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Immigration, Emigration, Fungible Labour and the Retreat from  
Progressive Taxation

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*Dominic de Cogan and Peter Harris, editors, Tax Justice and Tax Law:  
Understanding Unfairness in Tax Systems (Hart Publishing 2020) Chapter 8*

# 8

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## Immigration, Emigration, Fungible Labour and the Retreat from Progressive Taxation

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HENRY ORDOWER

With emphasis on the US, this chapter explores the role that taxation plays in the movement of people and capital. The chapter addresses the relationship between taxes and retention of capital, including tax incentives for capital investment, shifting tax burdens from capital to labour as progressive taxation wanes, and rules preventing the escape of capital from its current taxing jurisdiction. Next, the discussion moves on to consider how taxes supplement immigration policy to attract capital currently outside the jurisdiction. The chapter then queries whether taxes play any significant role in attracting or retaining skilled labour before identifying how tax trends disadvantage 'less desirable', fungible, frequently immigrant labour in response to anti-immigration and anti-immigrant public sentiment. The chapter concludes by observing a relationship between taxation and the unwillingness of societies to help those who culturally, ethnically, racially or religiously differ from the bulk of the membership in the society as that society may change from time to time.

### I. Introduction

Family unity has driven US immigration policy for legal, permanent immigration.<sup>1</sup> Admission categories other than family immigration are 'merit-based' even within the special category for diversity immigration.<sup>2</sup> Merit criteria assign priority to exceptional individuals with critical skills and education. Unskilled, fungible<sup>3</sup> workers are often admitted seasonally but permanent status is elusive<sup>4</sup> – even

<sup>1</sup> 8 USC §1151 et seq.

<sup>2</sup> *ibid.*

<sup>3</sup> See discussion of fungible workers in text attached to n 121.

<sup>4</sup> *ibid.*

those holding work permits under temporary asylum status may face removal from the US.<sup>5</sup>

Despite the apparent national origin-based immigration policy advanced early in President Trump's administration,<sup>6</sup> recent immigration policy emphasises economic rather than cultural or religious distinctions.<sup>7</sup> Consistent with merit- and economic contribution-based immigration, the President has instructed federal agencies to enforce a longstanding, but historically unenforced, requirement that sponsors of immigrants reimburse governmental expenditures on behalf of sponsored immigrants, including healthcare and welfare payments.<sup>8</sup> A new regulation<sup>9</sup> denies 'green cards'<sup>10</sup> to lawful immigrants on the basis that they are 'public charges'<sup>11</sup> when they claim public benefits.

Economic immigration restrictions also underlie an interim final rule<sup>12</sup> precluding asylum seekers from applying for US asylum if they pass through a third country without applying for and being denied asylum in that country.<sup>13</sup> The rule is comparable to the EU priority for asylum application in the first country of entry.<sup>14</sup> A grant of admission and asylum permits the asylum seeker to move freely throughout the EU. Most US asylum seekers come from Central American countries, are economically stressed, and travel over land through Mexico. If granted asylum in Mexico, they have no right of admission to the US.

<sup>5</sup> ND Schwartz, 'Washington Wants to Deport Washington's Builders', *New York Times* (15 September 2019) Business 1 (Salvadorans' proposed removal).

<sup>6</sup> Bans on immigration from predominantly Muslim countries. US Department of Homeland Security (DHS), 'Executive Orders on Protecting the Homeland', available at <https://www.dhs.gov/executive-orders-protecting-homeland> (accessed 3 December 2018).

<sup>7</sup> MD Shear, 'Trump Immigration Plan Emphasizes Immigrants' Skills Over Family Ties', *The New York Times* (15 May 2019), available at <https://www.nytimes.com/2019/05/15/us/politics/trump-immigration-kushner.html> (accessed 17 May 2019).

<sup>8</sup> M Talev and Justin Sink, 'Trump Looks to Threat of Welfare Bills to Curb Immigration', *Bloomberg* (23 May 2019), available at <https://www.bloomberg.com/news/articles/2019-05-23/trump-orders-government-to-collect-bills-for-immigrant-welfare> (accessed 24 May 2019).

<sup>9</sup> US Citizenship and Immigration Service (USCIS), DHS, *Inadmissibility on Public Charge Grounds*, 84 FR 41292 (August 14, 2019) (effective 15 October 2019).

<sup>10</sup> 'Green card' is the identification card that the USCIS issues to immigrants qualified to reside and work permanently in the US. USCIS, DHS, 'Green Card', available at <https://www.uscis.gov/greencard> (accessed 12 September 2019).

<sup>11</sup> 8 USC §1201(a)(4) (individuals who are likely to become public charges are ineligible to immigrate to or remain in the US).

<sup>12</sup> USCIS, DHS and Executive Office for Immigration Review, *Temporary Final Rule, Asylum Eligibility and Procedural Modifications*, 84 FR 33829 (July 16, 2019).

<sup>13</sup> A Ahmed and P Villegas, "'This Takes Away All Hope': Rule Bars Most Applicants for Asylum in US", *New York Times* (12 September 2019), available at <https://www.nytimes.com/2019/09/12/world/americas/asylum-seekers.html> (discussing the Supreme Court decision to remove the lower court injunction barring enforcement of the rule).

<sup>14</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (29 June 2013), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R0604> (accessed 7 September 2019).

The Social Security Administration sends 'no match letters' to employers of low wage immigrants in industries that may employ unauthorised workers notifying them that some employees' names do not match their social security numbers.<sup>15</sup> The notices do not require employers to take action but exert implicit pressure to screen for unauthorised workers. Employers may dismiss workers rather than investing the time and expense to correct possible errors.

Historically, immigration was a key source of much-needed labour in growing economies. The US was built by immigrants and guest workers, who sometimes were denied permanent residence and whose contributions were not always acknowledged.<sup>16</sup> European countries relied heavily on guest workers from the mid-twentieth century to the earlier twenty-first century, often without granting the workers the right to reside permanently or to become citizens.

In the twenty-first century, conflict zones and weak economies drive immigration from those areas to wealthier and more stable areas, while high taxes and regulation fuel emigration from wealthy stable economies to lower tax, less regulated jurisdictions. Labour flight to lower tax jurisdictions historically has not been prevalent because rendition of services was location dependent. The rapid growth of technology, however, has made many industries independent of the location of their service providers.<sup>17</sup> Cross-border competition for some labour has grown.

While top scientists and medical professionals have been in demand since the early years of the twentieth century, demand for technology expertise has accompanied growing international reliance on technology. The emergence of English as the international technical language has removed linguistic barriers to commerce. Individuals with technical expertise are able to work remotely or relocate. Competition in many realms has become international. Developing countries which devoted their limited resources to training their citizens to develop technical skills are concerned those educated individuals may move to countries offering higher salaries and better living circumstances.<sup>18</sup>

<sup>15</sup> Miriam Jordan, 'Letters From Washington: Your Employees Could Be Undocumented' *New York Times* (16 May 2019), available at <https://www.nytimes.com/2019/05/16/us/immigrants-undocumented-no-match.html> (accessed 17 May 2019). The policy of sending 'no match letters' was suspended from 2012 to 2019.

<sup>16</sup> Chinese labourers' contribution to building the transcontinental railroad in the US was not celebrated until the 150th anniversary in 2019. J Katz, 'The Transcontinental Railroad Wouldn't Have Been Built Without the Hard Work of Chinese Laborers' (2010) *Smithsonian Magazine*, available at <https://www.smithsonianmag.com/smithsonian-institution/transcontinental-railroad-chinese-labourers-180971919/#d40bEvGCK1RTcGYh.99> (accessed 25 May 2019); GH Chang, *Ghosts of Gold Mountain The Epic Story of the Chinese Who Built the Transcontinental Railway* (Boston MA, Houghton Mifflin Harcourt, 2019).

<sup>17</sup> Call centres for product support or marketing are examples, while technological services lend themselves to remote contact between clients and providers.

<sup>18</sup> Y Brauner, 'Brain Drain Taxation as Development Policy' (2010) 55 *Saint Louis University Law Journal* 221; M Lister, 'A Tax-Credit Approach to Addressing Brain Drain' (2017) 62 *Saint Louis University Law Journal* 63.

Whatever the reasons one chooses to emigrate, the immigrant expects equal and fair treatment by the receiving country. Tax burden distribution in the US discriminates somewhat against people of colour<sup>19</sup> and low wage immigrants.<sup>20</sup> Yet immigration has been largely absent from tax policy debate.<sup>21</sup> With emphasis on the US, this chapter inquires whether the taxation system provides fair treatment to all immigrant taxpayers or favours some immigrants over others.

This chapter first reviews the question of tax fairness in the distribution of tax burdens and whether tax structure discriminates against or favours taxpayers with differing characteristics. The chapter then addresses the relationship between taxes and retention of capital, including tax incentives for capital investment, shifting tax burdens from capital to labour, and rules preventing the escape of capital from its current taxing jurisdiction. The section following considers how taxes supplement immigration policy to attract capital currently outside the jurisdiction. Next, the discussion contemplates whether taxes play any significant role in attracting<sup>22</sup> or retaining skilled labour.<sup>23</sup> The final portion looks at taxes and tax trends and identifies how they disadvantage or benefit fungible labourers who often are immigrants and then concludes.

## II. Tax Fairness: From Progressivity to Regressivity

One fundamental principle of tax fairness – ‘horizontal equity’ – requires the tax law to treat like taxpayers alike. US tax law is racially neutral on its face. While no discriminatory intent manifests itself in tax legislative history and strong public policy principles preclude enactment of expressly racist legislation, critical tax scholars have identified provisions of the US tax law that discriminate racially<sup>24</sup> or sexually.<sup>25</sup> Advantageous treatment of investment income favours higher income taxpayers.<sup>26</sup> Wealthy and high income taxpayers capture most charitable

<sup>19</sup>DA Brown, ‘Teaching Civil Rights through the Basic Tax Course’ (2010) 54 *Saint Louis University Law Journal* 809, 813–15 (blacks receive fewer tax benefits from home ownership because they tend to be renters).

<sup>20</sup>See nn 121–143 and accompanying text.

<sup>21</sup>Cf H Ordower, ‘Taxing Others in the Age of Trump: Foreigners (and the Politically Weak) as Tax Subjects’ (2017) 62 *Saint Louis University Law Journal* 157 (discussing tax elements disadvantaging lower income immigrants).

<sup>22</sup>PR Dukmedjian and N Girleanu, ‘Luxembourg Offers Tax Incentives to Attract Highly Skilled Employees’, *Tax Notes* (6 December 2018), available at <https://www.taxnotes.com/worldwide-tax-daily/employment-taxes/luxembourg-offers-tax-incentives-attract-highly-skilled-employees/2018/12/06/28l6b> (accessed 1 October 2019).

<sup>23</sup>See n 18 for literature examples.

<sup>24</sup>Brown (n 19).

<sup>25</sup>NC Staudt, ‘Taxing Housework’ (1995–1996) 84 *Georgetown Law Journal* 1571.

<sup>26</sup>H Ordower, ‘Schedularity in US Income Taxation and its Effect on Tax Distribution’ (2014) 108 *Northwestern University Law Review* 905.

contribution tax benefits.<sup>27</sup> Among higher income taxpayers who enjoy tax expenditures, racial minorities are underrepresented.<sup>28</sup>

During the middle part of the twentieth century, a progressive income tax became a principal revenue source in advanced democracies.<sup>29</sup> Progressivity in taxation became the second fundamental principle of tax fairness: 'vertical equity'. The principle assumes that as an individual's income or wealth increases, the individual's ability and responsibility to pay tax increases disproportionately. In their seminal article on progressive taxation,<sup>30</sup> professors Blum and Kalven catalogued arguments for progressivity observing that regressive taxation is anathema to fair distribution of the tax burden and lacks support: '[i]t is so clear no one today favors any tax because it is regressive that the term itself has become colored'.<sup>31</sup> They concluded that smoothing economic inequality through redistribution of wealth is the strongest justification for progressive taxation,<sup>32</sup> understanding that 'the drawbacks of progression in terms of productivity must be weighed against its possible merits in allocating the tax burden fairly'.<sup>33</sup>

Despite its foundation in horizontal and vertical equity principles, basic tax structure tilted toward proportional and regressive taxes during the latter half of the twentieth century under the pressures of political influence of wealth and growing governmental revenue needs. A progressive income tax was difficult to collect efficiently and its high marginal rates imposed on mostly middle-income individuals from whom the state had to collect the bulk of its revenue were unpopular.<sup>34</sup> Legislatures sought other sources of revenue, especially in the welfare states of Northern Europe where less progressive and even regressive taxes emerged to carry the welfare state burden. Chief among those regressive taxes was value added tax (VAT).

VAT is somewhat hidden because the tax is built into the cost of goods and services. Taxpayer liquidity concerns of income taxes are absent because its inclusion in the price leaves the consumer a choice to pay the tax or not buy the item.

<sup>27</sup> H Ordower, 'Charitable Contributions of Services: Charitable Gift Planning for Non-Itemizers' (2014) 67 *Tax Lawyer* 517. Cf JJ Thorndike, 'Tax History: Charity Deductions Are for the Rich – and That Was Always the Plan' (2019) 164 *Tax Notes* 1856.

<sup>28</sup> US Dept of Commerce, Census Bureau, 2012 *Statistical Abstract*, Section 13. Income, Expenditures, Poverty, and Wealth, Table 697. 'Money Income of Households – Percent Distribution by Income Level, Race, and Hispanic Origin, in Constant (2009) Dollars', available at <https://www2.census.gov/library/publications/2011/compendia/statab/131ed/tables/12s0697.pdf?#> (accessed 4 May 2020).

<sup>29</sup> The top marginal rate of tax in the US was 92% in 1952. Tax Foundation, 'US Federal Individual Income Tax Rates History, 1862–2013 (Nominal and Inflation-Adjusted Brackets)' [31], available at <https://taxfoundation.org/us-federal-individual-income-tax-rates-history-1913-2013-nominal-and-inflation-adjusted-brackets/> (accessed 15 September 2019). Similarly, high marginal rates were prevalent or soon to be so in most European countries not in the Soviet sphere of influence.

<sup>30</sup> WJ Blum and H Kalven Jr, 'The Uneasy Case for Progressive Taxation' (1952) 19 *University of Chicago Law Review* 417.

<sup>31</sup> *ibid* 419.

<sup>32</sup> *ibid* 520.

<sup>33</sup> *ibid* 444.

<sup>34</sup> SO Lodin, 'Swedish Tax Reforms 1971–77 – Why So Many?' (1977) 56 *Acta Universitatis Stockholmiensis Studia Juridica Stockholmiensia* 181.

VAT has been so popular that the EU harmonised VAT taxation at a minimum rate of 15 per cent.<sup>35</sup>

For many moderate- and middle-income taxpayers, income from wages is their significant source of income. Since those taxpayers consume most of their wages for living expenses subject to VAT, VAT is effectively a tax on labour. VATs tend to be regressive because the lower the individual's income and wealth, the more the individual must dedicate their limited resources to basic living expenses subject to VAT. By contrast wealthier taxpayers devote significant amounts of income and wealth to investment rather than consumer purchases. Since purchases of intangible investment property such as corporate shares and bonds are not subject to VAT, income devoted to such investments remains free from VAT.

VAT rates have increased and income tax rates have declined over the last half century. Taxes on income from investment have declined disproportionately to taxes on income from personal services while supplemental wage taxes have grown. Frequently the wage taxes are indirect taxes that are imposed upon the employer but probably borne by employees in the form of lower wages than they otherwise might receive if there were no tax.<sup>36</sup>

Retreat from progressive taxation is an international trend that coincides with changing immigration patterns and increasing need to accept diverse refugee populations. Some immigrants will find work and invest capital and begin to pay income taxes quickly; others may not. Rules governing admission of immigrants to stable, developed countries try to anticipate income productivity.<sup>37</sup> Even if they differ ethnically, racially and religiously from the majority populace, wealthy and highly educated immigrants receive favourable admission decisions from immigration authorities more frequently than do conflict and economic refugees.<sup>38</sup>

Progressive taxation of the mid-twentieth century yielded to proportional and even regressive taxation in the twenty-first century as the burden of taxation shifted from capital to labour. While capital mobility can account for the shift from taxing capital to taxing labour, immigration also may have contributed to that shift.

### III. Retaining Rich People and their Capital

Professor Winters argues that civil oligarchs use their wealth to influence tax system changes that reduce progressive taxes and substitute regressive ones. He sees the

<sup>35</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:347:0001:0118:en:PDF> (accessed 15 September 2019). Exemptions and reduced rates are not uniform throughout the EU.

<sup>36</sup> M Friedman, 'Transfer Payments and the Social Security System' (1965) 11 *The Conference Board Record* 7.

<sup>37</sup> Compare the US shift to merit based immigration: see text at n 7 above.

<sup>38</sup> L Adim, 'Between Benefit and Abuse: Immigrant Investment Programs' (2017) 62 *Saint Louis University Law Journal* 121; A Christians, 'Buying In: Residence and Citizenship by Investment' (2017) 62 *Saint Louis University Law Journal* 51 (both articles discussing 'golden visas' for investors).



reduction of the maximum marginal income tax rate to be a result of oligarchical activity in order to gain anti-progressive taxation allies by including increased numbers of the wealthy but not obscenely wealthy as allies against progressive taxes by pushing them into the highest marginal brackets.<sup>39</sup> Alternative or additional forces driving a retreat from progressive taxation may have been growing tax avoidance and the international focus on retaining wealthy taxpayers in the face of international competition for their capital<sup>40</sup> and their skills.

High marginal income tax rates arguably encourage taxpayers to engage in aggressive tax planning. The tax sheltering industry in the US developed during the years of high marginal rates of income tax.<sup>41</sup> Yet, taxpayers often try to avoid even low rate taxes too.<sup>42</sup> Experience shows that even as income tax rates declined, taxpayers continued to seek aggressively structured planning opportunities to avoid or decrease the tax. So-called 'son of boss' structures in the US avoided the federal income tax largely on low rate long term capital gain then capped at 15 or 20 per cent.<sup>43</sup> Similarly, the S corporation payroll tax shelter avoided at most a 2.9 per cent combined employer-employee payroll tax.<sup>44</sup>

Expatriation to avoid very high taxes long has been a matter of concern in high marginal rate jurisdictions having territorial income tax systems.<sup>45</sup> Some

<sup>39</sup> JA Winters, 'Civil Oligarchies' in JA Winters, *Oligarchy* (Cambridge, CUP, 2011) ch 5 (distinguishing oligarchs from the merely wealthy and demonstrating that the extremely wealthy oligarchs bear an ever decreasing share of the tax burden in the US).

<sup>40</sup> A Alstadsæter, N Johannesen and G Zucman, 'Tax Evasion and Inequality' (2019) 109 *American Economic Review* 2073 (using leaked data showing that offshore tax evasion is highly concentrated among the rich in Scandinavia and highlighting the importance of factoring in tax evasion to properly measure inequality).

<sup>41</sup> H Ordower, 'The Culture of Tax Avoidance' (2010) 55 *Saint Louis ULJ* 47.

<sup>42</sup> Ordower (n 41); Alstadsæter, Johannesen and Zucman (n 40) (current lower than historical rates under Scandinavian income taxes do not stop offshore tax avoidance or evasion by wealthy taxpayers).

<sup>43</sup> 26 USC §1(h) (imposing a reduced rate of tax to net capital gain relative to the rate imposed on income of other types). Unlike the federal income tax that applies a reduced income tax rate to net capital gain, state income taxes generally apply an identical rate to net capital gain as they apply to income of all other types. State income taxes vary considerably from state to state and add an additional tax of as much as 3% in Indiana or 13% in California, for example, using 2019 rates. K Loughhead and E Wei, 'State Individual Income Tax Rates and Brackets for 2019' (*Tax Foundation Fiscal Fact No. 643*, 2019), available at <https://files.taxfoundation.org/20190515164552/State-Individual-Income-Tax-Rates-and-Brackets-for-2019-FF-643.pdf> (accessed 29 May 2019). 26 USC is the Internal Revenue Code of 1986, as amended (the 'Code'). In the following, sections of the Code will be referred to as 'IRC §' followed by a number.

<sup>44</sup> Citizens for Tax Justice, 'Payroll Tax Loophole Used by John Edwards and Newt Gingrich Remains Unaddressed by Congress' (6 September 2013), available at <https://www.ctj.org/payroll-tax-loophole-used-by-john-edwards-and-newt-gingrich-remains-unaddressed-by-congress/> (accessed 17 September 2019).

<sup>45</sup> Consider the Beatles and their tax moves described in N Irwin, 'The Beatles were the Mitt Romney of the 1960s, and other policy lessons from the Fab Four', *The Washington Post Blog*, 10 January 2014, available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/01/10/the-beatles-were-the-mitt-romney-of-the-1960s-and-other-policy-lessons-from-the-fab-four/>. Under a territorial system, taxpayers who are not resident in the taxing jurisdiction are subject to tax only on their incomes from sources in the taxing jurisdiction and not on their income from performance of services outside the taxing jurisdiction. The US taxes its citizens and permanent residents on their worldwide income so US taxpayers must relinquish their citizenship or green cards to free themselves from the US income tax. 26 CFR §1.1-1.

countries address part of the impact of expatriation with continuation taxes,<sup>46</sup> but those anti-avoidance limitations on expatriation to avoid tax are an imperfect solution. Decreasing marginal rates of income tax and repeal or reduction in taxes at death has not stanching the flow of capital to low tax jurisdictions<sup>47</sup> or expatriations from the US and other countries.<sup>48</sup> Improved communication technology and stable, safe residential environments in many low-tax or no-tax island jurisdictions enable US and European nationals to emigrate without losing contact or control over businesses operating in their home countries.

Nevertheless, as global competition for capital increased in the latter decades of the twentieth century, the steeply progressive income taxes with high maximum rates of tax characteristic of developed countries during the middle years of the twentieth century yielded to systems with moderate or flat progression and moderate maximum rates of tax.<sup>49</sup> Schedularity under income tax systems has increased with its nearly discrete tax bases to which differing tax rate schedules apply.<sup>50</sup> Under schedularity, taxes have tended to increase on less mobile income from labour and to decrease on more mobile income from property.<sup>51</sup> As VAT rates and wage taxes on labour increased, taxes on capital gain stabilised or became preferential;<sup>52</sup> taxes on income from capital, as opposed to gain on the appreciation in the value of capital, also enjoyed a preference in some instances;<sup>53</sup> and rates of tax on corporations declined and continue to decline.<sup>54</sup> Recently the US enacted a preferential schedule for income from the conduct of businesses, other than the business of an employee, through a 20 per cent deduction of the amount of income from the business.<sup>55</sup> The new deduction favours capital intensive businesses and would seem to violate the horizontal equity principle. Periodic wealth taxes and gift and estate taxes on the transmission of wealth similarly have declined or

<sup>46</sup> Sweden, for example: 3. Kap. 3 § 3., 7 § Inkomstskattelag (1999:1229) (Income Tax Law Sweden), available at <https://lagen.nu/1999:1229> (accessed 3 October 2019) (taxing expatriates on their income from all sources (obegränsad skattskyldighet) for five years following expatriation if they continue to have substantial connection with Sweden).

<sup>47</sup> Alstadsæter, Johannesen and Zucman (n 40).

<sup>48</sup> Department of the Treasury, Internal Revenue Service, 'Quarterly Publication of Individuals, Who Have Chosen To Expatriate, as Required by Section 6039G' (1st quarter, 2019), 84 FR 20954 (13 May 2019) (showing 1019 individuals).

<sup>49</sup> OECD Tax Database, available at <http://www.oecd.org/tax/tax-policy/tax-database.htm#pit> (accessed 3 October 2019).

<sup>50</sup> Ordower (n 26).

<sup>51</sup> OECD Tax Database (n 49).

<sup>52</sup> IRC §1(h) (net capital gain taxed at a maximum 20% marginal rate). As late as 1989, Sweden's maximum marginal rate of income tax was approximately 80%. Sweden now imposes a flat rate of 30% on income from capital but a maximum rate on income from labour of approximately 55% – with some variation a function of the local income tax. Sven-Olof Lodin et al, *Inkomstskatt – en läro- och handbok i skatterätt* (Lund, Studentlitteratur, 2011).

<sup>53</sup> IRC §1(h)(10) (qualified dividend preference in the US); dual income tax with a 30% rate on income from capital in Sweden.

<sup>54</sup> In 2018, the corporate income tax rate declined from a maximum of 35 to a flat 21% rate. IRC §11.

<sup>55</sup> Effective in 2018, qualified business income yields a 20% deduction so only 80% of qualified business income is taxable. IRC §199A.

disappeared.<sup>56</sup> Such changes in rates and schedular tax structures may discourage wealthy individuals from emigrating and settling in lower taxed countries or transferring their income producing personal property to low tax jurisdictions but the success of such tax reductions is not at all certain.<sup>57</sup>

Decline in maximum rates of tax and occasionally complete disappearance of taxes on transmission of wealth have limited impact on funding of governmental services and public benefits. While steeply progressive taxes are associated historically with public benefits and welfare states, even confiscatory taxes on the wealthiest residents are unlikely to yield sufficient revenue to maintain extensive governmental functions and services. Moderate income taxpayers must provide the revenue to fund the demands of modern governments.<sup>58</sup> The policy supporting steeply progressive and high income tax rates and taxes on transmission of wealth at death served primarily to level disparities between wealthier and poorer residents and limit the growth and maintenance of a privileged and dominant class in the society.<sup>59</sup> Perceptions of worthiness of tax objects changed during the last decades of the twentieth century. Increasing capital mobility challenged the commonly held view that income from labour should not be disfavoured in taxation relative to income from capital.<sup>60</sup> Arguments prevailed that capital is more productive than labour so should be taxed at a lower rate than labour is taxed.

If decreased rates of tax and preferential tax treatment of capital gain and other income from capital do not constrain taxpayers from removing their capital from their home countries, exit taxes or continuation taxes following exit have become popular for the home country to capture otherwise lost future tax revenue. The US has used both a continuation tax<sup>61</sup> and an exit tax.<sup>62</sup> A continuation tax imposes an obligation on the taxpayer to pay tax on some or all the taxpayer's income following change of residence or citizenship.<sup>63</sup> Most continuation taxes have limits on

<sup>56</sup> In 1976 estates in excess of \$600,000 were subject to estate tax in the US, but in 2019 estates become taxable only in excess of \$11.4 million. IRC §2010 (exemption from tax). The maximum estate tax rate in the US declined from 77% of taxable estates in excess of \$10 million in 1976 to 40% of taxable estates in excess of \$11 million. IRC §2001. Sweden repealed its inheritance tax in early 2005, retroactively to 17 December 2004, and its wealth tax in December 2007, retroactively to 1 January 2007. Sweden and Austria are unusual among OECD members in not having an inheritance or estate tax.

<sup>57</sup> See text at nn 40–45, above.

<sup>58</sup> Lodin (n 34).

<sup>59</sup> Blum and Kalven (n 30) 487.

<sup>60</sup> AW Mellon, *Taxation: The People's Business* (London, Macmillan, 1924) 56–58.

<sup>61</sup> IRC §877.

<sup>62</sup> IRC §877A.

<sup>63</sup> H Ordower, 'The Expatriation Tax, Deferrals, Mark to Market, the *Macomber* Conundrum and Doubtful Constitutionality' (2017) 15 *Pittsburgh Tax Review* 1, 7. Sweden's continuation tax (n 46), in addition to taxing income from all sources for 5 years (obegränsat skattskyldighet), also imposes limited tax liability of some expatriates on income from capital (begränsat skattskyldighet) for 10 years following change of residence. 3 ch. 19 § Inkomstskattelag (Svensk författningssamling [SFS] 1999:1229) (Swed.) (taxing Swedish citizens and permanent residents who leave Sweden on income from capital). Similarly, Germany has a 10-year continuation tax based on tax avoidance intent as described in D Gutmann, 'La lutte contre "l'exil fiscal": du droit comparé à la politique fiscale', *Le Cercle des fiscalistes* (24 May 2012), available at <http://www.lecercledesfiscalistes.com/publication/la-lutte-contre-l'exil-fiscal-du-droit-compare-a-la-politique-fiscale/234> (accessed 6 June 2019).

duration, commonly five or 10 years. The US tax had a 10-year durational limit.<sup>64</sup> An exit tax imposes a single incident of taxation on the taxpayer's deferred income and unrealised gain at the moment of expatriation.<sup>65</sup> In the US payment of all or part of the tax may be deferred if the taxpayer assures payment of the tax through a bond or through withholding by the third party payer of the income to the taxpayer.<sup>66</sup>

Historically, US persons have valued their status as citizens and permanent residents of the US. Stable governments and developed banking and communication systems in low tax jurisdictions now make US citizenship or the right to reside permanently less compelling than they once were. Expatriation for wealthy individuals has become an alternative to continued citizenship or residence when it diminishes the individual's tax burden substantially.<sup>67</sup> High net worth individuals' sources of income have globalised. US source income remains taxable in the US even after expatriation but foreign source income ceases to be so. Some income follows the residence of its owner and becomes foreign source following expatriation. For example, unrealised gain on corporate stock, bonds, collectibles, gemstones, artwork and other personal property would have been US source if realised and recognised before a US person's expatriation. If recognition is deferred until after expatriation, its source shifts to the new residence of the owner<sup>68</sup> and it becomes free from US tax. The expatriation tax is designed to capture the unrealised appreciation as taxable gain to the date of expatriation.<sup>69</sup>

The US makes it more difficult to shift the incidence of taxation to low tax jurisdictions than other countries with territorial systems do, because the US taxes its citizens, residents, and domestic corporations<sup>70</sup> on their income from all sources worldwide.<sup>71</sup> Despite worldwide taxation, the US generally cedes primary taxing jurisdiction for income produced outside the US to the country where the income is produced by crediting foreign taxes paid by the US person.<sup>72</sup> If the foreign taxes

<sup>64</sup> IRC §877(d)(2).

<sup>65</sup> AG Abreu, 'Taxing Exits' (1996) 29 *UC Davis Law Review* 1087 (analysing various proposals to counteract the tax loss from expatriation with the income tax and the transfer tax systems).

<sup>66</sup> IRC §877A (expatriation tax). The French expatriation tax Code général des impôts (Tax Code) art. 167a (Fr.) (as in effect in 1999) was determined to violate the EU treaty when applied to a French national moving within the EU. Case C-9/02 *Hughes de Lasteyrie du Saillant v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-2452 (European Court of Justice). The French expatriation tax was permissible, however, when a French national relocated to Switzerland. Case C-355/16 *Christian Picart v Ministre des Finances et des Comptes publics* (15 March 2018) in which the ECJ determined that the 1999 EU-Switzerland agreement on free movement of persons does not preclude France from imposing an exit tax on the unrealised gains of a taxpayer who moved to Switzerland but was not engaged in a trade or business there.

<sup>67</sup> Ordower (n 63) 6.

<sup>68</sup> IRC §865 (personal property sourced at residence).

<sup>69</sup> IRC §877A.

<sup>70</sup> Corporate residence for US tax purposes follows place of incorporation rather than seat of management. IRC §7701(a)(4).

<sup>71</sup> IRC §61 (defining gross income as all income from whatever source derived). Treasury reg §1.1-1 (worldwide taxation).

<sup>72</sup> IRC §901 (foreign tax credit).

are less than the US tax on the income, the US captures a tax amount equal to the difference between the higher US tax and the foreign tax credited.<sup>73</sup> If the foreign taxes are greater than the US tax, the credit may not exceed the amount of the US tax.<sup>74</sup>

To avoid US tax, US investors have two choices – one lawful, one not. There are also opportunities to defer US tax on the increase in the value of the taxpayer's investments. The lawful choice is to relinquish US citizenship or, for non-citizen residents, the right to reside in the US. That expatriation subjects the former US citizens and permanent residents to the expatriation tax.<sup>75</sup> Tax administration also has the power to certify seriously tax delinquent individuals to the Department of State for revocation or denial of issuance of the individual's passport.<sup>76</sup> Tax clearances are a requirement for non-residents exiting the US.<sup>77</sup>

The unlawful choice has been to secrete investments in foreign jurisdictions with strong bank secrecy laws so income and wealth remains hidden outside the US taxing jurisdiction, free from US tax.<sup>78</sup> The option of concealing income and income producing assets in a low tax, bank secrecy jurisdiction came under intense attack with the enactment of the Foreign Accounts Tax Compliance Act (FATCA) in 2010.<sup>79</sup> That legislation imposed substantial penalties on US taxpayers who failed to disclose their foreign accounts and pay tax on their income from those accounts. The Act also sanctioned foreign financial institutions accepting accounts from US taxpayers, which were not reported to US taxing authorities, by preventing them from participating in US programs, including reduced withholding on investments in the US – a feature important to the institution's underlying non-US investors.

Deferring US tax on increase in value is straightforward. Investors may operate businesses through or invest in domestic or foreign corporations and defer individual tax on the income until the individual shareholder receives distributions or sells the corporate shares. A peculiarity of the US tax system permanently eliminates the individual tax on gains but not dividends if the shareholder dies before selling the corporate shares as the decedent's property receives a new, fair market value tax basis at the owner's death.<sup>80</sup> A foreign corporation also permits the deferral of the US corporate-level income tax. Even if its shareholders are US persons, a foreign corporation is not subject to US taxing jurisdiction except on that portion of its income from US sources or effectively connected with its

<sup>73</sup> IRC §904 (limitation to US tax on the income).

<sup>74</sup> *ibid.*

<sup>75</sup> IRC §877A (see text to nn 65–66).

<sup>76</sup> IRC §7345 (certification under section 32101 of the FAST Act, Pub L 114-94 (2015) enacted as a revenue offset).

<sup>77</sup> IRC §6851(d); IRS, 'Departing Alien Clearance (Sailing Permit)', available at <https://www.irs.gov/individuals/international-taxpayers/departing-alien-clearance-sailing-permit> (accessed 3 October 2019).

<sup>78</sup> Compare for Scandinavia, Alstadsæter, Johannesen and Zucman (n 40).

<sup>79</sup> 124 Stat 71, Pub L 97-117 (2010).

<sup>80</sup> IRC §1014.

conduct of a US trade or business.<sup>81</sup> Most distributions of foreign source earnings of the foreign corporation to its non-corporate US owners become taxable in the US.<sup>82</sup> Since 2018, distributions of foreign source earnings to corporate shareholders that own at least 10 per cent of the voting rights in or the value of shares in the foreign corporation, that is, corporate US shareholders,<sup>83</sup> are free from US income tax on distributions from a foreign corporation under the 100 per cent dividends received deduction.<sup>84</sup>

The US has deployed an array of complex anti-avoidance or anti-deferral rules to prevent taxpayers from exploiting corporate limitations on US taxation of foreign source income. Some income of CFCs is taxable to the corporation's US shareholders if the placement of foreign source income serves no non-tax business purpose.<sup>85</sup> Passive investment income as well as sales and service income unrelated to the CFC's country of incorporation<sup>86</sup> trigger the inclusion to the shareholders as if the CFC were a tax transparent entity similar to a partnership.<sup>87</sup> US persons who invest in foreign investment companies may defer inclusion of the foreign investment company's income but when they sell their interests in the foreign company or receive distributions, the gain does not enjoy preferential rates on capital gains, and the gains and dividends become subject to an interest charge.<sup>88</sup> A decedent's estate does not get a new basis in foreign investment company shares so the estate's beneficiaries remain subject to the interest charge on the increase in value of the investment in the foreign investment company.<sup>89</sup> US corporations converting to foreign corporations to avoid US taxation on their foreign source income are caught by the anti-inversion provisions<sup>90</sup> subjecting them to continuing taxation of their foreign source income in the US.

<sup>81</sup> IRC §881 (fixed and determinable periodic income); IRC §882 (effectively connected income).

<sup>82</sup> IRC §316 (defining dividend as a distribution from any corporation's earnings and profits); IRC §301 (including dividends in the shareholder's income).

<sup>83</sup> Under IRC §951(b) (defining United States (US) shareholder except under IRC §245A the distributing corporation need not be a controlled foreign corporation ('CFC')). A CFC defined in IRC §957 (e) is a corporation in which US shareholders own more than half the voting power and share value.

<sup>84</sup> IRC §245A (anti-avoidance rules limit the value of the exclusion). IRC §951A taxes returns in excess of 10% of a CFC's tangible assets as subpart F income under the CFC provisions as global intangible income. IRC §59A imposes an additional base erosion alternative tax on related party transactions.

<sup>85</sup> IRC §951.

<sup>86</sup> Foreign base company income is subpart F income under IRC §952 included to the shareholders under IRC §951(a). IRC §954(a) (foreign base company income).

<sup>87</sup> IRC §951(a). Inclusion of CFC income is not fully transparent. Subpart F income that would have been capital gain to the corporation does not retain its character as capital gain to the US shareholders.

<sup>88</sup> IRC §1291 (income from a passive foreign investment company defined in IRC §1297). A taxpayer may avoid the unfavourable effect of these rules by electing to include the income of the foreign company in US income annually. IRC §1295 (qualified electing fund); IRC §1293 (inclusion of pro rata share of qualified electing fund income).

<sup>89</sup> IRC §1291(e).

<sup>90</sup> IRC §7874 (taxing all or part of a foreign entity's income in the US either as if it were a US entity or under a continuation tax following expatriation of the entity).



#### IV. Investors and Investor Immigrants (Commodifying Immigration)

As the US and other countries seek to limit expatriation of revenue, capital and people to protect the domestic tax base, there is active competition among jurisdictions, including the US, to attract cross-border capital and people. The global competition for capital is powerful and possibly destructive when it becomes a 'race to the bottom' of income inclusion and tax rates.

The US taxes the US-source investment income of non-resident alien individuals<sup>91</sup> and foreign corporations on its gross amount by requiring the person making any payment of US source income to a non-resident alien or foreign corporation to withhold<sup>92</sup> 30 per cent of the gross payment.<sup>93</sup> The US competes for the foreign investment capital with double tax treaties that reduce that rate of tax on interest, dividends, royalties and other investment income<sup>94</sup> and with exemptions from the withholding tax for the interest paid on deposits in financial institutions<sup>95</sup> and on portfolio indebtedness.<sup>96</sup>

State and local governmental units offer a variety of direct and tax subsidies to induce the enterprises planning to operate in the US to choose a specific locale. The practice of tax subsidy competition has generated a robust bidding process among states and localities in the US with questionable returns to the locality in exchange for considerable loss of tax revenue. The subsidies often do not require a permanent commitment from the enterprise and occasionally leave the locality with an ongoing facilities' burden after the enterprise ceases its operations there.<sup>97</sup>

Some low tax jurisdictions have competed actively for investor capital by offering bank secrecy and low or no income tax on the earnings of non-residents. The OECD targeted these jurisdictions as engaging in harmful tax practices in a 1998 initiative<sup>98</sup> leading to increased transparency and information sharing by

<sup>91</sup> IRC §7701(b)(1)(B) (defining nonresident alien as an individual neither a citizen nor resident of the US).

<sup>92</sup> IRC §1441 (withholding requirement).

<sup>93</sup> IRC §871 (tax on fixed, determinable, annual or periodic income of nonresident aliens); IRC §881 (similarly, foreign corporations).

<sup>94</sup> For example, Art. X of the United States – Canada Income Tax Convention, available at <https://www.irs.gov/pub/irs-trty/canada.pdf> (accessed 8 June 2019) reduces the withholding rate of dividends to 10% for certain corporate recipients and 15% for others.

<sup>95</sup> IRC §871(i).

<sup>96</sup> IRC §§ 871(h), 881(c). Portfolio interest is non-contingent interest paid pursuant to a registered debt instrument.

<sup>97</sup> H Ordower, 'Les Impôts Relatifs aux Investissements Étrangers aux États-Unis d'Amérique (observations générales)' (1996) 1996-2 *Revue Internationale de Droit Economique* 185.

<sup>98</sup> G Makhoul, 'Current Status of OECD's Harmful Tax Practices Initiative A statement by the Chairman of the OECD's Committee on Fiscal Affairs' (2002), available at <http://www.oecd.org/general/searchresults/?q=unfair%20tax%20competition&cx=012432601748511391518:xxeadub0b0a&cof=FORID:11&ie=UTF-8> (accessed 8 June 2019).

the targeted jurisdictions.<sup>99</sup> A second initiative on base erosion and profit shifting (BEPS) has continued the effort to achieve greater transparency with uniformity in tax rules to prevent arbitrage especially through use of hybrid structures.<sup>100</sup>

Such international efforts to limit tax competition may have motivated investors to become immigrants seeking the most favourable living and investment bases rather than simply moving capital. An emerging international competition issue has focused on 'golden' visas, including money laundering and similar concerns surrounding their issuance.<sup>101</sup> Rather than offering tax or direct subsidies for investment, countries with golden visa regimes expedite the immigration process for investors who bring substantial investment capital to the receiving country.

Under golden visa programmes, investor immigrants invest designated minimal amounts in the receiving country in exchange for the privilege to enter and reside there.<sup>102</sup> Some Caribbean island states exchange immediate citizenship for a fee rather than an investment commitment.<sup>103</sup> The amounts and industries in which the investments must be made are not uniform among countries. Economically developed countries like the US require a larger investment commitment than do countries looking to capture international capital to assist the country's lagging economic development.<sup>104</sup> Several countries also provide investor immigrants with temporarily favoured tax treatment.<sup>105</sup> Others are low tax jurisdictions that welcome investors from high tax jurisdictions who may wish to avoid or evade taxes in their home countries by changing their residence or citizenship.<sup>106</sup> Investor immigrants are desired and desirable as they add capital to the receiving country's economy.

Investor immigrants to the US are subject to general US taxing jurisdiction under the US worldwide taxation system when they become US residents. Their foreign source income draws a credit for taxes paid to foreign jurisdictions. Immigration for tax reasons is practical only for investors subject to taxes equal to or higher than US taxes in the country from which they are emigrating.

<sup>99</sup> OECD, *Harmful Tax Practices – 2018 Progress Report on Preferential Regimes; Inclusive Framework on BEPS: Action 5*, available at <https://www.oecd.org/tax/beps/harmful-tax-practices-2018-progress-report-on-preferential-regimes-9789264311480-en.htm> (accessed 9 June 2019).

<sup>100</sup> OECD, 'Base Erosion and Profit Shifting', available at <http://www.oecd.org/tax/beps/> (accessed 3 October 2019).

<sup>101</sup> C. Yeginsu, 'What Are Britain's "Golden Visas," and Why Are They Being Suspended?' *New York Times* (6 December 2018), available at <https://www.nytimes.com/2018/12/06/world/europe/uk-golden-visa-suspended.html> (accessed 4 October 2019) (expressing concern about Russian oligarchs' use of the British programme for money laundering).

<sup>102</sup> Adim (n 38); Christians (n 38).

<sup>103</sup> Adim (n 38) 122.

<sup>104</sup> Christians (n 38) 57.

<sup>105</sup> Ibid, 51 (discussing Italy's new programme, and comparison with Portugal, Malta, Ireland); RA Papotti and L Ferro, 'Italy's Attractive New Tax Regime for Wealthy Pensioners' *Tax Notes International* (29 April 2019) 343.

<sup>106</sup> FATCA legislation in the US (n 79); harmful tax competition and BEPS initiatives of the OECD (nn 98 and 100).



Where their emigration jurisdiction has lower taxes than the US, investor visas are desirable only from non-tax perspectives – opportunities, lifestyle, safety, etc. As investors they enjoy the tax advantages currently favouring capital over labour in the US,<sup>107</sup> including the absence of any social security tax on income from capital,<sup>108</sup> preferential rates for net capital gain and dividends,<sup>109</sup> deferral of inclusion in income of appreciation in the value of their property,<sup>110</sup> rapid tax recovery of many capital expenditures,<sup>111</sup> and a deduction of 20 per cent of the income from the conduct of a trade or business in the US.<sup>112</sup>

## V. Educated and Skilled Labour

### A. Skilled Immigrants

Countries also tend to welcome immigrants or temporary workers with specific skills in a variety of fields. The US has many immigration priority programs for educated and skilled workers.<sup>113</sup> Jobs for individuals with skills or training often pay better than jobs in the immigrant's country of origin. Like investor immigrants, skilled immigrants are subject to the general taxing jurisdiction of the US on their worldwide income. Unlike investor immigrants, skilled immigrants receive payment for services and do not enjoy the advantages of the current US preferences for income from capital. Since their visa status is employment dependent, they may not conduct an independent trade or business yielding the qualified business income deduction.<sup>114</sup> They must pay social security taxes but those with high demand skills may draw wages exceeding the social security earnings cap so only part of their wages are subject to the social security tax.<sup>115</sup> Some skilled employee visas permit conversion to permanent residence<sup>116</sup> and access to social security benefits at retirement age unavailable to other temporary workers who may not work in the US sufficiently long to qualify for benefits.<sup>117</sup> Employers also

<sup>107</sup> Generally n 39 (text accompanying and following).

<sup>108</sup> IRC §3101 (6.2% tax on wages); IRC §1401 (tax on self-employment income).

<sup>109</sup> IRC §1(h) (maximum rate on net capital gains and dividends).

<sup>110</sup> IRC §1001 (gain from sale or other disposition of property).

<sup>111</sup> IRC §168(k) (bonus depreciation).

<sup>112</sup> IRC §199A (n 55 and accompanying text).

<sup>113</sup> For example, USCIS, 'H-1B Specialty Occupations', available at <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models> (accessed 4 October 2019).

<sup>114</sup> IRC §199A (n 55 and accompanying text) (qualified business income).

<sup>115</sup> IRC §3101. In 2019, wages in excess of \$132,900 are free from the social security tax. 'Social Security Fact Sheet 2019 Social Security Changes', available at <https://www.ssa.gov/news/press/factsheets/cola-facts2019.pdf> (accessed 9 June 2019). Those who never become permanent residents are unlikely to draw any benefits under the social security system.

<sup>116</sup> H-1-B visas are dual purpose and permit application for green cards while other temporary work visas do not (text to n 113, above).

<sup>117</sup> nn 125–126, below, and accompanying text.

may offer various deferred compensation arrangements and, for some occupations, provide non-taxable benefits including housing and meals.<sup>118</sup> High wages may give the workers the opportunity to accumulate disposable income for investment to capture capital taxation benefits as investor immigrants do.

## B. Skilled Emigrants

Economically developing countries educate promising young citizens at government expense to develop an indigenous pool of skilled and educated workers. Those individuals are among the most desired candidates for immigration to economically developed countries where their skills also are needed. Salaries higher than those possible in their home country and better opportunities for family members are seductive, despite any privileges their education might afford them at home. Emigration thwarts the home country's plans for those individuals to fulfil important societal roles and advance the country's development. Prohibiting emigration provides a solution but raises human rights concerns. These privileged individuals consumed considerable amounts from limited national wealth to become who they are. Repayment in some manner may be appropriate.<sup>119</sup> Other countries impose a special fee or tax requiring an emigrant to repay all or part of the cost or value of the education or training as an exit tax or a continuation tax following emigration.<sup>120</sup>

## VI. Fungible Labour: Authorised and Unauthorised Immigrants

Many jobs require limited skills and training. The workers doing the jobs are substantially fungible. While unskilled jobs require some training – even specialised training in many instances – the necessary skills are relatively easy to learn and the shift from one unskilled job to another carries a moderate or low retraining cost. Unlike skilled and educated workers,<sup>121</sup> fungible workers receive limited amounts of nontaxable fringe benefits. Most fungible workers are subject to wage taxes on all their income because they do not earn more than the social security

<sup>118</sup> IRC §119 (exclusion from gross income of meals and lodging provided for the convenience of the employer).

<sup>119</sup> US Army, 'Earn Your Degree Through ROTC', available at <https://www.goarmy.com/benefits/education-benefits/earn-your-degree-through-rotc.html> (accessed 18 September 2019) (example of US service commitment military education programmes).

<sup>120</sup> T Boeri, H Brucker, F Doquier and H Rapoport (eds), *Brain Drain and Brain Gain The Global Competition to Attract High-Skilled Migrants* (Oxford, OUP, 2012); G Block and M Blake, *Debating Brain Drain: May Governments Restrict Emigration?* (Oxford, OUP, 2015); and literature cited at n 18, above.

<sup>121</sup> nn 113–120 above, and accompanying text.

tax ceiling. They spend the bulk of their income on necessities, leaving them little opportunity to accumulate wealth. In countries with VAT, substantially all of a fungible worker's income is subject to VAT as well as wage taxes. Fungible workers constitute much of the taxpaying public, bear a considerable portion of the burden of paying for government,<sup>122</sup> and are affected most profoundly as tax burdens shift from capital to labour.

Included in the pool of fungible labour are many immigrants who are low wage workers invited – sometimes temporarily as guest workers, sometimes as immigrants – to fill labour shortages. They are the Chinese labourers who built the US transcontinental railway;<sup>123</sup> the Mexicans, Central Americans and Filipinos who harvest crops; the Ukrainians, Lithuanians, Latvians, Caribbean islanders and Central Americans who provide cleaning services and home care for children, the elderly and individuals with disabilities. Some immigrate with the receiving government's authorisation and permission to work temporarily<sup>124</sup> or permanently, but many others enter without authorisation or with authorisation that does not permit them to work.

Once immigrants, whether temporary or permanent, reside in the US, their incomes become subject to the income tax and their wages to social security and Medicare taxes, although many will not reside in the US for the 10 years necessary to become eligible for retirement benefits under social security.<sup>125</sup> Many temporary workers and some immigrants who later reside outside the US lose benefits after six months outside the US.<sup>126</sup> Anyone buying items in the US pays state and local sales and use taxes even if the items are necessities for living. States vary with respect to items they may exempt from the state sales tax.<sup>127</sup>

In the US low wage earners qualify for a negative income tax<sup>128</sup> on their labour income.<sup>129</sup> The credit is substantial<sup>130</sup> but as the taxpayer's income increases, the credit rapidly phases out.<sup>131</sup> The credit does not help unemployed individuals and the phase out effectively imposes an additional 21 per cent tax on increases in wages in the phase-out range. Taxpayers lose the credit if they have income

<sup>122</sup> n 34 above, and accompanying text.

<sup>123</sup> n 16, above, and accompanying text.

<sup>124</sup> USCIS, 'H-2A, B temporary workers', available at <https://www.uscis.gov/working-united-states/temporary-nonimmigrant-workers> (accessed 18 September 2019).

<sup>125</sup> Social Security Administration, 'Retirement Benefits', available at <https://www.ssa.gov/pubs/EN-05-10035.pdf> (accessed 10 June 2019).

<sup>126</sup> 20 CFR § 404.460 (nonpayment of monthly benefits to aliens outside the United States).

<sup>127</sup> For example, New York State Department of Taxation and Finance, 'Lists of Exempt and Taxable Clothing, Footwear, and Items Used to Make or Repair Exempt Clothing', *Tax Bulletin ST-530 (TB-ST-530)* (10 March 2014), available at [https://www.tax.ny.gov/pubs\\_and\\_bulls/tg\\_bulletins/st/clothing\\_chart.htm](https://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/st/clothing_chart.htm) (accessed 10 June 2019).

<sup>128</sup> IRC § 32 (inflation adjusted, refundable credit designed originally to balance the social security tax).

<sup>129</sup> IRC § 32(c)(2) (wages plus self-employment income).

<sup>130</sup> IRC § 32(b) (as much as 45% of the taxpayer's earned income not exceeding \$14,570 in 2019 if the taxpayer has three or more qualifying children).

<sup>131</sup> *ibid.* The phase-out is 21.06% of each dollar over \$24,820 for married taxpayers filing jointly: Rev Proc 2018-57, 2018-49 IRB 19 (phase-out tables).

from capital exceeding a low threshold, thus discouraging any accumulation of wealth by low income individuals.<sup>132</sup> Fear of examination by the taxing authority may discourage taxpayers from claiming the credit since taxpayers claiming the credit are examined more frequently than taxpayers with much greater incomes.<sup>133</sup> Taxpayers who do not have social security numbers are ineligible for the credit even if they have alternate taxpayer identification<sup>134</sup> and meet the other qualifications for the credit. Unauthorised workers may pay social security and income taxes but may not claim the earned income credit.<sup>135</sup>

Unauthorised immigrants are subject to deportation and have little hope of gaining authorised status. Unless they secure false papers or alternative taxpayer identification,<sup>136</sup> unauthorised immigrants may not accept work in the formal economy of the country. They participate primarily in the informal economy in which they receive payment for their services or the goods they sell in cash or in barter goods and services. Generally they accept payments for their services at rates substantially below the formal economy market rate.<sup>137</sup> Such service value discounts are necessary to entice service recipients to use unauthorised workers' services rather than those offered in the formal market. Unauthorised workers frequently find employment in occupations in which supplies of authorised workers are inadequate or that authorised workers do not want. Many unauthorised workers are in household occupations where their employer is in need of the services but is unwilling or unable to pay formal market rates. The payments generally would yield no tax deduction for the employer so payments in cash outside the formal economy are not of any consequence to the employers.<sup>138</sup> Even when they might provide a tax benefit to the employer,<sup>139</sup> the wages may be sufficiently low that the tax benefit would not match the wage differential for authorised workers.

Many unauthorised workers without tax identification do not report their income for income tax purposes. Failure to report income poses risks of both civil and criminal penalties since their obligation to report and pay taxes is

<sup>132</sup> IRC §32(i)(2); Rev Proc 2018-57 (n 131) (threshold amount in 2019 is \$3,600).

<sup>133</sup> P Kiel, J Eisinger, and Propublica, 'The Golden Age of Rich People Not Paying Their Taxes', *The Atlantic* (11 December 2018), available at <https://www.theatlantic.com/politics/archive/2018/12/rich-people-are-getting-away-not-paying-their-taxes/577798/> (accessed 4 October 2019).

<sup>134</sup> The US issues individual taxpayer identification numbers (ITIN) on request to individuals not authorised to work in the US but who have income to report in the US. IRS, 'Instructions for Form W-7', available at <https://www.irs.gov/pub/irs-pdf/iw7.pdf> (accessed 4 October 2019).

<sup>135</sup> In some cases they may claim the child tax credit under IRC §24 because the child is a citizen of the US by birth in the US and has a social security number.

<sup>136</sup> US taxpayer identification, for example (see n 134).

<sup>137</sup> The informal (or underground economy) operates primarily in cash outside the banking system and government regulation. Workers are paid at below market rates and have no little or no job protection. International Labour Organization, 'More than 60 per cent of the world's employed population are in the informal economy' (8 April 2018), available at [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_627189/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_627189/lang--en/index.htm) (accessed 4 October 2019).

<sup>138</sup> Homecare workers for children, infirm and aged individuals, for example, generally non-deductible in any event as a personal expense under IRC §262 or the low wages in the informal economy being more valuable than a tax credit in those instances in which a credit is available. IRC §21.

<sup>139</sup> IRC §21 (dependent care expense credit, for example).

independent of immigration status. If they were authorised workers, the incomes of many would lie below the threshold at which an income tax otherwise might be payable<sup>140</sup> but, in most instances, a wage-based social security tax would be payable. In the US such low income workers if authorised to work in the US might qualify for the earned income credit.<sup>141</sup> Thus, they are disadvantaged relative to authorised workers both in wage levels and access to a low wage tax benefit. While many unauthorised immigrants may not pay an income tax, they do pay consumption taxes<sup>142</sup> and excise taxes as they consume and indirectly pay property taxes in their housing rent.<sup>143</sup>

## VII. Conclusion

Taxation plays a role in immigration and emigration and seems to drive some decisions to migrate from high to low tax jurisdictions. Capital mobility and labour immobility argue in favour of decreasing taxes on capital to prevent capital flight even if the decrease means shifting tax burdens to labour. Decreased taxes on capital, however, do not guarantee that capital will not flee. Another jurisdiction may offer still lower taxes and generate conditions for tax decrease competition, depriving the taxing jurisdiction of needed revenue. A race to the bottom on capital taxes enhances disparities between wealthy and poor residents and is unlikely to benefit developed economies. Growth of a privileged class undercuts longstanding commitments in advanced democracies to equality and equal opportunity.

Uncertainty for fungible, immigrant workers, both authorised and unauthorised, as to whether they will be permitted to remain in the country to which they have migrated often leaves them targets for exploitation. The immigrants accept low wages with few opportunities to organise to demand fairer wage treatment. Withholding to pay income and social security taxes from which they are unlikely to benefit further reduces already low wage income. Anti-immigrant government policies amplify uncertainty for fungible, immigrant workers and further exert downward pressure on wages assisting American business in keeping wages low and enhancing profitability.

Ability to pay – vertical equity – as a fundamental principle of taxation and resulting redistribution of wealth through strong welfare systems that provide for

<sup>140</sup> The income tax system of each developed economy does not tax incomes that fall below a minimum amount. That amount differs from country to country. In the US, the standard deduction under IRC §63 currently is \$12,000 so that incomes less than that amount are not taxable. In Germany, a subsistence minimum must remain free from the income tax under the Constitutional Court's decision BVerfGE 82, 60, 85 (29 Mai 1990, 1st Senat).

<sup>141</sup> IRC §32 (n 128 above, and accompanying text).

<sup>142</sup> The US has no national consumption tax but most of the states of the US have retail sales taxes.

<sup>143</sup> A Stevenson (A Jurow Kleiman), 'Improving the US Guest Worker System through Tax and Social Welfare Reform' (2014) 17 *Harvard Latino Law Review* 147 (providing an excellent discussion of these issues).

the needs of all remain as compelling today as they were when many economically developed countries chose to impose steeply progressive taxes. Yet the focus on competing for capital resources seems to have supplanted principles of fairness and ability to pay and resulted in increasingly flat or regressive taxation. Tax rate competition for capital seems a doubtful strategy heading toward a zero tax on capital income and raises the question of whether something else – immigrant exploitation, wealth-based power disparities – motivates countries to shift tax burdens from capital to labour.