

Book Reviews

What Are Tax Havens and Why Are They Bad?

THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS. By Gabriel Zucman. Chicago, Illinois: University of Chicago Press, 2015. 200 pages. \$20.00.

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Introduction

International taxation is a particularly distasteful portion of the current-events diet. There are plenty of good reasons to learn about it: presidential candidates rail against avoidance and inversions,¹ and headlines about Apple's offshore profits² and the Panama Papers³ regularly find themselves on the front page. But there is also no avoiding the fact that the details of the international tax system can be bewildering. For most people, no amount of descriptive creativity (the "double Irish, Dutch Sandwich" comes to mind⁴) will make it otherwise.

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1. See Catherine Rampell, *Clinton's Ambitious Plan: Make U.S.-based Corporations Pay Their Taxes*, WASH. POST (Dec. 14, 2015), https://www.washingtonpost.com/opinions/clintons-ambitious-plan-make-us-based-corporations-pay-their-taxes/2015/12/14/befce006-a2a6-11e5-b53d-972e2751f433_story.html [<https://perma.cc/S6XC-6T2S>] (reporting on Hillary Clinton's strategy for curbing tax inversions).

2. See Floyd Norris, *Apple's Move Keeps Profit Out of Reach of Taxes*, N.Y. TIMES (May 2, 2013), http://www.nytimes.com/2013/05/03/business/how-apple-and-other-corporations-move-profit-to-avoid-taxes.html?_r=0 [<https://perma.cc/87XZ-9EX3>] (describing Apple's tactic to avoid paying taxes by directing profits to low-tax or no-tax jurisdictions).

3. See Kylie MacLellan & Elida Moreno, *Prosecutors Open Probes as World's Wealthy Deny 'Panama Papers' Links*, REUTERS (Apr. 4, 2016), <http://www.reuters.com/article/panama-tax-idUSL5N177452> [<https://perma.cc/MXZ4-DPV4>] (reporting on documents leaked from a Panamanian law firm specialized in setting up offshore companies).

4. This is a tax scheme in which a U.S. parent company moves profits from an Irish subsidiary to a Dutch subsidiary, then back to a (separate) Irish subsidiary to maximize deductions and avoid withholding taxes. See, e.g., 'Double Irish with a Dutch Sandwich,' N.Y. TIMES (Apr. 28, 2012), http://www.nytimes.com/interactive/2012/04/28/business/Double-Irish-With-A-Dutch-Sandwich.html?_r=0 [<https://perma.cc/C2UV-QYZU>] (diagramming the way numerous companies take advantage of international taxation strategies to avoid high U.S. tax rates); Toby Sterling & Tom Bergin, *Google Accounts Show 11 Billion Euros Moved Via Low Tax 'Dutch Sandwich' in 2014*, REUTERS (Feb. 19, 2016), <http://www.reuters.com/article/us-google-tax-idUSKCN0VS1GP>

One of the great virtues of Gabriel Zucman's new book on tax havens, and occasionally its great drawback, is that it distills this bewildering complexity down to just a few base elements. His analysis locates clear villains—in Luxembourg and Switzerland, mostly—and arrives backed by a few simple, hard numbers.

Two numbers, in particular, provide the center of gravity for Zucman's account. The first is the amount of household financial wealth that national statistics overlook. Zucman estimates that \$7.6 trillion—8% of total worldwide wealth—is hidden in offshore accounts,⁵ the vast majority of which goes untaxed.⁶ The second is Zucman's attempt to quantify the costs of this unreported wealth. He estimates that it deprives governments of \$200 billion in annual revenue, or about 1% of the worldwide total.⁷ By his count, the United States alone loses \$35 billion.⁸

Making the first of these numbers look daunting requires no great effort. The missing \$7.6 trillion is only about \$600 billion less than the national wealth of Canada.⁹ The revenue figures require a bit more work, but not much: an additional \$200 billion in revenue would, for example, handily cover America's annual interest payments on its national debt.¹⁰ In short, unreported wealth and its potential consequences are a big deal, and the importance of the topic goes no small distance toward explaining Zucman's deserving rise (aided by his dissertation advisor and occasional co-author, Thomas Piketty) to something resembling wunderkind status.

But understanding where Zucman's numbers come from and knowing what to do with them are different matters. His book offers itself as an exercise in both quantification and evangelism: he comes armed with both a fact-laden diagnosis and a few simple prescriptions to make the world of international taxation a better place. Yet Zucman's figures should be viewed as conversation starters rather than argument enders: the connection between \$7.6 trillion in unreported wealth and the wider issue of tax havens is not as obvious as it might seem.

[<https://perma.cc/E8FN-NBZP>] (describing Google's use of the "double Irish, Dutch Sandwich" to earn most of its foreign income free of tax).

5. GABRIEL ZUCMAN, *THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS* 35 (Teresa Lavender Fagan trans., 2015).

6. *Id.* at 47.

7. *Id.* at 52.

8. *Id.* at 53.

9. See *National Balance Sheet and Financial Flow Accounts, Second Quarter 2015*, STAT. CAN. (Sept. 11, 2015), <http://www.statcan.gc.ca/daily-quotidien/150911/dq150911a-eng.htm> [<https://perma.cc/RP5R-MK6K>] (reporting the national wealth of Canada as \$8.3 trillion).

10. See Josh Zumbrun, *The Legacy of Debt: Interest Costs Poised to Surpass Defense and Nondefense Discretionary Spending*, WALL STREET J.: REAL TIME ECON. (Feb. 3, 2015, 11:13 AM), <http://blogs.wsj.com/economics/2015/02/03/the-legacy-of-debt-interest-costs-poised-to-surpass-defense-and-nondefense-discretionary-spending/> [perma.cc/99SQ-H3VJ] (stating that the U.S. government's interest costs are around \$200 billion a year).

With that in mind, this review has three goals. The first is simply to summarize and explain Zucman's central findings for a legal audience—and to offer a sense of the limits of these estimates, particularly with respect to revenue loss. The second is to situate these findings against the backdrop of two long-running debates in international taxation. One is definitional: What is a tax haven? The other is diagnostic: Why are they bad? Answering these questions is crucial to understanding Zucman's findings, but they emerge only fleetingly throughout his book. The third and final goal is to comment critically on the prescriptions Zucman offers for battling unreported wealth, including his most novel: a global registry for financial securities. This proposal might be a good deal more ambitious than Zucman anticipates. Fortunately, it is a proposal about which legal scholarship should have something to say.

I. Missing Wealth and Missing Revenue

A. *Missing Wealth*

Zucman's book is built around two central findings—what one might call “missing wealth” and “missing revenue.” Missing wealth can be described as the solution to a long-standing empirical puzzle: why, at the global level, do official statistics show that national liabilities exceed assets? As a matter of simple accounting definitions, this shouldn't be possible. I can have a net debt to my law review editor. The citizens of Connecticut can have a net debt to the citizens of California. And the citizens of the United States can have a net debt to the rest of the world. Globally, however, total liabilities should be matched by total assets: a liability recorded in one place should be equaled by an asset recorded in another.¹¹ But this is not what we observe: when the national assets and liabilities are summed up, the entire planet appears to be a net debtor. In their respective books, Zucman and Piketty actually make the same joke about this curious state of affairs: it appears as if Earth must be owned partly “by Mars.”¹²

Why does this gap between assets and liabilities exist? Zucman's claim is that it is an illusion created by the vigorous use of offshore banking.¹³ A simple example can illustrate.¹⁴ Imagine a French citizen who owns

11. ROBERT W. HAMILTON ET AL., *THE LAW OF BUSINESS ORGANIZATIONS: CASES, MATERIALS, AND PROBLEMS* 63–65 (12th ed. 2014) (discussing basic accounting principles and the requirement that a balance sheet of assets and liabilities must always state an equality).

12. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 465 (Arthur Goldhammer trans., 2014); ZUCMAN, *supra* note 5, at 37.

13. See Gabriel Zucman, *The Missing Wealth of Nations: Are Europe and the U.S. Net Debtors or Net Creditors?*, 128 Q.J. ECON. 1321, 1322 (2013) (asserting that international statistics do not account for assets held in tax havens).

14. See *id.* at 1327–28 (describing how French authorities fail to account for assets held in offshore custodian banks).

American securities. U.S. national accounts will dutifully record this as a liability. But French accounts will record this as an asset only if it is held in the right place. If it's held in a French portfolio, the asset will end up recorded in French statistics and cancel out the American liability. But this won't happen if the security is held in, say, Switzerland—a great antagonist in Zucman's story. Swiss law does not require that the asset be reported to (and thus recorded by) either Swiss or French authorities. When the French citizen puts her American securities in a Swiss account, those securities simply disappear from the national statistics.¹⁵

This gap also provides the crucial tool for measuring the amount of wealth held in such accounts: Zucman's estimate is simply the difference between globally identifiable financial assets and liabilities.¹⁶ This might seem trivial—a bit of addition followed by a dash of subtraction—but it isn't. Among other things, finding the value of this gap requires assembling aggregate data on portfolio assets and liabilities for just about every country in the world.¹⁷

This method does, however, require some crucial assumptions and comes burdened with a few limitations. A key assumption is that national accounts actually report and measure assets and liabilities accurately.¹⁸ It should be said: there are aspects of this data that do not inspire much confidence. National flow-of-funds estimates have a funny, “back-of-the-envelope” quality about them.¹⁹ (In the Federal Reserve's U.S. estimates, for example, the value of closely held equities—which are not traded on an open market and are thus stubbornly hard to value—is calculated simply by taking the companies' self-reported book value and subtracting 25%, as a slapdash illiquidity adjustment.)²⁰ But at least these rough-and-ready estimates have, as Piketty sometimes puts it, the considerable virtue of existing.²¹

15. *Id.*

16. *See id.* at 1338 (estimating that “the unrecorded wealth in all tax havens is equal to the difference between globally identifiable portfolio liabilities and assets”).

17. *See id.* at 1339 (stating that computing this value requires “aggregate portfolio securities asset and liability figures for all countries”).

18. *See id.* at 1337–38 (noting that determining the value of wealth held in tax havens requires assuming that “securities held by direct reporters . . . and those held onshore by households are well measured globally”).

19. For a recent discussion of these and related issues, see Chris William Sanchirico, *As American as Apple Inc.: International Tax and Ownership Nationality*, 68 TAX L. REV. 207, 233–37 (2015) (exploring problems with Treasury International Capital staff reports).

20. Richard E. Ogden et al., *Corporate Equities by Issuer in the Financial Accounts of the United States*, BOARD OF GOVERNORS OF THE FED. RES. SYS.: FEDS NOTES (Mar. 29, 2016), <https://www.federalreserve.gov/econresdata/notes/feds-notes/2016/corporate-equities-by-issuer-in-the-financial-accounts-of-the-united-states-20160329.html> [<https://perma.cc/B6KM-EJ8W>].

21. *See, e.g.*, PIKETTY, *supra* note 12, at 13 (“Although the information was not perfect, it had the merit of existing.”). Piketty's point is that it's better to have rough estimates than no estimates; Piketty himself has written that Zucman's estimates are “by nature uncertain.” *Id.* at 466.

A key limitation, meanwhile, is that Zucman's estimates are restricted to the gap of *financial* assets held offshore.²² Stocks and bonds are included; yachts and Cézannes are not. Whether one views Zucman's estimates as satisfactory will depend largely on how generously or fastidiously one views these drawbacks.²³ But the burden, at least in this reader's mind, is now firmly on the skeptics to explain why they might be fatal or to offer another hypothesis that is consistent with Zucman's findings.

B. Missing Revenue: A Few Skeptical Notes

Zucman's missing-revenue calculation, meanwhile, is an attempt to quantify the tax consequences of missing wealth.²⁴ As with missing wealth, Zucman's method here is, in principle, quite simple: he takes the sum of unreported wealth and the rate of turnover, makes some assumptions about the rate of return, and asks how much tax would be paid on the income under existing rates.²⁵ And, like Zucman's missing-wealth calculations, his revenue calculations offer an important sense of the magnitude at stake.

But I stumbled over two features of the revenue calculations. The first was his assumptions: Zucman asks what would happen if the returns on hidden wealth were taxed at existing marginal rates for dividends and estate transfers.²⁶ Zucman knows that using these rates might be unrealistic and argues that this makes his estimates a likely *understatement*, since they don't "include the cost of tax reductions that governments have had to agree to for fear that their taxpayers will hide their wealth in Switzerland."²⁷ This is a fine, sporting point. But I thought the logic probably cut the other way: like it or not, almost no high-wealth taxpayers actually pay at the highest marginal rates on their investments and estates.

Consider the estate tax, which (in the U.S. case) Zucman assumes takes a full 40% bite out of transferred estates.²⁸ For starters, I'm not sure why Zucman assumes all undisclosed U.S. wealth that "changes hands" will be

22. See Zucman, *supra* note 13, at 1335–44 (outlining Zucman's method for estimating global offshore wealth and noting that this includes only financial wealth, even though tax havens can be used for art or real estate).

23. *Id.* at 1345 ("A basic objection to my estimation procedure is that the global portfolio assets–liabilities gap may reflect data deficiencies unrelated to tax havens.").

24. See ZUCMAN, *supra* note 5, at 34–35 ("To estimate the global cost of offshore tax evasion, we need to know . . . how much additional taxes would be paid if all this wealth were declared.").

25. See *id.* at 35, 50 (estimating that a total of \$7.6 trillion is held in tax havens, that 3% of these assets change hands each year, and that these assets would be taxed by an average rate of 32%, totaling a loss of \$55 billion per year).

26. See *id.* at 51 (noting that his calculations are "based on the tax rates currently in force all over the world").

27. *Id.* at 82.

28. Gabriel Zucman, *The Hidden Wealth of Nations*, GABRIEL ZUCMAN, tbl.Data-Fig4_Tab1 (2015), <http://gabriel-zucman.eu/files/Zucman2015TablesFigures.xlsx> [https://perma.cc/8P2B-PVJB].

hit by the estate tax; it seems plausible that none of it would be.²⁹ (And if it's taxed at capital gains rates we would need to know something about basis.) But, even if we assume that all of these transfers are covered by the estate tax, there is still a large gap between the marginal and effective rates of this tax, which is classically described as voluntary. (That is, you can get around it with enough sly planning.)³⁰ Voluntary might be an overstatement,³¹ but if a high-wealth taxpayer is actually paying an effective rate of 40%, she's probably not trying hard enough. (And if she's willing to evade taxes with offshore banking, then she's probably going to be trying pretty hard.)³² The same is true of the dividend rates, which any number of moderately careful investment strategies can help avoid or delay on investment income.

The bottom line is that the strict binary—wealth is either wholly untaxed or taxed at the top marginal rate—isn't realistic. How sensitive are Zucman's results to these assumptions? Here's my attempt to offer a sense of an answer with data from the United States, which Zucman finds loses \$35 billion in revenue annually.³³ He gets this by taking his estimate of total undisclosed U.S. wealth (\$962 billion), assuming an 8% nominal rate of return taxed at 30.3%,³⁴ and a 3% estate turnover taxed at the top rate of 40%.³⁵ It's hard to know what the "right" tax rate or rate of return for these estimates should be,³⁶ but reasonable estimates benchmarked to effective rates produce rather

29. Zucman writes that "[a]round 3% of the [total] assets held in tax havens changes hands each year," but I do not see a reason why we should assume these are covered by the estate tax (which, in any event, has large exclusions). *Id.* at 50.

30. See George Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance*, 77 COLUM. L. REV. 161, 164 (1977) (describing the estate and gift tax as "seriously eroded" and entirely avoidable with enough effort and sophisticated tax strategies).

31. Cf. Paul L. Caron & James R. Repetti, *The Estate Tax Non-Gap: Why Repeal a "Voluntary" Tax?*, 20 STAN. L. & POL'Y REV. 153, 154 (2009) (suggesting that efforts to repeal the estate tax are evidence that the estate tax is not so easily avoided as some believe).

32. For a related discussion of these points, see Daniel Hemel, *What's the Matter with Luxembourg?*, NEW RAMBLER (Jan. 13, 2016), <http://newramblerreview.com/book-reviews/economics/what-s-the-matter-with-luxembourg> [<https://perma.cc/3Q7J-FADQ>].

33. ZUCMAN, *supra* note 5, at 53.

34. The 30.3% rate is an OECD figure that appears to be a top marginal rate imposed on dividends inclusive of both federal and state taxes. Zucman, *supra* note 28, at tbl.Data-Fig4_Tab1. The estate tax rate of 40% is the federal rate and ignores state variation in estate taxation. In what follows, I focus only on federal rates, which allows for a cleaner focus on federal revenue consequences.

35. Thus, $[962 \cdot .08 \cdot .303] + [962 \cdot .03 \cdot .4] = 34.87$. These numbers are from Zucman's online tables and figures. *Id.*

36. Both the rate of return and the tax rate will depend on how the funds are invested. If they're invested in long-term Treasury bonds, the rate of return will be lower, and the returns will be taxed at a higher ordinary income rate. If they're invested in corporate equity, the average rate of return will be higher, but the tax rate will be lower—and potentially nothing, depending on how the funds are invested and how the investments are held. For a helpful breakdown of the rates of return and investment types, see Aswath Damodaran, *Annual Returns on Stock, T.Bonds and T.Bills: 1928 - Current*, N.Y.U. STERN SCH. BUS., http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/histretSP.html [<https://perma.cc/R97F-236Z>].

different results. If we start with the same stock of undisclosed wealth and nominal rate of return, but assume an effective income tax rate of 23.5%, and an effective estate tax rate of 16.6%—tax rates that are still too high but at least based on the actual effective rates that wealthy taxpayers face³⁷—the U.S. revenue loss drops from \$35 billion to about \$23 billion.³⁸ If we assume a more modest 5% rate of return, it drops it to \$16 billion.³⁹ With a modicum of investment tax planning, it would drop below \$10 billion.

All of these numbers should be interpreted as a rough bounding exercise, not precise surgery. But ambiguities about tax rates and tax planning point toward a second and more general issue with Zucman's revenue estimates: they do not incorporate behavioral responses. This isn't an issue for Zucman's missing wealth estimates, since those calculations are an attempt to answer a beguiling factual question about the current state of the world: how much wealth is *actually held* in unreported offshore accounts? His revenue estimates, by contrast, are an attempt to answer a hypothetical question: if missing wealth were declared and taxed at existing marginal rates, what would the tax consequences look like? But a world in which an additional \$7.6 trillion is subject to taxation is a world in which many variables would be different.

Much has been written about whether and how revenue estimates of this kind should anticipate both micro and macroeconomic behavior.⁴⁰ There may also be important differences between this behavior in the long run and the short run.⁴¹ These estimates have been the source of some surprisingly fierce battles. But, without reenacting them, it seems fair to say that even the

37. Here I use the effective income tax rate paid by the top 1% of earners in 2011 (23.5%), and the effective estate tax rate (16.6%). Adrian Dungan & Michael Parisi, *Individual Income Tax Rates and Shares*, STAT. INCOME BULL. 44 (Spring 2014), <https://www.irs.gov/pub/irs-soi/14insprbultaxrateshares.pdf> [<https://perma.cc/XXA2-NSFF>]; Chye-Ching Huang & Chloe Cho, *Ten Facts You Should Know About the Federal Estate Tax*, CTR. ON BUDGET & POL'Y PRIORITIES (Sept. 8, 2016), <http://www.cbpp.org/research/federal-tax/ten-facts-you-should-know-about-the-federal-estate-tax?fa=view&id=2655> [<https://perma.cc/39T9-PUNM>]. The 23.5% rate is likely too high because it averages across rates paid on capital income and labor income.

38. That is, $[962 * .08 * .235] + [962 * .03 * .166] = 22.9$.

39. That is, $[962 * .05 * .235] + [962 * .03 * .166] = 16.1$.

40. See, e.g., Alan J. Auerbach, *Dynamic Scoring: An Introduction to the Issues*, 95 AM. ECON. REV. 421, 421–22 (2005) (discussing how dynamic scoring of revenue estimates can anticipate microeconomic effects); David Kamin, *Basing Budget Baselines*, 57 WM. & MARY L. REV. 143, 158–60 (2015) (discussing how revenue estimates in budget baselines are used in macroeconomic analysis).

41. If all currently undisclosed wealth was immediately declared and taxed, the short-run behavioral response would likely be close to zero. An important question here is whether such a view—immediate taxation of all currently undisclosed investments—is a realistic model for constructing revenue estimates.

most “static” federal revenue estimates attempt to incorporate some kind of micro-level behavioral responses.⁴²

In this case, two behavioral responses immediately come to mind.⁴³ First, there is the rate at which the undisclosed assets are transferred. If a tax system increases the tax owed on realized gains—as Zucman imagines—it will naturally affect the likelihood that and timing with which the assets change hands. Second, the owners themselves might live in different places. There is, inevitably, debate about the magnitude of these effects. My armchair suspicion is that there might be a relevant correlation between taxpayers who are willing to avoid taxes by illegally hiding money offshore and taxpayers who are willing to avoid taxes with deferral and emigration.⁴⁴ But it seems unlikely that these individuals will make the same consumption, investment, and residential decisions as they do now.

This uncertainty about the revenue consequences of hidden wealth points toward a set of issues that come up only fleetingly in Zucman’s book. Is missing revenue *really* the reason we care about tax havens? And is it the *only* reason? If the answer to both questions is yes, we should get used to living with the uncertainties sketched above. But I think the answer, at least to the second question, is no—certainly not for Zucman and probably not for society as a whole. Arriving at this conclusion, however, requires answering two basic questions that Zucman’s book doesn’t ask.

II. What Are Tax Havens and Why Are They Bad?

A. Two Definitional Preliminaries

Zucman’s calculations are about the size and costs of unreported wealth. Hence, the first half of the title of his book: *The Hidden Wealth of Nations*. But what about the second half: *The Scourge of Tax Havens*?

“Hidden wealth” and “tax havens” are not coterminous concepts, much less self-defining ones. And they are not the only concepts deployed in Zucman’s book: we are also warned about multinational companies shifting

42. The Joint Committee on Taxation is charmingly direct on this point. (Question: “Are Joint Committee on Taxation estimates ‘static?’” Answer: “No.”) *Frequently Asked Questions*, JOINT COMM. ON TAX’N, <https://www.jct.gov/other-questions.html> [<https://perma.cc/6D29-YES4>].

43. For a broad window into the general topic of behavioral response to taxation, see generally DO TAXES MATTER?: THE IMPACT OF THE TAX REFORM ACT OF 1986 (Joel Slemrod ed., 2d prtg. 1990).

44. Emerging momentarily from the armchair: perhaps the most probative evidence on this question comes from research on the international market for football players (in the global and not American sense), which finds evidence of high player mobility in response to taxation. See Henrik Jacobsen Kleven et al., *Taxation and International Migration of Superstars: Evidence from the European Football Market*, 103 AM. ECON. REV. 1892, 1922–23 (2013) (finding that low tax rates in Denmark on foreign football players is linked to greater mobility of higher skilled foreign players into the country).

and manipulating profits,⁴⁵ tax “avoidance and evasion,”⁴⁶ as well as “theft[,] pure and simple.”⁴⁷ Zucman uses these terms with the care of someone aware of their nuances, but rarely stops to define them for a generalist reader. For a book that is attempting to reach a wider audience—as, in the wake of “Pikettymania,”⁴⁸ this one almost certainly is—it might make sense to steer clear of the tedious definitional weeds. But this strategy produces occasional ambiguity about the scope of the book’s ambition.

Two definitional points are worth stressing. First, there is no universally accepted definition of a tax haven.⁴⁹ The Organisation for Economic Co-operation and Development (OECD) has offered one influential characterization that relies on four all-things-considered factors: low (or zero) tax rates, a reluctance to exchange information with other countries, a general lack of system transparency, and a failure to require that the economic activity of an incoming investor be “substantial” to obtain preferential tax treatment.⁵⁰

Of course, the OECD doesn’t have a monopoly on definitions. In a series of influential papers, for example, economist James Hines has relied on another definition that stresses low tax rates.⁵¹ Out of a total of forty-nine countries that appear on either the Hines or OECD lists, there is an overlap of thirty-two.⁵² Whether this degree of overlap should be viewed as dispiriting or encouraging is largely a matter of interpretation, but the seventeen countries that appear on one list but not the other include many of Zucman’s motivating examples (like Switzerland and Luxembourg). In this sense, tax havens bring to mind Justice Potter Stewart’s old line about

45. See ZUCMAN, *supra* note 5, at 1.

46. *Id.* at 4.

47. *Id.* at 79.

48. See, e.g., Alan S. Blinder, ‘Pikettymania’ and Inequality in the U.S., WALL STREET J. (June 22, 2014), <http://www.wsj.com/articles/alan-blinder-pikettymania-and-inequality-in-the-u-s-1403477052> [<https://perma.cc/4GQK-NU5H>].

49. See JANE G. GRAVELLE, CONG. RESEARCH SERV., R40623, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION 3 (2015) (stating that “there is no precise definition of a tax haven”).

50. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 22 (1998). For a general discussion of the OECD definition, see MICHAEL J. GRAETZ, FOUNDATIONS OF INTERNATIONAL INCOME TAXATION 492–93 (2003).

51. See, e.g., James R. Hines Jr., *Tax Havens* 1 (Mich. Ross Sch. of Bus. Office of Tax Policy Research, Working Paper No. 2007-3, 2007), <http://www.bus.umich.edu/otpr/WP2007-3.pdf> [<https://perma.cc/2XS6-QABZ>] (defining tax havens as “low-tax jurisdictions that offer . . . opportunities for tax avoidance”).

52. See Dhammika Dharmapala, *What Problems and Opportunities Are Created By Tax Havens?*, 24 OXFORD REV. ECON. POL’Y 661, 676 (2008) (listing the countries that qualify as tax havens under the Hines and OECD definitions of tax havens).

pornography⁵³: we might think we know tax havens when we see them, but it is surprisingly hard to draw up the precise list of family resemblances.

Second, there is the matter of the nitpicky-sounding distinction between tax avoidance and tax evasion. The difference is hardly intuitive, but it turns out to be highly important. Tax evasion usually refers to the illegal failure to report income.⁵⁴ Tax avoidance usually refers to legal (or at least not-yet-illegal) forms of tax planning that reduce tax liability.⁵⁵ This distinction is surely susceptible to further nitpicking—since what counts as legal is often determinable *ex post* and not *ex ante*⁵⁶—but it captures the bulk of an important divide in policy and practice.

These preliminaries help clarify the precise scope of Zucman's project. He is concerned almost exclusively with one dimension of the tax haven universe: jurisdictions that are reluctant to share information. And he is concerned primarily with the interaction between this form of bank secrecy and illegal tax *evasion*—not tax avoidance. This, in turn, allows a simple restatement of the book's core argument: nations with bank-secrecy laws that limit information sharing allow super-rich individuals to hide their wealth and, in so doing, break the laws of their home countries.⁵⁷

Zucman's book does have a brief final chapter that engages with issues of international corporate tax planning—that is, with legal tax avoidance.⁵⁸ In my view, this chapter—which builds on a distinct line of Zucman's research⁵⁹—fits somewhat uncomfortably alongside the previous four. Zucman's data and analysis might allow for some fairly confident conclusions about the extent and harm of personal tax evasion. But, as we'll see, such conclusions are much more tenuous with respect to corporate tax planning.

53. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).

54. See GRAVELLE, *supra* note 49, at 1 (distinguishing between tax avoidance and tax evasion on the basis that the latter refers to illegal tax reductions).

55. *Id.*

56. For a recent example of these problems, see Michael J. Graetz, *Behind the European Raid on McDonald's*, WALL STREET J. (Dec. 3, 2015), <http://www.wsj.com/articles/behind-the-european-raid-on-mcdonalds-1449187952> [<https://perma.cc/8FMR-XWF4>].

57. See ZUCMAN, *supra* note 5, at 79 (“It's important to understand that we're not talking about tax competition, but of theft pure and simple . . .”).

58. While corporations undoubtedly break the law, the consensus view is that evasion tends to be an individual issue and avoidance tends to be a corporate issue. See Dharmapala, *supra* note 52, at 665–66 (stating that tax havens are used by individuals for “illegally evading home-country taxes,” while corporations use tax havens for “legal tax avoidance”).

59. See generally Gabriel Zucman, *Taxing Across Borders: Tracking Personal Wealth and Corporate Profits*, J. ECON. PERSP., Fall 2014, at 121 (attempting to quantify revenue lost as a result of corporate tax avoidance).

B. Why Are Tax Havens Bad?

The background assumption of Zucman's text seems to be that both evasion *and* avoidance are problems—problems, in particular, for the revenue-gathering capacity of governments. But the difference between evasion and avoidance—between the illegal personal evasion and the legal corporate planning—turns out to have large consequences for why we might worry about tax havens. Other than a few die-hard tax protestors, few seem to doubt that illegal tax evasion is a problem worth solving. But whether this is true of the wider world of corporate tax planning remains hotly controversial.⁶⁰

Views on this wider subject—corporate tax planning and its relationship to international tax competition—are sometimes sorted into the “positive” and “negative” camps.⁶¹ The negative view—that international corporate tax planning harms the ability of individual nations to collect revenue—is certainly a respectable position and probably even the dominant one. The intuition behind it is easily grasped: if nations start selling services that allow foreign companies to reduce their domestic tax liabilities, it will trigger a race to the bottom in which no nation is able to gather more than a nominal fee from the most mobile companies.⁶²

But this view does not hold the field unchallenged. The standard response: it's *desirable* that foreign havens let domestic governments distinguish between the less mobile and more mobile companies that operate in domestic jurisdictions.⁶³ The intuition is that taxes on particularly mobile firms will just end up driving those firms away—and so, in the end, the tax will be borne by the immobile firms regardless.⁶⁴ For this reason, the argument goes, nations have an interest in distinguishing between firms on the basis of mobility: taxes end up falling where they would have anyway—

60. For competing views on this debate from a law-focused perspective, see generally Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573 (2000) (arguing that tax havens are problematic because they deprive countries of necessary revenue and force countries to employ less-progressive tax forms); and Julie Roin, *Competition and Evasion: Another Perspective on International Tax Competition*, 89 GEO. L.J. 543 (2001) (arguing against reforms that would weaken tax havens for normative and practical reasons). For a general overview of the arguments on each side of this debate, see GRAETZ, *supra* note 50, at 487–541.

61. I use these terms following Dharmapala, *supra* note 52, at 662.

62. For an influential formal model of this view, see Joel Slemrod & John D. Wilson, *Tax Competition with Parasitic Tax Havens*, 93 J. PUB. ECON. 1261, 1263–64 (2009).

63. See, e.g., Qing Hong & Michael Smart, *In Praise of Tax Havens: International Tax Planning and Foreign Direct Investment*, 54 EUR. ECON. REV. 82, 92 (2010) (arguing that, under certain assumptions, an increase in tax avoidance can lead to increased statutory and effective tax rates and increased citizen welfare).

64. This intuition is not new. See, e.g., Roger H. Gordon, *Taxation of Investment and Savings in a World Economy*, 76 AM. ECON. REV. 1086, 1100 (1986) (constructing a model in which smaller countries that tax mobile capital or immobile labor see those taxes borne entirely by labor).

on those hapless immobile firms—and individual countries get the benefit of keeping the investments of mobile firms inside their borders.

Each side in this long-running debate has a few arrows of suggestive evidence in its quiver. For the negative view, a particularly stark fact is that nations rarely act as if they are eager to distinguish between more and less mobile firms. Indeed, industrialized nations often expend a great deal of grief and treasure trying to shut down the barely-legal-until-they-aren't planning games.⁶⁵ The more optimistic view of tax havens, on the other hand, points to the fact that tax havens seem to “stimulate[] investment in nearby high-tax countries,”⁶⁶ and notes that the rise in tax haven investments is not associated with any precipitous decline in corporate tax revenues.⁶⁷ Lurking behind this disagreement of facts and formal models is perhaps a more fundamental—and probably intractable—disagreement about the nature of government: is tax competition a healthy stimulant that helps constrain the fecklessness of wasteful bureaucrats, or is it a downward spiral that prevents our noble, welfare-maximizing governments from striking the desired balance between equity and efficiency?⁶⁸

C. *The Moral Case Against Tax Evasion—and Its Wrinkles*

The ongoing debate over international tax planning brings us back to tax evasion: given the apparently unyielding arguments over tax avoidance and corporate tax planning, can anything clearer be said about the illegal tax evasion that is the primary object of Zucman's firepower?

I doubt that anyone who defends the positive view of corporate tax avoidance would lend his seal of approval to personal tax evasion. Nonetheless, the above question is not as easy to answer as it first appears. It is hard to say with much confidence which countries are the net winners and losers from the tangled network of transactions that enables evasion.⁶⁹ More broadly, the incidence of personal tax evasion remains contested: one

65. See Slemrod & Wilson, *supra* note 62, at 1262 (stating that the benefit of tax havens must be reconciled with the fact that nonhaven countries “expend considerable resources” to protect their own tax revenue threatened by haven transactions).

66. James R. Hines Jr., *Do Tax Havens Flourish?*, 19 TAX POL'Y & ECON. 65, 65 (2005); see also Mihir A. Desai et al., *Do Tax Havens Divert Economic Activity?*, 90 ECON. LETTERS 219, 219–20 (2006) (referring to the possibility that encouraging tax havens might facilitate investment in nearby high-tax countries).

67. Dharmapala, *supra* note 52, at 674. For a longer treatment of these issues, see generally Alan J. Auerbach, *Why Have Corporate Tax Revenues Declined? Another Look*, 53 CESIFO ECON. STUD. 153 (2007).

68. See GRAETZ, *supra* note 50, at 503 (commenting that tax havens undermine a sovereign nation's tax policy and ability to balance equity with efficiency as representatives and the populace desire, but noting that there is disagreement over whether this is a problem or benefit).

69. For a longer discussion of this point, see Hemel, *supra* note 32 (analyzing the impact of offshore tax evasion on the United States and United Kingdom and concluding that it is “difficult to know who wins and who loses from offshore tax evasion”).

might expect, for example, that as certain industries or investments fall victim to evasion—and as their after-tax rates of return start to rise—those industries will be subject to an influx of labor or investment that works, once more, to reduce the inflated after-tax returns.⁷⁰

Still, I think we can say something distinct, if not quite decisive, about tax evasion. Even if it turned out that the distributive consequences of tax evasion land in not-entirely-unappealing places, there is a distinctive reason why breaking the law is different: for both the elusive taxpayer and the facilitating tax haven, illegal tax evasion offends our sense of ordinary justice in a way that garden-variety corporate tax planning does not. In other words, to put it unobtrusively, illegal tax evasion is *wrong*.

It is wrong for a country to help facilitate tax evasion because of a simple norm of international relations: one country should not undermine the legal system of another.⁷¹ We are entitled to be appalled by countries that facilitate the evasion of domestic tax laws for the same reason one would be shocked by a country that facilitated the evasion of our domestic criminal laws. And we might think that tax evasion is wrong for the individual perpetrator because selecting which laws to obey, as if the U.S. Code were a cafeteria lunch line, violates the basic premise of our social contract. Zucman makes this point in passing,⁷² but it is Piketty, in his brief foreword to Zucman's text, that presses it hardest: “[M]odern democracies are based on a fundamental social contract: everybody has to pay taxes on a fair and transparent basis”⁷³ When that contract breaks down—when a “rising fraction of the population . . . feels that the system is not working for them”—then the “interclass solidarity” that binds the state together is at risk.⁷⁴

It is worth lingering on this point a bit longer, since it is a broader theme in Piketty's work (and what orbits it). Piketty has always stressed—as I suspect Zucman also believes—that the primary contribution of Piketty's research is the lush bushels of data it has gathered from around the world.⁷⁵ But when Piketty turns to diagnosis and prescription, he often invokes a faltering social contract: “a fiscal secession of the wealthiest citizens” could,

70. For a nice introduction to this argument, see James Alm & Keith Finlay, *Who Benefits From Tax Evasion?*, 43 *ECON. ANALYSIS & POL'Y* 139, 145–52 (2013) (summarizing different approaches to analyze the general equilibrium effects of tax evasion). One point of this general-equilibrium approach is that the distributional effects of tax evasion may depend on labor elasticity.

71. See GRAETZ, *supra* note 50, at 495 (claiming that “intentionally undermining the legitimate legal systems of other countries is wrong”).

72. See, e.g., ZUCMAN, *supra* note 5, at 56 (“When tax evasion is possible for the wealthy, there can be no consent for taxes.”).

73. Thomas Piketty, *Foreword* to GABRIEL ZUCMAN, *THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS* vii, vii–viii (Teresa Lavender Fagan trans., 2015).

74. *Id.* at viii.

75. See, e.g., Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States: 1913–1998*, 118 *Q.J. ECON.* 1, 3 (2003) (“[T]he primary contribution of this paper is to provide new series on income and wage inequality.”).

he has argued elsewhere, “do great damage to fiscal consent in general”⁷⁶—which would, in turn, exacerbate a variety of other social ills.

Provisionally, my chips are with Piketty and Zucman: creeping regressivity at the top of the distribution—whether it’s generated by tax havens, rent-seeking, or technology—doesn’t seem like a symptom of a healthy society. And yet two wrinkles in this line of argument must be kept in mind.

First, the predicted collapse of the democratic fiscal contract also implicates a bushel’s worth of thorny data questions. The literature on the relationship between democratic preferences and redistribution is daunting. Actually, it’s a mess.⁷⁷ But an extremely basic concern one might have, which Piketty himself sometimes echoes,⁷⁸ is that the public doesn’t really understand the nature of modern inequality, much less the complex tax treatment of high incomes.⁷⁹ At the same time, fears about the fragility of interclass solidarity must depend on an empirical premise about what various classes *actually know*, or at least actually believe, about the state of the fiscal union.

Second, the moral principle at stake—“fiscal consent,” divorced from whatever empirical consequences that might follow from its absence—seems like a geographically limited one. The wrongness of tax evasion depends, somewhat awkwardly, on *why* the investors use those unreported offshore accounts. For the United States and Europe, it’s not difficult to conclude that investors use unreported offshore accounts to evade legitimately enacted and generally applied domestic laws. But I think this is a much more challenging conclusion to arrive at for investors from places like Russia, the Middle East, and Africa. With these investors, one encounters a range of motives, from the ignoble to the perfectly banal. Some investors surely use offshore accounts to steal; others to avoid the risk of confiscatory domestic policies;

76. See PIKETTY, *supra* note 12, at 496–97 (“If taxation at the top of the social hierarchy were to become more regressive in the future, . . . such a fiscal secession of the wealthiest citizens could potentially do great damage to fiscal consent in general. . . . Individualism and selfishness would flourish: since the system as a whole would be unjust, why continue to pay for others?”). This is not to suggest that fiscal consent is the only reason Piketty objects to inequality. See, e.g., Liam Murphy, *Why Does Inequality Matter?: Reflections on the Political Morality of Piketty’s Capital in the Twenty-First Century*, 68 TAX L. REV. 613, 616 (2015) (discussing Piketty’s concerns with economic inequality and economic justice).

77. See, e.g., Daron Acemoglu et al., *Democracy, Redistribution and Inequality* 1 (Nat’l Bureau of Econ. Research, Working Paper No. 19746, 2013), <http://www.nber.org/papers/w19746> [<https://perma.cc/VUU8-3PLU>] (noting that “the empirical literature is very far from a consensus on the relationship between democracy, redistribution, and inequality”).

78. See, e.g., PIKETTY, *supra* note 12, at 259 (“[W]ealth is so concentrated that a large segment of society is virtually unaware of its existence . . .”).

79. This is also a large research agenda. For a snowflake-sized tip of the iceberg, see Vladimir Gimpelson & Daniel Treisman, *Misperceiving Inequality* 5–21 (Nat’l Bureau of Econ. Research, Working Paper No. 21174, 2015), <http://www.nber.org/papers/w21174> [<https://perma.cc/56KD-UHJ8>] (presenting survey findings of the public misperception of inequality).

others still to obtain wealth-management services that are simply unavailable at home.⁸⁰

This need not change the general point: our reasons for cracking down on individual tax evasion can be different and indeed stronger than our reasons for cracking down on corporate tax avoidance. But it does point toward a need for careful distinctions in the data—especially as European and North American nationals occupy a shrinking percentage of offshore accounts⁸¹ and as the research agenda moves from understanding the facts to assessing a response.

III. What Should We Do?

A. *Expanding FATCA*

So, what *should* we do about tax havens? Zucman's book contains two main proposals. The first is an expansion of America's Foreign Account Tax Compliance Act (FATCA).⁸² FATCA requires that foreign banks and other institutions automatically report financial information about U.S. taxpayers to the IRS, just as is required of domestic institutions.⁸³ If a foreign institution refuses, the United States imposes an additional 30% withholding tax on income flowing into that institution from the United States.⁸⁴

FATCA is important partly because it changes the default rules: it marks a shift from cumbersome "on demand" information exchanges—under which a government can actively request information on a case-by-case basis, with cause—to automatic ones, under which financial institutions transmit data as a matter of course.⁸⁵ Zucman's basic point is that FATCA's unilateralism is necessary (and desirable) but not sufficient to truly control global tax evasion, since individual financial institutions can decide to stop dealing with the United States.⁸⁶ (And, even if they do report to the United States, American ownership and income might be hidden behind inscrutable veils of entity ownership.) Zucman's proposal, which fits snugly alongside similar

80. See ZUCMAN, *supra* note 5, at 52 (noting that offshore banks may provide financial services to investors from countries that do not have a well-established financial system and who are unable to obtain such services without offshore banking). This wide range comes as no surprise, since one of the intriguing common features of tax havens is that they score extremely well on measures of stability and governance: they are countries that "can credibly commit not to expropriate foreign investors." Dhammika Dharmapala & James R. Hines Jr., *Which Countries Become Tax Havens?*, 93 J. PUB. ECON. 1058, 1058, 1064 (2009).

81. See ZUCMAN, *supra* note 5, at 33 ("If the current trend is sustained, emerging countries will overtake Europe and North America by the end of the decade.").

82. *Id.* at 76–77.

83. 26 U.S.C. § 1471 (2012).

84. *Id.*

85. ZUCMAN, *supra* note 5, at 64–65.

86. See ZUCMAN, *supra* note 5, at 65–66 (suggesting that banks may choose to invest only in Europe or Asia to avoid compliance with FATCA).

proposals from American law professors,⁸⁷ is to form a multilateral coalition of governments that more broadly share information and sanction noncompliant institutions. It's still plausible for a large bank to have no dealings with the United States. But good luck trying to pull that with the entire G-20 or the OECD.

To the benefits Zucman ascribes to an expanded FATCA, I'd like to add another: expanding FATCA would almost certainly help solidify it domestically. The domestic debate over the law has hinged largely on the costs it imposes on our citizens. Americans abroad, apparently dreading the additional hassle, have started giving up their passports at a higher rate.⁸⁸ Some foreign banks, sharing similar fears, have stopped offering banking services to U.S. clients.⁸⁹ As an absolute matter, these trends remain small. But that has not stopped the histrionics from getting large: FATCA is "the neutron bomb of the global financial system";⁹⁰ FATCA "destroys lives and the U.S. economy";⁹¹ and so on.

The degree to which one views these costs as tragic may depend in part on how large of a violin one plays for expat bankers who need to open new checking accounts and financial institutions that need to file additional paperwork. In crucial respects, it may be too early to tell if FATCA works well. (Although we can, I think, breathe a collective sigh of relief about the neutron bomb.) Regardless, a fully global FATCA would not give Americans an incentive to give up their citizenship, or foreign banks an incentive to deny Americans their services. This also hints at a nice irony of

87. See J. Richard (Dick) Harvey, Jr., *Offshore Accounts: Insider's Summary of FATCA and Its Potential Future*, 57 VILL. L. REV. 471, 487–88 (2012) (discussing the goals of FATCA, including the provision of a model for other countries to follow); Joshua D. Blank & Ruth Mason, *Exporting FATCA* 1245 (N.Y.U. Ctr. for Law, Econ. and Org., Working Paper No. 14-05, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2389500 [<https://perma.cc/VEW2-5KFN>] (arguing that FATCA provides a new global standard for automatic information exchange that has supported offshore tax compliance efforts of non-U.S. governments); Itai Grinberg, *Beyond FATCA: An Evolutionary Moment for the International Tax System* 57 (Jan. 27, 2012) (unpublished manuscript) (on file with author) (suggesting a framework for establishing a multilateral automatic information reporting regime based on existing OECD, EU, and U.S. systems).

88. See Sophia Yan, *Record 1,335 Americans Give Up Their Passports*, CNN MONEY (May 8, 2015), <http://money.cnn.com/2015/05/08/pf/taxes/american-expats-passports-renounce/> [<https://perma.cc/YS45-3XR4>] (reporting the burden of complicated tax paperwork as a factor in the record-high number of renunciations of American citizenship in 2015).

89. See Sophia Yan, *Banks Lock Out Americans over New Tax Law*, CNN MONEY (Sept. 15, 2013), <http://money.cnn.com/2013/09/15/news/banks-americans-lockout/index.html?iid=EL> [<https://perma.cc/VFH3-J8AJ>] (claiming that some global banks now refuse U.S. customers because they are unwilling to comply with the requirements of FATCA).

90. Lynnly Browning, *Analysis: Critics Say New Law Makes Them Tax Agents*, REUTERS: MONEY (Aug. 19, 2011), <http://www.reuters.com/article/us-usa-tax-fatca-idUSTRE77I38220110819> [<https://perma.cc/Q5KR-GDL5>].

91. Ellen Wallace, *EC Hails Proposed Deal to Catch Tax Evaders Between US and 5 EU Gov'ts*, GENEVALUNCH (Feb. 9, 2012), <http://genevalunch.com/2012/02/09/ec-hails-proposed-deal-to-catch-tax-evaders-between-us-and-5-eu-govts/> [<https://perma.cc/QRQ4-66TH>].

the FATCA criticisms. Critics often interpret FATCA's burdens—the additional hardship for globetrotting Americans, the extraterritorial reach that smacks of imperialism—as a reason to roll it back.⁹² In fact, these burdens disappear at either extreme—that is, a global FATCA, or no FATCA.

Still, a threshold issue for expanding FATCA is implementation: how do we transform a unilateral system into a multilateral one? Here, Zucman has the economist's occasional tendency to favor bloodless abstraction over the institutional nitty-gritty.⁹³ If one believes that global tax coordination resembles a prisoner's dilemma⁹⁴—in which individual countries have an incentive to break ranks at the cost of global welfare—Zucman's analysis will offer little reassurance.⁹⁵

But the facts, which are quickly outpacing the proposals, are cause for some comfort: in the summer of 2014, with a dose of inspiration from FATCA, the OECD approved a new standard for the global exchange of tax information, known informally as GATCA.⁹⁶ Pitfalls and land mines lie ahead, no doubt, but over ninety-five countries have a theoretical commitment to the standard, and the earliest adopters will start implementation around 2017.⁹⁷ The apparent plausibility of international coordination should provide particular cheer to Zucman—whose second proposal, more so than his first, may need to rely on it.

B. *A Global Financial Registry*

Zucman's second proposal is a public global registry for all circulated financial securities.⁹⁸ This would, he argues, serve the important purpose of verifying whether or not financial institutions are transferring the data

92. See, e.g., Stu Hagen, *An American Tax Nightmare*, N.Y. TIMES: THE OPINION PAGES (May 13, 2015), <http://www.nytimes.com/2015/05/14/opinion/an-american-tax-nightmare.html> [<https://perma.cc/UWD2-EB6V>] (describing FATCA as a “dangerous and growing government overreach” and arguing for its repeal).

93. See, e.g., ZUCMAN, *supra* note 5, at 81 (noting that the cooperation of a handful of countries would be effective in imposing high losses on uncooperative territories, so an effective, multilateral FATCA only requires small and easy-to-form coalitions).

94. See DANIEL N. SHAVIRO, *FIXING U.S. INTERNATIONAL TAXATION* 136–37 (2014) (describing international taxation as an illustration of the prisoner's dilemma).

95. See *id.* at 136–39 (discussing barriers to global tax coordination based on the prisoner's dilemma).

96. *Automatic Exchange of Financial Account Information*, OECD 2 (2016), <http://www.oecd.org/tax/exchange-of-tax-information/Automatic-Exchange-Financial-Account-Information-Brief.pdf> [<https://perma.cc/44P6-VCY9>]; Wouter Delbaere, *FATCA v. GATCA: Which Will Rule in Asia?*, WOLTERS KLUWER FINANCIAL SERVICES 1 (2014), <http://www.wolterskluwerfs.com/onesumx/comment-piece/FATCA-vs-GATCA-which-will-rule-in-asia.pdf> [<https://perma.cc/SV8V-KE7R>].

97. OECD, *supra* note 96, at 8.

98. ZUCMAN, *supra* note 5, at 92. For an analogy between the proposed world financial register and public real-estate records, see *id.* at 97.

required by a global FATCA.⁹⁹ The proposal is novel. (Piketty hints at it in *Capital in the Twenty-First Century*¹⁰⁰—the registry is a prerequisite for his global wealth tax—but Zucman had also sketched it in an earlier article.¹⁰¹) The proposal is also much more radical than expanding FATCA—and perhaps more radical than Zucman anticipates.

Zucman knows his proposal is likely to stoke some controversy and spends a few pages warding off two particular worries. The first is that the registry idea is an unrealistic utopian fantasy.¹⁰² (Since this criticism has bedeviled Piketty’s call for a global wealth tax, it’s no surprise to see Zucman acting like the best defense is a good offense.) Zucman argues that much of the information needed for a registry is already held in diffuse form by private companies, and could be merged and managed by an international institution like the IMF.¹⁰³ The second anticipated problem is that the registry would invade privacy. Zucman responds (convincingly in my view) by observing that existing property registries already make a great deal of ownership information publicly available—and are not, as far as I know, interpreted as evidence of a coming dystopia.¹⁰⁴ It’s hard to see why doing the same for financial instruments is qualitatively different.

And yet, it seems to me that Zucman does not engage with what is most radical and challenging about his registry proposal: ownership isn’t a brute fact that can be reported and verified as easily as the number of dollars sitting in a bank account or the number of shares sold on an exchange. And while Zucman knows that identifying ownership is a challenge,¹⁰⁵ he seems to view it as a logistical problem rather than an interpretive one. His book asserts that the global registry must look through to the “ultimate owner[s]” or “true holders” of securities, as well as the “actual clients” of secretive banks.¹⁰⁶ But ownership is a matter of legal construction, not scientific discovery. If ownership is defined by national (and often *local*) legal systems, how can it be reported in a registry shared by many nations?

To see this problem, take an analogy that Zucman starts with: registries for real property. In the United States such registries are held at the local

99. *Id.* at 92.

100. See PIKETTY, *supra* note 12, at 519–20 (noting that a small, global wealth tax “would be more in the nature of a compulsory reporting law than a true tax”).

101. See ZUCMAN, *supra* note 59, at 136–37 (explaining how a world financial registry would allow countries to monitor the distribution of corporate tax revenue across the globe).

102. See ZUCMAN, *supra* note 5, at 93 (“A global financial register is in no way utopian, because similar registers already exist . . .”).

103. See *id.* at 93–95 (describing the IMF as one of the only truly global international organizations and technically capable of creating and maintaining a global registry).

104. See *id.* at 96–97 (offering land and real estate records as demonstrative of how much information is already publicly available).

105. *Id.* at 95.

106. *Id.* at 96.

level, usually in county offices.¹⁰⁷ Among other things, these registries allow owners and third parties to verify whether or not there are encumbrances on a title. But what counts as an encumbrance varies by jurisdiction. Take mortgages: as anyone who has studied for the bar exam may painfully recall, some states follow a “title theory” (a mortgage means the bank has title) while others follow a “lien theory” (the occupant retains title).¹⁰⁸ Now imagine a registry that encompasses several jurisdictions, each with a different theory of the mortgage. Asking such a registry to identify the true owners of mortgaged properties would be a bit like asking what one city is the capital of both New York and California. It will vary.

This point generalizes the monstrously complex entities that roam the landscape of international taxation. Complicated forms of ownership—owning through layers of trusts and holding companies, or by executing instruments that are simply hard to categorize—don’t just make it more complicated to identify the true owners. Depending on the jurisdiction, they actually change the ownership. There will always be easy cases; Zucman’s registry will have no problem sorting those. But international tax planners are sophisticated actors and they won’t make the categories easy.

To a large extent, this issue already bedevils international taxation: it is why so-called hybrid entities and instruments—treated one way in jurisdiction *X* and another way in jurisdiction *Y*—are so popular. As an example, simply revisit one of the classic brainteasers of tax planning: the old debt–equity distinction. Debt (held by creditors) and equity (held by owners) are easy to distinguish at the extremes.¹⁰⁹ But between those extremes sits a wide scrubland of hard-to-classify instruments.¹¹⁰ Because jurisdictions tax debt and equity differently, there are often strong incentives to make debt look like equity or vice versa. But jurisdictions disagree about where and how to draw the line between the two categories—a traditional source of tax arbitrage¹¹¹—and there isn’t a right answer about where and how to do it. So if a holding company’s capital structure contains an instrument that is “equity” by U.S. standards and “debt” by French standards, how would Zucman’s registry classify the holders? Who would be the ultimate owners?

107. See THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 919 (2007) (explaining the function of the recorder of deeds and noting that there is typically a recorder’s office in every county in the state).

108. JESSE DUKEMINIER ET AL., *PROPERTY*, 618 n.17 (7th ed. 2010).

109. The economic difference is that debt has limited risk and limited return, while equity has unlimited risk and (potentially) unlimited returns.

110. For a general discussion of this distinction and its U.S. tax implications, see RICHARD L. DOERNBERG ET AL., *FEDERAL INCOME TAXATION OF CORPORATIONS AND PARTNERSHIPS* 89–104 (5th ed. 2014).

111. See Andriy Krahmal, *International Hybrid Instruments: Jurisdictional Dependent Characterization*, 5 *HOUS. BUS. & TAX L.J.* 98, 116–17 (2005) (explaining that jurisdictional distinctions between debt and equity instruments create opportunities for tax arbitrage).

To be sure, there will be plenty of easy cases where a registry would have no problem identifying the owners. But those plain-vanilla owners are already paying their taxes. It is precisely the borderline cases—involving aggressive planning through complicated deals—that are both the most important targets and the hardest to keep in sight.

In other words, asking a registry to record ownership will also require asking jurisdictions to coordinate on the legal treatment of instruments and entities. This is not to say that Zucman’s registry idea is a nonstarter. But it does raise issues beyond how to best scoop up piles of existing data and dump them into an existing international institution.

Fundamentally, those issues bring us back to the questions of multilateral coordination that we saw above with FATCA—but, this time, with a twist. Coordinating on an automatic information exchange—the transmission of those brute facts—is a good deal easier than coordinating on the substantive legal categories. Substantive coordination often occurs by treaty, but these deals are historically bilateral, not multilateral.¹¹² In the context of trade, the General Agreement on Trade and Tariffs provides a shared set of rules and the World Trade Organization provides a central body for decision making and enforcement. Similar agreements and bodies exist for international finance.¹¹³ But nothing equivalent exists for international taxation, at least not at the global level.¹¹⁴

There is, in the OECD’s recent “Base Erosion and Profit Shifting” project, a faint glimmer of hope on the horizon.¹¹⁵ Among other things, this effort targets exactly the types of “hybrid mismatche[s]” described above.¹¹⁶ But the project’s progress lags far behind FATCA and may face unique structural obstacles—like the treaty obligations of the various OECD member states.¹¹⁷ At least for now, I’m not holding my breath.

And, even if there is enough progress on international coordination such that a Zucman-style registry can be made a reality, it would end neither tax

112. See, e.g., Victor Thuronyi, *International Tax Cooperation and a Multilateral Treaty*, 26 BROOK. J. INT’L L. 1641, 1641 (2001) (stating that international tax law has over 1,500 bilateral treaties meant to prevent double taxation).

113. See, e.g., *International Monetary Fund Factsheet*, INT’L MONETARY FUND 1 (Sept. 2016), <https://www.imf.org/About/Factsheets/The-IMF-and-the-World-Trade-Organization?pdf=1> [<https://perma.cc/HWV2-MZC7>] (highlighting the International Monetary Fund’s role in supporting a “sound international financial system”).

114. GRAETZ, *supra* note 50, at 487.

115. For a comprehensive overview of this process, see generally Itai Grinberg, *The New International Tax Diplomacy*, 104 GEO. L.J. 1137 (2016).

116. See JOINT COMM. ON TAXATION, BACKGROUND, SUMMARY, AND IMPLICATIONS OF THE OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, S. DOC. NO. JCX-139-15, at 13 (2015) (noting that the “Base Erosion and Profit Sharing” plan would task the OECD with developing rules to neutralize the duplicative effects of hybrid entities and instruments).

117. See Michael J. Graetz, *Can a 20th Century Business Income Tax Regime Serve a 21st Century Economy?*, 30 AUSTL. TAX F. 551, 563 (2015) (listing various barriers to an OECD multilateral tax agreement, including domestic treaties between European nations).

evasion nor tax avoidance. It wouldn't end evasion because such a registry would apply only to *circulated* and *financial* securities; I don't doubt the ability of motivated tax cheats to migrate into investments that are neither. As for avoidance, my suspicion is that widespread agreement on international tax standards would simply make international tax planning look more like its domestic counterparts: we might not see as much tax arbitrage, but we would still see the classic tricks—namely, walking right up to the precipitous edge of the bright-line rules, and exploiting the fact that standards are hard for overburdened agencies to enforce.

This is all by way of saying that Zucman's registry leaves a lot to the imagination. And there's an odd way in which this shouldn't be surprising: it's not, after all, the kind of "registry" with which contemporary law has any experience. It actually has little in common with registries as the law has come to imagine them. There is, coincidentally, a small renaissance of academic interest in the subject of registries.¹¹⁸ But the focus of this new literature, as with its earlier incarnations,¹¹⁹ is on how registries aid the coordination and verification efforts of *private* parties. Relatively little attention—practically none, as far as I know—has focused on registries as a tool for enforcement and verification by the state *against* private parties.¹²⁰

This is despite the fact that, historically, public enforcement and taxation are two of the registry's ostensible goals.¹²¹ Zucman has done well to remind us of that fact. His quantitative efforts provide an important foundation for setting priorities, and his proposals add a dose of creativity to a debate that can feel stale. But designing the institutions to achieve his vision remains the burden of future work.

118. See Abraham Bell & Gideon Parchomovsky, *Of Property and Information*, 116 COLUM. L. REV. 237, 243–44 (2016) (discussing the functions of registries in modern property law).

119. See Douglas Baird & Thomas Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. LEGAL STUD. 299, 302–03 (1984) (discussing the role of registries in early conceptions of private property rights).

120. For a brief mention of these issues, see Bell & Parchomovsky, *supra* note 118, at 277.

121. See, e.g., Robert C. Ellickson & Charles DiA. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321, 373 & n.305 (1995) (describing taxation as one of the primary goals of ancient land registration).