being a citizen and the voluntary connection to the community that is required of meaningful “citizenship”. At the risk of oversimplification, I have identified (Categories A, B, C, D and E) five different kinds of “legal status” U.S. citizens who live outside the U.S. They are completely different and should NOT be subject to the same tax treatment.

Second: The U.S. must consider and demonstrate, what it is about citizenship per se, (regardless of “voluntary connection”) that could possibly justify a lifetime of tax servitude to the United States. As the above comment demonstrates, U.S. legislators simply assume “citizenship-based taxation” without considering “citizenship-based taxation”.

This problem is URGENT because of the realities of:

1. The U.S. attempting to impose “extra-territorial laws” on the world (examples include FATCA and citizenship-based taxation);
2. An evolution in U.S. citizenship law that defines U.S. citizenship solely in terms of “legal status” without consideration of connection to the U.S. In a world where citizenship is conferred by an accident of birth, taxation based ONLY on the “legal status” of citizen can constitute 21st century slavery;
3. Recent U.S. laws that impose “Exit Taxes” on U.S. citizens who relinquish their U.S. citizenship.^{xxxiii}

This is NOT just a problem for the U.S. and for those born in the U.S. It is an international issue because by imposing taxation on those who reside outside the U.S., the U.S. is actually imposing a tax on those “legal status” U.S. citizens who reside in those countries. FATCA has drawn attention to this as a serious problem that must be addressed.

As it currently stands, U.S. citizenship is simply not compatible with life in a Global world. Renunciations of U.S. citizenship are rising.^{xxxiv} Interestingly, many U.S. citizens are willing to pay the U.S. Exit Tax to no longer be a U.S. citizen.

Imagine that, a world where people are willing to pay to NOT be U.S. citizens. The “power to tax” is indeed the power to destroy.

ⁱ <http://usxcanada.wordpress.com>

ⁱⁱ <http://www.washingtontimes.com/news/2012/jan/4/tax-haven-wars/#comment-402059993>

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- iii http://www.forbes.com/sites/robertwood/2014/05/03/americans-are-renouncing-citizenship-at-record-pace-and-many-arent-even-counted/?commentId=comment_blogAndPostId/blog/comment/1057-27742-6453
- iv <http://blogs.wsj.com/washwire/2012/05/18/tax-history-why-u-s-pursues-citizens-overseas/>
- v <http://supreme.justia.com/cases/federal/us/265/47/case.html>
- vi <http://www.law.cornell.edu/supremecourt/text/17/316>
- vii <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/407/index.do?r=AAAAAQAVbGF3IHNVY2lldHkgdiBhbmRyZXdzAAAAAAE>
- viii <http://citizenshipsolutions.ca/2014/02/06/pfic-taxation-and-americans-abroad/>
- ix http://www.sheldensays.com/history_from_a_critical_perspect.htm
- x <https://www.google.com/search?q=James+Dale+Davidson+Sovereign+Individual&btnG=Search+Books&tbm=bks&tbo=1>
- xi <http://www.reuters.com/article/2011/12/08/us-usa-taxes-foreign-idUSTRE7B723920111208>
- xii <http://www.fsitaxposts.com/chapter-4-u-s-internal-revenue-code-1986/>
- xiii <http://www.levin.senate.gov/newsroom/press/release/levin-mccain-call-for-us-to-refrain-from-fatca-negotiations-with-russia>
- xiv <http://isaacbrocksociety.ca/2012/01/21/has-your-life-been-stolen-from-you/comment-page-3/>
- xv http://waysandmeans.house.gov/uploadedfiles/patricia_anderson_daddario.pdf
- xvi <http://citizenshipsolutions.ca/counseling-vs-counselling/emotional-counselling-for-those-threatened-by-the-fatca-roundup/>
- xvii <http://www.law.cornell.edu/constitution/amendmentxiv>
- xviii http://en.wikipedia.org/wiki/I_Have_a_Dream
- xix http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2186076
- xx http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2346458
- xxi <http://citizenshipsolutions.ca/wp-content/uploads/2014/02/Paying-Tribute-to-America.pdf>

xxii <http://www.whitehouse.gov/the-press-office/2013/02/12/president-barack-obamas-state-union-address>

xxiii <http://www.freerepublic.com/focus/news/1681132/posts>

xxiv <http://www.state.gov/documents/organization/120532.pdf>

xxv <http://www.richw.org/dualcit/law.html>

xxvi <Http://www.americansabroad.org>

xxvii <http://www.state.gov/documents/organization/120532.pdf>

xxviii <http://isaacbrocksociety.ca/2014/05/09/yes-senator-wyden-we-abandoned-america-and-am-proud-of-it/comment-page-2/#comment-1708912>

xxix <http://www.richw.org/dualcit/cases.html#Afroyim>

xxx <http://www.richw.org/dualcit/cases.html#Terrazas>

xxxi <http://www.law.cornell.edu/uscode/text/8/1481>

xxxii <http://isaacbrocksociety.ca/2014/05/09/yes-senator-wyden-we-abandoned-america-and-am-proud-of-it/comment-page-3/#comment-1710675>

xxxiii <http://www.law.cornell.edu/uscode/text/26/877A>

xxxiv <http://www.forbes.com/sites/robertwood/2014/05/03/americans-are-renouncing-citizenship-at-record-pace-and-many-arent-even-counted/>