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Allison Christians

McGill University Faculty of Law, allison.christians@mcgill.ca

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BUYING IN: RESIDENCE AND CITIZENSHIP BY INVESTMENT

ALLISON CHRISTIANS*

INTRODUCTION

Italy recently announced a new immigration program that invites certain high net worth individuals to make Italy their country of residence, enticing them with the right to pay a “substitute tax” of €100,000 per year on their foreign income and gains.¹ For those already residing in Italy, the highest marginal tax rate on income is 43%, with additional regional and municipal rates bringing the rate closer to 50%; capital gains are subject to a reduced rate (about half the regular rate).² Assuming eligible immigrants have significant foreign income and gains that would otherwise face the highest marginal rates of tax, the new program’s outcome would seem to ensure that prior residents face a significantly higher overall tax bracket than their new neighbours (unless of course, such individuals use other mechanisms and programs, whether in Italy or elsewhere, to also reduce their own tax rates).

Why would Italy design a tax scheme that appears to privilege certain immigrants over its other taxpayers in this manner? In reporting on the program for Forbes, journalist David Schrieberg stated that “[s]ome observers speculate that the new tax regime is aimed particularly at super-rich individuals

* H. Heward Stikeman Chair in the Law of Taxation, McGill University Faculty of Law. This research was assisted by a grant from the Social Science and Humanities Research Council of Canada. Thanks for helpful comments on an early draft are due to Montano Cabezas, David Lesperance, Henry Ordower, Peter Szigeti, and the participants of the Sanford E. Sarasohn Conference on Critical Issues in Comparative and International Taxation II: Taxation and Migration, Saint Louis University, 31 March 2017; as well as to Jake Heyka and Stephen Albers for excellent research assistance.

1. *Invest in Italy: Tax Regime for New Residents*, AGENZIA DELLE ENTRATE, http://www1.agenziaentrate.gov.it/english/invest_italy/new_residents_regime.htm [https://perma.cc/3NBX-BCVX]. To qualify, residents must have “been non-tax resident in Italy for at least 9 years out of the 10 years preceding their transfer to Italy,” and successful applicants may extend the regime to their family members at €25,000 per year per family member. *Id.*

2. *See, e.g.*, ERNST & YOUNG, 2016-17 WORLDWIDE TAX AND IMMIGRATION GUIDE 679, 681–82 (Ronald Anes ed., 2016), [http://www.ey.com/Publication/vwLUAssets/Worldwide_Personal_Tax_and_Immigration_Guide_2016-17/\\$FILE/Worldwide%20Personal%20Tax%20and%20Immigration%20Guide%202016-17.pdf](http://www.ey.com/Publication/vwLUAssets/Worldwide_Personal_Tax_and_Immigration_Guide_2016-17/$FILE/Worldwide%20Personal%20Tax%20and%20Immigration%20Guide%202016-17.pdf) [https://perma.cc/D5BH-F26M] (showing that capital gains transactions involving a non-qualified percentage of a company’s shares are taxed at a rate of 26%).

considering a Brexit-induced change of residence.”³ Schrieberg further acknowledged that Italy is not innovative in this respect: “Various countries including Portugal, Malta, Cyprus and Ireland have been chasing high net worth individuals with various incentives.”⁴ In fact, much of the world is engaged in an intense competition to make wealthy individuals their own tax residents, luring them away from rival countries.⁵

International law and political theory scholars have long wrestled with the normative implications of commodifying citizenship and access to immigration with pay-to-play visa programs, but the analysis does not typically consider the role the tax system plays or could play in valuing these schemes, nor how such schemes might impact the tax regime in terms of gross revenue or distributional effect.⁶ Yet governments increasingly appear to view their tax systems as a means of potentially increasing the value of residence and citizenship in their countries. The decision to define nationality to fulfill strategic aims may be viewed as consistent with the principle in international law that states are free to define their nationality as they see fit, and that other states should recognize these determinations unless they conflict with other international legal principles.⁷

Given the cost involved in forfeiting revenue from those arguably most able to pay, whether the programs actually produce the predicted outcomes, is one

3. David Schrieberg, *Italy Joins the European Race to Attract Wealthy Foreigners*, FORBES (Mar. 9, 2017, 4:33 PM), <https://www.forbes.com/sites/davidschrieberg1/2017/03/09/italy-joins-the-european-race-to-attract-wealthy-foreigners/#61a8614361e4> [<https://perma.cc/PS8L-HJ4B>].

4. *Id.*

5. See DAVID LEY, MILLIONAIRE MIGRANTS: TRANS-PACIFIC LIFE LINES 9 (2010) (“Some 30 nations around the world have business immigration programmes, intending to entice footloose entrepreneurs and investors to re-locate their transformative energies to a new national project of economic development,” and that for prospective migrants, “[t]he carrot inducing their migration is the promise of citizenship and the enhanced quality of life of advanced societies, assets that may well be inaccessible for these migrants through other immigration entry classes.” (citations omitted)).

6. See generally RAINER BAUBÖCK, TRANSNATIONAL CITIZENSHIP: MEMBERSHIP AND RIGHTS IN INTERNATIONAL MIGRATION (1994); CITIZENSHIP, DIVERSITY & PLURALISM: CANADIAN AND COMPARATIVE PERSPECTIVES (Alan C. Cairns et al. eds., 1999); Owen Parker, *Commercializing Citizenship in Crisis EU: The Case of Immigrant Investor Programmes*, 55 J. COMMON MKT. STUD. 332 (2017).

7. Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws art. 1, Apr. 12, 1930, League of Nations Doc. C.224.M.III.1930.V (1930) (“It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.”). States might respond to strategically driven nationality programs by declining entry to persons holding passports or visas from countries suspected of selling passports without adequate background checks. See, e.g., Anthony Van Fossen, *Citizenship for Sale: Passports of Convenience from Pacific Island Tax Havens*, 45 COMMONWEALTH & COMP. POL. 138, 140 (2007) (discussing opposition to certain passports following the U.S. terrorist attacks on Sept 11, 2001).

obvious question to be asked.⁸ Even if the programs, in fact, achieve their goals, questions surely arise regarding the normative justification for using the tax system to lure the wealthy away from other countries in this manner. Does the normative case differ when applied to humans as opposed to companies, which are routinely lured by many countries with various kinds of tax incentives? Does it differ when the luring state is richer or poorer relative to the countries of origin of prospective immigrants? Sketching out a framework for analyzing these questions from a normative perspective requires a sense of the various competing programs on offer. This Essay takes a first step by comparing national programs that use their taxing power in some manner to attract immigration. The aim is to highlight some of the factors that raise normative questions about the appropriate design and uses of a tax system. The Essay concludes that these questions are worthy of further study as increased competition to attract the wealthy is likely to continue going forward.

I. WHERE TO PARK FOR TAX PURPOSES

Much of the popular narrative surrounding international tax planning focuses on where multinational companies “park” their foreign earnings for tax purposes.⁹ Indeed, a steady stream of sensational news stories about the growing

8. See, e.g., Jelena Dzanic, *The Pros and Cons of Ius Pecuniae: Investor Citizenship in Comparative Perspective 2* (Eur. Univ. Inst., RSCAS Working Paper No. 14, 2012) (“Given the degree of discretion that governments have in deciding upon naturalisation on these grounds, citizenship by investment programs have raised numerous contentious questions, including those related to tax evasion, extradition, and corruption.”). Some countries have examined their programs and concluded that there is insufficient evidence of the promised benefits. See, e.g., DEP’T OF FIN., GOV’T OF CAN., *THE ROAD TO BALANCE: CREATING JOBS AND OPPORTUNITIES* 81 (2014), <http://www.budget.gc.ca/2014/docs/plan/pdf/budget2014-eng.pdf> [<https://perma.cc/27M4-39CV>]. Canada eliminated its federal immigrant investor program after concluding that there was “little evidence that immigrant investors as a class are maintaining ties to Canada or making a positive economic contribution to the country.” *Id.*; see also OFFICE OF INSPECTOR GEN., DEP’T OF HOMELAND SEC., *OIG-14-19, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES’ EMPLOYMENT-BASED FIFTH PREFERENCE (EB-5) REGIONAL CENTER PROGRAM 1* (2013), https://permanent.access.gpo.gov/gpo49978/OIG_14-19_Dec13.pdf [<https://perma.cc/EH9P-63WZ>]. The Department of Homeland Security was unable to “demonstrate that the program is improving the U.S. economy and creating jobs for U.S. citizens as intended by Congress.” *Id.*

9. Connie Guglielmo, *Apple, Google Among Top U.S. Companies Parking Cash Offshore to Reduce Taxes, Study Says*, FORBES (Aug. 1, 2013, 3:00 PM), <https://www.forbes.com/sites/connieguglielmo/2013/08/01/apple-google-among-top-u-s-companies-parking-cash-offshore-to-reduce-taxes-study-says/#443d6ba41bba> [<https://perma.cc/SER2-XSCA>] (citing U.S. PUB. INTEREST RESEARCH GRP., *OFFSHORE SHELL GAMES* (2013)); see also Tim Dickinson, *The Biggest Tax Scam Ever*, ROLLING STONE (Aug. 27, 2014), <http://www.rollingstone.com/politics/news/the-biggest-tax-scam-ever-20140827> [<https://perma.cc/PTC9-ZUZ2>] (“Some of America’s top corporations are parking profits overseas and ducking hundreds of billions in taxes. And how’s Congress responding? It’s rewarding them for ripping us off.”); David Meyer, *Here’s What You Need to Know About Apple’s \$14.5 Billion EU Tax Bill*, FORTUNE (Aug. 30, 2016, 6:07 AM),

stash of “offshore cash” held by some of the world’s largest, most visible, and, presumably, most profitable companies was the catalyst for the ongoing multilateral initiative to curb tax competition, known by its now-famous acronym of BEPS, for “base erosion and profit shifting.”¹⁰ With all eyes focused on the kinds of tax rules that allow companies to shift their profits for tax purposes, often without changing much or anything by way of “real” business locations or operations, the program to counter BEPS, if successful, will shift countries away from tax incentives that reward paper profit shifting in favour of tax incentives that will reward shifting of other activities and operations.¹¹

Shifting activities and operations will mean shifting people as well, including entrepreneurs, managers, highly skilled workers, and other key personnel. Tax incentives for favoured immigrants are but one aspect of this brave new world of tax competition. Yet these incentives, and the implications for countries that do not have the means to compete effectively or protect themselves against such competition, appear to be completely off the agenda for the countries currently focused on BEPS.¹²

As Italy’s new program implies, nations stand to gain from luring the wealthy in hopes that their fortunes will follow. Ultimately, the rich migrant population might be expected to become part of the tax base when the incentive expires, generating spillover effects in the meantime.¹³ In a world of increasing

<http://fortune.com/2016/08/30/apple-tax-ireland-ruling/> [<https://perma.cc/U22D-VUBL>] (“Apple has certainly claimed that it parks so much money offshore because of the U.S. tax code.”); Scott Thurm & Kate Linebaugh, *More U.S. Profits Parked Abroad, Saving on Taxes*, WALL ST. J. (Mar. 10, 2013, 8:15 PM), <http://online.wsj.com/article/SB10001424127887324034804578348131432634740.html> [<https://perma.cc/MM5J-U9Y3>]; Press Release, Opening Statement by John McCain on Apple Inc.’s Offshore Tax Avoidance (May 21, 2013), <https://www.mccain.senate.gov/public/index.cfm/press-releases?ID=C7781CE2-0700-D17F-6F9F-6BFF724BCAD2> [<https://perma.cc/M9XR-HPZG>] (Sen. John McCain stated: “Today, Apple has over \$100 billion, more than two-thirds of its total profits, stashed away in an offshore account. That’s over \$100 billion that are not currently subject to U.S. corporate income taxes . . .”).

10. For a discussion, see Allison Christians, *BEPS and the New International Tax Order*, 2016 BYU L. REV. 1603, 1604–05 (2017).

11. See, e.g., Yariv Brauner, *What the BEPS?*, 16 FLA. TAX REV. 55, 95, 97 (2014); Christians, *supra* note 10, at 1631.

12. The use of tax incentives to lure prospective migrants, and the effect of such incentive programs on other countries, is nowhere discussed in the fifteen action items identified and negotiated at the OECD as part of the BEPS project. See ORG. FOR ECON. CO-OPERATION & DEV. [OECD], OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT: 2015 FINAL REPORTS, EXECUTIVE SUMMARIES (2015), <https://www.oecd.org/ctp/beps-reports-2015-executive-summaries.pdf> [<https://perma.cc/9FZY-9H5K>].

13. See LEY, *supra* note 5, at 9 (“[From the state’s perspective,] the business immigrant as *homoeconomicus* is a trophy acquisition in a neo-liberal policy regime, top prize in the skilled immigrant stakes. Not merely self-supporting, the business immigrant has both the skill and the wealth to add value, to create jobs for others, and provide tax revenues for the state.” (citations omitted)). This view is echoed in government materials promoting their investor visa programs. See, e.g., Dep’t of Immigration & Border Prot., *What Is the Significant Investor Visa and Premium*

wealth inequality and a limited number of eligible elites to target for immigration, it is a buyer's market for the geographically mobile consumer of fiscally convenient tax residency.¹⁴ As a result, whether the wealthy will park themselves in Italy as opposed to another jurisdiction depends on a calculation of multiple personal and social factors, but also a calculation of the costs and benefits of competing residence programs that offer tax incentives to immigrants.

In thinking about the consequences for the tax system of immigrant investor programs and vice versa, a distinction must be made between types of immigration programs, since not all offer tax reductions relative to existing residents.¹⁵ Indeed, the distinctions between programs that do and do not offer tax reductions are stark reminders that the relative value of jurisdictional ties to prospective immigrants are driven in large part by pre-existing wealth and associated disparities among nations. Here, as in other forms of tax competition, smaller and poorer jurisdictions appear to be at a distinct disadvantage to their G7 and OECD counterparts, which do not need to sacrifice the integrity of their tax systems to attract prospective immigrants.¹⁶ As Table 1 below demonstrates,

Investor Visa?, AUSTRALIAN GOV'T, <http://www.border.gov.au/Lega/Lega/Form/Immi-FAQs/what-is-the-significant-investor-visa> [<https://perma.cc/KZ2C-N5L9>] ("The purpose of the visa is to provide a boost to the Australian economy and to compete effectively for high net worth individuals seeking investment migration.").

14. See, e.g., KATHRIN BRANDMEIR ET AL., ALLIANZ GLOBAL WEALTH REPORT 2015, at 45 (Heike Bahr et al. eds., 2015) (Ger.), https://www.allianz.com/v_1444215837000/media/economic_research/publications/specials/en/AGWR2015_ENG.pdf [<https://perma.cc/YV46-Q96F>]. The United States is the world's wealthiest country but also the most unequal among 55 countries studied. Also, "[t]here are now fewer people of 'high wealth' than there were at the start of the millennium [and] . . . the distribution of wealth within the countries . . . has also become significantly 'less equal,' with assets concentrated in the hands of ever fewer people." *Id.*; see also Adam Withnall, *All the World's Most Unequal Countries Revealed in One Chart*, INDEPENDENT (Nov. 23, 2016, 3:12 PM), <http://www.independent.co.uk/news/world/politics/credit-suisse-global-wealth-world-most-unequal-countries-revealed-a7434431.html> [<https://perma.cc/KV5Z-X7ZY>] ("Credit Suisse said the world had been growing more equal from the start of the century until 2008. 'The trend reversed after the financial crisis,' its report notes however, and while the most recent data is only provisional it looks set to continue to get more unequal.").

15. See *infra* note 16 and accompanying text.

16. Among the G7 countries, four (Canada, France, the United Kingdom, and the United States) offer immigration by investment programs, all of which involve significant investment amounts and none of which include a tax benefit that is not also available to domestic residents. For example, the U.S. Employment-Based Fifth Preference (EB-5) Program does not offer tax incentives to new immigrants, but is merely a path to permanent residency for those willing to invest a given amount of capital in the United States. For a description of the EB-5 program, see OFFICE OF INSPECTOR GEN, *supra* note 8, at 2. The same is true for the program offered by France. For a description of the French program, see Emmanuel Ruchat, *The French Residence Card for an Exceptional Economic Contribution*, HG.ORG, <https://www.hg.org/article.asp?id=32401> [<https://perma.cc/8822-FFN5?type=image>]. The same was true for the Canadian federal program, but that program was abolished in 2014. See DEP'T OF FIN., *supra* note 8 (explaining abandonment

smaller and poorer countries tend to command a much lower price for their immigration programs.¹⁷ Countries that appear to give up more by way of fiscal incentives also tend to have less flexibility to make up for lost revenues by shifting tax burdens to other sectors.¹⁸ Piling on to this built-in disadvantage, these countries face significant challenges in keeping their own highly skilled and high net worth populations from migrating to other countries, which also negatively impacts them socially, politically, and economically.¹⁹

TABLE 1: HOW MUCH TO LURE RICH RESIDENTS? SELECTED OBSERVATIONS²⁰

<i>Jurisdiction</i>	<i>Type of Program</i>	<i>Cost in USD</i>
Panama	Friendly Nation Visa	\$5,000
Paraguay	Residence by Investment	\$5,200
Thailand	Elite Easy Access	\$15,000
Lithuania	Entrepreneur	\$16,400

of program in Government’s 2014 Budget bill). A provincial version of the same program in Quebec remains. *See Investor Program*, GOV’T QUE., <http://www.immigration-quebec.gouv.qc.ca/en/immigrate-settle/businesspeople/applying-business-immigrant/three-programs/investors/index.html> [https://perma.cc/6TV5-TZD2]. While the United Kingdom has long excluded foreign income from taxation when earned by “non-domiciled residents,” this benefit is not limited to immigrants and the country’s investor visa program is not explicitly tied to residence status or other tax benefits. *See Tax on Foreign Income*, GOV’T U.K., <https://www.gov.uk/tax-foreign-income/non-domiciled-residents> [https://perma.cc/ZF4W-AJ2M] (explaining the taxation of non-domiciled residents); *United Kingdom Tier 1 (Investor) Visa*, GOV’T U.K., <https://www.gov.uk/tier-1-investor/overview> [https://perma.cc/893E-ZCF5].

17. *See infra* Table 1. Data compiled by the author, available upon request.

18. *See, e.g.*, Allison Christians, *Global Trends and Constraints on Tax Policy in the Least Developed Countries*, 42 U. B.C. L. REV. 239, 250, 253, 256 (2010) (suggesting that this practice has “created major constraints for tax policy design in the least developed countries”).

19. *See, e.g.*, Devesh Kapur, *Addressing the Brain Drain: A Partial Cosmopolitanism Approach*, 36 S. AF. J. PHIL. 45, 49–50 (2017) (“[There are multiple uncertainties regarding the economic and social impact of migration from global south to global north countries, but it is a] basic reality that all countries want immigrants with high levels of human capital for a reason. They are the future innovators, entrepreneurs, institution builders and tax payers. Conversely, their loss can harm domestic knowledge access, have adverse fiscal consequences for source countries, and weaken institutions.” (citations omitted)); Seán M. Muller, *The Economics and Philosophy of the Brain Drain: A Critical Perspective from the Periphery*, 36 S. AF. J. PHIL. 115, 116, 118–20 (2017) (critiquing economic theory that suggests source countries benefit from migration of highly skilled labour to richer countries).

20. The table shows a selection of residence by investment programs for comparison purposes, and is not a comprehensive listing of all residence by investment programs currently available. USD dollar amounts were calculated by reference to currency exchange available as of April 2017. Each program features important distinctions among residence requirements, terms, additional fees, and other requirements. Data compiled by the author, available upon request.

Latvia	Investor - Equity Capital Investment	\$40,288
Macedonia	Residence	\$43,460
Costa Rica	Investor Visa	\$60,000
United Kingdom	Tier 1 Entrepreneur	\$62,525
Ukraine	Investor Visa	\$108,650
Colombia	Colombia Investor Visa	\$134,444
Jersey	High Value Residency	\$135,813
Canada (Quebec)	Entrepreneur Program	\$147,580
Cayman Islands	Residency for persons of independent means (Cayman Brac or Little Cayman)	\$152,439
Brazil	Permanent Investor Visa	\$159,850
Andorra	Residence by Investment	\$250,000
Greece	Residency - Real-Estate Purchase	\$271,625
Portugal	Art, Culture, and Public Interest Investment	\$271,625
United Arab Emirates	Real estate investor visa	\$272,200
Turks & Caicos	Villas program	\$300,000
France	“Talent” program (providing 3-yr residence)	\$325,950
Cyprus	Residence by Investment	\$358,545
South Korea	Immigrant Investor Scheme for Real Estate (F-2/ F-5)	\$450,000
China	Investor Visa	\$500,000
Mauritius	Naturalization for Investors (IRS (Integrated Resort Scheme) and RES (Real Estate Scheme))	\$500,000
United States	Investor Visa (2) - EB 5	\$500,000
Ireland	Investor Program - Support of charity	\$543,250
Spain	Real-Estate Investment	\$543,250
Australia	Business Innovation (188 provisional)	\$756,100
Seychelles	Investor Type A	\$1,000,000
New Zealand	Investor	\$1,051,350
Netherlands	Dutch Investor Visa for High Net Worth Individuals	\$1,358,125
Singapore	Global Investors Program - Option A (New Business or Expanding Business)	\$1,794,000

Italy's program (and that of similar programs, such as those in the United Kingdom and Portugal) offers a reduced tax rate on specified income relative to non-immigrants.²¹ Other programs do not offer any special tax breaks but are simply intended to exchange the right to become a legal resident (and in some cases a citizen) in exchange for a service fee plus a specified investment in the country, whether in business, real property, or employment, for a specified time period.²² One characterization is that these programs are nothing more than a fast lane to visa status for those who can pay the premium. However, the immigration by investment program may be the only viable way to obtain a visa in some circumstances.²³

A number of countries offer fast-track immigration programs, with varying types, levels, and lengths of investment required.²⁴ Many seek inbound investment in specified sectors, the most popular being real property, domestic businesses, and start-ups.²⁵ Others do not specify the industry, but differential rates for varying types of property income may be relevant to the immigrant investor.²⁶

There is a fairly broad range of required investment in such programs, with some very inexpensive, such as Dominica's investor citizenship application, which affords the applicant a Dominican passport, without the need to ever visit

21. For a discussion, see generally Leila Adim, *Between Benefit and Abuse: Immigrant Investor Programs*, 62 ST. LOUIS U. L.J. 121 (2017).

22. This describes, *inter alia*, the programs in Canada and the United States. For a description of the Canadian program, see GOV'T QUE., *supra* note 16. For a description of the U.S. program, see *EB-5 Immigrant Investor Program*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/eb-5> [<https://perma.cc/D8G6-R7P3>].

23. See Dzanic, *supra* note 8, at 2, 11.

24. See, e.g., *Bulgaria: Residency & Citizenship by Investment*, ARTON CAP., <https://www.artoncapital.com/global-citizen-programs/bulgaria/> [<https://perma.cc/BG3H-RAQB>] (describing Bulgaria's fast-track visa program); *Investor Visas: United Kingdom*, LAW LIBR. CONG. (June 9, 2015), https://www.loc.gov/law/help/investor-visas/united-kingdom.php#_ftnref6 [<https://perma.cc/V35Z-ZEKL>] (describing U.K.'s fast-track investor visa program); *Recent Revisions in the Cyprus Permanent Residency by Investment (Fast-Track) Program*, C. SAAVA & ASSOCIATES LTD (June 10, 2016), <http://www.savvacypus.com/AboutUs/PublicationsBrochures/tabid/147/ID/328/Recent-revisions-in-the-Cyprus-Permanent-Residency-by-Investment-Fast-track-program.aspx> [<https://perma.cc/6CLS-L6EH>] (describing Cyprus's fast-track investor visa program).

25. Details with respect to a selection of investor immigration programs are on file with the author and available upon request.

26. For example, Latvia offers four residence by investment programs that are linked to investment in equity capital, a credit institution, real estate in the Regia area, or real estate in other areas, respectively. See *Legal Reports: Investor Visas: Latvia*, LAW LIBR. CONG. (June 9, 2015), <https://www.loc.gov/law/help/investor-visas/latvia.php> [<https://perma.cc/9C97-Z55R>]. Similarly, Portugal's five residence by investment programs are linked to investment in general real estate; refurbished real estate; equity capital; art, culture and public interest; and research and technology, respectively. See *Golden Residence Permit Programme*, PORTUGUESE IMMIGR. & BORDER SERV., http://www.sef.pt/portal/v10/en/asp/apoiocliente/detalheApoio.aspx?fromIndex=0&id_Linha=6269 [<https://perma.cc/8EVF-63EA>].

the country, for a mere \$100,000 USD.²⁷ Dominica’s program is a good example of straightforward commodification of citizenship, in which the state’s goal is clearly to raise revenue by a means other than taxation, rather than to actually lure wealthy foreign individuals to take up residence.²⁸ Table 2 below provides a snapshot of countries that offer citizenship for a set price without requiring residence.

TABLE 2: CITIZENSHIP BY INVESTMENT WITH NO RESIDENCE REQUIREMENT²⁹

<i>Jurisdiction</i>	<i>Program</i>	<i>Year Est.</i>	<i>Empowering Legislation</i>
Antigua & Barbuda	National Development Fund (non-refundable)	2013	Citizenship by Investment Act of 2013
Austria*	Extraordinary Merit	unknown	Art. 10 (6) of the Austrian Citizenship Act
Bulgaria**	Fast Track To Citizenship Program	2013	Foreigners in the Republic of Bulgaria Act

27. Vendors of legal services in connection with applying for Dominican citizenship advise prospective applicants that:

The Caribbean citizenship program’s investment criteria were originally scheduled to increase significantly in August 2016, with the minimum price of a Dominica passport rising 75% to \$175,000. *This major cost increase has now been put on hold until 2017, so if you are interested in becoming a Dominica citizen, we encourage you to act fast.*

DOMINICA CITIZENSHIP BY INV., [HTTP://WWW.DOMINICACITIZENSHIPBYINVESTMENT.COM/](http://www.dominicacitizenshipbyinvestment.com/) [<https://perma.cc/YBY3-JAJH>]; see DOMINICA CONST., § 101 (authorizing the acquisition of Dominica citizenship by a person otherwise not eligible); see also DOMINICA CITIZENSHIP ACT, § 8, § 20(1) (establishing requirements for obtaining Dominica citizenship).

28. See, e.g., Till Bruckner, *Battered by Climate Change, Small Island States Turn to Selling Passports*, DOMINICA NEWS ONLINE (July 26, 2016, 9:45 AM), <http://dominicanewsonline.com/news/homepage/news/general/battered-by-climate-change-small-island-states-turn-to-selling-passports/> [<https://perma.cc/G276-BJQP>] (explaining the economic rationale behind Dominica’s citizenship by investment program and quoting Dominica’s permanent representative to the United Nations that the program is “a major source of state revenue”).

29. Program data compiled by the author and available upon request.

Comoros	Comoros Economic Citizenship Program	2001	Law On Economic Citizenship, rev. as of 27 November 2008
Dominica	Citizenship by Investment Program	1993	Constitution, Section 101 and the Citizenship Act, Sections 8 and 20 (1)
Grenada	Donation to National Transformation Fund	2013	Grenada Citizenship by Investment Act (2013)
Malta	Individual Investor Program	2014	Maltese Citizenship Act (Cap. 188), Legal Notice 47 of 2014
Saint-Kitts and Nevis	Citizenship by Investment Program-Sugar Industry Diversification Foundation Contribution	1984	Citizenship by Investment Program
Serbia	Serbian Development Fund	2016	Law on Citizenship of Serbia and the Law on Amendments to the Law on Citizenship of Serbia
St. Lucia	National Economic Fund	2016	Citizenship by Investment Act No. 14 of 2015

Vanuatu	Honorary Citizenship under the Vanuatu Economic Rehabilitation Program	2015	Immigration Act (Cap 66)
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* Austria’s program is conditioned on “extraordinary merit” as determined by the government on a case-by-case basis, so mere investment is not sufficient to obtain citizenship.

** Bulgaria requires two “statutory visits” to the country.

There are no aggregate public statistics regarding how many individuals have applied for or received passports under these programs.³⁰ Based on advertising by legal and financial services providers to assist prospective citizenship applicants, some, such as Dominica’s economic citizenship package, appear intended mainly to offer even modestly wealthy nonresidents a second citizenship for convenient visa-free travel, rather than to target solely high net worth applicants or to seek nonresidents to take up permanent residence.³¹ Anecdotal evidence suggests that a second or third citizenship may be viewed as valuable for other non-tax purposes including giving children options for future work or study abroad.³²

However, other economic citizenship programs, such as that of Comoros, seem to contemplate assisting high net worth individuals in achieving privacy and “asset protection” goals.³³ No current financial and legal services advertisers

30. However, there are some reports of the success of various programs in terms of number of passports granted or amount of revenue raised in a given year. For example, the government of Dominica announced in 2016 that its investor citizenship program “was exceeding all expectations, raising US\$46 million during the first six months alone” and “[a]n official list of foreigners granted citizenship during the financial year 2014-15 . . . contains 158 names, a number broadly in line with officially reported budget revenues from the programme for that period.” Bruckner, *supra* note 28.

31. DOMINICA CITIZENSHIP BY INV., *supra* note 27 (“[T]he Commonwealth of Dominica passport provides visa-free or visa on arrival access to more than 115 countries around the world including the entire European Union, Switzerland, Singapore, and Hong Kong . . . [and] offers the *cheapest citizenship by investment program* in the world with reputable second passports starting at only \$100,000 USD.”).

32. See, e.g., Glenda Williams, *Buying Residency or a Passport with Offshore Property*, FINWEEK (May 6, 2017) (S. Afr.), <http://m.fin24.com/fin24/Finweek/Featured/buying-residency-or-a-passport-with-offshore-property-20170605> [<https://perma.cc/QB6M-RTR3>] (“Many families are buying into these programmes to provide their children with international opportunities and the option to study abroad.”); *Buying Foreign Citizenship*, MONEYWEB (May 27, 2015, 12:33 AM) (S. Afr.), <https://www.moneyweb.co.za/investing/offshore-investing/buying-foreign-citizenship/> [<https://perma.cc/BY6B-J59H>] (stating that many people considering EU investor programs do so not in order to move themselves but “mainly to give their children the opportunity to work and study in Europe”).

33. See *What You Need to Know About Comoros Citizenship by Investment*, MULTITRAVEL CONSULTANTS, INC., <http://www.comoros-citizenship.com/citizenship-by-investment/> [<https://perma.cc/DCM8-QGB4>] (“[T]he Comoros citizenship program . . . provides protection for your assets

explicitly state tax evasion as a goal, but many advertise investor residence and citizenship programs as means to achieve legal tax avoidance via a change in tax residence.³⁴ Tax planning may be accomplished with second citizenship, for example, where one's nationality is relevant to the assignment of tax residency under a treaty.³⁵

Other programs are more explicitly designed to attract the wealthy to become permanent residents and taxpayers. The "Dutch Investor Visa for High Net Worth Individuals" is a good example of one such program.³⁶ The Dutch Investor Visa program offers permanent residence by investment for eligible applicants who invest €1,250,000 in one of four specified investment categories, but appears to offer no particular tax relief once they are resident.³⁷ With top individual marginal tax rates above 50% in the Netherlands,³⁸ this program is not about luring immigrants with tax reductions; rather, it is solely about offering a fast path to immigration. That appears to be the case for many investor residency programs offered by the world's wealthiest countries.³⁹

and provides a high degree of privacy. As a part of this privacy agreement, your home country will never be notified that you have obtained a citizenship of the Comoros Islands.").

34. See, e.g., Andrew Henderson, *About Us*, NOMAD CAPITALIST, <http://nomadcapitalist.com/about/> [<https://perma.cc/M9KN-2UWK>] (stating as among his primary goals, "[h]elping people save \$280,000 a year in taxes"); *Legal Tax Avoidance*, PT SHAMROCK LTD., <http://ptshamrock.com/estate.html> [<https://perma.cc/E7KA-3VZV>].

35. Article 4 of the OECD model tax convention provides that when an individual is considered a resident under the domestic laws of each state, residence will be assigned based on a cascading set of tie-breaker rules, beginning with the location of the individual's permanent home and economic connections and, when all the other factors are non-determinative, ending with nationality. OECD, Model Convention with Respect to Taxes on Income and on Capital art. 4, Jan. 28, 2013, <http://www.oecd.org/tax/treaties/1914467.pdf> [<https://perma.cc/R28N-S3TP>]. For a person that is a national of only one of the two party states, tax residence status thus ultimately follows that nationality. However, the status of a dual national is ultimately determined by mutual agreement of the two states, thus preserving the possibility that the individual may be assigned residency in their preferred state. See *id.*

36. For program information, see *Investing in the Netherlands*, NETH. IMMIGR. & NATURALISATION SERV., <https://ind.nl/en/other/Pages/Investing-in-the-Netherlands.aspx> [<https://perma.cc/X76F-74SK>].

37. The four areas are direct investment in an "innovative Dutch company; [a] contractual joint venture that invests in one or more innovative companies; [a] participation fund affiliated with the Netherlands Venture Capital Association (NVP); and [a] seed fund recognized by the Minister of Economic Affairs." *Foreign Investors Scheme Eligibility Criteria Relaxed*, FRAGOMEN, DEL REY, BERNSEN & LOWEY, LLP (July 12, 2016), <https://www.fragomen.com/knowledge-center/immigration-alerts/foreign-investors-scheme-eligibility-criteria-relaxed> [<https://perma.cc/XX4M-GLBH>].

38. *Tax Rates in the Netherlands 2017*, EXPATAX, <https://www.expatax.nl/tax-rates-2017> [<https://perma.cc/YY24-XCNJ>] (showing that the top individual marginal tax rates in Netherlands are above 50%).

39. See, e.g., OFFICE OF INSPECTOR GEN., *supra* note 8, at 2 (showing that U.S. investor visa program requires investment of \$500,000 or \$1 million USD, depending on the circumstances); see

Immigration specialists seeking to provide legal services to potential applicants for the Dutch program describe it as designed to attract wealthy Asian investors in particular, but they characterized the response as “underwhelming,” citing its high cost and restrictions.⁴⁰ However, these legal service providers expect increased success in the program owing to the relaxation of certain investment conditions, including, notably, the removal of a condition that the applicant submit a report from an accountant “certifying that the investment funds were not obtained illegally.”⁴¹ It seems that this requirement deterred investors because their accountants “were not willing to accept liability for producing such a report.”⁴² This exchange highlights one of the major problems of immigration by investment programs, namely, that unless safeguards are put in place, the risk is significant that the dishonest will find it easier than the honest to migrate to the countries of their choice.

II. BARRIERS TO EXIT

Establishing residence in another country to avoid taxes in wealthy countries would be attractive only if the former tax residency in such countries can be terminated at little cost. This is not easily managed when the individual does not actually want to sever all ties to her country of original residence, but only seeks to generate the appearance of having transferred her residence. A foreign tax residency program that is based on delivering a tax reduction is not effective if the original residence country refuses to accept the putative emigrant’s claim of having left.⁴³ Accordingly, the value of tax migration lies not only in the luring jurisdiction offering an individual residency and a lowered tax burden, but also in the jurisdiction left behind accepting the claimed termination of residence for tax purposes. Perhaps because of this risk, many countries have residency termination rules designed to thwart, in effect, tax residence games.

These might be referred to colloquially as “sticky” or “clinging” residency rules. Some of these are designed simply to make sure that residents have truly

CONTACT SING., SING. ECON. DEV. BOARD, GLOBAL INVESTOR PROGRAMME 2 (May 1, 2017) (showing that Singapore Global Investor Program requires an investment of \$2.5 million USD); Immigration N.Z., *Investor Visas*, N.Z. NOW, <https://www.newzealandnow.govt.nz/move-to-nz/new-zealand-visa/visas-to-invest/investor-visa> [<https://perma.cc/4WBV-MR64>] (showing \$1 million USD investment required for New Zealand Immigrant Investor Program).

40. Christine Sullivan, *The Dutch Investor’s Permit: Twice as Nice*, FRAGOMEN, DEL REY, BERNSEN & LOWEY, LLP: BLOG (July 15, 2016), <https://www.fragomen.com/knowledge-center/articles/dutch-investor%E2%80%99s-permit-twice-nice> [<https://perma.cc/Y8C9-LKYG>].

41. *Id.*

42. *Id.*

43. *See, e.g., R. v. Reeder*, 1975 CarswellNat 163, para. 18 (Can. Tax Ct.) (WL) (rejecting the taxpayer’s contention that he had severed his residence in Canada and therefore subjecting him to full worldwide income taxation by Canada, with relief from double taxation afforded by treaty or statute as the case may be); *Bensoiullah v. The Queen*, 2009 CarswellNat 4249, para. 19 (Can. Tax Ct.) (WL) (stating that “it is not easy to stop being a resident of Canada”).

departed before terminating their tax status, sometimes because departure is often akin to death for tax purposes, as assets may be deemed disposed, giving rise to phantom income.⁴⁴ For example, Finland treats nonresident citizens as tax residents for three years after they emigrate unless they demonstrate that they no longer have any ties to Finland.⁴⁵ Similarly, Hungary treats nonresident citizens as permanent tax residents of Hungary, unless they also have another nationality or reside in a country that has a tax treaty with Hungary.⁴⁶

Other clinging residency rules are expressly designed to thwart residents from migrating to a more tax-favourable jurisdiction. For example, until a major tax reform in 2015, Italy treated nonresident citizens as permanent tax residents if they move to a blacklisted tax haven unless they demonstrated lack of ties to Italy.⁴⁷ Likewise, Spain treats nonresident citizens as tax residents for five years following a move to a blacklisted tax haven.⁴⁸ Usually these kinds of constraints to tax migration are unilateral, but they might also arise from bilateral agreement: France treats nonresident citizens as permanent tax residents if they move from France to Monaco, pursuant to a treaty between the two nations.⁴⁹

44. This is the case, for example, in Canada. *See* Income Tax Act, R.S.C. 1985, c 1 § 128.1(1) (Can.) (deeming disposition of certain types of property upon the taxpayer ceasing to be resident of Canada; the taxpayer may in certain circumstances make an election to defer to a later date the inclusion of taxable gain thereby produced).

45. *Moving away from Finland: Finnish Citizens and the 3-Year Rule*, FINNISH TAX ADMIN. (May 10, 2017), https://www.vero.fi/en/individuals/tax-cards-and-tax-returns/moving_away_from_finland/finnish_citizens_and_the_3year_rul/ [<https://perma.cc/V4HK-TBFK>] (“If you are a citizen of Finland and you leave Finland to live in a foreign country, you will normally continue as a Finnish tax resident during the tax year of your relocation, and for the three following tax years (this rule is known as the three-year rule). During this period, your tax residency cannot normally be changed to Finnish tax non-residency unless you make a specific request and can demonstrate that during the relevant tax year you no longer have any economic and social ties that connect you with Finland.”).

46. *See, e.g.*, DELOITTE, TAXATION AND INVESTMENT IN HUNGARY 2015: REACH, RELEVANCE, AND RELIABILITY 21 (2015), <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-hungaryguide-2015.pdf> [<https://perma.cc/KZ6V-F2T7>].

47. *See Italy Issues Major Changes to International Tax Rules*, ERNST & YOUNG (Sept. 28, 2015), <http://www.ey.com/gl/en/services/tax/international-tax/alert—italy-issues-major-changes-to-international-tax-rules> [<https://perma.cc/D83N-7UGM>].

48. *See* ERNST & YOUNG, SPAIN REDUCES ITS TAX HAVEN “BLACKLIST” 1 (2012), [http://www.ey.com/Publication/vwLUAssets/International_tax_alert_-_19_January_2012_-_Spain_reduces_its_tax_haven_blacklist/\\$FILE/EY_tax_news_2012012408.pdf](http://www.ey.com/Publication/vwLUAssets/International_tax_alert_-_19_January_2012_-_Spain_reduces_its_tax_haven_blacklist/$FILE/EY_tax_news_2012012408.pdf) [<https://perma.cc/4APT-RQSJ>].

49. Ordonnance n. 3.037 du 19/08/1963 rendant exécutoire à Monaco la Convention fiscale signée à Paris le 18 mai 1963 [Order no. 3.037 of 08/19/1963 rendering enforceable in Monaco the Tax Convention signed in Paris on May 18, 1963] art. 7, http://www.legimonaco.mc/305/legism_clois.nsf/db3b0488a44ebcf9c12574c7002a8e84/a7ab7aa3f21e31c3c1257c5a002f1824!OpenDocument&Highlight=0,rendant,ex%C3%A9cutoire,%C3%A0,Monaco,la,Convention,fiscale,sign%C3%A9e,%C3%A0,Paris,le,18,mai,1963 [<https://perma.cc/HQM3-BRRY>] (“Persons of French nationality who transport their domicile or residence to Monaco or who can not prove that they

Finally, both Eritrea and the United States seek to tax their respective citizens regardless of residence, albeit with vastly different strategies and outcomes.⁵⁰ Eritrea theoretically imposes taxation on its nonresident citizens permanently, at a reduced flat rate of 2% of worldwide income.⁵¹ However, it does this to finance an ongoing war and has been denounced by the United States and the United Nations for the practice.⁵² In addition, efforts by Eritrean officials to enforce its tax system overseas have been met by strong resistance in other countries, including the threatened expulsion of Eritrean government officials from their foreign consulates and posts.⁵³ Eritrea is perhaps not a good case study for examining the normative bounds of the tax jurisdiction. However, the United States, equally bold in asserting its right to tax nonresident citizens, has no better claim.

In fact, the U.S. claim over its nonresident citizens is much more onerous than that of Eritrea: all U.S. citizens (with an exception for Puerto Rican residents discussed below) are taxed permanently as if they resided in the United States.⁵⁴ Nonresident U.S. citizens, including dual citizens born abroad and of modest means, face what is arguably the world's most complex tax regime, namely the international sections of the U.S. Code. This regime is rife with

have five years of habitual residence in Monaco on 13 October 1962 will be subject, in France, to the personal income tax and the supplementary tax under the same conditions as if they had their domicile or residence in France.”).

50. See, e.g., Cynthia Blum & Paula N. Singer, *A Coherent Policy Proposal for US. Residence-Based Taxation of Individuals*, 41 VAND. J. TRANSNAT'L L. 705, 706, 706 n.3 (2008) (describing and distinguishing U.S. and Eritrean citizenship-based tax regimes).

51. MARTIN PLAUT, UNDERSTANDING ERITREA: INSIDE AFRICA'S MOST REPRESSIVE STATE 178 (2016).

52. S.C. Res. 2023, ¶ 10 (Dec. 5, 2011); see also *Security Council, by Vote of 13 in Favour, Adopts Resolution Reinforcing Sanctions Regime Against Eritrea 'Calibrated' to Halt All Activities Destabilizing Region*, UNITED NATIONS (Dec 5, 2011), <http://www.un.org/press/en/2011/sc10471.doc.htm> [<https://perma.cc/PK4B-AMPZ>].

53. See Meagan Fitzpatrick, *Eritrean Diplomat Ordered Out of Canada After 'Tax' on Ex-pats*, CBC NEWS (May 29, 2013, 10:23 PM) (Can.), <http://www.cbc.ca/news/politics/eritrean-diplomat-ordered-out-of-canada-after-tax-on-ex-pats-1.1309691> [<https://perma.cc/89P3-2HVS>]; Sam Jones, *Diaspora Tax for Eritreans Living in UK Investigated by Metropolitan Police*, GUARDIAN (June 9, 2015), <https://www.theguardian.com/global-development/2015/jun/09/eritrean-diaspora-tax-uk-investigated-metropolitan-police> [<https://perma.cc/48K8-WCCP>] (“Metropolitan police are examining allegation that the Eritrean embassy in London is illegally using a controversial diaspora tax to ‘punish and control’ Eritreans living in the UK”); Martin Plaut, *The Long Arm of the Eritrean Regime – Official Dutch Report*, WORDPRESS: MARTINPLAUT BLOG (Dec. 16, 2016), <https://martinplaut.wordpress.com/2016/12/16/the-long-arm-of-the-eritrean-regime-official-dutch-report/> [<https://perma.cc/4FAS-E2PP>] (providing English translation of report commissioned by the Dutch government that describes the activities of the Eritrean regime inside the Netherlands); see also PLAUT, *supra* note 51, at 178–79 (explaining the international response to Eritrea's diaspora tax).

54. I.R.C. § 7701(a)(30)(A) (2012) (defining U.S. persons for tax purposes to include U.S. citizens).

attribution, look-through, and anti-abuse rules designed for the most sophisticated taxpayers,⁵⁵ and has proven to be virtually immune to compliance by persons of modest means living permanently in other countries.⁵⁶

Persons with U.S. citizenship are therefore significantly less able to take advantage of foreign immigration incentive programs, owing to the unique inclusion of all citizens as permanent tax residents of the United States regardless of whether they have any personal or economic ties to the jurisdiction or even speak the language.⁵⁷ However, two features of the U.S. tax system potentially provide incentives for U.S. citizens to relocate abroad.

First, the foreign earned income exclusion might make it worthwhile for certain moderately wealthy U.S. citizens to relocate abroad so long as they engage in strict planning with respect to their financial investments and generally keep most of their passive investments and any business operations exclusively within the United States, and earning mostly or only employment income abroad.⁵⁸ Second, relocation to Puerto Rico could be a means to lower

55. For a survey, see generally ALLISON CHRISTIANS, SAMUEL A. DONALDSON & PHILIP F. POSTLEWAITE, *UNITED STATES INTERNATIONAL TAXATION* (2d ed. 2011).

56. See generally CONG. BUDGET OFFICE, CBO PAPER: SOCIAL SECURITY PRIVATIZATION EXPERIENCES ABROAD (1999) (explaining unresolved double taxation problems involving pension funds earned abroad by nonresident U.S. citizens); JOINT COMM. ON TAXATION, JCX-14-99, ANALYSIS OF ISSUES RELATING TO SOCIAL SECURITY INDIVIDUAL PRIVATE ACCOUNTS (1999); Gregory N. Filosa, *International Pension Reform: Lessons for the United States*, 19 TEMP. INT'L & COMP. L.J. 133 (2005) (discussing pension reform efforts in other countries); Barbara E. Kritzer, *Individual Accounts in Other Countries*, 66 SOC. SEC. BULL. 31 (2005) (discussing countries that have implemented personal accounts as part of their mandatory retirement income systems). For a discussion of the layperson's reaction to learning about U.S. citizenship-based taxation as it applies to dual citizens living permanently in other countries, see Allison Christians, *Understanding the Accidental American: Tina's Story*, 80 TAX NOTES INT'L 833 (2015). For a more technical explanation of the relevant provisions, see Allison Christians, *Taxpayer Rights in the United States*, in *DERECHO TRIBUTARIO Y DERECHOS HUMANOS [TAX LAW AND HUMAN RIGHTS]* 509 (César Alejandro Ruiz Jiménez ed., 2016) (Spain).

57. See I.R.C. § 1(c) (2012) (imposing U.S. federal income taxation on "every individual"); I.R.C. § 61(a) (2012) (defining income for tax purposes as "all income from whatever source derived"). While this construction would purport to include the entire global population, the Internal Revenue Code later limits the federal income taxation of noncitizens who are not residing in the United States. See I.R.C. § 7701(b)(1)(B) (defining a "nonresident alien" as an individual who is "neither a citizen of the United States nor a resident of the United States"); I.R.C. § 871 (2012) (limiting the U.S. federal income taxation of nonresident aliens to income derived from U.S. sources). Accordingly, an individual that is a U.S. citizen, like all other residents of the United States, is generally subject to federal income taxation on their worldwide income. As discussed below, some exceptions apply for residents of Puerto Rico.

58. See I.R.C. § 911(a)–(b) (2012). This is because the foreign earned income exclusion generally applies only to "earned" income, meaning mostly employment income, and because passive and business income earned by individuals through foreign corporations and trusts are subject to highly complex and punitive reporting and deemed income regimes. For an overview of

one's tax burden, since Puerto Rican residents, unlike all other U.S. citizens, are not subject to U.S. federal income tax on their domestic income.⁵⁹ This fact might seem to make Puerto Rico an ideal jurisdiction to offer residence by investment particularly to U.S. citizens. However, U.S. federal taxation does apply to the non-Puerto Rican income of Puerto Rican residents.⁶⁰ The benefits of relocation would thus be relatively small for investors who retain significant sources of foreign income, a likely scenario given Puerto Rico's relatively weak economy.⁶¹

The Puerto Rican exception to U.S. taxation is interesting because, like the United States, Puerto Rico's tax residency standard is bright line and mainly based on presence: an individual becomes a tax resident by being present for at least 183 days during the year in Puerto Rico as determined under the substantial presence test, by not having a tax home outside Puerto Rico during the tax year, and by not having a closer connection to the United States or a foreign country than to Puerto Rico.⁶² Notwithstanding the Puerto Rican exception, the rule for U.S. citizens is that establishing foreign residence has only modest impacts on tax outcomes, as tax reductions gained through the foreign earned income exemption are often more than reversed in terms of the increased planning required to avoid imputed income distributions as well as onerous annual compliance costs.⁶³

Countries clearly need a way to respond to the possibility that taxpayers may use immigrant investor programs to thwart taxation by their home countries. By extending its jurisdictional reach far past the global norm of residence, the United States seems to have the strongest armour at present, making it a potential

these issues and how they impact nonresident U.S. persons, see Allison Christians, *A Global Perspective on Citizenship-Based Taxation*, 38 MICH. J. INT'L L. 193 (2017).

59. I.R.C. § 933 (2012) ("The following items shall not be included in gross income and shall be exempt from taxation under this subtitle: . . . In the case of an individual who is a bona fide resident of Puerto Rico during the entire taxable year, income derived from sources within Puerto Rico (except amounts received for services performed as an employee of the United States or any agency thereof) . . .").

60. *See id.*; *see also* Topic Number: 901 – Is a Person with Income from Puerto Rico Required to File a U.S. Federal Income Tax Return?, INTERNAL REVENUE SERV. (Sept. 21, 2017), <https://www.irs.gov/taxtopics/tc900/tc901> [<https://perma.cc/9BZW-HY7B>].

61. Puerto Rico's ongoing economic woes are well documented. On January 18, 2017, Governor Ricardo A. Rosselló signed into law an Enabling Act of the Fiscal Agency and Financial Advisory Authority, Act 2-2017. The purpose of this law was to establish a "fiscal agent, financial advisor and reporting agent of all the entities of the Government of Puerto Rico . . . and to assist such entities in facing the grave fiscal crisis and economic emergency that Puerto Rico is currently experiencing." *See* Puerto Rico Fiscal Agency & Fin. Advisory Auth., *About FAFAA*, GOV'T PUERTO RICO, <http://www.aafaf.pr.gov/> [<https://perma.cc/J4D9-RT58>].

62. I.R.C. § 937(a) (2012).

63. *See, e.g.*, Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 169, 186 (2016) (describing some of the compliance difficulties faced by a nonresident U.S. citizen); Christians, *Tina's Story*, *supra* note 56, at 834–35 (same).

source of emulation by others.⁶⁴ However, the U.S. system cannot be replicated widely without visiting chaos in the international tax regime and widespread injustice on people who do not live in the country of their citizenship, or who are dual nationals.

A major cost of the U.S. system is that taxing people on the basis of their legal status alone is nearly impossible to administer, devastating to unsuspecting long-term nonresident citizens, and demanding on the countries of their actual residence (and often citizenship).⁶⁵ A second cost, the impact of which is much less easy to measure, is that the “Hotel California” aspect of U.S. citizenship-based taxation may make the United States overall less competitive in terms of luring wealthy immigrants from other countries.⁶⁶ If adopted by other countries, citizenship-based taxation would effectively nullify a century’s worth of effort in preventing double taxation on a bilateral (and more recently multilateral) basis,⁶⁷ as millions of people would suddenly be subject to multiple tax and reporting regimes with no administrative relief. It would be unfortunate if these costs are ignored by lawmakers in rich countries in the quest to eliminate artful manoeuvring by their own taxpayers, as well as by other jurisdictions.

III. DOES TAX IMMIGRATION COMPETITION WORK?

The strategy to lure wealthy immigrants with tax expenditure programs may be effective because the ultra rich have proven themselves to be very mobile and very willing to chase tax incentives.⁶⁸ At the same time, albeit with the frictions

64. See OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL INFORMATION IN TAX MATTERS: THE CRS IMPLEMENTATION HANDBOOK 56 (2015) (explaining how the U.S. adoption of disclosure rules for foreign financial institutions led to the development of a global standard modeled on the same structure).

65. See, e.g., Reuven S. Avi-Yonah, *The Case Against Taxing Citizens*, 58 TAX NOTES INT’L 389, 389 (2010) (“In a globalized world, citizenship-based taxation is an anachronism that should be abandoned.”); Blum & Singer, *supra* note 50, at 707, 717 (calling for a change to residence-based taxation on grounds that the administration of citizenship-based taxation “is too difficult and expensive for taxpayers and the IRS”); Christians, *supra* note 58 (making the case that taxing on the basis of citizenship is inconsistent with international law to the extent it demands any assistance from other countries to achieve compliance by their own residents and citizens); Mason, *supra* note 63, at 231 (analyzing the unintended consequences of taxing citizenship as a status).

66. See Mason, *supra* note 63, at 228–29 (explaining how an immigrant’s decision to become a U.S. citizen “comes with a hefty-price tag: life-long worldwide taxation”).

67. Ariane Pickering, *Why Negotiate Tax Treaties* 6–8 (United Nations Working Paper, Papers on Tax Treaties, No. 1-N, 2013).

68. Counting days of presence is therefore common among the community of expats seeking to avoid establishing residence in any one of several countries in which they hold property and enjoy spending time. Cf. James B. Stewart, *Tax Me If You Can: The Things Rich People Do to Avoid Paying Up*, NEW YORKER (Mar. 12, 2012), <https://www.newyorker.com/magazine/2012/03/19/tax-me-if-you-can> [<https://perma.cc/5DK6-93E8>] (explaining how wealthy New York City residents avoid New York City tax by spending no more than 183 days in New York City, even if they own a residence in the city and work there).

of family and other human relationships, the old observations about tax competition apply equally whether the targeted activity involves paper profit shifting or physical relocation of people and investments: an incentive is only as good as its latest competition.⁶⁹ There was a time when the U.S. statutory corporate tax rate was average or even low by world standards; tax competition has lowered the rates across the OECD and has made the U.S. system appear uncompetitive.⁷⁰ In response, U.S. companies plan their way around the U.S. tax rules to achieve low effective tax rates.⁷¹ Eliminating the opportunity to do that, while other countries have lowered their own rates, is little more than an invitation to outward migration of the wealthiest taxpayers.

Once tax residence (and by extension citizenship) is commodified, financial and legal barriers to mobility for the extremely wealthy simply drop away, making it virtually impossible for any state to tax their wealthiest residents. When that happens, the very normative foundations underlying any tax system that places different expectations upon its taxpayers based on their relative ability to pay are shaken. The income tax can hardly sustain itself on an ability-to-pay basis when most countries are engaged in providing increasingly generous tax expenditures to wealthy immigrants on the one hand, while constantly warding off efforts by other countries to attract their own wealthiest residents on the other.

69. This is perhaps why Canada recently abandoned its Immigrant Investor Program. *See, e.g.*, Susana Mas, *Millionaire Immigrant Investor Program Lures Only 7 Instead of 60*, CBC NEWS (Jan. 22, 2016, 4:01 PM), <http://www.cbc.ca/news/politics/immigration-investor-pilot-program-1.3331204> [<https://perma.cc/UE2A-UV8R>]. The revamped immigrant investor program in Canada failed to attract the expected number of applicants. An immigration attorney stated that:

Canada was asking prospective immigrants to write a blank cheque and hope that 15 years down the road they would see any return on that investment . . . [so it is] no surprise to see that the wealthy immigrant investor crowd would look at other immigration possibilities to come to this country in order to grow our economy, create jobs and find a secure place for their own families.

Id.

70. Tax Found., *OECD Corporate Income Tax Rates, 1981-2015*, GITHUB.COM (Nov. 24, 2015), https://github.com/TaxFoundation/data/blob/master/OECD-corporate-income-tax-rates/OECD_corp_income_tax_rates_1981-2015.csv [<https://perma.cc/PW6T-WTLF>] (showing the fall of corporate tax rates across the OECD from 1981 through 2015).

71. *See, e.g.*, JANE G. GRAVELLE, CONG. RESEARCH SERV., R41743, INTERNATIONAL CORPORATE TAX RATE COMPARISONS AND POLICY IMPLICATIONS 8, 26–27 (2014), <https://fas.org/sgp/crs/misc/R41743.pdf> [<https://perma.cc/LSX4-HB3G>]; Laura Power, *The Devil Is in the Details: A Comparison of the Corporate Average Effective Tax Rate Calculations Used by Government Agencies* 27 (U.S. Dep't. of Treasury, Office of Tax Analysis, Working Paper No. 105, 2016), <https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-105.pdf> [<https://perma.cc/5G54-79Y6>]. U.S. companies use a “combination of deferral of US taxation on foreign source income and variety of transfer pricing and ‘hybrid’ entity structures . . . to shift profits to low or no tax jurisdictions.” *Id.*

While it is not clear what equilibrium will finally be reached as countries compete with each other in this way, this seems to be a competition that only the wealthiest countries can possibly win, where winning is described as having attracted the most wealthy immigrants. Where this is accomplished by giving tax breaks and incentives, winning also comes at a cost of revenue. Spillover effects could include a slight increase in spending by the rich and perhaps some increased regional employment, but neither of these effects is guaranteed. General research regarding the efficacy of tax incentives to achieve spillover effects is mixed but not encouraging.⁷²

The use of tax systems to assist wealthy individuals in effectively choosing their tax residency for the maximum tax effect has a final feature that may significantly impact how easy (or not) it is for countries to respond to taxpayers playing tax residence games. This feature is the importance of claimed residence in triggering information exchange obligations and rights among countries. As alluded to above, most developed countries tax all of their individual residents, regardless of nationality, on their worldwide incomes.⁷³ As a result, the OECD's multilateral automatic information exchange project, the Common Reporting Standard ("CRS"), envisions a global system to identify the tax residence of every individual that owns virtually any financial asset, anywhere in the world, so that governments can assess their residents' tax obligations.⁷⁴

However, owing to the sheer enormity of the task, this system largely relies on the taxpayer's own certification as to residence.⁷⁵ Governments might not currently take the CRS regime or its core reliance on self-certification into account in designing their immigration by investment programs, but given the

72. See, e.g., IMF, *Options for Low Income Countries' Effective and Efficient Use of Tax Incentives for Investment*, Staff Report (Oct. 2015), <https://www.imf.org/external/np/g20/pdf/101515.pdf> [<https://perma.cc/7XRZ-JHTJ>] ("Countries often face pressures to attract investment by offering tax incentives, which then erode the countries' tax bases with little demonstrable benefit in terms of increased investment.").

73. See, e.g., HUGH J. AULT & BRIAN J. ARNOLD, *COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS* 431–34 (3d ed. 2010) (explaining how different countries determine tax residence); REUVEN S. AVI-YONAH, *INTERNATIONAL TAX AS INTERNATIONAL LAW: AN ANALYSIS OF THE INTERNATIONAL TAX REGIME* 28–29 (2007) ("The current trend for most countries is to emulate the United States and adopt worldwide taxation of individual residents . . .").

74. See *Automatic Exchange of Information: Common Reporting Standard (CRS)*, OECD, <http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/> [<https://perma.cc/W2T7-JWQ7>] (describing the global information gathering and exchange regime). The U.S. rule, known as the Foreign Account Tax Compliance Act, or FATCA, goes further, requiring the global system to identify the nationality of every individual that owns virtually any financial asset, anywhere in the world. See *Summary of FACTA Reporting for U.S. Taxpayers*, INTERNAL REVENUE SERV. (Sept. 30, 2017), <https://www.irs.gov/businesses/corporations/summary-of-fatca-reporting-for-us-taxpayers> [<https://perma.cc/Z4UH-MZ7B>].

75. See OECD, *supra* note 64, at 45, 57–58 (describing the function of self-certification for account holders for triggering tax information reporting among participating countries).

stakes, the world should expect that at least some will eventually recognize that these elements create a marketable opportunity. A surge of innovative tax residence programs designed to work the rules of the CRS regime (and perhaps its parent, the U.S. FATCA regime) in favour of wealthy taxpayers might therefore be an (unintended) outcome of the recent push for global cooperation and coordination on international tax.

CONCLUSION

In scholarship critiquing states that sell citizenship to the rich, political philosopher Rainer Bauböck likened citizenship to the Roman god Janus, whose two faces symbolized his role as the god of transitions, gates, doorways, beginnings and endings.⁷⁶ Just as Janus simultaneously looked to the past and the future, Bauböck identified citizenship as simultaneously looking outward and inward:

The external face turns to other states and demands that they recognise the country's passport as well as to citizens living abroad whom it promises the right to return and diplomatic protection. The internal face speaks to citizens as members of a democratic community [and] . . . tells them . . . they are equal as individuals and collectively govern themselves through their right to vote.⁷⁷

Observers of tax policy could well note that two faces are insufficient to capture the complex attitudes states have toward prospective residents and citizens when it comes to taxation. For the world's most prosperous individuals and their families, multiple states extend a warm welcome. Some countries anticipate significant lifestyle changes for those they seek to lure, requiring lengthy physical presence to establish and keep their tax-favoured residency status. But many are content to sell the legal status of tax residence and even citizenship for a set price. For the latter, what the individual does with this legal status is irrelevant. For the international tax regime, the consequences could be severe.

76. See Rainer Bauböck, *What Is Wrong with Selling Citizenship? It Corrupts Democracy!*, in *Should Citizenship Be for Sale?* 19, 19 (Ayelet Shachar & Rainer Bauböck eds., European Univ. Inst., RSCAS Working Paper No. 01, 2014), http://cadmus.eui.eu/bitstream/handle/1814/29318/RSCAS_2014_01.pdf [https://perma.cc/YE9E-XQBM].

77. *Id.*

