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THE TAX CODE AS NATIONALITY LAW

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Legal Studies Research Paper No. 05-18

Originally published in Volume 43, *Harvard Journal on Legislation*, Number 2, pp. 375–436, 2006.

ARTICLE

THE TAX CODE AS NATIONALITY LAW

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This Article questions the frequently asserted axiom that Congress's taxing power knows no bounds. It does so in the context of recently enacted legislation that creates a special definition of citizenship that applies only for tax purposes. Historically, a person was treated as a citizen for tax purposes (and therefore taxed on her worldwide income and estate) if, and only if, she was a citizen under the nationality law. As a result of the new statute, in certain circumstances a person might be treated as a citizen for tax purposes (and therefore taxed on her worldwide income and estate) for years or even decades after she is no longer a "real" citizen under the nationality law. The analysis first looks at international law principles, concluding that in certain circumstances the new statute exceeds the prescriptive jurisdictional limits of customary international law. It then examines the constitutional implications, arguing that the statute, at least in certain circumstances, reflects a rare occasion where Congress might have exceeded its Article I taxing powers. Moreover, even to the extent the statute is within Congress's powers, certain aspects of it violate the due process limitations of the Fifth Amendment. These conclusions highlight the importance of Congress taking constitutional and international law considerations more seriously with respect to future legislation in the increasingly important area of international taxation.

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> To boost the [national] economy I'd tax all foreigners living abroad.
>
> —Monty Python's Flying Circus[1]

This Article explores the outer limits of Congress's power to tax individuals in an international context. Traditionally, the United States has been among the most aggressive countries in exercising taxing jurisdiction abroad. The United States is the only major country that taxes the worldwide income of its citizens even if they live outside the country.[2]

Notwithstanding its existing position at the outer edges of taxing jurisdiction, the United States recently stretched these limits even further. As part of the American Jobs Creation Act ("AJCA") of 2004,[3] Congress adopted special provisions for determining whether an individual is considered a "citizen" for federal tax purposes and is thereby subject to taxation on her worldwide income. Prior to the enactment of the AJCA, the tax code definition of citizenship relied on the nationality law definition of citizenship: a person was treated as a citizen for tax purposes if, and only if, she was a citizen under the nationality law.[4] The enactment of the AJCA broke this direct link between the tax code and nationality law, at least in certain circumstances, and it is now possible for an individual to be treated as a citizen for tax purposes during a period when she is not a U.S. citizen under nationality law.[5]

The ACJA provisions that added sections 877(g) and 7701(n) to the Internal Revenue Code focus on a particular group of individuals: those who had been U.S. citizens but who renounced or otherwise lost their citizenship under the nationality law.[6] The new Code sections were intended to prevent perceived abuses of the tax law by these expatriates.[7] However, in enacting these anti-abuse provisions, Congress gave little attention to the broader consequences of unmooring the tax code definition of citizenship from the nationality law.

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[1] Graham Chapman et al., The Complete Monty Python's Flying Circus: All the Words 196 (1989).

[2] *See* Federal Income Tax Project, American Law Institute, International Aspects of United States Income Taxation: Proposals on United States Taxation of Foreign Persons and of the Foreign Income of United States Persons 6 (1987).

[3] Pub. L. No. 108-357, § 804, 118 Stat. 1418, 1569 (2004).

[4] *But see infra* note 114 (discussing very limited circumstances when the IRS by administrative ruling provided tax relief for certain periods when an individual was a citizen under the nationality law).

[5] The new AJCA provisions do not enable the opposite result—the treatment of an individual as a noncitizen for tax purposes when she is a citizen under the nationality law.

[6] The provisions also address persons who had been long-term residents (i.e., green card holders in at least eight of the preceding fifteen years) and who surrendered or otherwise lost that status.

[7] The term "expatriate" in this Article refers to an individual who has lost U.S. citizenship, not to a person who resides abroad but retains her U.S. citizenship.

This Article addresses the extent to which the special definitions of citizenship for federal tax purposes violate customary international law and constitutional limitations. In so doing, it considers what, if any, limits constrain Congress from moving toward the absurdist position of the introductory epigraph, which contemplates a country attempting to tax aliens who have absolutely no connection to that country.

Part I discusses the tax code's traditional reliance on the nationality law definition of citizenship and examines the concerns that led Congress to enact the new special definitions of citizenship for tax purposes. Part II then examines the relevant jurisdictional contours of international law, with a particular focus on prescriptive limitations under customary international law. It concludes that, at least in some circumstances, the new tax definitions of citizenship violate customary international law jurisdictional principles.

Part III examines the constitutional implications of the new tax definitions of citizenship. In particular, it considers the limits, if any, of Congress's taxing power under Article I as well as the constraints imposed by due process and equal protection principles. While acknowledging that Congress's taxing powers are almost unlimited, it argues that this is a rare circumstance in which Congress might have exceeded its sovereign taxing powers. Moreover, even if the provisions are within Congress's Article I taxing powers, certain aspects of the new provisions violate the due process limitations of the Fifth Amendment. Part IV addresses additional concerns raised by the new provisions, particularly with respect to the United States tax treaty network, relations with other countries, and practical enforcement difficulties.

The Article concludes that the significant constitutional, international law, and other problems raised by the new provisions greatly outweigh any purported benefits and that Congress should return to a uniform definition of citizenship for both tax and nationality law purposes. More generally, the Article demonstrates that there are constitutional and international law limits on Congress's ability to tax individuals in the international context and that these limitations deserve increased attention when Congress enacts future legislation.

I. The New Definition of Tax Citizenship

A. *Why Citizenship Matters for Tax Purposes*

In general, the United States taxes the worldwide income of its citizens and resident aliens regardless of where the individual lives or where the income arises.[8] In contrast, the United States taxes a nonresident alien—

[8] I.R.C. § 1 (2000); Treas. Reg. § 1.1-1(b) (as amended in 1974). This worldwide taxation of citizens and resident aliens is subject to several significant exceptions. For example,

a person who is neither a citizen nor a resident alien[9]—only on income connected with U.S. business activities[10] and certain investment-type income from United States sources.[11] A nonresident alien generally is not subject to U.S. income tax on income from sources outside the United States or on capital gains from the sale of property, regardless of where the property is located.

Because of this disparity between the income taxation of citizens and nonresident aliens, as well as similar distinctions in the context of the estate and gift tax regime,[12] incentives exist for a U.S. citizen to move outside the United States and surrender her citizenship status, thereby becoming a nonresident alien for tax purposes.[13] In response to concerns about tax-motivated expatriation, Congress in 1966 enacted a special alternative tax regime under Internal Revenue Code section 877 applicable to tax-motivated expatriates.[14] This regime did not purport to tax the former citizen on her worldwide income. Rather, it expanded the definition of U.S. source income upon which the former citizen could be taxed for a ten-year period[15] following the loss of citizenship.[16] During the past decade, Congress

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a qualified individual may exclude up to $80,000 of foreign earned income, as well as certain foreign housing costs, from her gross income. *See* I.R.C. § 911. In addition, the United States generally allows a tax credit to the extent of foreign income taxes imposed on the individual's foreign-source income. *See* I.R.C. §§ 901, 903–905 (2000).

[9] In general, a noncitizen is treated as a resident alien for income tax purposes during the year if she meets at least one of three tests: (1) the lawful permanent resident test; (2) the substantial presence test; or (3) the first-year election test. *See* I.R.C. § 7701(b)(1)(A). Only the first two tests are relevant to this Article. The lawful permanent residence test applies if the individual is a "lawful permanent resident" (i.e., green card holder) under the immigration laws at any time during the calendar year. I.R.C. § 7701(b)(1)(A)(i) (2000). The substantial presence test generally applies if the individual is physically present in the United States for at least 31 days during the calendar year and for at least 183 days under a three-year weighted formula (calculated by adding the days of physical presence in the current year, plus 1/3 of such days in the immediately preceding year, plus 1/6 of such days in the second preceding year). *See* I.R.C. § 7701(b)(3) (2000).

[10] *See* I.R.C. § 871(b) (2000).

[11] *See* I.R.C. § 871(a) (2000).

[12] For a discussion of the disparate estate and gift tax treatment of citizens and nonresident aliens, see Michael S. Kirsch, *Alternative Sanctions and the Federal Tax Law: Symbols, Shaming, and Social Norm Management as a Substitute for Effective Tax Policy*, 89 Iowa L. Rev. 863, 871–73 (2004).

[13] Of course, significant non-tax considerations weigh heavily against surrendering U.S. citizenship. In particular, a former citizen would no longer enjoy the rights and privileges associated with U.S. citizenship. *See id*. at 875. Moreover, feelings of patriotism and loyalty might preclude many citizens from expatriating regardless of the potential tax benefits that might be derived from the surrender of citizenship. *Id*. at 894.

[14] For a summary of the 1966 law and its 1996 amendments, see *id*. at 877–86.

[15] The so-called "ten-year period" could, as a practical matter, apply for slightly less than ten full years. *See id.* at 879 n.63.

[16] In particular, the section 877 alternative tax regime expands the definition of U.S.-source income so that the individual will be taxable on capital gains from the sale of stock in a U.S. corporation during the ten-year period. However, the individual, as a nonresident alien, will not be subject to tax on her foreign-source investment income and her foreign business income. The alternative tax regime also expanded the definition of U.S. situs property that could be subjected to the gift and estate tax for ten years following expatriation. *See*

has expended significant effort addressing perceived shortcomings in this regime, enacting legislation in this area in 1996[17] and again in 2004.[18]

B. Historic Reliance on Nationality Act Definition of Citizenship

Given the significant U.S. tax consequences that turn on citizenship, an important threshold question is whether or not an individual is a citizen for tax purposes. Prior to the enactment of the AJCA, the Internal Revenue Code did not define citizenship.[19] Instead, the tax law traditionally relied on the definition of citizenship under the Immigration and Nationality Act (INA).[20] Thus, if an individual was considered a citizen under the nationality laws, she was treated as a citizen for tax purposes.[21] If an indi-

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I.R.C. §§ 2107, 2501(a)(3) (LexisNexis 2006).

[17] *See* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 511, 110 Stat. 1936, 2093 (1996) (modifying sections 877, 2107, and 2501(a)(3) of the Internal Revenue Code).

[18] *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 804, 118 Stat. 1418, 1569. In addition to adding the new tax-focused definitions of citizenship described at length in this Article, AJCA eliminated the tax-motivation test for determining whether the alternative tax regime applies, replacing it with objective tests based on average income tax liability and net worth. With certain exceptions, a person who loses citizenship is subject to the alternative regime of section 877 if her average income tax liability for the five pre-expatriation years exceeds $124,000 (as modified annually for cost-of-living adjustments), her net worth on the date of expatriation is at least $2 million, or she fails to comply with certain documentation requirements. *See* I.R.C. § 877(a)(2) (LexisNexis 2006).

[19] As discussed *infra* notes 41–44 and accompanying text, the staff of the Joint Committee of Taxation prepared a report in 2003 analyzing the effectiveness of the 1996 legislation and containing proposals that were subsequently enacted by the AJCA. *See* STAFF OF JOINT COMM. ON TAXATION, 108TH CONG., REVIEW OF THE PRESENT-LAW TAX AND IMMIGRATION TREATMENT OF RELINQUISHMENT OF CITIZENSHIP AND TERMINATION OF LONG-TERM RESIDENCY (Comm. Print JCS-2-03, 2003), *available at* http://www.house.gov/jct/s-2-03.pdf [hereinafter 2003 JCT REPORT]. The 2003 JCT Report, referring to a transition rule in the 1996 legislation, stated that "there is some precedent for the divergence of the tax and nationality definitions of citizenship." *Id.* at 124. The transition rule cited, however, only involved an extension of the ten-year period under section 877 for certain pre-effective date expatriations if the individual delayed giving notice of citizenship loss to the Department of State. *Id.* at 80–81. The transition rule did not purport to continue taxing the individual on her worldwide income for periods after citizenship was lost under the nationality law.

[20] 8 U.S.C. §§ 1101–1537 (2000). This cross-reference to the nationality law appears in the Treasury Regulations rather than the Internal Revenue Code. *See* Treas. Reg. § 1.1-1(c) (as amended in 1974) (paraphrasing the citizenship clause of the Fourteenth Amendment and citing Immigration and Nationality Act provisions and Supreme Court decisions regarding citizenship).

This historical reliance on the nationality law's definition of citizenship dates back to the earliest days of the modern income tax. Although the early statutes did not explicitly state that the term "citizen" as used in the tax acts had the same meaning as under nationality law, such a connection was evident in early administrative guidance. *See* T.D. 3406, I-2 C.B. 42 (1922) (quoting the Commissioner of Internal Revenue's statement that a newly enacted nationality law, "while not an internal-revenue measure, is published for the information and guidance of revenue officers and others concerned in determining the citizenship" of relevant taxpayers); *see also* T.D. 861, 4 C.B. 59–60 (1921); T.D. 695, 3 C.B. 74 (1920); T.D. 533, 2 C.B. 59 (1920).

[21] In isolated circumstances involving individuals whose citizenship has been restored

vidual was not considered a citizen under the nationality law, she was treated as an alien for tax purposes.

In effect, this reliance on the nationality law kept the Internal Revenue Service out of the business of determining a taxpayer's citizenship status. Instead, such determinations were left to those federal departments with principal administrative responsibility over the immigration and nationality laws—most recently, the Department of State[22] and the Department of Homeland Security.[23]

Of particular relevance, for tax purposes the timing of citizenship loss was tied directly to the Department of State's administrative procedures for determining citizenship loss under the INA. The INA provides that an individual can lose citizenship by voluntarily performing one of several enumerated acts, provided the act was performed with the intent to relinquish citizenship.[24] These acts fall into two categories. First, an individual can make a formal renunciation of citizenship by executing an oath of renunciation before a U.S. diplomatic or consular officer outside the United States.[25] Second, rather than making a formal renunciation, an individual can commit one of several potentially expatriating acts enumerated in the statute, such as obtaining nationality in another country after reaching age eighteen or taking an oath of allegiance to another country after reaching age eighteen.[26]

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retroactively due to changes in nationality law interpretation, the IRS has issued administrative rulings treating those individuals as noncitizens for portions of the retroactivity period. *See infra* note 114.

[22] The Department of State is responsible for determining the citizenship status of a person located outside the United States, or in connection with the application for a U.S. passport while in the United States. *See* 22 C.F.R. §§ 50.1, 51.20, 51.40–43, 51.54, 51.80(a)(1) (2005); *see also* Department of State, Possible Loss of U.S. Citizenship and Dual Nationality, http://travel.state.gov/law/citizenship/citizenship_778.html (last visited Mar. 12, 2006). This authority includes determinations of loss of citizenship status. *See* 22 C.F.R. §§ 50.40–51 (2005) (discussed *infra* notes 29–35 and accompanying text).

[23] Pursuant to the Homeland Security Act of 2002, as of March 1, 2003, the Department of Homeland Security—in particular, its Bureau of U.S. Citizenship and Immigration Services—took over the immigration and naturalization functions previously handled by the Department of Justice's Immigration and Naturalization Service. *See* The Homeland Security Act, Pub. L. No. 107-296, § 451, 116 Stat. 2135 (2002); *see also* 8 C.F.R. § 1.1 (2005).

[24] 8 U.S.C. § 1481 (2000). Originally, the performance of an enumerated act caused an individual to lose citizenship regardless of whether the individual intended to lose citizenship thereby. *See* INA § 349, Pub. L. No. 82-414, 66 Stat. 163, 267–68 (1952); *see also* Perez v. Brownell, 356 U.S. 44, 61 (1958), *overruled by* Afroyim v. Rusk, 387 U.S. 253, 268 (1967). However, the Supreme Court subsequently determined that the Fourteenth Amendment prevents Congress from stripping an individual of citizenship based solely on a particular act unaccompanied by an intent of the individual to lose citizenship. *Afroyim*, 387 U.S. at 257. Congress subsequently amended the INA to make this intent requirement explicit. *See* Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653 § 18(a), 100 Stat. 3658.

[25] 8 U.S.C. § 1481(a)(5) (2000).

[26] *Id.* §§ 1481(a)(1)–(2). Other potentially expatriating acts in this second category include serving as an officer in the armed forces of another country, serving at any rank in the armed forces of a country engaged in hostilities against the United States, serving as an

Whereas an individual's intent to relinquish citizenship is clear in the case of a formal renunciation before a consular officer, an individual's intent often is not clear when she performs one of the other potentially expatriating acts. For example, a U.S. citizen who becomes a naturalized citizen of another country may or may not intend thereby to surrender her U.S. citizenship.[27] The INA requires that the party asserting that citizenship has been lost must establish the existence of requisite intent by a preponderance of the evidence.[28]

The Department of State has established administrative presumptions to determine whether an individual who performs a potentially expatriating act had the intent to relinquish citizenship.[29] In the case of three potentially expatriating acts—naturalization in a foreign country, taking a routine oath of allegiance to a foreign country, or accepting non-policy level employment with a foreign government—the Department of State presumes that the individual intended to retain her U.S. citizenship unless the individual affirmatively asserts to a consular officer that the act was performed with the intent to relinquish U.S. citizenship.[30] In the case of any other potentially expatriating act,[31] a U.S. consular officer attempts to ascertain whether there is evidence of intent to relinquish U.S. nationality.[32] If the consular official believes that an individual has lost citizenship under these standards, the official prepares a certificate of loss of nationality, which is then forwarded to the Department of State for approval.[33]

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officer or employee of a foreign government under certain circumstances, making a formal written renunciation of U.S. citizenship while in the United States during a time of war, or committing treason or attempting to overthrow the government of the United States. §§ 1481(a)(3)–(4), (6)–(7); *see also* Kirsch, *supra* note 12, at 873 n.40.

[27] In the *Afroyim* case, where the Supreme Court set out the intent requirement, Mr. Afroyim, a naturalized U.S. citizen, had voted in an election in Israel. 387 U.S. at 254–55. At the time, the INA provided that voting in a foreign election caused a U.S. citizen to lose his citizenship. *Id*. The *Afroyim* Court held that Mr. Afroyim could not be stripped of his U.S. citizenship in the absence of evidence that he intended to relinquish his citizenship by voting in the foreign election. *Id*. at 268.

[28] 8 U.S.C. § 1481(b); *see also* Vance v. Terrazas, 444 U.S. 252, 267 (1980) (upholding Congress's constitutional authority to legislate this "preponderance of evidence" standard for determining intent). While the Department of State is usually the party asserting that the individual intended to lose citizenship, in the case of an individual seeking to invoke citizenship loss to avoid taxes, the citizen assumes this role. *See* U.S. v. Matheson, 532 F.2d 809, 811 (2d Cir. 1976); *see also* U.S. v. Lucienne D'Hotelle de Benitez Rexach, 558 F.2d 37, 40 (1st Cir. 1977).

[29] 22 C.F.R. § 50.40(a) (2005). These presumptions were in effect even before their adoption as federal regulations in 1996. *See* Letter from Wendy R. Sherman, Assistant Sec'y for Legislative Affairs, Dep't of State, to Sen. Robert Packwood, Tab 2 (May 9, 1995), *reprinted in* Staff of the Joint Comm. on Taxation, 104th Cong., Issues Presented by Proposals to Modify the Tax Treatment of Expatriation G-59 (Comm. Print JCS-17-95 1995), *available at* http://www.house.gov/jct/s-17-95.pdf, at 249 [hereinafter 1995 JCT Report].

[30] 22 C.F.R. § 50.40(a).

[31] *See supra* note 26.

[32] Letter from Wendy R. Sherman, *reprinted in* 1995 JCT Report, *supra* note 29, at G-59.

[33] *See* 8 U.S.C. § 1501 (2000); 22 C.F.R. § 50.40(c) (2000). The Department of State

Of particular relevance, the actual date of citizenship loss is not governed by either the date the certificate of loss of nationality is prepared by a consular official or the date on which it ultimately is approved by the Department of State.[34] Rather, an individual's loss of citizenship is effective under the nationality law as of the date the expatriating act occurs (provided it was done with the requisite intent).[35] Thus, in the case of an expatriating act other than a formal renunciation, there could be a significant gap between the date citizenship is lost and the time when a consular official is notified of the loss and the Department of State documents the loss.

C. New Tax-Specific Definitions of Citizenship

In 2004, Congress enacted the AJCA, which unmoored the tax definition of citizenship from the INA nationality law definition.[36] In two particular circumstances the AJCA treats an individual as a U.S. citizen for tax purposes with respect to a period when the individual is not a citizen under the nationality laws.[37] The following Sections briefly describe the two circumstances where the AJCA creates a special definition of citizenship for tax purposes and provide a brief summary of the congressional rationale for the provisions.

1. Delayed Loss of Citizenship—Section 7701(n)

New Internal Revenue Code section 7701(n), as enacted by the AJCA,[38] provides that an individual who relinquishes citizenship under the nationality laws nonetheless continues to be treated as a citizen for tax purposes until the individual both notifies the Secretary of State that she has committed an expatriating act with the requisite intent and provides a statement to the IRS in accordance with Internal Revenue Code section 6039G.[39] Whereas the loss of citizenship is effective for nationality law pur-

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typically takes between two weeks and six months to approve a certificate of loss of nationality submitted by a consular official. *See* Letter from Wendy R. Sherman, *reprinted at* 1995 JCT Report, *supra* note 29, at G-55.

[34] *See* Letter from Wendy R. Sherman, *reprinted at* 1995 JCT Report, *supra* note 29, at G-55.

[35] *Id.*

[36] The AJCA also modified certain aspects of the substantive tax rules that apply to individuals who relinquish citizenship or long-term resident status. *See* AJCA, Pub. L. 108-357, § 804(a), 118 Stat. 1418, 1659 (2004).

[37] The nationality law's definition of citizenship continues to govern for tax purposes in other contexts.

[38] § 804(b), 118 Stat. at 1570; *see also* § 804(f), 118 Stat. at 1573 (applying the provision to individuals who expatriate after June 3, 2004); Gulf Opportunity Zone Act of 2005, Pub. L No. 109-135, § 403(v), 119 Stat. 2577, 2628 (making technical amendments to Internal Revenue Code section 7701(n)).

[39] I.R.C. § 7701(n) (LexisNexis 2006). The cross-reference to the information reporting requirement of I.R.C. § 6039G is somewhat vague. Section 6039G requires reporting by "any individual to whom section 877(b) applies for any taxable year." I.R.C. § 6039G(a)

poses as of the date of the expatriating act, it is not effective for tax purposes until both of these notification requirements are satisfied. Thus, under the new provision, it is possible for an expatriate to remain a citizen for tax purposes, taxable on her worldwide income, for many years after citizenship has been lost for nationality law purposes, even for the remainder of the individual's life.[40] Moreover, at her death her worldwide assets could be subject to U.S. estate tax.

This provision was based on a recommendation made by the staff of the Joint Committee on Taxation in a 2003 report on the taxation of expatriates.[41] In that report, the committee staff noted the pre-AJCA tax enforcement difficulties raised by the "lag time between citizenship relinquishment, which occurs upon the individual's completion of an expatriating act with the requisite intent to relinquish citizenship, and the date upon which the Department of State receives notice of the citizenship relinquishment."[42] In particular, the special income tax provisions pertaining to individuals who renounce citizenship with a principal purpose of tax avoidance apply for the ten-year period following the citizenship loss.[43] The committee staff noted that under pre-AJCA law, a significant portion of this time period might elapse before the IRS learns of the expatriation, thereby creating a significant enforcement hardship for the IRS.[44]

An additional potential concern, not directly addressed by the joint committee report or other legislative reports, might also have influenced the enactment of the new provision. As discussed above, the State Department utilizes administrative presumptions in determining whether a citizen who performs a potentially expatriating act had the requisite intent to relinquish citizenship.[45] In a 1998 report, the Treasury Department expressed concern that these presumptions could "provide[ ] a potential expa-

(LexisNexis 2006). Thus, it focuses on ongoing annual reporting during the ten years that an expatriate is subject to the special income tax regime of I.R.C. § 877. Section 6039G, as amended by AJCA, does not expressly require the filing of an information statement at the time citizenship is purportedly lost. Nonetheless, in the context of I.R.C. § 7701(n)(2), the I.R.S. has interpreted "a statement in accordance with section 6039G" to refer to the initial information reporting that the expatriate makes on IRS Form 8854, *Initial and Annual Expatriation Information Statement*. *See* Notice 2005-36, 2005-19 I.R.B. 1007; *see also* I.R.S., Instructions for Form 8854, at 2.

[40] Similarly, a former long-term resident who fails to notify the IRS of the loss of such status can continue to be taxed as a resident in perpetuity, even after she surrenders her green card to the Department of Homeland Security. *See* I.R.C. § 7701(n)(2). Although many of the arguments set forth in this Article also apply to former long-term residents who continue to be taxed as residents pursuant to the AJCA provisions, this Article focuses primarily on former citizens.

[41] *See* 2003 JCT Report, *supra* note 19, at 208–10; *see also* H.R. Rep. No. 108-548, pt. 1, at 253 (2004) (citing similar enforcement concerns as those raised by the Joint Committee staff).

[42] 2003 JCT Report, *supra* note 19, at 124.

[43] *See* I.R.C. § 877(a)(1) (LexisNexis 2006).

[44] *See* 2003 JCT Report, *supra* note 19, at 124, 209.

[45] *See supra* notes 29–35 and accompanying text.

triate with the ability to engage in significant tax planning"[46] and "allow certain expatriating citizens to avoid U.S. worldwide taxing jurisdiction for periods when they might have been entitled to receive the benefits of U.S. citizenship."[47]

In particular, a U.S. citizen willing to surrender citizenship to avoid taxes might commit a potentially expatriating act, such as obtaining nationality in another country, yet refrain from notifying a consular official as to any expatriating intent. Thus, the individual could retain her "ability to invoke [her] U.S. citizenship if, for example, an emergency arose and [she] needed the assistance of a U.S. embassy or consulate."[48] Yet, if at some future date the individual determines that losing citizenship at the earlier date would have been tax advantageous (e.g., if the IRS audits the individual and asserts worldwide taxation over the individual based on her citizenship), the individual could inform a consular official that the earlier expatriating act had been performed with an intent to lose citizenship. In the absence of contrary evidence,[49] the Department of State presumably would accept the individual's statement of intent and would document the individual's loss of citizenship under the nationality law retroactive to the date of the expatriating act. Because the tax law definition of citizenship refers to the nationality law, the loss would also be retroactive for tax purposes. In effect, the subjective intent criteria and the retroactive nature of the citizenship loss under the nationality law allow the individual "to determine after the fact whether an expatriation effective from the earlier date would be tax advantageous now."[50] During the period between the acquisition of the foreign nationality and the date, if any, that the IRS audits the individual, she would retain the ability to claim that she remained a U.S. citizen. If, for example, she faced an emergency that required assistance of a U.S. consulate or embassy or she decided to return to the United States to live, the State Department, under its administrative presumptions, would accept that assertion.

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[46] Office of Tax Pol'y, Dep't of Treasury, income tax compliance by U.S. Citizens and U.S. Lawful Permanent Residents Residing Outside the United States and Related Issues 33 (1998), *reprinted in* 98 LEXIS TNT 87-16 [hereinafter Treasury Report]. In the interest of disclosure, it should be noted that the author, while working at the Internal Revenue Service and subsequently at the Treasury Department, participated in the drafting of the Treasury Report.

[47] *Id*. at 28.

[48] *Id.* at 33.

[49] Contrary evidence could include "evidence of travel on a U.S. passport or of any other acts unequivocally indicating that the person had held himself out as a U.S. citizen" during the period following the potentially expatriating act. *Id*.

[50] *Id*. at 34. A similar result would apply for gift and estate tax purposes. For example, if the individual died before notifying a consular official about a potentially expatriating act, her executor might attempt to argue that the individual intended to lose citizenship pursuant to the act, and therefore the estate should not be subject to U.S. estate tax on its worldwide assets.

The 1998 Treasury Report, in highlighting this potential abuse, did not assert that a significant number of citizens were engaging in this abuse of the State Department administrative presumptions for tax avoidance purposes. Rather, the report described the scheme in hypothetical terms.[51]

The two-pronged test of citizenship loss under new Internal Revenue Code section 7701(n) would prevent this abuse by ignoring, for tax purposes, the retroactive effect of citizenship loss under the nationality law. An individual would remain a citizen for tax purposes until she notified the U.S. consular official of an expatriating act and intent (assuming that she also complied with the IRS notification requirement). Thus, under the new law, an individual could no longer gain the tax advantages of retroactively revoking citizenship. The new tax provision does not alter the nationality law rules, so the loss would still be retroactive for nationality law purposes.

The new law goes much further than merely shutting down this potential abuse of the nationality law. It also creates the possibility of continued worldwide taxation even for periods after the State Department has issued the certificate of loss of nationality, when the possibility no longer exists that the individual could try to invoke the benefits of citizenship. Because new section 7701(n) delays the loss of citizenship for tax purposes until *both* the notification of a consular official and the filing under I.R.C. section 6039G,[52] an individual who fails to file IRS Form 8854 as required by section 6039G would remain a U.S. citizen for tax purposes even after notifying the Department of State, subjecting her to continued worldwide U.S. tax liability for the remainder of her lifetime,[53] as well as worldwide U.S. estate taxation upon her death.[54]

2. *Reacquisition of Renounced Citizenship—Section 877(g)*

New Internal Revenue Code section 877(g), also enacted by the AJCA, creates a second tax code departure from the nationality law definition of citizenship. Whereas section 7701(n) focuses on the timing of citizenship loss, section 877(g) addresses the period following citizenship loss. Pursuant to section 877(g), certain individuals who lose citizenship under the nationality law and have that loss recognized for tax purposes under section 7701(n) may, nonetheless, be treated as citizens for tax purposes in future years. In particular, if an expatriate who is subject to the alternative tax regime of section 877[55] is physically present in the United States

[51] *Id.* at 28.
[52] I.R.C. § 6039G (LexisNexis 2006).
[53] If the individual fails to file income tax returns voluntarily, the period of limitations for assessing tax will remain open indefinitely. *See* I.R.C. § 6501(c)(3) (2000).
[54] *See* Notice 2005-36, *supra* note 39.
[55] *See supra* notes 14–18 and accompanying text.

for more than thirty days in any of the ten years following expatriation,[56] she will be treated as a citizen for tax purposes during that year.[57] Accordingly, during that year she will be subject to U.S. income taxation on her worldwide income and, if she makes any gifts or dies during that year, she will be subject to U.S. gift or estate taxation on her worldwide gifts or estate.[58]

Consider the example of an individual who committed a potentially expatriating act in 2006 but did not notify the State Department of her expatriating intent and file IRS Form 8854 until 2010. Under section 7701(n), she will be treated as losing citizenship for tax purposes in 2010, although her citizenship loss for nationality law purposes will be retroactive to 2006. If her net worth or average pre-expatriation income tax liability exceeds the thresholds of section 877(a), she will be subject to the alternative tax regime of section 877(b) for ten years, beginning in 2010. As discussed previously,[59] that alternative regime imposes tax on a broader range of income from U.S. sources than would ordinarily apply to a nonresident alien, but it falls far short of imposing worldwide taxation on the individual.

Assume that the individual visits the United States in 2014 and is physically present in the country for 31 days during that year. Pursuant to new section 877(g), the individual will be treated as a citizen for U.S. tax purposes in 2014, even though she previously was treated as having lost citizenship for tax purposes in 2010 (and for nationality law purposes in 2006). As a result, in 2014 she will be subject to U.S. taxation on her worldwide income. Of course, the individual will not be treated as a citi-

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[56] This ten-year period in section 877(g) begins only when the individual is treated as having lost citizenship for tax purposes. *See* I.R.C. § 7701(n) (LexisNexis 2006).

[57] Section 877(g) provides that the special income tax regime of section 877:

> [S]hall not apply to any individual to whom this section [877] would otherwise apply for any taxable year during the 10-year period referred to in subsection (a) in which such individual is physically present in the United States at any time on more than 30 days in the calendar year ending in such taxable year, and such individual shall be treated for purposes of this title as a citizen or resident of the United States, as the case may be, for such taxable year.

I.R.C. § 877(g)(1) (2000). The "as the case may be" language treats a former citizen who runs afoul of the 30-day test as a citizen, and treats a former long-term resident who runs afoul of the test as a resident. *See* H.R. Rep. No. 108-548, pt. 1, at 255 (2004).

The statute provides certain exceptions. In particular, in counting the number of days of physical presence during the year, the former citizen may disregard up to thirty days in which she is performing services in the United States for an employer, provided that the individual is not related to the employer and the employer meets reporting requirements that may be specified by the IRS. *See* I.R.C. § 877(g)(2)(A) (2000).

[58] Because section 877(g), if applicable, treats the individual as a citizen for purposes of the entire Internal Revenue Code, the citizenship definition applies not only to the income tax regime but also to the estate and gift tax regimes. *See* H.R. Rep. No. 108-548, pt. 1, at 255–56.

[59] *See supra* note 16.

zen for nationality law purposes in 2014 and therefore will not be eligible for any of the benefits of citizenship during that year.

According to the House Ways and Means Committee report, section 877(g) was enacted due to concern that "[i]ndividuals who relinquish citizenship . . . for tax reasons often do not want to fully sever their ties with the United States; they hope to retain some of the benefits of citizenship . . . without being subject to the U.S. tax system as a U.S. citizen."[60] In particular, Congress was concerned that an individual, following citizenship loss, could spend an average of four months per year[61] in the United States without being treated as a resident alien taxable on worldwide income.[62] By treating a former citizen who spends more than thirty days in the United States in a single calendar year as a citizen for tax purposes, the new

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[60] H.R. Rep. No. 108-548, pt. 1, at 253. The Committee report's assertion that a former citizen might be able to retain some of the benefits of citizenship is somewhat misleading. As discussed *infra* note 61 and accompanying text, the Committee's main concern focused on individuals who spend significant time in the United States following their citizenship loss. However, a former citizen who enters and spends time in the United States after relinquishing citizenship is subject to significant visa and other requirements generally applicable to aliens. This stands in stark contrast to a citizen, who can enter the United States at will. Thus, while an expatriate might desire to retain various ties to the United States, including the ability to make future visits, it is misleading to characterize those ties as a continuation of citizenship benefits.

Like the new citizenship loss provision of section 7701(n), the new section 877(g) citizenship reacquisition provision was based on a recommendation by the staff of the Joint Committee on Taxation. *See* 2003 JCT Report, *supra* note 19, at 210–11.

[61] 2003 JCT Report, *supra* note 19, at 210–11. As discussed *supra* note 9, a non-citizen can be treated as a resident alien, taxable on worldwide income, if she is physically present in the United States for at least 31 days during the calendar year and for at least 183 days under a three-year weighted formula. *See* I.R.C. § 7701(b)(3) (2000). The committee report's reference to four months per year contemplates a non-citizen who spends 120 days in the United States in three successive years, yielding a total of 180 days under the weighted formula, just under the 183-day threshold that would trigger resident status. Even if the 183-day threshold is triggered, under certain circumstances the individual might be able to avoid tax resident status, provided she is present in the United States for fewer than 183 days during the *current* year and has a closer connection to a foreign country in which she has her tax home. I.R.C. § 7701(b)(3)(B).

[62] Congress previously addressed this purported abuse by former citizens attempting to spend significant time in the United States. In 1996, it enacted legislation intended to permanently ban former citizens who had relinquished citizenship for tax-avoidance purposes from reentering the United States. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 352, 110 Stat. 3009-546, 3009-641. This provision, known as the "Reed Amendment," placed tax-motivated expatriates on the same immigration law inadmissibility list that includes "terrorists, World War II–era Nazis, practicing polygamists, persons with communicable diseases, and persons convicted of certain crimes." Kirsch, *supra* note 12, at 892 (citing INA § 212, *codified at* 8 U.S.C. § 1182). Due to substantive and technical problems with the statute, the Department of Homeland Security has not yet implemented the provision, and in practice it has had only limited in terrorem effects. *See id.* at 900. By enacting new I.R.C. section 877(g), which contemplates the possibility of a former citizen spending significant amounts of time in the United States after relinquishing citizenship, Congress has implicitly recognized the many shortcomings of the Reed Amendment. *See generally* Kirsch, *supra* note 12 (critiquing the Reed Amendment on instrumental, expressive, and symbolic grounds).

provision eliminates any tax benefits the individual otherwise would have enjoyed for that year by having previously renounced her citizenship.

II. Customary International Law Violations

The two recently enacted tax code definitions of citizenship raise significant jurisdictional issues under international law. The relevant jurisdictional principles of international law arise from two main sources: specific agreements, in the form of treaties or conventions, which may be either bilateral between two states or multilateral among several states; and international custom of nations that evidences a general practice accepted as law (known as "customary international law").[63]

As a practical matter, most individuals who are subject to the AJCA tax citizenship provisions would not be expected to establish residence in a country with which the U.S. has a tax treaty.[64] Accordingly, the jurisdictional limitations imposed on the United States by tax treaties would not be of assistance to these individuals.[65] Instead, these individuals would have to rely on customary international law[66] to find potential jurisdictional restrictions on the ability of the United States to enact the AJCA definitions of tax citizenship.[67]

Customary international law addresses several jurisdictional categories.[68] Of particular relevance to the present inquiry is the United States' jurisdiction to prescribe[69]—i.e., the extent of its authority "to make its sub-

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[63] *See* Restatement (Third) of the Foreign Relations Law of the United States § 102 (1987). The Restatement cites a third source of international law, "derivation from the general principles common to major legal systems of the world," *see id*. § 102(1)(c), although it acknowledges that treaties and customary international law represent the principal sources. *See id.* at pt. 1, ch. 1, introductory note.

[64] The majority of the United States' tax treaties are with countries that are members of the Organization for Economic Cooperation and Development (OECD). To the extent that taxes influence an individual's decision to surrender U.S. citizenship, that individual is more likely to move to a non-OECD country with relatively low taxes and more limited exchange of tax information with the United States.

[65] The jurisdictional limitations of tax treaties as applicable to the AJCA provisions is discussed *infra* Part IV.A.

[66] Customary international law reflects those practices that countries follow because they feel legally obligated to behave in that way. *See* Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987).

[67] An individual who is a resident of a treaty country could rely on these customary international law arguments in addition to any jurisdictional restrictions set forth in the treaty.

[68] The Restatement recognizes three types of jurisdiction: prescriptive (defined in the text), enforcement (the ability of a country "to induce or compel compliance or to punish noncompliance with its laws or regulations"), and adjudicative (the ability of a country "to subject persons or things to the process of its courts or administrative tribunals"). Restatement (Third) of the Foreign Relations Law of the United States § 401 (1987). *But see* Cecil J. Olmstead, *Jurisdiction*, 14 Yale J. Int'l L. 468 (1989) (criticizing the Restatement's addition of the adjudicative category of jurisdiction).

[69] In the tax context, jurisdiction to enforce also plays a significant role. The enforcement difficulties associated with the AJCA provisions are discussed *infra* notes 291–300 and accompanying text. Jurisdiction to adjudicate might also play a significant role with

stantive laws applicable to particular persons and circumstances."[70] In contrast to adjudicative jurisdiction, which focuses on the ability of a court to adjudicate a particular dispute, prescriptive jurisdiction focuses on the power of the legislature to make a law apply in certain international contexts.

This Part analyzes the extent to which the AJCA citizenship definitions violate the prescriptive jurisdictional principles of customary international law. The analysis concludes that in certain contexts the tax citizenship definitions violate these jurisdictional limits. Part III then addresses the relevance, if any, of these customary international law violations under the U.S. Constitution.

A. Prescriptive Jurisdictional Principles

1. Bases for Prescriptive Jurisdiction

Customary international law recognizes several bases that permit a country to exercise prescriptive jurisdiction. The three most widely recognized bases are territoriality, nationality, and the protective principle.[71] The following analysis briefly summarizes each of these principles then considers the extent, if any, to which these principles permit the worldwide taxation of a former citizen (in the nationality law sense) who is treated as a citizen for tax purposes under the AJCA provisions.

a. Territoriality and Effects

Customary international law recognizes a country's jurisdiction to prescribe law with respect to "conduct that, wholly or in substantial part, takes place within its territory" and with respect to persons or things present within its territory.[72] In the context of taxation, this territorial-based principle generally is referred to as source-based taxation.[73] Source-based taxa-

respect to a former citizen living abroad who purportedly is subject to the AJCA provisions. However, even if the United States is able to exercise personal jurisdiction over the individual because, for example, she visits the United States, the issue regarding prescriptive jurisdiction will remain significant.

[70] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV, introductory note (1987).

[71] *See id.* § 402(1)–(3). Other jurisdictional bases, which are less widely applied, include the passive personality principle (involving an act committed outside the country's territory if the victim is a national of that country) and universality (allowing prosecution of certain offenses, such as genocide and war crimes, that are universally condemned, even though there is no link to the country's territory). *See id.* §§ 402 cmt. g, 404. These jurisdictional bases are not relevant to the analysis of the AJCA tax provisions.

[72] *Id.* § 402(1).

[73] *See* AMERICAN LAW INSTITUTE, *supra* note 2, at 6; Reuven S. Avi-Yonah, *International Tax as International Law*, 57 TAX L. REV. 483, 490 (2004); Walter Hellerstein, *Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective*, 38 GA. L. REV. 1, 6–8 (2003). So-called residence-based taxation,

tion refers to a country imposing tax based on some connection between the nation's geographic territory and the location of the business activity or property that gives rise to the income.[74] For example, the United States exercises source-based taxation when it taxes a nonresident alien on income connected to a U.S. business operation or arising from certain U.S.-source passive investments.[75]

Effects-based jurisdiction is closely related to territorial jurisdiction.[76] The effects principle permits a country to prescribe laws covering conduct that takes place outside its territory but that has, or is intended to have, substantial effect within its territory.[77] While the effects doctrine has been recognized for much of the last century in the criminal law area,[78] some questions still remain regarding the outer boundaries of this principle, particularly with respect to economic regulation.[79] Nonetheless, the United States has relied extensively on the effects doctrine in applying U.S. antitrust laws to conduct outside the United States when that conduct was intended to produce, and actually did produce, a substantial effect in the United States.[80]

b. Nationality

Customary international law also allows a country to prescribe law with respect to the "activities, interests, status, or relations of its nationals outside as well as within its territory."[81] This principle, which allows ex-

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discussed *infra*, particularly as applied to non-citizens residing in the United States, has elements of territoriality, given its focus on the taxpayer's physical presence within the country's territory. *See* Ramon J. Jeffery, The Impact of State Sovereignty on Global Trade and International Taxation 45 (1999). However, because residence-based taxation often involves taxation of extraterritorial income by reason of the personal status of the taxpayer in relation to the country, it is more generally associated with nationality-based jurisdiction. *See infra* notes 82–85 and accompanying text.

[74] *See* American Law Institute, *supra* note 2, at 7; *see also* Restatement (Third) of the Foreign Relations Law of the United States § 411 (1987).

[75] *See supra* notes 9–11 and accompanying text.

[76] *See* Restatement (Third) of the Foreign Relations Law of the United States § 402(1)(c) & cmt. (d) (1987) (categorizing effects-based jurisdiction as a type of territorial jurisdiction). Indeed, effects-based jurisdiction is often referred to as "objective territoriality." *See* David J. Bederman, International Law Frameworks 176 (2001).

[77] Restatement (Third) of the Foreign Relations Law of the United States § 402(1) (1987).

[78] *See* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7, 1927).

[79] *See* Bederman, *supra* note 76, at 177; *see also* H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government's Campaign Against International Bribery*, 22 Hastings Int'l & Comp. L. Rev. 407, 446–47 n.154 (1999) (citing circumstances where "the doctrine's applicability to instances of solely economic effect within U.S. territory has been questioned").

[80] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795–96 (1993).

[81] Restatement (Third) of the Foreign Relations Law of the United States § 402(2) (1987). As a technical matter, the terms "national" and "citizen" are not necessarily synonymous. Nationality is a concept of international law, and has international consequences, such as diplomatic protection and jurisdiction. *Id.* § 211 cmt. (h) rept. note 6. Citizen-

traterritorial application of law based on the person's status, has expanded so that in certain circumstances "[i]nternational law has increasingly recognized the right of a state to exercise jurisdiction on the basis of domicile or residence,"[82] rather than just nationality. Indeed, in the field of taxation, it is very common for countries to tax income arising outside of the country's geographical boundaries if it is earned by a resident of the country (whether or not the resident is a citizen of the country). While the United States embraces this broad taxation of its residents,[83] it is one of the few countries in the world that takes full advantage of nationality-based jurisdiction to tax the foreign income of its citizens who reside outside the country.[84] Taxation of income based on the individual's status in relation to the country, rather than the location of the activities or property giving rise to the income, is often referred to as residence-based taxation, even when the taxpayer is a citizen residing abroad.[85]

c. Protective Principle

Customary international law also recognizes that a country can prescribe laws regarding "certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests."[86] This principle generally does not apply in the taxation area. However, it is relevant to the extent the AJCA provisions are viewed as protecting the United States against one of the "limited class of other state interests" as contemplated by the principle.

2. Reasonableness Limitation

Even if one of the three above-mentioned bases of jurisdiction exists, under customary international law a country "may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unrea-

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ship is a concept in the nationality law of many countries and generally reflects that subset of nationals who are entitled to full political rights in the country, such as the right to vote and hold office. *Id*. Because the relevant tax provisions focus on citizenship (which implies nationality), this Article treats the two terms interchangeably.

[82] *Id*. § 402 cmt. (e). The comments in the Restatement explicitly list taxation as an area where extraterritorial prescriptive jurisdiction has been expanded to include not only nationals, but also domiciliaries and residents. *Id*.; *see also* Avi-Yonah, *supra* note 73, at 484–86 (discussing the expansion of nationality-based taxing jurisdiction to include residence and domicile); Hellerstein, *supra* note 73, at 5–6.

[83] *See supra* note 8.

[84] *See supra* note 2 and accompanying text.

[85] *Cf*. American Law Institute, *supra* note 2, at 6 (referring to it as "domiciliary jurisdiction").

[86] Restatement (Third) of the Foreign Relations Law of the United States § 402(3) (1987).

sonable."[87] The determination of whether an exercise of prescriptive jurisdiction is reasonable depends on "all relevant factors,"[88] including the extent to which there is a link between the activity and the country; the connections, such as nationality or residence, between the country and the person; and the character of the activity to be regulated, its importance to the country, and the degree to which it is regularly accepted.[89]

In the tax context, it is not necessarily unreasonable for a country to exercise taxing jurisdiction over a person's income merely because another country exercises jurisdiction over the same income. Indeed, this potential for double-taxation is a common phenomenon in international taxation, particularly when one country exercises jurisdiction based on a territorial-based source principle and another country exercises nationality or residence-based jurisdiction over the taxpayer.[90] Under such circumstances, source-based jurisdiction generally is treated as having a superior claim, and the country exercising nationality or residence-based taxation is expected to provide relief from double-taxation.[91]

B. Shifting Jurisdictional Basis of Section 877

Before analyzing the extent to which the new AJCA tax definitions of citizenship violate these jurisdictional principles, it is interesting to note the extent to which these new definitions reflect a shift in jurisdictional exercise over individuals who lose citizenship (in a nationality law sense). Prior to the AJCA, an individual who lost citizenship (under the nationality laws) with a principal purpose of tax avoidance became subject to the alternative tax regime of Internal Revenue Code section 877 for a ten-year period.[92] Even after the enactment of the AJCA, this alternative tax regime applies to individuals who lose citizenship under the new definition and whose average income tax liability or net worth exceeds statutory thresholds.[93]

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[87] *Id.* § 403(1); *see also* Stephen E. Shay et al., *What's Source Got To Do with It? Source Rules and U.S. International Taxation*, 56 TAX L. REV. 81, 116 n.112 (2002). The Restatement lists relevant factors for determining whether the exercise of jurisdiction is unreasonable. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (1987); *cf.* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 818–19 (Scalia, J., dissenting) (relying on the Restatement's reasonableness standards on the grounds that they "appear fairly supported in the decisions of this Court construing international choice-of-law principles").

[88] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (1987).

[89] *Id.*

[90] AMERICAN LAW INSTITUTE, *supra* note 2, at 7.

[91] *See id.* § 413, rept. notes 1, 2. The United States, when exercising nationality or residence-based taxation, generally provides a tax credit to the extent a foreign country imposes tax on foreign-source income. *See* I.R.C. § 901 (2000).

[92] *See* I.R.C. § 877(a) (LexisNexis 2006).

[93] *See supra* note 18.

The section 877 alternative tax regime, if applicable, does not provide that the former citizen is taxable on her worldwide income (as she would have been had she remained a citizen). Rather, it generally applies the same source-based taxation that normally applies to nonresident aliens (i.e., imposing tax only on income connected to a U.S. business or arising from certain U.S.-source passive investments).[94] In exercising this source-based taxation, however, it creates a broader definition of U.S. source income (e.g., capital gain from the sale of stock in a U.S. domestic corporation) than would ordinarily apply to a nonresident alien.[95]

Thus, prior to the AJCA, Congress exercised restraint in taxing individuals who surrendered citizenship, implicitly avoiding taxation based on nationality or residence. By enacting a source-based regime, it relied on broadly accepted territorial principles, merely expanding the types of income connected to its territory that would be subject to tax in the hands of certain former citizens.[96] While Congress has continued this exercise of expanded source-based jurisdiction in some circumstances following the enactment of the AJCA,[97] the new definitions of citizenship for tax purposes reflect a shift in jurisdictional focus in those circumstances when they apply. In particular, by classifying certain former citizens (in the nationality law sense) as citizens for tax purposes, and thereby purporting to tax their worldwide income, Congress apparently is trying to invoke nationality-based jurisdiction over these individuals. The following Section examines the extent to which such an expansion of jurisdiction is justifiable under customary international law.

C. AJCA Jurisdictional Violations

In analyzing whether the AJCA's special definitions of citizenship for tax purposes satisfy the above-mentioned prescriptive jurisdictional limits under customary international law, it is important to consider each of the AJCA provisions separately. Under the AJCA provisions, a person who loses citizenship under the nationality law might be treated as a citizen for tax purposes following the date on which her loss occurs for nationality law purposes under three main circumstances. The first two circumstances contemplate a delayed loss of citizenship for tax purposes, while the third circumstance causes a reacquisition of citizenship for tax purposes.

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[94] *See* I.R.C. § 877(b)(1) (cross-referencing the provisions of I.R.C. § 872, which generally apply to nonresident aliens).

[95] *See* I.R.C. § 877(d)(1)(B).

[96] For another example of Congress's recognition that it lacked jurisdiction under customary international law to tax a nonresident directly on foreign source income, see Avi-Yonah, *supra* note 73, at 498 (discussing Congress's structuring of the Foreign Personal Holding Company and Controlled Foreign Corporation rules in order to comply with its understanding of the jurisdictional limitations of then-existing customary international law).

[97] *See supra* notes 16–18 and accompanying text.

First, the person might commit a potentially expatriating act (e.g., obtaining nationality in another country) with an intent to lose citizenship but might refrain from notifying either the Department of State or the IRS of that action. Under such circumstances, the loss of citizenship for nationality law purposes technically occurs on the date the act is committed with requisite intent, even though the Department of State will not be aware of the loss and will not be in a position to document that loss. Under new Internal Revenue Code section 7701(n), the individual remains a citizen for tax purposes under these circumstances.[98]

Second, the person might commit a potentially expatriating act with an intent to lose citizenship and might notify the Department of State of the act but fail to notify the IRS as required by section 6039G. Under such circumstances, the Department of State will document the loss of citizenship retroactively to the date the act was committed.[99] However, under new Internal Revenue Code section 7701(n), the individual will remain a citizen for tax purposes because that statute requires notification of both the Department of State[100] and the IRS in order to lose citizenship status for tax purposes.[101]

Third, the person might commit a potentially expatriating act with an intent to lose citizenship and might notify both the Department of State and the IRS of the loss of citizenship. Under such circumstances, the individual will have complied with section 7701(n), and the loss of citizenship will be recognized for tax purposes. If, however, the individual's average income tax liability or net worth exceeds the section 877(a) statutory thresholds and the individual is physically present in the United States for more than thirty days in any of the ten calendar years following citizenship loss, the individual will again be treated as a citizen for tax purposes during that year pursuant to Internal Revenue Code section 877(g).[102]

The relevant question is whether the treatment of the individual as a citizen for tax purposes in each of these circumstances is within the permissible jurisdictional principles of customary international law.[103] For

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[98] *See supra* notes 38–39 and accompanying text.

[99] *See supra* notes 34–35 and accompanying text.

[100] Although the statute refers to notification of the "Secretary of State or the Secretary of Homeland Security," the reference to the Secretary of Homeland Security is directed principally at long-term residents who are terminating their residency status. *See supra* note 40.

[101] *See* I.R.C. § 7701(n) (LexisNexis 2006).

[102] *Id.* § 877(g); *see supra* notes 55–59 and accompanying text.

[103] The 2003 JCT Report acknowledges as a general matter that "[i]ndefinitely taxing a nonresident noncitizen on his or her worldwide income . . . would seem to exceed U.S. taxing jurisdiction and could be viewed as inconsistent with principles of international taxation." 2003 JCT Report, *supra* note 19, at 109; *see also* Avi-Yonah, *supra* note 73, at 498 ("Can a country simply decide to tax nonresidents that have no connection to it on foreign source income? The answer is clearly no, both from a practical perspective and, I would argue, from a customary international law perspective."). The 2003 JCT Report, upon which the AJCA provisions are based, contains a cursory analysis of whether the tax citizenship provisions violate international law, concluding that they do not interfere with the right to surrender citizenship but failing to address potential violations of prescriptive

each potential application of the AJCA provisions, it is sufficient if there is at least one applicable jurisdictional basis. An application of the AJCA provisions will exceed permissible jurisdictional limits only if none of the prescriptive jurisdictional bases justifies the application under the circumstances.[104]

1. Territoriality and Effects

a. Section 7701(n)—Failure To Notify

Section 7701(n), which delays the loss of citizenship for tax purposes until the individual has notified both the Department of State and the IRS, cannot be justified under territorial jurisdiction principles, regardless of whether it is applied because of failure to notify the Department of State, the IRS, or both. Classifying the individual as a citizen for tax purposes results in taxation not only of income connected to a U.S. business or U.S.-source passive investments—both of which are legitimate targets of taxation under territorial principles[105]—but also of foreign-source income that has no connection to a U.S. business or U.S. investments.[106] Moreover, the individual, particularly if she has notified the Department of State of her citizenship loss but has not yet notified the IRS, is unlikely to have any significant connection with U.S. territory.[107] Because section 7701(n) imposes tax on persons that are not within U.S. territory with respect to their business or investment activities that are not connected to U.S. territory, it is difficult to see any territorial-based justification for taxing the worldwide income of the individual.

Similarly, the effects-based aspect of territoriality does not justify the application of worldwide taxation under section 7701(n). As a threshold matter, it is doubtful that a former citizen residing outside the United States who fails to file an information statement could be viewed as having a "substantial" effect on United States territory in years following her expatriation.[108] At most, the failure to file an information statement with the Internal Revenue Service could be viewed as an attempt to avoid or evade the extended source-based tax regime of section 877. Even in the unlikely

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jurisdiction. *See* 2003 JCT REPORT, *supra* note 19 at 123–25.

[104] In general, a country is presumed to have a valid jurisdictional basis for its legislation, and the burden of proof is on the party asserting that no valid jurisdictional basis exists. *See supra* note 76; *see also* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 499 (1996).

[105] Indeed, the United States generally taxes nonresident aliens on these types of income. *See supra* notes 72–75 and accompanying text.

[106] *See supra* note 8 and accompanying text.

[107] Once the Department of State has documented the loss of citizenship, the individual will be an alien who is subject to the same restrictions on entering the United States as are other aliens.

[108] *See supra* notes 77–80 and accompanying text.

event that this could be viewed as having a substantial effect on the United States,[109] the United States response—imposition of worldwide tax pursuant to the "citizen" label of section 7701(n)—goes well beyond any territorial connection to the United States.

b. Section 877(g)—More than Thirty Days of Physical Presence

In contrast to section 7701(n), which generally involves individuals who remain outside the United States, section 877(g) applies to individuals who have at least some physical connection with U.S. geographic territory—i.e., more than 30 days of physical presence in any of the ten post-expatriation years. Nonetheless, territorial jurisdictional principles do not support taxation of the worldwide income of such an individual under section 877(g). Unlike nationality-based jurisdiction, which supports the taxation of income arising outside a country's territory, territorial-based principles only permit taxation of income derived from or associated with the individual's presence or business activities in the country, or derived from property located in the territory of the country.[110] Because section 877(g) purports to tax the individual on her worldwide income (by reason of its "citizen" characterization), its broad reach cannot be justified by customary international law's territoriality principle of prescriptive jurisdiction.

2. Nationality

a. Section 7701(n)—Failure To Notify Department of State

Nationality-based jurisdictional principles support the application of section 7701(n) when it is applied due to the individual's failure to notify the Department of State of the potentially expatriating act. Consider the example in which an individual commits a potentially expatriating act, such as obtaining nationality in another country in 2006, and fails to inform a Department of State consular official of the act and requisite intent until 2010. The Department of State will then, in 2010, document the loss of citizenship retroactive to 2006.[111]

The relevant question is whether, with respect to that interim period from 2006 through 2010, the nationality principle provides a jurisdictional basis for the United States to tax the individual's worldwide income.

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[109] *See supra* note 79 and accompanying text (discussing potential limitations on customary international law effects-based jurisdiction in the economic sphere).

[110] *See* Restatement (Third) of the Foreign Relations Law of the United States § 412(1)(b) & (c) cmt. a (1987); *see also supra* notes 72–75 and accompanying text.

[111] This assumes that the individual has not, as a factual matter, traveled on a U.S. passport or otherwise acted as a U.S. citizen during the intervening period. *See supra* notes 29–33, 49 and accompanying text.

Nationality-based taxing jurisdiction is based not only on the inherent relationship between the country and the individual but also on the benefits that citizenship provides.[112] For example, in *Cook v. Tait*,[113] the Supreme Court rejected a taxpayer's assertion that international law prohibits the taxation of a nondomiciliary citizen's income arising outside the United States and observed that "the government, by its very nature, benefits the citizen and his property wherever found, and therefore, has the power to make the benefit complete [by having authority to collect tax.]"[114]

The benefits rationale underlying nationality-based jurisdiction provides strong support for allowing application of section 7701(n) to the individual who delays notifying the Department of State of the expatriat-

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[112] *See* Hellerstein, *supra* note 73, at 6.

[113] 265 U.S. 47 (1924).

[114] *Id.* at 56. Edwin R.A. Seligman, a Columbia University economist who played a leading role in the development of modern international income taxation, observed that nationality-based taxing jurisdiction developed because "political rights involve political duties. Among them is certainly the duty to pay taxes." Edwin R. A. Seligman, Essays in Taxation 111 (10th ed. 1931).

The Court of Appeals for the First Circuit, in *United States v. D'Hotelle de Benitez Rexach*, 558 F.2d 37 (1st Cir. 1977), also recognized the importance of the benefits rationale in determining whether the United States could impose tax for periods when an individual's citizenship status was in doubt. That case considered whether the taxpayer was subject to tax as a citizen for the period between 1949 and her death in 1973. Although her residence abroad purportedly caused her to lose citizenship in 1949 under the then-existing nationality law, the Supreme Court's decision in *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967), declared that intent to relinquish citizenship is a necessary prerequisite to citizenship loss, thereby casting doubt on the taxpayer's earlier loss. The First Circuit (ruling in the tax case after the taxpayer's death) held that the taxpayer had not lost citizenship by reason of her 1949 actions because she did not have an intent to lose citizenship in 1949. Nonetheless, the court declared that the taxpayer "cannot be dunned for taxes to support the United States government during the years in which she was denied its protection." *D'Hotelle*, 558 F.2d at 43. As a factual matter, the court found that the taxpayer had utilized the benefits of citizenship from 1949 through 1952 (because her passport had been renewed during that period), but that as of 1952 both the taxpayer and the Department of State had ceased to consider her a citizen, and she no longer utilized any benefits of citizenship. Accordingly, the court held that the taxpayer was subject to tax from 1949 through 1952 but not thereafter. *Id*. Although the court's reasoning focused on equity principles, the benefits rationale reflected therein closely parallels the benefits rationale that arises under customary international law's nationality jurisdiction. *See* U.S. v. Matheson, 532 F.2d 809, 819 (2d Cir. 1976) ("[O]ne gaining governmental benefits on the basis of a representation or asserted position is thereafter estopped from taking a contrary position in an effort to escape taxes.").

The IRS has applied a benefits analysis to provide administrative relief to certain taxpayers whose citizenship was restored retroactively under changes to the immigration laws after the Department of State had treated them as losing citizenship in the absence of intent to do so. *See* Rev. Rul. 92-109, 1992-2 C.B. 3; Rev. Rul. 75-357, 1975-2 C.B. 5 (noting that tax relief would not be available if the taxpayer had "affirmatively exercised a specific right of citizenship" during the interim period when citizenship purportedly had been lost); Rev. Rul. 70-506, 1970-2 C.B. 1. The IRS purported to base these rulings on its discretionary authority regarding the retroactivity of regulations under I.R.C. § 7805(b) (2000), instead of on international law grounds. *See* R. Rhoades & M. Langer, U.S. International Taxation and Tax Treaties § 24.02[1] (2001) (discussing an IRS policy statement allowing discretionary relief for certain individuals who mistakenly thought they had lost citizenship, provided, inter alia, that the individual had not affirmatively exercised any citizenship rights during the relevant period).

ing act. Despite the Department of State's eventual determination that the individual's loss of citizenship occurred as of the expatriating act, during the actual years of that period before the determination the Department of State would not have contemporaneous knowledge that the individual had committed the act with the requisite intent. The Department of State would therefore not be in a position to deny the individual the benefits of citizenship.[115] Because the individual would retain the de facto ability to obtain the benefits of citizenship prior to the time she notified the Department of State, the benefits rationale underlying nationality-based taxing jurisdiction justifies the imposition of tax under section 7701(n) for that period based on the contemporaneous understanding.

b. Section 7701(n)—Failure To Notify IRS

Assume that the individual commits the potentially expatriating act in 2006 and notifies the Department of State of the act and expatriating intent in 2010 but fails to notify the IRS of the citizenship loss as required by section 6039G. Section 7701(n) would continue to treat the individual as a U.S. citizen for tax purposes, even though the Department of State has become aware of the citizenship loss and issues a certificate of loss of nationality.[116] For example, decades later, the United States could attempt to subject the individual to income tax or, perhaps more importantly, to estate taxes based on worldwide assets upon her death.[117] Nationality-based jurisdiction is much more difficult to justify under these circumstances.

The benefits rationale discussed above does not apply in this situation. Once the Department of State determines that citizenship was lost pursuant to a previously committed act, it will no longer permit the individual to invoke any benefits of U.S. citizenship. Accordingly, any effort to tax the individual for periods after 2010 would reflect an attempt to impose a duty associated with citizenship without any of the corresponding benefits of citizenship.

More fundamentally, once the Department of State has been notified of the expatriating act and makes a determination of loss of citizenship, the individual can no longer be considered a national as that term is used in customary international law, and nationality-based jurisdiction is inapplicable for subsequent periods.[118] Although customary international law

[115] If questioned about the prior potentially expatriating act, the individual presumably could claim that the act was performed without intent to lose citizenship. As long as the consular official was not aware of any evidence to the contrary, the official would accept the individual's assertion. *See supra* text accompanying note 30. Of course, if the individual actually exercised these rights during the interim period, it would undercut a subsequent claim that the potentially expatriating act had been performed with an intent to lose citizenship. *See supra* note 49 and accompanying text.

[116] *See supra* notes 38–39 and accompanying text.

[117] *See supra* note 12.

[118] Although customary international law extends nationality-based taxing jurisdiction

does not define who is a "national" and generally leaves that determination to the internal law of each country,[119] a country cannot merely label a person as a national (or citizen) for purposes of a narrow context, such as taxation, and thereby subject her to the duties that arise.[120] International law contemplates some basic parameters of the nationality definition. In particular:

> [N]ationality is a continuing legal relationship between the sovereign State on the one hand and the citizen on the other. The fundamental basis of a man's nationality is his membership in an independent political community. This legal relationship involves rights and corresponding duties upon both—on the part of the citizen no less than on the part of the State.[121]

By classifying the person as a "citizen" for tax purposes, section 7701(n) does not purport to establish nationality in this international law sense. It creates no rights typically associated with nationality. It merely purports to impose one particular obligation often associated with nationality—the burden of worldwide taxation—on a person who no longer has nationality (or the benefits thereof) either under U.S. nationality law or in

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to include the taxation of residents, *see supra* notes 81–85 and accompanying text, this aspect of nationality-based jurisdiction does not apply in the current circumstances. Section 7701(n) can apply even if the individual never returns to the United States and therefore could not be considered a U.S. resident. *See* I.R.C. § 7701(n) (LexisNexis 2006).

[119] *See* Restatement (Third) of the Foreign Relations Law of the United States § 211 cmt. c (1987). Although countries are given wide latitude in defining who is a national, under international law "other states need not recognize a nationality that is not based on an accepted 'genuine link.'" *Id*. § 211 (internal citation omitted). Universally accepted "genuine links" for establishing nationality include nationality conferred by reason of birth in a state's territory (*jus soli*) or of birth to parents who are nationals (*jus sanguinis*). *Id*. § 211 cmt. c. In addition, voluntary naturalization generally is recognized as long as the individual has at least some ties to the state before naturalization, such as a period of residence. *Id*. The application of section 7701(n) in the present context does not establish or recognize "nationality" in the international law sense, so the question of whether there is a genuine link is not reached.

[120] The 2003 JCT Report, upon which the AJCA provisions are based, attempts to justify section 7701(n) based on a country's ability to create evidentiary standards for determining when citizenship is lost. *See* 2003 JCT Report, *supra* note 19, at 124. The Report cites Congress's ability to "require reasonable evidentiary standards, such as the filing of an IRS form, as a requirement for loss of citizenship." *Id*. The Report, however, takes the concept of evidentiary standards out of context. While Congress does indeed have the ability to adopt evidentiary standards for determining when a person loses citizenship under the nationality laws, under section 7701(n) a failure to file the requisite tax form does not affect the individual's citizenship status under the nationality laws. *See supra* notes 29–35 and accompanying text. At most, the JCT Report's focus on evidentiary standards would justify Congress in changing the nationality law itself to deny loss of citizenship for nationality law purposes until the proper tax form is completed.

[121] Re Lynch, *Ann. Dig. Of Pub. Int'l Law Cases, 1929–30* 221, 223, *quoted in* I.A. Shearer, Starke's International Law 307 (11th ed. 1994); *see also* Nottebohm Case (Liech. v. Guat.) (second phase), 1955 I.C.J. 4 (Apr. 5) (noting reciprocal rights and obligations of nationality).

the international law sense. Unlike the situation discussed in the prior Section, where section 7701(n) imposes the tax burden of citizenship for a period when the benefits of citizenship are de facto available contemporaneously to the individual, section 7701(n) continues a significant obligation associated with nationality for periods when the corresponding rights and benefits of citizenship have already been extinguished under U.S. nationality laws. Because section 7701(n) in this context purports to impose citizenship-based taxation for periods when there is no nationality in the customary international law sense, it cannot be justified under nationality-based jurisdictional principles.[122] This conclusion is made even stronger by the fact that the United States' practice of imposing worldwide taxation based on citizenship is viewed as pushing the limits of acceptable state practice even when the taxpayer is a national in the customary international law sense.[123]

c. Section 877(g)—More than Thirty Days of Physical Presence

For the same reasons, section 877(g) cannot be justified on pure nationality-based jurisdictional grounds. Although section 877(g) classifies certain individuals[124] as "citizens" for tax purposes if they spend more than thirty days in the United States during one of the ten calendar years immediately following citizenship loss, that status does not constitute nationality as that term is used under customary international law.

Nonetheless, another interpretation of the provision might justify the use of nationality-based taxing jurisdiction. In the context of taxation, customary international law has expanded the idea of nationality-based jurisdiction to include jurisdiction based on an individual's residence or domicile.[125] Although section 877(g) classifies an individual to whom it applies as a "citizen" for tax purposes,[126] in order to provide the most deferential analysis of the statute's validity under customary international law

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[122] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 211 cmt. a (1987) (noting the link between nationality, as the term is used in customary international law, and nationality-based prescriptive jurisdiction). Moreover, because the individual is not physically in the United States, it cannot be justified under the residence-based extension of nationality jurisdiction. *See supra* notes 81–85 and accompanying text.

[123] *See supra* notes 82–83.

[124] As discussed *supra* notes 55–58 and accompanying text, section 877(g) generally applies to an individual whose citizenship loss has been recognized for both nationality law and tax purposes, whose average income tax liability or net worth on the date of citizenship loss exceeded statutory thresholds, and who is physically present in the United States for more than thirty days during any of the ten post-expatriation years.

[125] *See supra* notes 81–85 and accompanying text.

[126] Section 877(g) provides that an individual to whom it applies "shall be treated . . . as a citizen or resident of the United States, as the case may be," for the relevant year. I.R.C. § 877(g)(1) (LexisNexis 2006). In context, this language indicates that a person who previously lost citizenship is treated as a "citizen" under this provision, and a person who previously lost long-term residency status (i.e., having held a green card for at least eight of the prior fifteen years) is treated as a "resident" under this provision. *Id.*

the following analysis assumes that the statute is treating the individual as a resident. This assumption is justified by the fact that the statute's application depends on the number of days of physical presence (a concept often associated with residence), and worldwide taxation generally would result from the application of the statute regardless of whether the individual is labeled a "citizen" or a "resident."[127]

No uniform definition of residence exists. Instead, "[t]he concept of residence as applied for tax purposes varies considerably among states. It usually refers, however, to the personal connection an individual has with a particular territory."[128] One commentator summarized the acceptable range of definitions as follows:

> An important element in most definitions of residence is presence in the jurisdiction for a specified length of time: often 183 days or more in the taxable year . . . . Sometimes presence in prior years is also taken into account. Although some countries rely on the physical presence test exclusively . . . , many—particularly OECD countries—have additional reasons for which someone can be considered a resident, including status as a permanent resident for immigration purposes, domicile, having an habitual place of abode, and so forth.[129]

The United States has adopted several of these elements.[130] The United States' "substantial presence" test sets a lower threshold for residence than do most countries that use a physical presence test (typically 183 days in the current year).[131] The United States also treats a person as a resident for income tax purposes if she holds a green card.[132] For estate and gift tax purposes, the United States generally uses the subjective common law

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[127] Although citizens and resident aliens generally are subject to the same tax rules under the Internal Revenue Code, *see* Treas. Reg. § 1.1-1(a)(1) (as amended in 1974), there are some isolated circumstances where their treatment differs, *see, e.g.*, I.R.C. § 911(d)(1) (2000) (providing the definition of a "qualified individual" who is eligible for the foreign earned income exclusion). Even if section 877(g) cannot be read as a matter of statutory interpretation to impose residence-based taxation on the former citizen, the analysis in the text is important. If customary international law would permit residence-based taxation under the circumstances, while not allowing nationality-based jurisdiction, Congress presumably could change the statute so that a former citizen to whom section 877(g) applies is treated as a "resident" for tax purposes.

[128] Richard L. Doernberg et al., Electronic Commerce and Multijurisdictional Taxation 74 (2001).

[129] Victor Thuronyi, Comparative Tax Law 289 (2003); *see also* Doernberg, *supra* note 128, at 74.

[130] *See generally supra* note 9 (discussing U.S. rules for determining tax residency).

[131] *See* Rhoades & Langer, *supra* note 114, ¶ 6.8 n.29 ("[A] typical definition of residence is physical presence in the state for seven months or more during the taxable year.").

[132] *See* I.R.C. § 7701(b)(1)(A)(i) (2000).

domicile test, rather than a physical presence test, for determining residence.[133]

In the present section 877(g) context, the relevant question is whether a former citizen's physical presence in the United States for only 31 days during a calendar year is sufficient to justify worldwide taxation under residency jurisdiction principles. While customary international law does not specify a bright-line 183-days-per-year rule for countries that rely on a physical presence test—indeed, the United States' weighted substantial presence formula sets a slightly lower standard by including a portion of the days in the two preceding years—customary international law does seem to establish a threshold in that general range.[134] A test triggered by only 31 days of physical presence in a single year is substantially below the typical 183-day test used by most countries that rely on a physical presence test.[135]

In short, none of the commonly accepted physical presence-based tests of residence support a hairtrigger 31-day standard for making a person a tax resident who is thereby subject to worldwide taxation. Indeed, the section 877 standard is well below any commonly accepted standard. Moreover, the more subjective common law domicile standard often used as a residence test, which involves a subjective intent to remain indefinitely,[136] provides even less support for allowing 31 days of physical presence to constitute residence.

The "reasonableness" requirement of customary international law jurisdiction provides another impediment to justifying section 877(g) on residence grounds. As noted above, even if a country has jurisdiction to prescribe under one of the customary bases, that jurisdiction may not be exercised in an unreasonable way.[137] The Restatement commentary specifically addresses this limitation in the residence-based taxation context. The commentary observes that "a tax on a nonresident alien temporarily present within a state, measured by his worldwide income, could be challenged as a violation of international law."[138] A similar concern was raised by one of the leading figures in the development of the modern U.S. income tax, who observed that "[t]emporary residence is plainly inadmissible as a test" for residence-based taxing jurisdiction.[139] Given the gross disparity be-

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[133] *See* Treas. Reg. § 20.0-1(b) (as amended in 1994).

[134] *See supra* note 131 and accompanying text.

[135] *See supra* notes 129 & 131 and accompanying text.

[136] *See* Treas. Reg. § 20.01-(b)(1) (as amended in 1994).

[137] *See* Restatement (Third) of the Foreign Relations Law of the United States § 403(1) (1987); *see also supra* notes 87–91 and accompanying text (discussing reasonableness limitation).

[138] *See* Restatement (Third) of the Foreign Relations Law of the United States § 411 cmt. d (1987).

[139] Seligman, *supra* note 114, at 112. Professor Seligman observed that "[i]f a traveler chances to spend a week in a town just when the tax collector comes around, there is no good reason why he should be assessed on his whole property by this particular town; the relations between him and the government are too slight." *Id.*

tween a 31-day threshold and the thresholds generally used by countries to define residence, the 31-day standard of section 877(g) appears to be much closer to the "temporarily present" concept referred to in the Restatement commentary, for which worldwide taxation is not permitted.

The reasonableness limitation is particularly relevant given the underlying purposes of allowing residence-based taxing jurisdiction. The U.S. Supreme Court has noted that the "universally recognized" principle allowing residence-based taxation of extraterritorial income is based on the individual's "[e]njoyment of the privileges of residence in the State and the attendant right to invoke the protection of its laws," noting that these are "inseparable from responsibility for sharing the costs of government."[140] An individual who spends close to half the year or more in a state—as the tests based on 183 days of physical presence contemplate—indeed has enjoyed significant privileges in that state. In contrast, an individual who has spent only 31 days in a country has enjoyed significantly fewer privileges and protections in that country, particularly when those limited privileges and protections are used as a justification to tax the individual's worldwide income for the entire year, as is the case under section 877(g).

Thus, in the case of a person who is subjected to worldwide taxation under section 877(g) by reason of spending only 31 days in the United States during one of the ten post-expatriation years, the imposition of tax most likely would violate customary international law. If, in contrast, the person triggers section 877(g) by reason of spending significantly more time in the United States—for example, 160 days in a single year during the post-expatriation period—the case against taxing jurisdiction is much weaker. Whereas the large gulf between 31 days and 183 days makes a conclusion of unreasonableness somewhat easier, the difference between 160 days and the commonly accepted 183-day period is much less.[141] Accordingly, the question of whether the application of section 877(g) violates customary international law might depend on the specific facts of the case—in particular, how many days of physical presence the individual actually had in the United States. The strongest case for finding a violation of customary law exists for an individual who is physically present in only a single year during the ten-year period and barely exceeds the 31-day threshold in that year. Under such circumstances, worldwide taxation based on residence would be extremely difficult to justify under customary

[140] New York *ex rel.* Cohn v. Graves, 300 U.S. 308, 313 (1937); *see also* Hellerstein, *supra* note 73, at 5–6. In this regard, the rationale is similar to the benefits rationale underlying citizenship-based jurisdiction. *See id.* at 6.

[141] At the extreme, consider an individual who had 120 days of physical presence in each of three consecutive years within the ten-year period after citizenship loss. Such an individual would just fail to be treated as a resident under the weighted average substantial presence test. *See supra* note 9. Given how close the individual was to meeting the accepted U.S. residency standard, it would be very difficult to argue that the imposition of section 877(g) would violate customary international law's residence-based standards.

international law jurisdictional principles and the reasonableness limitations.

3. Protective Principle

The final potential jurisdictional basis considered—the protective principle—does not justify taxation under either section 7701(n) or section 877(g). Customary international law recognizes that a country can prescribe laws regarding "certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests."[142] The principle generally permits a state to punish offenses, such as:

> offenses directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems, e.g., espionage, counterfeiting of the state's seal or currency, falsification of official documents, as well as perjury before consular officials, and conspiracy to violate the immigration or customs laws.[143]

The interests implicated by sections 7701(n) and 877(g) fall far short of this "limited class" of offenses against state interests for which the protective principle can be invoked. The principal interests that sections 7701(n) and 877(g) protect against are perceived abuses of citizenship renunciation to achieve tax savings.[144] In particular, the sections are directed at people who either fail to notify the Department of State of the expatriating act immediately, or subsequently re-enter the United States, presumably on a legal basis,[145] in future years. However, none of these concerns rises to the level of an offense "generally recognized as crimes by developed legal systems."[146] Indeed, none of them is even a crime under U.S. law.[147] Moreover, the act underlying the purported abuse—i.e., the re-

[142] Restatement (Third) of the Foreign Relations Law of the United States § 402(3) (1987).

[143] *Id.* § 402 cmt. f.

[144] *See supra* notes 41–50, 60–62 and accompanying text.

[145] Although the Reed Amendment, enacted in 1996, purports to deny future admittance to a former citizen who lost citizenship for tax purposes, that provision has never been enforced, and the enactment of section 877(g) appears to be an acknowledgment by Congress that it will not be enforced in any meaningful way. *See supra* note 62; *cf.* Kirsch, *supra* note 12, at 881–83.

[146] Restatement (Third) of the Foreign Relations Law of the United States § 402 cmt. f (1987).

[147] The nationality laws continue to treat an individual as losing citizenship at the time she voluntarily commits a potentially expatriating act with an intent to lose citizenship. *See* 8 U.S.C. § 1481; *see also supra* note 24 and accompanying text. Moreover, the Reed Amendment, restricting the admissibility of former citizens whose loss of citizenship was tax-motivated, has never been enforced. *See supra* note 145.

nunciation of citizenship—is generally considered to be a protected right under customary international law.[148] Finally, while worldwide taxation based on citizenship is recognized as legitimate under international law, it is generally viewed with disfavor by many countries.[149] For these reasons, an argument that sections 877(g) and 7701(n) are justified by the protective principle of taxing jurisdiction is not persuasive.

4. *Consequences*

Based on the foregoing analysis, the strongest case for the existence of valid taxing jurisdiction under customary international law applies when a person commits a potentially expatriating act (e.g., obtaining nationality in another country) with an intent to lose citizenship but refrains from notifying the Department of State. Under such circumstances, section 7701(n) can be justified under nationality-based principles, particularly given the contemporaneous potential availability of citizenship benefits prior to notifying the Department of State.

In contrast, section 7701(n) is not justifiable under nationality-based principles when applied to periods after the individual has informed the Department of State of the citizenship loss but before she has complied with the IRS reporting requirements of section 6039G. Moreover, territorial principles and the protection principles do not justify worldwide taxation under these circumstances.

The validity of section 877(g) depends on the particular circumstances in which it is applied. To the extent that it is applied to a person who is physically present in the United States for a significant number of days during a relevant year—e.g., a number that narrowly fails to trigger the substantial presence test—the application of the statute most likely is a valid exercise of residence-based jurisdiction. However, at the other extreme, if an individual's physical presence barely trips the section 877(g) threshold—e.g., a number close to the 31-day minimum in only a single year of the ten-year post-expatriation period—the application of the statute to impose worldwide taxation might not be justified under residence-based jurisdictional principles, particularly given the reasonableness limitation thereon. Moreover, territorial principles and the protection principles would not justify worldwide taxation under such circumstances.

It is important to note that a taxpayer may not have any effective remedy with respect to these potential international law violations. If the United States seeks to apply section 877(g) or 7701(n) against an individual in

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[148] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 211 cmt. d. Indeed, the United States has a long history, dating back to the War of 1812, of supporting a person's right under international law to renounce citizenship. *See generally* Kirsch, *supra* note 12, at 903 n.183 (discussing historical basis of right to renounce citizenship).

[149] *See supra* note 2 and accompanying text.

violation of the prescriptive jurisdictional limits of customary international law, no international judicial forum is available in which the individual (or the individual's new country of nationality[150]) can seek relief. Although the International Court of Justice generally hears disputes involving violations of customary international law, the United States withdrew its consent to compulsory jurisdiction to that court in 1986.[151] Accordingly, in the event the United States seeks to assert tax liability against the individual, her only direct legal recourse would be a constitutional challenge in U.S. courts.[152]

Various indirect responses may be available for violations of customary international law.[153] For example, the individual's new state of nationality might make a formal diplomatic protest against the United States if the United States seeks to tax the individual in violation of customary international law.[154] Moreover, the new state of nationality could pursue unilateral countermeasures against the United States for the jurisdictional violation, provided that such actions are in proportion to the United States' violation.[155] However, none of these responses is likely to provide any practical benefit to the taxpayer.

III. Constitutional Violations

While the international law violations discussed in the preceding Part may create problems for the United States in its international relations,[156] they do not provide the taxpayer with any direct legal remedy.

This Part considers the extent to which an individual might be able to challenge the new provisions under the U.S. Constitution. In so doing, it focuses on the circumstance that most clearly violates customary interna-

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[150] In general, obligations of customary international law run between states, and it is the responsibility of each state to seek redress on behalf of its nationals. *See* Restatement (Third) of the Foreign Relations Law of the United States § 902(2), cmt. i. *But see id*. § 906 cmt. a ("[F]ew international agreements have given private persons access to an international forum where the agreement establishing the forum allows such extension of its jurisdiction.").

[151] *See* 85 Dept. of State Bull. 82 (1985).

[152] The constitutional issues raised by the AJCA provisions are discussed in the next Part. There are other significant practical considerations of relevance to the taxpayer, particularly with respect to potential difficulties the United States might face in enforcing collection of taxes in the international context. *See infra* notes 291–300 and accompanying text.

[153] Any such claims generally may be made only if the individual's attempt for relief through U.S. courts is unsuccessful. *See* Restatement (Third) of the Foreign Relations Law of the United States § 902 cmt. k.

[154] *See* Restatement (Third) of the Foreign Relations Law of the United States § 902.

[155] *See id*. § 902 cmt. d. The countermeasures could only be directed against the United States itself, not against U.S. nationals. *Id*. § 905 cmt. b. Thus, the other country could not retaliate by attempting to impose taxes against U.S. nationals in a manner that violated jurisdictional principles.

[156] *See infra* Part IV.

tional law jurisdictional principles; the continued treatment of a person as a tax citizen under section 7701(n) for periods after the individual has informed the Department of State of her citizenship loss but before she has complied with the IRS reporting requirements of section 6039G. In this circumstance, the Department of State has already documented that the individual is no longer a citizen under the nationality law and is no longer entitled to the benefits of citizenship. Yet, as a "tax citizen," her worldwide income continues to be taxable for decades and, upon her death, she could be subject to U.S. estate tax on her worldwide assets.

A. General Principles

The interplay of customary international law and the U.S. Constitution raises many noteworthy issues. For example, significant academic debate has addressed the extent, if any, to which the substantive rules of customary international law constitute federal common law, thereby creating subject matter jurisdiction for federal courts and potentially preempting inconsistent state laws.[157] In addition, recent Supreme Court opinions have raised issues regarding the extent to which international norms are relevant in interpreting constitutional standards, such as the term "cruel and unusual punishments" under the Eighth Amendment as applied to state death penalty provisions.[158]

This Article does not address these general debates. Rather, it focuses on potential constitutional limits under the Constitution on Congress's ability to impose worldwide taxation on former citizens pursuant to the new tax-specific definitions of citizenship. In particular, it considers whether the new provisions exceed Congress's taxing power under Article I of the

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[157] In particular, these debates focus on the modern validity, if any, of the Supreme Court's famous observation that "[i]nternational law is part of our law," The Paquete Habana, 175 U.S. 677, 700 (1900), and the extent to which customary international law constitutes federal common law after the Court's decision in Erie Railroad Co. v. Tomkins, 304 U.S. 64 (1938). *Compare, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing that customary international law is general common law that was abrogated by *Erie* and does not have the status of post-*Erie* federal common law), *with* Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997), *and* Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393 (1997) (defending the "modern" position that customary international law can constitute federal common law). *See generally* Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365 (2002).

[158] *See* Roper v. Simmons, 543 U.S. 551, 575 (2005) (considering international norms in holding that the Eighth Amendment prohibits execution of juveniles under age eighteen); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (considering the view of the "world community" in holding that the Eighth Amendment prohibits execution of mentally retarded individuals). *But see Roper*, 543 U.S. at 622–28 (Scalia, J., dissenting) (arguing that the practices of other countries are irrelevant in interpreting the Eighth Amendment).

Constitution or violate other constitutional limitations, such as the due process and equal protection principles under the Fifth Amendment.[159]

Constitutional challenges to federal tax statutes face difficult hurdles. As many commentators have observed,[160] since the enactment of the Sixteenth Amendment in 1913, federal tax statutes repeatedly have withstood challenges brought on constitutional grounds. Nonetheless, as the following analysis demonstrates, the AJCA definitions of tax citizenship, at least as applicable in certain circumstances, may cross the boundaries of constitutional permissibility.

As a threshold matter, it should be noted that a federal statute that violates customary international law is not necessarily unconstitutional.[161] The United States generally has a dualist system in which national law and international law are considered separate and distinct legal systems, with international law having applicability only to the extent it is incorporated or transformed into national law.[162] Even those scholars who claim that customary international law rises to the status of federal common law generally recognize that Congress has the ability to alter that law by statute. Accordingly, the violation of prescriptive jurisdiction under customary international law discussed in the prior Part is relevant to this Part's constitutional analysis only indirectly. In particular, the violation is relevant to the analysis of Congress's taxing powers only to the extent that Article I incorporates prescriptive jurisdictional limitations of customary international law. The violation is even less relevant to the potential due process and equal protection limitations, except to the extent that the same concerns underlying the customary international law prescriptive jurisdictional limitations might have relevance to the constitutional limitations.

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[159] *Cf.* A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379 (1997) (distinguishing between Congress's power to legislate extraterritorially and an individual's Fifth Amendment rights that might preclude application of that legislation).

[160] *See, e.g.*, JOSEPH ISENBERGH, INTERNATIONAL TAXATION, U.S. TAXATION OF FOREIGN PERSONS AND FOREIGN INCOME ¶ 1.5.1; AMERICAN LAW INSTITUTE, *supra* note 2, at 1; Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 TAX LAW 3, 4 (1987). *But see* Nichols v. Coolidge, 274 U.S. 531 (1927) (including transfer in gross estate for estate tax purposes violated Due Process when transfer had been completed prior to 1916 enactment of the estate tax).

[161] Indeed, Congress may constitutionally override a treaty obligation of the United States, even though the Supremacy Clause, U.S. CONST. art. VI, cl. 2, explicitly refers to treaties (along with federal statutes) as the supreme law of the land. *See infra* notes 279–284 and accompanying text. In contrast to its explicit reference to treaties, the Supremacy Clause does not explicitly mention customary international law.

[162] *See* BEDERMAN, *supra* note 76, at 151–53. In contrast, a monist system treats international law and national law as parts of the same legal system, with international law having a higher prescriptive value than national law. *Id.* at 151.

B. Congressional Authority

The Constitution grants Congress broad taxing powers. Article I provides that "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises."[163] Although the text of the Constitution provides one express exception[164] and two express limitations[165] to this taxing authority, none of those restrictions applies in the current context. Accordingly, the threshold inquiry is whether the general grant of taxing authority in Article I permits Congress to tax the worldwide income (or worldwide estate) of individuals treated as tax citizens under section 7701(n) many years after having lost citizenship under the nationality laws.

Courts generally have interpreted the Constitution's taxing power very broadly. The Supreme Court has on numerous occasions rejected arguments that Congress lacked the constitutional authority under Article I to enact a particular tax.[166] Indeed, some Supreme Court dicta implies that the authority knows no limits.[167]

However, these broad statements regarding taxing authority generally arise in domestic situations where the focus is on the particular type of tax involved instead of in an international setting where there are questions of jurisdiction to tax a particular individual. In those cases involving Congress's authority to impose taxes in an international setting, the Supreme Court has been less inclined to rely on flat assertions of unlimited authority under the Article I taxing power clause. Instead, the Supreme Court, while upholding all constitutional challenges to Congress's taxing

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[163] U.S. Const. art. I, § 8, cl. 1.

[164] Congress may not impose any tax or duty on an export from a state. *Id.* art. I, § 9, cl. 5.

[165] All duties, impost, and excise taxes must be uniform throughout the United States, *id.* art. I, § 8, cl. 1, and any capitation or other "direct" tax must be apportioned among the states in proportion to their population. *Id.* art. I, § 9, cl. 4. The former restriction is not relevant in the present circumstances. With respect to the latter restriction, the Sixteenth Amendment makes clear that an income tax is not a direct tax within the meaning of the apportionment clause. *See id.* amend. XVI. The Supreme Court has observed that the Sixteenth Amendment did not augment Congress's power to tax, but merely eliminated the apportionment requirement. *See* Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 17–18 (1916); *see also* South Carolina v. Baker, 485 U.S. 505, 523 n.13 (1988); William E. Peck & Co. v. Lowe, 247 U.S. 165, 172–73 (1918).

[166] *See, e.g.*, Stanton v. Baltic Mining Co., 240 U.S. 103 (1916) (upholding tax on income of a mining company); *Brushaber*, 240 U.S. at 12–26 (upholding tax on corporate income); *see also infra* notes 168–184 and accompanying text (citing cases upholding taxes imposed in international context).

[167] For example, in upholding a nineteenth-century federal license tax on selling alcohol and lottery tickets, the Court stated that, apart from the export exception and the apportionment and uniformity limitations, the federal taxing power "reaches every subject, and may be exercised at discretion." License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867). Similarly, in upholding various challenges to an income tax enacted shortly after the ratification of the Sixteenth Amendment, the Court declared that congressional taxing power "is exhaustive and embraces every conceivable power of taxation," and that this proposition "has been so often authoritatively declared as to render it necessary only to state the doctrine." *Brushaber*, 240 U.S. at 12.

authority in the international sphere, has analyzed Congress's authority in a broader context. As discussed below, the Court repeatedly has justified Congressional authority to tax in the international context by reference to international prescriptive jurisdictional standards, implying that the Article I taxing authority granted to Congress, while encompassing the full power granted to a sovereign country, is nonetheless limited to the taxing power that sovereign countries enjoy under international law.

In *United States v. Bennett*,[168] the Supreme Court upheld Congress's authority to impose an excise tax with respect to a U.S. citizen's ownership and use of a yacht outside of U.S. territorial waters.[169] The Court first distinguished the taxing power of Congress from the more limited taxing power of the states, stating that congressional power "is coextensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution and therefore embraces all the attributes which appertain to sovereignty in the fullest sense."[170] Although this language might imply almost unlimited congressional power, the Court then elaborated on the taxing "attributes which appertain to sovereignty." The Court did not reject outright the limitation on taxing sovereignty proposed by the taxpayer—"that the power to tax [is] limited by the capacity of the taxing government to afford that benefit and protection which is the true basis of the right to tax . . . ."[171] Rather, the Court implicitly acknowledged this limitation on the inherent taxing authority of sovereign nations but noted that the taxpayer's "confusion of thought consists in mistaking the scope and extent of the sovereign power of the United States as a nation and its relation to its citizens and their relations to it."[172] In particular, the Court concluded that the standard was satisfied because the federal government "by its very nature benefit[s] the citizen and his property wherever found."[173]

In the landmark *Cook v. Tait* decision,[174] the Court addressed the scope of Congress's taxing power under the income tax, holding that Congress has authority to tax a U.S. citizen residing abroad on income arising from foreign sources.[175] The Court noted the need to "make further exposition of the national power as the case depends upon it."[176] The Court then quoted extensively from *Bennett*, particularly with reference to the link between the power to tax and the benefits of citizenship, concluding that the "power in its scope and extent . . . is based on the presumption that government by its very nature benefits the citizen and his property wherever

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[168] 232 U.S. 299 (1914).
[169] *Id.* at 307.
[170] *Id*. at 306.
[171] *Id*. at 307.
[172] *Id*.
[173] *Id*.
[174] 265 U.S. 47 (1924).
[175] *Id.* at 56.
[176] *Id*. at 55.

found."[177] The *Cook* Court then summarized the *Bennett* principle, observing:

> In other words, the principle was declared that the government, by its very nature, benefits the citizen and his property wherever found and, therefore, has the power to make the benefit complete. Or to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, and was not and cannot be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen.[178]

In *Burnet v. Brooks*,[179] the most recent of the relevant Supreme Court cases addressing congressional taxing authority in an international context, the Court focused on Congress's taxing power with respect to noncitizens who reside outside the United States. In *Brooks*, the decedent was an alien residing abroad who, at the time of his death, owned bonds and stock certificates that were physically located in the United States. The Court concluded that Congress had the power to impose the estate tax with respect to these securities.[180] In addressing the power to impose the tax, the Court explicitly concluded that "[w]e determine national power [to tax] in relation to other countries and their subjects *by applying the principles of jurisdiction recognized in international relations*."[181] The Court engaged in a lengthy analysis of the nation's inherent sovereign taxing powers,[182] stating that:

> So far as our relation to other nations is concerned, and apart from any self-imposed constitutional restriction, we cannot fail to regard the property in question as being within the jurisdiction of the United States,—that is, it was property *within the reach of the power which the United States by virtue of its sovereignty could exercise as against other nations and their subjects without violating any established principle of international law*.[183]

After mentioning the traditional jurisdictions to tax recognized by international law, such as citizenship, domicile, source of income, or situs of

[177] *Id*. at 56.
[178] *Id*.
[179] 288 U.S. 378 (1933).
[180] *Id*. at 396.
[181] *Id*. at 405–06 (emphasis added).
[182] *See id*. at 396–400.
[183] *Id*. at 396 (emphasis added).

property, the Court stated that "the sovereign taxing power as exerted by governments in the exercise of jurisdiction [can be based] upon any one of these grounds."[184]

None of these three cases addressing the reach of Congress's taxing powers relied on the apparently broad language in Article I, section 8 of the Constitution, although the government's counsel in *Cook* explicitly invited the Court to do so.[185] The Court instead positioned the federal taxing power within the broader context of the United States' rights as a sovereign nation.[186] The analysis in the three cases implies that Congress's Article I taxing power, although it encompasses the full measure of a sovereign's taxing power, cannot exceed the power that a sovereign enjoys under international law.[187] While the particular exercises of taxing power in those three cases fell within accepted taxing jurisdictional bases and thus were held valid,[188] the Court's rationale implies that a tax statute with no jurisdictional basis would be invalid.

As discussed in Part II.C, the application of Internal Revenue Code section 7701(n) to impose worldwide income (or worldwide estate) taxation on a former citizen who had notified the Department of State of her citizenship loss decades earlier but had failed to notify the IRS cannot be supported under customary international law jurisdictional principles.[189] Ac-

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[184] *Id.* at 399; *see also* Comm'r v. Nevious, 76 F.2d 109, 110 (2d Cir. 1935) (citing *Brooks* to conclude that "[t]he United States has jurisdiction to tax when it can lay hold of either the obligor or the obligee of a chose in action"); McDougall v. Comm'r, 45 B.T.A. 803, 809–10 (1941) (citing *Brooks*'s reliance on "the principles of jurisdiction recognized in international relations" to hold that Congress can impose worldwide estate tax based on the decedent's U.S. domicile).

[185] Brief for Defendant in Error at 3, Cook v. Tait, 265 U.S. 47 (1924) (No. 220). Indeed, the government counsel's principal argument was based on the assertion in the *License Tax Cases* that the taxing power under Article I "reaches every subject, and may be exercised at discretion." License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867).

[186] *Cook*, 265 U.S. at 56.

[187] One additional Supreme Court case supports the foregoing analysis. In *United States v. Rice*, 17 U.S. (4 Wheat.) 246 (1819), the Court held that no federal customs duties were owed with respect to a period when a U.S. port was under British occupation during the War of 1812. The Court stated that the British had "acquired that firm possession which enabled [them] to exercise the fullest rights of sovereignty over that place [and the] sovereignty of the United States over the territory was, of course, suspended." *Id.* at 254. The Court then observed that the port "was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants were subject to such duties only as the British government chose to require." *Id.* While the *Rice* case admittedly involved unusual facts, the Court's reasoning implies that Congress's seemingly broad powers to impose duties under Article I, section 8 are subject to the jurisdictional restraints generally applicable to a sovereign under international law.

[188] The taxes in *Bennett* and *Cook* were upheld on nationality-based principles, while the tax in *Brooks* was upheld based on the property's situs in U.S. territory. United States v. Bennett, 232 U.S. 299, 307 (1914); *Cook*, 265 U.S. at 56; *Brooks*, 288 U.S. at 405.

[189] Even to the extent the provision is viewed as a method for preventing tax avoidance or evasion, such a rationale would only justify taxing jurisdiction tailored to the extended source-based taxation of the section 877 alternative tax regime, not ongoing worldwide taxation. *See supra* notes 108–109 and accompanying text.

cordingly, such an application would present the strongest case for constitutional challenge under the foregoing analysis.[190]

It is important to acknowledge that these cases addressing Congress's jurisdictional powers to impose tax were decided more than seventy years ago during the pre-*Erie* and *Lochner* eras and prior to the Court's explicit acknowledgment of broad legislative jurisdiction in certain non-tax areas.[191] Nonetheless, by the time these tax cases were decided, the Court's views regarding Congress's prescriptive jurisdiction in an international context had already undergone significant evolution and expansion. Whereas early nineteenth-century Supreme Court cases reflected a natural law-based focus on territorial jurisdictional limitations,[192] by the time of the *Cook v. Tait* decision in 1924 and *Brooks* in 1933, the Court had shown a significant willingness to expand the limits of Congress's international prescriptive jurisdiction beyond the constraints of nineteenth-century jurisprudence.[193] Accordingly, the Court's tax decisions quoted above, with their limiting language regarding Congress's legislative jurisdiction, cannot be wholly dismissed as merely reflecting the views of a bygone era.

While some non-tax lines of cases might provide support for a broad interpretation of Congress's powers in an international context, these cases are distinguishable from the present circumstances. For example, the Supreme Court has often upheld the extraterritorial application of federal statutes in non-tax areas. While the Court applies a presumption that Congress does not intend for statutes to apply extraterritorially,[194] the Court permits extraterritorial application of federal law when congressional intent to do so is sufficiently clear.[195] By focusing on Congress's intent, the

[190] In contrast, the application of section 7701(n) in the case of an individual who has notified neither the Department of State nor the IRS of the expatriating act does not violate the prescriptive jurisdictional principles of customary international law, *see supra* notes 111–115 and accompanying text, and therefore would not be subject to constitutional challenge under the foregoing rationale. While the application of section 877(g) might raise prescriptive jurisdiction questions under customary international law in the case of an individual who spends only thirty-one days in the United States eight or nine years after losing citizenship, *see supra* notes 134–141 and accompanying text, such circumstances involve at least some territorial connection to the United States and would be more difficult to challenge on constitutional grounds than would the application of section 7701(n). For example, the Court found in *Brooks* that the mere physical location of stock certificates and bonds in the United States was sufficient to bring those assets within the constitutional taxing power of the United States. 288 U.S. at 405.

[191] *See* Erie R.R. v. Tomkins, 304 U.S. 64; Lochner v. New York, 198 U.S. 45 (1905). This broad extraterritorial jurisdiction perhaps is most notable in the context of effects-based jurisdiction as applied to U.S. antitrust laws. *See supra* note 80 and accompanying text; *see also infra* notes 194–199 and accompanying text.

[192] *See* Born, *supra* note 104, at 496–98.

[193] *See id.* at 497–500 (citing *Cook v. Tait* and other early twentieth-century Supreme Court cases as evidence of the development of "contemporary" limits on legislative jurisdiction).

[194] *See* EEOC v. Arabian American Oil Co. ("Aramco"), 499 U.S. 244, 248 (1991).

[195] The Supreme Court recently found that Congress intended to apply Title III of the Americans with Disabilities Act to foreign-flag cruise ships that dock in United States ports. *See* Spector v. Norwegian Cruise Line Ltd., 125 S. Ct. 2169, 2178 (2005). For ex-

cases assume, either explicitly or implicitly, that Congress has the power to legislate extraterritorially if it chooses to do so.[196]

These cases, however, differ from the present circumstances in a significant way. The parties in these cases generally have some connection to the United States sufficient to establish a basis for prescriptive jurisdiction. For example, in cases regarding the potential extraterritorial application of labor laws, the cases typically involve a U.S. citizen employee and a U.S.-incorporated employer.[197] Similarly, in cases involving ships, the ships typically dock in U.S. ports, carry U.S. passengers, or have some other connection to the United States.[198] Accordingly, the outer limits of congressional power are not seriously at issue in those cases. Thus, dicta in those cases stating that Congress has the power to legislate extraterritorially might merely be an acknowledgement that a sufficient jurisdictional connection exists in those particular cases,[199] rather than a statement that Congress has unlimited authority in all situations. Accordingly, that dicta would not be dispositive in the case of an application of section 7701(n) to tax the worldwide income of a person decades after she notified the Department of State of her citizenship loss, because no recognized prescriptive jurisdictional basis exists.

A complementary line of Supreme Court cases explicitly states that Congress has the power to enact legislation that contravenes customary international law.[200] These cases can arise either outside U.S. territory or

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amples of cases holding that there was not sufficient evidence of congressional intent to override the presumption against extraterritoriality, see *Aramco*, 499 U.S. 244 (1991) (then-existing version of Title VII of the Civil Rights Act of 1964); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) (National Labor Relations Act); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957) (Labor Management Relations Act of 1947); Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949) (Eight Hour Law).

In the present circumstances, sections 877(g) and 7701(n) focus on the worldwide income of former citizens who spend all or a significant portion of their time outside the United States. Accordingly, by their very nature these provisions evince a congressional intent to tax persons and income outside the United States, and the presumption against territoriality would be overridden.

[196] For example, the opinion in *Foley Bros.* states that "[t]he question before us is not the power of Congress to extend the Eight Hour Law to work performed in foreign countries. Petitioner concedes that such power exists." 336 U.S. at 284.

[197] *See, e.g.*, *Aramco.*, 499 U.S. at 246; *Foley Bros.*, 336 U.S. at 283.

[198] *See, e.g.*, *Norwegian Cruise Line*, 125 S. Ct. at 2175; *McCulloch*, 372 U.S. at 12; *Benz*, 353 U.S. at 139.

[199] For example, in support of its brief statement in dicta that Congress has the power "to extend the Eight Hour Law to work performed in foreign countries," the *Foley Bros.* opinion cites *Blackmer v. United States*, 284 U.S. 421 (1932), and *United States v. Bowman*, 260 U.S. 94 (1922). Those cases do not purport to grant Congress unlimited prescriptive power worldwide. Rather, both of those cases involved Congress's power to subject U.S. citizens outside the United States to certain criminal proceedings. Indeed, those cases referred to the United States's right as a sovereign to assert authority over its citizens. Thus, the statement in *Foley Bros.* regarding Congress's extraterritorial powers is best interpreted as referring to Congress's authority over U.S. citizens (the factual situation in *Foley Bros.* itself).

[200] *Cf. Authority of the Federal Bureau of Investigation to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities*, 13 U.S.

within U.S. territory.[201] Because of the desire to avoid conflicts with customary international law, these cases provide that "[a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[202] This presumption against violations of customary international law implies that, if it so intends, Congress has the power to enact legislation violating customary international law. Indeed, in a dissenting opinion in a non-tax case, Justice Scalia stated "[t]hough it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe."[203] Justice Scalia provides no direct citation for this pronouncement regarding Congress's prescriptive authority, relying instead on the implication arising from the judicial presumption.[204]

As with the cases addressing the presumption against extraterritoriality, these cases involving the presumption against violating customary international law differ from the section 7701(n) circumstances in a significant way. As discussed previously, section 7701(n), at least when applied

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Op. Off. Legal Counsel 163, 183 (1989) (arguing that "[t]he President, acting through the Attorney General, has the inherent constitutional authority to deploy the FBI to investigate and arrest individuals for violations of United States law, even if those actions contravene international law").

[201] *See* Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1959) (holding that as a matter of statutory interpretation, Congress did not intend to violate customary international law by applying Jones Act to a foreign-flagged, foreign-owned ship manned by foreign seamen, while in U.S. territorial waters); *see also* Lauritzen v. Larsen, 345 U.S. 571 (1953) (similarly holding that Congress would not intend to violate customary international law by applying the Jones Act to a foreign-flagged, foreign owned ship in Cuban waters). Accordingly, this line of cases is separate from the previously discussed line of cases dealing with the presumption against extraterritoriality. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (citing EEOC v. Arabian American Oil Co., 499 U.S. 244, 264 (Marshall, J., dissenting)).

[202] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

[203] *Hartford Fire Ins.*, 509 U.S. at 815 (Scalia, J., dissenting). Justice Scalia's dissent argued that, as a matter of statutory interpretation, in the absence of evidence to the contrary Congress should not be considered to have intended an unreasonable application of the Sherman Act to foreign corporations. *Id*. at 819.

[204] The only relevant citation in the paragraph containing Justice Scalia's statement is to the *Schooner Charming Betsy* presumption against interpreting a statute to violate customary international law if any other interpretation is possible. *Id.* at 814–15; *see also supra* note 202 and accompanying text (quoting *Schooner Charming Betsy* presumption). One D.C. Circuit case, in dicta, makes an assertion similar to that of Justice Scalia, stating that the "reverse side of this general [*Schooner Charming Betsy*] canon of statutory construction, of course, is that courts of the United States are nevertheless obligated to give effect to an unambiguous exercise by Congress of its jurisdiction to prescribe even if such an exercise would exceed the limitations imposed by international law." FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1323 (D.C. Cir. 1980). The D.C. Circuit, however, made this assertion in a context where the United States clearly had jurisdiction to prescribe under international law (based on the effects of the foreign company's sales on the U.S. market). *Id.* at 1316. Moreover, as the court recognized, the issue in the case involved jurisdiction to enforce rather than jurisdiction to prescribe. The court applied the *Schooner Charming Betsy* presumption to find that Congress had not intended for the statute to permit service of subpoenas abroad in a manner that would violate enforcement jurisdiction under customary international law. *Id.* at 1323.

to a person who many years earlier notified the Department of State of her loss of citizenship but failed to notify the IRS, lacks any recognized prescriptive jurisdiction under customary international law. In contrast, the relevant Supreme Court cases involve situations where the United States has some valid jurisdictional claim over the matter, but customary international law provides that the United States' jurisdiction must yield to that of another sovereign.

For example, in *Lauritzen v. Larsen*,[205] the Court observed that customary international maritime law provided that Danish law, rather than the Jones Act, should apply to an injury suffered by a Danish seaman on a Danish-owned and flagged ship in Cuban waters. The Court, applying the presumption against violating customary international law, held that, as a matter of statutory interpretation, Congress did not intend for the Jones Act to apply and override customary international law. Of particular relevance to the present inquiry, the Court acknowledged that the United States had a jurisdictional claim over the case, because the seaman had been hired in the United States while the ship was in the New York port and he was later returned to the United States after the voyage.[206] Thus, the Court's implication that Congress had power to override customary international law if it so desired might have been based on the inherent understanding that the United States itself had a valid jurisdictional basis for prescribing law, even though that basis was inferior to another country's claim under international law. If so, the case might merely support Congress's ability to override international choice of law principles when multiple countries (including the United States) have jurisdiction, rather than a broader ability to assert prescriptive jurisdiction even when the United States has no jurisdictional basis whatsoever under international law.[207] Un-

[205] 345 U.S. 571 (1953).

[206] *Id*. at 582–83.

[207] Other cases recognizing Congress's power to override customary international law also involve facts where the United States has some type of prescriptive jurisdictional basis but where customary international law would require the United States to defer to a greater claim of another sovereign. *See, e.g.*, The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 145–46 (1812) (holding that although international law provides that ships of war entering the port of a friendly power are exempt from that host country's jurisdiction, "[w]ithout doubt, the sovereign of the place is capable of destroying this implication"). In *The Paquete Habana*, 175 U.S. 677 (1900), the Court implied that Congress, if it had enacted a specific statute, could have permitted the seizure of foreign ships that were violating a U.S. wartime blockade of Cuba. Such a statute would not have fit squarely into the traditional prescriptive jurisdictional bases, but the wartime situation might have given rise to protective principles. Moreover, the case does not fit squarely within the current analysis because any such statute might have been justified by Congress's explicit constitutional authority to "make Rules concerning Captures on Land and Water." U.S. CONST. art. I, § 8, cl. 11.

A legal memorandum prepared by the Department of Justice's Office of Legal Counsel relies on the *Schooner Exchange* and other cases to conclude that "[b]oth Congress and the President, acting within their respective spheres, retain the authority to override" any customary international law limits on U.S. law enforcement in foreign countries. *See Authority of the Federal Bureau Of Investigations*, *supra* note 200, at 171. That legal memorander this interpretation, this line of cases would not necessarily support Congress's power to exercise taxing jurisdiction in circumstances, such as the potential application of section 7701(n) discussed above, where the United States has no claim for prescriptive jurisdiction.

At least one federal district court has adopted similar reasoning in a foreign Commerce Clause setting. In *United States v. Yunis*, the alien defendant was charged with various federal crimes relating to the hijacking of a foreign aircraft in a foreign country.[208] The court denied defendant's motion to dismiss with respect to most charges but the court granted the motion to dismiss with respect to certain charges under a federal statute that purported to regulate foreign air commerce. The court reasoned:

> [T]he government contends that Congress has authority to regulate global air commerce under the commerce clause. U.S. Const. art. I, § 8, c.3. The government's arguments based on the commerce clause are unpersuasive. Certainly Congress has plenary power to regulate the flow of commerce within the boundaries of United States territory. But it is *not empowered to regulate foreign commerce which has no connection to the United States*. Unlike the states, foreign nations have never submitted to the sovereignty of the United States government nor ceded their regulatory powers to the United States.[209]

A commentator subsequently cited this rationale for the proposition that Congress does not have the power to make "outrageous assertions" of U.S. jurisdiction, such as an attempt to "to criminalize a high stakes poker game between two Australians sailing an Australian sailboat from Australia to Fiji."[210]

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dum, however, implicitly assumes that the United States has some underlying jurisdictional connection to the overseas activity. In particular, the memo implicitly invokes "protective principle" jurisdiction, focusing on the ability of the United States to "protect its own vital national interests" with respect to terrorist groups and drug traffickers that target the United States in circumstances where the foreign government fails to take steps to protect the United States. *Id.* at 166. Under this interpretation, the memorandum does not necessarily support an unlimited exercise of congressional power when the United States has no underlying jurisdictional connection to the person or activity (as is the case with an extreme application of section 7701(n)).

[208] 681 F. Supp. 896, 898 (1988), *conviction aff'd*, 924 F.2d 1086 (D.C. Cir. 1991).

[209] *Id*. at 907 n.24 (emphasis added).

[210] *See* Weisburd, *supra* note 159, at 418–20. Professor Weisburd also relies on the Supreme Court decision in *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820). In that case, the Court "addressed in dictum the question whether a statute criminalizing piracies and felonies at sea should be read as applying to murders committed by aliens against alien victims upon non-American ships." Weisburd, *supra* at 419. The Court concluded that Congress lacked the power to punish murder on the high seas (as opposed to piracy, which is explicitly covered by Article I, § 8, cl. 9). *Furlong*, 18 U.S. at 198. Despite Professor Weisburd's broad reading of the *Furlong* decision to support a restricted view of enumerated Article I powers, such as the commerce clause, when they purport to reach events with no U.S. connection, the case might instead stand for the narrower proposition that murder,

In summary, while a constitutional challenge to Congress's power to enact section 7701(n) may face significant hurdles, such a challenge finds significant support in the reasoning of those Supreme Court cases that have addressed the extent of Congress's sovereign powers to tax in an international context. The Supreme Court cases applying interpretive presumptions against Congress legislating extraterritorially or in violation of customary international law do not necessarily imply that Congress has unlimited jurisdiction to tax in situations when there is no valid prescriptive jurisdiction claim under customary international law. Although claims challenging Congress's power to tax historically have received a chilly response from the Court and the principal cases discussed above are at least seventy years old, the rationale of those opinions warrants a serious consideration of the outer boundaries of Congress's power to tax in an international setting, particularly given the Court's recent willingness to find limitations on Congress's powers under the Commerce Clause of Article I.[211]

Despite the potential merits of this argument regarding limitations on Congress's taxing power, the political question doctrine might preclude the Supreme Court from addressing it. As the Supreme Court noted in *Baker v. Carr*,[212] the political question doctrine "is primarily a function of the separation of powers,"[213] and the dominant considerations for determining its applicability turn on "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination."[214] While *Baker v. Carr* left this determination to case-specific inquiry, it did note several relevant factors, including the extent to which the issue touches on foreign relations.[215] To the extent that the Court were to regard the present issue as a political question,[216] it would decline to rule on the issue and would not invalidate section 7701(n) as exceeding Congress's powers.

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unlike piracy, is not an enumerated power under Article I, section 8, and therefore is beyond Congress's legislative authority.

[211] *See* United States v. Morrison, 529 U.S. 598 (2000) (holding that Congress lacked commerce clause authority to provide a civil remedy for gender-motivated violence); United States v. Lopez, 514 U.S. 549 (1995) (holding that Congress lacked commerce clause authority to regulate handguns in school zones). Unlike the international concerns at issue in the present context, the *Morrison* and *Lopez* cases involved federalism concerns.

[212] 369 U.S. 186 (1962).

[213] *Id*. at 210.

[214] *Id*. (citing Coleman v. Miller, 307 U.S. 433, 454–55 (1939)).

[215] 369 U.S. at 211.

[216] *See generally* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002) (arguing that recent Supreme Court decisions, demonstrate a decreasing reliance on the political question doctrine and an increasing willingness to decide a broader range of constitutional questions).

C. Due Process and Equal Protection Limitations

If, notwithstanding the foregoing arguments, Congress is found to have the power under Article I to enact the AJCA special definitions of tax citizenship, the statute might still be challenged as violating other constitutional limitations.[217] This Section considers two potential limitations under the Fifth Amendment: due process and equal protection. It concludes that a strong argument exists for invalidating section 7701(n) on due process grounds for periods after an individual has notified the Department of State of her citizenship loss but has not yet notified the IRS.

As a threshold matter, it is important to note that an individual subject to section 7701(n) is an alien for nationality law purposes, and the Supreme Court has found that aliens with insufficient connections to the United States are not entitled to the full protections of the Fifth Amendment.[218] However, the application of section 7701(n) is itself based on the fiction that the individual is in some sense a "citizen" who has sufficient connection to the United States to warrant the imposition of worldwide taxation. Moreover, any attempt to adjudicate section 7701(n) would occur in a federal court, where the Supreme Court has shown a stronger willingness to accord aliens Fifth Amendment protections.[219]

1. Due Process

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[220] The Supreme Court has interpreted this clause as requiring not only adequate procedures, such as notice and hearing, but also justification for the government's action.[221] The Court has given wide latitude to the government in applying due process standards, with no economic legislation having been found to violate the Due Process Clause since 1937.[222]

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[217] *See* BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 1.2.1 (3d ed. 1999) ("Like all other federal powers, the right of Congress to levy and collect taxes is subject to a wide range of constitutional limits, including the due process clause . . . ."); RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE AND PROCEDURE § 5.2 (3d ed. 1999).

[218] *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (analogizing the lack of Fifth Amendment protections for aliens to the refusal to extend Fourth Amendment protections to the Mexico home of a Mexican citizen).

[219] *See* Weisburd, *supra* note 159, at 399–403.

[220] U.S. CONST. amend. V.

[221] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 523–24 (2d ed. 2002).

[222] *See id.* at 601; *see also* United States v. Carlton, 512 U.S. 26, 34 (1994) (noting that these pre-1937 cases were decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded'" (quoting Ferguson v. Skrupa, 372 U.S. 726, 730 (1963))).

However, several federal appeals courts[223] and numerous commentators[224] have observed that in an international setting, an overly broad assertion of federal prescriptive jurisdiction might violate due process constraints on federal lawmaking. Section 7701(n), particularly as applied to individuals after they have notified the Department of State of their citizenship loss but before they have notified the IRS, appears to present such a situation.

Perhaps the most relevant Supreme Court case is *Helvering v. City Bank Farmers Trust Co.*,[225] which involved a due process challenge in a domestic setting[226] to a federal estate tax anti-avoidance provision. In determining whether the tax statute violated due process, the Court focused on whether the anti-abuse provision was "unreasonably harsh or oppressive" or was "arbitrary."[227] While subsequent Supreme Court cases addressing economic legislation have formulated the standard somewhat differently, focusing on whether the legislation has a "legitimate legislative purpose furthered by rational means,"[228] a more recent opinion noted that the "harsh and oppressive" standard "does not differ from the prohibition against arbitrary and irrational legislation that applies generally to enactments in the sphere of economic policy."[229]

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[223] *See* Tamari v. Bache & Co., 730 F.2d 1103, 1107 n.11 (7th Cir. 1984) ("Were Congress to enact a rule beyond the scope of these [customary international law prescriptive] principles, the statute could be challenged as violating the due process clause on the ground that Congress lacked the power to prescribe the rule."); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972).

[224] *See* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992); Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289, 313; Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 206 (1991). *But see* Weisburd, *supra* note 159, at 408–17.

[225] 296 U.S. 85 (1935). Several more recent circuit court cases have relied on *City Bank* in analyzing due process challenges to federal tax statutes. *See, e.g.*, Di Portanova v. United States, 690 F.2d 169, 180 (Ct. Cl. 1982) (upholding constitutionality of earlier version of I.R.C. § 877); Schuster v. Commissioner, 312 F.2d 311, 318 (9th Cir. 1962).

[226] Although the decedent was a non-resident citizen, this fact was not relevant to the decision.

[227] *City Bank Farmer's Trust*, 296 U.S. at 89–90.

[228] General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992); *see also* CHEMERINSKY, *supra* note 221, at 600–01.

[229] United States v. Carlton, 512 U.S. 26, 30 (1994) (holding that retroactive estate tax legislation did not violate due process).

The Supreme Court has established a higher standard for reviewing due process challenges if a fundamental right is infringed. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); *see generally* CHEMERINSKY, *supra* note 221, at 764. In determining whether something is a fundamental right, the Supreme Court has included liberties that are "deeply rooted in this Nation's history and tradition." Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977). The Supreme Court has recognized the importance in our nation's history of the right to renounce citizenship. *See* Afroyim v. Rusk, 387 U.S. 253 (1967); *see also* Kirsch, *supra* note 12. Even if the right to renounce citizenship rises to the level of a fundamental right, the higher standard of review would not apply. Although sections 877(g) and 7701(n) apply to individuals who purport to lose citizenship, these tax provisions do not "infringe" a person's ability to renounce citizenship. In particular, they do not interfere with a person's ability to commit a potentially expatriating act with the requisite intent and have the resulting citizenship loss recognized by the Department of State.

The Court in *City Bank Farmer's Trust* concluded that the estate tax provision at issue did not violate due process because Congress had a legitimate purpose to prevent tax avoidance.[230] It was uncontested that trust property was includible in a decedent's gross estate if the decedent had previously transferred property to the trust and, at the time of death, had held a right to revoke the trust.[231] Congress was concerned that the decedent might try to plan around this result by conditioning the revocation power on the consent of a (potentially pliant) trust beneficiary.[232] Accordingly, the statute provided that the need for the beneficiary's consent was to be ignored in determining whether the decedent held a revocation power.[233] The Court concluded that the statute, by ignoring the beneficiary's consent power and requiring the property to be included in the decedent's gross estate, was sufficiently related to Congress's tax avoidance purpose.[234] In effect, the statute ensured that the underlying estate tax provision (the inclusion of trust property over which the original donor holds a revocation power) would be enforceable despite attempts by taxpayers to circumvent it with potentially meaningless joint consent powers.

As was the estate tax provision in *City Bank Farmer's Trust*, section 7701(n) was enacted to address tax avoidance concerns. However, section 7701(n) is not rationally related to this purpose when it is used to tax an individual years after she has notified the Department of State of her expatriating act but before she has complied with the IRS reporting requirements.[235] For time periods after which the individual has notified the Department of State of her citizenship loss, the only purpose of section 7701(n) is to ensure that the IRS obtains sufficient information from the individual to enable enforcement of the alternative tax regime of section 877 (and related estate and gift tax provisions).[236] Section 877's alternative tax regime does not impose perpetual worldwide taxation on former citi-

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Even though a potential tax taint might remain, for nationality law purposes the loss would be recognized and other burdens associated with citizenship, such as potential obligations of military service, would no longer apply.

[230] *City Bank Farmer's Trust*, 296 U.S. at 92. The challenged tax provision was the predecessor to current I.R.C. section 2038 (governing revocable transfers).

[231] *Id.* at 88.

[232] *Id.* at 90.

[233] *Id.* at 88–89.

[234] *Id.* at 91.

[235] A stronger relationship exists in the case of an individual who has failed to notify either the Department of State or the IRS of the expatriation. *See supra* notes 45–51 and accompanying text. To the extent an anti-avoidance provision, such as section 7701(n), imposes the same type of tax (i.e., worldwide taxation) as the underlying provisions that it is backstopping, there appears to be a rational relationship.

[236] *See supra* notes 41–44 and accompanying text. For periods prior to the notification of the Department of State, Congress also might have been concerned with an individual's obtaining the benefits of citizenship while avoiding the burdens of worldwide taxation. *See supra* notes 46–52 and accompanying text. However, such concerns no longer apply once the individual has notified the Department of State and thereby had the citizenship loss documented for nationality law purposes.

zens; rather, it merely expands the types of U.S. source income upon which a former citizen will be taxed for a ten-year period.[237] In contrast, section 7701(n), which purports to backstop the enforcement of section 877, imposes worldwide taxation on the individual (by treating her as a citizen for tax purposes), potentially in perpetuity.

The enactment of an anti-abuse provision that imposes taxation much more broadly than the tax provision it is intended to backstop seems difficult to justify even under the admittedly lenient rational basis test. The provision's constitutional infirmity is not based on the mere assertion that Congress could have crafted a better-tailored statute[238] (although Congress did, in fact, create a more narrowly tailored anti-abuse provision in the context of the 1996 amendments to section 877).[239] Rather, it is based on the lack of any rational connection between the perceived abuse and the legislative response. Unlike the anti-abuse estate tax provision in *City Bank Farmer's Trust*, which ensured that the underlying estate tax provision would apply notwithstanding taxpayer's efforts to circumvent it, section 7701(n) bears no relationship, and is grossly disproportionate to, the U.S. source-focused alternative tax regime of section 877 that it purports to backstop.[240]

If section 7701(n), in this context, were viewed as satisfying the due process rational basis test, it is difficult to envision any due process limitation on the taxation of individuals in an international context. Taken to an extreme, a lack of due process violation in the present context might justify Congress imposing a worldwide taxation regime on almost any nonresident alien in the guise of an anti-avoidance provision. For example, if a nonresident alien (who had never been a citizen) failed to report or pay tax on income connected with a U.S. business or U.S. investment property,[241] Congress might enact an "anti-abuse" provision that treats the individual as a citizen for tax purposes, taxable on worldwide income. To the extent such a response is viewed as having no rational relation to the prevention of tax avoidance by nonresident aliens, section 7701(n) also should be viewed as having no rational connection to the prevention of tax avoidance under section 877. After all, both situations involve an overly broad application of worldwide taxation to protect the enforceability of a narrow U.S. source-focused tax regime.

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[237] *See supra* notes 14–18 and accompanying text.

[238] Di Portanova v. United States, 690 F.2d 169, 180 (Ct. Cl. 1982) (upholding a prior version of I.R.C. § 877 against due process and equal protection challenges, stating that "the possibility that Congress might draft a better or a more comprehensive statute is not a reason for invalidating" a statute as long as it meets a minimum rationality test).

[239] *See* 2003 JCT Report, *supra* note 19.

[240] *See* Helvering v. City Bank Farmers Trust Co., 296 U.S. 85, 92 (1935). In this context, the special definition of citizenship provided in section 7701(n) for tax purposes could be an example of the *City Bank Farmer's Trust* court's observation that there are due process limitations on Congress's ability "to create a fictitious status under the guise of supposed necessity." *Id*.

[241] As discussed *supra* notes 9–11 and accompanying text, nonresident aliens generally are taxable on these types of income under the Internal Revenue Code.

2. *Equal Protection*

An equal protection claim in the present context would compare the treatment of expatriates who run afoul of section 877(g) or 7701(n) against the treatment of expatriates who do not trigger those provisions.[242] In the most extreme case, involving the application of section 7701(n) to a person who informed the Department of State of the citizenship loss but failed to notify the IRS under section 6039G, the relevant inquiry would be whether the adverse treatment of this person, in contrast to a person who notified both the Department of State and the IRS, is justified.

Although a "strict scrutiny" standard sometimes applies to classifications that discriminate against aliens,[243] it is doubtful that such a standard would apply in the present circumstance, even though the individual would be a noncitizen (under nationality laws) at the time the IRS attempts to assert tax under section 7701(n). First, the Supreme Court has recognized that Congress has significantly more power than states to establish distinctions based on alienage.[244] That power includes the right to make distinctions not only between aliens and citizens but also among different classes of citizens.[245] Moreover, the Court's rationale for providing heightened scrutiny for state alienage classifications is largely inapplicable in the present context. Whereas heightened scrutiny generally is grounded in the inability of aliens to vote and thereby protect themselves in the political process,[246] former citizens subject to section 7701(n) previously were enfranchised and voluntarily surrendered that right pursuant to their expatriation. The case for strict scrutiny is undercut further by the fact that the present circumstances involve tax legislation. The Supreme Court has been particularly reluctant to subject tax statutes to heightened scrutiny, noting that "legislatures have especially broad latitude in creating classifications and distinctions in the tax statutes."[247]

For the foregoing reasons, it is likely that a court would apply a rational basis, rather than strict scrutiny, test to sections 877(g) and 7701(n). Unlike the due process analysis, which focuses on the substantive aspects

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[242] Unlike the Fourteenth Amendment that applies to the states, the Fifth Amendment does not explicitly refer to equal protection rights. However, the Supreme Court has held that equal protection principles apply to the federal government through the Fifth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954); *see also* CHEMERINSKY, *supra* note 221, at 642–43.

[243] *See* CHEMERINSKY, *supra* note 221, at 739–43.

[244] *See id*. at 745 (citing Mathews v. Diaz, 426 U.S. 67 (1976)).

[245] *Diaz*, 426 U.S. at 80.

[246] *See* CHEMERINSKY, *supra* note 221, at 742.

[247] Regan v. Taxation with Representation, 461 U.S. 540, 547 (1983); *see also* Barclay & Co. v. Edwards, 267 U.S. 442, 449–50 (1924) (permitting Congress to treat foreign corporations as a separate class for tax purposes); BITTKER & LOKKEN, *supra* note 217, ¶ 1.2.5 ("[T]he tax laws have drawn so many distinctions that even a Supreme Court confident of its power to distinguish between reasonable and arbitrary behavior in other statutory areas has hesitated to act as a referee of tax legislation.").

of the provisions, the equal protection analysis merely focuses on whether there is a rational basis for creating some kind of distinction between the classes of persons.[248] In this narrow context, it appears that there is a rationale for distinguishing between former citizens who give up citizenship and run afoul of section 877(g) or 7701(n), and those who give up citizenship and do not trigger those provisions. In particular, with respect to section 877(g), the classes spend different amounts of time in the United States during the ten-year post-expatriation period. With respect to section 7701(n), the classes create different levels of enforcement difficulty for the IRS. Accordingly, a challenge based solely on equal protection concerns would most likely fail.

IV. Additional Considerations

As discussed in Part II, certain aspects of the AJCA definitions of tax citizenship violate the prescriptive jurisdictional bases of customary international law. As argued in Part III, certain applications of section 7701(n) raise significant constitutional concerns, particularly with respect to due process. Even to the extent the AJCA provisions are consistent with the Constitution, additional considerations demonstrate the need for Congress to reconsider its use of special tax-based definitions of citizenship in this context. This Part briefly summarizes these considerations.

A. *Effect on Treaty Network*

1. *Inapplicability of Treaty Saving Clause*

The United States is a party to bilateral income tax treaties with more than sixty countries.[249] While the specific terms of each treaty differ,[250] tax treaties generally are structured so that the United States provides certain relief from U.S. taxation to residents of the treaty partner, while the

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[248] *See* Chemerinsky, *supra* note 221, at 643.

[249] *See* John Venuti et al., *Current Status of U.S. Tax Treaties and International Tax Agreements*, 34 Tax Mgm't. Int'l J. 707, 711 (2005) (listing countries). The United States also has a network of bilateral estate and/or gift tax treaties with sixteen countries. *Id*.

[250] Discrepancies are due to differences in the tax systems of each treaty partner and the results of bilateral treaty negotiations. However, the treaties share a common structure and common provisions and are based on similar model treaties. *See* Organisation for Economic Co-Operation and Development, Committee on Fiscal Affairs, Model Tax Convention on Income and Capital (2000), *reprinted in* Model Tax Convention on Income and on Capital (Organisation for Economic Co-Operation and Development, 2000) [hereinafter OECD Model Treaty]; Dep't of Treasury, United States Model Income Tax Convention of Sept. 20, 1996, http://www.treas.gov/offices/tax-policy/library/model996.pdf [hereinafter U.S. Model Treaty] (based largely on the OECD Model Treaty); Dep't of Treasury, Technical Explanation of the United States Model Income Tax Convention of Sept. 20, 1996, http://www.irs.gov/pub/irs-trty/usmtech.pdf [hereinafter U.S. Model Technical Explanation].

treaty partner reciprocally provides relief from its tax to residents of the United States.[251] For example, the Internal Revenue Code generally imposes a thirty percent tax on certain U.S. source investment income earned by a nonresident alien and imposes a graduated tax on income connected to a nonresident alien's conduct of a U.S. trade or business. However, if the taxpayer is a resident of a country with which the United States has an income tax treaty, the treaty either eliminates or reduces the U.S. tax on the individual's U.S. investment income[252] and prevents the United States from taxing the individual's U.S. business income unless the individual conducts the business through a "permanent establishment" in the United States.[253]

Under a treaty's definition of "resident," it is possible that a U.S. citizen living abroad could be treated as a resident of the other country for treaty purposes.[254] Nonetheless, U.S. tax treaties contain a "saving clause" that prevents such a U.S. citizen from invoking the treaty against the United States to reduce her U.S. tax liability.[255] For example, a U.S. citizen who resides in the United Kingdom might be treated as a resident of the United Kingdom under the U.S.-U.K. treaty's tie-breaker rule. Nevertheless, the United States, pursuant to the treaty's saving clause, reserves the right to exercise its full taxing jurisdiction over the U.S. citizen.

The U.S. Model Treaty contains a special definition of "citizen" for purposes of applying the saving clause:

> [f]or this purpose [i.e., the saving clause], the term "citizen" shall include a former citizen . . . whose loss of such status had as one of its principal purposes the avoidance of tax (as defined under the laws of the Contracting State of which the person was a citizen or long-term resident), but only for a period of 10 years following such loss.[256]

This aspect of the saving clause is intended to ensure that the United States can impose tax under Internal Revenue Code section 877 on a person who has surrendered U.S. citizenship, even if the individual subsequently

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[251] In addition to providing benefits to certain taxpayers, income tax treaties often contain provisions that benefit the respective governments' abilities to enforce their tax laws. For example, income tax treaties generally provide for information exchange and limited collection assistance between the respective tax administrators. *See, e.g.*, U.S. Model Treaty, *supra* note 250, art. 26; 2003 JCT Report, *supra* note 19, at 98–99 n.377 (citing five income tax treaties that contain broad collection assistance provisions).

[252] *See, e.g.*, U.S. Model Treaty, *supra* note 250, arts. 10 (dividends), 11 (interest), and 12 (royalties).

[253] *See, e.g.*, *id.* art. 7.

[254] *See id.* art. 4. If the individual meets the general definition of "resident" with respect to both countries, the definition's tie-breaker rules might treat her as a resident of the other country. *See id.*

[255] *See id.* art. 1, para. 4. The treaty contains limited exceptions to the saving clause, which allow a U.S. citizen who is resident in the other treaty country to claim certain benefits of the treaty. *See id.* art. 1, para. 5(a).

[256] *See* U.S. Model Treaty, *supra* note 250, art. 1, para. 4.

acquires residence in a country with which the United States has a tax treaty.[257] The treaty provision's focus on former citizens "whose loss of such status had as one of its principal purposes the avoidance of tax" tracks the threshold requirement of section 877 in effect prior to the enactment of the AJCA. Following the enactment of the AJCA, tax liability under section 877 no longer depends on whether the former citizen had a principal purpose of tax avoidance.[258]

The enactment of the AJCA raises significant issues regarding the applicability of the treaty saving clause to individuals who lose citizenship under the nationality laws.[259] Of particular relevance, it raises the question of whether the saving clause applies to an individual who has lost citizenship under the nationality laws but who continues to be treated as a citizen for tax purposes under section 877(g) or 7701(n).[260]

The general language of the saving clause provides that the United States "by reason of citizenship may tax its citizens, as if the Convention had not come into effect."[261] The principal issue, then, is whether the treaty's reference to a "citizen" encompasses only those individuals who are citizens in a nationality law sense or whether it is broad enough to cover an

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[257] *See* U.S. Model Technical Explanation, *supra* note 250, at 6.

[258] *See supra* note 18.

[259] As a practical matter, a former citizen who is subject to the ACJA provisions might be unlikely to move to a country with which the United States has a tax treaty. *See supra* note 64.

[260] The AJCA modifications to section 877 also raise the question of whether the saving clause applies to a person whose nationality loss is respected for tax purposes and who is subject to the alternative tax regime of section 877. Although this Article focuses on expatriates whose expatriation is not respected for tax purposes, this question is worth brief consideration. The principal issue is whether the model treaty's special saving clause definition regarding former citizens, which tracks the tax-motivation language of pre-AJCA section 877, continues to apply now that section 877 no longer depends on a principal purpose of tax avoidance. *See supra* note 18. A strong argument can be made that the saving clause does not apply, and the United States therefore cannot apply the section 877 alternative tax regime to a former citizen who is a resident of a treaty country. Although the treaty saving clause states that the existence of tax avoidance motive is determined "under the laws of the Contracting State of which the person was a citizen," that language has no direct relevance under the post-AJCA version of section 877, because the new statute does not purport to look at tax motivation. *See* 2003 JCT Report, *supra* note 19, at 206 (observing that "no subsequent inquiry into the taxpayer's intent would be required or permitted"); IRS, Notice 2005-36, *supra* note 39, at 1007 (observing that new section 877 applies "without regard to tax motivation"). *But see* 2003 JCT Report, *supra* note 19, at 206 (noting that the objective monetary thresholds of new section 877 are intended to "serve as a proxy for tax motivation"). To the extent the other treaty country may have been willing to accept the saving clause's applicability to pre-AJCA section 877 because that statute looked to actual tax motivation, the treaty country might view the new section 877, with its purely objective inquiry and lack of any reference to tax motivation, as beyond the scope of the saving clause. The IRS might be able to address this problem by making a factual determination of tax avoidance purpose with respect to a former citizen who establishes residence in a treaty partner and is otherwise subject to new section 877, although such a factual inquiry would raise the many administrative difficulties that led Congress to discard motivation in the statute. *See also infra* note 286 (noting that the legislation probably will not be treated as overriding the treaty in this context).

[261] U.S. Model Treaty, *supra* note 250, art. 1, para. 4.

individual who, despite having lost citizenship under the nationality laws, is labeled as a "citizen" for tax purposes under the Internal Revenue Code.

Both the language of the treaty and the general circumstances surrounding treaty negotiations suggest that the treaty reflects the former interpretation and that the general saving clause therefore cannot be invoked to tax the worldwide income of the individual. The U.S. Model Treaty does not provide a specific definition of the term "citizen."[262] However, it does refer to citizenship in the context of defining the term "national."[263] The term "national" of a Contracting State is defined, with respect to an individual, as "any individual possessing the nationality or citizenship of that State."[264] This "possessing" citizenship language, as commonly used, refers to a person who holds citizenship in the nationality law sense and is thereby entitled to the benefits of citizenship.[265] Moreover, the official commentary to the OECD Model Treaty, upon which this provision of the U.S. Model is based,[266] makes clear that the definition of the term "national" is governed by the nationality laws of each state.[267]

This connection between the treaty's use of the term citizenship and a country's nationality laws is furthered by the special reference to former citizens in the saving clause. The saving clause specifies that "citizens" shall include those who relinquished their citizenship within the prior ten years with "one of [their] principle purposes the avoidance of tax."[268] The inclusion of this special definition strongly implies that, in its absence, the saving clause's general preservation of taxing jurisdiction over "citizens" applies only to individuals who currently are citizens in the nationality law sense. Moreover, the special definition's use of the term "former citizen"

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[262] *See* U.S. Model Treaty, *supra* note 250, art. 3 (no definition of citizenship in the "General Definitions" article).

[263] *See id.* art. 3, para. 1(h). The definition of "national" is relevant for purposes of the residence tie-breaker provision, the taxation of income from government services, and the application of non-discrimination provisions. *See id.* art. 4, para. 2; art. 19; art. 24, para. 1.

[264] *Id*. art. 3, para. 1(h).

[265] *See also* U.S. Model Technical Explanation, *supra* note 250, at 82 (using the terms "citizenship" and "nationality" interchangeably in explaining that, in the event of certain disputes arising under a tax treaty, taxpayers can present their case "only to the competent authority of their country of residence, or citizenship/nationality").

[266] *See id.* at 11 ("This definition [of national] is closely analogous to that found in the OECD Model.").

[267] Organisation for Economic Cooperation and Development, Committee on Fiscal Affairs, Commentary on Model Tax Convention on Income and Capital art. 3, ¶ 8 (2000), *reprinted in* Model Tax Convention on Income and on Capital (Organisation for Economic Co-Operation and Development, 2000) [hereinafter OECD Model Commentary] ("Obviously, in determining what is meant by 'the nationals of a Contracting State' in relation to individuals, reference must be made to the sense in which the term is usually employed and each State's particular *rules on the acquiring or loss of nationality*." (emphasis added)). Indeed, the drafters of the commentary apparently viewed this relationship between the term "national" and the countries' nationality laws as self-evident, stating that "[i]t was not judged necessary to include in the text of the Convention any more precise definition of nationality, nor did it seem indispensable to make any special comment on the meaning and application of the word." *Id*.

[268] *See supra* text accompanying note 256.

and reference to the ten-year period following the loss of citizenship makes clear that the term "citizen" is used in its nationality law sense.[269]

One definitional provision of the U.S. Model Treaty potentially supports an interpretation of the term "citizen" in the saving clause to include a person who has lost citizenship under the nationality law but is treated as a tax citizen under the AJCA provisions. The catch-all provision of the general definitions article provides that "unless the context otherwise requires," a term not otherwise defined in the treaty should "have the meaning which it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State."[270]

This provision implies that the term "citizen" in the saving clause, because it is not otherwise explicitly defined in the treaty, should have the same meaning it has under the laws of the United States, with the U.S. tax law's definition taking precedence. Under such a reading, an individual who is treated as a citizen for tax purposes under the new AJCA provision would be a citizen within the meaning of the saving clause, and the United States would retain unlimited taxing jurisdiction over the individual.

The principal shortcoming of this argument is that the treaty looks to the domestic law definition only if the context does not otherwise require.[271] In the case of the citizenship definition, the context does otherwise require. As discussed above, both the treaty and the technical explanation repeatedly use the terms "citizen" and "citizenship" by reference to the nationality law. Moreover, the special "former citizen" definition in the saving clause is understandable only if citizenship is understood in the nationality law sense.

In addition, the Treasury Department's technical explanation to this catch-all provision states that the domestic law's definition of an otherwise undefined term is not applicable if it "lead[s] to results that are at variance with the intentions of the negotiators and of the Contracting States when the treaty was negotiated and ratified."[272] Given the reluctance of most countries to recognize United States taxing jurisdiction over actual citizens residing outside the United States, it is extremely unlikely that a treaty partner's negotiators would have intended that the U.S. could stretch its taxing jurisdiction under the treaty to cover the worldwide income of individuals who are no longer U.S. citizens under the nationality law. Indeed,

[269] Indeed, at the time the U.S. Model Treaty was developed and the actual treaties based on it were negotiated, there was no special tax definition of citizenship under the Internal Revenue Code. The treaty negotiators most likely did not contemplate the possibility that "citizen" could refer to anything other than its commonly understood nationality law status.

[270] U.S. Model Treaty, *supra* note 250, art. 3, para. 2.

[271] *See id.*

[272] U.S. Model Technical Explanation, *supra* note 250, at 12.

by including a narrow expansion of the saving clause to permit taxation of tax-motivated "former citizens" for ten years under the pre-AJCA version of section 877,[273] negotiators implicitly agreed that the United States could not unilaterally effect a significant jurisdictional expansion over the worldwide income of a broader class of former citizens in perpetuity.

A final consideration involves the potential use of the special "former citizen" language of the saving clause as a basis itself for taxing a former citizen (in the nationality law sense) who is a resident of the other country. The AJCA provisions, by treating the person as a citizen, cause the individual to be taxable on worldwide income. This goes far beyond the limited jurisdiction contemplated by the special "former citizen" treaty language. That special provision, drafted in the context of pre-AJCA section 877, was intended merely to allow the United States to impose a slightly expanded version of source taxation to the tax-motivated former citizen than would otherwise apply to a nonresident alien.[274] This narrow purpose of section 877 is made clear in the Treasury Department's Technical Explanation to the U.S. Model Treaty,[275] as well as the technical explanations to actual tax treaties that contain the provision.[276] Accordingly, if the United States were to attempt to bootstrap worldwide taxation using this narrow "former citizen" provision of the saving clause, the other treaty country could be expected to object.

2. *Potential Treaty Override*

Before concluding that this analysis would permit a former citizen (in a nationality law sense) who resides in a treaty country to invoke the benefits of the treaty to prevent the United States from applying the new AJCA provisions, it is important to consider the relationship between tax treaties and statutes. Once a tax treaty enters into force, it constitutes the "supreme Law of the Land"[277] under the Constitution, along with the Internal Revenue Code and other federal statutes.[278]

Given the equal constitutional weight of treaties and statutes,[279] courts have adopted several principles to determine whether a taxpayer is subject to tax when a tax code provision imposes tax but a treaty purports to call

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[273] *See supra* notes 256–258 and accompanying text.

[274] Most notably, under the alternative regime of section 877, the former citizen is taxable on gain from the sale of stock in a U.S. domestic corporation, which ordinarily is not taxable when derived from a nonresident alien. *See* I.R.C. § 877(b). *See generally supra* notes 14–18 and accompanying text.

[275] *See* U.S. Model Technical Explanation, *supra* note 250, at 6.

[276] *See, e.g.*, Dep't of Treasury, Technical Explanation to the U.S.-U.K. Income Tax Treaty 6 (Mar. 5, 2003), http://www.ustreas.gov/offices/tax-policy/library/teus-uk.pdf.

[277] U.S. Const. art. VI.

[278] *Id.*

[279] *See* I.R.C. §§ 894(a), 7852(d)(1) (2005).

off taxation.[280] As a threshold matter, courts will attempt to interpret the treaty and the statute in a way that avoids a conflict between the two.[281] If a nonconflicting interpretation is not possible, courts generally give precedence to the provision that was adopted later in time.[282] Thus, it is possible that Congress can enact a statutory provision that overrides a provision of a preexisting bilateral tax treaty. However, given the significance of the United States unilaterally overriding its international treaty obligations,[283] courts adopt such an interpretation only if Congress expresses a clear intent that the statute override a preexisting treaty provision.[284]

In the present context, if the treaty saving clause does not apply, then the statute cannot be read consistently with the treaty—the treaty would prevent the United States from taxing the individual, whereas the ACJA provisions would purport to impose tax. Accordingly, the relevant question is whether Congress, in enacting AJCA, expressed a clear intention that the statute override preexisting treaties, such as those based on the U.S. Model Treaty. In contrast to the 1996 amendments to section 877, wherein the committee reports explicitly discussed the extent to which a treaty override was intended,[285] neither the statutory language of section 877 nor the relevant committee reports discuss this issue. Indeed, there is no indication that Congress considered whether the new statutory provisions might lead to a treaty conflict. Moreover, the JCT Report, upon which the legislation was based, did not address the potential treaty conflict that could result, nor did it indicate that the JCT recommendation was intended to override any treaty obligations. Given this lack of congressional intent to override a treaty, it is likely that a court would follow the jurisdictional limitations

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[280] *See* Federal Income Tax Project, American Law Institute, International Aspects of United States Income Taxation II: Proposals on United States Income Tax Treaties 64 (1992). For a more detailed explanation of these principles, including illustrations of their application to specific treaty provisions, see Joel D. Kuntz & Robert J. Peroni, U.S. International Taxation ¶ 4.03 (Warren, Gorham & Lamont 1992).

[281] *See* American Law Institute, *supra* note 280, at 64.

[282] *Id*.

[283] Because a treaty override may be considered a breach of the tax treaty, the treaty partner may have remedies available to it under international law, including the possibility of terminating or suspending the treaty in the case of a material breach. *See generally* Organisation for Economic Co-Operation and Development, Committee on Fiscal Affairs, Tax Treaty Override, R(8)-10 (2000), *reprinted in* Model Tax Convention on Income and on Capital (Organisation for Economic Co-Operation and Development, 2000); *see also* American Law Institute, *supra* note 280, at 73–77 (recommending that "the United States should not adopt a policy of implementing legislation in a manner that would constitute a breach of its obligations under income tax treaties").

[284] *See* Kuntz & Peroni, *supra* note 280, ¶ 4.03. For a list of several occasions in the past thirty years in which Congress has overridden tax treaty provisions, see Infanti, *supra* note 279, at 682–83; *cf.* Avi-Yonah, *supra* note 73, at 493–96 (arguing that several recent congressional treaty overrides were justified due to the excessively slow pace of treaty negotiations).

[285] The 1996 conference report contained an unusual directive that 1996 legislative changes would override then-existing treaties for only ten years, at which time any then-existing treaties that had not yet been renegotiated would no longer be overridden. *See* H.R. Rep. No. 104-738, at 329 (1996) (Conf. Rep.).

imposed by the treaty, thereby precluding the application of the AJCA special tax citizenship definitions in the context discussed above.[286]

B. Undermining Respect for International Law

By violating customary international law jurisdictional principles, the AJCA tax citizenship definitions might undermine respect among other countries for international law, particularly in the tax context. The United States depends on other countries' general adherence to the principles of international law. To the extent that other countries no longer feel compelled to comply with these standards, or seek to retaliate against United States companies or individuals in response to the United States' perceived overreaching,[287] U.S. interests might suffer.

Justice Scalia has noted the importance of prescriptive comity, whereby sovereign nations afford each other respect by limiting the reach of their laws.[288] Under this principle, U.S. interests might be better served if Congress refrained from prescribing laws that could be perceived as unreasonable, even if jurisdiction technically exists under customary international law.[289] Obviously, this argument regarding the potential adverse impact of overbroad legislation is even stronger when international law jurisdiction is lacking, as in the present case.

C. Enforcement Difficulties

A final concern is extremely important from a practical perspective. Even if the AJCA provisions are upheld as constitutional, they will probably yield little revenue and be extremely difficult to enforce. Congress has imposed various versions of section 877 (and the related estate and gift tax provisions) for almost forty years, and the IRS has had significant enforcement problems since the outset.[290] Although the issue occupied significant congressional time in the mid-1990s, the resulting modifications in

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[286] A similar rationale would preclude the IRS from applying post-AJCA section 877 to a person whose loss of citizenship is respected for tax purposes. *See supra* note 260.

[287] *Cf.* Christopher J. Lord, Note, *Stapled Stock and I.R.S. Sec. 269B: Ill-Conceived Change in the Rules of International Tax Jurisdiction*, 71 CORNELL L. REV. 1066, 1089–90 (1986) (observing that other countries might perceive the U.S. staple stock regime to be an overbroad taxation of foreign corporations and might therefore retaliate against U.S. corporations). It is possible that such retaliation might itself violate customary international law. *See supra* note 155.

[288] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

[289] *See id.* at 818 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987)).

[290] *See* 2003 JCT REPORT, *supra* note 19, at 83–102 (summarizing enforcement problems with 1996 legislation); Kirsch, *supra* note 12, at 881–83 (summarizing enforcement problems with original 1966 legislation).

1996 had only limited effect and created additional administrative problems of their own.[291]

While some aspects of the AJCA—particularly the elimination of the previously existing ruling process and its subjective inquiry into motivation—may alleviate administrative difficulties, the AJCA provisions creating special definitions of citizenship for tax purposes will create additional enforcement difficulties. Prior to the enactment of the AJCA, section 877 focused on expanding the definition of U.S. source income—in particular, focusing on gains from the sale of domestic U.S. corporations. While that expansion of the tax base might have created some enforcement problems, at least it focused on property with a U.S. connection, thereby creating a possibility that the IRS could enforce the provision. In contrast, the new provisions, by treating the individual as a citizen taxable on her worldwide income, put the IRS in an almost impossible enforcement position.[292] Problems could arise both with respect to the IRS receiving information regarding the individual and her potential tax liability, and with respect to enforcing the law if the individual is determined to have tax liability.[293]

Regarding the information collection problem, the individuals to whom the AJCA tax citizenship definitions apply might have little future contact with the United States. Whereas a person subject to section 877(g) will at least have thirty-one days of contact, a person subject to section 7701(n) might have none, particularly if that person has already notified the Department of State of her citizenship loss but has failed to notify the IRS. Given the admitted difficulties the IRS has had in enforcing worldwide taxation against continuing U.S. citizens who happened to live abroad,[294] the chance of collecting useful information with respect to the new class of tax citizens is slim. The United States does not have unilateral authority to conduct tax investigations overseas.[295] Even if the individual resides in a country with which the United States has a tax treaty that gener-

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[291] *See* 2003 JCT Report, *supra* note 19, at 83–137 (discussing administrative and enforcement problems of 1996 legislation).

[292] Even the 2003 JCT Report, upon which the AJCA provisions were based, acknowledged that "with the person, property, and income outside of the United States, effective administration of" a rule that indefinitely taxes a nonresident noncitizen on worldwide income "may be impossible." 2003 JCT Report, *supra* note 19, at 109.

[293] As prominent commentators have noted, an analysis of jurisdiction to prescribe "is incomplete without also taking into account the limits on jurisdiction to adjudicate and enforce. A country cannot enforce an income tax in the absence of information and the ability to compel compliance." Shay et al., *supra* note 87, at 116; *see also* Isenbergh, *supra* note 160, ¶ 1.5.2; Hellerstein, *supra* note 73, at 13 (discussing theoretical and practical limitations on jurisdiction to enforce tax collection); Martin Norr, *Jurisdiction to Tax and International Income*, 17 Tax L. Rev. 431, 432 (1962) ("Tax jurisdiction in practice is a different matter from tax jurisdiction in theory. However lawful an assertion of tax jurisdiction may be, power to make the assertion effective is nevertheless required.").

[294] *See* Treasury Report, *supra* note 46, para. 27.

[295] *See Authority of the Federal Bureau Of Investigations*, *supra* note 200, at 165 (observing that the United States cannot mount tax investigations in another state's territory except under the terms of a treaty or with the consent of the other country).

ally provides for information sharing, the other country is unlikely to provide the IRS with information under the treaty regarding the individual.[296]

Even if the IRS becomes aware of a taxable event regarding a tax citizen—for example, if a well-known person who has surrendered citizenship (in the nationality law sense) subsequently dies, the death might be reported in the press—the IRS will have little ability to collect any taxes. In particular, if the individual has no ongoing connection to the United States, the United States might have neither *in personam* nor *in rem* jurisdiction with respect to collection attempts.[297] Moreover, under longstanding principles of international law, the country in which the individual resides generally is not required to recognize or enforce judgments for the collection of taxes rendered by a U.S. court.[298]

Thus, to the extent that Congress was attempting to improve compliance with respect to citizens and long-term residents who lose their status, these AJCA provisions will prove disappointing. Of course, it is possible that revenue collection was not Congress's only concern. After all, relatively few individuals expatriate each year, and Congress's prior sojourns in this area have been fraught with symbolic political concerns.[299] However, to the extent that Congress sought to make a symbolic statement in the AJCA by purporting to heighten the tax consequences of renouncing citizenship, its approach might have backfired. In particular, to the extent potential expatriates perceive that the new provisions are unenforceable, they might be encouraged to expatriate. Moreover, to the extent the general public perceives that Congress has enacted unenforceable legislation, the public's respect for the tax system, and desire to comply, might be undermined.[300]

V. Conclusion

Under U.S. tax law, significant tax burdens are imposed on U.S. citizens. The worldwide taxation of U.S. citizens traditionally has been justified

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[296] *See supra* notes 249–276 and accompanying text.

[297] This potential lack of court jurisdiction to adjudicate should be distinguished from the lack of legislative jurisdiction to prescribe, which is the focus of this Article. *See* Restatement (Third) of the Foreign Relations Law of the United States pt. IV, intro. note; *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813–14 (1993) (Scalia, J., dissenting).

[298] *See* Restatement (Third) of the Foreign Relations Law of the United States § 483 (1987). Although the foreign country might have discretion to enforce a U.S. court judgment regarding collection, *see id.* cmt. a, given the AJCA provisions' jurisdictional overreach, it is highly doubtful that a foreign country would exercise such discretion.

[299] *See generally* Kirsch, *supra* note 12 (discussing symbolic aspects of 1996 legislation).

[300] *Id.* at 917 (citing studies regarding social norms and tax compliance). These potential problems illustrate the observation by a commentator in another context that a "nation has little to gain from attempting to levy on property, taxpayers, or activities that are beyond the limits of the nation's enforcement power." Robert L. Palmer, *Toward Unilateral Coherence in Determining Jurisdiction to Tax Income*, 30 Harv. Int'l L.J. 1, 4 (1989).

based on the important link between the rights and obligations of citizenship. Merely calling a person a citizen for tax purposes does not necessarily justify imposing the same significant tax consequences that attach to "real" citizens.

This Article demonstrates the significant problems that arise under customary international law and the U.S. Constitution when the term "citizen" is separated from its conceptual underpinnings. In particular, in certain situations the treatment of an individual as a citizen for tax purposes after she has lost citizenship for nationality law purposes violates the prescriptive jurisdictional limitations of customary international law and raises significant questions regarding the statute's constitutionality, both with respect to Congress's Article I power to enact the tax and with respect to Fifth Amendment due process. Even to the extent the provisions are constitutional, they might create conflicts with U.S. tax treaty partners and undermine respect for international law in the tax field. Moreover, they ultimately may be of little practical benefit to the United States, given the significant enforcement difficulties they create.

Assuming that Congress continues to believe that renunciation of citizenship necessitates a targeted response,[301] Congress should reconsider the special tax definitions of citizenship enacted by AJCA. To the extent Congress is concerned with the Department of State's administrative procedures and evidentiary standards for determining when citizenship is lost, it should consider the possibility of revising relevant aspects of the Immigration and Nationality Act.[302] To the extent it is concerned with tax-motivated former citizens re-entering the United States for significant periods, it should consider amending relevant 1996 immigration law provisions to make them properly targeted and enforceable.[303] Regardless of which, if any, alternative approaches are enacted to address tax-motivated expatriation,[304] the definition of citizenship in regards to tax should be returned to its historic roots in the nationality law.

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[301] While it is unlikely that any significant number of elected officials would take the position that the tax code should not contain special rules targeting tax-motivated expatriates, well-reasoned arguments for that position have been advocated by Professor Alice Abreu. *See* Alice G. Abreu, *Taxing Exits*, 29 U.C. DAVIS L. REV. 1087, 1158 (1996) (arguing that individuals should be able to weigh the value of U.S. citizenship against the tax benefits of expatriation and act accordingly).

[302] For example, in 1995 the Clinton administration proposed a Department of State-initiated Consular Efficiency Act, which would have provided that an individual could lose citizenship under the nationality laws only by taking an oath of renunciation before a U.S. consular official, with loss of citizenship effective as of the date of the oath. *See* TREASURY REPORT, *supra* note 46, at 35.

[303] The 1996 immigration provisions (the Reed Amendment) are summarized *supra* note 62; *see also* Kirsch, *supra* note 12, at 935–36 (outlining a proposal for narrowly targeting the Reed Amendment in an enforceable way).

[304] The other significant proposal frequently considered in this area involves a mark-to-market approach, where an expatriate is treated for tax purposes as having sold all her assets on the date of her citizenship loss and, thereafter, she is treated as any other nonresident alien. *See also* Andrew Walker, *The Tax Regime for Individual Expatriates: Whom to Im-*

The analysis set forth in this Article also has broader implication beyond its application to the new AJCA provisions. In a world of increased individual mobility, Congress may have future occasion to consider the extent to which it will assert taxing jurisdiction over individuals with only limited connections to the United States. The constitutional and international law limitations addressed herein deserve attention in any such legislative action.

press?, 58 TAX LAW. 555, 562 (2005) (proposing a departure wealth tax based on the estate tax). *See generally* Kirsch, *supra* note 12, at 883–86 (describing mark-to-market proposals).