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Western Corporate Fiscal Citizenship in the 21st Century

Alex Freund[*]

Abstract

For the Western world, the challenges of the 21st Century are numerous, from climate change's effects on food production and coastal cities to underfunded social safety nets to automation's impact on the middle class. To handle such costly problems, government intervention will be required. Government intervention, however, always comes at a cost to either individuals or corporations. To determine who should bear these costs, scholars and experts should turn to notions of fiscal citizenship – the social contract between the state and private parties through taxation and the provision of goods and services. By applying principles of individual fiscal citizenship to corporations, which have traditionally not been included in notions of fiscal citizenship, a strong case emerges for corporations to bear the costs of these impending 21st century harms.

[*] J.D., Northwestern Pritzker School of Law, 2020. The author would like to thank the Northwestern Journal of International Law and Business editorial staff for helping refine this Note, Executive Director of the American Bar Foundation & Research Professor Ajay Mehrotra for inspiring me to think about questions of fiscal citizenship, and, most importantly, my father, David Freund, for sharing his love of taxation with me and providing unfettered support in all endeavors.

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I. INTRODUCTION

In the foreseeable future, global economic, environmental, and social conditions will require expensive private and public solutions. With the rise of automation, global warming, and underfunded social safety nets among these conditions, it is likely that national governments will need to step in to cover the scope of the potential economic harm. Of course, government intervention always comes at a cost. Either individuals or corporations will need to fund the future liabilities incurred to abate these twenty-first century harms.

As a part of the post-World War II global order, taxation has become the "lifeblood" of the modern liberal state.[1] Consequently, the relationship between the public (both as individuals and business entities) and a state's need for revenue, also known as fiscal citizenship, has become of paramount importance.[2] Up to this point, existing literature on fiscal citizenship has focused on the "benefit theory" of taxation with respect to individuals, delineating the obligations that individuals have to bolster the state's tax receipts in exchange for rights against specified harms.[3] When fiscal citizenship is strong, taxpayers adhere to the taxation status quo or demand increased taxes and view the state as a legitimate actor raising funds for the general welfare.[4] When fiscal citizenship is weak, taxpayers chastise taxation as oppressive and demand reduced tax liabilities, undermining the political and economic stability of the post-war liberal state, as government expenditure begin to exceed revenues.[5]

To some degree, there exists a cohesive, albeit nuanced, narrative of U.S. fiscal citizenship, documenting its decline from the early 1940s to the present. Little literature has attempted to address the scope of fiscal citizenship in Europe, the other pillar of post-war liberalism outside of North America. With an increasingly globalized economy, country-by-country interdependence has increased, and fiscal citizenship needs to be

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1 Ajay K. Mehrotra, *Fiscal Forearms: Taxation as the Lifeblood of the Modern Fiscal State, in* THE MANY HANDS OF THE STATE: THEORIZING THE COMPLEXITIES OF POLITICAL AUTHORITY AND SOCIAL CONTROL 284, 285(Kimberly Morgan & Ann Orloff eds., 2017).

2 *See Id.*

3 *See generally* Graeme S. Cooper, *The Benefit Theory of Taxation*, 11 AUSTL. TAX F. 397 (1994). The two modern theories of taxation are Erik Lindahl's "benefits theory," where taxpayers pay the state proportionately for the benefits that they receive, and Cecil Pigou's "ability to pay theory," where taxpayers pay the state based on the taxpayers' income. *Id.* at 441 & 418.

4 *See* Steven A. Bank & Kirk J. Stark, *War and Taxes*, 4 J. SCHOLARLY PERSP. i, xvii (2008). Strong fiscal citizenship does not necessitate the absence of hesitation in increasing tax liabilities, only the flexibility and openness to pursue such increases if either fiscally or morally necessary.

5 *See* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 4 (2004). Weak fiscal citizenship is frequently the manifestation of "everyday libertarianism," where an individual uses Kantian property rights to claim pre-tax income as wholly the individual's and taxation as a confiscatory act.

embraced on a multi-national level. Establishing a global framework for individual fiscal citizens, however, is only the starting — not focal — point of this paper. Using a comparative analysis, this paper intends on applying ideas of individual fiscal citizenship developed both in the United States and Europe to each region's respective corporate tax environment in order to determine how closely regional corporate fiscal citizenship mirrors regional individual fiscal citizenship.

By examining corporate fiscal citizenship, a relatively untouched area of the law through a benefits theory lens, this paper will use existing research on individual fiscal citizenship to create a basis for identifying what corporate fiscal citizenship looks like in both Europe and the United States. The purpose of this exercise is to identify what it means to be a good corporate fiscal citizen, irrespective of region, with respect to supplying national governments with sufficient receipts to neutralize the previously identified twenty-first century negative externalities in exchange for the right to cause those externalities.

II. THE FOUNDATIONS OF FISCAL CITIZENSHIP

A. Social Contract – Rights and Obligations

Fundamentally, fiscal citizenship is a social contract between the state and a class of actors whereby rights are exchanged for obligation in the form of tax liabilities. The scope of fiscal citizenship can be as broad and ambiguous as United States fiscal citizenship or as narrow as the fiscal citizenship of refugees in post-Syrian refugee crisis Germany.[6] The social contracts with both subjects, while different in scope, have utility for the tax policy maker. A thorough analysis allows policy experts to weigh each class of actors' state-granted rights against the class's obligation to the state, assessing whether the class has a sufficient obligation and if the class is adequately meeting that obligation. In some instances, the state may even determine that the class of actors has a satisfactory obligation but has not received comparable rights and that those rights must be expanded.[7] If an imbalance between a class's obligation and rights exists and goes

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[6] From 2014 through 2017, 1,400,000 immigrants applied for asylum in Germany, primarily from Syria, Afghanistan, and Iraq and 800,000 applications were accepted. *See* Valentina Romei, Billy Ehrenberg-Shannon, Haluka Maier-Borst & Guy Chazan, *How well Have Germany's Refugees Integrated?*, FIN. TIMES (Sept. 19, 2017), https://www.ft.com/content/e1c069e0-872f-11e7-bf50-e1c239b45787.

[7] *See* Lydia DePillis, *Changes to the Child Tax Credit: What it Means for Families*, CNN BUS. (Dec. 16, 2017, 12:50 PM), https://money.cnn.com/2017/12/16/news/economy/child-tax-credit/index.html. The 2017 Tax Cut and Jobs Act increased the Child Tax Credit from $1,000 to $2,000 without a related increase in taxes for the lower income brackets that can utilize the Child Tax Credit. Similarly, the standard deduction was raised to $12,000 for individuals and $24,000 for joint filers, reducing the taxable income of these households without increasing the rates on the remaining taxable income and consequently the total tax liability.

unaddressed for too long, the state risks undermining the credibility of its fiscal state and promoting the lynchpin of poor fiscal citizenship, tax avoidance.[8]

One important component of the modern American fiscal state and many of its European peers is that they enforce their social contract through inexact withholdings and subsequent tax filings.[9] In the United States, most Americans must fill out a Form 1040 accounting for their taxable income during the previous year by mid-April of every year.[10] Some spectators have directly advocated for this mass-income tax regime, outlining the virtues of both the taxpayer and the collector diligently reviewing the obligation collection portion of their contract.[11] Of course, not all countries, including several in Europe (most notably Germany and the United Kingdom), embrace mass-income return filling. Regardless, while these countries may not have adopted a mass-income tax regime, at least some individual taxpayers are required to file tax returns.[12] On the corporate side, U.S. corporations file Form 1120, and all European corporations file proper forms with respect to their country of incorporation.

B. Tax Law and Policy of the Liberal State

German sociologist Max Weber, who theorized about modernity and rationalism, wrote that "a stable system of *taxation* is the precondition for the permanent existence of bureaucratic administration."[13] With the rise of progressive individual and corporate taxation to fund World War I, the subsequent administrative expansion in the United States, and the rebuilding efforts in Europe following World War II, the twentieth century experienced a drastic need for increased state revenues and the tools to

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8 *Do Higher Taxes Encourage Tax Avoidance?*, FOX BUS. (May 13, 2011), https://www.foxbusiness.com/features/do-higher-taxes-encourage-tax-avoidance.

9 *See What other countries use return-free tax filing?*, TAX POL. CTR., https://www.taxpolicycenter.org/briefing-book/what-other-countries-use-return-free-tax-filing (last visited Nov. 24, 2019).

10 Rocky Mengle, *Tax Day 2019: When's the Last Day to File Taxes?*, KIPLINGER (Apr. 11, 2019), https://www.kiplinger.com/article/taxes/T056-C005-S001-tax-day-2019-when-s-the-last-day-to-file-taxes.html.

11 *See* LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX, 2-3 (2013). These virtues preclude the values of the fourteen-line postcard-sized tax returns that were called for leading up to the 2017 Tax Cuts and Jobs Act. The tax reform, however, eventually resulted in one postcard-sized return with six supplemental worksheets. *See also* Robert C. Williams, *Ryan's Deceptively Simple Promise of Postcard Tax Filing*, TAX POL'Y CTR. (Jun. 27, 2016), https://www.taxpolicycenter.org/taxvox/ryans-deceptively-simple-promise-postcard-tax-filing.

12 *What Other Countries Use Return-Free Tax Filing?*, TAX POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/what-other-countries-use-return-free-tax-filing (last visited Sept. 28, 2019).

13 MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 208 (H. H. Gerth & C. Wright Mills eds., 1946)(emphasis in original).

acquire such revenues.

As the United States boosted its social programs and implemented Franklin D. Roosevelt's Social Security in 1935, Johnson's "Great Society" programs like Medicaid in 1965 and Medicare in 1966, and Nixon's Environmental Protection Agency in 1970, the welfare state and the public's dependence on it expanded. Hand-in-hand with public dependence came popularity across ideological lines, instituting a lock-in effect where each program and institution became increasingly salient in the taxpayer's mind with every passing year.[14] Across the Atlantic, France instituted a public health insurance program in 1945, and the United Kingdom followed by establishing the National Health Service and universal healthcare in 1948. Across Europe, a similar phenomenon occurred over the next twenty to thirty years, creating the political economy of the welfare state.[15] While wildly popular, these programs aroused tensions within their societies, causing a "welfare-state backlash" that persists until the present and makes the funding of social programs much more politically capital intensive.[16]

Beyond balancing its distribution of obligations and rights with respect to modern welfare state, new global problems challenge tax policy experts across Europe and the United States. Climate change alone is estimated to cause $16 trillion in damages with the vast majority of the monetary harm falling on the United States, Europe, and other developed nations with great wealth and high physical asset prices.[17] Automation poses a serious threat to social welfare programs already financially strained by accumulated welfare-backlash: leading consulting firm McKinsey has projected that one-third of U.S. workers could face technological unemployment by 2030 with a similar trend worldwide.[18] Additionally, massive corporations like Walmart have sustained low wages with the intention of its low-income employees getting taxpayer subsidies from social programs.[19]

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[14] According to an April 2015 poll conducted by the Kaiser Family Foundation, 83%, 77%, and 63% of respondents believed that social security, Medicare, and Medicaid, respectively, were "very important." Mira Norton, Bianca DiJulio & Mollyann Brodie, *Medicare and Medicaid at 50*, KAISER FAMILY FOUNDATION (July 17, 2015), https://www.kff.org/medicaid/poll-finding/medicare-and-medicaid-at-50/. Even low tax and budget slashing Republicans have become wary of attacking social security, Medicare, and Medicaid. *See* Glenn Kessler, *Are Republicans Seeking to 'Get Rid of Medicare, Medicaid and Social Security'*?, WASH. POST (Oct. 23, 2018), https://www.washingtonpost.com/politics/2018/10/23/are-republicans-seeking-get-rid-medicare-medicaid-social-security/.

[15] Eleanor Beardsley, *Can the European Welfare State Survive?*, NPR (July 14, 2010), https://www.npr.org/templates/story/story.php?storyId=128485416.

[16] Douglas A. Hibbs & Henrik Jess Madsen, *Public Reactions to the Growth of Taxation and Government Expenditure*, 33 WORLD POL. 413, 413 (1981).

[17] *The Costs of Climate Inaction*, NATURE (Sept. 25, 2018), https://www.nature.com/articles/d41586-018-06827-x.

[18] *See* Thomas Franck, *McKinsey: One-third of US Workers Could be Jobless by 2030 Due to Automation*, CNBC (Nov. 29, 2017), https://www.cnbc.com/2017/11/29/one-third-of-us-workers-could-be-jobless-by-2030-due-to-automation.html.

[19] AMERICANS FOR TAX FAIRNESS, WALMART ON TAX DAY: HOW TAXPAYERS SUBSIDIZE

1. Obligations: Raising Revenue

With the understanding that tax law and policy in large part revolves around funding the modern welfare state and will certainly be necessary to mitigate or compensate for harm from automation, global warming, and underfunded social programs, it is important to understand the mechanics of raising revenue. For individuals, three types of taxes usually apply: income, property, and consumption. Income is usually divided into three categories: first, income derived from an individual's capital; second, income earned from an individual's wages or other sources; third, income produced by corporations. These three categories frequently have differing tax rates, sometimes with and other times without elements of progressive taxation. Property taxes might be collected locally or nationally depending on the country. As for consumption taxes, they are gathered locally in the United States and nationally through a value-added tax ("VAT") in Europe.

Below, Table 1 documents the taxes collected by the United States, Germany, Sweden, France, and the Organisation for Economic Co-operation and Development ("OECD") average along with various other developed nations.[20] Notably, the United States receives very little revenue from consumption taxes.[21] A lack of VAT taxes accounts for almost all the difference between the United States' 25.9% tax to GDP ratio and the 34.2% OECD average tax to GDP ratio (an 8.3% differential). With respect to the sum of "personal income taxes" and "corporate income taxes" in terms of GDP percentages, the United States collects a comparable percentage to Germany, Sweden, France, and the OECD average. With the enactment of the 2017 Tax Cut and Jobs Act ("TCJA"), which lowered the corporate tax rate to 21% and gave pass-through entities a 20% deduction on qualified business income ("QBI") through section 199A of the Internal Revenue Code, new data will likely lower U.S. corporate income tax receipts that further lag behind the OECD average.[22]

AMERICA'S BIGGEST EMPLOYER AND RICHEST FAMILY 3-4 (2014), https://americansfortaxfairness.org/files/Walmart-on-Tax-Day-Americans-for-Tax-Fairness-11.pdf. Coupled with stagnant real wages, low-skilled employees face dire circumstances with little leverage. Drew Desilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RES. CTR. (Aug. 7, 2018), http://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/.

[20] The Organisation for Economic Co-operation and Development ("OECD") is an intergovernmental economic organization with 36 member countries that attempts to establish international economic norms through evidence-based solutions. *Who We Are*, OECD, https://www.oecd.org/about/(last visited Nov. 3, 2019).

[21] *See Policy Basics: Where Do Federal Tax Revenues Come From?*, CTR. ON BUDGET & POL'Y PRIORITIES (Jun. 20, 2019), https://www.cbpp.org/research/federal-tax/policy-basics-where-do-federal-tax-revenues-come-from.

[22] Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13001(a) (2017); Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11011(a); Kate Davidson, *U.S. Tax Revenues Fall, Deficit Widens in Wake of New Tax Law*, WALL ST. J. (Feb. 13, 2019), https://www.wsj.com/articles/u-s-tax-revenue-declined-0-4-in-2018-11550084426.

Table 1. International Comparison of Taxes as a % of GDP, 2014[23]

	Mexico	Korea	USA	Canada	Japan	OECD Average	Germany	Sweden	France
Total Taxes/ % GDP	15.2	24.6	25.9	31.2	32	34.2	36.6	42.8	45.5
Income, Profits Taxes*	5.7	7.2	12.3	15	10.2	11.5	11.4	14.9	10.8
Personal Income Taxes	3	4	10.2	11.3	6.1	8.4	9.6	12.2	8.5
Corporate Income Taxes	2.6	3.2	2.2	3.3	4.1	2.8	1.7	2.7	2.3
Consumption Taxes	5.4	7.4	4.5	7.2	6.3	11	10.1	12.1	11
Value Added Taxes	3.9	4.2	0	4.2	3.9	6.8	7	9	6.9
Sales Taxes	0	0	2	0.1	0	0.1	0	0	0
Other^	1.5	3.2	2.5	2.9	2.4	4.1	3.1	3.1	4.1
Payroll and Workforce Taxes	0.4	0.1	0	0.6	0	0.4	0	4.5	1.6
Property Taxes	0.3	2.7	2.8	3.7	2.7	1.9	1	1.1	3.9
Social Security Contributions	3.1	6.6	6.2	4.7	12.7	9.1	13.9	9.9	17
Unallocable Taxes#	0.2	0.7	0	0	0.1	0.2	0	0	1.1

Even without a VAT tax and lower overall tax revenues as a percentage of GDP, the United States incurred a deficit no worse than Europe's worst offenders in 2017. As a percentage of GDP, the United States ran a 3.4% deficit.[24] In comparison, the United Kingdom ran a 3.6% deficit, France had a 2.7% deficit, and Spain held a 3.3% deficit.[25] Still, this performance leaves a great deal to be desired and stands in stark contrast with Germany, Switzerland, Norway, and Greenland, which all netted surpluses.[26] Given the United States' lower revenue as a percentage of GDP, this means that the United States runs a proportionately smaller welfare state and could see sizable surpluses if it retained the current size of its welfare state and matched its tax revenues with the OECD average.

Generally, a country running a deficit or surplus is not necessarily an indication of the public support for that country's government.[27] Conceptually, debt was created to foster growth and expand the buying power of an actor who lacked the current assets to make a purchase. In other words, debt is a growth vehicle. While countries can run surpluses by

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[23] Ajay K. Mehrotra, *T.S. Adams and the Beginning of the value-Added Tax*, N.Y.U. TAX POL'Y COLLOQUIUM 3 tbl.1 (Apr. 3, 2018), https://www.law.nyu.edu/sites/default/files/upload_documents/T.S.%20Adams%20and%20the%20Beginning%20of%20the%20Value-Added%20Tax%20-%20Mehrotra.pdf.

[24] *The World Factbook*, CIA, https://www.cia.gov/library/publications/the-world-factbook/fields/2222.html (last visited Nov. 10, 2018).

[25] *Id.*

[26] *Id.*

[27] *See* Andrew Kohut, *Debt and Deficit: A Public Opinion Dilemma*, PEW RES. CTR. (Jun. 14, 2012), https://www.people-press.org/2012/06/14/debt-and-deficit-a-public-opinion-dilemma/.

making revenues outstrip receipts, there may be an argument that those countries should be running deficits instead. In some cases, short-term deficits can allow for meaningful growth at a faster and more sustainable rate than the gains of reducing national debt with a surplus. At the same time, if a country is continually running deficits but has a stagnant growth pattern, it may face long-term fiscal problems. This is all to say that surplus and deficit figures should not be construed as an indicator of the overall financial stability of a country. Instead, the above surpluses and deficits should be read in conjunction with Table 1 in order to stroke the imagination of what adjusting specific mechanisms of a country's tax structure might do for its ability to meet its current receipts.

In large part, Europe has been able to meet its revenue needs and hold a comparably low corporate tax rate when compared to the pre-TCJA rate due to its VAT, which subsidized revenue shortfalls from lowering their corporate and individual rates. Noticeably, the United States does not have a VAT to subsidize the cutting of its corporate rate to 21% and its 199A deduction on QBI for pass-through entities.[28] For U.S. policy makers, this begs the question whether a VAT is necessary in the United States. If not, then either the welfare state has to be drastically reduced against public support, or new systems of taxation need to be implemented to stabilize the U.S. fiscal state.

In recent years, the United States has worked with its European partners, as part of the G20, and the OECD to address base erosion and profit sharing ("BEPS") schemes used by multinational entities to move revenue to low-tax jurisdictions and reduce their tax liabilities.[29] Some solutions to BEPS look like the Global Intangible Low-Taxed Income ("GILTI") and Base Erosion Anti-abuse Tax ("BEAT").[30] Other theorists have proposed reworking capital taxation and eliminating both corporate income, dividend, and other capital gains taxes with a flat 0.8% asset tax to capture 20% of the long-term appreciation of capital.[31] It is unclear to what extent these regimes would shore up the tax avoidance mechanisms of the present regime, but they nonetheless point to a field of innovative revenue raising solutions for the modern liberal state.

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[28] Tax Cuts and Jobs Act, *supra* note 22.

[29] *What is BEPS*, OECD, https://www.oecd.org/tax/beps/about/ (last visited Oct. 10, 2019).

[30] GILTI and BEAT establish new minimum taxes to capture (1) profit shifted to lower-taxed regimes through intellectual property and (2) related-party payments that are tantamount to aggressive profit sharing. BEAT alone is expected to raise $149.6 billion from 2018-2027. Martin A. Sullivan, *Economic Analysis: Can Marked-Up Services Skip the BEAT?*, TAX NOTES (Feb. 6, 2018), https://www.taxnotes.com/tax-reform/economic-analysis-can-marked-services-skip-beat.

[31] A flat capital tax on securities equivalent to 0.8% of security's value would theoretically make BEPS activity irrelevant, as the gains reaped from that activity should be reflected in the value of the corporation's underlying security. Mark P. Gergen, *How to Tax Capital*, 70 TAX L. REV. 1, 31 (2016).

Though, of course, as T.S. Adams suggests, it is possible to spoil the income tax system if those burdened with the obligation to pay do not see the goals of the system as legitimate.[32] Underlying all politically salient tax reform, individuals and corporate special interests compete to subdue the other. These powerful lobbies define what constitutes both a worthwhile reason to raise taxes and to lower them. In the United States, the TCJA highlights this tension.[33] Overall, in spite of any tension with respect to where national tax systems should go from here, there must lie at least some benefit for the taxpayer in this bargain with the state. Otherwise, a social contract would not have been entered.

2. Rights: Tax Benefits

Across Europe and the United States, various general tax benefits are conferred to individuals. To name a few, public healthcare, home buying subsidies, renewable energy subsidies, and mass transportation are prevalent in the twenty-first century.[34] For the average taxpayer, these benefits are easily understood and accessible rights that are the result of a social contract with the state. Not all individuals will utilize every right annually or even in the individual's lifetime, but they remain available options. Consequently, when the taxpayer considers his or her arrangement with the state, he or she must place a weight on the availability of all available rights. A taxpayer's value of rights is likely elastic with use, but in some instances, taxpayers might support provisions that are unlikely to ever benefit them directly.[35]

Still, subtler but equally significant benefits exist for individual taxpayers within a country's tax code. Even though a code section might

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[32] For a more fundamental understanding of the founding of the U.S. domestic and international tax system and one of its visionaries, T.S. Adams, *see* Mehrotra, *supra* note 23, at 2 & 19. *See also* Michael J. Graetz & Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 DUKE L.J. 1021, 1039 (1997).

[33] According to survey data from the Roper Center iPoll Databank at Cornell University, 54% of Americans stated that "reducing income taxes for all Americans" was "very important" to them but only 39% of respondents approved of the TCJA. *See* Karlyn Bowman, *Public Opinion on the Tax Cuts and Jobs Act of 2017*, TAX NOTES (Jul. 9, 2018), https://www.aei.org/wp-content/uploads/2018/08/Bowman-On-the-Margin-July-9-2018-1.pdf.

[34] *See, e.g.*, Erin Mundahl, *US Still Subsidizing Renewable Energy to the Tune of Nearly $7 Billion*, INSIDE SOURCES (Mar. 12, 2019), https://www.insidesources.com/us-still-subsidizing-renewable-energy-to-the-tune-of-nearly-7-billion/ (noting that in 2016, the U.S. government spent $14 billion on energy subsidies alone). After the Great Recession in 2008, the United States instituted a new homeowner tax credit that ended in 2010. Rickie Houston, *What Is the First-Time Home Buyer Credit? Does It Still Exist?*, SMART ASSET (Jan. 28, 2019), https://smartasset.com/taxes/first-time-homebuyer-tax-credit.

[35] *See, e.g., Gates Foundation Awards $14.5 Million for Global Healthcare Access*, PHILANTHROPY NEWS DIG. (Dec. 13, 2018), *https*://philanthropynewsdigest.org/news/gates-foundation-awards-14.5-million-for-global-healthcare-access (discussing the world' second richest person, Bill Gates, supporting access to public healthcare).

describe a class of eligible taxpayers, qualified but unsophisticated taxpayers are often de facto locked out of these benefits due to the code's complexity, negatively impacting public perception of the code's inclusivity and public support for the administrative regime. For instance, the U.S. Earned Income Tax Credit ("EITC") and charitable deduction provisions "encourage civic and political participation" by communicating that poor individuals, on one hand, ought to have a basic level of income and, on the other hand, rich individuals should not be punished by the tax code for transferring wealth to society's neediest.[36] These provisions are often misunderstood and distorted by the public, getting lost in the former's technical title and labeling the latter as a financially advantageous tax write-off for the rich.[37] These distortionary effects can play a major role in increasing and decreasing the demand to weaken, maintain, or bolster certain provisions in the code.

Beyond widely visible and rather obscure benefits, there exists a realm of proposed healthcare, education, and other fundamental benefits that has existed in Europe for several decades and has recently taken a foothold in the United States.[38] Some of these benefits overlap or expand on widely visible benefits like public education and public healthcare, but some are wholly unique. For example, several European countries have begun to pilot universal basic income programs–de facto negative income taxes.[39] Other proposed measures include renter's tax credits, retraining programs, and minimum elderly benefits.[40] While some of these ideas have existed

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[36] ZELENAK, *supra* note 11, at 68-70.

[37] The annual cost of the charitable giving tax deduction is approximately $60 billion with two-thirds of the rewards going to US households earning more than $200,000. In 2017, only 0.35% of the bottom 20% of Americans used the charitable giving tax deduction with most Americans in that tax bracket not able to file itemized deductions that exceed the $6,000 standard deduction. With a doubling of the standard deduction, the charitable giving tax deduction is even more inaccessible to low and middle-income households. Dan Kopf, *US tax reformers should get rid of the charitable deduction*, QUARTZ (Oct. 5, 2017), https://qz.com/1092737/us-tax-reformers-should-get-rid-of-the-charitable-deduction-too-bad-they-wont/.

[38] In 2017, New York established the Excelsior Scholarship for qualified low-income residents to receive free tuition at New York community colleges. *See* Ashley A. Smith, *Free Impact on N.Y. Community Colleges*, INSIDE HIGHER ED (Oct. 13, 2017), https://www.insidehighered.com/news/2017/10/13/impact-new-yorks-free-tuition-program-two-community-colleges; Ashley A. Smith, *Tens of Thousands of Adults Line Up for Free College in Tennessee*, INSIDE HIGHER ED (Aug. 24, 2018), https://www.insidehighered.com/news/2018/08/24/tennessee-sees-thousands-apply-tuition-free-adult-plan (Tennessee provides tuition- free community college education for qualifying adults).

[39] Tracy Brown Hamilton, *The Netherlands' Upcoming Money-for-Nothing Experiment*, THE ATLANTIC (Jun. 21, 2016), www.theatlantic.com/business/archive/2016/06/netherlands-utrecht-universal-basic-income-experiment/487883/. *See also* A.T.G., *A Negative Income Tax in The Netherlands? A General and Emancipatory Point of View*, 18 J. ECON. STUD. 105 (1991); Nicole E.M. de Jager, et al., *A Negative Income Tax in a Mini-Welfare State: A Simulation Exercise With MIMIC*, 18 J. OF POL. MODELING 223 (1996).

[40] In 2018, U.S. Senator Kamala Harris proposed a tax credit for renters earning below

since at least the 1960s, they have come to the forefront with increasing Western inequality.[41]

On the corporate side, where taxpayers are more sophisticated, there exists a wide array of benefits that are guaranteed under the corporate tax regime. In the U.S. code, for instance, sections 351 and 368 allow taxpayers to change the form but not the substance of their capital in either the formation or reorganization of a corporation without incurring tax consequences.[42] While these provisions are likely to benefit the newly founded corporations or the highly complex ones, other provisions assist business entities with statuses somewhere in between. Section 1012 promotes the investment in small business stock through capital gain exclusion from gross income, nudging capital flows away from the long-established and the middle market corporations into the mom and pop sector.[43]

However, the conceptualization of this benefit structure from the ground up is no more than a useless theoretical exercise that does not help further the understanding of the social contract entered between the taxpayer and the government. Under the status quo, the benefits theory largely ignores the lock-in effect, the idea that tax policy is path-dependent and the longer a provision or rate exists the more likely that this provision or rate will endure.[44] Accepting the lock-in effect, the new status quo supposes that the current benefits are the result of a bargain where consideration and mutual assent have already been achieved. For obligations or rights to change, a new contract must be formed with the

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$100,000 annually and spending more than 30 percent of their income on rent and utilities. In Europe, Sweden uses a 0.3% payroll tax to fund "Job Security Councils" that provides transition services to "redundant" employees. *See* Thomas K. Grose, *The Worker Retraining Challenge*, U.S. NEWS & WORLD REP. (Feb. 6, 2018), https://www.usnews.com/news/best-countries/articles/2018-02-06/what-sweden-can-teach-the-world-about-worker-retraining.

[41] The OECD measured the top earning decile's and the bottom earning decile's average annual percentage change in real income among its member states from the mid-1980s to the late-2000s. The United States had 0.1% growth in the bottom decile and 1.5% in the top decile. Sweden, Italy, Germany, and the United Kingdom also all had greater growth in the top decile, pushing the OECD difference between top and bottom decile growth to 0.6%. *An Overview of Growing Income Inequality in OECD Countries: Main Findings*, OECD 23 (2011), https://www.oecd.org/els/soc/49499779.pdf.

[42] Section 351 of the Internal Revenue Code exempts taxpayers from taxation for contributions of capital to a corporation in exchange for stock if the taxpayer controls 80% of the voting and non-voting stock immediately after. Section 368(a)(1)(A)-(G) provides seven types of tax-free reorganizations. *See* I.R.C. §§ 351, 368 (LEXIS current through Pub. L. 116-56).

[43] *See Id.* at § 1012, et seq. (LEXIS current through Pub. L. 116-63).

[44] An example of lock-in is the failure of the United States to adopt the VAT that every other industrialized nation in the world uses, despite the intellectual foundation of the VAT being laid in the United States. The eschewing of the VAT in the Revenue Act of 1921, by Roosevelt during World War II, and various times since has led to a dependence on income taxation, both individual and corporate, and an aversion to a federal-level consumption tax. *See* AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE 376-383(2013).

taxpayer. Tax policy as a modification of a previously formed contract fails to recognize generational shifts and a general lack of continuity in demographics. The state is no longer negotiating with the same parties, and the priorities of the state itself are fundamentally different.

This new vantage embraces diverse vehicles that might seem facially contradictory to achieve the same interest under the old status quo. When corporate tax brackets originated, Europe and the United States were seeking revenue streams to finance costly world wars.[45] After the war, these contracts continued with the assumption that the revenue stream would continue to support the public through government bureaucracy.[46] In sum, the contract with corporations was to provide a service to the public with the first service being wartime national security and the second post-war public welfare. Under the old approach, downward adjustments to the corporate tax would constitute an undermining of the public welfare. However, rationales for the drastic decrease in U.S. corporate tax rates in the 2017 TCJA were rooted in the promotion of public welfare through the growth of the U.S. economy.[47]

When thrown together, policy makers, individuals, and corporations battle each other to secure the best benefits for their ideological or technocratic camp. These ongoing negotiations represent a balancing act between adjusting the government's social contract with older generations and forging a new contract with younger generations of individuals and corporate leadership. Internally distorted by generational divides, rifts within generations, and the varying transparency of benefits in the code to taxpayers, tax law and policy is subject to one final external distortion: geopolitical expenditure.

3. Determining Ethical Behavior

Considering the United States' unique and extremely high military spending as a percentage of GDP, topped only by countries like Russia, Ukraine, Sudan, and Saudi Arabia, the idealistic notion of *Pax Americana* has driven the United States to militarily position itself across the world and

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[45] AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE 15-17(2013).

[46] *Id.* at 17.

[47] Proponents of the TCJA claim that the pre-TCJA statutory corporate tax rate of 35% hindered economic growth against European peers with the highest marginal rates near 20%. *See* Casey Mulligan, *At 21 or 20 Percent, New Corporate Tax Rate Will Boost US Economy*, THE HILL (Dec. 18, 2017), https://thehill.com/opinion/finance/365400-at-21-or-20-new-corporate-tax-will-boost-us-economy. Detractors of this viewpoint hold that U.S. effective corporate tax rates were never near the statutory level and already hovered near those of its European peers. *See Actual U.S. Corporate Tax Rates Are in Line with Comparable Countries*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 10, 2017), *https://www.cbpp.org/research/federal-tax/actual-us-corporate-tax-rates-are-in-line-with-comparable-countries.*

ensure the safety of international shipping lanes.[48] This presence seemingly details a moral right and obligation to pay in the fiscal contract between citizens and the government to increase international soft power and provide for global security. If a sort of global fiscal citizenship exists, with an effectively subsidized European defense budget, Europeans and their governments might have an obligation to support stability in their states through education, healthcare, and other taxation and welfare spending.

These propositions circle the root of a more fundamental and important question: to what extent can rights and obligations be withheld by and from the taxpayer and the state? This question is at the center of defining fiscal citizenship between the state and both individuals and corporations. If a citizen could withhold taxes from the state because the citizen does not agree with the approach of the current presidential administration, certainly the state could not provide the stability needed to serve its citizens. In the same vein, if the state could withhold services to certain arbitrarily chosen populations, surely those populations would not contribute to the stability of the fiscal state. This tension, which could easily turn into a vicious cycle of distrust, underlies fiscal citizenship. Without a certain level of faith by the state in citizens and by citizens in the state, the whole ceases to work.

Somewhere between complete withholding of benefits by the state and obligations by citizens, there is a point in which each side breaches its ethical obligation to the other. If an individual finds $10 on the ground, few would claim it an ethical breach to not report it as income to the state. At the same time, if the state cancelled the annual firework show due to inclement weather, few could claim that the state has breached its ethical responsibility to provide benefits. As a framework, I propose one standard represented two different ways to represent the ethical bright line for the state and for taxpayers: corporate and individual.

> 1) If the aggregate actions of taxpayers committing a specific type of tax avoidance, whether legal or illegal, materially limits the government's ability to gather revenue to pay for the lowest-cost essential taxpayer benefit, then the taxpayer has breached an ethical duty.
>
> 2) If the government fails to provide material funding for a preestablished essential public benefit that was not eliminated at the

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[48] In 2017, the United States spent 3.7% of its GDP on military expenditure, compared to the 1.5% average across the European Union. When European countries were grouped differently, the differences were largely the same. Central Europe and the Baltics clocked in at 1.6%, and Europe and Central Asia clocked in at 1.7%. Only when high income European countries were excluded did expenditure come close at 3.1%, but that is likely due to the increasing returns to scale. *Military Expenditure (% of GDP)*, THE WORLD BANK, https://data.worldbank.org/indicator/MS.MIL.XPND.GD.ZS?view=chart (last visited Sept. 28, 2019).

behest of taxpayers, then the government has breached its ethical duty.

4. Assessing Penalties

If parties conduct unethical behavior, it is uncontroversial to assert that the parties ought to face repercussions. In the case of constitutional citizenship questions, a party may simply be deported. The controversial task is determining the degree of punishment. Obviously, deportation is not and ought not be the punishment for violating fiscal citizenship. It would verge on absurdity to deport even a tourist, let alone a corporation, for failing to pay a $0.07 bag tax at the grocery store while still taking a bag. Even the most skillful tax dodgers who pass through the United States become fiscal citizens at some point in time, whether that be by paying taxes on airfare into the country, sales tax on a bag of chips, or employment taxes through temporary work. With this broad base of fiscal citizens and the absurdity of draconian punishments for tax evasion in mind, governments need a range of proportionate civil and criminal punishments to reasonably enforce fiscal citizenship.

In this section, I want to first lay out the common types of penalties on both the criminal and civil side. I then want to discuss the effects that these penalties have on individuals and corporations. After that, I want to briefly talk about innovative penalties that have been proposed to more accurately reflect how fiscal citizenship has been cheated and the extent that it has been cheated. The currently administrated penalties originate from the various revenue codes of each nation and their criminal statutes. Tax scholars, philosophers, economists, and historians have written extensively on their efficacy.

In the United States, there are both criminal and civil penalties, enforced by state governments, the Internal Revenue Service ("IRS"), Federal Bureau of Investigation ("FBI"), and Department of Justice ("DOJ"). These penalties range from jail time to monetary fines. In the case of undistributed accumulated earnings, the taxpayer is required to pay the federal government 20% of all earnings that were undistributed by the business entity and that should have been distributed.[49] Tax evasion, which is estimated to have cost the U.S. government $3.44 trillion from 2001-2010, can come with a prison sentence of up to five years and a monetary penalty of $100,000 for individuals and $500,000 for corporations.[50] While

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[49] Section 532 of the Internal Revenue Code applies only to shareholders attempting to use their corporate entity as a means of avoiding taxation either to gain taxation at a preferable rate in the future or pass on the corporation with a stepped-up basis at death. I.R.C. § 532 (current through Pub. L. 116-56).

[50] I.R.C. § 7201 (current through Pub. L. 116-56); While tax evasion cost the U.S. government $3.44 trillion over a decade, it is estimated that tax evasion costs governments $3.1 trillion or 5.1% of the global GDP annually. Julia Werdigier, *Tax Evasion Costs Governments $3.1 Trillion Annually, Report Says*, N.Y. TIMES (Nov. 28, 2011),

the government had hoped that these penalties would deter tax evasion, the scope of annual tax evasion is still roughly equal to a year's worth of corporate income tax revenue ($35 billion).[51] In other words, full compliance would be equivalent to doubling the corporate income tax.

In Europe, tax fines can be quite large, much larger than those levied in the United States. For example, in 2016, the European Commission levied a $15(€13) billion fine on Apple for taking advantage of illegal tax benefits from 2003-2014 in Europe's tax haven: Ireland.[52] Other global giants, like Amazon, Google, and Starbucks, have also found themselves in the crosshairs of the European Commission with fines ranging from the hundreds of millions to billions in U.S. dollars.[53] While the desire to curb tax evasion is a sound policy principle practiced by the European Commission and its member states, its target selection can sometimes be borne out of political pressure, not other rational measures like the ability and likelihood to pay the fine or the difficulty to prove a convincing case.[54]

Each member state chooses how and whether to assess criminal punishment for tax crimes. In some member states, like France, tax crimes are prosecuted very narrowly. In France, a complaint needs to be filed and then the tax administration has to assent to the complaint being investigated any further.[55] Conversely, in Germany, it is mandatory to prosecute all tax crimes. If the prosecutor's office and police find sufficient evidence of illegality, they must move forward and prosecute.[56] This bottom-up approach where law enforcement and prosecutors are required to lead the way is the inverse of France's top-down expert-driven discretionary system. As such, both systems represent the far ends of the criminal tax spectrum in Europe.

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https://www.nytimes.com/2011/11/26/business/global/26iht-tax26.html?mtrref=www.google.com.

51 Total corporate income tax receipts for 2015, the last year for which data is available, were just under $342 billion. *Federal Revenue: Where Does the Money Come From*, NAT'L PRIORITIES PROJECT, https://www.nationalpriorities.org/budget-basics/federal-budget-101/revenues/ (last visited Sept. 28, 2019).

52 Romain Dillet, *Apple started paying $15 billion European tax fine*, TECH CRUNCH (May 19, 2018), https://techcrunch.com/2018/05/19/apple-started-paying-15-billion-european-tax-fine/.

53 For a more wholistic view on fines assessed by the European Union, *See* Joon Ian Wong, *How to keep track of the billions in penalties the EU is slapping on global companies*, QUARTZ (Oct. 4, 2017), https://qz.com/1094137/amazon-eu-taxes-how-to-keep-track-of-all-the-eus-major-tax-and-antitrust-decisions/.

54 Reuters, *EU Reps Admit That the $14.5 Billion Apple Tax Bill Was 'Political'*, FORTUNE (Sept. 5, 2016), http://fortune.com/2016/09/05/eu-apple-tax-political/.

55 European Parliamentary Research Serv., Member States' Capacity to Fight Tax Crimes: Ex-Post Impact Assessment, PE 603.257, at 48-49 (July 2017).

56 *Id.* at 48-50.

5. Determining Tribunal

In the United States, businesses and individuals go through several tribunals, depending on the nature of their issue and preference of the litigant: the IRS, state trial and appellate courts, the U.S. Tax Court, District Courts, U.S. Court of Federal Claims, Court of Appeals, and the U.S. Supreme Court. In Europe, there are regional, national, and E.U.-based tribunals. This section outlines (1) those tribunals' authority (e.g. binding vs. non-binding and regional vs. national) and (2) their effectiveness in levying and collecting the aforementioned civil penalties against individuals and corporations and enforcing criminal penalties against persons.

An unusually high number of courts can hear tax issues in the United States and render binding judgments. If a tax question is a state or local tax issue, then the claim will originate in state courts, unless there is a direct federal constitutional issue, and can be appealed directly from the state's highest court to the U.S. Supreme Court. This process is identical to that of a standard state law claim. Tax tribunals differentiate themselves on the federal level, where a taxpayer can bring a claim in a U.S. District Court, the U.S. Court of Federal Claims ("CFC"), or the U.S. Tax Court ("USTC"). Unlike in a district court or the CFC, taxpayers do not need to have paid their assessed tax liability before bringing suit in the USTC.[57] Still, there is a significant amount of tax litigation that goes on outside of the USTC. According to the CFC, approximately 10% of its cases are tax refund litigation.[58] In large part, this is due to the CFC and district courts having authority over the USTC in refund litigation if it gains jurisdiction in same taxable year.[59]

To get a broader sense of how taxpayers choose their tribunal, it is important to look at both the number of cases brought in front of the tribunals and the dollars in dispute. In 2007, 29,040 cases were in dispute with the USTC, 800 with district courts, and 500 with the CFC.[60] On a per capita basis, $799,319 was the average dispute in front of the USTC, $6,875,000 in front of district courts, and $5,400,000 in front of the CFC.[61]

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57 *About the Court*, U.S. TAX COURT (Aug. 6, 2019), https://www.ustaxcourt.gov/about.htm.

58 *Statistical Report For the Fiscal Year October 1, 2017 - September 30, 2018*, U.S. COURT OF FEDERAL CLAIMS (Oct. 29, 2019), https://www.uscfc.uscourts.gov/sites/default/files/Statistical%20Report%20for%20FY2018.pdf. I.R.C. § 1491 (2018) gives the CFC authority to hear refund litigation. Filing a petition to the Tax Court, where 97% of tax litigation is heard, precludes the ability to bring those claims in front of the CFC or a district court for the disputed year(s). *See* Elizabeth Chao & Andrew R. Roberson, *Overview of Tax Litigation Forums*, MCDERMOTT WILL & EMERY (Apr. 21, 2017), https://www.taxcontroversy360.com/2017/04/overview-of-tax-litigation-forums/.

59 *See* Gerald A. Kafka, *Choice of Forum in Federal Civil Tax Litigation (Part 1)*, THE PRAC. TAX LAW., Winter 2011, at 56.

60 *Id.* at 60.

61 The results were derived by dividing the 2007 dollars in dispute number by the 2007 number of cases in dispute: Tax Court ($23.5 billion/29,400), district courts ($5.5

These figures indicate that statutory inertia pushing refund litigation to district courts and the CFC makes them the avenues of choice (or, perhaps, necessity) for corporations.

Ignoring a tax penalty could lead to the forced closure of a corporation or even more severe penalties and possible criminal charges. An important mechanism to make sure that taxpayers even make it to the tribunal stage, which has the full effect of the law and government to enforce penalties, the U.S. audit regime polices the giant corporate actors that use sophisticated tax-free or low-tax vehicles like the "Double Irish with a Dutch Sandwich."[62] The audit regime in the U.S., however, has declined in recent years. As recently as 2010, corporations with $20 billion or more in assets filed 447 tax returns and 431 were audited (96.4%).[63] Yet, in 2017, at 331 audits, 100 less corporations with $20 billion or more in assets were audited despite the number of filers rising from 169 to 616.[64] The effective audit rate for 2017, consequently, was 53.7%. Audit time, a unit measure of 2,000 revenue agent audit hours, also fell during that time period from 613 to 311.[65]

In Europe, each nation has its own tax tribunal. Denmark's Customs and Tax Tribunal is the forum for prosecuting cases brought by the Danish Tax Agency, the Tax Appeals Agency ("TAA"), and the Danish Customs and Tax Administration. Specifically, the TAA files cases involving "taxation, VAT, duties, customs duty, collection of public debts and property assessment."[66] The TAA transitions the tax issue from a generic district tribunal to a regional appeals board and then finally to the National Tax Tribunal.

Some countries, however, do not render an initial judgment through their judiciary. In England, an administrative agency–usually Her Majesty's Revenue and Customs, Border Force, the National Crime Agency, or the Welsh Revenue Authority–renders judgment on the tax issue at hand before it can be appealed to the First-Tier Tribunal, a special tribunal established in the Tribunals, Courts and Enforcement Act 2007.[67] England allows for

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billion/800), CFC ($2.7 billion/500). *Id.*

[62] For a more detailed explanation of the "Double Irish with a Dutch Sandwich" vehicle and how it uses tax havens and mismatching tax-residence definitions, *See 'Double Irish With a Dutch Sandwich'*, N.Y. TIMES (Apr. 28, 2012), *https://archive.nytimes.com/www.nytimes.com/interactive/2012/04/28/business/Double-Irish-With-A-Dutch-Sandwich.html?_r=0.*

[63] TRAC IRS, NEARLY HALF OF CORPORATE GIANTS ESCAPE IRS AUDIT IN 2017, at 1 (2018), http://trac.syr.edu/tracirs/latest/507/.

[64] *Id*.

[65] *Id*. at 1-2.

[66] *About Skatteankestyrelsen*, SKATTEANKESTYRELSEN, https://skatteankestyrelsen.dk/english/about-skatteankestyrelsen (last visited Nov. 13, 2018).

[67] *First-tier Tribunal (Tax)*, GOV.UK, https://www.gov.uk/courts-tribunals/first-tier-tribunal-tax (last visited Oct. 10, 2019); Tribunals, Courts and Enforcement Act 2007, c. 2, s. 3 (1).

the appeal of decisions related to both "indirect" and "direct" taxes.[68] The former includes "Income Tax, PAYE tax, Corporation Tax, Capital Gains Tax, National Insurance contributions, Statutory Sick Pay, Statutory Maternity Pay, Inheritance Tax," while the latter includes VAT, customs, and excise taxes.[69] If an unsatisfactory decision is rendered in the First-Tier Tribunal, the decision can be appealed in the Upper Tribunal.[70]

For tax issues arising out of E.U. law, cases can be brought in front of the Court of Justice of the European Union ("CJEU"). The court consists of forty-seven judges and will be increased to fifty-six in 2019 in order to ensure each European country has two judges.[71] In addition to the requirement that a claim arise out of E.U. law, it must also be between E.U. institutions or member states; in some instances, individuals, corporations, and other organizations can also bring claims. Overall, the CJEU is primarily concerned with making national countries apply E.U. law and sanctioning E.U. institutions. National courts may defer cases to the CJEU; otherwise, the litigant needs to assert a claim that the litigant was directly harmed by an E.U. institution.[72]

Out of these European systems, three distinctions from the U.S. regime are notable. First, there is a clear establishment of national tribunals, even in the European Union. Second, these tribunals hear the entire spectrum of tax claims, even if special tribunals are required or issues are split up into different categorizations (such as direct or indirect tax) through administrative regulations or statutes. Third, the E.U. provides a more holistic framework for appeal than the United States. Due to the limited scope of the CJEU and the difficulty of bringing claims, the forty-seven current CJEU judges closed proceedings in only about 760 cases combined in 2018.[73]

III. THE STATE OF FISCAL CITIZENSHIP

A. Individual

In the United States, individuals have become disillusioned with their

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[68] *Appeal to the Tax Tribunal*, GOV.UK, https://www.gov.uk/tax-tribunal (last visited Nov. 13, 2018).

[69] *Id.*

[70] *Appeal to the Upper Tribunal (Tax and Chancery)*, GOV.UK, https://www.gov.uk/tax-upper-tribunal (last visited Nov. 24, 2019); Tribunals, Courts and Enforcement Act 2007, c. 2, s. 3 (2).

[71] *Court of Justice of the European Union (CJEU)*, EUROPA (Feb. 21, 2019), https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en.

[72] *Id.*

[73] Simon Taylor, *EU Changes Rules for Appeals Before the Court of Justice*, LAW.COM (Apr. 9, 2019), https://www.law.com/2019/04/09/european-union-changes-rules-for-appeals-before-the-eu-court-of-justice-292-43518/.

social contract with the modern American fiscal state.[74] In turn, the Tea Party movement formed in 2009, demanding lower taxation (i.e. current tax obligations) and curbing of the national debt (i.e. future tax obligations).[75] The powerful Tea Party movement led to a gain of sixty-three seats in the U.S. House of Representatives for Republicans, the largest swing in the House since 1948 and the largest midterm swing since 1938. Norway's Progress Party, Hungary's Jobbik, and the United Kingdom's Independence Party ("UKIP") reflect the Tea Party influence in Europe.[76] While these parties are not mere carbon copies of one another, they share the mix of nationalism and fundamental anti-modern fiscal state ideologies of the Tea Party.

The Tax Affinity Hypothesis cuts across the fundamental tenets of the Tea Party, holding that taxpayers derive some utility from paying taxes.[77] Some researchers have even found that taxpayers respond more negatively to a cost when it is labeled as a fee instead of a tax.[78] In other words, if the taxpayer believes that part of the cost the taxpayer bears is due to an excise tax or tax to benefit some part of that taxpayer's society, then the taxpayer is less reticent to pay that cost.

In essence, this camp is the omega to fiscal citizens' alpha. The Tea Party camp supports lower rates across the board, whether that be on individuals or corporations. Some even suggest a flat tax rate, so that no taxpayer is taxed differently based on the taxpayer's compensation.[79] On

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[74] According to an April 2017 poll conducted by the CBS News, 56% of respondents believed that the income tax system was either "somewhat fair" or "quite unfair, the lowest levels of the five times CBS News conducted this poll since 1978." Jennifer De Pinto, *Poll – Do Americans Think Their Tax System is Fair?*, CBS NEWS (Apr. 14, 2017), https://www.cbsnews.com/news/poll-do-americans-think-their-tax-system-is-fair/. Notably, in the 2015 version, 55% "thought corporations paid less than their fair share. *Id.*

[75] Amy Gardner & Michael E. Ruane, *"Tea Party" Protesters Gather in Washington to Rally Against Taxes, Spending*, WASH. POST (Apr. 16, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/04/15/AR2010041503344.html; *see also* Bill Fortier, *Tea Party Faithful Greet Tax Day*, WORCESTER TELEGRAM & GAZETTE (Apr. 16, 2012), http://www. telegram.com/article/20120416/NEWS/104169961/1160; Jennifer Feehan, *Tea Partiers Gather in Perrysburg*, THE BLADE (Apr. 20, 2014), http://www.toledoblade.com/local/2014/04/20/Tea-Partiers-gather-in-Perrysburg.html. For more on the Tea Party movement, *see generally* RONALD P. FORMISANO, THE TEA PARTY: A BRIEF HISTORY (2012) and THEDA SKOCPOL & VANESSA WILLIAMSON, THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM (2012).

[76] *Europe's Tea Parties*, THE ECONOMIST (Jan. 2, 2014), https://www.economist.com/leaders/2014/01/02/europes-tea-parties.

[77] Iwan Djanali & Damien Sheehan-Connor, *Tax Affinity Hypothesis: Do We Really Hate Paying Taxes?*, 33 J. ECON. PSYCHOL. 758, 759 (2012).

[78] *Id.*

[79] *Senator Rand Paul Releases Flat Tax Plan*, COMM. FOR RESPONSIBLE FED. BUDGET (Nov. 16, 2015), https://www.crfb.org/blogs/senator-rand-paul-releases-flat-tax-plan-0. An interesting variant to the regressive flat tax structure is Daniel Hemel's flat tax rate coupled with a demogrant to remove the discriminatory tax effects caused by marital status while maintaining a progressive structure. *See* Daniel Jacob Hemel, *Beyond the Marriage Tax*

the other side, those in favor of fiscal citizenship either believe in maintaining the taxation status quo or raising taxes. For raising taxes, this might be accomplished through an adjustment of individual or corporate brackets or new tax vehicles like GILTI, BEAT, and sometimes even an old vehicle like VAT.

For most governments, it causes alarm if a taxpayer breaks from her country and chooses to earn revenue elsewhere or renounce citizenship. Surely, this abandonment is not the Tea Party brand of disdain for fiscal citizenship but a reallocation of fiscal citizenship. For U.S. taxpayers earning income abroad, it is still required that the taxpayer file a tax return with the IRS.[80] For the first $103,900 of income, however, the taxpayer can claim a foreign income earned exclusion.[81] This means that the income will not be included in the gross income of the taxpayer for the sake of the taxpayer's liability. Any income above the foreign income earned exclusion threshold will be subject to both the United States and international tax, but the United States will grant a tax credit on all international tax paid by the taxpayer.[82]

While the European Union has no formalized rules on how to tax the income of its member states' citizens abroad, most European countries can usually tax the worldwide income of their expatriates.[83] As general guidance, under the European bilateral tax treaties, a European expatriate should be considered a tax-resident in the country where the taxpayer earns "all or almost all" of the taxpayer's income.[84] To avoid double taxation, the country of citizenship must forego taxation of a taxpayer's income if that taxpayer is a tax-resident of another country. At the same time, the country where the taxpayer is considered a tax-resident must equally apply its taxation rules to that taxpayer, even if the taxpayer is not a resident in other regards, as to avoid double non-taxation.[85] To some extent, this fluidity between tax-residence and citizenship residence reflects the post-national membership unique to the European Union.[86]

Trilemma, 54 WAKE FOREST L. REV. (forthcoming)(manuscript at 104-105), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438075.

80 *Taxpayers Living Abroad*, IRS (Oct. 2, 2019), https://www.irs.gov/individuals/international-taxpayers/taxpayers-living-abroad.

81 *Foreign Earned Income Exclusion*, IRS (Jun. 14, 2019), https://www.irs.gov/individuals/international-taxpayers/foreign-earned-income-exclusion.

82 *Id*.

83 *Income Taxes Abroad*, EUROPA (Feb. 25, 2019), https://europa.eu/youreurope/citizens/work/taxes/income-taxes-abroad/index_en.htm.

84 *Id.*

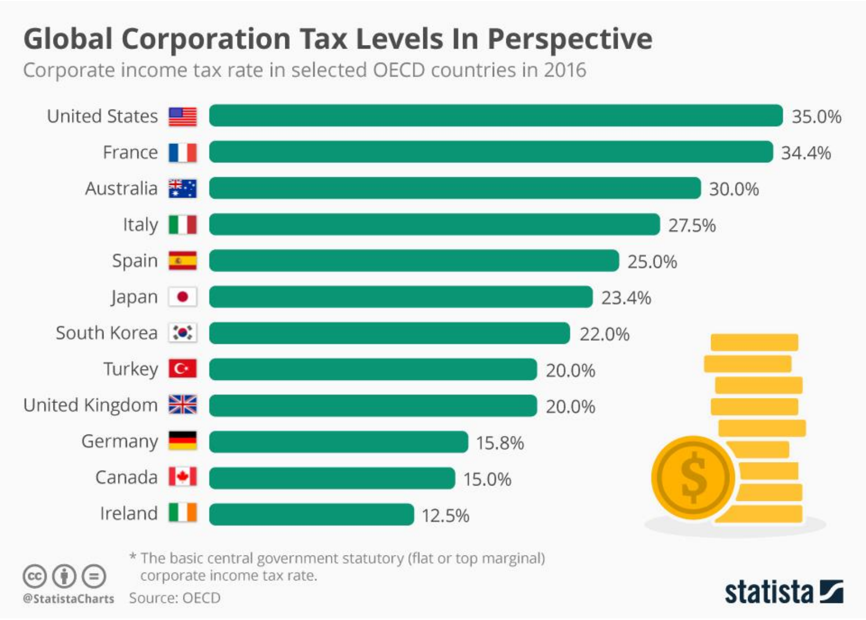
85 A taxpayer could not gain or retain residency in the United Kingdom if the taxpayer did not stay for 183 days in a year or if the taxpayer did not live in the UK for 91 days repeatedly across several years, but the taxpayer could still be considered a resident for tax purposes under the E.U. framework. *See* Donald Pearce-Crump, *Commonwealth Citizenship and British Income Tax Law*, 113 S. AFR. L.J. 415, 419 (1996).

86 Helen E. Hartnell, *Belonging: Citizenship and Migration in the European Union and*

B. Corporate

While individual fiscal citizenship has a great deal of literature surrounding it, corporate fiscal citizenship is frequently given little attention. Corporations are even quite frequently and shockingly seen as complicated capital assets that provide an eventual return to the shareholder level. Yet, corporations are more than that. Corporations are lifelike entities. With more than 50,000 mergers and acquisitions in 2015, 2016, and 2017, corporations are becoming increasingly organizationally and technically diverse.[87] With increased media scrutiny of these giant corporations that seem to have a horse in every race, shareholder activism has risen.[88] With companies being forced out of certain partnerships, how has a reckoning of the corporate social conscience affected the corporate partnership with the state?

Figure 1: Corporate Tax Levels Pre-TCJA[89]



in Germany, 24 BERKELEY J. INT'L. L. 330, 333 (2006).

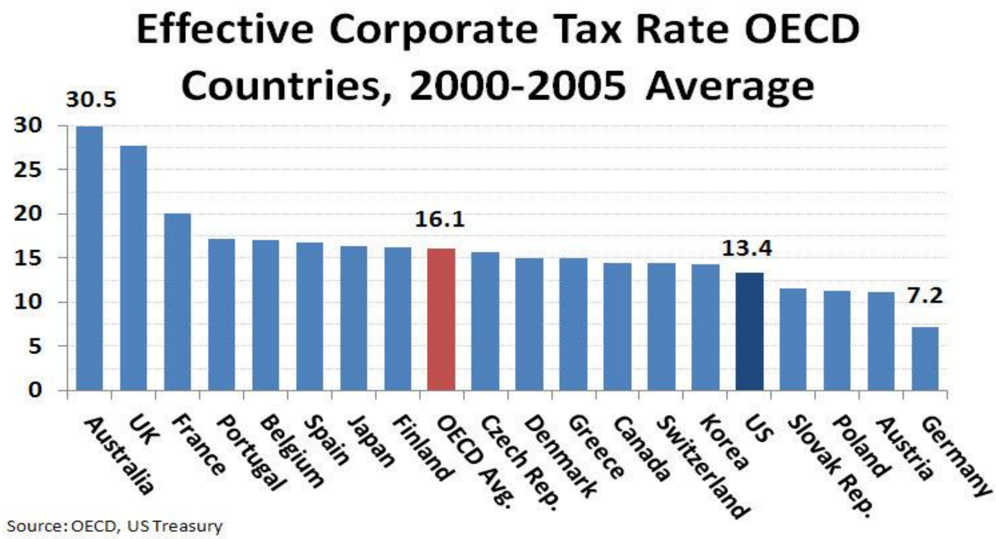
[87] Benjamin Gomes-Casseres, *What the Big Mergers of 2017 Tell Us About 2018*, HARV. BUS. REV. (Dec. 28, 2017), *https*://hbr.org/2017/12/what-the-big-mergers-of-2017-tell-us-about-2018.

[88] *See* Manuel Baigorri & Nishant Kumar, *Black Swans, Wolves at the Door: the Rise of Activist Investors*, BLOOMBERG (Jul. 13, 2017), https://www.bloomberg.com/news/articles/2017-07-12/black-swans-wolves-at-the-door-the-rise-of-activist-investors.

[89] Niall McCarthy, *Global Corporation Tax Levels in Perspective*, STATISTA (Aug. 25, 2016), https://www.statista.com/chart/5594/global-corporation-tax-levels-in-perspective/.

Figure 1 shows that before the TCJA, the United States had the highest corporate tax rate across North America and Europe. Yet, few Americans actually believed that corporations paid their fair share of tax liabilities.[90] Infamous stories circulate year after year about giant corporations paying little to no U.S. income tax.[91] It would surprise almost no Americans that Figure 2 puts the effective American corporate tax rate low among its European peers. With the post-TCJA rate, the effective U.S. rate has likely dropped even further to a lower level near Austria and Germany.

Figure 2: Effective Corporate Tax Rate (2000-2005)[92]



Even with the knowledge that corporations are complex, ever-expanding, and are large revenue contributors to the nation's fiscal coffers, it may not be readily apparent why corporate fiscal citizenship is important.

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[90] Frank Newport, *Majority Say Wealthy Americans, Corporations Taxed Too Little*, GALLUP (Apr. 18, 2017), https://news.gallup.com/poll/208685/majority-say-wealthy-americans-corporations-taxed-little.aspx.

[91] *E.g.* Laura Stampler, *Amazon Will Pay a Whopping $0 in Federal Taxes on $11.2 Billion Profits*, FORTUNE (Feb. 14, 2019), https://fortune.com/2019/02/14/amazon-doesnt-pay-federal-taxes-2019/.

[92] *Treasury Conference on Business Taxation and Global Competitiveness*, U.S. DEPARTMENT OF THE TREASURY, 42, https://www.treasury.gov/press-center/press-releases/Documents/07230%20r.pdf (last visited Nov. 24, 2019); Effective Corporate Tax Rate OECD Countries, 2000-2005 Average, WIKIMEDIA COMMONS, https://upload.wikimedia.org/wikipedia/commons/a/ae/Effective_Corporate_Tax_Rate_OECD_Countries%2C_2000-2005_Average.jpg (last visited Nov. 24, 2019).

One could argue that individual fiscal citizenship is important because individuals need to have faith in elected officials and the government more generally. Assuming the good health of the welfare state is in an individual's interest, poor fiscal citizenship would disrupt domestic stability and worsen an individual's life quality. However, that same argument cannot be made for corporations. While corporations need regulatory agencies and certain legal protections, the state's failure to provide revenue for public education, social security, or some other program is unlikely to have any major direct impact.

Instead, the importance of fiscal citizenship is found through the harms that come with the capitalization and subsequent operation of a corporation. Through a benefits theory approach, corporate fiscal citizenship should necessarily reflect the reality that unique societal responsibilities come from large-scale business activities. In asking questions of corporate fiscal citizenship, it is necessary to determine the effect of corporations' negative externalities. To get an answer to this inquiry, it is important to look at exactly in what social, political, and economic climate corporations currently operate across the globe before turning to the tax liabilities of corporations.[93]

1. New Era of U.S. Tax Policy After the Great Recession

In 2008, the Great Recession shook the world, causing markets to crash, gross domestic product to decline, and unemployment to spike. Six years later, only five of the seventy-one countries with publicly available quarterly data had avoided a recession.[94] Despite being blamed as the culprit of this crisis, subprime mortgages were only a symptom of a much deeper systematic failure. American economist Ravi Batra argued that growing inequality was at fault.[95] Across the Atlantic, Scottish economist Alisa McKay and Norwegian sociologist Margunn Bjørnholt agreed and posited that the only solution to prevent future crises was to reform capitalism starting with social responsibility.[96] To handle this great task of

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[93] It is necessary to understand the cost of the remedies that the government needs to take before addressing the taxpayers' obligations to the government. Governments are not incurring the cost of making skies or rivers cleaner for corporations, like they are for individuals. The benefit conferred to the corporation is an environment as clean as yesterdays to pollute without being destroyed in the process of creating a product. If a business destroys the environment needed to make that product, the business can no longer operate.

[94] *GDP and Main Components - Volumes: Percentage Change On Previous Quarter*, OECD, https://data.oecd.org/gdp/quarterly-gdp.htm (adjusted by season and by working days) (last visited Mar. 12, 2019).

[95] Ravi Batra, *Weapons of Mass Exploitation*, TRUTHOUT (May 8, 2011), https://truthout.org/articles/weapons-of-mass-exploitation/.

[96] MARGUNN BJØRNHOLT & AILSA MCKAY, *Advances in Feminist Economics in Times of Economic Crisis*, *in* COUNTING ON MARILYN WARING: NEW ADVANCES IN FEMINIST ECONOMICS 7, 8-10 (Bjørnholt and McKay eds., 2014).

socially responsible reform, the United States and Europe have taken drastically different approaches.

In the United States, the TCJA not only tapped into new revenue sources and tightened the grip on evasive old revenue but also redefined corporate fiscal citizenship. At the heart of the corporate tax reform were two fundamental changes to the tax code: the addition of 199A and the overall reduction of the corporate tax rate from 35% to 21%.[97] Essentially, it was decided that corporations were paying more than their fair share of taxes. While the final rate was increased to 21% from 20% and measures were implemented to significantly reduce base erosion, like BEAT and GILTI, the revenue shortfall from the TCJA remains overwhelming, adding $1.9 trillion in debt over the next decade.[98]

Because the United States will have to confront costly economic disruptions in the next century, increasing debt is perhaps an unorthodox choice. Paired with the fact that most countries use healthy economies to pay down debt, this choice signals a departure from the deficit hawk moderates of the twentieth century.[99] Borrowing, of course, means that the United States will have to service its debt well into the future and that some future constituency must bear the cost. Given the popular bipartisan tax base broadening approach taken under President Reagan in 1986, it is unclear whether large corporations will pay for the price of the dramatic tax cuts they receive today or if the costs will be passed on to individuals.[100]

Regardless of what constituency ends up footing the bill, the TCJA serves as an alarming continuation of the "starve the beast" policy that Republicans have used to lead an assault on the U.S. welfare state.[101] The unintended–or perhaps even intended– consequence is that there will be little flexibility in providing widespread government retraining programs to combat automation and AI, or in offering renewable energy subsidies to combat global warming without massive and unpopular future tax hikes. With corporate tax rates lower than individual tax rates, it is clear that the United States has chosen to deemphasize not the ability to pay but the

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[97] Tax Cuts and Jobs Act, *supra* note 22.

[98] Chris Macke, *TCJA One Year Later: One Broken Promise After Another*, THE HILL (Dec. 26, 2018), https://thehill.com/opinion/finance/422861-tcja-one-year-later-one-broken-promise-after-another.

[99] Andrea Thomas, *Germany's budget surplus set to soar this year*, MARKETWATCH (Dec. 6, 2018), https://www.marketwatch.com/story/germanys-budget-surplus-set-to-soar-this-year-2018-12-06.

[100] During Reagan's historic Tax Reform Act of 1986, the corporate income tax rate was reduced from 50% to 35% and the individual income tax rate was reduced from 50% to 28%. To fund these tax decreases, the Reagan administration broadened the tax base and eliminated numerous deductions and credits, shifting the costs primarily to individuals. *See* ALAN MURRAY & JEFFREY BIRNBAUM, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM (1988).

[101] MICHAEL J. GRAETZ, 100 MILLION UNNECESSARY RETURNS: A SIMPLE, FAIR, AND COMPETITIVE TAX PLAN FOR THE UNITED STATES 18 (2010).

benefits theory principle with respect to corporations. The corollary to this proposition is that individuals must bear the greater burden of a changing society.

2. European Reaction

The European Union took the diametrically opposite route. While many member states slashed taxes and issued rebates during the Great Recession, the European Union has learned that reducing national debt during healthy times is essential to providing stimulus during economic downturns.[102] In 2009, the European Union had a debt to GDP ratio of 73.3, rising year after year to its peak of 86.6 in 2014.[103] Every year since 2014, which the World Bank labeled as the recession's turning point,[104] has seen a decrease in the European Union's debt to GDP ratio to 81.7 in 2017.[105]

While the European banking system still remains in relative disarray as member states have had difficulty recapitalizing their insolvent banks, economic conditions are dramatically better in the vast majority of both Eastern and Western Europe, even if they lag behind U.S. benchmarks.[106] Still, even though the economy is generally improved and overall debt levels in the European Union have decreased, member states have not uniformly increased taxes to achieve their desired results. Both France and Italy raised taxes to reduce deficits, but Ireland, Spain, and the United Kingdom cut spending instead.[107] This result is not necessarily surprising when looking at path-dependent tax policy among European welfare states; however, it is noteworthy.[108]

Overall, the European Union has stabilized and even reduced its debt levels due to successful tax hikes and spending cuts, an approach that stands in stark contrast to that of the United States. Until recent years, the corporate income tax has played a consistent role in this stabilization and debt reduction.

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[102] The use of financial institutions along with tax cuts to stimulate the economy is a classical Keynesian measure that has become the stalwart of western liberal fiscal administration. *See generally* Sarwat Jahan et al., *What is Keynesian Economics?*, FIN. & DEV., Sept. 2014, at 53.

[103] *European Union Government Debt to GDP*, TRADING ECON., https://tradingeconomics.com/european-union/government-debt-to-gdp (last visited Sept. 29, 2019).

[104] *Global Economy at a Turning Point, Says World Bank*, THE WORLD BANK (Jan. 14, 2014), http://www.worldbank.org/en/news/press-release/2014/01/14/global-economy-turning-point-world-bank.

[105] *European Union Government Debt to GDP*, *supra* note 103.

[106] *A Decade After the Great Recession, Is the Global Financial System Safer?*, KNOWLEDGE@WHARTON (Sept. 11, 2018), http://knowledge.wharton.upenn.edu/article/ten-years-great-recession-global-financial-system-safer/.

[107] Vanessa Houlder, *Tax and spend in EU differs after crisis*, FIN. TIMES (Dec. 10, 2015), https://www.ft.com/content/3747d6c2-9f1b-11e5-beba-5e33e2b79e46.

[108] *See* JUNKO KATO, REGRESSIVE TAXATION AND THE WELFARE STATE: PATH DEPENDENCE AND POLICY DIFFUSION 50-52(2009).

Figure 3: European Union Corporate Income Tax 2009-2018[109]

In 2016, the corporate income tax rate took an unprecedented downward turn, departing from already historic low rates. By 2018, it had reached its new historic low of 21.3%, a rate nearly identical to the United States' 21% corporate income tax. While the U.S. corporate income tax rate was cut from 35% to 21% overnight, the step down from 35% to 21.3% was much less dramatic in the European Union, occurring over 21 years.[110] Meanwhile, the U.S. high of 35% existed as recently as 2017. The difference in the European Union is that the full corporate tax liability is not accounted for by the corporate income tax. The VAT imposes a significant liability upon the value added to products by European corporations, raising about 7% of a country's GDP in taxes compared to the approximately 3% raised by the corporate income tax.[111]

Fiscal stewardship in the European Union has not come at the cost of corporate fiscal citizenship. If anything, the European Union's emphasis on the VAT and its robust revenue raising capabilities are better suited for the problems of the twenty-first century. Global warming, pollution, and automation are either products of excessive consumerism or enablers thereof. Forcing a VAT on both consumers and corporations creates a powerful revenue stream to directly address these looming and costly issues. Moreover, the revenue is not subject to deferral or avoidance through complicated international tax planning and arbitrage. There are no treaties that can conceivably allow consumers or producers to create the

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[109] *European Union Corporate Tax Rate*, TRADING ECON., https://tradingeconomics.com/european-union/corporate-tax-rate (last visited Mar. 16, 2019).

[110] *Id*. (select "MAX" under the graph to view the change over 21 years).

[111] OECD, REVENUE STATISTICS 2018: TAX REVENUE TRENDS IN THE OECD 7 tbl.2 (2018), https://www.oecd.org/tax/tax-policy/revenue-statistics-highlights-brochure.pdf.

infamous double non-taxation that corporations seek. Neither are there carve-outs in European tax codes to defer VAT liabilities through depreciation or other tax-advantaged mechanisms. A low corporate tax and substantial VAT regime still force corporations to internalize the cost of some of their externalities.

The European system is, however, not perfect. While it appears to tax corporations through the benefits principle through the VAT, it is only a half-hearted approach. The European Union is still also pursuing the ability-to-pay theory through general corporate taxation. While a mixed solution might be preferable–ability to pay and the benefits principle are surely not mutually exclusive–the corporate income tax is an outmoded method of achieving the desired results. Deferred tax liabilities through depreciation, namely accelerated depreciation, and base erosion have resulted in a loss of 4-10% of annual corporate income tax globally.[112]

IV. THE PATH TOWARD CORPORATE FISCAL CITIZENSHIP

Fundamentally, the taxation of capital sits at the heart of corporate fiscal citizenship reform. Corporations are the manifestation of individuals' desire to invest and maximize their capital. If the taxation of labor allocation is to reflect an individual's obligation to society and right to receive benefits from that society, there is no morally coherent reason to exclude an individual's allocation of capital from like treatment. While the taxation of an individual's labor primarily goes toward supporting labor longevity through defense, medical, and education spending, it follows that the taxation of capital should go toward supporting capital longevity: roads, bridges, and the environment, among others. The taxation of capital is, generally, the bedrock of individual capital rights, so cash-strapped nations need to consider reworking their capital taxation regimes to make corporate fiscal citizens bear costs that mirror those that individual fiscal citizens bear for their rights.

Of course, both the taxation of labor and capital have overlapping interests. For instance, education is the foundation of human capital and necessary to make efficient labor decisions. Even more advanced areas like artificial intelligence create overlap between labor and capital, causing declining demand and increasing infrastructure to facilitate capital returns. These overlaps are natural and illustrative that no clearly delineated bright line exists for the categorization of all rights that individuals receive from their labor and capital taxation. The more important point is that, despite the overlap, there are two distinct and clearly defined moral mandates linked to labor and capital taxation. The latter is the target of the following recommendation.

[112] *OECD Presents Outputs of OECD/G20 BEPS Project for Discussion at G20 Finance Ministers Meeting*, OECD (May 10, 2015), *http*://www.oecd.org/ctp/oecd-presents-outputs-of-oecd-g20-beps-project-for-discussion-at-g20-finance-ministers-meeting.htm.

In 2019, U.S. Senator Elizabeth Warren proposed a wealth tax to much Democratic fanfare and Republican scorn.[113] Under Warren's proposal, households with a net worth between $50 million and $1 billion would pay 2% of their assets annually in taxes.[114] In addition, Warren would levy a surtax of 1% on households with net worth in excess of $1 billion.[115] While Warren's proposal seems radical, much of the United States already has a wealth tax – i.e. property taxation - that frequently goes towards supporting education funding and subsequently, human capital. For the United States government, this form of capital taxation dates back to the Articles of Confederation.[116] Warren's expanded vision is not new either.

In Europe, the wealth tax found both a twentieth-century resurgence and twenty-first century rollback. Austria, Germany, France, Sweden, and the Netherlands, among others, have experienced either the introduction or the abolishment of a wealth tax in the last fifty years, with the latter generally under conservative coalition governments.[117] These wealth taxes, unlike in the United States, were generally attacked for economic and not moral considerations. Capital drain, economic distortions, and administrative costs were the prominent claims against preserving a wealth tax.[118] To a degree, these are valid concerns. Even the most morally righteous tax ought not to create economic ruin; such distress would likely prove counter-productive to the preservation of capital.

Of the three claims against the wealth tax, the most serious hurdle is avoiding capital drain. Economic distortions and administrative costs are inherent to all taxation and can be mitigated. High-information economies ease administrative costs, and, in the present case, minimal capital drain will ease economic distortions.[119] Given that Europe and the United States both constitute high-information economies, driving capital drain down is the key factor in creating a palatable capital tax. As a general rule, capital achieves a 3-5% long-term return, so capital drain exists when either the tax

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[113] Adam Shaw, *Elizabeth Warren Calls for 'Wealth Tax' on Richest Americans*, FOX NEWS (Jan. 24, 2019), https://www.foxnews.com/politics/elizabeth-warren-to-call-for-wealth-tax-on-richest-americans-report.

[114] Matthew Yglesias, *Elizabeth Warren's Proposed Tax on Enormous Fortunes, Explained*, VOX (Jan. 24, 2019), https://www.vox.com/policy-and-politics/2019/1/24/18196275/elizabeth-warren-wealth-tax.

[115] *Elizabeth Warren Proposes 'Wealth Tax' on Americans with More Than $50 Million in Assets*, CNBC (Jan. 24, 2019), https://www.cnbc.com/2019/01/24/elizabeth-warren-to-propose-new-wealth-tax-economic-advisor.html.

[116] Calvin H. Johnson, *A Wealth Tax is Constitutional*, 38 A.B.A. TAX TIMES, No. 4, Summer 2019, https://www.americanbar.org/groups/taxation/publications/abataxtimeshome/19aug/19aug-pp-johnson-a-wealth-tax-is-constitutional/.

[117] *See* Christopher Heckly, *Wealth Tax in Europe: Why the Decline?*, at 39-50,INSTITUT DE L'ENTREPRISE (Jun. 2004), http://www.hluthafar.is/assets/files/ExecSummaryHeckly.pdf.

[118] *Id.*

[119] Gaëtan Nicodème, *Corporate Income Tax and Economic Distortions*, CESIFO WORKING PAPER, No. 2477, Nov. 2008, at 5-9.

rate exceeds the 3-5% return range or constitutes a significant enough percentage for investors to either consume capital instead of investing it or otherwise investing it in a low-capital-tax jurisdiction.[120]

Despite popular support, Elizabeth Warren's proposed tax is unlikely to meet the criteria for a palatable wealth tax.[121] Warren's 2% rate on assets between $50 million and $1 billion would effectively be a 52% income tax on unrealized investment returns and her 3% tax on assets above $1 billion would equal a 78% tax on unrealized capital returns.[122] A sale of these assets for those with $50 million to $1 billion in total assets would be at the 20% long-term rate and yield a 61.6% tax burden on returns, lowering a 4% investment return to 1.57%. Similarly, a sale of these assets for those with over $1 billion in total assets would also occur at the highest marginal long-term capital gains rate of 20% and create total tax burden of 82.4% on returns, lowering a 4% long-term investment return to 0.704%.[123] At such low return rates, there is a very real risk that investors would instead choose to consume capital, obscure its value, renounce citizenship, or hide it in an international tax haven.

Despite this setback, the United States and Europe do not need to return to square one. If supporters of the capital tax shift their focus from the popular imagination to developments in tax academia, a workable solution exists. Professor Mark Gergen suggests that a flat 0.8% tax on publicly-traded securities would provide enough revenue to eliminate all other capital taxation, including the corporate income tax, income tax on the sale of all securities, and the individual income tax on all other investment or business income.[124] Additionally, due to perfect information collection of public security prices and the flat nature of the tax, administration costs would plummet. Increased distortions are unlikely to occur in either the United States or Europe. Gergen's tax has an effective rate of 20% on the 4% long-term investment return, which is similar to

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[120] *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 164 (2015). Picketty notes that long-term capital return rate until the 21st century was 4-5%, but long-term capital returns may be in the 3-4% range in the 21st century.

[121] Christopher Ingraham, *Over 60 Percent of Voters Including Half of Republicans Support Elizabeth Warren's Wealth Tax*, WASH. POST (Feb. 6, 2019), https://www.washingtonpost.com/us-policy/2019/02/05/over-percent-voters-including-half-republicans-support-elizabeth-warrens-wealth-tax/?utm_term=.c52795885216.

[122] The arithmetic to arrive at these results assumes Piketty's 4% annual long-term return on capital: ((1.04*0.02)/(0.04))*100% = 52% and ((1.04*0.03)/(0.04))*100% = 78%.

[123] After losing 52% and 78% of long-term returns, the security holder is left with 48% (1.92%) and 22% (0.88%) of the 4% return, respectively. On sale or exchange of the security, given holding requirements are met, there would be an additional 20% long-term capital gains tax on the remaining 48% and 22% of gain. Ultimately, this equates to remaining returns of 38.4% (1.536%) and 17.6% (0.704%) of the 4% long-term annual return if the security is sold after a year of holding. *See* PIKETTY, *supra* note 120 at 206 (2014).

[124] Gergen, *supra* note 31, at 1.

long-term capital gains and corporate income tax rates across Europe and in the United States.[125]

Comparatively, the Gergen regime is not only economically sensible but also morally righteous with respect to the goal of fiscal citizenship through taxation of corporate capital. It can have its cake and eat it too. Myriads of other tax reform regimes exist, but they normally either falter in raising receipts or protect only a miniscule amount of societal capital. Notably, three reform regimes have become commonplace in the twenty-first century: corporate income tax, social tax credits, and penalty regimes. With individual ethics bleeding into corporations and shareholder activism increasing, Gergen's regime captures the benefits of all three regimes.[126]

First, the corporate income tax regime has forever suffered from base erosion and crafty transfer pricing techniques that have allowed corporations like Apple to sock billions in income overseas in either low- or no-tax jurisdictions, achieving almost permanent tax deferral.[127] Increasing rates would only promote greater base erosion and lead to more seemingly inevitable tax holidays.[128] Under the Gergen plan, it would not matter where Apple shifts its income because it would have to pay taxes based on the value of its issued securities, which account for the positioning of its assets and income globally.

Second, social tax credits and penalty regimes attempt to represent

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[125] Kyle Pomerleau, *U.S. Taxpayers Face the 6th Highest Top Marginal Capital Gains Tax Rate in the OECD*, TAX FOUND. (Mar. 24, 2015), https://taxfoundation.org/us-taxpayers-face-6th-highest-top-marginal-capital-gains-tax-rate-oecd/. The U.S. capital gains rate sits at 23.8% when accounting for federal taxes, 6.4% higher than the OECD's weighted average.

[126] *See* Yuliya Ponomareva, *Shareholder Activism is on The Rise: Caution Required,* FORBES (Dec. 10, 2018), *https*://www.forbes.com/sites/esade/2018/12/10/shareholder-activism-is-on-the-rise-caution-required/.

[127] Apple was able to successfully defer over $36 billion in tax liabilities, only choosing to pay due to a U.S. tax holiday resulting from the TCJA that allows for far reduced tax rates. Daisuke Wakabayashi & Brian X. Chen, *Apple, Capitalizing on New Tax Law, Plans to Bring Billions in Cash Back to U.S.*, N.Y. TIMES (Jan. 17, 2018), https://www.nytimes.com/2018/01/17/technology/apple-tax-bill-repatriate-cash.html.

[128] *Id*. *In* general, tax holidays provide either low-rate or tax-free transfers of untaxed income into the jurisdiction in question. For instance, the United States' repatriation tax from the 2017 TCJA has set rates of 15.5% and 8% for the repatriation of untaxed income in the form of cash and noncash assets, respectively. Erica York, *Evaluating the Changed Incentives for Repatriating Foreign Earnings*, TAX FOUND. (Sept. 27, 2018), https://taxfoundation.org/tax-cuts-and-jobs-act-repatriation/. Several European countries have also implemented tax holidays from time to time. The downside of these holidays is that they incentivize long-term deferral of income. Chuck Marr & Chye-Ching Huang, *Repatriation Tax Holiday Would Lose Revenue and is a Proven Policy Failure*, CTR. ON BUDGET & POL'Y PRIORITIES (Jun. 20, 2014), https://www.cbpp.org/research/repatriation-tax-holiday-would-lose-revenue-and-is-a-proven-policy-failure. While a corporate tax planner would rather pay the new 21% U.S. corporate rate over the old 35% rate, that same planner would rather pay 15.5% or 8% over the new 21% rate. If the corporation in question does not have a high demand for either liquidity or capital, such deferral through tax havens can prove rewarding.

both sides of a coin, heads rewarding social enterprise with credits and tails punishing social malfeasance with penalties. In theory, these regimes punish for the destruction of capital that corporate pollution and the release of greenhouse gases cause, but they rely heavily on litigation and *ex post* information gathering that can be politically and economically difficult. Meanwhile, Gergen's plan offers an *ex ante* solution that uses *ex post* corrective measures.[129] Both forecasts of harm to public goods and the actual resulting harm create unwanted downward pressure on security prices.

Because a corporation's ultimate obligation is to reward investors by raising share prices, Gergen's plan bizarrely inverts the dual penalty-credit regime, counterintuitively resulting in better long-term outcomes for public capital and generating higher tax receipts. The penalty and credit regime focus on harm caused now, but its revenue dries up when harm ceases to occur. Gergen's plan instead plays into the long-term sociology of market demand and the psychology of the activist shareholder that seeks higher returns and fewer negative externalities.[130] Instead of tapping a short-term revenue stream from pollution and greenhouse gas emissions, it taps into a much larger and longer-term cash cow as activist shareholders and market demand push companies to invest in greener energy and punish the stock prices of those that do not. Corporations are consequently forced to appease their activist shareholders and market demand, investing in less polluting and greenhouse gas emitting technology, increasing the value of corporate securities, and facing a higher tax liability as a result.

On its face, bearing an increased cost while moving to cleaner, more innovative, and sustainable uses of public capital seems counterintuitive. One might think that surely firms who make these shifts deserve lower tax rates. That contention might bear some weight if market economics and shareholder activism were not sufficiently powerful motivators in themselves. Instead, the purpose of increasing tax liabilities as firms improve their value through the adoption of new technologies is to increase the overall expenditure on capital. A capital tax reform that only replaced the revenues of a piecemeal approach dollar-for-dollar with those of a comprehensive plan that stopped collecting revenue after firms innovated would only maintain the status quo of corporate fiscal citizenship. If firms

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[129] When internal corporate forecasts undershoot Wall Street expectations, security prices generally fall. *See e.g.* Wallace Witkowski, *Micron Stock Tanks as Sales Outlook Falls Well Short of Target, Production Growth Slashed*, MARKETWATCH (Dec. 19, 2018), https://www.marketwatch.com/story/micron-shares-drop-as-sales-outlook-falls-1-billion-short-of-wall-street-target-2018-12-18.

[130] *See generally* Shane Goodwin, *The Long-Term Efficacy of Activist Directors*, SSRN (Feb. 11, 2016), https://ssrn.com/abstract=2731369. Organic milk stands as one of the modern successes of market demand. *See* Catherine Green & William McBride, *Consumer Demand for Organic Milk Continues to Expand – Can the U.S. Dairy Sector Catch Up?*, CHOICES, 4th Quarter 2015 30(1), at 2-5.

are both innovating and paying a tax on capital, the fiscal bond moves from taxation as damages to taxation as investments in future capital regulation and administrative programs.

V. CONCLUSION

Over the next century, global economic, environmental, and social conditions will require expensive private and public solutions. Accounting for the rise of automation, global warming, and underfunded social safety nets will cause an immense financial strain on national governments. So far, individual fiscal citizenship has failed in covering this funding gap. Consequently, the corporate actors responsible for the cause of these twenty-first century ailments need to step up, especially with a growing tax resistance among individuals in both the United States and abroad. To best capture the corporations' proper obligation to the state, a mixture of the benefits theory and ability-to-pay principles must be used. Under the Gergen regime, capital taxation greatly affects both a corporation's ability to amass revenue and operate in the global marketplace as well as the benefits it receives from having a government that creates stability for capital markets that allowed for the corporation's growth. Without making corporations fulfill their true obligations to the state in compensation for their externalities, tax policy will favor the abuse of a corporation's bad faith bargained-for rights.