

WORLDWIDE TAXATION AND FATCA:  
A CONSTITUTIONAL CONUNDRUM OR THE FINAL PIECE OF  
THE TAX EVASION PUZZLE?

*Ann C. Kossachev\**

INTRODUCTION

Congress passed the Foreign Account Tax Compliance Act (FATCA), an innovative and revolutionary tax reform, on March 18, 2010, as part of the Hiring Incentives to Restore Employment Act.<sup>1</sup> The purpose of FATCA is to combat tax avoidance by United States taxpayers holding foreign accounts.<sup>2</sup> As part of FATCA, the United States Department of the Treasury has negotiated and entered into agreements with foreign nations to implement a system of tax information exchange.<sup>3</sup> Information about American account holders from foreign financial institutions will be exchanged directly with the Internal Revenue Service (IRS).<sup>4</sup> Those account holders and foreign financial institutions that are unwilling to provide the required information will be subject to a thirty percent withholding tax on certain payments of United States source income.<sup>5</sup> FATCA's provisions were officially implemented on July 1, 2014.<sup>6</sup>

FATCA is premised on a nearly century old system of worldwide or citizenship-based taxation. The Supreme Court's 1924 landmark

---

\* George Mason University School of Law, J.D. Candidate, May 2015; Binghamton University, B.A. Economics and Political Science, 2012. I would like to thank Ginny Chung, Professor Terrence Chorvat, and Professor Michael S. Greve for their inspirational advice. I would also like to thank the editorial staff of the *George Mason University Civil Rights Law Journal* for their excellent feedback, and, most importantly, my family and friends for their patience and encouragement.

<sup>1</sup> Hiring Incentives to Restore Employment Act of 2010, Pub. L. No. 111-147, 124 Stat. 71.

<sup>2</sup> See I.R.S. Notice 2013-43, at 1, 2013-31 I.R.B. 113 (July 13, 2013), available at <http://www.irs.gov/pub/irs-drop/n-13-43.pdf>.

<sup>3</sup> See *Foreign Account Tax Compliance Act (FATCA)*, U.S. DEP'T OF TREASURY, <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> (last updated June 9, 2014).

<sup>4</sup> I.R.S. Notice 2013-43, at 1, 2013-31 I.R.B. 113 (July 13, 2013), available at <http://www.irs.gov/pub/irs-drop/n-13-43.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 6.

decision in *Cook v. Tait* established the heart of our citizenship-based taxation system.<sup>7</sup> Citizenship-based taxation is an approach that taxes people based on their status as citizens, rather than on their residence or on the source of their income.<sup>8</sup> Alternatively, residence-based or territorial-based taxation systems only tax current residents or income derived from an internal source.<sup>9</sup> *Cook v. Tait* solidified Congress's international taxing power, but, now that FATCA is expanding that power through information exchange, are the constitutional foundations of that monumental decision still sound? Or is it time to overhaul the system and switch to residence-based taxation?

Congress exercises wide discretion in deciding whom to tax and how much.<sup>10</sup> Thus, so constitutional challenges to the taxing power are particularly difficult. Taxation has traditionally been viewed as a fundamental right of nationhood.<sup>11</sup> This right, however, should not come at the expense of the civil rights of a nation's citizens. Citizenship-based taxation as established in *Cook v. Tait* sparks concerns that Congress may not only be overstepping its taxing power, but also that it is violating the Fifth Amendment rights of citizens. Additionally, a global model of tax information exchange predicated on worldwide taxation raises concerns regarding Sixth Amendment treaty powers and Fourth Amendment privacy rights.

Furthermore, the proposed implementation and enforcement of FATCA suggests there may be some benefits to a residence-based system and several disadvantages to a citizenship-based system of taxation.<sup>12</sup> But completely revolutionizing our taxation scheme is infeasible and would do more harm than good in our presently fragile economic state. Some scholars also believe that a change to residence-based taxation would not solve the problems facing United

---

<sup>7</sup> 265 U.S. 47, 55-56 (1924).

<sup>8</sup> Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117, 119 (2014).

<sup>9</sup> See *id.*

<sup>10</sup> *Di Portanova v. United States*, 690 F.2d 169, 180 (1982).

<sup>11</sup> See *Burnet v. Brooks*, 288 U.S. 378, 404 (1933); see also Allison Christians, *Sovereignty, Taxation and Social Contract*, 18 MINN. J. INTL. L. 99, 106 (2009) (“[T]he principle is generally accepted in the literature: sovereign status seems to include a right to tax in some form, so that infringing on the right of taxation is an infringement on sovereignty itself.”).

<sup>12</sup> Joanna Heiberg, Note, *FATCA: Toward a Multilateral Automatic Information Reporting Regime*, 69 WASH. & LEE L. REV. 1685, 1708-12 (2012).

States citizens abroad because simple administrative changes to FATCA are all that is required.<sup>13</sup>

There is a significant amount of criticism in the press and academic community regarding citizenship-based taxation.<sup>14</sup> In light of FATCA's goal of curbing tax evasion, this Comment addresses many of these criticisms and all of the foregoing constitutional uncertainties, while analyzing *Cook v. Tait* through this new lens.<sup>15</sup> Ultimately, this Comment concludes that even though the United States is an outlier, there is no concrete legal rationale for opposing and eliminating citizenship-based taxation in favor of a residence-based system, even if administrative and international policy concerns favor reformation.<sup>16</sup> Uprooting nearly a century of precedent simply cannot be justified.

Scholars have argued that because many countries explicitly or implicitly define residence as domicile, or an individual's permanent home, rather than physical presence during the tax year, residence-based taxation and citizenship-based taxation overlap.<sup>17</sup> This Comment argues that marking a distinction between the two systems is no longer a worthwhile pursuit. Finally, for countries entering into a reciprocal intergovernmental agreement (IGA) pursuant to FATCA, the United States may be backhandedly encouraging a citizenship-based taxation system.

Part I.A of this Comment will provide an overview of the historical foundations supporting the citizenship-based taxation system, particularly the Supreme Court's 1924 decision in *Cook v. Tait*. Part I.B will then cover the development of FATCA and its evolution since it was enacted in 2010, including criticisms of FATCA relating to citizenship-based taxation. Part II.A argues that a constitutional analysis of citizenship-based taxation reveals that, despite numerous objections, the United States system of worldwide taxation is constitutionally and legally sound. Finally, Part II.B of this Comment contends that, in a world of tax transparency, the distinction between taxation systems

---

<sup>13</sup> See generally J. Richard Harvey, Jr., *Worldwide Taxation of U.S. Citizens Living Abroad: Impact of FATCA and Two Proposals* (Villanova Pub. Law and Legal Theory, Working Paper No. 2013-3057, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2318463](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318463).

<sup>14</sup> See *infra* Part I and Part II.

<sup>15</sup> 265 U.S. 47 (1924).

<sup>16</sup> See generally Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1344 (2011).

<sup>17</sup> *Id.* at 1323-24.

may no longer be necessary assuming successful implementation of FATCA.

## I. BACKGROUND & DISCUSSION

The traditional justification for the right to tax a citizen on worldwide income has existed for almost a century.<sup>18</sup> However, in a world of instant communication, rapid technological developments, and increasing mobility, academics argue that this justification may not be as persuasive as it once was.<sup>19</sup> This section covers the emergence of worldwide taxation and its justification. Next, this section explores a modern application of worldwide taxation: FATCA. Finally, this section introduces pressing constitutional questions surrounding the debate over citizenship-based taxation as applied to FATCA.

### A. *Historical Backdrop: Cook v. Tait and Its Posterity*

Citizenship-based taxation began during the Civil War<sup>20</sup> and then greatly expanded in 1864 to apply to the income of “every person residing in the United States, or of any citizen of the United States residing abroad,” no matter the source of the income.<sup>21</sup> The Revenue Act of 1913 was the first income tax enacted after the passage of the Sixteenth Amendment, and worldwide taxation has remained since then.<sup>22</sup> The application of income tax to citizens living abroad was at that time largely a “symbolic gesture” aimed at easing the common fear of rich Americans living abroad to escape both the tax and the draft.<sup>23</sup>

In 1924, worldwide taxation was challenged in the Supreme Court in *Cook v. Tait*.<sup>24</sup> A United States citizen residing in Mexico chal-

---

<sup>18</sup> See generally *Cook*, 265 U.S. 47.

<sup>19</sup> See generally Bernard Schneider, *The End of Taxation Without End: A New Tax Regime for U.S. Expatriates*, 32 VA. TAX. REV. 1 (2012) (discussing the various justifications for the worldwide taxation of nonresidents and concluding that it is no longer justified).

<sup>20</sup> Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 292, 309 (1861).

<sup>21</sup> Act of June 30, 1864, ch. 173, § 116, 13 Stat. 223, 281 (1864).

<sup>22</sup> Schneider, *supra* note 19, at 4.

<sup>23</sup> Reuven S. Avi-Yonah, *The Case Against Taxing Citizens*, 58 TAX NOTES INT’L 389, 390-91 (2010) (arguing that the provision was a creature of its time because the United States was in crisis and citizens were expected not only to pay tax but also to risk their lives for their country. Today, the United States is “not in crisis, there is no draft, and hundreds of thousands of U.S. citizens live permanently overseas for reasons that have nothing to do with taxation”).

<sup>24</sup> 265 U.S. 47, 54 (1924).

lenged Congress's right to tax his Mexican source income because it lacked both residence and source jurisdiction.<sup>25</sup> The Court denied this contention and held that precedent dictates that the power to tax cannot depend on the situs of the property, whether in or out of the United States, nor can it depend on the domicile of the citizen.<sup>26</sup> That is, a citizen may have domicile in a foreign country and his income may also be derived from a foreign country, but the United States government still has power to impose a tax based on the benefits the income provides.<sup>27</sup> The Court concluded that "government, by its very nature, benefits the citizen and his property wherever found, and therefore has the power to make the benefit complete."<sup>28</sup>

Shortly after this decision, the international business community began raising concerns about American competitiveness in foreign trade.<sup>29</sup> In response, Congress passed the Revenue Act of 1926 to allow United States citizens to exclude all "earned income" from foreign sources so long as individuals are nonresidents of the United States for more than half of the taxable year.<sup>30</sup> This legislative shift corresponded with an attitude shift regarding citizens abroad.<sup>31</sup> Congress was less worried about wealthy citizens relocating abroad for their own personal pleasure and to avoid taxes, and more concerned with "hardworking salesmen moving abroad, often at great personal discomfort and sacrifice, in order to expand their U.S. employers' (and, accordingly, America's) interests throughout the world."<sup>32</sup> This marked a notable transition from *Cook v. Tait*'s insistence on the government making benefits complete for citizens abroad to the government recognizing the sacrifice and hardships of American citizens abroad.

For a brief period between 1978 through 1981, Congress decided to require all income to be included but allowed deductions for certain costs of living abroad.<sup>33</sup> In response to complaints, Congress rein-

---

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 54-56 (citing *United States v. Bennett*, 232 U.S. 299 (1914)).

<sup>27</sup> *Id.* at 56.

<sup>28</sup> *Id.*

<sup>29</sup> Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443, 457 (2007).

<sup>30</sup> *Id.* at 457-58.

<sup>31</sup> *See id.* at 458.

<sup>32</sup> *Id.*

<sup>33</sup> Tax Treatment Extension Act of 1977, Pub. L. No. 95-615, § 203(a), 92 Stat. 3097, 3100 (1978).

stated the foreign earned income exclusion in 1981 and it remains in effect today.<sup>34</sup> Scholars argue that changes in the global economy, since Congress enacted the existing framework more than thirty years ago, warrant a debate over whether citizenship-based taxation and the corresponding tax credits should exist at all.<sup>35</sup>

Proponents of citizenship-based taxation continue to argue that the title of “United States citizen” carries countless benefits and therefore entitles Congress to impose a tax on citizens regardless of their place of residence.<sup>36</sup> The benefits of citizenship include the right to vote,<sup>37</sup> “the right to enter the United States at any time, and the right to protection in times of crisis.”<sup>38</sup> Thus, the taxes that foreign-based citizens pay function like “fee-for-service transactions,” or a quid pro quo, in exchange for the rights they retain abroad.<sup>39</sup> Others, however, argue that citizenship-based taxation is not clearly justified because the benefits to a nonresident citizen are minimal<sup>40</sup> and very little revenue is derived from taxing United States citizens living abroad.<sup>41</sup>

---

<sup>34</sup> Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 111(a), 95 Stat. 172 (codified as amended at I.R.C. § 911 (2007)); see also Kirsch, *supra* note 29, at 459-60.

<sup>35</sup> Kirsch, *supra* note 29, at 463.

<sup>36</sup> Kirsch, *supra* note 29, at 469-71 (citing Robert J. Peroni, *Back to the Future: A Path to Progressive Reform of the U.S. International Income Tax Rules*, 51 U. MIAMI L. REV. 975, 1009 (1997)).

<sup>37</sup> Perna Rao, Note, *What Would Humphrey Bogart Do?: An Overview of Federal Taxes as They Apply to the International Community of U.S. Nationals*, 25 QUINNIPIAC PROB. L.J. 298, 303 (2012) (citing Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1308 (2011) (discussing the right of a nonresident U.S. citizen to cast an absentee ballot in federal elections in a state which he was domiciled before leaving the United States)).

<sup>38</sup> Rao, *supra* note 37, at 303 (citing Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443, 472, 475 n.137, 476 (2007)).

<sup>39</sup> Kirsch, *supra* note 29, at 470-71.

<sup>40</sup> See Reuven S. Avi-Yonah, *International Tax as International Law*, 57 TAX L. REV. 483, 484-85 (2004) (“The United States insists on the right to tax its citizens on worldwide income no matter where they live. The Supreme Court in *Cook v. Tait* upheld this principle because of the benefits the United States provides its citizens even if they live overseas. But the opinion is weak, its underlying rationale is doubtful (are these benefits really so great?), and almost no other country follows the rule. Thus, although international law seems to sanction the U.S. practice (and the United States has written it into all its tax treaties), it seems a dubious rule to follow, and it has been criticized by academics.”).

<sup>41</sup> *Id.* at 486 (“It is doubtful, however, whether the United States should continue to insist on taxing its citizens living overseas, especially since because of a combination of exemptions and credits (and enforcement difficulties) it collects little tax from them.”).

## B. *A Global Model: The Foreign Account Tax Compliance Act*

In 2000, the Organization for Economic Development and Cooperation (“OECD”) began keeping a list of tax havens,<sup>42</sup> or places where people keep money undetected to avoid taxation. This list has changed over time: nine of the countries now on the list were not on the initial list, including Switzerland and Luxembourg.<sup>43</sup> Interest in tax havens has steadily increased since scandals arose surrounding the Swiss bank UBS AG and the Liechtenstein Global Trust Group, which prompted lawsuits by the United States and other countries.<sup>44</sup> In 2009, “UBS AG agreed . . . to pay \$780 million to settle charges it had helped U.S. taxpayers hide assets.”<sup>45</sup> Since this settlement, more than eighty United States taxpayers have been criminally charged, and Wegelin & Co., Switzerland’s oldest bank, closed after pleading guilty to helping United States taxpayers hide more than \$1.2 billion in foreign accounts.<sup>46</sup> A recent meeting between the G20 industrialized and developing countries led to a proposal of sanctions for tax havens, and a number of countries began to indicate commitments to information sharing agreements.<sup>47</sup> Information sharing and cooperation are at the very heart of the Foreign Account Tax Compliance Act and the corresponding intergovernmental agreements with other countries.<sup>48</sup>

The overall goal of FATCA is to put an end to the blatant efforts of foreign banks to deliberately seek out American elites and help them evade their tax obligations to the United States.<sup>49</sup> On March 18, 2010, the Hiring Incentives to Restore Employment Act (HIRE Act) was passed<sup>50</sup> and added a revolutionary new chapter to the Internal

---

<sup>42</sup> JANE G. GRAVELLE, CONG. RES. SERV., R40623, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION 3 (2013).

<sup>43</sup> See *id.* at 4.

<sup>44</sup> *Id.* at 5.

<sup>45</sup> Laura Saunders, *Overseas Americans: Time to Say ‘Bye’ to Uncle Sam?*, WALL ST. J., Aug. 17, 2013, available at <http://online.wsj.com/article/SB10001424127887323455104579014772169287210.html>.

<sup>46</sup> *Id.*

<sup>47</sup> GRAVELLE, *supra* note 42, at 5 (citing Anthony Faiola & Mary Jordan, *Tax-Haven Blacklist Stirs Nations: After G-20 Issues Mandate, Many Rush to Get Off Roll*, WASH. POST, Apr. 4, 2009).

<sup>48</sup> See generally Foreign Account Tax Compliance Act, 26 U.S.C §§ 1471-74 (2010).

<sup>49</sup> See Allison Christians, *Putting the Reign Back in Sovereign*, 40 PEPP. L. REV. 1373, 1383 (2013).

<sup>50</sup> I.R.S. Notice 2013-43, at 1, 2013-31 I.R.B. 113 (July 13, 2013), available at <http://www.irs.gov/pub/irs-drop/n-13-43.pdf>.

Revenue Code (the Code).<sup>51</sup> Chapter 4 of the Code (sections 1471 through 1474) “requires withholding agents to withhold 30 percent of certain payments to a foreign financial institution (FFI) unless the FFI has entered into an agreement (FFI agreement) with the IRS to, among other things, report certain information with respect to U.S. accounts.”<sup>52</sup> Chapter 4 imposes additional withholdings, as well as documentation and reporting requirements pertaining to certain payments.<sup>53</sup> For example, payments made to select nonfinancial foreign entities (NFFEs) fall under this category.<sup>54</sup> On January 17, 2013, following the enactment of the HIRE Act, the Treasury Department and the IRS provided for a phased implementation of FATCA requirements.<sup>55</sup> The phased requirements began on January 1, 2014 and continue through 2017.<sup>56</sup> FATCA requires FFIs “to report to the IRS information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest.”<sup>57</sup>

However, on July 12, 2013, due to the influx of interested countries, the Treasury announced a six-month extension to July 1, 2014.<sup>58</sup> The extension allowed for more time to complete agreements with interested foreign jurisdictions.<sup>59</sup> It “also provide[d FFIs] with the time necessary to comply with FATCA while helping to ensure efficient implementation of the law.”<sup>60</sup> The final regulations included provisions to (1) build intergovernmental agreements (IGAs) that foster international cooperation, (2) phase in the timeline for due diligence, reporting, and withholding and align them with IGAs, (3) expand and clarify the scope of payments not subject to withholding,

---

<sup>51</sup> See generally Foreign Account Tax Compliance Act, 26 U.S.C §§ 1471-74 (2010).

<sup>52</sup> I.R.S. Notice 2013-43, at 1, 2013-31 I.R.B. 113 (July 13, 2013), available at <http://www.irs.gov/pub/irs-drop/n-13-43.pdf>.

<sup>53</sup> *Id.* at 1-2.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 2.

<sup>56</sup> *Id.*

<sup>57</sup> Foreign Account Tax Compliance Act (FATCA), U.S. DEP'T OF TREASURY, <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> (last updated June 9, 2014).

<sup>58</sup> Press Release, U.S. Dep't of the Treasury, Treasury Engaging With More Than 80 Countries to Combat Offshore Tax Evasion and Improve Global Tax Compliance (July 12, 2013), available at <http://www.treasury.gov/press-center/press-releases/Pages/jl2012.aspx>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*



(4) refine and clarify the treatment of investment entities, and (5) clarify the compliance and verification obligations of FFIs.<sup>61</sup>

On July 26, 2012, the Treasury released the Model 1 IGA, in both reciprocal and nonreciprocal versions.<sup>62</sup> Reciprocal means that the United States will also provide tax information regarding foreign accounts to the FATCA partner.<sup>63</sup> The Model 1 IGA provides for bilateral agreements with foreign jurisdictions, under which FFIs would report directly to their respective tax authorities and the tax authority would then automatically exchange that information on a government-to-government basis with the United States.<sup>64</sup> Later, on November 14, 2012, the Treasury released the non-reciprocal Model 2 IGA, under which FFIs report information directly to the IRS and augment the information the IRS receives upon request from the respective foreign governments.<sup>65</sup> To date, the Treasury has concluded several bilateral agreements based on both the Model 1 and Model 2 IGAs.<sup>66</sup> More than fifteen countries have signed a bilateral agreement with the United States, seven of which became signatories by the time of the extension announcement in July 2013.<sup>67</sup>

The criticisms of both FATCA and citizenship-based taxation demand an examination of both the relevant historical precedent leading up to its passage and the global arena facing this new international tax regime. Tax evasion is not just an American problem; it is a worldwide problem.<sup>68</sup> The United States is simply the first to single-handedly propose a solution of this magnitude.<sup>69</sup>

---

<sup>61</sup> Press Release, U.S. Dep't of the Treasury, Treasury and IRS Issue Final Regulations to Combat Offshore Tax Evasion (Jan. 17, 2013), *available at* <http://www.treasury.gov/press-center/press-releases/Pages/tg1825.aspx>.

<sup>62</sup> I.R.S. Notice 2013-43, at 2, 2013-31 I.R.B. 113 (July 13, 2013), *available at* <http://www.irs.gov/pub/irs-drop/n-13-43.pdf>.

<sup>63</sup> Press Release, U.S. Dep't of the Treasury, Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA, *available at* <http://www.treasury.gov/press-center/press-releases/documents/reciprocal.pdf> (last visited Nov. 6, 2014).

<sup>64</sup> I.R.S. Notice 2013-43, at 2-3, 2013-31 I.R.B. 113 (July 13, 2013), *available at* <http://www.irs.gov/pub/irs-drop/n-13-43.pdf>.

<sup>65</sup> *Id.* at 3.

<sup>66</sup> *Id.*

<sup>67</sup> Foreign Account Tax Compliance Act (FATCA) - Archive, U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx> (last updated Nov. 5, 2014).

<sup>68</sup> See *Fighting Tax Evasion*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEV., <http://www.oecd.org/ctp/fightingtaxevasion.htm> (last visited Oct. 17, 2014).

<sup>69</sup> See Itai Grinberg, *The Battle Over Taxing Offshore Accounts*, 60 UCLA L. REV. 304, 309-10 (2012).

## II. ANALYSIS

This Comment contends that FATCA is constitutionally in line with our legal framework. Furthermore, despite potential constitutional questions surrounding citizenship-based taxation and the foundations of FATCA, the system of information exchange that it proposes should be successful and may even encourage other countries to follow suit. Finally, FATCA's system of tax transparency will improve international cooperation and foster a united front against the issue of tax avoidance, but it might require a few additions.

### A. *Cook v. Tait and the Constitution*

On a fundamental level, *Cook v. Tait*<sup>70</sup> promotes a system of taxation without representation that is particularly problematic for legal permanent residents who do not enjoy the comforts of citizenship. Article I of the Constitution specifies that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and *general Welfare* of the United States."<sup>71</sup> The average individual living abroad either moves there to work temporarily or for some permanent reason, but either way they are probably not asking for or helping themselves to many of the benefits offered by the government at that time.<sup>72</sup> Most scholars claim that the biggest benefit to residing abroad is the ability to vote in federal elections, but realistically, how many citizens actually vote while residing abroad? Nonetheless, there are tangible benefits that an American accrues while living abroad, regardless of their intention to use them or to vote in an election.<sup>73</sup> Is there a way to distinguish between individuals who utilize enough government services abroad to be taxed and those who do not?

No scholarship suggests that there is a way to differentiate between these two categories of United States citizens, which is why our current blanket system exists. More importantly, in domestic tax cases, the Supreme Court has ruled that benefits are gained simply by virtue of the services that are available for use when they are

---

<sup>70</sup> 265 U.S. at 56.

<sup>71</sup> U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

<sup>72</sup> See *Avi-Yonah*, *supra* note 40, at 484-85 (asking "are these benefits really so great?").

<sup>73</sup> *Kirsch*, *supra* note 29, at 473-76 (listing property protection, the right to vote, and the right to enter, among other benefits).

needed.<sup>74</sup> This, along with the holding in *Cook v. Tait*, suggests that the Court and Congress are likely to have the same understanding of benefits on an international scale.

Those opposed to the taxation of citizens abroad would like to see the Internal Revenue Code restructured to reflect modern developments in the global economy. These opponents argue “that the United States must either eliminate citizenship-based taxation or . . . exclude all income earned by U.S. citizens working abroad. . . .”<sup>75</sup> However, advocates of the system argue that these changes, particularly recent technological developments, actually bolster the continuation of our current citizenship-based taxation system by creating even stronger links between citizens residing abroad and those living in the United States.<sup>76</sup>

In fact, one scholar contends that FATCA may seriously undermine the claim that the United States is threatened by globalization and technological change.<sup>77</sup> FATCA “is an assertion by the U.S. that it not only has the jurisdictional authority to trace its resources no matter where in the world they are located, but that it also has the capacity to do so.”<sup>78</sup> Yet, is this flexing of sovereign muscle breaking constitutional constraints on the nation’s power to access its citizens’ private financial information? Many constitutional questions arise from Congress’s ability to impose worldwide taxation and now to curb tax evasion. However, federal statutes have repeatedly withstood challenges brought on constitutional grounds since the passage of the Sixteenth Amendment in 1913.<sup>79</sup>

“The Constitution grants Congress broad taxing powers,”<sup>80</sup> and there have not been any relevant cases challenging the constitutionality of this power in close to a century.<sup>81</sup> On a rudimentary level, the

---

<sup>74</sup> See *Massachusetts v. United States*, 435 U.S. 444, 468 (1978) (“Every aircraft that flies in the navigable airspace of the United States has available to it the navigational assistance and other special services supplied by the United States. And even those aircraft[s], if there are any, that have never received specific services from the National Government benefit from them in the sense that the services are available for their use if needed and in that the provision of the services makes the airways safer for all users.”).

<sup>75</sup> Kirsch, *supra* note 29, at 463.

<sup>76</sup> *Id.* at 481-82.

<sup>77</sup> Christians, *supra* note 49, at 1396.

<sup>78</sup> *Id.*

<sup>79</sup> Michael S. Kirsch, *The Tax Code as Nationality Law*, 43 HARV. J. ON LEGIS. 375, 409 (2006).

<sup>80</sup> *Id.* at 410.

<sup>81</sup> *Id.* at 412 (citing *Burnet v. Brooks*, 288 U.S. 378, 396-406 (1933)).

revenue a government uses to provide services for its people must come from somewhere. The most obvious source is a federal tax. In the Federalist Papers, the Founding Fathers endorsed taxes as an inherent right of nationhood and necessary to creating a functional, efficient government.<sup>82</sup>

In Federalist Number 30, Alexander Hamilton expounds that “there must be interwoven, in the frame of the government, a general power of taxation, in one shape or another.”<sup>83</sup> He points out that the necessities of a nation will usually be at least equal to its resources.<sup>84</sup> This proposition leads to the conclusion that revenue must be raised to satisfy the nation’s necessities over and above its available resources.<sup>85</sup> Hamilton then addressed concerns and objections to the power of taxation by posing several important questions:

How is it possible that a government half supplied and always necessitous, can fulfill the purposes of its institution, can provide for the security, advance the prosperity, or support the reputation of the commonwealth? How can it ever possess either energy or stability, dignity or credit, confidence at home or respectability abroad? How can its administration be any thing else than a succession of expedients temporizing, impotent, disgraceful? How will it be able to avoid a frequent sacrifice of its engagements to immediate necessity? How can it undertake or execute any liberal or enlarged plans of public good?<sup>86</sup>

All of these questions lead to the conclusion that taxes are a necessary function of government. Furthermore, Hamilton sought to ease worries regarding an unrestrained power of taxation with two considerations: (1) we are sure the resources of the community will be used for the benefit of the Union, and (2) whatever deficiencies that exist can be easily supplied by loans.<sup>87</sup> Thus, the government has the best interest of its citizens in mind so it will use the revenue it generates to promote the general welfare and supplement the funding of any additional programs with loans.

---

<sup>82</sup> See generally THE FEDERALIST NO. 30 (Alexander Hamilton).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See *id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

In Federalist No. 33, Hamilton argued that the Constitution authorizes laying taxes through both the Necessary and Proper Clause and the Supremacy Clause.<sup>88</sup> Congress is given broad discretion to enact laws or engage in activities that assist in the execution of the powers in the Constitution through the Necessary and Proper Clause.<sup>89</sup> Clause 1 of Article I, Section 8 grants Congress the taxing power; and “the phrase to provide for the common Defence and general Welfare modifies the power to tax.”<sup>90</sup> The Necessary and Proper Clause<sup>91</sup> “convert[s that] tax power into a power to provide for the common defense and general welfare by any means.”<sup>92</sup> Taxation is just an instrument for achieving the goals outlined in Clause 1, and Clause 18 allows for nontax instruments to be used to achieve those goals.<sup>93</sup> But by itself, the Necessary and Proper clause does not justify expanding who can be taxed and by how much.

However, there is no limitation as to the type of tax that may be implemented, so long as it is not a direct tax without apportionment.<sup>94</sup> The Necessary and Proper Clause does allow for an expansion of Congressional power provided that it is supported by a constitutional purpose.<sup>95</sup> Acts of Congress become federal law, reigning supreme as the law of the land,<sup>96</sup> and the Supremacy Clause effectively guarantees that taxes imposed by Congress carry a presumption of constitutionality.<sup>97</sup>

The Founding Fathers also viewed taxation as a means for a nation to legitimize itself and provide the services demanded by the public.<sup>98</sup> In the Federalist Papers, Alexander Hamilton discusses

---

<sup>88</sup> THE FEDERALIST NO. 33 (Alexander Hamilton).

<sup>89</sup> *United States v. Comstock*, 560 U.S. 126, 133-34 (2010) (“[T]he Necessary and Proper Clause makes clear that the Constitution’s grants of specific federal legislative authority are accompanied by broad power to enact laws that are ‘convenient, or useful’ or ‘conductive’ to the authority’s ‘beneficial exercise.’” (citing *McCulloch v. Maryland*, 17 U.S. 316, 413, 418 (1819)). Cf. THE FEDERALIST NO. 44 (James Madison) (“Without the *substance* of this power, the whole Constitution would be a dead letter.” (emphasis in original)).

<sup>90</sup> Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25, 69 (2005) (internal quotation marks omitted).

<sup>91</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>92</sup> Johnson, *supra* note 90, at 69.

<sup>93</sup> *Id.*

<sup>94</sup> U.S. CONST. art I, § 9, cl. 4.

<sup>95</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>96</sup> U.S. CONST. art VI, cl. 2.

<sup>97</sup> See THE FEDERALIST NO. 33 (Alexander Hamilton).

<sup>98</sup> See generally THE FEDERALIST NO. 30 (Alexander Hamilton).

objections to the Constitution based on the idea that state governments should handle “internal” taxation whereas federal government should have “external” taxing powers.<sup>99</sup> Within that context, Hamilton explained that this distinction would “violate the maxim of good sense and sound policy, which dictates that every *power* ought to be in proportion to its *object*; and would still leave the general government in a kind of tutelage to the State governments, inconsistent with every idea of vigor or efficiency.”<sup>100</sup> This question of federalism is not one of the main concerns regarding the constitutional inquiries related to worldwide taxation, but Hamilton’s notion of “good sense and sound policy” and the idea that every power should be proportional to its object has a very broad application.

Hamilton’s statements ought to be interpreted to mean that a government should not exert an overly broad power to tax. Others, however, may view it as Hamilton embracing the economic idea of ability-to-pay. But those two views are not irreconcilable. An ability-to-pay, or progressive tax system, may function effectively and efficiently without the government overstepping its constitutional authority to tax. But did the Founders ever envision a decision like *Cook v. Tait* and a world of such mobility and technological capabilities? The answer is no, meaning the time has come to reevaluate our international tax policies.

Although the Constitution itself does not use the word “citizen” when referring to rights,<sup>101</sup> the addition of the Bill of Rights secured crucial rights for all “people” in the United States.<sup>102</sup> The Fifth Amendment ensures that individuals will not be subject to takings by the government without just compensation.<sup>103</sup> Thus, the government may not deprive individuals of their personal property even if it is used for a public good because private individuals should not be required to bear the burden of many.<sup>104</sup> Even if the government only takes a portion of an individual’s property, “[i]t has been said that ‘the government does not simply take a single ‘strand’ from the ‘bundle’ of

---

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* (emphasis in original).

<sup>101</sup> See U.S. CONST. pmbl.

<sup>102</sup> U.S. CONST. amend. I–X.

<sup>103</sup> U.S. CONST. amend. V.

<sup>104</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

property rights: it chops through the bundle, taking a slice of every strand.’”<sup>105</sup>

The notion that a government’s taking of property chops through an individual’s bundle of rights indicates that the taking of even a small portion of an individual’s property effectively deprives the individual of all his or her property rights.<sup>106</sup> “Property” is a rather nebulous term, meant to encompass not only real property, but also intangibles such as investments, stocks, and debts owed, or anything in which an individual claims “the right of ownership” or enjoys a “bundle of rights.”<sup>107</sup> The relevant points of inquiry regarding a government taking include determining first whether taxation of an individual’s worldwide income affects a taking of private property, next whether the taking is for a public purpose, and finally whether there is just compensation.<sup>108</sup>

On the first point, it is undeniable that an individual’s income is private property. Although money is definitely private property, courts have even gone so far as to recognize interest income as private property.<sup>109</sup> Even though the definition of property is so expansive, property subject to a government taking is much more narrowly defined: the property that is taken must be “a specific, nonfungible asset.”<sup>110</sup> Money is not necessarily a specific asset in the sense that the IRS does not care which dollars you use to pay your taxes owed; and it is also highly fungible—one dollar may be replaced with another and they will be exactly the same.<sup>111</sup> The proposition that federal income tax is a taking may be disposed after a simple analysis of the first element. Since the inception of the federal income tax in 1913,<sup>112</sup> no credible scholar has proposed that federal income tax obligations

---

<sup>105</sup> Mark R. Jundt & Vernon R. Pederson, *A Vexatious Problem Among Many: In Light of the Conflict Between the Fifth and Sixteenth Amendments, Is Taxation an Uncompensated Taking?*, 84 N.D. L. REV. 365, 366 (2008) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

<sup>106</sup> *Id.*

<sup>107</sup> BLACK’S LAW DICTIONARY 1335 (9th ed. 2009).

<sup>108</sup> Jundt & Pederson, *supra* note 105, at 369.

<sup>109</sup> *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998).

<sup>110</sup> Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 Nw. U. L. REV. 189, 198 (2002).

<sup>111</sup> Jundt & Pederson, *supra* note 105, at 372.

<sup>112</sup> U.S. CONST. amend. XVI.

transgress the Takings Clause,<sup>113</sup> however, one may examine whether a violation of substantive due process has occurred.

Nonetheless,

[i]t is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.<sup>114</sup>

Since *Cook v. Tait*, courts have continually embraced the concept that a government benefits its citizens and can, therefore, tax them regardless of their residence.<sup>115</sup> Consequently, taxing citizens living abroad may not be arbitrary and irrational based on the idea that the citizen receives the ability to enjoy economic life, at their leisure, in both the country they reside in as well as the United States. This is essentially a variation of the benefits theory and it is only mildly persuasive.

When an individual has the resources to pay the tax, however, the ability-to-pay theory of taxation says they should be compelled to pay their share.<sup>116</sup> But then these individuals, regardless of how affluent they may be, are left paying separate taxes for two countries in which they are unlikely to be equally invested. Although many critics of citizenship-based taxation argue that double taxation is a huge concern, they simplify the issue to make it more appealing to legislatures and the general public and often end up overstating its significance.<sup>117</sup> The emphasis is misplaced because many foreign countries impose little or no income tax on United States citizens working there.<sup>118</sup> Addition-

---

<sup>113</sup> Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 729 (2002).

<sup>114</sup> *Id.* at 731-32 (alteration in original) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

<sup>115</sup> See *Bowring v. Bowers*, 24 F.2d 918, 923 (2d Cir. 1928) (holding that an alien is a resident in New York for tax purposes and that while the outcome in *Cook v. Tait* may be severe and potentially unsound as a matter of economic policy, it is hard to see why aliens who take up permanent residence in the United States should fare any better); *In re Walters*, 166 B.R. 119, 120 (Bankr. N.D. Ind. 1993) (finding the debtor's claim that he is a "non-resident alien" unpersuasive and that he meets the definition of a taxpayer subject to U.S. federal tax).

<sup>116</sup> See Joseph M. Dodge, *Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles*, 58 TAX L. REV. 399, 401 (2005) (citing RICHARD GOODE, *THE INDIVIDUAL INCOME TAX* 11, 17-20 (1976)).

<sup>117</sup> Kirsch, *supra* note 29, at 503.

<sup>118</sup> *Id.* at 504 (citing Sharon Reier, *Uncle Sam Takes a Bite out of Expatriate Incomes: Burden of New Tax Law Expected to Fall on the Middle Class and Semi-Retired*, N.Y. TIMES,



ally, the foreign tax credit for income received abroad relieves this burden of double taxation by reducing the United States income tax liability by the corresponding amount.<sup>119</sup> When a citizen is paying minimal taxes, as far as policy is concerned, all that is left for critics to argue are issues of fairness and administrative problems.

Although policy concerns have their place, they are not legal reasons for opposing the current system of citizenship-based taxation. These concerns do not make it clearly beneficial to overturn *Cook v. Tait* and our whole tax system. Absent a legal reason to do so, and with the policy arguments indistinct and in conflict, nearly one hundred years of precedent should not be overturned. If FATCA and citizenship-based taxation is legal, then the constitutional issues briefly mentioned above can be dismissed.

A related and troubling point is that the Code treats similar citizens very differently based on the nature and level of taxation within the foreign country where they reside.<sup>120</sup> Section 61 of the Code defines gross income as “all income from whatever source derived.”<sup>121</sup> This leads to the conclusion that income generated abroad may be taxable income because it is a source, even though it is not present in the United States. However, an American citizen residing in a country that taxes income pays little to no United States income tax because the foreign tax on foreign-source income is credited against the citizen’s income tax liability dollar-for-dollar.<sup>122</sup> Conversely, a United States citizen who resides in a nation that finances public activity through a general sales tax pays the full rate of the United States income tax because the foreign sales tax payments are neither deductible nor creditable.<sup>123</sup> Both citizens receive the same benefits, yet they pay a different tax rate because of inadequacies in our tax system to recognize discrepancies in foreign tax systems and carve out exceptions accordingly. The Code’s treatment of nonresident citizens seemingly undermines arguments in favor of worldwide taxation of United States citizens based on the benefits theory.<sup>124</sup> But even though

---

May 27, 2006, available at [http://www.nytimes.com/2006/05/26/style/26iht-ataxes.1826160.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/05/26/style/26iht-ataxes.1826160.html?pagewanted=all&_r=0). (noting “no-tax and low-tax areas like much of the Middle East, some Caribbean nations and Hong Kong”).

<sup>119</sup> See Kirsch, *supra* note 29, at 505.

<sup>120</sup> Zelinsky, *supra* note 16, at 1319.

<sup>121</sup> I.R.C. § 61 (2006).

<sup>122</sup> Zelinsky, *supra* note 16, at 1318.

<sup>123</sup> *Id.* at 1319.

<sup>124</sup> *Id.* at 1320.

“[m]inimal benefits do not justify maximal taxation,”<sup>125</sup> they do justify minimal taxation.

That is where communication and negotiation among countries regarding tax treaties becomes crucial. When representatives from two countries gather to discuss tax systems they have the ability to determine differences in their respective systems and then reach a conclusion as to how to compromise tax rates or which tax system should prevail. This ensures that a citizen is not fully taxed by each country and there is an attempt at eliminating double taxation. FATCA negotiations are conditioned on existing tax treaties—that is, the Treasury will negotiate the terms of the IGA only if there is a tax information exchange agreement between the countries. Therefore, FATCA seems to resolve one of the most pressing issues that arise from a constitutional analysis of citizenship-based taxation.

The policy reasons for overhauling the citizenship-based taxation system simply do not hold muster when viewed against the backdrop of nearly one hundred years of precedent. Additionally, despite the expansive definition of property, taxable income almost never falls into the category of a Fifth Amendment taking.<sup>126</sup> Even though the mere existence and availability of benefits to citizens residing abroad justifies Congress’ power to impose a minimal level of taxation, the Code’s variable treatment of individuals living abroad raises concerns. These concerns could very well be mitigated by a global communication system, like the one FATCA aims to establish.

## B. *The Never-ending Fight Against Tax Evasion*

Since its passage in 2010, some have questioned the constitutional authority to enter into the executive agreements required by FATCA.<sup>127</sup> Cases revealing the historical development of the executive authority to enter into international agreements suggest that FATCA falls within the constitutionally permissible purview.<sup>128</sup> Even though international cooperation impediments could threaten the suc-

---

<sup>125</sup> *Id.* at 1309.

<sup>126</sup> See Krotoszynski, *supra* note 113, at 729.

<sup>127</sup> See Patrick Temple-West, *Rand Paul FATCA Opposition Aims to Weaken Law Fighting Offshore Tax Evasion*, THE HUFFINGTON POST (May 8, 2013), [http://www.huffingtonpost.com/2013/05/08/rand-paul-fatca\\_n\\_3234435.html](http://www.huffingtonpost.com/2013/05/08/rand-paul-fatca_n_3234435.html).

<sup>128</sup> See *Reid v. Covert*, 354 U.S. 1 (1957); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936); *Burnet v. Brooks*, 288 U.S. 378 (1933).

successful implementation of FATCA on a worldwide scale, the intergovernmental agreements formed so far under the Act guarantee a stable foundation for cooperation.

### 1. A Constitutional Agreement

In 1936, the Court in *United States v. Curtiss-Wright Export Co.* held that “[t]he President is the constitutional representative of the United States with regard to foreign nations.”<sup>129</sup> The court stated:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.<sup>130</sup>

The Court then explained that even though the Constitution does not explicitly permit it, simply by virtue of national sovereignty, the United States has the power to enter into international agreements other than treaties.<sup>131</sup> Therefore, as a consequence of nationhood, the President as the sole organ of international relations may enter into agreements with foreign nations. The executive agencies may also help the President to “take [c]are” of the laws passed by Congress.<sup>132</sup> FATCA was passed by Congress in 2010 and is now being implemented by the executive branch;<sup>133</sup> therefore, it enjoys the highest level of constitutional authorization.

A slight caveat arises when considering *Reid v. Covert*, where the Court held that the Fifth and Sixth Amendments to the Constitution limit the treaty power.<sup>134</sup> This suggests that due process may be a real concern regarding FATCA because “no agreement with a foreign

---

<sup>129</sup> 299 U.S. at 319.

<sup>130</sup> *Id.* at 319-20.

<sup>131</sup> *See id.* at 322.

<sup>132</sup> U.S. CONST. art. II, § 3.

<sup>133</sup> *See* Foreign Account Tax Compliance Act (FATCA), U.S. DEP’T OF TREASURY, <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> (last updated June 9, 2014).

<sup>134</sup> 354 U.S. at 8-9.

nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.”<sup>135</sup> However, in light of *Cook v. Tait*, there are no constitutional impediments to imposing an income tax on a citizen that resides in a foreign nation. FATCA aims to prevent citizens from avoiding income tax, so it is permitted by that same logic. Therefore, there are no constitutional restraints on the President or the Treasury department to enter into intergovernmental agreements with foreign nations. These agreements do not, in any way, abrogate the rights of our citizens; either those living here in the United States or those located abroad.

Thus, it seems that taxation is the exception to this limitation on treaty powers. In *Burnet v. Brooks*, the Court held that the United States could impose an estate tax on a foreign national with United States assets consistent with principles of international relations because the rule prohibiting multiple taxation by the states is not applicable to relations between the United States and other sovereigns.<sup>136</sup> Again, the national sovereignty theory was invoked, along with the Necessary and Proper Clause jurisprudence,<sup>137</sup> to prove that “the United States is vested with all the powers of government necessary to maintain an effective control of international relations.”<sup>138</sup> The court embraces the idea that the taxing power of the federal government is so intricately interwoven with its sovereignty that the taxing power of states is not a valid comparison when it comes to questions of jurisdiction and the Constitution.<sup>139</sup> The power of a state to tax an individual does not transcend its borders, however, the United States can tax its citizens even outside of its borders.<sup>140</sup>

Although laws and treaties are subject to the limitations of the Constitution, taxes involve a primary shift in focus from the rights of an individual to the rights of the state to benefit itself and its sovereignty for the ultimate betterment of its citizens. Tensions arise between the provisions in current tax treaties and the negotiations surrounding FATCA. These treaties undoubtedly benefit the individual by seeking to coordinate tax systems to eliminate double taxation.

---

<sup>135</sup> *Id.* at 16.

<sup>136</sup> 288 U.S. 378, 405-06 (1933) (“The Constitution creates no such relation between the United States and foreign countries as it creates between the states themselves.”).

<sup>137</sup> See U.S. CONST. art. I, § 8, cl. 18.

<sup>138</sup> *Burnet*, 288 U.S. at 396.

<sup>139</sup> *Id.* at 404-05 (citing *United States v. Bennett*, 232 U.S. 299, 305-06 (1914)).

<sup>140</sup> *Burnet*, 288 U.S. at 405 (citing *Cook v. Tait*, 265 U.S. 47, 55-56 (1924)).

Even though it may not be a complete shift away from the holdings in *Cook v. Tait*,<sup>141</sup> and *Burnet v. Brooks*,<sup>142</sup> on its face it does appear that this is a shift in perspective from solely the nation's interests to now include the individual's interests. This is a civil rights victory, but do the pursuits of international cooperation and national sovereignty suggest mutual exclusivity? They can coexist in a world where uniformity and tax compliance is the goal. That regime benefits everyone involved—the United States, its citizens, and partnering nations.

Tax information is available to partnering nations complying with FATCA, but it is only on a bilateral, not multilateral, level.<sup>143</sup> If all compliant nations have the same objective—to end tax evasion—then FATCA would benefit from a more uniform international system. The President, having the authority to engage in international agreements, could foster the creation of such a system as an expansion of FATCA through multilateral agreements. Even though nations will still have their own goals and certainly retain their sovereignty, this could be the most comprehensive and effective approach to solving the tax evasion issue.

## 2. Citizenship Versus Residence: How To Make FATCA Succeed

Despite all the criticism surrounding citizenship-based taxation<sup>144</sup> and the many scholars who argue that the system will hinder the success of FATCA,<sup>145</sup> some still have confidence in the system and argue that it is the best mechanism for implementation.<sup>146</sup> Citizenship-based taxation is a more efficient mechanism because a difficult domicile inquiry is required in a residence-based system. It is, therefore, best to keep this system as we implement and enforce an overarching international tax reform to keep compliance with FATCA as simple as possible for United States citizens.

---

<sup>141</sup> 265 U.S. at 56.

<sup>142</sup> 288 U.S. at 405-06.

<sup>143</sup> See I.R.S. Notice 2013-43, at 3-4, 2013-31 I.R.B. 113 (July 13, 2013), available at <http://www.irs.gov/pub/irs-drop/n-13-43.pdf>.

<sup>144</sup> See Avi-Yonah, *supra* note 40, at 484-85.

<sup>145</sup> See Patrick W. Martin, *FATCA of the HIRE Act Crashes Head on into the "Twilight Zone" (Lawful Permanent Residents Living Overseas)*, 36 INT'L TAX J. 39, 44 (2010); see also Schneider, *supra* note 19, at 37-38.

<sup>146</sup> Zelinsky, *supra* note 16, at 1325, 1350; see also Kirsch, *supra* note 8, at 210.

FATCA is premised on open channels of communication between countries, so it is foreseeable that some countries could find the advantages of the United States system of worldwide taxation very appealing and worth the transition. A system that is (1) less administratively burdensome; (2) generates more revenue; and (3) has the potential to facilitate a global system of tax information exchange to avoid tax evasion provides numerous benefits for developing countries. If FATCA encourages a domicile inquiry to uncover information about taxpayer foreign accounts, then it encourages the overlap with residence-based taxation. Once an overlap exists for an extended period of time, there will no longer be a need for a distinction between the two because they will be functionally the same.

If FATCA helps to eliminate the distinction and citizenship-based taxation is a more efficient system, then is the United States backhandedly encouraging other countries to adopt our system?<sup>147</sup> This brings the analysis back to the idea of sovereignty and international law theories because “[t]ax policy is not made in an international vacuum.”<sup>148</sup> Other international relations may impede or aid discussions of the taxing authorities.<sup>149</sup> Considering the government shutdown and near debt default at the start of the 2014 fiscal year, other countries may not be as confident in our government and, particularly, our tax system as they were before. Scholars argue that, “because tax ties directly into the economic engine that is central to international power and prestige, it may be challenging to obtain agreement.”<sup>150</sup>

---

<sup>147</sup> See Christians, *supra* note 49, at 1394 n.80 (“If exerting citizenship-based taxation is merely a matter of administrative capacity, success in implementing the FATCA regime may encourage other countries to follow the U.S. lead.”); see also Christians, *supra* note 49, at 1394 n.80 (quoting Brian J. Arnold, *Tax Discrimination Against Aliens, Non-Residents, and Foreign Activities: Canada, Australia, New Zealand, the United Kingdom and the United States* 7 (Canadian Tax Paper No. 90, 1991) (“A country’s legal authority to levy tax is effectively limited only by practical considerations of enforcement and collection. Rules of public international law or domestic constitutional law restrict a country’s jurisdiction to tax only in narrow, relatively insignificant ways.”)).

<sup>148</sup> Diane Ring, *International Tax Relations: Theory and Implications*, 60 TAX L. REV. 83, 90 (2007).

<sup>149</sup> *Id.* at 90 & n.25 (“denying credit for foreign taxes paid to a country if: (1) the United States does not recognize the government, (2) the United States has ‘severed diplomatic relations’ with the country (or simply does not conduct relations with the country); or (3) the country is designated by the Secretary of State as one ‘which repeatedly provides support for acts of international terrorisms [sic]’” (quoting IRC § 901(j)(1)-(2) (2010)). “Countries currently identified by the Service as falling under § 901(j) include Cuba, Iran, North Korea, Sudan, and Syria.” Ring, *supra* note 148, at 90 n.25 (citing Rev. Rul. 2005-3, 2005-1 C.B. 334 (2004)).

<sup>150</sup> Ring, *supra* note 148, at 90.

During the shutdown there was also some speculation that the already time-stressed FATCA negotiations might be delayed because of governmental dysfunction.<sup>151</sup> The United States is therefore not likely to be capable of encouraging other countries to do much with their economic systems right now.

Ultimately, every country makes a decision regarding the proper tax system to further its individual success. Additionally, the question of backhanded acceptance of the system of worldwide taxation suggests a “follow-the-leader” approach to international cooperation,<sup>152</sup> which is not very cooperative at all. A more neoliberal bargaining approach would be better suited to establish an agreement among countries, if they can find the lowest common denominator.<sup>153</sup> Given that FATCA is a way to overcome information barriers, a bargaining approach should allow countries to reach a conclusion with relative ease. The United States must be careful not to come off as the power-hungry leader trying to persuade countries to follow suit, and rather portray itself as the leader of a team effort who is both willing to listen to and cooperate with any country to pursue mutual interests.

There are also several policy reasons why FATCA is destined to be successful. First, it is a great tool for international cooperation and is the best step toward unity in the international tax regime. The Treasury Department has been working very hard to establish comprehensive IGAs through negotiation meetings with individual countries and many have already signed or are very close to signing a bilateral agreement.<sup>154</sup> Second, the heightened tax transparency that will be fostered through FATCA is a useful tool for governments to be more efficient in collecting revenue. And finally, privacy concerns surrounding the implementation of FATCA are all over-hyped. FATCA is a workable model and is something that should appeal to countries from every part of the world as a means of fighting their own tax evaders.

---

<sup>151</sup> See Alison Bennett, *Government Shutdown Could Delay FATCA Guidance, Agreements, Practitioners Say*, 32 TAX MGMT WKLY. REP. 1362 (2013).

<sup>152</sup> See Ring, *supra* note 148, at 113.

<sup>153</sup> *Id.*

<sup>154</sup> See James Hamilton, *Treasury Will Work to Satisfy EU Privacy Concerns Regarding Provision of FATCA Information*, 7 INT'L SEC. & FIN. REPORTING UPDATE 4, Feb. 16, 2012, available at 2012 WL 488024. Only countries that began negotiations early in the process, however, have received customized agreements. See also *id.*

These privacy concerns, however, have sparked many comments both from critics and even legislators on Capitol Hill.<sup>155</sup> The Fourth Amendment ensures the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>156</sup> Opponents contend that FATCA infringes upon constitutional rights because the private details of the financial assets of anyone considered a “U.S. Person” would be provided to the IRS without a warrant requirement or suspicious activity report.<sup>157</sup>

Although privacy violations are a very grave concern, individuals agree to surrender certain privacies, particularly information about their financial assets to the IRS, in exchange for citizenship status and its accompanying benefits.<sup>158</sup> If a certain tax and its implementation are constitutional, then the government has supreme authority to impose it on all of its citizens. FATCA is no more than a check that taxes are imposed on all individuals equally, particularly those living abroad or those who have assets abroad. From this perspective, FATCA furthers the constitutional notion of equality under the law. It is a tax regime that simply attempts to redistribute the tax burden where it belongs, thereby providing benefits for everyone at a relatively lower cost. This Comment will not delve further into the Fourth Amendment privacy concerns associated with information sharing and international application, but for the purposes of FATCA, privacy is ensured by a secured exchange system between countries with extensive treaties and IGAs.

Another policy objection to FATCA is its potentially harmful effect on United States competitiveness. FATCA evokes the Civil War era sentiments regarding the justification for citizenship-based taxation,<sup>159</sup> but many scholars criticize FATCA precisely for this reason. The majority of tax scholarship has argued that American competitiveness will suffer if we force institutions to report information regarding our citizens’ bank accounts.<sup>160</sup> Fewer investments and

---

<sup>155</sup> See, e.g., Temple-West, *supra* note 127.

<sup>156</sup> U.S. CONST. amend. IV.

<sup>157</sup> Press Release, United States Senator Rand Paul, Sen. Paul Introduces Bill to Repeal Anti-Privacy Provisions in FATCA (May 8, 2013), available at [http://www.paul.senate.gov/?p=press\\_release&id=793](http://www.paul.senate.gov/?p=press_release&id=793).

<sup>158</sup> See generally Kirsch, *supra* note 29, at 471-79.

<sup>159</sup> See *supra* Part I.A.

<sup>160</sup> See Heiberg, *supra* note 12, at 1705; see generally Carol P. Tello, *Reporting, Withholding, and More Reporting: HIRE Act Reporting and Withholding Provisions*, 39 TAX. MGMT. INT'L J. 5 (2010).



unwillingness to work with United States citizens will tarnish our international reputation and certainly hurt confidence in our markets and government, therefore, “FFIs that choose to comply might shift compliance costs to U.S. investors.”<sup>161</sup>

First, regarding the concern that FFIs will be unwilling to work with United States citizens and these citizens will then become outcasts in the international financial world, the Treasury has combated such objections: “FATCA withholding applies to the U.S. investments of FFIs whether or not they have U.S. account holders, so turning away known U.S. account holders will not enable an FFI to avoid FATCA.”<sup>162</sup> Second, America’s international reputation has already been tarnished for reasons unrelated to tax policy, particularly involvement in armed conflicts abroad. It is unlikely that a tax policy that many major countries have already agreed to implement on a reciprocal basis is going to significantly hurt our reputation and competitiveness. At worst, investors will lash out at other countries for agreeing to comply with FATCA. Third, confidence in American markets has decreased since the financial crisis in 2008 and confidence in our government is still low because of the all-too-recent government shutdown. Finally, compliance costs may shift, but they will shift to every investor in all countries that have chosen to comply with FATCA. These fears cannot and will not affect just the United States, meaning the United States will not be the outlier in the war against tax avoidance.

Several other policy objections prop up the anti-FATCA camp, including the large administrative burden imposed on both individuals and governments,<sup>163</sup> and the difficulties associated with modern technologies and increased globalization.<sup>164</sup> But most of these arguments are rather simplistic, focusing on the “intrusive reporting regime[’s] . . . complexity, disproportionate cost, heavy-handedness, extra-territoriality, and unprecedented use of withholding to force disclosure of information.”<sup>165</sup> Scholars that pursue this line of reasoning

---

<sup>161</sup> See Heiberg, *supra* note 12, at 1705 (citing Micah Bloomfield & Dmitriy Shamakov, *The Thirty Percent Solution?: FATCA Provisions of the HIRE Act*, STROOCK SPECIAL BULL. 1, 6 (2010), available at <http://www.stroock.com/SiteFiles/Pub920.pdf>).

<sup>162</sup> Robert Stack, *Myth vs. FATCA: The Truth About Treasury’s Effort to Combat Offshore Tax Evasion*, U.S. DEP’T OF TREASURY (Sept. 20, 2013), <http://www.treasury.gov/connect/blog/Pages/Myth-vs-FATCA.aspx>.

<sup>163</sup> See Heiberg, *supra* note 12, at 1704-05.

<sup>164</sup> Kirsch, *supra* note 29, at 512.

<sup>165</sup> Schneider, *supra* note 19, at 37.

highlight that minimal tax revenue is collected from citizens living and working abroad.<sup>166</sup> They also point out that FATCA heightens the tax burden on lawful permanent residents (LPRs) temporarily residing abroad by subjecting them to its reporting regime; and this is much less justifiable because LPRs do not receive any of the benefits of citizenship.<sup>167</sup> LPRs, however, do have the benefit of living and working in the United States and they may enter and exit with relative ease. Also, even if minimal tax revenue and the inequity of taxing LPRs is true, the benefits of added revenue coupled with the increased security of FATCA outweigh the disadvantages of the Act.

Policy concerns aside, FATCA bolsters a well-established system of citizenship-based taxation, which is predicated on constitutional authority and a century of legal precedent. Absent a convincing legal reason to switch to a residence-based system, such a foundation cannot be uprooted. Just because the United States is taking the lead on curbing tax evasion does not mean that the international community cannot make its own decisions regarding their level of involvement in FATCA and their domestic tax laws.

## CONCLUSION

Constitutional concerns surrounding FATCA should be dismissed because its foundation, citizenship-based taxation, is couched in nearly a century of Supreme Court decisions. This legal precedent and several persuasive policy advantages, particularly international cooperation and efficiency, overwhelm the policy objections regarding FATCA. Congressional approval and executive authority creates a strong presumption of constitutional support, therefore, FATCA enjoys the highest level of legal endorsement.

With this legal framework in mind, in a post-FATCA-enactment world of tax transparency, the distinction between competing taxation systems will no longer be a concern because of free-flowing information. A reduced distinction between systems could encourage nations to take the initiative to make strides toward even greater international cooperation on tax policies. FATCA certainly bolsters our legal foundation based on the Supreme Court's decision in *Cook v. Tait*, and it is undoubtedly one of the last pieces of the tax evasion puzzle.

---

<sup>166</sup> See, e.g., Avi-Yonah, *supra* note 23, at 393-94.

<sup>167</sup> See Martin, *supra* note 145, at 40-44.