

# THE MYTHS AND TRUTHS OF EXTRATERRITORIAL TAXATION

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The 1924 U.S. Supreme Court decision *Cook v. Tait* is considered to underpin the U.S. extraterritorial tax system. It is cited with statements such as “it is settled law” that the U.S. Constitution permits the federal government to tax the worldwide income of nonresident U.S. citizens. But in the century since *Cook* was decided, both U.S. citizenship and the U.S. tax system have developed and expanded, as have our understandings of equal protection and human rights.

As compared to 1924, today many more overseas Americans are subjected to a nationality-based extraterritorial system that severely penalizes activities required to sustain modern life. The activities include owning a home, holding a bank account, investing and planning for retirement, operating a business, holding certain jobs, and pursuing community service opportunities. Neither U.S. residents (regardless of nationality) nor non-U.S. nationals residing overseas are subjected to such a penalizing system.

While *Cook* may hold that the federal government has the power to tax overseas Americans based upon their worldwide income, it is a myth that *Cook* allows the government to tax overseas Americans under any conditions, without any regard for the effects the policies have and in manners that violate their Constitutional and human rights.

*Cook* is ripe for revisiting. The U.S. extraterritorial tax system is unique in the world. Other countries offer examples of alternative systems that protect against tax abuse while also respecting fundamental rights.

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INTRODUCTION

As John F. Kennedy said in his 1962 Commencement Address at Yale University: “The great enemy of truth is very often not the lie – deliberate, contrived and dishonest – but the myth – persistent, persuasive and unrealistic.”<sup>1</sup>

Kennedy continued: “Too often we hold fast to the clichés of our forebears. We subject all facts to a prefabricated set of interpretations. We enjoy the comfort of opinion without the discomfort of thought.”<sup>2</sup>

For over a hundred years, Americans living overseas have been the casualties of myth after myth: about who they are, about why they live overseas, about how they are taxed by the United States, and about the righteousness of how the United States taxes them. The first of these myths dates back over a hundred years; since that time the old myths have been renewed and perpetuated while new ones have been developed and propagated.<sup>3</sup>

<sup>1</sup> John F. Kennedy, Commencement Address at Yale University (June 11, 1962), <https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/yale-university-19620611>.

<sup>2</sup> *Id.*

<sup>3</sup> See generally Laura Snyder, *The Criminalization of the American Emigrant*, 167 TAX NOTES FED. 2279 (June 29, 2020) (hereinafter “*Criminalization*”); Laura Snyder, *Taxing the American Emigrant*, 74 TAX LAW. 299, 304-13, 326-44 (2021) (hereinafter “*Emigrant*”); John Richardson, *The United States Imposes a Separate and Much More Punitive Tax on U.S. Citizens Who Are Residents of Other Countries*, TAX CONNECTIONS (Mar. 13, 2019), <https://www.taxconnections.com/taxblog/the-united-states-imposes-a-separate-and-more-punitive-tax-system-on-us-dual-citizens-who-live-in-their-country-of-second-citizenship/> (hereinafter “*More Punitive*”); Karen Alpert, *Investing with One Hand Tied Behind Your Back—An Austra-*

Decided in 1924, *Cook v. Tait*<sup>4</sup> is considered a seminal case establishing the power of the federal government to tax overseas Americans based upon their worldwide income.<sup>5</sup> But just how far does that power go? That question has not been explored. Instead, in the nearly 100 years since *Cook* was handed down, a myth has developed. The myth, typically implied rather than expressly stated, is that *Cook* allows the federal government to impose any taxation upon overseas Americans regardless of the circumstances and without any constraints.

Given how dramatically the circumstances of overseas taxation have changed and how damaging U.S. tax and banking policies are for overseas Americans, it is imperative to challenge the myth of *Cook v. Tait*. It is imperative to challenge the conditions under which the United States taxes its overseas citizens.

To challenge the myth, this paper begins by (II) providing an overview of *Cook*'s historical context. This paper then describes how the conditions of overseas taxation have changed during the century since *Cook* was decided and how, because of these changes, the U.S. extraterritorial tax system today violates multiple fundamental rights. This includes: (III) the expansion of both the U.S. extraterritorial tax system and U.S. citizenship, together with the judicial protection of U.S. citizenship; (IV) the expansion of equal protection; (V) the signature and ratification by the United States of multiple human rights instruments; and (VI) the adoption of the Taxpayer Bill of Rights. This paper concludes with (VII) a description of how the United States can tax persons outside the country in a manner that respects their constitutional and human rights. Appendix A contains a detailed timeline demonstrating the evolutions of U.S. extraterritorial taxation and banking, citizenship, and equal protection policies, in parallel.

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*lian Perspective on United States Tax Rules for Non-Resident Citizens* (Jan. 8, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3097931](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3097931) (hereinafter "*Investing with One Hand*").

<sup>4</sup> *Cook v. Tait*, 265 U.S. 47 (1924).

<sup>5</sup> See, e.g., Bernard Schneider, *The End of Taxation Without End: A New Tax Regime for U.S. Expatriates*, 32 VA. TAX REV. 1, 5 (2012) (stating, "It is settled law that the United States has the power to impose an income tax on the basis of citizenship alone, regardless of residence."); Edward Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1302 (2011) (stating "It has long been established that the U.S. Constitution permits the federal government's worldwide taxation of nonresident U.S. citizens"). See also William Thomas Worster, *Renouncing U.S. Citizenship Through Expatriation*, in THE CONSULAR PRACTICE HANDBOOK 7 n.55 (Michael H. Davis, et al., eds, 2012); William L. Dentino & Christine Manolakas, *The Exit Tax: A Move in the Right Direction*, 3 WM. & MARY BUS. L. REV. 341, 350 (2012), <https://scholarship.law.wm.edu/wmblr/vol3/iss2/3>.

## I. COOK'S HISTORICAL CONTEXT: AN OVERVIEW

In 1924, the year *Cook* was handed down, the situation of overseas Americans was considerably different as contrasted with today. This was the case both as regards the components of the U.S. tax system as well as who was subject to it. As a result of these differences, the consequences of *Cook* for Americans overseas in 1924 were quite different from what they are today.<sup>6</sup>

Table 1 demonstrates that in 1924, filing thresholds and exemptions were high relative to average incomes for the time. As a result, few – as little as 6.56% of the American population<sup>7</sup> – filed a tax return, let alone paid any federal income tax. Further, the tax system itself was considerably less complex and less penalizing, especially for overseas Americans.<sup>8</sup> Notably, in 1924 there were none of the reporting requirements or penalizing taxation with respect to foreign corporations, mutual funds (PFICS), non-U.S. retirement accounts (foreign trusts), or phantom gains that exist today.<sup>9</sup> There were no reporting requirements for non-U.S. financial accounts, let alone draconian penalties for failure to report.<sup>10</sup> Nor was there any tax penalty, exit tax, or renunciation fee in the event of expatriation.<sup>11</sup>

Further, as Table 2 demonstrates, in 1924 many if not most Americans who lived outside the United States for anything more than a short period lost their U.S. citizenship by operation of law.<sup>12</sup> This was especially the case for naturalized U.S. citizens and women who married non-U.S. citizens; they lost their U.S. citizenship after residing outside the United States for either two or five years, depending upon the country where they resided. American children born and residing outside the United States lost their U.S. citizenship if, upon turning 18, they did not record at a U.S. consulate their intention to reside in United States and retain U.S. citizenship and take an oath of allegiance to the United States.<sup>13</sup> In essence, in 1924 the only Americans who could reside overseas on a long-term basis without losing their U.S. citizenship by opera-

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<sup>6</sup> See Laura Snyder, *The Unacknowledged Realities of Extraterritorial Taxation*, 47 S. ILL. UNIV. L. J. 243, 256-62 (2023) (hereinafter “*Unacknowledged Realities*”).

<sup>7</sup> I.R.S., STATISTICS OF INCOME FROM RETURNS OF NET INCOME FOR 1924 (1926), at 4.

<sup>8</sup> See *infra* Table 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* For descriptions of these policies, see Richardson, *supra* note 3; Snyder, *Criminalization*, *supra* note 3; Snyder, *Emigrant*, *supra* note 3 at 304-313, 326-344; see also Shu-Yi Oei, *The Offshore Tax Enforcement Dragnet*, 67 EMORY L. J. 655 (2018). As regards changes adopted in 2017 regarding the regime for foreign corporations, see Patrick Riley Murray, *Size Matters (Even If the Treasury Insists It Doesn't): Why Small Taxpayers Should Receive a De Minimis Exemption from the GILTI Regime*, 106 MINN. L. REV. 1625 (2022).

<sup>12</sup> See *infra* Table 2.

<sup>13</sup> *Id.*

tion of law were those who: (i) were natural-born U.S. citizens, (ii) did not naturalize in another country, and (iii) in the case of women, did not marry a non-U.S. citizen. The many overseas Americans who did not meet all three of these requirements lost their U.S. citizenship and thus were no longer subject to the U.S. extraterritorial tax system.<sup>14</sup>

In sum, in 1924 not only was the U.S. tax system considerably less complex and less penalizing than it is today, especially for overseas Americans, but also it did not concern many overseas Americans because they lost U.S. citizenship by operation of law. Today the U.S. extraterritorial tax system is highly complex and penalizing. It concerns all overseas Americans except those who take the active step to renounce U.S. citizenship, thereby not only losing their U.S. citizenship but also incurring a high renunciation fee as well as, depending upon their circumstances, a penalizing exit tax.<sup>15</sup> Because of these dramatic developments, *Cook's* impact today is more far-reaching and consequential than could have been imagined in 1924.

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<sup>14</sup> See *id.*

<sup>15</sup> See Robert W. Wood, *U.S. Has World's Highest Fee to Renounce Citizenship*, FORBES (Oct. 23, 2015, 8:59 PM), <https://www.forbes.com/sites/robertwood/2015/10/23/u-s-has-worlds-highest-fee-to-renounce-citizenship/#5f214c2d47de>; Robert W. Wood, *Renounce U.S., Here's How IRS Computes 'Exit Tax,'* FORBES, (Feb. 27, 2017, 9:29 AM), <https://www.forbes.com/sites/robertwood/2017/02/27/renounce-u-s-heres-how-irs-computes-exit-tax/?sh=6af94ce7287d>.

TABLE 1: CONTRASTING U.S. TAXATION IN 1924 AND 2019

	1924	2019
Average annual household income	\$2,196 <sup>16</sup>	\$68,703 <sup>17</sup>
Filing thresholds	Single: \$5000 gross or \$1000 net Married couple: \$5000 gross or \$2500 net <sup>18</sup>	Single: \$12,200 Married filing jointly or Qualifying widow(er): \$24,400 Married filing separately: \$5 Head of household: \$18,350 <sup>19</sup>
Exemptions/Standard deductions	Single: \$1000 Head of family or married couple: \$2500 Each dependent: \$400 <sup>20</sup>	Single or Married filing separately: \$12,200 Married filing jointly or Qualifying widow(er): \$24,400 Head of household: \$18,350 <sup>21</sup>
Number of households	24,351,676 <sup>22</sup>	120,756,048 <sup>23</sup>
Number of returns filed	7,369,788 <sup>24</sup>	157,705,360 <sup>25</sup>
% of households filing a return <sup>26</sup>	30.26%	130.6% <sup>27</sup>

<sup>16</sup> Seth Robinson, *Inflation 101: What is Inflation? (Retirement Planning Part 3 of 5)*, SAVOLOGY (Aug. 18, 2020), <https://savology.com/what-is-inflation>.

<sup>17</sup> U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2019 (2020), <https://www.census.gov/library/publications/2020/demo/p60-270.html>.

<sup>18</sup> Revenue Act of 1924, Pub. L. No. 68-176 § 223; 43 Stat. 253, 280; IRS, REGULATIONS 65 RELATING TO THE INCOME TAX UNDER THE REVENUE ACT OF 1924 (1924), at 134-35.

<sup>19</sup> I.R.S., TAX YEAR 2019 - 1040 AND 1040-SR INSTRUCTIONS 9 (2020); different thresholds apply in the case of taxpayers over age 65. *Id.*

<sup>20</sup> Revenue Act of 1924, Pub. L. No. 68-176 § 216, 43 Stat. at 272.

<sup>21</sup> I.R.S., TAX YEAR 2019 INSTRUCTIONS, *supra* note 21 at 6.

<sup>22</sup> U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 61 (1921), <https://www2.census.gov/prod2/statcomp/documents/1921-02.pdf> (number of households based upon 1920 census).

<sup>23</sup> U.S. Census Bureau, *US Census 2020 QuickFacts*, 2019, <https://www.falmouthma.gov/DocumentCenter/View/10510/2020-Census-Quick-Facts> (number of households, 2015-2019).

<sup>24</sup> I.R.S., STATISTICS OF INCOME FOR 1924, *supra* note 7, at 116, 272.

<sup>25</sup> I.R.S., *SOI Tax Stats — Historic Table 2*, <https://www.irs.gov/statistics/soi-tax-stats-historic-table-2>, Cell B9 of form titled “Total File, All States” (updated Mar. 16, 2022).

<sup>26</sup> This is calculated by dividing the number of returns filed by the number of households.

<sup>27</sup> Data indicates that for many U.S. households more than one income tax return is filed. This might be explained by some households including unmarried couples or adult children, which would require multiple returns in a single household.

	1924	2019
Average income per return	\$3,481 <sup>28</sup>	\$76,668 <sup>29</sup>
Lowest / highest tax bracket	2% / 46% <sup>30</sup>	10% / 37% <sup>31</sup>
Reporting and taxation of non-U.S. source income of non-U.S. corporations (CFCs)	No	Yes (via U.S.-person shareholder) <sup>32</sup>
Reporting and taxation of retirement accounts (foreign trusts)	No	Yes <sup>33</sup>
Reporting and punitive taxation of mutual funds / passive foreign investment companies (PFICs)	No	Yes <sup>34</sup>
Taxation of phantom gains	No	Yes <sup>35</sup>
Reporting of non-U.S. financial accounts and penalties for failure to report	No	Yes <sup>36</sup>
Expatriation/exit tax	No	Yes <sup>37</sup>
Renunciation fee	No	Yes <sup>38</sup>

<sup>28</sup> I.R.S., STATISTICS OF INCOME FOR 1924, *supra* note 7, at 4, Column “Average net income per return.”

<sup>29</sup> I.R.S., *SOI Tax Stats — Historic Table 2*, *supra* note 25, form titled “Total File, All States,” Total adjusted gross income \$ 12,090,994,318,000 [Cell B27] divided by Total number of returns 157,705,360 [Cell B9].

<sup>30</sup> Revenue Act of 1924, Pub. L. No. 68-176 §§ 210-211, 43 Stat. at 264-67. *See also* Tax Foundation, *Historical U.S. Federal Individual Income Tax Rates & Brackets, 1862-2021* (Aug. 24, 2021), <https://taxfoundation.org/historical-income-tax-rates-brackets/>.

<sup>31</sup> I.R.S., TAX YEAR 2019 INSTRUCTIONS, *supra* note 21, at 104.

<sup>32</sup> The Revenue Act of 1962 introduced Subpart F to the IRC and expanded the definition of “Controlled Foreign Corporation” (CFC) to include not just corporate shareholders of foreign companies, but also individuals. *See* Appendix A, *infra* note 556 and accompanying text.

<sup>33</sup> The Revenue Act of 1962 introduced the first requirements for filing of informational returns for foreign trusts. *See* Appendix A, *infra* notes 557-558 and accompanying text.

<sup>34</sup> The Tax Reform Act of 1986 introduced the first PFIC rules imposing penalizing taxation on foreign mutual funds. *See* Appendix A, *infra* notes 591-592 and accompanying text.

<sup>35</sup> Revenue Ruling 90-79 ruled that persons who sell their home outside the United States are subject to tax on any “phantom income” that may result because of changes in the value of the currency with which the home was purchased and sold as compared to the U.S. dollar. *See* Appendix A, *infra* notes 593-597 and accompanying text.

<sup>36</sup> The Bank Secrecy Act of 1970 introduced FBAR, and the HIRE Act of 2010 introduced FATCA. *See* Snyder, *Criminalization*, *supra* note 3, at 2282-87; Snyder, *Emigrant*, *supra* note 3, at 306-10. *See also* Appendix A, *infra* notes 566, 615 and accompanying text.

<sup>37</sup> The Foreign Investors Tax Act of 1966 introduced the first expatriation tax, and the Heroes Earnings Assistance and Relief Tax Act of 2008 introduced the first exit tax. *See infra* notes 282-300 and accompanying text. *See also* Appendix A, *infra* notes 563, 606-607, 614 and accompanying text.

<sup>38</sup> The *Schedule of Fees for Consular Services* issued in 2010 introduced the first fee for the issuance of a Certificate of Loss of Nationality. *See* Appendix A, *infra* note 619 and accompanying text.



TABLE 2: CONTRASTING LOSS OF U.S. CITIZENSHIP BY OPERATION OF LAW IN 1924 AND 2019

		Loss of U.S. citizenship by operation of law?	
Categories of persons		In 1924	In 2019
1	Persons who acquire citizenship of another country by naturalization	Yes <sup>39</sup>	No <sup>40</sup>
2	Naturalized U.S. citizens who reside for more than 2 years in originating country	Yes <sup>41</sup>	No <sup>42</sup>
3	Naturalized U.S. citizens who reside for more than 5 years in any other country (other than originating country)	Yes <sup>43</sup>	No <sup>44</sup>
4	Women who marry a non-U.S. citizen and reside overseas for 2 years in the country where her husband is a citizen	Yes <sup>45</sup>	No <sup>46</sup>
5	Women who marry a non-U.S. citizen and reside overseas for 5 years in any other country (other than the country where her husband in a citizen)	Yes <sup>47</sup>	No <sup>48</sup>

<sup>39</sup> Expatriation Act of 1907, Pub. L. No. 59-193, § 2, 34 Stat. 1228, 1228-29, and later the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 349, 66 Stat. 163, 267-68. See Appendix A, *infra* notes 525, 545 and accompanying text.

<sup>40</sup> In 1990, the U.S. Department of State issued an information sheet entitled “Advice about Possible Loss of U.S. Citizenship and Dual Nationality.” It confirmed the position taken by the Supreme Court in *Vance v. Terrazas* (444 U.S. 252 (1980)) that dual nationality was not a reason for expatriation. The sheet specified that there is a presumption that persons who naturalize in another country intend to retain U.S. citizenship. HERZOG, *infra* note 525, at 108-9. See also Appendix A, *infra* notes 598-599 and accompanying text.

<sup>41</sup> Expatriation Act of 1907 § 2, 34 Stat. at 1228, and later the Immigration and Nationality Act of 1952 §§ 352-54, 66 Stat. at 269-72 (specifying three years rather than two). Such a person was presumed to have ceased being an American citizen. The presumption could be overcome upon presentation of “satisfactory evidence” to a consular officer. *Id.* See Appendix A, *infra* notes 525, 545 and accompanying text.

<sup>42</sup> In 1964 in *Schneider v. Rusk*, the U.S. Supreme Court ruled that the relevant provision of the Immigration and Nationality Act of 1952 was violative of due process under the Fifth Amendment of the Constitution. *Schneider v. Rusk*, 377 U.S. 163, 164, 168-69 (1964). See *infra* notes 75-77 and accompanying text. See also Appendix A, *infra* note 560 and accompanying text.

<sup>43</sup> See *supra* note 41.

<sup>44</sup> See *supra* note 42.

<sup>45</sup> Married Women’s Independent Nationality Act (also referred to as the Cable Act), Pub. L. No. 67-346, § 3, 42 Stat. 1021, 1022 (1922).

<sup>46</sup> Immigration and Nationality Act of 1952 § 357, 66 Stat. at 272 (ending for women the automatic loss of U.S. citizenship by reason of marriage to an alien and residence overseas).

<sup>47</sup> See *supra* note 45.

<sup>48</sup> See *supra* note 46.

		Loss of U.S. citizenship by operation of law?	
Categories of persons		In 1924	In 2019
6	Children born outside the United States as U.S. citizens and residing overseas who, upon their 18th birthday, do not record at a U.S. consulate their intention to reside in the United States and retain U.S. citizenship and take an oath of allegiance to the United States	Yes <sup>49</sup>	No <sup>50</sup>

II. EXPANSION OF THE TAX SYSTEM AND OF CITIZENSHIP, AND THE PROTECTION OF CITIZENSHIP FROM FORCED EXPATRIATION

As the overview in Part II above demonstrates, since *Cook* was decided, both (A) the U.S. tax system and (B) U.S. citizenship have greatly expanded. This Part analyzes their expansion in greater detail as well as (C) the steps taken by the U.S. Supreme Court to ensure protection against the forceable loss of U.S. citizenship.

A. *Expansion of U.S. Tax System*

At the time *Cook* was decided, the U.S. tax system bore little resemblance to what it is today. It was considerably simpler, as evidenced by the length of the tax codes. The Revenue Act of 1924 was 103 pages,<sup>51</sup> and its accompanying Regulations 65 was 163 pages,<sup>52</sup> for a total of 266 pages. Today the Internal Revenue Code and its accompanying regulations are so long it is difficult to measure their precise length; in 2012 the National Taxpayer Advocate estimated the combined Code and Regulations at approximately 4 million words, or 9,000 pages.<sup>53</sup>

Further, how the United States taxed overseas Americans bore little resemblance to how it does so today. In 1924 there were no information-only reporting requirements, and thus no penalties connected with failure to file purely informational forms. Nothing in the Revenue Act of 1924 specifically targeted non-U.S. source income with taxation more penalizing than that applied to U.S. source income. Foreign trusts were not

<sup>49</sup> Expatriation Act of 1907 § 6, 34 Stat. at 1229.

<sup>50</sup> After 1924, U.S. nationality law evolved to require U.S. citizen children born overseas to live in the United States before a specified age and for a minimum number of years to retain U.S. citizenship. All such requirements were ended in 1978. See Appendix A, *infra* note 578 and accompanying text.

<sup>51</sup> Revenue Act of 1924, Pub. L. No. 68-176, 43 Stat. 253.

<sup>52</sup> Or, including its frontmatter, 179 pages. Regulations 65, *supra* note 18.

<sup>53</sup> See Joseph Bishop-Henchman, *How Many Words are in the Tax Code?*, TAX FOUNDATION (April 15, 2014), <https://taxfoundation.org/how-many-words-are-tax-code/>.

taxed, and foreign corporations were taxed based only upon their U.S. source income.<sup>54</sup>

The transformation of the U.S. extraterritorial tax system from its relatively benign beginnings in the early twentieth century to the expansive, complex, and highly penalizing system that it is today did not happen all at once. It happened progressively over several decades, beginning with seemingly small changes that, at the time, might have appeared harmless to all but the most attentive. For example, when the Kennedy Administration created the Subpart F regime in 1962,<sup>55</sup> who could have predicted that its evolution, most recently culminating in the 2017 Tax Cuts & Jobs Act and under the guise of the Transition Tax,<sup>56</sup> would have the effect of eliminating large portions of the retirement savings of Americans operating small businesses in Canada?<sup>57</sup> When the same Revenue Act of 1962 introduced the first informational reporting requirements for foreign trusts,<sup>58</sup> who could have predicted that the evolution of the requirements would result in overseas Americans today facing IRS-imposed penalties ranging from \$10,000 to \$110,000<sup>59</sup> for failure to meet an unclear filing deadline for a merely informational form pertaining to their state-sponsored retirement and other investment plans?<sup>60</sup>

Appendix A contains a timeline detailing step-by-step how, over more than a century, the U.S. extraterritorial tax system transformed from relatively narrow and benign to expansive, complex, and highly penalizing for overseas Americans.<sup>61</sup> It did this by the progressive, deliberate targeting and punishing of income, investments, and financial accounts that, while for U.S. residents may be “foreign,” for overseas Americans are domestic and necessary for modern life.

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<sup>54</sup> Revenue Act of 1924 § 233(b), 43 Stat. at 283.

<sup>55</sup> *Supra* note 32 and Appendix A, *infra* notes 556, 573 and accompanying text.

<sup>56</sup> Appendix A, *infra* notes 628-629 and accompanying text. A high-profile case concerning the Transition Tax is currently before the Supreme Court, *Moore v. United States*, No. 22-800 (U.S.). See, e.g., Andrew Velarde, *Supreme Court to Hear Transition Tax Case with Vast Implications*, 180 TAX NOTES FED. 125 (July 3, 2023).

<sup>57</sup> PREP Podcaster, *Subpart F, GILTI and the Transition Tax - Fake Income: Americansabroad [sic] are Taxed More Punitively Than US Residents* (Jan. 3, 2022), <https://prep.podbean.com/e/subpart-f-gilti-and-the-transition-tax-fake-income-americansabroad-are-taxed-more-punitively-than-us-residents/>. See also Snyder, *Emigrant*, *supra* note 3, at 337-38.

<sup>58</sup> See Appendix A, *infra* notes 557-558 and accompanying text.

<sup>59</sup> See *Shocking Behind the Scenes Story: Tax Professionals Advocating For Taxpayers On 3520-A IRS Penalties*, TAX CONNECTIONS (Nov. 21, 2019), <https://www.taxconnections.com/taxblog/shocking-behind-the-scenes-story-tax-professionals-advocating-for-taxpayers-on-3520-a-irs-penalties/>.

<sup>60</sup> Such as the United Kingdom’s Individual Savings Account (ISA). See Gary Carter, *Form 3520 And Substitute Form 3520-A For Foreign Trusts And Gifts From Nonresidents*, TAX CONNECTIONS (Nov. 21, 2019), <https://www.taxconnections.com/taxblog/form-3520-and-substitute-form-3520-a-for-foreign-trusts-and-gifts-from-nonresidents/>.

<sup>61</sup> *Infra* notes 515-638 and accompanying text, left column “Taxation.”

### B. *Expansion of U.S. Citizenship*

As the reach and the nature of the U.S. extraterritorial tax system has changed since *Cook*, so has the reach and nature of U.S. citizenship, although not in the same progressive manner. Instead, after 1924 U.S. citizenship first contracted before, a few decades later, considerably expanding and becoming more fixed in nature.

The contraction came with the Nationality Act of 1940<sup>62</sup> and the Immigration and Nationality Act of 1952.<sup>63</sup> These Acts codified the highly fluid nature of U.S. citizenship as something one could have, lose, and, in some cases re-gain<sup>64</sup> depending upon multiple life circumstances. Circumstances for losing U.S. citizenship included: residing outside the United States for an extended period, reaching 16 years of age while residing outside the United States, and the expatriation of a parent. A long list of expatriating acts included: naturalization in another country, making an oath of allegiance to another country, voting in a foreign election, serving in the armed forces of another country, and desertion of the U.S. military.<sup>65</sup> And as was already the case at the time of *Cook*, special expatriating provisions continued to apply to naturalized U.S. citizens: they were considered to have lost U.S. citizenship if they resided in their originating country for three years (in some cases two) or in any other country for five years.<sup>66</sup>

These Acts had considerable impact. Data covering the period 1945 to 1967 (the year, as discussed below,<sup>67</sup> *Afroyim* was decided), shows that an average of 4,096<sup>68</sup> Americans per year were non-voluntarily expatriated (lost their U.S. citizenship by operation of law).

Patrick Weil tells the story of how U.S. Supreme Court Justice Earl Warren battled for more than a decade to protect U.S. citizenship from

<sup>62</sup> See Appendix A, *infra* notes 538-539 and accompanying text.

<sup>63</sup> See Appendix A, *infra* notes 545-546 and accompanying text.

<sup>64</sup> For example, a woman who had lost her U.S. citizenship by reason of a marriage to an alien could, upon the termination of that marriage and subject to certain other conditions, re-gain U.S. citizenship. Nationality Act of 1940, Pub. L. No. 76-853, § 317(b), 54 Stat. 1137, 1146-47; Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 324(c), 66 Stat. 163, 246-47.

<sup>65</sup> Appendix A, *infra* notes 515-638, 538, 545-546 and accompanying text. See also HERZOG, *infra* note 525 at 45-50.

<sup>66</sup> Expatriation Act of 1907 § 2, 34 Stat. at 1228; Nationality Act of 1940 § 404, 54 Stat. at 1170; Immigration and Nationality Act of 1952 § 352, 66 Stat. at 269-70.

<sup>67</sup> *Infra* note 79 and accompanying text.

<sup>68</sup> See PATRICK WEIL, *THE SOVEREIGN CITIZEN* 198-99 (2012). This is calculated after removing from the total count of expatriated persons the number of persons listed as having renounced U.S. citizenship (an average of 265 persons per year from 1945 to 1967). See also Table 3, *infra* text accompanying note 90.

forced expatriation.<sup>69</sup> The highlights of this work include these three seminal U.S. Supreme Court decisions:

*Trop v. Dulles* (1958):<sup>70</sup> In 1944 Private Albert L. Trop escaped from a U.S. Army stockade in Morocco. He was gone less than a day and surrendered when he was walking back towards his base. He was, nevertheless, convicted of desertion. His later application for a passport was denied on the grounds that under the Nationality Act of 1940 he had lost his citizenship due to desertion.<sup>71</sup>

The Court ruled the relevant section of the Nationality Act of 1940 violated the 8th Amendment as a cruel and unusual punishment.<sup>72</sup> In the decision, Warren described the importance of citizenship for all other rights, stating:

[With] denationalization [. . .] there may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community [. . .] the expatriate has lost the right to have rights.<sup>73</sup>

*Schneider v. Rusk* (1964):<sup>74</sup> Angelika L. Schneider was born in Germany. As a child she moved to the United States and became a naturalized U.S. citizen along with her parents. As an adult, she moved back to Germany. Her 1959 application for a U.S. passport was denied on the grounds that she had lost her U.S. citizenship because she had returned to live in her country of origin for more than three years.<sup>75</sup>

The Court held that the law cannot create a second class of citizens – that since no rule deprived natural-born Americans of their citizenship because of extended or permanent residence overseas, it was unconstitutionally discriminatory and a violation of Fifth Amendment due process to apply such a rule only to naturalized citizens.<sup>76</sup> The Court further

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<sup>69</sup> Patrick Weil, *Can a Citizen be Sovereign?*, 8 HUMANITY 1, 3-12 (2017). See also WEIL, THE SOVEREIGN CITIZEN, *supra* note 68, at 111-75.

<sup>70</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>71</sup> *Id.* at 87. See Appendix A, *infra* note 551 and accompanying text. See also Weil, *Can a Citizen be Sovereign?*, *supra* note 69, at 4; WEIL, THE SOVEREIGN CITIZEN, *supra* note 68, at 146-47.

<sup>72</sup> *Trop*, 356 U.S. at 99-103.

<sup>73</sup> *Id.* at 101-02. See also Appendix A, *infra* note 551 and accompanying text.

<sup>74</sup> *Schneider v. Rusk*, 377 U.S. 163 (1964).

<sup>75</sup> *Id.* at 164. See Appendix A, *infra* note 560 and accompanying text. See also WEIL, THE SOVEREIGN CITIZEN, *supra* note 560, at 169-71.

<sup>76</sup> *Schneider*, 377 U.S. at 168-69.

stated: "Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons."<sup>77</sup>

*Afroyim v. Rusk* (1967):<sup>78</sup> Beys Afroyim, a naturalized U.S. citizen, moved to Israel where he voted in an election. The U.S. Department of State later refused to renew his passport, claiming he had lost his U.S. citizenship because of his participation in a foreign election.<sup>79</sup> The Court rejected this claim, holding that Congress may not do anything to "abridge or affect" citizenship conferred by the Fourteenth Amendment.<sup>80</sup>

The *Afroyim* Court further held:

[T]he Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.<sup>81</sup>

With *Afroyim*, the U.S. Supreme Court made it clear: U.S. citizenship is safeguarded under the Fourteenth Amendment. Congress may not take it away from a person who does not want to give it up. Congress may not even take actions that "abridge or affect" citizenship.

The effect of *Afroyim* and, more generally, Chief Justice Warren's work to protect U.S. citizenship, was to considerably expand U.S. citizenship among Americans living overseas. No longer are American women who marry non-citizens and who live with their spouses outside the United States considered to have lost their U.S. citizenship. No longer are their children born and living outside the United States considered to have lost U.S. citizenship upon reaching adulthood. No longer are children born in the United States to two non-citizens and who, while still children, return to their parents' home country, considered to have lost U.S. citizenship upon reaching adulthood. Today, thanks to the tireless work of Chief Justice Warren and others, all these persons living outside of the United States on a long-term basis retain U.S. citizenship.

<sup>77</sup> *Id.* at 169.

<sup>78</sup> *Afroyim v. Rusk*, 387 U.S. 253 (1967).

<sup>79</sup> *Id.* at 254. See Appendix A, *infra* notes 564-565 and accompanying text. See also Weil, *Can a Citizen be Sovereign?*, *supra* note 69, at 1, 6-7; WEIL, THE SOVEREIGN CITIZEN, *supra* note 68 at 173-76.

<sup>80</sup> *Afroyim*, 387 U.S. at 266.

<sup>81</sup> *Id.* at 268.

C. *Protection Against the Forcible Destruction of Citizenship*

Weil describes the protection of citizenship to be among the “landmark achievements of the second half of the twentieth century.”<sup>82</sup> Given the importance of citizenship for all other rights, Warren’s work to protect U.S. citizenship can only be applauded.

But it did have one presumably inadvertent result, to ensnare millions of overseas Americans into the U.S. extraterritorial tax system – persons who previously would not have been subject to U.S. taxation on their worldwide income.

As discussed above, at the time *Cook* was decided in 1924, the U.S. extraterritorial tax system was relatively benign.<sup>83</sup> At the time *Afroyim* was decided in 1967, this was still the case for the most part. The Revenue Act of 1962 had introduced some penalizing provisions, but those provisions pale in comparison to what was to come from 1970 onwards.<sup>84</sup>

Today the U.S. extraterritorial tax system is so penalizing for overseas Americans it causes many to renounce U.S. citizenship. They renounce not because they no longer want to be U.S. citizens but because the U.S. extraterritorial tax system prevents them from living normal lives – as tax residents of other countries – in the places where they live. When they renounce, they do not celebrate. To the contrary, they feel “angry,” “sad,” “torn up,” “grief,” “sick in my stomach,” “heavy heart,” “devastated,” “fraught,” and “holding back tears.” One “burst into tears,” and another vomited.<sup>85</sup>

Appendix A includes a timeline detailing the initial contraction and then expansion of U.S. citizenship from 1855 to the present day.<sup>86</sup> This timeline appears alongside the timeline detailing U.S. extraterritorial tax and banking policies,<sup>87</sup> demonstrating how the expansion of both those policies and of citizenship occurred in parallel.

As seen in Tables 3<sup>88</sup> and 4,<sup>89</sup> beginning in 2013-14, the period when most intergovernmental agreements (IGAs) implementing FATCA were signed, the number of Americans renouncing U.S. citizenship rose to levels exceeding those of 1945 to 1967 – levels greater than those which prompted Chief Justice Warren’s crusade to save U.S. citizenship. An average of 4,249 Americans per year renounced U.S. citizenship

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<sup>82</sup> Weil, *Can a Citizen be Sovereign?*, *supra* note 69, at 2.

<sup>83</sup> *Supra* notes 16-38, 51-60 and accompanying text.

<sup>84</sup> See Appendix A, *infra* notes 566-638 and accompanying text.

<sup>85</sup> Snyder, *Emigrant*, *supra* note 3, at 312.

<sup>86</sup> *Infra* notes 515-638 and accompanying text, middle column “Citizenship.”

<sup>87</sup> *Supra* note 61 and accompanying text.

<sup>88</sup> See *infra* Table 3.

<sup>89</sup> See *infra* Table 4.

from 2013 to 2020. This compares to an average of 722 per year who renounced from 1996 to 2012.

TABLE 3: FORCED EXPATRIATIONS PER YEAR, 1945 TO 1977<sup>90</sup>

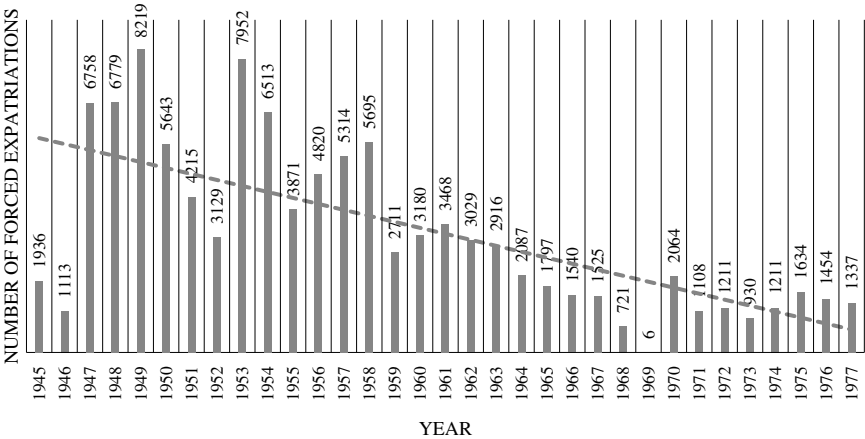
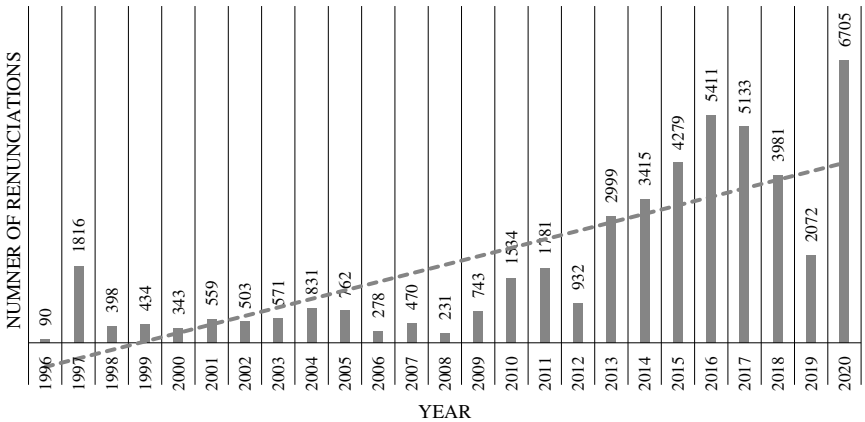


TABLE 4: RENUNCIATIONS PER YEAR, 1996 TO 2020<sup>91</sup>



The consular officers who conduct renunciation procedures at U.S. consulates sometimes inquire about reason(s) for renouncing. Many

<sup>90</sup> WEIL, *THE SOVEREIGN CITIZEN*, *supra* note 68, at 198-99. See *supra* note 68 for explanation of how amounts are calculated.

<sup>91</sup> Laura Snyder, *Dispelling the Myth of the Wealthy American Expat, or Are Americans Free to Live Outside the United States?*, 3-4 (2019), [https://www.progressiveconnexions.net/wp-content/uploads/2019/11/LauraSnyder\\_draftpaper-ver2.pdf](https://www.progressiveconnexions.net/wp-content/uploads/2019/11/LauraSnyder_draftpaper-ver2.pdf) [<https://perma.cc/326W-FK5X>] (prepared for the Progressive Connexions' third global conference, *Diasporas: An Inclusive Interdisciplinary Conference*); Gary Robinson, *Record Numbers Renounce US Citizenship*, INTERNATIONAL INVESTMENT (Aug. 11, 2020), <https://www.internationalinvestment.net/news/4018849/record-renounce-us-citizenship>; Elizabeth Anne Brown, *How Americans in Europe are Struggling to Renounce US Citizenship*, THE LOCAL (Feb. 11, 2022, 15:25 PM), <https://www.thelocal.com/20220211/how-americans-in-europe-are-struggling-to-renounce-us-citizenship/>.



renunciants fear offering a truthful response because of the “Reed Amendment.”<sup>92</sup> Adopted in 1996 as an amendment to the Immigration and Nationality Act of 1952, it seeks to bar the entry into the United States of former U.S. citizens who are determined have renounced for the “purpose of avoiding taxation by the United States.”<sup>93</sup> While few Americans renounce U.S. citizenship to avoid paying U.S. taxes,<sup>94</sup> they do renounce because U.S. taxation and banking policies prevent them from living normal lives.<sup>95</sup> Renunciants fear that if, in explaining their reasons for renunciation, they mention the word “tax,” let alone be entirely candid with the consular officer, they may not be able to enter the United States where they have remaining family connections.<sup>96</sup>

Most U.S. states recognize the doctrines of constructive dismissal (or constructive discharge) and constructive eviction. The former occurs when an employer makes working conditions so intolerable the employee has no choice but to resign.<sup>97</sup> The latter occurs when a landlord causes a disturbance to a tenant that precludes the tenant from enjoying the benefits of the premises or renders the premises unsuitable for the purpose for which it was leased, leaving the tenant with no choice but to

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<sup>92</sup> See Appendix A, *infra* note 608 and accompanying text.

<sup>93</sup> 8 U.S.C. § 1182(a)(10)(E); see Appendix A, *infra* note 608 and accompanying text.

<sup>94</sup> Most do not owe any U.S. tax. For an explanation of why this is the case, see Laura Snyder et al., *Mission Impossible: Extraterritorial Taxation and the IRS*, 170 TAX NOTES FED. 1827, 1832 n.14 (Mar. 22, 2021). See also Organ, *infra* note 472, at 4 (observing that most overseas Americans who renounce U.S. citizenship “had no or little tax liability in the years prior to expatriation”); Laura Snyder, *Extraterritorial Taxation #12: It’s Not About Paying Taxes*, SEAT Working Paper Series #2023/12 (June 5, 2023), <https://ssrn.com/abstract=4466128>.

<sup>95</sup> Doris L. Speer, *AARO 2020 Advocacy Survey Results Article 3: Americans Who Consider Renouncing Citizenship*, ASS’N OF AM. RESIDENT OVERSEAS (Mar. 15, 2021), [https://www.aaro.org/images/pdf/survey/ARTICLE\\_03\\_RENUNCIATION\\_2021\\_MARCH\\_15\\_DLS.pdf](https://www.aaro.org/images/pdf/survey/ARTICLE_03_RENUNCIATION_2021_MARCH_15_DLS.pdf); Laura Snyder, “*Being an American Outside of America is No Longer Safe.*” *Effects of the Extraterritorial Application of U.S. Taxation and Banking Policies – Survey Report: Data – Part 2 of 2*, STOP EXTRATERR. AM. TAX’N (May 4, 2021), at 58-66, [http://seatnow.org/survey\\_report\\_intro\\_page/participant-data-downloadable-version/participant-data-part-2-of-2/](http://seatnow.org/survey_report_intro_page/participant-data-downloadable-version/participant-data-part-2-of-2/) (hereinafter “SEAT Survey – Data Part 2 of 2”); Laura Snyder, “*Being an American Outside of America is No Longer Safe.*” *Survey Report: Effects of the Extraterritorial Application of U.S. Taxation and Banking Policies – Participant Comments – Version 1 of 3*, STOP EXTRATERR. AM. TAX’N (May 4, 2021), at 498-560, [http://seatnow.org/survey\\_report\\_intro\\_page/comments\\_downloadable/participant-comments-version-1-of-3-organized-by-topic/](http://seatnow.org/survey_report_intro_page/comments_downloadable/participant-comments-version-1-of-3-organized-by-topic/) (hereinafter “SEAT Survey – Participant Comments”).

<sup>96</sup> See, e.g., Wilton Jere Tidwell, Comment to *Homeland Security Enforced Reed Amendment Twice in 14 Years; Banished Two Ex-Citizens Who Mentioned Tax Motivations*, ISAAC BROCK SOC’Y (Mar. 23, 2016), <http://isaacbrocksociety.ca/2016/03/23/homeland-security-enforced-reed-amendment-twice-in-14-years-banished-two-ex-citizens-who-mentioned-tax-motivations/comment-page-1/> (stating “[o]nly a rank fool would ever admit they renounced for tax reasons”).

<sup>97</sup> See, e.g., Blair A. Copple, *Clarifying Constructive Discharge*, 50 U. S. F. L. REV. 103 (2016).

vacate.<sup>98</sup> In neither case is it required that the employer or landlord act with the specific intent of causing the employee to resign or the tenant to vacate; they need only to have acted in the manner that resulted in the inhospitable conditions.<sup>99</sup> In each case, the actions of the employer or landlord could be characterized as the “forcible destruction” of the employment or tenancy.<sup>100</sup>

The situation of overseas Americans is directly analogous. The dramatic increase in the number of persons renouncing U.S. citizenship since 2013 is not inexplicable. To the contrary, it clearly tracks the implementation of FATCA.<sup>101</sup> That is, despite the Supreme Court’s holding in *Afroyim* that Congress may not do anything to “abridge or affect” citizenship conferred by the Fourteenth Amendment,<sup>102</sup> Congress is again, through a tax code that makes it difficult for overseas Americans to survive, abridging and affecting U.S. citizenship.<sup>103</sup>

From 2013 to 2020, the average number of renunciants per year (4,249)<sup>104</sup> exceeded those from 1945 to 1967 (4,096),<sup>105</sup> when Congressional policies also caused the “forcible destruction” of U.S. citizenship. Today, U.S. taxation and banking policies make U.S. citizenship intolerable for many Americans, leaving them with no choice but to renounce. They do so not because they want to—the process makes them “burst

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<sup>98</sup> See, e.g., Samuel H. Weissbard & Camellia K. Schuk, *Building a Case for Constructive Eviction*, CCIM INST., <https://www.ccim.com/cire-magazine/articles/building-case-constructive-eviction/> (accessed June 24, 2023).

<sup>99</sup> With respect to constructive dismissal, see, e.g., Daniel Schwartz, *Constructive Discharge Does Not Require Proof Employer Intended Employee to Quit*, CONN. EM. L. BLOG (April 16, 2020), <https://www.ctemploymentlawblog.com/2020/04/articles/constructive-discharge-does-not-require-proof-employer-intended-employee-to-quit/>; Mike Pospis, *Constructive Discharge Claims Survive Summary Judgment*, POSPIS L. (May 10, 2020), <https://pospislaw.com/blog/2020/05/10/constructive-discharge-claims-survive-summary-judgment/>. With respect to constructive eviction, see, e.g., *Everything You Need to Know About Constructive Eviction as a Landlord*, ZUMPER (Jan. 26, 2021), <https://www.zumper.com/manage/resources/constructive-eviction-landlord/>; D. Bradley Pettit, *Landlord Tenant/Constructive Eviction and Breach of Covenant of Quiet Enjoyment*, NAT’L LEGAL RSCH GRP (June 25, 2020), <https://www.nlr.com/property-law-legal-research/landlord-tenant/constructive-eviction-and-breach-of-covenant-of-quiet-enjoyment>.

<sup>100</sup> See sources cited *supra*, note 99.

<sup>101</sup> See list of FACTA Intergovernmental Agreements (IGAs): U.S. DEP’T TREAS., FOREIGN ACCOUNT TAX COMPLIANCE ACT, <https://home.treasury.gov/policy-issues/tax-policy/foreign-account-tax-compliance-act> (accessed June 24, 2023).

<sup>102</sup> *Afroyim*, 387 U.S. at 266.

<sup>103</sup> The United States – or at least its Executive Branch – acknowledges this situation. See *infra* notes 469-472 and accompanying text. See also, e.g., Kathleen Peddicord, *Does Renouncing U.S. Citizenship Make Sense For The Average American Abroad?*, FORBES (July 28, 2022, 11:19 AM), <https://www.forbes.com/sites/kathleenpeddicord/2022/07/28/does-renouncing-us-citizenship-make-sense-for-the-average-american-abroad/?sh=58694d5123ca> (stating, “[a] tax laws become more onerous and the IRS’s global reach strengthens, could renunciation come to make sense for the everyday American expat?”).

<sup>104</sup> *Supra* notes 85-91 and accompanying text.

<sup>105</sup> *Supra* note 68 and accompanying text.

into tears” and vomit<sup>106</sup>—but because, like those who are constructively dismissed or evicted, they have no choice.<sup>107</sup> U.S. taxation and banking policies are causing the forcible destruction of U.S. citizenship. This occurs in violation of the Fourteenth Amendment, which, *Afroyim* holds, prevents Congress from adopting laws or engaging in practices that result in the forcible destruction of U.S. citizenship. The teaching of *Afroyim* is that citizenship belongs to the individual and not to the government.

### III. EXPANSION OF EQUAL PROTECTION

At the time *Cook* was decided, *Plessy v. Ferguson*<sup>108</sup> was the law of the land. In *Plessy*, the Court held that racial segregation on railroad cars was permissible under the now infamous and thoroughly discredited “separate but equal” doctrine.<sup>109</sup> The rationale adopted by the Court in *Plessy* is what has been described as the “prototype” of the traditional deferential rational basis review that is still applied today, depending upon the context.<sup>110</sup>

In *Plessy*, Louisiana state law required railroad companies to provide “equal but separate accommodations for the white, and colored races,”<sup>111</sup> and required the railroad companies to enforce the segregation. When the law was challenged by a man described as “seven eighths Caucasian and one eighth African blood,”<sup>112</sup> claiming a seat in the car reserved for whites, the Court interpreted the scope of the equal protection clause narrowly; the Court stated that while the object of the Fourteenth Amendment was “undoubtedly” to enforce racial equality “before the law,” it “could not have been intended” to abolish distinctions based upon color or to enforce social (as opposed to political) equality.<sup>113</sup> For

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<sup>106</sup> *Supra*, note 85 and accompanying text.

<sup>107</sup> One survey participant stated: “I would love to keep my citizenship with the U.S., but that is out of the question the way things are now.” SEAT Survey – Participant Comments, *supra* note 95, at 499. Another stated: “If there are no positive changes in the near future, I will renounce. I cannot stay in an abusive relationship. And it is all related to taxation because I love(d) my country and have always supported the U.S. It just can’t go on.” *Id.* at 505. See also Rachel Heller, *The Irony of Renouncing Under Duress*, RACHEL’S RUMINATIONS (Nov. 2015), <https://rachelsruminations.com/renouncing-under-duress/>; and *infra* notes 465-468 and accompanying text.

<sup>108</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896). See Appendix A, *infra* note 524 and accompanying text.

<sup>109</sup> See, e.g., Oriana González, *Louisiana Governor Pardons Plessy, From “Separate but Equal” Ruling*, Axios (Jan. 5, 2022), <https://www.axios.com/2022/01/05/louisiana-pardon-plessy-ferguson-racism>; *Plessy v. Ferguson*, History.com (Jan. 11, 2023), <https://www.history.com/topics/black-history/plessy-v-ferguson#plessy-v-ferguson-significance>.

<sup>110</sup> Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 748 (2014). The concept of “rational basis review” is discussed *infra* text accompanying notes 120-125.

<sup>111</sup> *Plessy*, 163 U.S. at 540.

<sup>112</sup> *Id.* at 538.

<sup>113</sup> *Id.* at 544.

the Court, racial segregation of this kind was within the competency of the legislature in the exercise of its police power. The only limits upon this power were that the laws be enacted “in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class.”<sup>114</sup>

*Plessy* has been roundly condemned as an expression of a “morally bankrupt philosophy.”<sup>115</sup> It should not be permissible “in our democracy for a dominant group to harness the public laws toward the end of controlling the circumstances of a subordinate group.”<sup>116</sup> It has also been condemned as a failure of the judicial process: the failure to develop a legal test that would require the Court to look beyond what seemed familiar and reasonable in order to engage in a critical analysis of whether the law in question violated the principal tenet of the equal protection clause.<sup>117</sup>

*Plessy*’s failure was the instigation for the Court to develop some means of discerning, on the one hand, those legislative acts that needed only to pass the same “reasonableness” test applied in *Plessy* from, on the other hand, those legislative acts requiring greater judicial enquiry.

The Court’s first step on that path came in 1938 – fourteen years after *Cook* – with *United States v. Carolene Products Company*.<sup>118</sup> *Carolene*’s now famous Footnote Four introduced the principle of levels of scrutiny, including strict scrutiny, to be applied by a court when considering the constitutionality of a law. Footnote Four established the need for increased scrutiny of laws that affect certain groups, notably groups subject to prejudice as “discreet and insular minorities,” rendering them politically powerless.<sup>119</sup>

After *Carolene* and for much of the remainder of the twentieth century, the Court was confronted with a large variety of situations testing the parameters of the Equal Protection Clause. These situations enabled the Court to develop the principles it had set out in Footnote Four into a loosely defined doctrine based upon suspect classification analysis and associated tiers of scrutiny.

It is beyond the scope of this paper to provide an exhaustive discussion of the Court’s doctrine.<sup>120</sup> Hornbook descriptions explain that equal

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<sup>114</sup> *Id.* at 550.

<sup>115</sup> Pollvogt, *supra* note 110, at 750.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

<sup>119</sup> *Id.* at 152 n.4.

<sup>120</sup> For more complete reviews as well as critiques, see, e.g., Pollvogt, *supra* note 110; Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135 (2011); Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991).

protection challenges to government regulation are subject to one of three tiers of scrutiny: strict, intermediate, or minimal (or “rational basis”).<sup>121</sup> The doctrine calls for the application of strict scrutiny to laws that discriminate based on race or nationality/country of origin or that discriminate with regard to a fundamental right.<sup>122</sup> Laws subject to strict scrutiny are valid only if they are necessary to achieve a compelling governmental interest.<sup>123</sup> Laws discriminating based on gender are subject to intermediate scrutiny; they are constitutional only if they are substantially related to an important state interest.<sup>124</sup> Save for certain exceptions, most other laws are considered consistent with the Equal Protection Clause provided they are rationally related to a legitimate governmental interest.<sup>125</sup>

This Part will focus on those elements of the doctrine – again, the doctrine developed in the decades after *Cook* – that are the most relevant to the U.S. extraterritorial tax system. Those elements include: (A) inherent suspicion of distinctions based upon country of origin; (B) law cannot create a second class of citizens; (C) animus is per se a constitutional wrong; and (D) a law must rationally relate to a legitimate governmental interest. The last section (E) offers an alternative perspective on how to understand the U.S. extraterritorial tax system in the context of the Fourteenth Amendment.

#### A. *Distinctions Based Upon Country of Origin Are Inherently Suspect*

As stated above, laws that discriminate based on race or country of origin are subject to strict scrutiny.<sup>126</sup> This – the highest level of scrutiny – dictates that such laws are valid only if they are necessary to a compelling governmental interest. This level of scrutiny is so high that once a court decides it is applicable to the law in question, it is highly likely that the law will be found unconstitutional.

Since *Cook*, throughout the twentieth century, and into this century, the Court has on multiple occasions denounced laws classifying persons based upon country of origin or nationality.<sup>127</sup> The decisions include:

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<sup>121</sup> See, e.g., Suzanna Sherry, *Selective Judicial Activism: Defending Carolene Products*, 14 GEO. J. L. & PUB. POL’Y 559, 560 (2016).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Supra* text accompanying notes 119-125.

<sup>127</sup> Interestingly, some members of Congress have vociferously denounced the tax laws of other countries on the grounds that they discriminate against Americans, whether in their practice or by their terms. They have also threatened retaliatory actions. But their denunciations and threats are hypocritical given their silence and inaction in relation to the nationality-based U.S. extraterritorial tax system. Not only does the system also discriminate against Americans

*Hirabayashi v. United States* (1943):<sup>128</sup> The Court upheld a wartime curfew for people of Japanese ancestry, arguing that it was necessary considering “the danger of espionage and sabotage, in time of war and of threatened invasion.”<sup>129</sup> In another period, the Court, however, explained, such laws would likely have been struck down because distinctions “solely because of [ . . . ] ancestry are, by their very nature, odious to a free people whose institutions are founded upon the doctrine of equality.”<sup>130</sup>

*Oyama v. California* (1948):<sup>131</sup> The Court struck down a statute presuming that transfers of real property from persons ineligible for citizenship because of their nationality (in this case, Japanese) to their U.S. citizen children were attempts to circumvent the state’s Alien Land Law rather than legitimate gifts.<sup>132</sup> The Court stated that a state may not discriminate based on a parent’s country of origin absent “compelling justification.”<sup>133</sup>

*Hernandez v. Texas* (1954):<sup>134</sup> The Court held that “the exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment.”<sup>135</sup> The Court also observed that “community prejudices are not static, and, from time to time, other differences from the community norm may define other groups which need the same protection”.<sup>136</sup>

*Graham v. Richardson* (1971):<sup>137</sup> The Court struck down an Arizona requirement that welfare recipients be either U.S. citizens or aliens who have lived in the country for at least 15 years.<sup>138</sup> In doing so, the Court compared classifications based on alienage to those based upon nationality and race, declaring that all such classifications are inherently suspect and subject to close judicial scrutiny.<sup>139</sup>

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but – unlike the laws of other countries – it is within the direct power of Congress to change it. See generally Laura Snyder, *Discriminatory Taxes and Congress: Do as I Say, Not as I Do*, 180 TAX NOTES FED. 1283 (Aug. 21, 2023). See also *infra* notes 155-164 and accompanying text.

<sup>128</sup> *Hirabayashi v. United States*, 320 U.S. 81 (1943).

<sup>129</sup> *Id.* at 100.

<sup>130</sup> *Id.*

<sup>131</sup> *Oyama v. California*, 332 U.S. 633 (1948).

<sup>132</sup> *Id.*; see Klarman, *supra* note 120, at 233.

<sup>133</sup> *Oyama*, 332 U.S. at 640.

<sup>134</sup> *Hernandez v. Texas*, 347 U.S. 475 (1954).

<sup>135</sup> *Id.* at 479.

<sup>136</sup> *Id.* at 478; See Pollvogt, *Beyond*, *supra* note 110 at 756 (describing *Hernandez* as recognizing the “concept of social group discrimination outside of/in addition to the familiar race discrimination paradigm, and articulat[ing] a surprisingly clear alternative vision of equal protection analysis—complete with a coherent evidentiary rule”).

<sup>137</sup> *Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 371-72.

*In re Griffiths* (1973):<sup>140</sup> The Court confirmed *Graham v. Richardson* in a case striking down Connecticut's exclusion of aliens from the practice of law. The Court repeated that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."<sup>141</sup>

*Frontiero v. Richardson* (1973):<sup>142</sup> The Court struck down a policy of the U.S. military automatically (without proof) allowing servicemen to claim their spouses as dependents for the purposes of obtaining benefits but requiring servicewomen to demonstrate proof of their spouses' dependence.<sup>143</sup> The Court agreed with the plaintiff that classifications based upon sex, like classifications based upon national origin, are inherently suspect and must be subjected to "close" judicial scrutiny.<sup>144</sup> The Court also stated that national origin is an "immutable characteristic determined solely by the accident of birth."<sup>145</sup>

*City of Cleburne v. Cleburne Living Center* (1985):<sup>146</sup> The Court declined to hold cognitive disability a quasi-suspect classification calling for a higher standard of judicial review.<sup>147</sup> In doing so, the Court repeated that statutes classifying persons based on national origin (as well as alienage or race) are subject to strict scrutiny. The Court explained:

These factors [national origin, alienage, or race] are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others. For these reasons, and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny, and will be sustained only if they are suitably tailored to serve a compelling state interest.<sup>148</sup>

*Students for Fair Admissions v. Harvard* (2023):<sup>149</sup> The Court held that race-based admissions policies at two U.S. universities violated the

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<sup>140</sup> *In re Griffiths*, 413 U.S. 717 (1973).

<sup>141</sup> *Id.* at 721.

<sup>142</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 682.

<sup>145</sup> *Id.* at 686.

<sup>146</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 440. The clause typically used in this context is "narrowly tailored." See Luiz Antonio Salazar Arroyo, *Tailoring the Narrow Tailoring Requirement in the Supreme Court's Affirmative Action Cases*, 58 CLEV. ST. L. REV. 649, 653-56 (2010).

<sup>149</sup> *Students for Fair Admissions v. Harvard*, No. 20–1199 (U.S. 2023) (slip op.).

Equal Protection Clause of the Fourteenth Amendment.<sup>150</sup> In explaining that the policies were inherently suspect<sup>151</sup> and subject to strict scrutiny,<sup>152</sup> the majority as well as two concurring opinions made clear that race and nationality are inextricably linked.<sup>153</sup> “Antipathy” towards distinctions based on race/nationality, the Court further explained, is “deeply rooted in our Nation’s constitutional and demographic history.”<sup>154</sup>

These decisions leave no doubt that any law, regulation or other governmental action or policy drawing distinctions based upon country of origin or nationality are subject to strict scrutiny. As such, they will be found to violate the Fourteenth Amendment’s Equal Protection Clause absent a showing on the part of the government that they are necessary and narrowly tailored to serve a compelling governmental interest.

Section 1 of the Internal Revenue Code imposes U.S. federal taxation upon every “individual,” without drawing any distinctions regarding residence, nationality, or other factors.<sup>155</sup> This ambiguous language arguably subjects every person in the world, regardless of residence – or any other connection to the United States – to the U.S. tax system.<sup>156</sup> Thus, it is no surprise that the first thing the first Treasury Regulation does is to draw distinctions. Treasury Regulation § 1.1-1(a)(1) classifies “individuals” into three groups. The first group is based upon U.S. residence; it includes all residents of the United States, regardless of citizen-

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<sup>150</sup> *Id.* at 39.

<sup>151</sup> *Id.* at 18.

<sup>152</sup> *Id.* at 15.

<sup>153</sup> The majority opinion recalls that “hostility to [. . .] race and nationality [. . .] in the eye of the law is not justified” *Students*, slip op. at 11, quoting *Yick Wo*, 118 U.S. 356, 374 (1886) (internal quotation marks omitted). The majority opinion reminds us that *Yick Wo* applied the Clause to “aliens and subjects of the Emperor of China,” *Students*, slip op. at 11 (quoting *Yick Wo* at 368), while *Truax v. Raich* applied the Clause to “a native of Austria,” *Students*, slip op. at 11 (quoting *Truax*, 239 U.S. 33, 36, 39 (1915)), and *Strauder v. West Virginia*, in dictum, applied it to “Celtic Irishmen.” *Students*, slip op. at 11 (quoting *Strauder*, 100 U.S. 303, 308 (1880)). The concurring opinion of Justice Thomas refers to “the Mexican or Chinese race.” *Students*, slip op. at 15 (Thomas, J., concurring) (quoting *Slaughter-House Cases*, 83 U.S. 36, 72 (1872)). Justice Thomas later mentions the internment of Japanese Americans in relocation camps following the bombing of Pearl Harbor, Holocaust survivors, and Irish immigrants. *Students*, slip op. at 44, 54 (Thomas, J., concurring). The concurring opinion of Justice Gorsuch breaks down the race of “Asian” into several different nationalities: Chinese, Korean, Japanese, Indian, Pakistani, Bangladeshi, Filipino. *Students*, slip op. at 6 (Gorsuch, J., concurring). Justice Gorsuch also breaks down the race of “White” into a multitude of different nationalities, including Welsh, Norwegian, Greek, Italian, Moroccan, Lebanese, Turkish, Iranian, Iraqi, Ukrainian, Irish, and Polish. *Students*, slip op. at 7, 13 (Gorsuch, J., concurring).

<sup>154</sup> *Id.* at 18 (quoting *Regents of University of California v. Bakke*, 438 U.S. 265, 291 (1978)). See also *id.* at 11, 15 (where the majority opinion equates race and nationality).

<sup>155</sup> 26 U.S.C. § 1.

<sup>156</sup> See John Richardson et al., *A Simple Regulatory Fix for Citizenship Taxation*, 169 TAX NOTES FED. 275, 280 (Oct. 12, 2020); Snyder, *Unacknowledged Realities*, *supra* note 6 at 249-50.



ship and even regardless of legal status as a resident.<sup>157</sup> The remaining two groups are based upon non-U.S. residence combined with nationality. More specifically, one group consists of persons who are non-residents of the United States but who are U.S. citizens;<sup>158</sup> the other group consists of persons who, while also non-residents of the United States, are not U.S. citizens (they are referred to as nonresident aliens, or “NRAs”).<sup>159</sup>

Based upon a cursory analysis of Treasury Regulation § 1.1-1(a)(1),<sup>160</sup> it might be argued that the classification of “citizen” includes all U.S. citizens, including those who live in the United States. Indeed, that is how the classification is presented in § 1.1-1(b).<sup>161</sup> But the reality is that in the specific context of federal taxation, the reference to “citizen” has consequence only with respect to persons living outside the United States. Given all U.S. residents are subject to U.S. federal taxation without limit, regardless of their citizenship status,<sup>162</sup> the only persons who can be concerned by the reference to “citizens” are persons living outside the United States. Treasury Regulation § 1.1-1 unmistakably classifies those persons based on their country of origin: among all persons living outside the United States, U.S. tax rules subject those whose country of origin is the United States to far more onerous federal tax burdens as compared to those whose country of origin is not the United States. Stated another way, if the reference to “citizens” were removed from Treasury Regulation § 1.1-1,<sup>163</sup> it would have great consequence for U.S. citizens living outside the United States while it would have no consequence for anyone – U.S. citizen or not – residing in the United States, nor for those living outside the United States who are not citizens.<sup>164</sup> Understood in this manner, it is clear that the classification of “citizens” as it is contained in federal tax rules constitutes a suspect classification based upon country of origin (or nationality) and, as such, it is subject to strict scrutiny by a court.

Because the classification is subject to strict scrutiny, if it were challenged before a court, the government would have the burden of demonstrating that the classification is narrowly tailored to serve a compelling governmental interest. This requires a two-part analysis: (i) is there a

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<sup>157</sup> Treas. Reg. § 1.1-1(a)(1).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Treas. Reg. § 1.1-1(b).

<sup>162</sup> See Francine J. Lipman, *The “ILLEGAL” Tax*, 11 CONN. PUB. INT. L. J. 93 (2012) (explaining the punitive manner by which undocumented immigrants are taxed in the United States, including federal income tax). *Id.* at 99-102.

<sup>163</sup> And other relevant sections of the Internal Revenue Code and Treasury Regulations.

<sup>164</sup> Other than enabling them to live freely outside the United States should they seek to do so.

compelling governmental interest; and (ii) if so, is the classification narrowly tailored to serve that interest?

### 1. Compelling Governmental Interest?

Several rationales have been offered to justify the worldwide taxation of overseas Americans. The rationales include allegiance to the United States,<sup>165</sup> benefits received as a U.S. citizen,<sup>166</sup> membership in U.S. society,<sup>167</sup> it is “worth the tax cost,”<sup>168</sup> and “administrability.”<sup>169</sup> Regardless of the merit of any of these rationales,<sup>170</sup> they should not be confused with what might constitute a compelling governmental interest. To the contrary, except perhaps for “administrability,” each of those rationales were conceived from the perspective of overseas Americans – the rationales are intended to explain why it is appropriate for the United States to tax the worldwide income of overseas Americans. For the purposes of strict scrutiny, the question must be asked from the perspective of the government: what is its compelling interest in the classification?

The U.S. tax system is a comprehensive regulatory regime that must meet constitutional standards. In this context, most would agree that the federal government has an interest in taxation. At the same time, however, few would agree that the federal government has a compelling interest in taxation regardless of the conditions. Few would agree that the federal government has a compelling interest in taxing whomever it

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<sup>165</sup> See Edward Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1293 (2011); see also Albert Levitt, *Income Tax Predicated upon Citizenship: Cook v. Tait*, 11 VA. L. REV. 607, 609-10 (1924-1925); Laura Snyder, *Can Extraterritorial Taxation Be Rationalized?*, 76 TAX LAW. 535, 543-46 (2023).

<sup>166</sup> This is the rationale offered by the Court in *Cook*: there is a “presumption that government, by its very nature, benefits the citizen and his property wherever found, and, therefore, has the power to make the benefit complete.” 265 U.S. at 56. Nielsen echoes this position, stating: “American citizens abroad do receive some benefits from their citizenship which [justifies] the U.S.’s exercise of taxing jurisdiction.” Grace Nielsen, *Resolving the Conflicts of Citizenship Taxation: Two Proposals*, 25 FLA. TAX REV. 436, 456 (2021). See Snyder, *Rationalized*, *supra* note 165 at 546-64.

<sup>167</sup> See Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443, 480-84 (2007); Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117, 125-27 (2014). See, generally Daniel Shaviro, *Taxing Potential Community Members’ Foreign Source Income*, 70 TAX L. REV. 75 (2016). See also Snyder, *Rationalized*, *supra* note 165 at 564-71.

<sup>168</sup> Kirsch, *Revisiting*, *supra* note 167, at 125; Paul R. Organ, *Citizenship and Taxes: Evaluating the Effects of the U.S. Tax System on Individuals’ Citizenship Decisions* 52-53 (Aug. 23, 2021) (Ph.D. dissertation, University of Michigan) (on file with the IRS), <https://www.irs.gov/pub/irs-utl/21rpcitizenshipandtaxes.pdf>. See Snyder, *Rationalized*, *supra* note 165 at 572-75.

<sup>169</sup> See generally Zelinsky, *supra* note 165. See also Snyder, *Rationalized*, *supra* note 165 at 575-77.

<sup>170</sup> See generally Snyder, *Rationalized*, *supra* note 165, explaining why none of the rationales have merit.

chooses, whenever it chooses, however it chooses, and in any amount it chooses, without any restraint. For example, presumably everyone would object to federal tax enforcement agents forcibly entering homes to confiscate cash or items of value, if the agents' only basis for doing so was to raise revenue. This demonstrates that for even the most ardent supporters of taxation, there are – or, at least, there should be – limits on the federal power to tax, and that they include constitutional limits (in this case, Fourth Amendment protections against unreasonable search and seizure).<sup>171</sup>

From the perspective of the government, the explanation commonly offered for taxation is the need for the government to raise revenue to fund government expenditures.<sup>172</sup> However, Modern Monetary Theory (MMT) teaches that while this explanation may be true for state and local governments who do not have their own sovereign currency, it is not true of the U.S. federal government.<sup>173</sup> Not only can the federal government create its own currency, but it must do so. If the federal government did not create currency and then spend it into the economy, there would be no medium of exchange in the country (other than foreign currencies), nor any currency in the economy to tax back.<sup>174</sup> When a tax is paid, the money is removed from circulation and effectively destroyed.<sup>175</sup>

Given, as MMT teaches, the purpose of federal taxation is not to raise revenue, what is its purpose? As long ago as 1946, Beardsley Ruml, a Director of the New York Federal Reserve Bank, offered a useful framework. He explained that taxation serves the following important purposes:

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<sup>171</sup> U.S. CONST. amend IV.

<sup>172</sup> See, e.g., Ctr on Budget and Pol'y Priorities, *Policy Basics: Where Do Our Federal Tax Dollars Go?*, <https://www.cbpp.org/research/federal-budget/where-do-our-federal-tax-dollars-go> (Apr. 9, 2020).

<sup>173</sup> See, e.g., Gareth Hutchens, *Modern Monetary Theory: How MMT is Challenging the Economic Establishment*, ABC NEWS (July 17, 2020), <https://www.abc.net.au/news/2020-07-17/what-is-modern-monetary-theory/12455806>.

<sup>174</sup> See generally STEPHANIE KELTON, *THE DEFICIT MYTH: MODERN MONETARY THEORY AND THE BIRTH OF THE PEOPLE'S ECONOMY* (2020); see also Andrew Baker & Richard Murphy, *Modern Monetary Theory and the Changing Role of Tax in Society*, 19 SOC. POL'Y & SOC'Y 454, 457 (2020). In addition, when a government accepts its own currency in the settlement of tax, it creates demand for the currency. Further, the requirement that tax be paid using this currency usually requires that the currency in question be used as a medium for exchange within the economy. *Id.*; see also Stephanie Kelton, *How We Think About the Deficit Is Mostly Wrong*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/opinion/deficit-tax-cuts-trump.html>.

<sup>175</sup> John Christensen & Nicholas Shaxson, 'The Magic Money Tree:' *From Modern Monetary Theory to Modern Tax Theory*, TAX JUST. NETWORK (Mar. 5, 2019), <https://taxjustice.net/2019/03/05/the-magic-money-tree-from-modern-monetary-theory-to-modern-tax-theory/>.

- Issuing currency without taxing any back would lead to inflation. Taxation allows the government to remove money from the economy to limit inflation.
- Gross levels of inequality are considered by many to threaten democracy as well as economic and social development. Taxation allows the government to affect a redistribution of income to alleviate inequality.
- Governments often seek to encourage or discourage specific behaviors. Taxation can be used for this purpose. Examples include, on one hand, taxes to discourage pollution, smoking, or Wall Street speculation, and, on the other hand, incentives to encourage the use of electric vehicles or engaging in higher education or training.
- It can be useful for governments to isolate or establish a line item to keep track of specific programs, such as Social Security or the Highway Trust Fund.<sup>176</sup>

This list offers a useful framework for determining what, if any, compelling interest the United States may have in taxing overseas citizens.

To begin, any mention of citizenship as a legitimate purpose for taxation is conspicuously absent. To the contrary, this framework is predicated upon the assumption that the taxpayers in question reside in the country in question, regardless of citizenship, or, at a minimum, that it applies to activity taking place within and not outside the country in question.

Further, it would be nonsensical to suggest that the United States government has a compelling interest in taxing for the purpose of limiting inflation, reducing inequality, or encouraging or discouraging behaviors for countries other than the United States. And if it were to do so, it would be a gross violation of the sovereignty of those other countries, as it would be if another country attempted to do the same for the United States.

Taxing persons outside the United States has little effect on inflation in the United States, especially to the extent that those persons earn and spend outside the United States and in currencies other than the U.S. dollar.<sup>177</sup> (On the other hand, when an overseas American pays income

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<sup>176</sup> Laura Snyder et al., *Should Overseas Americans Be Required to Buy Their Freedom?*, 172 TAX NOTES FED. 223, 229-30 (2021). See Beardsley Ruml, *Taxes for Revenue Are Obsolete*, VIII AMERICAN AFFAIRS 35, 36 (Jan. 1946).

<sup>177</sup> See, e.g., Mark Horton and Asmaa El-Ganainy, *Fiscal Policy: Taking and Giving Away*, INAT'L MON. FUND (accessed June 23, 2023), <https://www.imf.org/en/Publications/>

tax to the United States based on income originating from the American's country of residence, it has multiple negative repercussions for that country, as explained below).<sup>178</sup>

This leaves the purpose of incentivizing or disincentivizing specific behaviors. Most would agree that, if this is to be the purpose for any given tax, it should seek to encourage behaviors that are beneficial to society (not behaviors that detract from society) or to discourage behaviors that are detrimental to society or, more generally, that are wrong or abhorrent. At a bare minimum, taxation should not be used to discourage behaviors that are protected as either constitutional or human rights. As discussed in detail below,<sup>179</sup> leaving one's country is a human right protected by multiple human rights instruments that the United States has both signed and ratified. Understood in this manner, the United States has no compelling governmental interest in using taxation (or any other means) either to discourage Americans from living outside the United States or to discourage them from engaging in economic activity (such as purchasing a home, investing, saving for retirement, or operating a business) in the countries where they live.

If the teachings of MMT were set aside and it was accepted that a purpose of federal taxation was to raise revenue, this would still not constitute a compelling reason. To begin, it would be excessively broad: if that were all that was required to justify federal taxation then the United States could, without limit, tax all persons in the world based upon their worldwide income, regardless of their citizenship or any other status. Further, the United States collects little revenue from overseas Americans; amounts collected from persons filing a tax return from outside the United States represent just 0.51% of total federal income tax revenue and just 0.19% of total federal government spending.<sup>180</sup>

Not only does the United States not have any compelling reason for taxing persons living outside the United States based upon their worldwide income, it also has at least two compelling reasons why it should not, as discussed immediately below.

- a. The U.S. Extraterritorial Tax System Threatens the Sovereignty of Other Countries and Violates Their Right to Self-Determination

When the United States imposes its extraterritorial tax system upon persons residing in other countries, the system operates to nullify those

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fandd/issues/Series/Back-to-Basics/Fiscal-Policy (discussing how a country uses fiscal policy to influence its own economy).

<sup>178</sup> *Infra* notes 181, 478-485 and accompanying text.

<sup>179</sup> *Infra* notes 412-429 and accompanying text.

<sup>180</sup> Snyder et al., *Buy Their Freedom*, *supra* note 176, at 234.

countries' own policies. Americans living in other countries have considerable difficulties, as examples: owning their own homes, investing, saving for retirement, and fully utilizing welfare benefits in accordance with the policies adopted by the countries where they live. As a result, overseas Americans are not able to integrate into their communities in the manner policymakers in those countries intended and, upon retirement, they are more likely to become public charges.<sup>181</sup>

In addition, the U.S. extraterritorial tax system violates many countries' data protection,<sup>182</sup> human rights,<sup>183</sup> banking,<sup>184</sup> and succession planning policies,<sup>185</sup> rendering those policies ineffectual for a portion of the population of the countries where they were adopted. Further, the U.S. extraterritorial tax system imposes on economic activity outside the United States a tax that is different from that imposed by the country where the activity took place, violating that country's tax policies.<sup>186</sup> And when an overseas American pays tax to the United States based upon that economic activity, the results in the American's country of residence are: (i) a reduction of the money in circulation for the purchase of goods and services,<sup>187</sup> (ii) a reduction in the tax base, and (iii) an increase in the risk of deflation.<sup>188</sup> These results occur outside of the control of that country's monetary authorities. All these consequences of the U.S. extraterritorial tax system threaten the sovereignty and violate the right to self-determination of the countries where overseas Americans live.<sup>189</sup>

#### b. The United States is Unable to Administer its Extraterritorial Tax System

U.S. tax rules require the IRS to administer three tax systems, all in accordance with the Taxpayer Bill of Rights: (i) a domestic system for U.S. residents, (ii) a system based upon source for nonresident aliens, and (iii) an extraterritorial system based upon U.S. nationality. The IRS has made clear that it is unable or unwilling to administer the extraterritorial system.<sup>190</sup>

This is demonstrated in a multitude of ways. Just a few examples include (1) the failure to train IRS agents regarding the unique issues

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<sup>181</sup> See *infra* notes 477-485 and accompanying text.

<sup>182</sup> See Snyder, *Emigrant*, *supra* note 3, at 328-30.

<sup>183</sup> *Id.* at 333-34.

<sup>184</sup> *Id.* at 331-33.

<sup>185</sup> *Id.* at 338-41.

<sup>186</sup> *Id.* at 341-44.

<sup>187</sup> While this is generally undesirable for any country, it is especially undesirable for countries in the euro-zone, as these countries do not control their own money supply.

<sup>188</sup> See Snyder, *Emigrant*, *supra* note 3, at 341-44.

<sup>189</sup> *Id.* at 344; *infra* notes 477-485 and accompanying text.

<sup>190</sup> See generally Snyder et al., *Mission Impossible*, *supra* note 94.

faced by overseas Americans; (2) the refusal to establish adequate channels of communication with overseas Americans, whether by phone, postal mail, or electronic means; (3) the refusal to communicate with non-English-speaking overseas Americans in the languages they understand; (4) the failure to adopt adequate means to either receive payments from or effect payment to overseas Americans; and (5) the highly discriminatory treatment of overseas Americans (compared with U.S. residents) regarding access to in-person assistance and low-income taxpayer clinics.<sup>191</sup>

The Taxpayer Advocacy Panel (TAP), a federal advisory committee to the IRS, has recommended that the IRS address many of these issues.<sup>192</sup> In almost every case, the IRS has refused to do so. Its refusals nearly always cite budgetary concerns, stating, as examples, that the implementation of the recommendation “would increase the overall cost” or is “unfeasible” given the resources required.<sup>193</sup> These responses are an admission that the IRS has neither the resources nor the expertise to effectively administer a tax system for overseas Americans whose existence —economically, and in many cases linguistically —is “foreign” to the United States.

As detailed above<sup>194</sup> and elsewhere,<sup>195</sup> there are multiple, complex capacities that the IRS would need to develop to adequately, let alone fairly, administer the United States’ system of extraterritorial taxation and in compliance with the Taxpayer Bill of Rights.<sup>196</sup>

Setting aside the extent to which the development of these capacities is humanly possible — it is unclear that it is — it would require enormous resources. Even when given the opportunity, the IRS does not request the needed resources<sup>197</sup> and Congress has given no indication it would grant them if they were requested. The fact that the United States does not even aspire to administering its extraterritorial system in any manner that is adequate, let alone fair and in compliance with the Taxpayer Bill of Rights, is a compelling reason to end the system.

When the media raises the question of the U.S. extraterritorial tax system, it does so principally in a discussion about wealthy persons moving their residence outside the United States, or renouncing U.S. citizenship, reportedly with the principal purpose of reducing if not eliminating

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<sup>191</sup> *Id.* at 1829-30. See also *infra* notes 497-499 and accompanying text.

<sup>192</sup> See generally Snyder et al., *Mission Impossible*, *supra* note 94.

<sup>193</sup> *Id.* at 1834, 1835, 1839.

<sup>194</sup> *Supra* note 191 and accompanying text.

<sup>195</sup> See generally Snyder et al., *Mission Impossible*, *supra* note 94.

<sup>196</sup> See *infra* notes 497-499 and accompanying text.

<sup>197</sup> I.R.S., IR-2021-07, TAXPAYER FIRST ACT REP. TO CONG. (Jan. 2021). The IRS had the opportunity to request the needed resources in this 2021 report to Congress, but failed to do so. See Snyder et al., *Mission Impossible*, *supra* note 94, at 1843-53.

their U.S. tax burdens.<sup>198</sup> These persons are implicitly (if not explicitly) portrayed as having taken advantage of the United States – its regulatory environment and its resources – to build their fortunes, only to leave the country to avoid paying taxes on those fortunes.

All persons have human rights, including the wealthy. The United States cannot have a compelling governmental interest in measures that prevent or discourage *any* American – including those who are wealthy – from exercising their human right to leave the United States. How the U.S. extraterritorial tax system makes it difficult for Americans of all income levels to leave the United States is discussed in further detail below.<sup>199</sup>

This does not mean that the United States would not have a compelling governmental interest in taxing such persons' U.S.-sourced income, as well as – at least arguably – the gains in the value of their assets *while they were U.S. residents*.

But the reach of the U.S. extraterritorial tax system is far more extensive than those limited purposes, as seen immediately below.

## 2. Narrowly Tailored Classification?

As mentioned immediately above, media is replete with articles perpetuating the illusion that Americans who leave the United States to reside in another country and/or who renounce U.S. citizenship are wealthy, and their principal purpose is to avoid U.S. taxation. These articles cause considerable harm to overseas Americans because they propagate the stereotype that they are rich, unpatriotic, lazy, tax dodgers.<sup>200</sup> The reality is that for every Eric Schmidt (former Google CEO)<sup>201</sup> or Eduardo Saverin (Facebook co-founder)<sup>202</sup> who seek to move to a tax haven to reduce their U.S. tax burden, there are hundreds of thousands of ordinary Americans who seek to live ordinary lives in ordinary countries that impose ordinary taxes. They live outside the United States not to

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<sup>198</sup> See, e.g., Juliana Kaplan, *Ultrawealthy Americans are Ditching Their US Citizenship in Droves*, BUS. INSIDER (Aug. 5, 2021), <https://www.businessinsider.com/ultrawealthy-us-citizens-are-denouncing-citizenship-in-droves-2021-8>; Paul Sullivan, *When U.S. Citizenship Starts Looking Like a Bad Deal*, N.Y. TIMES (Dec. 6, 2019), <https://www.nytimes.com/2019/12/06/your-money/wealth-renounce-us-citizenship.html>. See also Snyder, *Emigrant*, *supra* note 3, at 320, 325-26.

<sup>199</sup> See *infra* notes 412-429 and accompanying text (discussing the human right to leave one's country).

<sup>200</sup> See Snyder, *Emigrant*, *supra* note 3 at 325-26.

<sup>201</sup> Theodore Schleifer, *The Former CEO of Google has Applied to Become a Citizen of Cyprus*, VOX (Nov. 9, 2020), <https://www.vox.com/recode/2020/11/9/21547055/eric-schmidt-google-citizen-cyprus-european-union>.

<sup>202</sup> Tom McCarthy, *Eduardo Saverin Renounces US Citizenship Ahead of Facebook IPO*, THE GUARDIAN (May 11, 2012), <https://www.theguardian.com/technology/us-news-blog/2012/may/11/facebook-eduardo-saverin-us-citizenship>.



avoid taxation (they live in countries with ordinary tax systems), but to pursue professional opportunities, to be with a romantic partner, to fulfill family obligations, or simply for adventure.<sup>203</sup> Many left the United States as children, with their families, or as young adults.<sup>204</sup> Many have lived outside the United States for decades.<sup>205</sup> And some were born outside the United States and have never lived there<sup>206</sup> — they are U.S. citizens by virtue of the U.S. citizenship of a parent. Most overseas Americans are low or middle-income and have limited savings, if any.<sup>207</sup> Those who have achieved financial success did so outside the United States, using resources outside the United States. When some of these ordinary persons take the drastic step of renouncing U.S. citizenship, they do so not to “avoid paying U.S. taxes” (most owe no U.S. tax)<sup>208</sup> but because for them the limitations the U.S. extraterritorial tax system places upon their lives are no longer tenable.<sup>209</sup>

The U.S. extraterritorial tax system makes it impossible for ordinary Americans to live ordinary lives in countries with ordinary tax systems (not tax havens) because they can engage in most ordinary economic activities only with considerable difficulty.<sup>210</sup> And of those who seek to live an ordinary life by renouncing U.S. citizenship, many face a penalizing exit tax calculated based on all their assets, not just those acquired using U.S. resources.<sup>211</sup>

At the same time, the U.S. extraterritorial tax system is ineffective in preventing the kind of abuses that the media so often highlights. Only exceptionally wealthy persons, not ordinary ones, have the resources to purchase citizenships and establish residencies in tax havens.<sup>212</sup> Indeed, not only does the U.S. tax system fail to prevent this kind of abuse, but it

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<sup>203</sup> Laura Snyder, *Effects of the Extraterritorial Application of U.S. Taxation and Banking Policies – Survey Report: Data – Part 1 of 2*, STOP EXTRATERRITORIAL AMERICAN TAX’N 1, 10 (May 4, 2021), [http://seatnow.org/survey\\_report\\_intro\\_page/participant-data-downloadable-version/participant-data-part-1-of-2/](http://seatnow.org/survey_report_intro_page/participant-data-downloadable-version/participant-data-part-1-of-2/) (hereinafter “SEAT Survey – Data Part 1 of 2”).

<sup>204</sup> *Id.* at 11 (indicating that 70% of survey participants –Americans living overseas– left the United States before age 36).

<sup>205</sup> *Id.* (indicating that 44% of the survey participants were living outside the United States for more than two decades).

<sup>206</sup> *Id.* at 9.

<sup>207</sup> *Id.* at 7-8.

<sup>208</sup> *See supra* note 94.

<sup>209</sup> *See supra* notes 103-107, and *infra* notes 465-468, and accompanying text.

<sup>210</sup> *See generally* Laura Snyder, *Extraterritorial Taxation #2: How It Is Experienced*, SEAT Working Paper Series #2023/2 (June 5, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4465003](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4465003).

<sup>211</sup> *See infra* notes 329-357 and accompanying text.

<sup>212</sup> MacKenzie Sigalos, *This Company Sells Passports to Americans Looking for a Tax Break on Their Bitcoin Profits*, CNBC (July 11, 2021), <https://www.cnbc.com/2021/07/11/plan-b-passport-tax-break-bitcoin-profits.html>; Francisca Fernando et al., *Citizenship For Sale*, FIN. & DEV. 50-52 (June, 2021), <https://www.imf.org/external/pubs/ft/fandd/2021/06/pdf/citizenship-for-sale-fernando-pampolina-sykes.pdf>; Matthew De Saro, *Plan B Passport is Selling*

facilitates it by offering favorable tax conditions to Americans with the resources to establish residence in a U.S. territory such as Puerto Rico<sup>213</sup> or the U.S. Virgin Islands.<sup>214</sup>

### 3. Summary

In sum, the classification of “citizens” as it is contained in federal tax rules constitutes a suspect classification based upon country of origin (or nationality) and, as such, it is subject to strict scrutiny by a court. The United States has no compelling interest in taxing the non-U.S. income of persons living overseas whose country of origin is the United States. While the United States has an interest in preventing tax abuses by wealthy persons whose fortunes were built using U.S. resources, the U.S. extraterritorial tax system’s classification of overseas persons based upon country of origin is not narrowly tailored to serve that interest. The prevention of tax abuses by wealthy citizens can be achieved through a system of residence-based taxation and the implementation of a departure (rather than exit) tax.<sup>215</sup>

#### B. Law Cannot Create a Second Class of Citizens

*Schneider v. Rusk* (1964)<sup>216</sup> involved a woman who moved from Germany to the United States as a child and became a naturalized U.S. citizen along with her parents, and who, as an adult, moved back to Germany.<sup>217</sup> After living overseas for several years, she applied for a U.S.

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*Citizenship For Tax Havens to Crypto Investors*, YAHOO! (July 12, 2021), <https://www.yahoo.com/video/plan-b-passport-selling-citizenship-164123964.html>.

<sup>213</sup> See Offshore Protection, *Offshore Jurisdiction Review: Puerto Rico as a Tax Haven* (Jan. 28, 2023), <https://www.offshore-protection.com/puerto-rico-tax-haven>. See also Robert W. Wood, *Puerto Rico Tax Haven Is Alluring, But Are There Tax Risks?*, FORBES (Jan. 10, 2022) (“Puerto Rico’s program is incredible. . . . [where you can] pay a fraction of the taxes you do now. . . . If you can really move yourself and/or your business, you may be able to cut your income taxes to the bone”), <https://www.forbes.com/sites/robertwood/2022/01/10/puerto-rico-tax-haven-is-alluring-but-are-there-tax-risks/?sh=58264853a838>; Glen E. Frost & Mary F. Lundstedt, *Tax-Weary Americans Find Haven in Puerto Rico*, FROST L. (“Puerto Rico has enacted aggressive legislation in order to attract new businesses and high net worth individuals. As a U.S. territory, Puerto Rico is uniquely able to offer incentives unavailable anywhere else in the world now.”), <https://www.districtofcolumbiataxattorney.com/articles/tax-weary-americans-find-haven-in-puerto-rico/> (accessed June 24, 2023).

<sup>214</sup> Brittany De Lea, *Epstein’s Private Island: Business and Tax Breaks*, FOX BUS. (Aug. 15, 2019), <https://www.foxbusiness.com/features/epsteins-private-island-business-taxes>; Tom Metcalf et al., *The Jeffrey Epstein Guide to Cutting Your Tax Bill by 90%*, BLOOMBERG L. (July 28, 2019) (“[W]hat’s legally on offer there ‘is a huge gift’ for people of means.”), <https://www.stetson.edu/law/studyabroad/cayman/media/The-Jeffrey-Epstein-Guide-to-Cutting-Your-Tax-Bill.pdf>.

<sup>215</sup> See *infra* notes 357, 507-512 and accompanying text.

<sup>216</sup> *Schneider v. Rusk*, 377 U.S. 163 (1964). See *supra* notes 75-77. See also *infra* Appendix A, note 560 and accompanying text.

<sup>217</sup> *Schneider*, 377 U.S. at 164.

passport.<sup>218</sup> The U.S. Department of State rejected her request, asserting that pursuant to the Immigration and Nationality Act of 1952 (INA) she had lost her U.S. citizenship because she had returned to live in her country of origin for an extended period.<sup>219</sup> *Schneider* sued for a declaratory judgement that she was still a U.S. citizen.<sup>220</sup>

The Court commented extensively on the prejudice against naturalized citizens reflected in the INA:

This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable, and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make. [ . . . ] A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may.<sup>221</sup>

Ultimately, the Court explained, the relevant clause of the INA created “a second-class citizenship.”<sup>222</sup> This was unacceptable because regardless of whether a citizen was naturalized or native born, living abroad was “no badge of lack of allegiance, and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons.”<sup>223</sup>

There are important parallels between *Schneider* and the U.S. extra-territorial tax system. To begin, in both cases the laws in question were motivated by “impermissible assumption”<sup>224</sup> — in other words, by prejudice — held against persons who are U.S. citizens but who have associations considered too close with places outside the United States. In both cases, the persons in question were/are assumed to hold insufficient allegiance to the United States and to have no legitimate reason to live outside the United States. And the “impermissible assumptions” go one step further than those observed by the Court in *Schneider*: naturalized or not, Americans living overseas today are assumed to do so for the purpose of avoiding U.S. taxation.

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.* Section 352(a)(1) of the INA (Pub. L. No. 82-414) provided that naturalized citizens shall lose their U.S. citizenship if they maintain continuous residence in their country of origin for three years. § 352(a)(1), 66 Stat. at 269. *See supra* note 41 and *infra* Appendix A, note 545 and accompanying text.

<sup>220</sup> *Schneider*, 377 U.S. at 164.

<sup>221</sup> *Id.* at 168.

<sup>222</sup> *Id.* at 169.

<sup>223</sup> *Id.*

<sup>224</sup> *Supra* note 221 and accompanying text.

In both cases, the result is law so penalizing for a specific class of U.S. citizens that they are relegated to second class citizenship, in violation of the Fourteenth Amendment. Table 5<sup>225</sup> catalogs the many ways the U.S. extraterritorial tax system does this with respect to overseas Americans: (1) by penalizing financial and other activities carried out by overseas Americans in their country of residence while allowing U.S. residents to engage in the same kinds of activities in their country of residence without penalty; (2) by reserving most tax credits (such as the Earned Income Tax Credit and the Work Opportunity Tax Credit) to U.S. residents, regardless of citizenship status; (3) by requiring overseas Americans to prepare U.S. tax returns that are considerably more complex than those required of most U.S. residents, subject to draconian penalties in the event of inadvertent error and often requiring professional assistance that is considerably more expensive than that required for a U.S. resident's tax return; (4) by excluding overseas Americans entirely from certain IRS services and by providing them with significantly reduced levels of other services, as compared to U.S. residents; (5) by requiring overseas Americans to submit a list of the accounts they hold in their country of residence to a "Financial Crimes Enforcement Network"; (6) by requiring financial institutions in other countries to identify "suspected U.S. persons" and report to the IRS detailed information about those persons' accounts, subject to draconian penalties; and (7) by causing non-governmental actors to deny to overseas Americans banking, mortgages, and other financial services as well investment, employment, community service, and other opportunities in their country of residence.

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<sup>225</sup> *Infra* notes 226-247 and accompanying text.

TABLE 5: OVERSEAS AMERICANS RELEGATED TO SECOND CLASS CITIZENSHIP

		Non-Resident Aliens (NRAs)	U.S. Residents (regardless of nationality)	U.S. Nationals Living Outside the United States
	<b>Contained in text of U.S. law/regulation/treaty</b>			
1	Eligible for Earned Income Tax Credit	-	X <sup>226</sup>	-
2	Eligible for Work Opportunity Tax Credit	-	X <sup>227</sup>	-
3	Eligible for 2021 Advanced Child Tax Credit	-	X <sup>228</sup>	-
4	Access to in-person IRS services	-	X <sup>229</sup>	-
5	Eligible for full tax treaty benefits	X	X <sup>230</sup>	-
6	Subject to U.S. taxation based on worldwide income	-	X	X

<sup>226</sup> To be eligible for the Earned Income Tax Credit, a taxpayer must meet certain requirements which operate to exclude overseas Americans. Notably, the taxpayer must not claim the Foreign Earned Income Exclusion and, depending on the circumstances, may not use the filing status married filing separately (MFS). I.R.S., *Who Qualifies for the Earned Income Tax Credit (EITC)*, [https://www.irs.gov/publications/p596#en\\_US\\_2020\\_publink1000298590](https://www.irs.gov/publications/p596#en_US_2020_publink1000298590) (Mar. 14, 2022). Overseas taxpayers use the filing status MSF at a higher rate than domestic taxpayers (17.64% as compared to 2.09%). *See infra* notes 574, 631.

<sup>227</sup> Eligibility for the Work Opportunity Tax Credit is structured in a manner that makes it all but impossible for an employer or employee located outside the United States to qualify. For example, the employer’s application for the credit must be certified by a state workforce agency. These do not exist outside the United States. *See* I.R.S., *How to File a WOTC Certification Request*, <https://www.dol.gov/agencies/eta/wotc/how-to-file> (last visited June 24, 2023).

<sup>228</sup> The 2021 American Rescue Plan expanded the child tax credit, including the implementation of advance payments. However, to qualify at least one of the child’s parents must have lived in the United States for at least half the year. Further, the credit applied only with respect to children who had a valid Social Security Number; many U.S. citizens living overseas do not meet the requirements to pass U.S. citizenship to their children born outside the United States thus those children are ineligible for Social Security Numbers. *See* I.R.S., *Advance Child Tax Credit Payments in 2021*, <https://www.irs.gov/credits-deductions/advance-child-tax-credit-payments-in-2021> (May 25, 2022). *See also infra* notes 636-638.

<sup>229</sup> *See* Snyder et al., *Mission Impossible*, *supra* note 94, at 1832. *See also* Appendix A, *infra* note 624 and accompanying text.

<sup>230</sup> *See, e.g.,* Karen Alpert, *Saving Clause*, LET’S FIX THE AUSTRALIA/US TAX TREATY!, <https://fixthetaxtreaty.org/problem/saving-clause/> (last visited June 8, 2022). *See also* John Richardson, *Dual Citizenship, the Lack of Definition of “Citizen” in the “Savings Clause” of U.S. Tax Treaties and Why These Are Important*, CITIZENSHIP SOLUTIONS (May 29, 2016), <http://citizenshipsolutions.ca/2016/05/29/the-lack-of-definition-of-citizens-in-the-savings-clause-of-u-s-tax-treaties-and-why-it-is-important/>.

		Non-Resident Aliens (NRAs)	U.S. Residents (regardless of nationality)	U.S. Nationals Living Outside the United States
7	Penalizing U.S. taxation of retirement savings in country of residence (CoR)*	-	-	X <sup>231</sup>
8	Penalizing U.S. taxation of investments and capital gains in CoR	-	-	X <sup>232</sup>
9	Penalizing U.S. taxation of business operations in CoR	-	-	X <sup>233</sup>
10	Penalizing U.S. taxation of welfare benefits in CoR	-	-	X <sup>234</sup>
11	Incur taxable phantom gains based upon currency used in CoR	-	-	X <sup>235</sup>
12	Highly complex U.S. tax return	-	-	X <sup>236</sup>
13	Considerably reduced IRS services	-	-	X <sup>237</sup>
14	Required to compile two different lists of accounts held in CoR and to submit one list to “Financial Crimes Enforcement Network” and the other list to IRS	-	-	X <sup>238</sup>
15	Financial institutions in CoR required to submit to IRS detailed information about accounts held	-	-	X <sup>239</sup>

<sup>231</sup> *Infra* note 448 and accompanying text. *See also* Appendix A, *infra* notes 557-558, 575, 603 and accompanying text.

<sup>232</sup> *Infra* note 448 and accompanying text. *See also* Appendix A, *infra* notes 591-592, 616, 626 and accompanying text.

<sup>233</sup> *Supra* note 57; *infra* note 437 and accompanying text.

<sup>234</sup> *See* Snyder, *Criminalization*, *supra* note 3, at 2282; Snyder, *Emigrant*, *supra* note 3, at 305; SEAT Survey – Participant Data Part 1 of 2, *infra* note 203, at 14, 27; SEAT Survey – Participant Comments, *supra* note 95, at 353-57.

<sup>235</sup> *Supra* note 35; Appendix A, *infra* note 597.

<sup>236</sup> Snyder, *Criminalization*, *supra* note 3, at 2282; Snyder, *Emigrant*, *supra* note 3, at 305; SEAT Survey – Participant Comments, *supra* note 95, at 142-173; DA Survey, *infra* note 437, at 4, 14, 17.

<sup>237</sup> *Infra* notes 497-498 and accompanying text.

<sup>238</sup> Snyder, *Criminalization*, *supra* note 3, at 2285; Snyder, *Emigrant*, *supra* note 3, at 309.

<sup>239</sup> Snyder, *Criminalization*, *supra* note 3, at 2285; Snyder, *Emigrant*, *supra* note 3, at 308-09.

		Non-Resident Aliens (NRAs)	U.S. Residents (regardless of nationality)	U.S. Nationals Living Outside the United States
	<b>Occur as a consequence of U.S. law/regulation/treaty</b>			
16	High cost to prepare U.S. tax return	-	-	X <sup>240</sup>
17	Inability to open or keep bank/financial accounts in CoR	-	-	X <sup>241</sup>
18	Barred from certain investments in CoR	-	-	X <sup>242</sup>
19	Difficulties to obtain mortgage in CoR	-	-	X <sup>243</sup>
20	Difficulties to hold title to family assets in CoR	-	-	X <sup>244</sup>
21	Denied certain positions of employment in CoR	-	-	X <sup>245</sup>
22	Denied certain opportunities for community service in CoR	-	-	X <sup>246</sup>
23	Inability in CoR to hold power of attorney or serve as trustee for a family member or serve as executor of family member's estate	-	-	X <sup>247</sup>

### C. *Animus is Per Se a Constitutional Wrong*

*Department of Agriculture v. Moreno* (1973)<sup>248</sup> involved a 1971 amendment to the Food Stamp Act of 1964 which withdrew food stamp

<sup>240</sup> Snyder, *Criminalization*, *supra* note 3, at 2282; Snyder, *Emigrant*, *supra* note 3, at 305; SEAT Survey – Data Part 2 of 2, *supra* note 95, at 53; SEAT Survey – Participant Comments, *supra* note 95, at 173-222; DA Survey, *infra* note 437, at 4.

<sup>241</sup> Snyder, *Criminalization*, *infra* note 3, at 2285-86; Snyder, *Emigrant*, *infra* note 3 at 309-10; SEAT Survey – Data Part 2 of 2, *supra* note 95, at 32, 35, 38-39, 41, 43; SEAT Survey – Participant Comments, *supra* note 95, at 236-66.

<sup>242</sup> *Id.* See also SEAT Survey – Data Part 2 of 2, *supra* note 95, at 32, 34.

<sup>243</sup> Snyder, *Criminalization*, *infra* note 3 at 2286; Snyder, *Emigrant*, *infra* note 3, at 310; SEAT Survey – Data Part 2 of 2, *supra* note 95, at 32, 42; SEAT Survey – Participant Comments, *supra* note 95, at 357-61; DA Survey, *infra* note 437, at 12, 31.

<sup>244</sup> Snyder, *Criminalization*, *supra* note 3, at 2281-82; Snyder, *Emigrant*, *supra* note 3, at 305; SEAT Survey – Data Part 1 of 2, *supra* note 203, at 14, 23; SEAT Survey – Participant Comments, *supra* note 95, at 270-86.

<sup>245</sup> Snyder, *Emigrant*, *supra* note 3, at 311; SEAT Survey – Data Part 1 of 2, *supra* note 203, at 14, 28; SEAT Survey – Participant Comments, *supra* note 95, at 339-50.

<sup>246</sup> Snyder, *Criminalization*, *supra* note 3, at 2286; Snyder, *Emigrant*, *supra* note 3, at 310; SEAT Survey – Data Part 2 of 2, *supra* note 95, at 32, 40; SEAT Survey – Participant Comments, *supra* note 95, at 350-53.

<sup>247</sup> Snyder, *Criminalization*, *supra* note 3 at 2286; Snyder, *Emigrant*, *supra* note 3 at 310; SEAT Survey – Data Part 2 of 2, *supra* note 95, at 32, 44.

<sup>248</sup> *Department of Agriculture v. Moreno*, 413 U. S. 528 (1973).

benefits if any individual living in a household was unrelated to the other residents.<sup>249</sup> The Court invalidated the amendment on the grounds that it violated the equal protection component of the Fifth Amendment's Due Process Clause.<sup>250</sup>

In invalidating the amendment, the Court pointed to the Act's legislative history which, the Court observed, indicated that the amendment was intended to prevent "hippies" and "hippie communes"<sup>251</sup> from participating in the food stamp program. For the Court, this evidence alone was reason enough to invalidate the amendment, without the need to consider whether "hippies" or "hippie communes" constituted a protected class.<sup>252</sup>

The Court explained: "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."<sup>253</sup>

Since *Moreno*, the Court has developed a doctrine of animus described as an "independent constitutional force."<sup>254</sup> This development occurred in cases such as:

*City of Cleburne v. Cleburne Living Center* (1985),<sup>255</sup> in which the city of Cleburne, Texas required a special zoning permit for a proposed group home for the cognitively disabled. The Court refused to classify cognitively disabled persons as a suspect class subject to heightened scrutiny.<sup>256</sup> But the Court nevertheless ruled that the requirement for a special zoning permit violated equal protection rights because "requiring the permit in this case appears to us to rest on an irrational prejudice against the [cognitively disabled]."<sup>257</sup>

*Romer v. Evans* (1996)<sup>258</sup> involved Colorado's constitutional Amendment 2, which sought to void existing anti-discrimination policies in Colorado intended to protect gay men and lesbians at various levels of state government.<sup>259</sup> Amendment 2 further forbade cities, counties, departments, and the state legislature from passing such protections in the

<sup>249</sup> *Id.* at 528.

<sup>250</sup> *Id.* at 528-29. *See also* Appendix A, *infra* note 569 and accompanying text.

<sup>251</sup> *Moreno*, 413 U. S. at 534.

<sup>252</sup> *Id.* at 538.

<sup>253</sup> *Id.*

<sup>254</sup> Dale Carpenter, *Windsor Products: Equal Protection from Animus* 2013 SUP. CT. REV. 183 (2013).

<sup>255</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

<sup>256</sup> *Id.* at 432, 442-47. *See also supra* note 147 and accompanying text.

<sup>257</sup> *City of Cleburne*, 473 U.S. at 433. *See also* Appendix A, *infra* note 588-589 and accompanying text.

<sup>258</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>259</sup> *Id.*



future.<sup>260</sup> In striking down Amendment 2 the Court stated, “the amendment seems inexplicable by anything but animus toward the class it affects.”<sup>261</sup>

*United States v. Windsor* (2013)<sup>262</sup> involved the Defense of Marriage Act (DOMA), which defined “marriage” and “spouse” to exclude same-sex partners for purposes of federal law.<sup>263</sup> The result, in this case, was that the surviving spouse of a same-sex marriage was unable to claim the federal estate tax exemption.<sup>264</sup> The Court held that DOMA violated the equal protection component of the Fifth Amendment’s Due Process Clause.<sup>265</sup> Citing *Moreno*, the Court explained that “the avowed purpose and practical effect of [DOMA] are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages.”<sup>266</sup>

The animus doctrine constitutionalizes the basic precept that it is wrong for one person to treat another person malevolently. A purpose to inflict injury or indignity is an impermissible purpose.<sup>267</sup> “This sentiment so suffuses our moral and legal tradition that hardly anyone would deny it.”<sup>268</sup> Even Justice Antonin Scalia would agree. In his dissent in *Romer* he wrote: “Of course it is our moral heritage that one should not hate any human being or class of human beings.”<sup>269</sup>

It follows from this that scholars have described the animus doctrine as a “silver bullet.”<sup>270</sup> when the Court identifies evidence of animus, other purported governmental interests are necessarily discredited, regardless of whether they appear legitimate on a superficial level. This is appropriate because if animus is, in fact, constitutionally impermissible, no law found to be motivated by animus should be permitted to stand.<sup>271</sup>

Unlike a finding of discriminatory intent, a finding of animus should not trigger further scrutiny; rather, it should end the case, and end it with a defeat for the government. Because animus short-circuits the tiered scru-

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<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 632. See Carpenter, *supra* note 254, at 210, 212. See also Appendix A, *infra* note 605 and accompanying text.

<sup>262</sup> *United States v. Windsor*, 570 U.S. 744 (2013).

<sup>263</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); *Windsor*, 570 U.S. at 744.

<sup>264</sup> *Windsor*, 570 U.S. at 744.

<sup>265</sup> *Id.* at 746.

<sup>266</sup> *Id.* at 746. See also Appendix A, *infra* note 620 and accompanying text.

<sup>267</sup> Carpenter, *supra* note 254, at 243.

<sup>268</sup> *Id.* at 185.

<sup>269</sup> 517 U.S. at 644.

<sup>270</sup> Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 889, 930 (2012).

<sup>271</sup> *Id.* at 930.

tiny analysis, cutting immediately to the ultimate constitutional question about invidiousness, there is simply nothing left for a court to consider once it concludes that a law is grounded in animus.<sup>272</sup>

The evidence of animus need not be extensive; *Moreno* was decided based on “sparse” legislative history.<sup>273</sup> Nor need it be explicit; it can be inferred. Evidence of animus can be found in a variety of sources beyond legislative history, such as in the media and in the structure of the law in question.<sup>274</sup> Further, it is not necessary that the law in question be solely motivated by animus: it suffices that animus “may be lurking” as a motivation.<sup>275</sup>

The evidence that the U.S. extraterritorial tax system is motivated by animus is both plentiful and unequivocal. From the system’s first inceptions in the nineteenth century until the present-day members of Congress and other policymakers have not hesitated to express their contempt for overseas Americans and their desire to punish them because they live overseas. They have expressed this in legislative history, in the press, and in the titles and terminology of the laws themselves. Examples include:

#### 1. 1860s: The Origins of the Income Tax

The Revenue Acts of 1861 and 1862 limited the taxation of overseas Americans to only specified types of unearned U.S.-source income (earned income, as well as any kind of income sourced outside the United States, were excluded).<sup>276</sup> The Revenue Act of 1864 changed that by expanding the taxation of overseas Americans to all their income, regardless of type or source.<sup>277</sup> The legislative history reveals that for Senator Jacob Collamer of Vermont this change was justified not because it served any one or more governmental interests, but because those Americans who “skulk away” to Paris “avoiding the risk of being drafted” should not “get off with as low a tax as anybody else.”<sup>278</sup>

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<sup>272</sup> William D. Araiza, *Animus and its Discontents*, 71 FLA. L. REV. 155, 188 (2019). Araiza also explains “when the Court has pushed forward in its review of a law even after initially observing its grounding in animus, it should be understood as endeavoring to ensure that, in fact, animus was the reason for the law.” *Id.* at 189.

<sup>273</sup> *Id.* at 164.

<sup>274</sup> *Id.* at 179 (citing Pollvogt, *Unconstitutional*, *supra* note 270, at 926).

<sup>275</sup> Daniel O. Conkle, *Animus and Its Alternatives: Constitutional Principle and Judicial Prudence*, 48 STETSON L. REV. 195, 200 (2019) (citing WILLIAM D. ARAIZA, *ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* 139 (2017)).

<sup>276</sup> See Appendix A, *infra* notes 515-516 and accompanying text.

<sup>277</sup> See Appendix A, *infra* note 517 and accompanying text.

<sup>278</sup> CONG. GLOBE, 38th Cong., 1st Sess., 2661 (1864) (Statement of Sen. Jacob Collamer), <https://memory.loc.gov/ammem/amlaw/lwecglink.html>.

## 2. 1890s: The Reinstatement of the Income Tax

When the income tax was reinstated in 1894,<sup>279</sup> it included the taxation of overseas Americans on all forms of their worldwide income. The legislative history reveals that for Senator George Hoar of Massachusetts this was justified again not because it served any one or more governmental interests but because there exists “that class of persons” who go abroad for the “very purpose” of escaping the burdens of citizenship. They live in luxury in a foreign capital and at less cost, but they have “none of the voluntary obligations which rest upon citizens, of charity, or contributions, or supporting churches, or anything of that sort.”<sup>280</sup> Senator Hoar makes clear that the only reason to tax overseas Americans is to punish them for living overseas: “*He is the one human being we ought to tax.* If there is any good in an income tax that would be the good thing if it did that”<sup>281</sup> (emphasis added).

## 3. 1990s: The Exit Tax

The 1990s was a time when members of Congress and other policymakers held particular vitriol for overseas Americans. They seemed either unaware or unwilling to acknowledge that an important source of their wrath was an action taken by the same body – Congress – three decades earlier – the Foreign Investors Tax Act of 1966 (FITA).<sup>282</sup> The declared purpose of FITA was to restructure the U.S. tax system for non-resident aliens (NRAs) and to remove “those tax roadblocks which have discouraged foreign investments in this country.”<sup>283</sup> In a nutshell, FITA established considerable tax advantages for NRAs. For example, for them – and only for them – it eliminated taxation of interest and capital gains. The cumulative effect of FITA was to transform the United States into a tax haven for foreign investors.<sup>284</sup>

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<sup>279</sup> See Appendix A, *infra* note 522 and accompanying text. The Revenue Act of 1864 was allowed to expire in 1872.

<sup>280</sup> 26 CONG. REC. S6632–33 (daily ed. June 21, 1894) (statement of Sen. George Hoar).

<sup>281</sup> *Id.*

<sup>282</sup> See Appendix A, *infra* note 563 and accompanying text.

<sup>283</sup> President Lyndon B. Johnson, Statement by the President Upon Signing the Foreign Investors Tax Act and the Presidential Election Fund Act (Nov. 13, 1966), <https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-the-foreign-investors-tax-act-and-the-presidential>.

<sup>284</sup> See, e.g., Charles E. McLure, Jr., *U.S. Tax Laws and Capital Flight from Latin America*, 20 UNIV. MIA. INTER-AMER. L. REV. 321 (1989) (explaining how FITA led to capital flight from Latin America to the United States). See also Taxes for Expats, *Background and History of Tax on U.S. Expatriation*

Part 1: *History of Citizenship-Based Taxation*, <https://www.taxesforexpats.com/expat-tax-advice/Background-and-History-of-Tax-On-Expatriation.html> (last visited June 1, 2022); Gladys R. Navarro, *Federal Estate Tax Planning and the Nonresident Alien: The Costly Privilege of Dying an American*, 12 L. AMERICAS 503, 529 (1980) (“No other nation in the world treats foreign investors as well as the United States”).

Congress anticipated that because FITA offered such favorable conditions that were not available to U.S. residents or citizens, some Americans might be motivated to leave the United States and renounce U.S. citizenship to benefit from the new tax regime for NRAs.<sup>285</sup> For Congress this was not acceptable; its solution was the creation of an expatriation tax.<sup>286</sup>

FITA's expatriation tax applied for a period of ten years to the U.S.-source income of individuals whose principal motive for expatriation was to avoid U.S. taxation.<sup>287</sup> In practice, however, the legislation was ineffective at reducing the tax benefits of expatriation offered by FITA. The IRS was not informed of expatriations, determining the tax avoidance motive was difficult, individuals could restructure their assets to escape the tax, and enforcement over a period of ten years with respect to persons living outside the country was impossible.<sup>288</sup>

Even if FITA's expatriation tax was ineffective, however, there is no evidence that FITA motivated a mass exodus from the United States, or even much of an exodus at all. To the contrary, it appears that relatively few persons renounced U.S. citizenship in the three decades following adoption of FITA in 1966. In that year 379<sup>289</sup> persons renounced US citizenship while in 1993 a total of 306<sup>290</sup> — 73 fewer — persons renounced.<sup>291</sup>

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285 “[An exit tax is necessary because] the bill . . . may encourage some individuals to surrender their U.S. citizenship and move abroad . . . [B]y doing so an expatriate would avoid the graduated tax rates on his U.S. investment income (and, in certain cases, avoid some estate taxes).” REPORT OF THE COMM. ON FIN. U. S. SENATE TO ACCOMPANY H.R. 13103 A BILL TO PROVIDE EQUITABLE TAX TREATMENT FOR FOREIGN INVESTMENT IN THE UNITED STATES, S. Rep. No. 1707, at 28 (Oct. 11, 1966).

286 *Id.*

287 See Taxes for Expats, *supra* note 284.

288 *Id.* The Committee on Taxation of the Association of the Bar of the City of New York foresaw this result. In its 1966 written statement to the House Committee on Ways and Means, it recommended against the expatriation penalties, stating:

[I]t may be questioned whether, on the one hand, the position of nonresident aliens is so greatly improved by the bill that U.S. citizens not otherwise prompted to expatriate themselves for tax reasons will now be induced to do so or, on the other hand, whether the penalties themselves are severe enough to prevent significant tax advantage from being gained for such surrender . . . Enforcement of such a provision can hardly be uniform; and lack of uniformity is further suggested in the exception provided for cases of dual citizenship. Moreover, it seems questionable whether, from a national policy standpoint, the United States should undertake such measures against persons willing to surrender their citizenship.

WRITTEN STATEMENTS BY INTERESTED INDIVIDUALS AND ORGANIZATIONS ON H.R. 11297 THE FOREIGN INVESTORS TAX ACT OF 1965 SUBMITTED TO COMMITTEE ON WAYS AND MEANS, at 128 (1966).

289 WEIL, THE SOVEREIGN CITIZEN, *supra* note 68, at 199.

290 Brigid McMenamin, *Flight Capital*, FORBES 55, 58 (Feb. 28, 1994), [http://uniset.ca/fatca/BrigidMcMenamin\\_Flight\\_Capital.pdf](http://uniset.ca/fatca/BrigidMcMenamin_Flight_Capital.pdf).

291 Compare this to the 6,705 renunciants listed for 2020. Table 4, *supra* note 91 and accompanying text. Just 157 renounced in 1992. See McMenamin, *supra* note 290.

Apparently, however, it was too many. A November 1994 article in *Forbes* magazine sarcastically entitled “The New Refugees”<sup>292</sup> told the story of a handful of wealthy persons who had expatriated in “recent years.” The article made no mention of how FITA – an act of Congress – had made expatriation attractive for some. Instead, the article compared the low taxes of the Reagan era to those of the Clinton era and blamed the expatriations on “Clintonomics and wealth redistribution.”<sup>293</sup>

The article created a firestorm. Lawmakers couldn’t declare their animus towards overseas Americans forcefully enough, both in the Congressional record and to the media:

[Americans] are going to great lengths, thousands of miles to other countries, to avoid paying their fair share. In a metaphorical sense, burning the flag, giving up what should be their most sacred possession, their American citizenship, to find a tax loophole. . . . These are precisely the sort of greedy, unpatriotic people that FDR called malefactors of great wealth. . . . Let us not allow more of these rich freeloaders to get away.

(Sen. Max Baucus, 1995)<sup>294</sup>

I would hope that one day we will just publish the names of people that America has given so much to and that they care so little about that citizenship that they would flee in order to avoid taxes.

(Rep. Charles Rangel, 1995)<sup>295</sup>

How can you say that we should all do our share in America, including making all the kids, and the elderly people, and everybody else, have to contribute to the deficit, to bring it down, and at the same time allow these sleazy bums, who don’t want to pay their taxes, to

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<sup>292</sup> Robert Lenzner & Philippe Mao, *The New Refugees*, *FORBES* 131 (Nov. 21, 1994), <https://famguardian.org/Subjects/LawAndGovt/Citizenship/Forbes1.htm>.

<sup>293</sup> *Id.*

<sup>294</sup> *S. Comm. on Fin., Tax Treatment of Expatriated Citizens: Hearing on S. 453, S. 700, H.R. 831, H.R. 981, H.R. 1535 & H.R. 1812 Before the S. Comm. on Fin., 104th Cong. 2* (1995), <https://www.finance.senate.gov/imo/media/doc/Hrg104-795.pdf> [<https://perma.cc/7LDH-XW26>] (statement of Sen. Max Baucus).

<sup>295</sup> 141 CONG. REC. H3996 (daily ed. Mar. 30, 1995), <https://www.congress.gov/congressional-record/1995/03/30/house-section/article/H3996-1> [<https://perma.cc/HR85-XA8G>] (statement of Rep. Charles Rangel).

leave this country, and renounce their citizenship, and expect me to have one iota of sympathy for them?  
(Rep. Neil Abercrombie, 1995)<sup>296</sup>

If you've gotten your riches from America, you should pay your fair share of taxes. These expatriates are really like economic Benedict Arnolds.  
(Leslie Samuels, Ass't Sec. (Tax Policy), U.S. Department of the Treasury, 1995)<sup>297</sup>

This barefaced animus – which, again, was a consequence of FITA, an act of Congress – led directly to two more acts of Congress, both adopted in 1996: (i) the Health Insurance Portability and Accountability Act, which expanded tax penalties for expatriation, created a presumption that expatriation is for tax avoidance purposes if the expatriate's income tax or net worth surpassed specified amounts, and instituted the “Quarterly Publication of Individuals Who Have Chosen to Expatriate”<sup>298</sup> (also referred to as the “Name and Shame List”)<sup>299</sup>; and (ii) the Reed Amendment, which seeks to bar entry into the United States of former U.S. citizens who are determined to have renounced U.S. citizenship for the purpose of avoiding taxation by the United States.<sup>300</sup>

#### 4. Legal Titles and Terminology

Congress has communicated its animus towards overseas Americans in the very titles and terminology of its laws.

The Foreign Account Tax Compliance Act (2010), or “FATCA” is an allusion to “fat cats,”<sup>301</sup> a derogatory expression referring to persons who have become wealthy through questionable means. Senator Sheldon Whitehouse confirmed the animus contained in this name when he stated during a 2021 Congressional hearing, “[i]t's too bad that we couldn't put an extra ‘T’ on it. Then it would say FAT CAT which would be such an

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<sup>296</sup> 141 CONG. REC. H3850 (daily ed. Mar. 28, 1995), <https://www.congress.gov/congressionalrecord/1995/03/28/house-section/article/H3845-1> [<https://perma.cc/K3MT-TTJL>] (statement of Rep. Neil Abercrombie).

<sup>297</sup> Karen de Witt, *Some of Rich Find a Passport Lost is a Fortune Gained*, NY TIMES (Apr. 12, 1995), <https://www.nytimes.com/1995/04/12/us/some-of-rich-find-a-passport-lost-is-a-fortunegained.html> [<https://perma.cc/AF5X-GGKU>].

<sup>298</sup> See Appendix A, *infra* notes 606-607 and accompanying text. The penalties for expatriation were again expanded in 2008. Appendix A, *infra* note 614 and accompanying text.

<sup>299</sup> See Barbara Shecter, *U.S. Tax Crackdown Driving More Expats Living in Canada to Renounce Citizenship*, FIN. POST (July 4, 2014), <https://financialpost.com/news/fp-street/u-s-tax-crackdown-driving-more-expats-living-in-canada-to-renounce-citizenship>.

<sup>300</sup> See Appendix A, *infra* note 608 and accompanying text. See also *supra* notes 92-96 and accompanying text.

<sup>301</sup> See, e.g., Lisa De Simone, Rebecca Lester & Kevin Markle, *Transparency and Tax Evasion: Evidence from the Foreign Account Tax Compliance Act (FATCA)*, 58 J. ACCT. RES. 105, 106 n.1 (Mar. 2020).

appropriate acronym for it.”<sup>302</sup> The IRS, also, has expressed its animus towards overseas Americans who hold bank accounts in the countries where they live; The IRS refers to them as “suspected” U.S. persons—terminology typically reserved for persons believed to have committed a crime.<sup>303</sup>

Global Intangible Low-Taxed Income, or “GILTI:” this is the name assigned by the Tax Cuts and Jobs Act (2017) to a tax on the earnings of non-U.S. companies that are controlled by U.S. persons.<sup>304</sup> The name leaves no doubt about the animus members of Congress hold for those subject to the law: they are guilty.

In sum, the U.S. extraterritorial tax system was conceived in and is maintained by unequivocal and long-standing animus towards overseas Americans. For this reason alone, it violates the Fourteenth Amendment.

The future does not bode well. A 2022 candidate for the U.S. House of Representatives has described overseas Americans as “dirtbags.”<sup>305</sup> Further, a 2023 report issued by the Senate Finance Committee asserts “[d]ual citizenship affords unique opportunities for cross-border tax evasion.”<sup>306</sup> The majority of overseas Americans hold dual citizenship.<sup>307</sup>

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<sup>302</sup> His remarks were met with laughter. *Closing the Tax Gap: Lost Revenue from Non-compliance and the Role of Offshore Tax Evasion: Hearing Before the Senate Subcommittee on Taxation and IRS Oversight*, 117th Congress at 1:53:17 (Statement of Sen. Sheldon Whitehouse), May 11, 2021, <https://www.finance.senate.gov/hearings/closing-the-tax-gap-lost-revenue-from-noncompliance-and-the-role-of-offshore-tax-evasion>. See also SEAT, *Re: “Closing the Tax Gap: Lost Revenue from Noncompliance and the Role of Offshore Tax Evasion” Hearing May 11, 2021 - Submission on behalf of Stop Extraterritorial American Taxation (SEAT)*, STOP EXTRATERR. AM. TAX’N, May 24, 2021 at 2, <http://seatnow.org/wp-content/uploads/2021/05/SEAT-Submission-Closing-the-Tax-Gap-Lost-Revenue-from-Noncompliance-and-the-Role-of-Offshore-11-May-2021.pdf> (objecting to Whitehouse’s comment as “an indescribably ignorant and appalling comment about the impact of FATCA on Americans abroad!”).

<sup>303</sup> INTERNAL REVENUE SERV., FOREIGN ACCOUNT TAX COMPLIANCE ACT INTERNATIONAL COMPLIANCE MANAGEMENT MODEL (ICMM)—FATCA 4.1—REPORT NOTIFICATION TECHNICAL SUPPORT GUIDE—VERSION 3.0 4 (June 2, 2016), <https://www.irs.gov/pub/efatca/fatcaicmmreportnotificationtechnicalsupportguidedraft.pdf> [<https://perma.cc/J6FJ-692Z>].

<sup>304</sup> See Appendix A, *infra* notes 628-629 and accompanying text.

<sup>305</sup> Max Steiner (@MaxSteinerCA), TWITTER (Dec. 27, 2021), <https://twitter.com/MaxSteinerCA/status/1475598854158311425>.

<sup>306</sup> SEN. FIN. COMM., CREDIT SUISSE’S ROLE IN U.S. TAX EVASION SCHEMES 1, 4, 33 (Mar. 29, 2023), <https://www.finance.senate.gov/imo/media/doc/SFC%20CREDIT%20SUISSE%20REPORT%20FINAL%20Mar%2028.pdf>.

<sup>307</sup> See, e. g., SEAT Survey—Data Part 1 of 2, *supra* note 203, at 4; Democrats Abroad Taxation Task Force, *Once Uncomfortable, Now Suffocating: A 2022 Update on Tax and Financial Access Issues of Americans Abroad*, DEMOCRATS ABROAD 6 (Nov. 30, 2022), [https://assets.nationbuilder.com/democratsabroad/pages/31033/attachments/original/1669430637/Democrats\\_Abroad\\_2022\\_Update\\_on\\_Tax\\_and\\_Financial\\_Access\\_Issues\\_of\\_Americans\\_Abroad.pdf?1669430637](https://assets.nationbuilder.com/democratsabroad/pages/31033/attachments/original/1669430637/Democrats_Abroad_2022_Update_on_Tax_and_Financial_Access_Issues_of_Americans_Abroad.pdf?1669430637).

*D. Law Must Rationally Relate to a Legitimate Public Interest*

If no other equal protection argument is available, then the “rational basis” level of review is applied. This is considered the least stringent review, where a court considers whether the classification has a legitimate purpose and whether the governmental action has a rational relationship with that purpose.

This is, arguably, the level of review applied by the Court in *Cook*.<sup>308</sup> Assuming that it is, then it would appear at first glance that the question of whether the U.S. extraterritorial tax system passes a rational basis review has been asked and answered. However, the tax system that the Court reviewed in *Cook* bears no resemblance to the system in place today. As explained in Part III(A) above<sup>309</sup> and as evidenced by Appendix A,<sup>310</sup> today’s system is far more punitive and far-reaching. It is ripe for re-review.

For the purposes of this review, the U.S. extraterritorial tax system can be considered as three basic components: (1) the taxation of overseas Americans on an ongoing basis, (2) FATCA, and (3) the exit tax. Section (4) below addresses the question of judicial deference in tax related issues.

1. The Taxation of Overseas Americans on an Ongoing Basis

As mentioned above, several rationales have been offered to explain why the United States should tax the worldwide income of overseas Americans.<sup>311</sup> A synthesis of those rationales is, in essence, that U.S. taxation is the counterpart of U.S. citizenship. But if this were the case — if U.S. taxation was truly the counterpart of U.S. citizenship, then:

- Residents of the United States who are not citizens would be exempt from U.S. taxation, or inversely, as soon as they became subject to U.S. taxation, they would be granted U.S. citizenship as a matter of right;
- Green card holders living outside the United States would not be subject to worldwide taxation by the United States, given that they are not citizens; and
- Nonresident aliens who have U.S.-source income would not be subject to U.S. taxation on that income, given they are not citizens.

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<sup>308</sup> See *supra* notes 108-125 and accompanying text.

<sup>309</sup> *Supra* notes 38, 51-61 and accompanying text.

<sup>310</sup> *Infra* notes 519-690 and accompanying text.

<sup>311</sup> *Supra* notes 165-169 and accompanying text. See generally Snyder, *Rationalized*, *supra* note 165.



The fact that none of those statements is true demonstrates that U.S. taxation is not, in reality, the counterpart of U.S. citizenship.

Further, in the decades after *Cook* was decided the United States became party to two international human rights instruments guaranteeing citizenship (nationality) as a human right.<sup>312</sup> It is antithetical to the most fundamental premise of human rights to impose taxation in counterpart.

Further, assuming the United States had a legitimate purpose in taxing the worldwide income of its overseas citizens for no reason other than their U.S. citizenship, how it taxes them bears no rational relationship to whatever that purpose may be. The United States imposes upon overseas Americans a system of taxation that is far more comprehensive, penalty laden and punitive than that imposed upon U.S. residents.<sup>313</sup> There is no way to rationalize the penalizing nature of the current system. There are no circumstances under which the United States could have a rational – or moral – interest in penalizing its overseas citizens for engaging in ordinary economic activities that are essential for life in the modern world – activities such as saving for retirement, investing, owning a home, operating a business, or holding a bank account.<sup>314</sup> Nor are there circumstances under which the United States could have a rational – or moral – interest in instituting or perpetuating a tax system that it is unable to administer.<sup>315</sup>

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<sup>312</sup> UDHR, Appendix A, *infra* note 541 at art. 15, ¶ 1(“Everyone has the right to a nationality”); art. 15(2) (“No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality”). See also ICERD, Appendix A, *infra* note 601, at art. 5, ¶ (d)(iii) (declaring the right to nationality). The United States is a signatory to the UDHR and has ratified the ICERD. See also Karen Alpert, Laura Snyder & John Richardson, *The Implications of Tax Residence for Human Rights* at 16-20 (Feb. 10, 2020), <https://az659834.vo.msecnd.net/eventsairseasiaproduct/production-tcm-public/8f91c37e383447feb6e21cb732414dae> [<https://perma.cc/93ZA-85EQ>] (prepared for the “Accounting & Finance Association of Australia and New Zealand” (AFAANZ) 2020 Annual Conference); Appendix A, *infra* notes 541, 601 and accompanying text.

<sup>313</sup> Richardson, *More Punitive*, *supra* note 3.

<sup>314</sup> *Id.* See also Snyder, *Criminalization*, *supra* note 3 at 2280-82; Snyder, *Emigrant*, *supra* note 3 at 304-06, 334-44; Murray, *supra* note 11; SEAT Survey – Participant Comments, *supra* note 95 at 92-141, 270-86, 315-50; Doris L. Speer, *AARO 2020 Advocacy Survey Results Article 6: Taxation and Banking*, ASS’N OF AM. RESIDENT OVERSEAS, April 26, 2021, at 1, [https://www.aaro.org/images/pdf/survey/ARTICLE\\_06\\_TWO\\_SYSTEMS\\_2021\\_APR\\_26\\_DLS.pdf](https://www.aaro.org/images/pdf/survey/ARTICLE_06_TWO_SYSTEMS_2021_APR_26_DLS.pdf) (hereinafter “AARO Survey Article 6”); Doris L. Speer, *AARO 2020 Advocacy Survey Results Article 8: Citizenship-Based Taxation*, ASS’N OF AM. RESIDENT OVERSEAS, May 25, 2021, at 3, 4, [https://www.aaro.org/images/pdf/survey/ARTICLE\\_08\\_CBT\\_2021\\_MAY\\_25\\_DLS.pdf](https://www.aaro.org/images/pdf/survey/ARTICLE_08_CBT_2021_MAY_25_DLS.pdf) (hereinafter “AARO Survey Article 8”); Doris L. Speer, *AARO 2020 Advocacy Survey Results Article 10: It’s So Difficult to Save for Retirement!*, ASS’N OF AM. RESIDENT OVERSEAS, July 5, 2021, at 4-9, [https://www.aaro.org/images/pdf/survey/ARTICLE\\_10\\_RETIREMENT\\_ACCOUNTS\\_2021\\_JULY\\_5\\_DLS.pdf](https://www.aaro.org/images/pdf/survey/ARTICLE_10_RETIREMENT_ACCOUNTS_2021_JULY_5_DLS.pdf) (hereinafter “AARO Survey Article 10”).

<sup>315</sup> See generally Snyder et al., *Mission Impossible*, *supra* note 94; and *infra* notes 497-498.

## 2. FATCA

FATCA was adopted in reaction to a report issued by Senator Carl Levin claiming that the United States lost an estimated \$100 billion in tax revenues due to offshore tax abuses.<sup>316</sup> The figure of \$100 billion was justified with references to studies of offshore accounts held by U.S. residents and of multinational companies engaged in fraudulent transfer pricing arrangements involving intellectual property.<sup>317</sup> Neither Levin's report nor any of the studies cited in Levin's report addressed overseas Americans who bank and otherwise carry out their financial affairs in the countries where they live.<sup>318</sup> At no point was it asserted, much less demonstrated, that overseas Americans engage in U.S. tax evasion or that their accounts are used for that purpose.<sup>319</sup>

Nevertheless, FATCA was drafted to apply to all U.S. citizens regardless of where they live in the world, and to encompass all financial accounts<sup>320</sup> held by U.S. citizens outside the United States, including those held by overseas Americans in the countries where they live. The result has been devastating for overseas Americans; in the countries where they live, FATCA has led to the denial of banking and other financial services, of ownership of family assets, of mortgages, and of employment, entrepreneurial, and community service opportunities.<sup>321</sup>

The United States has a legitimate purpose in reducing tax evasion and the use of offshore accounts for tax evasion. However, because FATCA has such a broad application, it does not bear a rational relationship to that purpose. There is no rational relationship between, on the one hand, the offshore accounts held by U.S. residents (U.S. nationals or not) that may be used for tax evasion and, on the other hand, the local accounts held by U.S. nationals in the countries where they live and pay taxes – accounts that are necessary for normal life in the modern world. At least one data-driven study provides evidence that this is the case.<sup>322</sup>

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<sup>316</sup> Snyder, *Criminalization*, *supra* note 3 at 2283-84; Snyder, *Emigrant*, *supra* note 3 at 307-8.

<sup>317</sup> Snyder, *Criminalization*, *supra* note 3 at 2284; Snyder, *Emigrant*, *supra* note 3 at 307-8.

<sup>318</sup> Snyder, *Criminalization*, *supra* note 3 at 2284; Snyder, *Emigrant*, *supra* note 3 at 308.

<sup>319</sup> Snyder, *Criminalization*, *supra* note 3 at 2284; Snyder, *Emigrant*, *supra* note 3 at 308. A 2023 IRS working paper confirms there is no evidence that the accounts of overseas Americans are used for tax evasion. *See supra* note 322 and accompanying text.

<sup>320</sup> Subject to a threshold. *See* Snyder, *Emigrant*, *supra* note 3 at 309.

<sup>321</sup> Snyder, *Criminalization*, *supra* note 3 at 2285-86; Snyder, *Emigrant*, *supra* note 3 at 309-10. *See also* SEAT Survey – Participant Comments, *supra* note 95 at 236-66, 339-53, 357-61; Doris L. Speer, *AARO 2020 Advocacy Survey Results Article 2: We Are Fed Up with FATCA and FBAR!*, ASS'N OF AM. RESIDENT OVERSEAS, Feb. 23, 2021, at 2, [https://www.aaro.org/images/pdf/survey/ARTICLE\\_02\\_FATCA\\_2021\\_FEB\\_22\\_DLS.pdf](https://www.aaro.org/images/pdf/survey/ARTICLE_02_FATCA_2021_FEB_22_DLS.pdf) (hereinafter “AARO Survey Article 2”).

<sup>322</sup> Johannesen et al., *The Offshore World According to FATCA: New Evidence on the Foreign Wealth of U.S. Households*, IRS Working Paper (Mar. 9, 2023), <https://www.irs.gov/>

Also exposing the irrationality of FATCA is the availability of the Common Reporting Standard (CRS), developed by the Organization for Economic Co-operation and Development (OECD) in 2014. Since 2017 approximately 110 countries have joined CRS, pursuant to which they share information about accounts that persons (regardless of citizenship) hold outside their country of residence.<sup>323</sup> This is in direct contrast to FATCA, pursuant to which the country where a person lives transmits information about that person to a country where that person does not live – the United States. Further, CRS is a mutual exchange of information whereas FATCA is a one-way only transmittal of information from other countries to the United States.<sup>324</sup> CRS would offer to the United States a means to obtain information about the accounts U.S. residents (regardless of citizenship) hold in other countries. This would address FATCA’s ostensible purpose – to combat offshore tax abuse – without FATCA’s devastating overreach. However, to date the United States has declined to join CRS.<sup>325</sup>

Yet further exposing the irrationality of FATCA is the fact that the IRS does not have the resources required to process the vast quantities of data it receives from countries around the world. This problem was first exposed in 2018 by the Treasury Inspector General for Tax Administration (TIGTA). After an audit, TIGTA concluded that, despite spending nearly \$380 million, the IRS “is still not prepared to enforce compliance”

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pub/irs-soi/23rpfatcaevidenceforeignwealth.pdf. See Laura Snyder, *Overseas Americans Are Ordinary People, Not FATCATs*, 179 TAX NOTES FED. 1345 (May 22, 2023).

<sup>323</sup> See generally OECD, *What is the CRS?* (accessed June 24, 2023), <https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/>.

<sup>324</sup> See Jane G. Gravelle & Donald J. Marples, *The Foreign Account Tax Compliance Act (FATCA)*, Cong. Rsch. Serv. Report No. IF 12166 at 2 (July 15, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF12166> (explaining that legislation would be required to authorize the collection of the data needed for full reciprocity).

<sup>325</sup> The fact that the United States has not joined CRS is an important reason why today – more than five decades after the adoption of the Foreign Investors Tax Act of 1966 – the United States is the “world’s leading perpetrator of financial secrecy” and “a generous tax haven for foreign oligarchs, rich executives, and other elites.” Jake Johnson, *‘A Shameful Distinction’: US Ranked World’s Biggest Perpetrator of Financial Secrecy*, COMMON DREAMS (May 17, 2022), <https://www.commondreams.org/news/2022/05/17/shameful-distinction-us-ranked-worlds-biggest-perpetrator-financial-secrecy> (citing Tax Justice Network’s 2022 Financial Secrecy Index, placing the United States at the top of a list of jurisdictions the “most complicit in helping individuals to hide their finances from the rule of law”). Tax Justice Network, *Financial Secrecy Index 2022* (accessed June 24, 2023), <https://fsi.taxjustice.net/>. See also Rachel E. Brinson, *Is the United States Becoming the “New Switzerland”? Why the United States’ Failure to Adopt the OECD’s Common Reporting Standard is Helping it Become a Tax Haven*, 23 N.C. BANKING INST. 231 (2019); Oliver Bullough, *The Great American Tax Haven: Why the Super-Rich Love South Dakota*, THE GUARDIAN (Nov. 14, 2019), <https://www.theguardian.com/world/2019/nov/14/the-great-american-tax-haven-why-the-super-rich-love-south-dakota-trust-laws> [<https://perma.cc/U4N9-TK74>].

of FATCA.<sup>326</sup> Four years later nothing had changed; After a 2022 audit, TIGTA observed that from 2010 to 2020 the IRS spent \$574 million on FATCA implementation, still without any demonstration of compliance.<sup>327</sup> In his 2022 testimony to the House of Representatives' Committee on Ways and Means, then IRS Commissioner Charles Rettig lamented Congress's failure to authorize the necessary resources: "[Because of limited resources,] we are often left with manual processes to analyze reporting information we receive. Such is the case with data from [FATCA]. Congress enacted FATCA in 2010, but we have yet to receive any significant funding appropriation for its implementation."<sup>328</sup>

During the more than one decade since Congress adopted FATCA Congress has failed to authorize the funding necessary to assure compliance. In the meantime, FATCA has served no purpose other than to harass and intimidate overseas Americans and financial institutions. There are no circumstances under which the United States has a rational – or moral – interest in harassing and intimidating its overseas citizens because they engage in normal banking activities in the countries where they live.

### 3. Exit (Expatriation) Tax

As discussed above,<sup>329</sup> the first exit (expatriation) tax was created in 1966, when Congress granted considerable tax advantages to NRAs, effectively turning the United States into a tax haven for foreign investors. When Congress did that, it anticipated that some individuals may be encouraged "to surrender their U.S. citizenship and move abroad."<sup>330</sup> It was clear that Congress was concerned with persons who were then living in

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<sup>326</sup> Treasury Inspector General for Tax Administration, *Despite Spending Nearly \$380 Million, the Internal Revenue Service Is Still Not Prepared to Enforce Compliance with the Foreign Account Tax Compliance Act*, Reference No. 2018-30-040, at 1 (July 5, 2018).

<sup>327</sup> Treasury Inspector General for Tax Administration, *Additional Actions Are Needed to Address Non-Filing and Non-Reporting Compliance Under the Foreign Account Tax Compliance Act*, Reference No. 2022-30-019, at ii (April 7, 2022). The report states: "To date, the IRS has been unable to quantify revenue generated from FATCA compliance activity beyond the \$14 million in revenue from penalties unrelated to the campaigns, despite spending over \$574 million on implementation and establishing two campaigns that have sent out 847 letters to taxpayers." *Id.* at 21-22. See also Robert Goulder, *The TIGTA Report: Lessons From a Decade of FATCA*, TAX NOTES (May 6, 2022), <https://www.taxnotes.com/featured-analysis/tigta-report-lessons-decade-fatca/2022/05/06/7dgb7> (stating "FATCA's scope is overinclusive, and it has been from day one").

<sup>328</sup> *Written Testimony of Charles P. Rettig, Commissioner Internal Revenue Service before the House Ways and Means Committee, Subcommittee on Oversight on the Filing Season and IRS Operations*, 117th Cong. (updated Oct. 12, 2022), <https://www.irs.gov/newsroom/written-testimony-of-charles-p-rettig-commissioner-internal-revenue-service-before-the-house-ways-and-means-committee-subcommittee-on-oversight-on-the-filing-season-and-irs-operations>.

<sup>329</sup> *Supra* notes 282-286 and accompanying text.

<sup>330</sup> REPORT OF THE COMM. ON FIN, *supra* note 286 and accompanying text.

the United States and whose financial interests – principally investments – were centered in the United States. Congress was concerned that at least some of them might choose to move out of the country and renounce U.S. citizenship for the purpose of benefitting from the new, favorable tax regime offered to NRAs with investments in the United States. At no point did Congress express any specific interest in or concern with Americans already living outside the United States – persons whose financial interests are centered in a country other than the United States. Nor at any point did Congress consider the consequences the newly created expatriation tax might have for them.

As also discussed above,<sup>331</sup> three decades later (in 1994) *Forbes* published an article depicting a handful of wealthy Americans who had done exactly what Congress had feared: they moved out of the United States – for the most part to countries reputed as tax havens, such as the Bahamas and the Cayman Islands – and renounced their U.S. citizenship while maintaining their financial interests in the United States, thus enabling them to benefit from the favorable tax treatment accorded to foreign investors. The outrage that the *Forbes* article provoked from members of Congress and other lawmakers was palpable. They called these former Americans “rich freeloaders,” “malefactors of great wealth,” “sleazy bums,” and “economic Benedict Arnolds.”<sup>332</sup> These former Americans were people who had “gotten [their] riches from America,” but who then wouldn’t “pay [their] fair share.”<sup>333</sup> Congress couldn’t act quickly enough to expand the penalties for renunciation of U.S. citizenship and even to seek to bar reentry into the United States.<sup>334</sup> Again, however, there is no evidence that any separate consideration was made for Americans residing outside the United States on a long-term basis – in ordinary, not tax haven, countries – and whose financial interests were centered outside the United States.

Since the 1990s Congress has acted twice more – in 2004<sup>335</sup> and 2008<sup>336</sup> – to expand the breadth and depth of the tax consequences of

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<sup>331</sup> *Supra* note 292 and accompanying text.

<sup>332</sup> *Supra* notes 294-297 and accompanying text.

<sup>333</sup> *Id.*

<sup>334</sup> Hearings were organized in July 1995, just seven months after the November 1994, publication of the *Forbes* article. *Tax Treatment of Expatriates: Senate Finance Committee Members Heard Testimony Concerning Wealthy Individuals Who Give Up Their U.S. Citizenship In Order to Avoid Taxes*, July 11, 1995, <https://www.c-span.org/video/?66084-1/tax-treatment-expatriates>. Legislation expanding the penalties for expatriation was adopted in 1996. *See supra* notes 298-299 and accompanying text. *See also* Appendix A, *infra* notes 606-608 and accompanying text.

<sup>335</sup> *See* Appendix A, *infra* note 613 and accompanying text.

<sup>336</sup> *See* Appendix A, *infra* note 614 and accompanying text.

expatriation. Today the consequences are complex as well as highly penalizing.<sup>337</sup> The exit tax regime can be summarized as follows.

To begin, the regime applies to persons renouncing U.S. citizenship who meet one of these three criteria: (i) their “average annual net income tax” for the five taxable years ending before the expatriation date is more than US\$178,000;<sup>338</sup> (ii) the net value of their assets totals \$2 million or more (an amount that is not indexed for inflation); or (iii) they fail to certify to the IRS (via Form 8854) that they have complied with all U.S. federal tax obligations for the five years preceding the date of expatriation.<sup>339</sup>

If a person meets at least one of these criteria, they are called a “covered expatriate.” Covered expatriates are subject to the exit tax regime, which has several components: (i) a tax upon the net unrealized gain on all their worldwide assets as if such property were sold for its fair market value on the day before the expatriation date; (ii) “specific tax deferred accounts” are treated as distributed and are subject to income taxation; and (iii) the present value of non-U.S. pension and other deferred compensation plans is included in income and subject to taxation.<sup>340</sup> This tax applies regardless of whether any such assets have been sold, and so regardless of whether there is any cash available to pay the tax.<sup>341</sup> In each case the income inclusion takes place on the day before expatriation and encompasses the pension, home, and other assets accumulated while the expatriate was living outside the United States – thus, without the use of U.S. resources.<sup>342</sup>

At first glance one might conclude that only a few people are concerned by the exit tax given how high the dollar thresholds appear to be. However, the net asset value threshold of \$2 million includes the value of the expatriate’s home.<sup>343</sup> Many overseas Americans live in countries with a high cost of living. For example, in 2022 the average price for a two-bedroom apartment in London was more than \$1 million

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<sup>337</sup> See, e.g., Alexander M. Gelardi, *The Expatriation Rules of the Heroes Earnings Assistance and Relief Tax Act of 2008*, INT’L TAX J. 89 (May-June 2009), <https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1034&context=bacctpub>.

<sup>338</sup> This amount is subject to adjustment for inflation.

<sup>339</sup> See Gelardi, *supra* note 337 at 91. Special rules apply in the case of persons who were dual citizens from birth and who meet certain other conditions. *Id.* See also IRS, *Expatriation Tax* (updated Mar. 9, 2023), <https://www.irs.gov/individuals/international-taxpayers/expatriation-tax>.

<sup>340</sup> See Gelardi, *supra* note 337 at 92-93.

<sup>341</sup> *Id.*

<sup>342</sup> See, e.g., John Richardson, *Why Is the United States Imposing an “Exit Tax” on the Canadian Pensions of Canadian Citizens Living in Canada?* CITIZENSHIP SOLUTIONS (July 27, 2017), <http://citizenshipsolutions.ca/2017/07/27/why-is-the-united-states-imposing-an-exit-tax-on-the-canadian-pensions-of-canadian-citizens-in-canada/>.

<sup>343</sup> See, e.g., Wood, *Renounce U.S.*, *supra* note 15.

(£814,000).<sup>344</sup> In Paris, the price for a two-bedroom apartment can range from a low of \$1.3 million (€1.2 million) to \$2.5 million (€2.3 million) and more.<sup>345</sup> In Toronto the average price for a detached home has exceeded \$1.5 million (CAD\$ 2 million).<sup>346</sup> While clearly the owners of such homes are not poor, nor does the ownership of these homes make them wealthy; these are the prices everyone who lives in these metropolitan areas are required to pay to have a roof over their head. Further, many Americans have resided outside the United States for decades;<sup>347</sup> they purchased the homes where they live with their families when the prices were far below their market value today.<sup>348</sup>

When the value of the expatriate's home is combined with the value of their other assets, such as a pension or a small business, it becomes clear that the U.S. exit tax ensnares many overseas Americans who are middle class. Their principal – if not only – assets are the home they live in and the pension with which they expect to retire.

Further, regardless of the extent of their wealth, Americans who have lived overseas on a long-term basis did not “get their riches from America,”<sup>349</sup> nor have they otherwise “freeloaded”<sup>350</sup> off the United States to gain any wealth they may have. To the contrary, when they left the United States – often as babies, or in their teens, 20s, or 30s – they generally owned few, if any, assets.<sup>351</sup> And some overseas Americans

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<sup>344</sup> Matthew Boyle, *Cost of a City Centre Flat Around the World*, FINDER (updated May 13, 2022), <https://www.finder.com/uk/world-cost-of-a-flat>.

<sup>345</sup> Paris Rental, *How Much is a 2 Bedroom Apartment in Paris?* (Dec. 5, 2019), <https://en.parisrental.com/blog/buying-and-selling/how-much-is-a-2-bedroom-apartment-in-paris>.

<sup>346</sup> Penelope Graham, *The Average Detached House in Toronto Has Officially Crossed the \$2M Mark*, STOREYS (Mar. 3, 2022), <https://storeys.com/toronto-houses-now-2m-second-strongest-february-treble/>.

<sup>347</sup> See SEAT Survey—Data Part 1 of 2, *supra* note 203, at 11 (showing that 66% of survey participants left the United States more than 10 years ago and 44% left more than 20 years ago).

<sup>348</sup> See, e.g., John Clarke, *When Canada's Housing Bubble Pops, It Will Cause Misery and Ruin*, JACOBIN (Jan. 6, 2022), <https://jacobin.com/2022/01/canadahousing-market-real-estate> (explaining that in the previous two decades, home prices in Canada went up by 375 percent. The increases were especially pronounced in Toronto and Vancouver, up by 450 and 490 percent respectively); Aussie, *25 Years of Housing Trends* (accessed June 24, 2023), [https://www.aussie.com.au/content/dam/aussie/documents/home-loans/aussie\\_25\\_years\\_report.pdf](https://www.aussie.com.au/content/dam/aussie/documents/home-loans/aussie_25_years_report.pdf) (demonstrating that between 1993 and 2018, national median house values in Australia grew by 412 percent). See also *Property Prices in France Have Doubled in 10 Years, Study Finds*, THE CONNEXION (Sept. 1, 2021), <https://www.connexionfrance.com/article/Practical/Property/Property-prices-in-France-have-doubled-in-10-yearsstudy-finds>.

<sup>349</sup> *Supra* note 297 and accompanying text.

<sup>350</sup> *Supra* note 294 and accompanying text.

<sup>351</sup> See, e.g., SEAT Survey—Data Part 1 of 2, *supra* note 203, at 7-8 (indicating that participants in a survey of overseas Americans have modest incomes (66% have individual annual income of less than \$75,000 and 25% less than \$25,000), and few are wealthy (47% have savings of less than \$50,000)). See also *id.* at 10 (indicating that 46% of overseas Americans left the United States to join a romantic partner or to pursue professional opportunities and 10% left as children, with their families). See *id.* at 9 (indicating that of U.S. citizens who

have never lived in the United States – they were born outside the country to at least one U.S.-citizen parent.<sup>352</sup>

These overseas Americans who renounce U.S. citizenship have nothing to do with the “malefactors of great wealth”<sup>353</sup> and “economic Benedict Arnolds”<sup>354</sup> that each iteration of the U.S. expatriation/exit tax was intended to target.<sup>355</sup> Most of these overseas Americans are ordinary middle class and, to the extent they have accumulated any wealth, it was done using the resources of the countries where they live. Given they have not built their wealth in the United States, they are not renouncing for the reason Congress anticipated – to benefit from the favorable tax regime accorded to foreign investment in the United States. Instead, their purpose in renouncing is to be able to live normal lives in the countries where they have lived for years if not decades, freed from the highly penalizing U.S. extraterritorial tax system. Extending the exit tax to them is not rational because it imposes considerable hardship upon them without any possibility of serving the stated purpose of the tax.<sup>356</sup>

Other countries have also faced the issue of how to prevent tax abuse when a resident leaves their country to live elsewhere. They assess a tax at the time the person in question departs their country to live in another. Unlike the United States (which practices both residency-based and citizenship-based taxation), these countries practice residency-based taxation only. Citizenship bears no relevance to tax status and their departure taxes apply to all departing residents regardless of citizenship.<sup>357</sup>

The United States has a legitimate purpose in preventing tax abuse. The stated purpose of the U.S. exit tax is to discourage wealthy U.S.

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were born outside the United States, 80% have never lived in the United States). *See id.* at 11 (indicating that 17% of overseas Americans left the United States before the age of 21 and 70% left before the age of 36. This data, considered as a whole, indicates that when Americans leave the United States (if they ever did live there) to live in another country, most are young (under age 36) and have few assets).

<sup>352</sup> See SEAT Survey—Data Part 1 of 2, *supra* note 151, at 9.

<sup>353</sup> *Id.*

<sup>354</sup> *Supra* note 297 and accompanying text.

<sup>355</sup> Nothing in the legislative histories of the various iterations of the exit (expatriation) tax mentions any wrongdoing by Americans living overseas on a long-term basis. *See supra* notes 286. *See also* Snyder, *Rationalized*, *supra* note 165 at 600 n.317.

<sup>356</sup> *See, e.g.,* Richardson, *Canadian Pensions*, *supra* note 342.

<sup>357</sup> Examples include Canada and Denmark, which assesses a tax on the value of a variety of different assets at the time of departure, and France, whose departure tax is assessed only on the value of corporate stock. *See* Mathieu De Lajarte, *The Tax Consequences of Leaving Canada Permanently*, CPA CANADA (May 31, 2021), <https://www.cpacanada.ca/en/news/canada/2021-05-31-departure-tax>; PWC, Denmark *Individual - Other Taxes* (updated Feb. 27, 2023), <https://taxsummaries.pwc.com/denmark/individual/other-taxes#:~:text=Exit%20taxation%20applies%20for%20individuals,%2C%20certain%20property%20investments%2C%20etc;Direction+G%C3%A9n%C3%A9rale+des+Finances+Publiques,+Do+I+Have+to+Pay+an+%20Exit+Tax%3F> (updated April 22, 2021), <https://www.impots.gouv.fr/international-particulier/questions/i-am-leaving-france-do-i-have-pay-exit-tax>. *See also infra* notes 510-511 and accompanying text.



residents from “taking advantage” of the resources of the United States to build their fortunes, only to leave the country to then benefit from the favorable tax treatment accorded to foreign investors.<sup>358</sup> The experience of other countries demonstrates it is possible to accomplish this purpose by imposing a departure tax that is triggered upon departure from the country, not upon renunciation of citizenship. The United States has no rational – or moral – interest in extending its exit tax to encompass persons who for the most part are middle class and who, to the extent they have any wealth, gained it while living outside the United States and using resources outside the United States.

#### 4. Deference in Tax-Related Issues?

It is said that the Court practices special deference to tax legislation, almost never finding it unconstitutional.<sup>359</sup> Assuming this is the case (it is not clear that it is),<sup>360</sup> the reason commonly offered is that “logically, any imposition of any tax is rationally related to raising revenue, [which is] a singular and uncontroversially legitimate end.”<sup>361</sup>

To begin, and as discussed above,<sup>362</sup> MMT teaches that the United States federal government, as a sovereign currency issuer, does not tax to raise revenue. To the contrary, the federal government must first issue

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<sup>358</sup> *Supra* notes 285-300 and accompanying text.

<sup>359</sup> See Stephen W. Mazza & Tracy A. Kaye, *Restricting the Legislative Power to Tax in the United States*, 54 AM. J. COMP. L. 641, 656 (2006) (quoting *Regan v. Taxation with Representation of Washington* (461 U.S. 540 (1983))). In *Regan*, the Supreme Court rejected a First Amendment challenge to a provision in the federal tax code denying tax-exempt status for substantial lobbying activities:

[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification. . . . [T]he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it. 461 U.S. at 547-48.

See also Reuven Avi-Yonah, *Should U.S. Tax Law Be Constitutionalized? Centennial Reflections on Eisner v. Macomber* (1920), 16 DUKE J. CONST. L. & PUB. POL’Y 65, 88 (2021) (observing that the U.S. Supreme Court has not held a federal income tax provision unconstitutional since 1920). But see discussion of *United States v. Windsor* regarding the federal estate tax, *supra* notes 263-266, *infra* note 371, and accompanying text.

<sup>360</sup> See Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004) (citing multiple decisions, many adopted after *Regan*, in which the Court invalidated tax related classifications as lacking a rational basis for equal protection purposes. Examples include: (i) the taxation of out-of-state car purchases. *Id.* at 489; (ii) a value-added tax imposed on foreign but not domestic corporations. *Id.* at 497 n.62; (iii) an arbitrary gross receipts tax. *Id.*; (iv) a New Mexico tax preference distinguishing between long-term and short-term resident Vietnam veterans. *Id.* at 513 n.120; (v) a use tax that burdened out-of-state car buyers *Id.*; (vi) an Alabama law that provided tax relief to in-state but not foreign businesses. *Id.*; (vii) the discriminatory application of a West Virginia tax assessment law. *Id.* at 535).

<sup>361</sup> Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1657 (2016).

<sup>362</sup> *Supra* notes 172-176 and accompanying text.

currency for there to be currency in the economy to tax back. A sovereign currency issuer does have legitimate reasons to tax – such as to seek to control inflation or inequality, or to encourage or discourage specific behaviors – but raising revenue is not one of them.<sup>363</sup>

Further, there are multiple examples of taxes that were adopted without any purpose of raising revenue and, if they did, it was incidental. One is the high marginal tax rates (over 90%) that the U.S. Congress adopted in the mid-twentieth century.<sup>364</sup> There was little expectation that such rates would result in significantly increased tax revenue. Instead, the expectation as well as the effect was to discourage high salaries and other forms of income, given any income over the applicable threshold would be taxed away.<sup>365</sup> Such high marginal rates were not, and were not intended to be, “rationally” related to raising revenue. Another example are the various excess (or windfall) profits taxes that the United States has adopted at different times in its history, generally when the country was at war. Their purpose was not to gain revenue but to ensure that companies could not profiteer from war or from some other emergency (such as an energy crisis) considered to lead to unjust enrichment.<sup>366</sup>

If the lessons of MMT were set aside and it was accepted that the federal government needed to tax for the purpose of raising revenue, this would not mean that raising “any” tax revenue is a “singular and uncontroversially legitimate end.”<sup>367</sup> As long ago as 1819 Chief Justice John

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<sup>363</sup> *Id.*

<sup>364</sup> See, e.g., Joseph Bishop-Henchman, *Top Federal Income Tax Rate Was Once Over 90 Percent*, TAX FOUNDATION (Oct. 1, 2008), <https://taxfoundation.org/top-federal-income-tax-rate-was-once-over-90-percent/>; Andrew Syrios, *The Good Ol’ Days: When Tax Rates Were 90 Percent*, MISES INSTITUTE (Nov. 24, 2015), <https://mises.org/library/good-ol-days-when-tax-rates-were-90-percent>.

<sup>365</sup> See, e.g., Jordan Weissmann, *Did the Rich Really Pay Much Higher Taxes in the 1950s? The Answer Is a Little Complicated*, SLATE (Aug. 07, 2017), <https://slate.com/business/2017/08/the-history-of-tax-rates-for-the-rich.html>; Joe Nocera, *How a 91% Rate Sparked the Golden Age of Tax Avoidance in 1950s Hollywood*, LOS ANGELES TIMES (Jan. 30, 2019), <https://www.latimes.com/business/la-fi-nocera-tax-avoidance-20190129-story.html>; See also Alan Reynolds, *The Economic Impact of Tax Changes, 1920–1939*, 41 CATO J. 159 (Winter 2021), <https://www.cato.org/cato-journal/winter-2021/economic-impact-tax-changes-1920-1939> (observing: “large reductions in marginal tax rates on incomes above \$50,000 in the 1920s were *always* matched by large increases in the amount of high income reported and taxed). Large increases in marginal tax rates on incomes above \$50,000 in the 1930s were *almost* always matched by large *reductions* in the amount of high income reported and taxed.” *Id.* at 161).

<sup>366</sup> See, e.g., Reuven Avi-Yonah, *Time to Tax Excessive Corporate Profits*, AM. PROSPECT, April 18, 2022, <https://prospect.org/economy/time-to-tax-excessive-corporate-profits/> (explaining why the United States implemented windfall profits taxes in the past and arguing that one should be implemented now to prevent companies from earning windfall profits due to the COVID-19 pandemic and the war in Ukraine). Avi-Yonah expressly states that the purpose of the tax would not be to raise revenue but to “induce a fall in prices, which would benefit everyone except corporate shareholders.” *Id.*

<sup>367</sup> See *supra* note 361 and accompanying text.

Marshall wrote “the power to tax involves the power to destroy [. . .] To carry it to the excess of destruction would be an abuse, to presume which would banish that confidence which is essential to all Government.”<sup>368</sup>

If it were true that raising “any” tax revenue was a “singular and uncontroversially legitimate end,”<sup>369</sup> what would prevent Congress from imposing a 100% income tax from the first dollar? What would prevent it from taxing the worldwide income of all persons in the world, regardless of country of residence? Given the United States has already instituted an extraterritorial tax system that it applies to millions of people<sup>370</sup> living outside the country based upon one nationality, would it be such a big step to extend the system to all nationalities? What would prevent Congress from applying different tax regimes dependent upon a person’s race, gender, or sexual orientation? Indeed, when the U.S. Supreme Court invalidated the 1996 Defense of Marriage Act in *United States v. Windsor*, it did so because the Act lead to unequal treatment with respect to federal taxation, based upon sexual orientation.<sup>371</sup> These absurd examples demonstrate Marshall’s point: that there must be restraints of some kind upon the federal government’s power to tax, or it can lead not just to irrational but also to destructive results (such as, in the case of overseas Americans, the destruction of citizenship).<sup>372</sup> Ultimately, if there were no equal protection limits upon the power of Congress to tax, Congress would have license to violate equal protection guarantees, provided the violations were channeled through the tax system.<sup>373</sup>

The U.S. extraterritorial tax system offers further examples of laws that were adopted without the purpose of raising revenue from overseas Americans. Senator Collamer explained that overseas Americans ought to “pay a higher rate of tax”<sup>374</sup> not because the government needs the revenue, but because overseas Americans “skulk” away to Paris.<sup>375</sup> Senator Hoar explained that the overseas American is the “one human being we ought to tax,”<sup>376</sup> again not because the government needs the revenue, but simply because they went abroad.<sup>377</sup>

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<sup>368</sup> *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819).

<sup>369</sup> See *supra* notes 361, 367 and accompanying text.

<sup>370</sup> Estimates of the number of Americans living outside the United States range from 5.5 to 9 million. See Snyder, *Unacknowledged Realities*, *supra* note 6 at 272.

<sup>371</sup> See *supra* notes 263-266 and accompanying text.

<sup>372</sup> *Supra* notes 82-107 and accompanying text.

<sup>373</sup> This is also demonstrated in the hypothetical example discussed above of tax enforcement agents forcibly entering homes to confiscate cash or items of value, for no reason other than to raise revenue. *Supra* note 171 and accompanying text.

<sup>374</sup> *Supra* note 278 and accompanying text.

<sup>375</sup> *Id.*

<sup>376</sup> *Supra* notes 280-281 and accompanying text.

<sup>377</sup> *Id.*

The U.S. extraterritorial tax system is replete with provisions whose purpose is not to raise revenue but to discourage – if not entirely end – certain behaviors, and to punish those who engage in them. Examples include the punitive tax regimes applied to mutual funds (PFICs)<sup>378</sup> and to non-U.S. retirement accounts (foreign trusts),<sup>379</sup> as well as FATCA,<sup>380</sup> and the exit tax.<sup>381</sup> Each of these regimes was adopted in reaction to abuses committed by U.S. residents; in no case were any tax abuses by long-term overseas Americans cited, nor in any case was it expected that the law would result in increased revenue from them.<sup>382</sup>

The fact that the purpose of the U.S. extraterritorial tax system is not to raise revenue is borne out in the system's consequences. The amount it raises is negligible: just 0.51% of the total U.S. tax liability for individuals, which represents 0.19% of total spending by the federal government.<sup>383</sup> Further, the system's devastating effects for overseas Americans have little to do with the payment of U.S. taxes; most do not owe U.S. tax.<sup>384</sup> As explained above, the system is so penalizing it prevents overseas Americans from living normal lives in the places where they live.<sup>385</sup> For many the situation becomes so intolerable they feel they have no choice but to take the drastic and – as Chief Justice Marshall pre-

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<sup>378</sup> The PFIC rules have been described as “wall[ing] off” U.S. investors from foreign mutual funds. See Appendix A, *infra* note 592 and accompanying text.

<sup>379</sup> See Caldwell & Nagel, *infra* note 575 at 676-77 (describing tax abuses relating to foreign trusts committed by U.S. residents, and explaining that prior to the adoption of the Tax Reform Act of 1976, which expanded measures relating to foreign trusts, the Treasury Department had consistently urged Congress to adopt measures discouraging the use of foreign trusts). The result, Caldwell & Nagel explain, is to give domestic trusts more favorable treatment than foreign trusts (that is, the result is not and was not intended to be raising revenue). *Id.* at 677.

<sup>380</sup> The purpose of FATCA was to discourage the use of offshore accounts by U.S. residents. See *supra* note 319 and accompanying text. There is no evidence that FATCA has resulted in any increased revenue. See *supra* notes 326-328 and accompanying text.

<sup>381</sup> See *supra* note 286 (citing a 1966 report to Congress explaining that an exit tax was needed to discourage expatriation (so not to raise revenue)). See also William Thomas Worster, *Human Rights Law and the Taxation Consequences for Renouncing Citizenship*, 62 ST. LOUIS UNIV. L. J. 85, 100 n.109 (2017) (citing a 1995 letter from Leslie B. Samuels, then Assistant Secretary for Tax Policy, U.S. Dep't Treas., to Kenneth J. Kies, Chief of Staff, stating that the exit tax is an effort to deter or punish tax-motivated expatriation) (letter reprinted in STAFF OF JOINT COMM. ON TAXATION, 104TH CONG., ISSUES PRESENTED BY PROPOSALS TO MODIFY THE TAX TREATMENT OF EXPATRIATION G-50, G-54 (Joint Comm. Print 1995)); Elise Tang, *Solving Taxpatriation: “Realizing” It Takes More Than Amending the Alternative Tax*, 31 BROOK. J. INT'L L. 615, 616-17 (2006) (explaining that the “ultimate goal” of the exit tax is to stop tax-motivated expatriation).

<sup>382</sup> With respect to FATCA, see *supra* notes 318-319 and accompanying text. With respect to the exit tax, see *supra* note 334 and accompanying text.

<sup>383</sup> Snyder et al., *Buy Their Freedom*, *supra* note 176 at 234; Snyder, *Unacknowledged Realities*, *supra* note 6 at 274.

<sup>384</sup> *Supra* note 94.

<sup>385</sup> *Supra* notes 313-314 and accompanying text.

dicted – destructive step of renouncing U.S citizenship.<sup>386</sup> Their purpose is not to avoid paying U.S. taxes but to be able to live normal lives.

Avi-Yonah argues that, in contrast to U.S. state income tax law, U.S. federal income tax law should not be “constitutionalized” (subject to constitutional review by the Supreme Court).<sup>387</sup> He argues this not because he thinks that federal tax law should be exempt from equal protection scrutiny – to the contrary, he asserts that it should be subject to such scrutiny<sup>388</sup> – but because, in his opinion, the U.S. Supreme Court is “not up to the task.”<sup>389</sup> Instead, Avi-Yonah argues, it should fall to Congress to assess tax laws “against a constitutional equal protection standard.”<sup>390</sup> But this position places the fox in charge of the hen house. It ignores the essential role of the U.S. Supreme Court both to ensure that the other two branches of government recognize the limits of their power and to protect fundamental rights by striking down laws that violate the Constitution.<sup>391</sup> It also ignores that in 1982 Congress expressly rejected as “obsolete” any obligation for the federal government to provide “fair and equitable treatment” for overseas Americans with respect to taxation as well as other issues.<sup>392</sup> It ignores the U.S. Supreme Court itself which, in *Cleburne*,<sup>393</sup> explained that discrimination based upon national origin, alienage, or race, “is unlikely to be soon rectified by legislative means.”<sup>394</sup> In sum, Avi-Yonah’s position abandons overseas Americans – indeed, all Americans – to the consequently unchecked power of the

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<sup>386</sup> *Infra* notes 465-468 and accompanying text.

<sup>387</sup> Avi-Yonah, *Constitutionalized*, *supra* note 359 at 66, 87-88. Even though Avi-Yonah’s analysis is limited to “tax expenditures,” his conclusion is nevertheless a sweeping one encompassing all “tax laws.” *Id.* at 88. The U.S. Department of Treasury defines “tax expenditures” as “revenue losses attributable to provisions of Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability.” U.S. Dep’t Treas., *Tax Expenditures* (accessed June 24, 2023), <https://home.treasury.gov/policy-issues/tax-policy/tax-expenditures>. Avi-Yonah’s examples of tax expenditures include the exclusion of employer provided health care premiums from income and the deductibility of home mortgage interest and local property taxes. Avi-Yonah, *Constitutionalized*, *supra* note 359 at 82-83, 85-86.

<sup>388</sup> Avi-Yonah, *Constitutionalized*, *supra* note 359 at 88.

<sup>389</sup> *Id.*

<sup>390</sup> *Id.*

<sup>391</sup> United States Courts, *About the Supreme Court* (accessed June 24, 2023), <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about>.

<sup>392</sup> See Appendix A, *infra* notes 579-581, 583-585 and accompanying text. See also PREP Podcaster, *In 1978 the US Had a Law Promoting Fair and Equitable Treatment for Americans Abroad* (July 14, 2022), <https://prep.podbean.com/e/in-1978-the-us-had-a-law-promoting-fair-and-equitable-treatment-for-americans-abroad/>; *President Carter Believes in Human Rights and #Americansabroad*, RENOUNCE U.S. CITIZENSHIP (Jan. 25, 2013), <https://renounceuscitizenship.wordpress.com/2013/01/25/president-carter-believes-in-human-rights-and-american-sabroad/#comments>.

<sup>393</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

<sup>394</sup> *Supra* note 148 and accompanying text.

U.S. Congress. As regards the U.S. extraterritorial tax system, Congress has demonstrated incontrovertibly that it is “not up to the task” of respecting equal protection or other fundamental rights.<sup>395</sup>

## 5. Summary

The U.S. extraterritorial tax system cannot pass the “rational basis” level of review. As it applies to overseas Americans the system has no legitimate purpose, nor does the United States have a rational interest in maintaining it. It is important to understand that the purpose of the system is not to collect tax revenue and that the devastating effects of the system for overseas Americans have little to do with the payment of U.S. taxes. Finally, any suggestion that, because tax legislation is at issue, a court should assume greater deference in its review is to grant to Congress a license to violate equal protection guarantees, as long as the violations are channeled through the tax code.

### *E. An Alternative Perspective on Equal Protection*

The U.S. Supreme Court’s suspect classification analysis is the subject of multiple critiques. It is described as “rife with inconsistencies and contradictions.”<sup>396</sup> The Court has not recognized any new suspect or quasi-suspect classification since the 1970s.<sup>397</sup> In “closing”<sup>398</sup> the set of recognized classifications, the Court ignores its own declaration in *Hernandez* that, because “community prejudices are not static,” flexibility is needed in determining the suspect classes.<sup>399</sup> Pollvogt argues that the Court’s very usage of the suspect classification analysis does not just fail to promote equality, it actively sustains structures of inequality.<sup>400</sup>

Pollvogt continues: “By comparing social groups to one another and sorting them into suspect, quasi-suspect, and non-suspect classes, the Court itself engages in discriminatory, hierarchical ordering of these social groups with respect to one another. Worse yet, this ordering is virtu-

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<sup>395</sup> There is no indication that Congress has paid heed to Avi-Yonah’s 2010 paper describing multiple problems with the U.S. extraterritorial tax system and encouraging Congress to re-examine it. Reuven S. Avi-Yonah, *The Case Against Taxing Citizens 2* (U. Mich. L. Sch. Pub. L. & Legal Theory Working Paper Ser., Paper No. 190, 2010), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1578272](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1578272) [<https://perma.cc/L39L-L5VD>].

<sup>396</sup> Pollvogt, *Beyond*, *supra* note 110 at 796.

<sup>397</sup> See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 747-48 (2011) (explaining that over the past decades, the Court has systematically denied constitutional protection to new groups and curtailed it for already covered groups due to what Yoshino refers to as “pluralism anxiety”).

<sup>398</sup> See Pollvogt, *Beyond*, *supra* note 110 at 765 n.124 (citing Yoshino, *supra* note 397 at 757-58).

<sup>399</sup> See Pollvogt, *Beyond*, *supra* note 110 at 756-58.

<sup>400</sup> *Id.* at 796.

ally permanent.”<sup>401</sup> Further, because the Court treats suspect classification status and heightened scrutiny as “scarce resources,” it preserves the excessively deferential rational basis review as the default standard.<sup>402</sup> The reflexive distinction made between heightened scrutiny and rational basis review reinforces the belief that most discrimination against social groups is presumptively permissible.<sup>403</sup>

Ultimately, Pollvogt argues, suspect classification analysis asks the wrong question. The question should not be which social groups are deserving of special judicial solicitude, be it because of their political marginalization, a characteristic of themselves they cannot control, or a history of discrimination. Instead, the question should be: does the law in question interfere with individual self-determination in an impermissible manner? That is, understanding that most laws can interfere with self-determination, does the law in question impose legal burdens in a way that does not correspond to individual responsibility? Expressed yet another way, does the law rely on status as a proxy for conduct?<sup>404</sup> Pollvogt explains, “such reliance is offensive to democracy even if there is a measure of accuracy to the stereotype.”<sup>405</sup> When a law does rely upon status – or “facial classification” – of persons, then, Pollvogt argues, the burden is on the government to prove an affirmative connection between the trait that defines the targeted group and the governmental and individual interests being regulated.<sup>406</sup>

This alternative analysis for equal protection, Pollvogt explains, is considerably more flexible than suspect classification analysis. Under the latter, once the Court has determined that a classification is suspect, then it is so for all time and for all purposes, thereby freezing our understanding of discrimination and prejudice. In contrast, Pollvogt’s trait-relevancy analysis is fact- and context-specific, allowing for more nuanced and nimble determinations over time. Further, requiring the government to justify all status-based laws forces the government to provide reasons and rationales in every case; this can expose irrational, stereotyped approaches.<sup>407</sup>

Pollvogt’s alternative perspective on equal protection offers a useful alternative means of understanding the U.S. extraterritorial tax system. The system imposes upon persons having the status of U.S. citizen living outside the United States burdens that are not imposed upon persons of any other status, be it a U.S. resident or a non-U.S. citizen living outside

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<sup>401</sup> *Id.* at 797.

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

<sup>404</sup> *Id.* at 798-800.

<sup>405</sup> *Id.* at 800.

<sup>406</sup> *Id.* at 801.

<sup>407</sup> *Id.* at 802.

the United States. The singular trait that defines this burdened group is U.S. citizenship. However, there is no connection between citizenship and participation in the U.S. economy. There is no connection between citizenship and the U.S. government's legitimate interests in taxation.<sup>408</sup> There is no connection between draft dodgers of the Civil War (or of any war) and the overwhelming majority of U.S. citizens living overseas. There is no connection between U.S. residents who seek to shelter their assets in foreign trusts and U.S. citizens living overseas who seek to save for retirement. There is no connection between U.S. residents who hide their money in offshore accounts and U.S. citizens living overseas who hold ordinary accounts in their countries of residence (FATCA). There is no connection between, on the one hand, persons who, after acquiring great wealth in the United States, move to a tax haven and renounce U.S. citizenship to benefit from the favorable tax treatment accorded to foreign investors in the United States and, on the other hand, Americans living in ordinary (non-tax haven) countries on a long-term basis, and, to the extent they acquire wealth, do so in their countries of residence (exit tax). There is no connection between multinational companies seeking to shift profits outside the United States and overseas Americans operating small businesses in the countries where they live (Transition Tax and GILTI).

The U.S. extraterritorial tax system relies upon the status of overseas American as a proxy for conduct. The system interferes with the individual self-determination of overseas Americans and imposes legal burdens on them in a manner that does not correspond to their individual responsibility. In sum, Pollvogt's alternative perspective on equal protection further exposes the profound irrationality and immorality of the U.S. extraterritorial tax system.

#### IV. SIGNATURE AND RATIFICATION BY THE UNITED STATES OF MULTIPLE HUMAN RIGHTS INSTRUMENTS

Since *Cook* was decided, the United States has signed, or signed and ratified, multiple international human rights instruments. Today the U.S. extraterritorial tax system violates multiple provisions of these instruments: (A) the right to move from one country to another, (B) the right to work and free choice of employment, (C) equality in dignity and rights, and (D) the freedom from the arbitrary deprivation of one's nationality

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<sup>408</sup> Again, if there were such a connection then residents of the United States who are not citizens would be exempt from U.S. taxation, or inversely, as soon as they became subject to U.S. taxation, they would be granted U.S. citizenship as a matter of right; green card holders living outside the United States would not be subject to worldwide taxation by the United States, given that they are not citizens; and nonresident aliens who have U.S.-source income would not be subject to U.S. taxation on that income, given they are not citizens. *See supra* text accompanying notes 311-312.



and the right to return to one's own country; (E) further, when the United States claims as U.S. tax residents persons who do not live in the United States, it is not only violating the rights of those persons but also the rights of the countries where U.S. citizens live – namely the right of those countries to self-determination.

The United States has taken steps to limit – if not entirely nullify – the direct application of these instruments for the country (the United States).<sup>409</sup> Nevertheless, an analysis of how the United States violates these instruments is important because it further exposes the problems and injustices of the U.S. extraterritorial tax system and underscores the system's immorality. As Talerman explains, international human rights norms are important for “naming and shaming” American civil rights abuses.<sup>410</sup> In addition, the analysis supports the demonstration that, in a discussion of equal protection, the United States has neither a compelling nor a legitimate interest in continuing the U.S. extraterritorial tax system.<sup>411</sup>

#### A. *The Right to Leave One's Country*

Moving in search of a better life is a key driver behind the development of human civilization. The right to move, to distance oneself, or even to run away, is one of the most fundamental guarantees of human liberty.<sup>412</sup> In 1868, the United States Congress itself proclaimed: “[T]he right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and pursuit of happiness.”<sup>413</sup>

Human rights champion José D. Inglés described the right to leave one's country as essential for personal self-determination.<sup>414</sup> In 1999 the United Nations Human Rights Committee stated that “liberty of movement is an indispensable condition for the free development of a person.”<sup>415</sup>

The right to move from one country to another has not only been affirmed by defenders of human rights and even the United States Con-

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<sup>409</sup> See Talerman, *infra* note 417 at 303-12.

<sup>410</sup> *Id.* at 303.

<sup>411</sup> *Supra* text accompanying notes 165-199, 308-357.

<sup>412</sup> Dimitry Kochenov, *The Right to Leave Any Country Including Your Own in International Law*, 8 CONN. J. INT'L L. 43, 47 (2012).

<sup>413</sup> Expatriation Act of 1868, *see* Appendix A, *infra* note 520 and accompanying text.

<sup>414</sup> Kochenov, *supra* note 412 at 47 (quoting José D. Inglés, *Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country*, U.N. Doc. E/CN.4/Sub.2/220/Rev.1, U.N. Sales No. 64.XIV.2, at 9 (1963), <https://www.refworld.org/pdfid/45139c394.pdf>).

<sup>415</sup> Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 67th sess., UN Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 2, 1999), at 2, <https://www.refworld.org/pdfid/45139c394.pdf>.

gress, but is also enshrined in four international human rights instruments. Each contains a clause in essence stating: “Everyone has the right to leave any country, including his own, and to return to his country.”<sup>416</sup>

The reiteration of the right to leave one’s country for another in as many as four international human rights instruments underscores the fundamental importance of this right. The United States has signed one of the four instruments (the Universal Declaration of Human Rights) and has both signed and ratified two of them: the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>417</sup>

The U.S. extraterritorial tax system violates the right to leave a country for another in an insidious manner. While U.S. citizens can remove themselves from the physical territory of the United States, they can never remove themselves from the fiscal territory of the United States. Because of punitive tax rules they find themselves shut out from many investments, from retirement planning, from entrepreneurial opportunities, and from holding many kinds of assets, including owning their home or other real estate jointly with their spouse.<sup>418</sup>

Rather than an obstacle as obvious as physical restraint at the border, overseas Americans instead are faced with a variety of fiscal restraints at multiple touch points in their lives. This has multiple – and significant – repercussions. It prevents the individual from integrating in their community and within their very own family. Given the importance of money and access to assets and finance for normal living much less physical survival, the ultimate effect of these restraints is to deprive the individual of access to essential means of life.

As for those who seek to escape by renouncing U.S. citizenship, two additional hurdles lie in their path: (1) the renunciation fee of \$2,350, the

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<sup>416</sup> The four instruments are: G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 13, ¶ 2 (Dec. 10, 1948), [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_217\(III\).pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_217(III).pdf) [<https://perma.cc/L2FG-KG7J>] (hereinafter “UDHR”); G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, at art. 12, ¶ 2 (Dec. 16, 1966), [https://www.ohchr.org/en/professional interest/pages/ccpr.aspx](https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx) [<https://perma.cc/HHR5-4TJX>] (hereinafter “ICCPR”); G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, at art. 5, ¶ (d)(ii) (Dec. 21, 1965), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> [<https://perma.cc/UN5U-XS9S>] (hereinafter “ICERD”); G.A. Res. 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, at art. 8 (Dec. 18, 1990), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx> [<https://perma.cc/C7W3-ME8D>] (hereinafter “ICRMW”).

<sup>417</sup> See generally Lily Talerman, *Name and Shame: How International Pressure Allows Civil Rights Activists to Incorporate Human Rights Norms into American Jurisprudence*, 17 DUKE J. CONST. L. & PUB. POL’Y 303 (2022).

<sup>418</sup> See *supra* notes 313-314 and accompanying text.

world's highest,<sup>419</sup> and (2) for many, the exit tax, which can amount to as much as 39.6% of the value of the former citizen's worldwide assets as of the day of expatriation.<sup>420</sup> As explained above, the tax applies regardless of whether any gains are actually realized, and so regardless of whether any cash is on hand to pay the tax.<sup>421</sup>

Article 12 of the ICCPR allows for restrictions to be placed upon a person's freedom to leave a country, including their own. However, this may occur only under exceptional circumstances. As CCPR General Comment No. 27 explains, any restrictions may only be for the purposes of protecting "national security, public order, public health or morals, or the rights and freedoms of others."<sup>422</sup> Any restrictions must also meet each of the criteria below:

- Be "necessary in a democratic society,"
- Be proportionate to the interest to be protected;
- Be appropriate to achieve their protective function;
- Be the least intrusive instrument amongst those which might achieve the desired result; and
- Not impair the essence of the right.<sup>423</sup>

It is difficult to imagine how the fiscal restraints the United States places upon its citizens living overseas (the inability to save for retirement, to hold a bank account, to operate small business, etc.) could be justified as necessary for the protection of national security, public order, public health or morals, or the rights and freedoms of others. The renunciation fee is even more difficult to justify on any of these grounds. The U.S. State Department has defended the high fee as a response to high demand and paperwork,<sup>424</sup> but given it is more than twenty times the average fee for other high-income countries this explanation is difficult to understand.<sup>425</sup>

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<sup>419</sup> Wood, *World's Highest Fee*, *supra* note 15. In January 2023, the State Department announced its intention to reduce the fee to \$450, but no timeline for implementing the reduction has been proposed. See Kiarra M. Strocko, *U.S. Government Set to Reduce Citizenship Renunciation Fee*, 178 TAX NOTES FED. 438 (Jan. 16, 2023).

<sup>420</sup> Wood, *Renounce*, *supra* note 15.

<sup>421</sup> *Supra* note 341 and accompanying text.

<sup>422</sup> Human Rights Committee, *CCPR General Comment No. 27*, *supra* note 415, at 3. Some limitations on the ability to renounce citizenship are considered permissible under the ICCPR, but only a very small number. The most notable is to prevent statelessness. Others include the need to have adequate mental capacity, not having unfulfilled military service obligations, and not being subject to criminal investigation. See, e.g., Worster, *Human Rights Law*, *supra* note 381 at 97-98.

<sup>423</sup> Human Rights Committee, *CCPR General Comment No. 27*, *supra* note 415, at 3.

<sup>424</sup> Wood, *World's Highest Fee*, *supra* note 15.

<sup>425</sup> See "Eric," *Comparison of Fees and Procedures for Renouncing Citizenship in Various Countries*, ISAAC BROCK SOC'Y, Aug. 22, 2014, <http://isaacbrocksociety.ca/2014/08/22/comparison-of-fees-and-procedures-for-renouncing-citizenship-in-various-countries/comment-page-1/>.

Other countries offer examples that the United States can follow with respect to residence-based taxation and a targeted departure tax.<sup>426</sup> The existence of these examples underscores further that there is no credible argument that the restraints imposed by the U.S. extraterritorial tax system are “necessary in a democratic society,” much less proportionate, appropriate, or the least intrusive means to further any interest that the United States may purport to seek to protect.

It would be difficult to argue that the exit tax does not violate Article 12 of the ICCPR given that as far back as 1966 a Congressional committee report expressly stated that the purpose of the tax was to discourage expatriation.<sup>427</sup> In 1995 the U.S. Department of Treasury reiterated that the exit tax is an effort to deter or punish tax-motivated expatriation.<sup>428</sup> And U.S. courts have agreed, stating that this tax is “enacted to forestall tax-motivated expatriation” and “designed to discourage voluntary expatriation.”<sup>429</sup>

In sum, the fiscal restraints that the United States places upon overseas Americans impair the essence of the fundamental right of any citizen to leave their country. Fiscally, for as long as they are citizens, they cannot leave.

### *B. The Right to Work, Free Choice of Work and Freedom from Discrimination in Work*

Work is essential for material subsistence, for socialization and for self-actualization.<sup>430</sup> At the same time, it is essential that a person’s work be freely chosen. Free choice of work is important not only to prevent slavery<sup>431</sup> but also for self-actualization: freely chosen (as opposed to forced) work is essential for human dignity, self-esteem and self-respect,<sup>432</sup> and for the full development of human capacities.<sup>433</sup> Freedom from discrimination in hiring as well as promotion is equally essential for human dignity, self-esteem, and self-respect.

The importance of work, of freely chosen work, and of work free from discrimination is amplified in today’s world where precarity of employment is the norm. In the United States, nearly half the population

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<sup>426</sup> For examples of departure taxes imposed by other countries, see *supra* note 357.

<sup>427</sup> *Supra* notes 286, 330 and accompanying text.

<sup>428</sup> Worster, *Human Rights Law*, *supra* note 381 at 100.

<sup>429</sup> See Worster, *Human Rights Law*, *supra* note 381 at 100, 100 n.110 (citing Kronenberg v. Comm’r, 64 T.C. 428, 434 (1975) and *Di Portanova v. United States*, 690 F.2d 169, 179 (Cl. Ct. 1982)). These decisions predate the signature and ratification by the United States of the ICCPR (1992) and ICERD (1994). Appendix A, *infra* note 600 and accompanying text.

<sup>430</sup> Pablo Gilabert, *Labor Human Rights and Human Dignity*, 42 PHIL. SOC. CRITICISM 171, 178 (2015).

<sup>431</sup> *Id.* at 173.

<sup>432</sup> *Id.* at 178.

<sup>433</sup> *Id.* at 181.

works in “low-quality,” low-paying jobs.<sup>434</sup> A member of Congress, Senator Marco Rubio, has penned multiple articles deploring that not all Americans in the United States have access to dignified work.<sup>435</sup>

Like the right to move from one country to another, work-related rights are also enshrined in several human rights instruments. These instruments protect (among other work-related rights): (1) the right to work, (2) the free choice of employment, (3) freedom from discrimination in employment, notably based on national origin, and (4) equal opportunity for promotion in employment, subject to no considerations other than those of seniority and competence.<sup>436</sup>

As was the case for the right to leave one’s country for another, the reiteration in several international human rights instruments of the rights to work, to free choice of work, and to freedom from discrimination in work underscores the equally fundamental importance of these rights.

The U.S. extraterritorial tax system violates these fundamental human rights with respect to work in multiple ways:

(1) For those Americans who have created their own small business overseas, many find themselves in severe financial hardship, with some being forced to close, because the U.S. extraterritorial tax system severely penalizes businesses operated by overseas Americans in the countries where they live. Businesses operated in the same countries but by persons of other nationalities are not subject to the same rules, placing businesses operated by overseas Americans at a competitive disadvantage. Given this, it is no surprise that many overseas Americans who

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<sup>434</sup> Jack Kelly, *The Frightening Rise in Low-Quality, Low-Paying Jobs: Is This Really a Strong Job Market?* FORBES (Nov. 25, 2019), <https://www.forbes.com/sites/jackkelly/2019/11/25/the-frightening-rise-in-low-quality-low-paying-jobs-is-this-really-a-strong-job-market/?sh=4a2cf8ec4fd1>; Aimee Picchi, *Almost Half of All Americans Work in Low-Wage Jobs*, CBS NEWS (Dec. 2, 2019), <https://www.cbsnews.com/news/minimum-wage-2019-almost-half-of-all-americans-work-in-low-wage-jobs/>.

<sup>435</sup> Sen. Marco Rubio, *Americans Deserve Dignified Work* (Sept. 14, 2021), <https://www.rubio.senate.gov/public/index.cfm/2021/9/icymi-rubio-americans-deserve-dignified-work>; Sen. Marco Rubio, *What Economics Is For*, FIRST THINGS (Aug. 26, 2019), <https://www.firstthings.com/web-exclusives/2019/08/what-economics-is-for>; Sen. Marco Rubio, *America Needs to Restore Dignity of Work: The American Dream is About the Opportunity to Earn Happiness—and the Government has a Responsibility to Facilitate That*, THE ATLANTIC (Dec. 13, 2018), <https://www.theatlantic.com/ideas/archive/2018/12/help-working-class-voters-us-must-value-work/578032/>.

<sup>436</sup> The three instruments are: (1) UDHR, *supra* note 416 at art 23(1); (2) ICERD, *supra* note 416 at art 5(e)(i); (3) GA. Resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, at arts 2, 6(1), and 7(c) (Dec. 16 1966), (hereinafter, “ICESCR”), <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>. As discussed *supra* text accompanying notes 416–418, the United States has signed the UDHR and has signed and ratified the ICERD. The United States has signed but not ratified the ICESCR.

would like to create their own businesses have refrained from doing so out of fear that their businesses will suffer the same fate.<sup>437</sup>

(2) As an extension of the right to move from one country to another; by restraining this right the United States also restrains the right of Americans to pursue work opportunities in other countries.

(3) To the extent an American would prefer to pursue work opportunities outside the United States but does not do so because of the penalizing nature of the U.S. extraterritorial tax system, their work in the United States cannot be described as “freely chosen.”

(4) Many Americans working overseas face discrimination in hiring and promotion as well as with respect to entrepreneurial opportunities because of their country of origin is the United States: Many non-U.S. employers do not want to hire and/or promote overseas Americans and many non-U.S. entrepreneurs refuse to partner with overseas Americans because of the tax consequences and overall financial instability an overseas American introduces to the enterprise.<sup>438</sup>

In sum, the U.S. extraterritorial tax system results in multiple violations of the fundamental human rights to work, to free choice of work, and to freedom from discrimination in work.

### C. *Equality in Dignity and Rights*

For Immanuel Kant, the protection of dignity of the person means that a person should be afforded liberties allowing them to live in accor-

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<sup>437</sup> SEAT Survey – Data Part 1 of 2, *supra* note 203 at 24; SEAT Survey – Data Part 2 of 2, *supra* note 95 at 48-51; SEAT Survey – Participant Comments, *supra* note 95 at 339-350; Snyder, *I Feel Threatened* – Part 1, *infra* note 438 at 18; Laura Snyder, “*I Feel Threatened by My Very Identity*”: Report on US Taxation and FATCA Survey—Part 2 Comments, at 5, 8, 16, 34-35, 51-56, 58, 60, 65 (Oct. 25, 2019), <http://www.citizenshipsolutions.ca/wp-content/uploads/2019/10/Part-2-Comments.pdf> [https://perma.cc/9BTA-CQ8U] (hereinafter “Snyder, *I Feel Threatened* – Part 2”); Snyder, *I Feel Threatened* – Part 3, *infra* note 438; Carmelan Polce, *Tax Filing from Abroad: Research on NonResident Americans and U.S. Taxation*, DEMOCRATS ABROAD, Mar. 1, 2019, at 4, 5, 25-27 <http://seatnow.org/wp-content/uploads/2021/12/18.-Democrats-Abroad-2019-Survey.pdf> (hereinafter “DA Survey”). See also Murray, *supra* note 11.

<sup>438</sup> SEAT Survey – Data Part 1 of 2, *supra* note 203 at 14, 28; SEAT Survey – Data Part 2 of 2, *supra* note 95 at 32, 45; SEAT Survey – Participant Comments, *supra* note 95 at 339-350; Laura Snyder, “*I Feel Threatened By My Very Identity*”: Report On US Taxation and FATCA Survey Part 1: Data, at 33 (Oct. 25, 2019), <http://www.citizenshipsolutions.ca/wp-content/uploads/2019/10/Part-1-Data.pdf> (hereinafter “Snyder, *I Feel Threatened* – Part 1”); Snyder, *I Feel Threatened* – Part 2, *supra* note 437 at 11, 13, 15-16, 22, 44-46, 58, 80; Laura Snyder “*I Feel Threatened By My Very Identity*” Report On US Taxation and FATCA Survey Part 3: Case Study, at 6 (Oct. 25, 2019), <http://www.citizenshipsolutions.ca/wp-content/uploads/2019/10/Part-3-Case-Study.pdf> (hereinafter “Snyder, *I Feel Threatened* – Part 3”); DA Survey, *supra* note 437 at 6.

dance with ends that they freely chose.<sup>439</sup> By enjoying all liberties, a person can be an autonomous agent with the ability to define their own destiny independently.<sup>440</sup> To achieve this, the state must not take actions which threaten or violate an individual's enjoyment of all fundamental rights and freedoms.<sup>441</sup>

The dignity of a person cannot be respected and protected if there is no recognition of fundamental rights and freedoms that equally apply to all people, irrespective of their gender, economic status, or nationality.<sup>442</sup> Together with the right to life, the right to human dignity or dignified treatment is viewed as a pillar of social empowerment, social transformation, and economic development.<sup>443</sup>

Karst makes this analysis less abstract. For him, equality is denied when a person is treated as an inferior, when they are treated in a manner that differentiates them from others in such a way that they do not belong, they are not quite human, they are stigmatized.<sup>444</sup> For Karst, an essential element of equality is freedom from stigma.<sup>445</sup>

Equality in dignity and rights is also enshrined in several human rights instruments. These instruments provide that “[a]ll human beings are born free and equal in dignity and rights” and that they are “equal before the law” free of any discrimination based on national origin.<sup>446</sup>

The U.S. extraterritorial tax system violates the principle of equality in dignity and rights in several manners. Overseas Americans, because of their national origin:

- Are stigmatized by potential employers and entrepreneurial partners who fear the tax and financial consequences of employing/partnering with a U.S. citizen;<sup>447</sup>

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<sup>439</sup> Callixte Kavuro, *The Value of Human Dignity in the Refugee Protection*, 5 AFR. HUM. MOBILITY REV. 1510, 1512 (April 2019) (quoting IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* (Yale University Press, 1785) 8-31).

<sup>440</sup> *Id.*

<sup>441</sup> *Id.*

<sup>442</sup> Kavuro, *supra* note 439 at 1513.

<sup>443</sup> *Id.* at 1522.

<sup>444</sup> Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 248-49 (1983).

<sup>445</sup> *Id.* at 249. Kavuro shares this view: *supra* note 439 at 1531.

<sup>446</sup> The three instruments are: (1) UDHR, *supra* note 416 at art 1; (2) ICCPR, *supra* note 416 at art 26; (3) ICERD, *supra* note 416 at art 5. As discussed *supra* text accompanying notes 416-418, the United States has signed the UDHR and has signed and ratified both the ICCPR and the ICERD.

<sup>447</sup> Snyder, *Criminalization*, *supra* note 3 at 2281, 2286; Snyder, *Emigrant*, *supra* note 3 at 305, 310. See also AARO Survey Article 2, *supra* note 321 at 2; AARO Survey Article 6, *supra* note 314 at 1, 3-4, 6-7; DA Survey, *supra* note 437 at 5, 6, 20, 25-27; SEAT Survey – Participant Data Part 1 of 2, *supra* note 203 at 14, 28; SEAT Survey – Data Part 2 of 2, *supra* note 95 at 32, 45, 48-50; SEAT Survey – Participant Comments, *supra* note 95 at 316-50.

- Are deprived of the opportunities for tax-advantaged retirement savings and other investments;<sup>448</sup>
- Cannot invest in most mutual funds available to others in their country of residences;<sup>449</sup>
- Are stigmatized by overseas financial planners who prefer not to deal with the complications an overseas American presents;<sup>450</sup> and
- Are stigmatized in their own families when their names are kept off titles to family assets located outside the United States.<sup>451</sup>

In sum, and as Kant described, the U.S. extraterritorial tax system denies to overseas Americans the liberties that would allow them to live in accordance with the ends they freely chose. They cannot be “autonomous agents” with the ability to define their destinies independently. Instead, their financial as well as social destinies – which are their means of survival – are defined by the U.S. extraterritorial tax system. Neither the other residents of the countries where they live nor their fellow Americans living in the United States are subjected to the same limitations.

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<sup>448</sup> Snyder, *Criminalization*, *supra* note 3 at 2281; Snyder, *Emigrant*, *supra* note 3 at 304, 334-38. *See also*: AARO Survey Article 6, *supra* note 314 at 3; AARO Survey Article 8, *supra* note 314 at 4; AARO Survey Article 10, *supra* note 314 at 4-9; DA Survey, *supra* note 437 at 5, 6, 13, 22, 27, 34, 35; SEAT Survey – Data Part 1 of 2, *supra* note 203 at 16-17; SEAT Survey – Data Part 2 of 2, *supra* note 95 at 63; SEAT Survey – Participant Comments, *supra* note 95 at 92-129. For a detailed account by one overseas American living in Australia see *A Senior Citizen’s Story*, LET’S FIX THE AUSTRALIA/US TAX TREATY! (accessed June 24, 2023), <http://fixthetaxtreaty.org/about/our-stories/a-senior-citizens-story/>.

<sup>449</sup> Snyder, *Criminalization*, *supra* note 3 at 2281; Snyder, *Emigrant*, *supra* note 3 at 304, 338-41. *See also*: AARO Survey Article 6, *supra* note 314 at 1, 3; AARO Survey Article 8, *supra* note 314 at 3-4; AARO Survey Article 10, *supra* note 314 at 5-6; DA Survey, *supra* note 437 at 5, 13, 17, 20, 22, 23, 27, 31, 34-35; SEAT Survey – Data Part 1 of 2, *supra* note 203 at 14, 16-17; SEAT Survey – Participant Comments, *supra* note 95 at 92-141.

<sup>450</sup> *See* Robbie Lawther, *Serving US Expats is a ‘Difficult Area for Advisers,’* INTERNATIONAL ADVISER (July 5, 2021), <https://international-adviser.com/serving-us-expats-is-a-difficult-area-for-advisers/>.

<sup>451</sup> SEAT Survey – Participant Comments, *supra* note 95 at 270-286. *See also* Snyder, *I Feel Threatened – Part 3*, *supra* note 438.



*D. Freedom from the Arbitrary Deprivation of One's Nationality and the Right to Return to One's Country*

First Hannah Arendt<sup>452</sup> and then United States Chief Justice Earl Warren<sup>453</sup> described citizenship as “the right to have rights.” That is, Arendt explained, while simply being a human being should be enough to protect fundamental human rights, in reality it is not sufficient.<sup>454</sup> Because the modern institution of the state is grounded on the principle of national and territorial sovereignty, human rights can only be protected through citizenship of a state.<sup>455</sup> Warren further underscored the importance of citizenship when he wrote that denationalization is “a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.”<sup>456</sup>

Both Arendt and Warren were speaking in the context of statelessness, where the deprivation of citizenship results in the person not being a citizen of any country. Warren describes statelessness as “a condition deplored in the international community of democracies.”<sup>457</sup> Statelessness is, indeed, a deplorable condition. Under any conditions losing a citizenship that one does not want to lose is deplorable, even if, by virtue of dual citizenship, it does not result in statelessness. Losing a citizenship means losing membership in a community; it means losing one's rights in that community. The European Court of Human Rights has underscored the importance of nationality as an inherent part of a person's social identity and as such determined that it is a protected element of private life.<sup>458</sup>

An important element of citizenship is the right to enter and remain in the country of one's citizenship. When a person is deprived of their citizenship, they are relegated to the status of foreigner, and as such are deprived of the right to enter that country as well as to remain on a long-term basis. As a foreigner, they may or may not be allowed to visit, and, if allowed, will be permitted to stay only for a temporary period.

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<sup>452</sup> Leila Faghfour Azar, *Hannah Arendt: The Right to Have Rights*, CRITICAL LEGAL THINKING (July 12, 2019), <https://criticallegalthinking.com/2019/07/12/hannah-arendt-right-to-have-rights/> [https://perma.cc/DH2J-D9DP]. See also YOSHI HARPAZ, CITIZENSHIP 2.0: DUAL NATIONALITY AS A GLOBAL ASSET 3 (2019) (explaining: “Citizenship defines the scope of rights that an individual may claim and specifies which state is expected to answer those claims”).

<sup>453</sup> *Trop v. Dulles*, 356 U.S. 86, 102 (1958).

<sup>454</sup> Azar, *supra* note 452.

<sup>455</sup> *Id.*

<sup>456</sup> *Trop*, 356 U.S. at 101-2.

<sup>457</sup> *Id.* at 102.

<sup>458</sup> Hélène Lambert, *Refugee Status, Arbitrary Deprivation of Nationality, and Statelessness within the Context of Article 1A(2) of the 1951 Convention and its 1967 Protocol Relating to the Status of Refugees*, UNHCR Paper, Legal and Protection Policy Research Series, Division of International Protection, 27 (Oct. 1, 2014), <http://dx.doi.org/10.2139/ssrn.2521076>.

Freedom from the arbitrary deprivation of one's nationality and the right to return to one's country are enshrined in several human rights instruments. They state, in essence, "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality,"<sup>459</sup> and "everyone [. . .] has the right to return to his country."<sup>460</sup>

The U.S. extraterritorial tax system causes the arbitrary deprivation of citizenship.<sup>461</sup> An additional consequence of this loss of citizenship (among other consequences) is the loss of the right to return to one's country. This loss is especially acute given the Reed Amendment, which seeks to bar entry into the United States of former U.S. citizens who are determined have renounced U.S. citizenship for the purpose of avoiding U.S. taxation.<sup>462</sup>

The United Nations Human Rights Council has stated that the question of arbitrary deprivation of nationality does not comprise the loss of nationality "voluntarily" requested by the individual.<sup>463</sup> As discussed above, most overseas Americans who renounce U.S. citizenship do so not because they no longer want to be U.S. citizens but because they see no other way to escape the penalizing nature of the U.S. extraterritorial tax system. Their renunciation is directly comparable to the constructive eviction of tenants and the constructive dismissal of employees. In each case, the victims are placed in untenable positions that leave them with no choice but to leave. Had their positions not been so punishing they would have wanted to stay.<sup>464</sup>

As also discussed above, when they renounce U.S. citizenship; overseas Americans report feeling "angry" and "devastated," and they "burst into tears" and vomit.<sup>465</sup>

The involuntary nature of such renunciations is evident in this statement:

<sup>459</sup> UDHR, *supra* note 416, at art 15(2).

<sup>460</sup> The instruments are: (1) UDHR, *supra* note 416 at art 15(2); (2) ICCPR, *supra* note 416 at art 12(4); (3) ICERD, *supra* note 416 at art 5(d)(ii); (4) ICRMW, *supra* note 416 at art 8(2). As discussed *supra* text accompanying notes 416-418, the United States has signed the UDHR and has signed and ratified both the ICCPR and the ICERD.

<sup>461</sup> See *supra*, notes 82-107 and accompanying text, discussing the forceable destruction of citizenship.

<sup>462</sup> See *supra*, notes 92-96 and accompanying text, and Appendix A, *infra* note 608 and accompanying text. While U.S. authorities rarely seek to enforce the Reed Amendment, the law nevertheless has the effect of placing overseas Americans in positions of fear; either of renouncing, or, if they do renounce, of visiting the United States. See *supra* notes 92-96 and accompanying text.

<sup>463</sup> Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General*, 25th sess, A/HRC/25/28, at 3 n.4 (Dec. 19, 2013), <https://www.refworld.org/docid/52f8d19a4.html>.

<sup>464</sup> See *supra*, notes 85, 107 and accompanying text.

<sup>465</sup> *Supra* note 85 and accompanying text.

I felt betrayed by the US and will NEVER forgive them for forcing me to renounce my citizenship; it was part of who I am.

On the day of my renouncement I was in a fugue state, the only way for me to emotionally survive. Once there I just wanted to punch, kick, scream at the consular official, tell her how much I HATED the US government but obviously that was not the correct behaviour. I don't think I really heard what she was saying, just put my hand up, signed my name, took a moment to stare right into her eyes and left.

Since that day I live with rage, sorrow, relief and confusion about who I am. I am not a REAL Canadian, I am no longer an American, it feels groundless. In reality it doesn't really matter but yet it does somehow. Americans abroad have become refugees without refuge, US out to destroy them, home nations will not protect them. We are the citizenry of no one, it is actually terrifying and NO ONE CARES.<sup>466</sup>

Another former U.S. citizen wrote:

[R]enunciation [is] not one of those things you “get over” [. . .] I didn't feel I had any choice. If I had a choice, I'd still be American.<sup>467</sup>

And another:

The day of renunciation, uncontrollable tears streamed down my face as I read the necessary oath. I feel that the United States obliged me to renounce through the imposition of inexplicably oppressive laws and I feel betrayed by my own country.<sup>468</sup>

These overseas Americans did not want to stop being U.S. citizens; this is evidenced in their sadness, their anger, their vomiting, and their tears. Their objective was to escape from the conditions that made it impossible for them to live normal lives outside the United States – to escape from the laws that were “out to destroy them” and from which the countries where they reside failed to protect them. They felt coerced to renounce – under patent duress – as the only path to safety available to them.

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<sup>466</sup> Snyder, *I Feel Threatened – Part 2*, *supra* note 437 at 75.

<sup>467</sup> Ruth Freeborn, Comment to *My Renunciation Day*, RACHEL'S RUMINATIONS (Nov. 19, 2015), <https://rachelsruminations.com/renunciation-day/> [<https://perma.cc/UP3T-6Q8A>].

<sup>468</sup> SEAT Survey – Participant Comments, *supra* note 95 at 539.

The Executive Branch acknowledges that the U.S. extraterritorial tax system compels many overseas Americans to renounce U.S. citizenship. This is evidenced in at least two ways:

- The issuance of the 2019 statement “Joint Foreign Account Tax Compliance Act (FATCA) FAQ: Joint Frequently Asked Questions (FAQ) from the Department of the Treasury, the Department of State, the Internal Revenue Service, and the Social Security Administration on Obtaining Social Security Numbers, Expatriation, and Tax Implications.”<sup>469</sup> In this lengthy title alone the United States recognizes that the U.S. extraterritorial tax system causes persons living overseas to “give up”<sup>470</sup> U.S. citizenship – that there is a direct causal link between the tax system and their loss of U.S. citizenship.
- The IRS making available on its website a 2021 draft paper by a University of Michigan doctoral student entitled *Citizenship and Taxes: Evaluating the Effects of the U.S. Tax System on Individuals’ Citizenship Decisions*.<sup>471</sup> The paper analyzes non-public data that the IRS provided to the author. The author’s conclusions include: “the recent increase in renunciations is mainly driven by those who have for many years lived abroad, rather than by individuals leaving the U.S., and [ . . . ] these renunciations are primarily a response to increased compliance costs, not tax liabilities.”<sup>472</sup>

The United Nations Human Rights Council has explained that even when statelessness is not at play, “[s]tates must weigh the consequences of loss or deprivation of nationality against the interest that it is seeking to protect, and consider alternative measures that could be imposed.”<sup>473</sup> The loss or deprivation of nationality that does not serve a legitimate aim

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<sup>469</sup> U.S. Dep’t of State Bureau of Consular Affairs, *Joint Foreign Account Tax Compliance Act (FATCA) FAQ: Joint Frequently Asked Questions (FAQ) from the Department of the Treasury, the Department of State, the Internal Revenue Service, and the Social Security Administration on Obtaining Social Security Numbers, Expatriation, and Tax Implications* (last updated Nov. 22, 2022), <https://travel.state.gov/content/travel/en/international-travel/while-abroad/Joint-Foreign-Account-Tax-Compliance-FATCA-FAQ.html>.

<sup>470</sup> *Id.* at Question 10.

<sup>471</sup> Paul R. Organ, *Citizenship and Taxes: Evaluating the Effects of the U.S. Tax System on Individuals’ Citizenship Decisions* (draft Aug. 23, 2021), <https://www.irs.gov/pub/irs-utl/21rpcitizenshipandtaxes.pdf>.

<sup>472</sup> *Id.* at 1.

<sup>473</sup> Human Rights Council, *supra* note 463 at 16.

or is not proportionate is arbitrary and therefore prohibited.<sup>474</sup> As discussed above, the U.S. extraterritorial tax system neither serves a legitimate aim nor is proportionate.<sup>475</sup> Alternative means are available, notably the use of a tax system based solely upon residency and a departure tax applied to all persons, regardless of nationality, when they move out of the United States.<sup>476</sup>

### E. *The Right of Self-Determination*

It is not just individuals who are the victims of the human rights abuses that result from the U.S. extraterritorial tax system. Countries or, more precisely, “peoples” (explained below) as a collective are also victims.<sup>477</sup>

This occurs when the decisions and policies of one country have an effect in another country such that the ability of the people of the second country to make their own decisions and apply their own policies within their country is limited.

This occurrence is particularly egregious when it results in the violation of the right of a subset of the group or the group as a whole to participate effectively in the economic and political life of the country.<sup>478</sup>

Article 1 of the ICCPR enshrines this right:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.<sup>479</sup>

United Nations Human Rights Committee has explained that the right of self-determination is of particular importance because “its reali-

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<sup>474</sup> *Id.*

<sup>475</sup> *Supra* notes 200-214, 308-357, and accompanying text.

<sup>476</sup> *See supra* note 357 and accompanying text and *infra* notes 510-511 and accompanying text.

<sup>477</sup> *See generally* Laura Snyder, *Extraterritorial Taxation #13: Other Countries Have a Duty to Act*, SEAT Working Paper Series #2023/13 (June 5, 2023), <https://ssrn.com/abstract=4466153>.

<sup>478</sup> Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, 55 WASH. & LEE L. REV. 773, 777 (1998).

<sup>479</sup> ICCPR, *supra* 416 at art 1.

zation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.”<sup>480</sup> In other words, in the absence of the right of self-determination, the other rights discussed in this paper would be more difficult to protect.

The U.S. extraterritorial tax system violates the right of other countries to self-determination. The system prevents the peoples of other countries (any country where overseas Americans live) from freely determining their economic and social development. For example, many countries where overseas Americans live have made policy decisions not to tax certain kinds of income, such as welfare benefits, pension contributions and/or proceeds, or capital gains on the sale of a residence, or to tax them at a reduced rate.<sup>481</sup> When those countries make such a policy decision it is for their own policy reasons. For example, it could be because taxpayers have certain kinds of income at vulnerable times in their lives (unemployment, disability, old age, death of a spouse) and the country in question has determined that during those vulnerable periods it wants the taxpayer to have the full (or greater) benefit of that income. When the United States nevertheless taxes that income (which it normally does given that neither the foreign earned income exclusion nor foreign tax credits would apply),<sup>482</sup> this directly overrides the policy determinations of the country where the overseas American lives and deprives residents (who are often also citizens) of that country of a portion of their means of subsistence.<sup>483</sup>

In addition, the policies of many countries encourage spouses and other family members to hold joint title to family assets. This facilitates estate planning as well as access to family assets upon the death of a spouse or other family member. The U.S. extraterritorial tax system

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<sup>480</sup> Human Rights Committee, *CCPR General Comment No. 12: Article 1 (Right to Self-Determination)*, *The Right to Self-Determination of Peoples*, 21st sess at 1 (Mar. 13, 1984), <https://www.refworld.org/docid/453883f822.html>.

<sup>481</sup> See, e.g., Alpert, *Investing with One Hand*, *supra* note 3 (discussing Australian superannuation and other investments). France does not tax capital gains with respect to the sale of a primary residence; when a U.S. citizen sells their home in France, any capital gains are fully taxable by the United States. See, e.g., *French Property Taxes for Non-Residents and Expats*, GREENBACK EXPAT TAX SERVICES (Dec. 4, 2021), <https://www.greenbacktaxservices.com/blog/french-property-taxes-non-residents-expats/>.

<sup>482</sup> See Snyder, *Emigrant*, *supra* note 3 at 341-43. See also PREP Podcaster, *US Taxation of Americans Abroad: Do the Foreign Tax Credit Rules Work? - Sometimes Yes and Sometimes No*, May 7, 2020, <https://prep.podbean.com/e/us-taxation-of-americans-abroad-do-the-foreign-taxcredit-rules-work-sometimes-yes-and-sometimes-no/> [https://perma.cc/ZVB2-DPML]; PREP Podcaster, *US Taxation of Americans Abroad: The Confusing World of Foreign Tax Credits and Why Americans Abroad May Pay More Tax than Their Neighbours and More Than Homeland Americans*, May 7, 2020, <https://prep.podbean.com/e/us-taxation-of-americansabroad-the-confusing-world-offoreign-tax-creditsandwhy-americans-abroadmaypay-more-tax-than-their-neighboursand-more-than-h/>.

<sup>483</sup> See *supra* notes 181-189 and accompanying text.

causes the economic ostracization of overseas Americans from their families. That is, some overseas Americans are denied title to family assets located outside the United States to shield the assets from U.S. capital gains tax.<sup>484</sup> This does not just leave those overseas Americans financially vulnerable; it also thwarts both the economic and social development of those countries in the manner their lawmakers intended.

Finally, because foreign pension plans and other foreign investments are subject to heavy U.S. tax penalties, many overseas Americans find themselves unable to plan or save effectively for their retirement.<sup>485</sup> The result is the increased probability that when they retire, they will not have sufficient financial resources and will become public charges in the countries where they live. Further, these tax penalties encourage overseas Americans to move capital out of the country where they live to the United States. Both results thwart the economic development of the country in the manner its policymakers intended.

It is in these manners that the U.S. extraterritorial tax system violates both Article 1(1) and Article 1(2) of the ICCPR. It does this not only by infringing upon the free pursuit of the economic and social development of those countries but also by depriving residents of those countries of their means of subsistence.

## V. ADOPTION OF THE TAXPAYER BILL OF RIGHTS

The Taxpayer Bill of Rights (TBOR) was enacted in 2015, more than 90 years after *Cook*.<sup>486</sup> This enactment did not establish new rights for U.S. taxpayers; rather, it combined existing rights found in various tax laws, regulations, and policies and put them in one place, making them easier to identify.

The creation of the TBOR is credited principally to Nina Olson, the former National Taxpayer Advocate.<sup>487</sup> She is often quoted as saying, “[a]t their core, taxpayer rights are human rights.”<sup>488</sup>

The direct enforceability of the TBOR is in question.<sup>489</sup> Nevertheless, an analysis of how the United States violates the TBOR is important

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<sup>484</sup> See, e.g., Snyder, *I Feel Threatened – Part 3*, *supra* note 438.

<sup>485</sup> *Supra* notes 448-449 and accompanying text.

<sup>486</sup> IRS, *Taxpayer Bill of Rights*, updated Feb. 24, 2022, <https://www.irs.gov/taxpayer-bill-of-rights>; enacted as 26 USC §7803(a)(3) (2015). See Appendix A, *infra* note 625 and accompanying text.

<sup>487</sup> Andrew R. Roberson, *The Taxpayer Bill of Rights: A Primer and Thoughts on Things to Come*, 38 ABA TAX TIMES (Spring 2018), [https://www.americanbar.org/groups/taxation/publications/abataxtimes\\_home/18may/18may-pbm-roberson-the-taxpayer-bill-of-rights/](https://www.americanbar.org/groups/taxation/publications/abataxtimes_home/18may/18may-pbm-roberson-the-taxpayer-bill-of-rights/)

<sup>488</sup> *Id.*

<sup>489</sup> See, e.g., Leandra Lederman, *Is the Taxpayer Bill of Rights Enforceable?* Indiana Legal Studies Research Paper No. 404 (April 4, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3365777](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3365777).

because, like an analysis of international human rights instruments,<sup>490</sup> a TBOR analysis further exposes the problems and injustices of the U.S. extraterritorial tax system – in particular as regards IRS administration – and further underscores the immorality of the system. In addition, the analysis supports the demonstration that, in a discussion of equal protection, the United States has neither a compelling nor a legitimate interest in continuing the U.S. extraterritorial tax system.<sup>491</sup>

The U.S. extraterritorial tax system violates the TBOR in both (A) its substance, and (B) its failed administration.

#### A. *The Substance of the U.S. Extraterritorial Tax System Violates TBOR*

The TBOR includes the Right to a Fair and Just Tax System. According to this Right, taxpayers “have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely.”<sup>492</sup>

The simple fact of the United States imposing its tax rules on persons who live overseas constitutes a fundamental violation of this right. This is because the U.S. tax system applies the exact same rules regardless of the taxpayer’s residence; in doing so it fails to consider that the circumstances of persons living overseas are entirely different from those of persons living in the United States and from other overseas Americans living in other countries. The U.S. tax rules heavily penalize non-U.S.<sup>493</sup> investments, non-U.S. retirement plans, non-U.S. banks accounts, non-U.S. businesses, and non-U.S. unearned income.<sup>494</sup> It is relatively easy for most U.S. residents to avoid these.<sup>495</sup> For Americans living overseas on a long-term basis, it is impossible. Neither the content nor the application of U.S. tax rules considers the dramatic differences in circumstances that affect the overseas American’s underlying liabilities, ability to pay, or ability to provide information timely. The U.S. extraterritorial tax sys-

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<sup>490</sup> *Supra* text accompanying notes 409-410.

<sup>491</sup> *Supra* text accompanying notes 165-199, 308-357.

<sup>492</sup> Taxpayer Bill of Rights, *supra* note 486.

<sup>493</sup> The choice of the term “non-U.S.” rather than “foreign” is deliberate. It is intended to emphasize that these non-U.S. investments, retirement plans, bank accounts, businesses, and unearned income are domestic – not foreign – for the overseas American.

<sup>494</sup> See *supra* notes 447-451 and accompanying text and Table 5. See also Richardson, *More Punitive*, *supra* note 3; Jacqueline Bugnion, *Concerns About the Taxation of Americans Resident Abroad*, TAX NOTES (Aug. 24, 2015), 861-66, <https://adcsovereighty.files.wordpress.com/2015/09/bugnion-08-24-15.pdf>.

<sup>495</sup> A notable exception is immigrants to the United States, to the extent they retain assets located in their countries of origin and/or they inherit assets located in their country of origin. See generally Oei, *supra* note 11.



tem expects overseas Americans to live their lives as if they were in the United States; this is impossible for them to do.<sup>496</sup>

*B. The Failed Administration of the U.S. Extraterritorial Tax System Violates TBOR*

Without question there are many failures in the IRS's administration of the domestic tax system. They pale, however, in comparison to the failures in the IRS's administration of the extraterritorial tax system. These multiple failures result in multiple violations of the TBOR, as summarized in Table 6.<sup>497</sup> Further, taken as a whole, the IRS's discriminatory treatment of overseas Americans as compared to U.S. residents constitutes a violation of the Right to a Fair and Just Tax System.

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<sup>496</sup> This is impossible because other countries have their own rules regarding employment, business organization, asset ownership, investment, and taxation that all residents must respect regardless of citizenship. For an explanation specially with respect to Americans living in France, see Snyder, *Emigrant*, *infra* note 3 at 306 n.22. Indeed, it is in ignoring the rules of other countries that the U.S. extraterritorial tax system violates their sovereignty. *See id.* at 326-44. For an additional discussion of why this is impossible, see Oei, *supra* note 11 at 698-700.

<sup>497</sup> For a detailed discussion of these failures, see Snyder et al., *Mission Impossible*, *supra* note 94. To understand the longstanding nature of these failures, see a 1979 report describing many of the same problems. *Report Submitted by American Citizens Abroad: "Laws and Regulations of the United States That Discriminate Against American Citizens Living Abroad, or That Make Overseas American Noncompetitive in the Markets of the World"*, contained as Appendix B to U.S. SENATE COMMITTEE ON FOREIGN RELATIONS, Appendix A, *infra* note 579 at 89-93.

TABLE 6: COMPARISON OF IRS SERVICES FOR U.S. RESIDENTS AND OVERSEAS AMERICANS AND RESULTING VIOLATIONS OF THE TAXPAYER BILL OF RIGHTS<sup>498</sup>

IRS Service	Adapted for U.S. Residents	Adapted for Overseas Americans	Taxpayer Bill of Rights Violations
In-person assistance	Yes	No	-Right to be informed -Right to quality service
Toll-free telephoning	Yes	No	-Right to be informed -Right to quality service -Right to pay no more than correct amount of tax
Knowledgeable IRS agents	Yes	No	-Right to be informed -Right to quality service
Online accounts	Yes	No	-Right to be informed -Right to quality service
E-filing	Yes	Sometimes	-Right to quality service -Right to pay no more than correct amount of tax
Timely delivery of postal mail	Mostly	Severe delays are common	-Right to be informed -Right to quality service -Right to finality
Use of other languages	Yes	No	-Right to be informed -Right to quality service
Explanations of tax obligations	Yes	Limited	-Right to be informed -Right to quality service

<sup>498</sup> Snyder et al., *Mission Impossible*, *supra* note 94 at 1829-30.

IRS Service	Adapted for U.S. Residents	Adapted for Overseas Americans	Taxpayer Bill of Rights Violations
Making payments to the IRS	Some problems	Widespread problems, including high costs	-Right to quality service -Right to pay no more than correct amount of tax
Receiving payments from the IRS	Some problems	Widespread problems, including high costs	-Right to quality service -Right to pay no more than correct amount of tax
Third-party assistance	Yes	Limited and at high cost	-Right to be informed -Right to quality service -Right to retain representation
Low-income taxpayer clinic (LITC)	Yes	No	-Right to retain representation <sup>499</sup>
IRS internal organization	Yes	No	-Right to quality service

CONCLUSION: TAXING IN RESPECT OF RIGHTS

*Cook* holds that the federal government has the power to tax overseas Americans based upon their worldwide income. It is a myth, however, that *Cook* allows the government to tax overseas Americans under any conditions and without any regard for the effects the policies have. It is a myth that *Cook* allows the federal government to tax overseas Americans in manners that violate their fundamental rights.

This paper demonstrates that the U.S. extraterritorial tax system as it exists today violates multiple fundamental rights:

- Protection against the forcible destruction of citizenship;<sup>500</sup>
- Equal protection under the Fifth and Fourteenth Amendments;<sup>501</sup>

<sup>499</sup> The IRS website explains that for taxpayers with income below a specified level, the right to retain representation include access to representation by an LITC for free or a minimal fee. LITCs, all of which are located in the United States, are partially funded by the IRS. IRS, *Taxpayer Bill of Rights 9: The Right to Retain Representation* (updated Nov. 16, 2022), <https://www.irs.gov/newsroom/taxpayer-bill-of-rights-9#:~:text=Taxpayers%20have%20the%20right%20to,if%20they%20cannot%20afford%20representation.>

<sup>500</sup> *Supra* notes 82-107 and accompanying text.

<sup>501</sup> *Supra* notes 108-407 and accompanying text.

- The right to leave one's country;<sup>502</sup>
- The right to work, free choice of work, and freedom from discrimination in work;<sup>503</sup>
- Equality in dignity and rights;<sup>504</sup>
- Freedom from the arbitrary deprivation of nationality and the right to return to one's country;<sup>505</sup>
- Right of self-determination,<sup>506</sup> and
- Multiple elements of the Taxpayer Bill of Rights (the right to a fair and just tax system; the right to be informed; the right to quality service; the right to pay no more than the correct amount of tax; the right to finality; and the right to retain representation).<sup>507</sup>

The U.S. extraterritorial tax system is unique in the world; no other country taxes its overseas citizens in a comparable manner.<sup>508</sup> Other countries offer to the United States a multitude of examples of systems that further the legitimate purpose of preventing tax abuse while also respecting fundamental rights.

Drawing from those examples, the right system for the United States would feature the following elements:<sup>509</sup>

- Taxation and citizenship are entirely dissociated; citizenship bears no relevancy to taxation. Instead, income taxation is based upon – and only upon –

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<sup>502</sup> *Supra* notes 412-429 and accompanying text.

<sup>503</sup> *Supra* notes 430-437 and accompanying text.

<sup>504</sup> *Supra* notes 441-451 and accompanying text.

<sup>505</sup> *Supra* notes 452-476 and accompanying text.

<sup>506</sup> *Supra* notes 478-485 and accompanying text.

<sup>507</sup> *Supra* notes 486-499 and accompanying text.

<sup>508</sup> Three other countries in the world – Eritrea, Myanmar, and Hungary – tax the foreign income of their nonresident citizens on an ongoing basis. These countries do so in manners that are different and considerably more limited as compared to the United States. Eritrea taxes the foreign income of its nonresident citizens at a flat rate of 2%. *See* DSP-GROEP BV & TILBURG SCHOOL OF HUMANITIES, DEPARTMENT OF CULTURE STUDIES, *THE 2% TAX FOR ERITREANS IN THE DIASPORA: FACTS, FIGURES AND EXPERIENCES IN SEVEN EUROPEAN COUNTRIES* (June, 2017), [https://eritreahub.org/wp-content/uploads/2020/10/The\\_2\\_Tax\\_for\\_Eritreans\\_in\\_the\\_diaspora.pdf](https://eritreahub.org/wp-content/uploads/2020/10/The_2_Tax_for_Eritreans_in_the_diaspora.pdf) [<https://perma.cc/RJT2-CBKH>] (exposing multiple problems with the legality of Eritrea's diaspora tax as well as with its enforcement). Myanmar taxes the non-salary income of its nonresident citizens at a reduced flat rate of 10%. *See* PwC, *Myanmar: Individual - Taxes on Personal Income* (last reviewed Mar. 1, 2023), <https://taxsummaries.pwc.com/myanmar/individual/taxes-on-personal-income> [<https://perma.cc/H4QH-6ZC7>]. Hungary taxes the income of its nonresident citizens only if they (1) are not dual citizens, and (2) live in a country with which Hungary does not have a tax treaty. EY, *WORLD-WIDE PERSONAL TAX AND IMMIGRATION GUIDE 2021–22*, at 622-28 (2022), [https://www.ey.com/en\\_gl/tax-guides/worldwide-personal-tax-and-immigration-guide](https://www.ey.com/en_gl/tax-guides/worldwide-personal-tax-and-immigration-guide) [<https://perma.cc/N3KF-JY5D>].

<sup>509</sup> *See also* Laura Snyder, *Extraterritorial Taxation #15: Taxing in Respect of Rights*, SEAT Working Paper Series #2023/15 (June 5, 2023), <https://ssrn.com/abstract=4466241>.

residence and source. Persons who both are not residents (again, regardless of citizenship) of the United States and are tax residents of another country, have no tax obligations to the United States, including no filing or reporting obligations, except with respect to any U.S.-source income they may have.

- If there is an exit (or departure) tax, it is imposed at the time a person ceases to be a resident. Again, citizenship status is not relevant. The departing taxpayer may choose either to pay the applicable tax at the time of departure or to defer payment until the asset in question is sold.<sup>510</sup> Some assets are exempt from the departure tax, such as retirement plans/savings and certain types of real estate and business property;<sup>511</sup>
- The United States joins the OECD's Common Reporting Standards (CRS)<sup>512</sup> and does not impose duplicative reporting requirements for offshore financial accounts. Only accounts that are truly offshore (not in the taxpayer's country of residence) are reportable, and they are reportable only to the taxpayer's country of residence.

It is time to end the U.S. extraterritorial tax system. The system is both irrational and immoral:<sup>513</sup> it singles out overseas Americans based upon their nationality and imposes upon them legal burdens that are not placed upon any other category of persons and that do not correspond to their individual responsibility.

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<sup>510</sup> Australia offers this choice. See Sophie Mao, *I Am Moving Overseas. What is the Exit Tax?* LEGAL VISION (updated Dec. 6, 2021), <https://legalvision.com.au/moving-overseas-exit-tax/>.

<sup>511</sup> Canada exempts from its departure tax: (i) retirement and related plans; (ii) Canadian business property (including inventory) if the business is carried on through a permanent establishment in Canada; (iii) real estate located in Canada, and (iv) real estate located outside Canada that was acquired prior to the last time the taxpayer became a resident of Canada. See Government of Canada, *Dispositions of Property* (updated Jan. 24, 2023), <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/individuals-leaving-entering-canada-non-residents/dispositions-property.html>.

<sup>512</sup> See *supra* notes 323-325 and accompanying text.

<sup>513</sup> As specifically regards the immorality of the U.S. extraterritorial tax system, see *supra* text accompanying notes 409-410, 489-491.

APPENDIX A: Evolution of the U.S. Extraterritorial Tax System, of U.S. Citizenship, and of Equal Protection

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
1855		Citizenship Act of 1855: Established the U.S. citizenship of: (1) persons born outside the United States whose father was a U.S. citizen at time of birth, except if father never resided in the United States; and (2) women who are or shall be married to a U.S. citizen. <sup>514</sup>	
1861- 62	Revenue Acts of 1861 and 1862: Established the first federal income tax. Subjected “every person residing in the United States” (regardless of citizenship) to taxation on all income, regardless of source, at a rate of 3% (under the Revenue Act of 1862 the rate of 5% applied to income over \$10,000). <sup>515</sup> Income subject to taxation included income from em- ployment, profession, trade or vocation, as well as from property, rents, interest, and dividends. Subjected “any citizen of the United States resid-		

<sup>514</sup> Citizenship Act of 1855, 10 Stat. 604.

<sup>515</sup> Under the Revenue Act of 1861, the rate of 3% applied to income over \$800 and a lower rate of 1.5% applied to interest upon treasury notes or other securities of the United States. Revenue Act of 1861, § 49, 12 Stat. 292, 309. Under the Revenue Act of 1862, the rate of 3% applied to income over \$600. Revenue Act of 1862, § 90, 12 Stat. 432, 473.

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
	ing abroad” to taxation on U.S.-source income only, at the rate of 5%. Income subject to taxation was limited to annual gains, profits, or income, rents, and dividends accruing upon any property, securities, and stocks owned. <sup>516</sup> Did not include income from employment, profession, trade, or vocation.		
1864	Revenue Act of 1864: Expansion of taxation of “any citizen of the United States residing abroad” to include both worldwide income as well as income from employment, profession, trade, or vocation. <sup>517</sup>		
1868		14th Amendment: Established that all persons born or naturalized in the United States are U.S. citizens. Requires a state to provide to all persons within its jurisdiction equal protection of the laws. <sup>518</sup> Expatriation Act of 1868: (1) Proclaimed that all persons have the right to expatriate, <sup>519</sup> and (2) provided that naturalized citizens are entitled to the same protections of person and property as native-born citizens. <sup>520</sup>	
1871	Revenue Act of 1864 allowed to expire. <sup>521</sup>		

<sup>516</sup> Revenue Act of 1861, § 49, 12 Stat. at 309; Revenue Act of 1862, § 90, 12 Stat. at 473. Under the Revenue Act of 1861 a lower rate of 1.5% applied to interest upon treasury notes or other securities of the United States. Revenue Act of 1861 § 49, 12 Stat. at 309.

<sup>517</sup> Revenue Act of 1864, §116, 13 Stat. 223, 281.

<sup>518</sup> U.S. CONST. amend XIV.

<sup>519</sup> Expatriation Act of 1868, Preamble, 15 Stat. 223

<sup>520</sup> Expatriation Act of 1868, § 2, 15 Stat. at 224.

<sup>521</sup> Sheldon D. Pollack, *The First National Income Tax, 1861–1872*, 67 TAX L AW. 1, 19-20 (2014).

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
1894	Wilson-Gorman Tariff Act of 1894: Reinstated the federal income tax. Included taxation of U.S. citizens living overseas on all forms of their worldwide income. <sup>522</sup>		
1895	<i>Pollock v. Farmers' Loan &amp; Trust Company</i> : Income tax of the Wilson-Gorman Tariff Act is declared unconstitutional. <sup>523</sup>		
1896			<i>Plessy v. Ferguson</i> : Court held that racial segregation on railroad cars was permissible under the "separate but equal" doctrine.  Court stated that the only limits upon the legislature in the exercise of its police power were that the laws be enacted "in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class." <sup>524</sup>
1907		Expatriation Act of 1907: Established loss of U.S. citizenship for: (1) persons who acquire citizenship of another country by naturalization; (2) naturalized U.S. citizens who either (i) reside in originating country for more than 2 years, or (ii) reside in	

522 Wilson-Gorman Tariff Act of 1894, § 27, 28 Stat. 509, 553.

523 157 U.S. 429 (1895).

524 163 U.S. 537, 550 (1896). See *supra* notes 108-117 and accompanying text.



Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
		any other country for more than 5 years; (3) women who marry a non-citizen (she assumes his citizenship until the end of the marriage); (4) children born and residing overseas who, upon their 18th birthday, do not record at a U.S. consulate their intention to reside in United States and retain U.S. citizenship, and take an oath of allegiance to the United States. <sup>525</sup>	
1913	16 <sup>th</sup> Amendment: Established Congress's right to impose federal income taxation. <sup>526</sup> Underwood-Simmons Tariff Act of 1913: Subjected to federal income taxation these three groups: (i) "every citizen of the United States, whether residing at home or abroad," (ii) "every person residing in the United States, though not a citizen thereof," and (iii) "persons residing elsewhere." <sup>527</sup> Regulations 33 (1914): Repeated this description of the three groups. Persons in groups (i) and (ii) are subject to taxation on the basis on their "net income arising or accruing from all sources." Persons in group (iii)		

<sup>525</sup> Expatriation Act of 1907, Pub. L. No. 59-193, §§ 2-3, 6, 34 Stat. 1228, 1228-29. *See* BEN HERZOG, REVOKING CITIZENSHIP: EXPATRIATION IN AMERICA FROM THE COLONIAL ERA TO THE WAR ON TERROR 43-45 (2015).

<sup>526</sup> U.S. CONST. amend XVI.

<sup>527</sup> Underwood-Simmons Tariff Act of 1913 (also referred to as Revenue Act of 1913), Pub. L. No. 63-16, § II(A); 38 Stat. 114, 166.

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
	are subject to taxation on the basis of their net income from “all property owned and of every business, trade, or profession carried on in the United States.” <sup>528</sup>		
1918	Revenue Act of 1918: Imposed federal income taxation on every “individual,” regardless of residence or citizenship. Specified that nonresident aliens are subject to taxation only with respect to U.S.-source income. <sup>529</sup>		
1919	Regulations 45: First regulatory definition of “citizen” for the purpose of establishing the persons liable to tax. Described “persons liable to tax” as “every citizen of the United States, wherever resident [...]. It makes no difference that he may own no assets within the United States and may receive no income from sources within the United States. Every resident alien is liable to tax, even though his income is wholly from sources outside the United States. Every nonresident alien individual is liable to the tax on this income from sources within the United States.” <sup>530</sup> Defined “citizen” as: “Every person born in the United States subject to its jurisdiction, or naturalized in the United States, is a citizen. When any naturalized citizen has left the United States and resided for two years in the foreign country from which he came, or for five years in any other foreign country, he is presumed to have lost his American citizenship; but this presumption does not apply to residence abroad while the United States is at war. An Italian, who has come to the		

528 U.S. Internal Revenue, REGULATIONS 33: LAW AND REGULATIONS RELATIVE TO THE TAX ON INCOME OF INDIVIDUALS, CORPORATIONS, JOINT STOCK COMPANIES, ASSOCIATIONS, AND INSURANCE COMPANIES IMPOSED BY SECTION 2 ACT OF OCT. 3, 1913, T.D. 1944, 16 TREAS. DEC. INT. REV. ART. 1 AT 29 (JAN. 5, 1914).

529 Revenue Act of 1918, Pub. L. No. 65-254, § 210, § 213(c); 40 Stat. 1057, 1062, 1066.

530 U.S. Internal Revenue, REGULATIONS 45 RELATING TO THE INCOME TAX AND WAR PROFITS AND EXCESS PROFITS TAX UNDER THE REVENUE ACT OF 1918 (PRELIMINARY EDITION RELATING TO THE INCOME TAX ON INDIVIDUALS), T.D. 3146, House Doc. 1826, art. 3 at 12 (1919).

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
	United States and filed his declaration of intention of becoming a citizen, but who has not yet received his final citizenship papers, is an alien. A Swede who, after having come to the United States, and become naturalized here, returned to Sweden and resided there for two years prior to April 6, 1917, is presumed to be once more an alien. On the other hand, an individual born in the United States subject to its jurisdiction, of either citizen or alien parents, who has long since moved to a foreign country and established a domicile there, but who has never been naturalized in or taken an oath of allegiance to that or any other foreign country, is still a citizen of the United States. <sup>531</sup>		
1922		Married Women's Independent Nationality Act: Partially reversed the Expatriation Act of 1907 by allowing a woman residing in the United States who married a non-U.S. citizen to keep U.S. citizenship. However, if she resided for two years in the country where her husband is a citizen, or for five years in any other country, the presumption that she lost U.S. citizenship remained. <sup>532</sup>	
1924	<i>Cook v. Tait:</i> Held that the government's power to tax is not dependent upon the situs of the property or the domicile of the citizen, but upon "his relation as a citizen to the United States and the relation of		

<sup>531</sup> *Id.*, art. 4 at 12.

<sup>532</sup> Married Women's Independent Nationality Act (also referred to as the Cable Act), Pub. L. No. 67-346, § 3, 42 Stat. 1021, 1022 (1922). See Herzog, *supra* note 525 at 44.

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
	the latter to him as a citizen.” This is because “government, by its very nature, benefits the citizen and his property wherever found, and therefore has the power to make the benefit complete.” <sup>533</sup>		
1926	Revenue Act of 1926: Introduction of the Foreign Earned Income Exclusion (FEIE). Applied to persons residing outside the United States for at least six months. Applied to all income earned outside the United States but not to any unearned income, such as from investments. <sup>534</sup>		
1935	Regulations 86: Modified the definition of “citizen” <sup>535</sup> for the purpose of establishing the persons liable to tax, to read as follows: “Every person born or naturalized in the United States, and subject to its jurisdiction, is a citizen. When any naturalized citizen has left the United States and resided for two years in the foreign country from which he came, or for five years in any other foreign country, it is presumed that he has ceased to be an American citizen. This presumption does not apply, however, to residence abroad while the United States was at war, nor does it apply in the case of individuals born in the United States subject to its jurisdiction. However, even though an individual born in the United States, subject to its jurisdiction, of either citizen or alien parents, resided in a foreign country for a number of years, he would still be a citizen of the United States, unless he had become naturalized in, or taken an oath of allegiance to, the foreign country of residence or some other foreign		

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265 U.S. 47, 56 (1924). See *supra* notes 45, 47 and accompanying text.

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Revenue Act of 1926, Pub. L. No. 69-20, § 213(b)(14), 44 Stat. 9, 26.

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*Supra* note 531 and accompanying text.

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	state. A foreigner who has filed his declaration of intention of becoming a citizen of the United States but who has not yet received his final citizenship papers is an alien. <sup>536</sup>		
1938			<i>United States v. Carolene Products Company</i> : This case's Footnote 4 introduced the principle of levels of scrutiny, including strict scrutiny, by a court when considering the constitutionality of a law. Footnote 4 established the need for increased scrutiny of laws that affect certain groups, notably groups subject to prejudice as "discreet and insular minorities," rendering them politically powerless. <sup>537</sup>
1940		Nationality Act of 1940: Extensive collection of provisions describing conditions for birth right citizenship and for naturalization as well as for loss of U.S. citizenship. The Act codified the fluid nature of U.S. citizenship as something one could have, lose, and re-gain depending upon multiple life circumstances, such as: as a naturalized citizen, residing outside the United States for an extended period; reaching 16 years of age while residing outside the United States; returning to the United States, etc. <sup>538</sup> A long list of expatriating acts included: naturalization in another	

<sup>536</sup> Bureau of Internal Revenue, REGULATIONS 86 RELATING TO THE INCOME TAX UNDER THE REVENUE ACT OF 1934, art. 11-3 at 3-4 (1935).  
<sup>537</sup> 304 U.S. 144, 152 (1938). See *supra* notes 118-119 and accompanying text.  
<sup>538</sup> Nationality Act of 1940, Pub. L. No. 76-853, § 201(g), §§ 401, 54 Stat. 1137, 1139, 1170. See *supra* notes 62-66 and accompanying text.

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
		country; oath of allegiance to another country; voting in a foreign election; serving in the armed forces of another country; and desertion of the U.S. military. <sup>539</sup>	
1943			<i>Hirabayashi v. United States</i> Court stated that “Distinctions between citizens solely because of their ancestry are, by their very, nature odious to a free people whose institutions are founded upon the doctrine of equality.” <sup>540</sup>
1948		Universal Declaration of Human Rights: Contains the rights: (i) to leave any country, including one’s own, (ii) to return to one’s country; (iii) to a nationality; (iv) to not be arbitrarily deprived of nationality; and (v) to change nationality. <sup>541</sup>	<i>Oyama v. California</i> : Court held that a state may not discriminate based on country of origin absent “compelling justification.” <sup>542</sup>
1950	Treasury Decision 5815: Again modified the definition of “citizen” <sup>543</sup> for the purpose of establishing the persons liable to tax, to read as follows: “Every person born or naturalized in the United States, and subject to its jurisdiction, is a citizen. For rules governing the expatriation of citizens by birth and naturalized citizens; see sections 401-		

<sup>539</sup> *Id.* at §§ 401-404, 54 Stat. 1168-70. *See also* Alan G. James, *Expatriation in the United States: Precept and Practice Today and Yesterday* 27 SAN DIEGO L. REV. 853, 875-76 (1990).

<sup>540</sup> 320 U.S. 81, 100 (1943). *See supra* notes 129-130 and accompanying text.

<sup>541</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 13, ¶ 2; art. 15 (Dec. 10, 1948).

<sup>542</sup> 332 U.S. 633 (1948). *See supra* notes 132-133 and accompanying text.

<sup>543</sup> *Supra* note 536 and accompanying text.

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
	410 of the Nationality Act of 1940, as amended (54 Stat. 1168 (8 U. S. C. 801-810)). A foreigner who has filed his declaration of intention of becoming a citizen but who has not yet been admitted to citizenship by a final order of a naturalization court is an alien.” <sup>544</sup>		
1952		Immigration and Nationality Act of 1952: In a manner similar to the Nationality Act of 1940, the 1952 Act also contained an extensive collection of provisions describing conditions for birth right citizenship and for naturalization as well as for loss of U.S. citizenship. The Act confirmed the fluid nature of U.S. citizenship and the ease with which U.S. citizenship could be lost, such as by: the expatriation of a parent; naturalizing in another country; voting in a foreign election; as a naturalized U.S. citizen, living outside the United States for an extended period of time; serving in the armed forces of another country; desertion of the U.S. military; and being a dual national from birth who, within three years of their 22 <sup>nd</sup> birthday, does not return to live in the United States. <sup>545</sup> The Act ended for women the automatic loss of U.S. citizenship by reason of marriage to an alien and residence overseas. <sup>546</sup>	

544 T.D. 5815, 1950-2 C.B. 7 (1950).

545 Immigration and Nationality Act of 1952, Pub. L. No. 82-414, §§ 349-354, 66 Stat. 163, 267-272. See *supra* notes 62-66 and accompanying text.

546 *Id.* at § 357, 66 Stat. at 272.

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
1953-54	Regulations 118: Again modified the definition of “citizen” <sup>547</sup> for the purpose of establishing the persons liable to tax, to read as follows: “Every person born or naturalized in the United States, and subject to its jurisdiction, is a citizen. For rules governing the expatriation of citizens by birth and naturalized citizens, see sections 349 to 357, inclusive, of the Immigration and Nationality Act, 1952 (8 U. S. C. 1481–1489). A foreigner who has filed his declaration of intention of becoming a citizen but who has not yet been admitted to citizenship by a final order of a naturalization court is an alien.” <sup>548</sup>		<i>Hernandez v. Texas</i> (1954): Court held that “community prejudices are not static, and, from time to time, other differences from the community norm may define other groups which need [equal] protection.” <sup>549</sup> <i>Bolling v. Sharpe</i> (1954): Court held that not just state, but also federal laws must comply with the 14 <sup>th</sup> Amendment’s equal protection clause. <sup>550</sup>
1958		<i>Trop v. Dulles</i> : Soldier was convicted of desertion. His later application for a passport was denied on the grounds that under the Nationality Act of 1940 he had lost his citizenship due to desertion. Court ruled the relevant section of the Nationality Act of 1940 violated the 8 <sup>th</sup> Amendment as a cruel and unusual punishment. In this decision, Chief Justice Earl Warren described the importance of citizenship for all other rights, writing: “[With] denationalization [...] there may be involved no physical mistreatment, no primitive torture. There is instead	

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*Supra* note 549 and accompanying text.

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Regulations 118, 26 C.F.R. Sec. 39.111-3 (1953); *See also* T.D. 6161, 1956-1 C.B. 7, 13 (1956).

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347 U.S. 475, 479 (1954). *See supra* notes 135-136 and accompanying text.

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347 U.S. 497 (1954).



Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
		the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community [...] the expatriate has lost the right to have rights." <sup>551</sup>	
1959	Circular No. A-25: Enshrined the principle that the federal government must charge a fee for all services which "convey special benefits to recipients above and beyond those accruing to the public at large." The fee charged must recover the full cost to the federal government of rendering that service. <sup>552</sup> In accordance with this Circular and its 1993 revision, <sup>553</sup> all U.S. citizen services offered by U.S. consulates are funded solely by user fees and not by taxation. <sup>554</sup> This includes charging "market prices" when the government is not acting in its capacity as sovereign. <sup>555</sup>		
1962	Revenue Act of 1962: (1) CFCs: First effort to use income tax laws to limit investment overseas. Introduced Subpart F to IRC. Expanded the definition of "Controlled Foreign Corporation" (CFC) to include not just		

<sup>551</sup> 356 U.S. 86, 101-2 (1958). See *supra* notes 71-73 and accompanying text.  
<sup>552</sup> Bureau of the Budget, Circular No. A-25, 1-3 (Sept. 23, 1959).  
<sup>553</sup> Office of Management and Budget, Circular No. A-25 Revised (Transmittal Memorandum No. 1) (July 8, 1993).  
<sup>554</sup> *Consular Services for Americans*, ASS'N OF AM. RESIDENT OVERSEAS (Nov. 13, 2019), <https://www.aaro.org/events/event-reports/798-consular-services-for-americans> [https://perma.cc/4PWK-5XL7].  
<sup>555</sup> Circular No. A-25 Revised, *supra* note 553, at 3.

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
	<p>corporate shareholders of foreign companies but also individuals. Introduced restrictions on U.S. shareholders' ability to defer taxes on certain types of CFC income by requiring the income to be included in the U.S. shareholders' current-year taxable incomes regardless of repatriation to the United States. Subjected certain CFC income to taxation as ordinary income rather than capital gains.<sup>556</sup></p> <p>(2) Foreign trusts: First requirements for filing of informational returns for foreign trusts.<sup>557</sup> Several non-U.S. pension/retirement plans qualify as "foreign trusts."<sup>558</sup></p> <p>(3) FEIE: Introduction of a cap on the amount of earned income that can qualify under the FEIE.<sup>559</sup></p>		

<sup>556</sup> Revenue Act of 1962, Pub. L. No. 87-834 § 12, 76 Stat. 960, 1006-31. See Sebastian Dueñas, *CFC Rules Around the World*, Tax Foundation Fiscal Fact No. 659, at 4 (June, 2019), <https://files.taxfoundation.org/20190617100144/CFC-Rules-Around-the-World-FF-659.pdf>.

<sup>557</sup> Revenue Act of 1962 §§ 7(f)-(g), 76 Stat. at 988-89 (adding to the Code new § 6048 (requirement to file) and § 6677 (penalties for failure to file)).

<sup>558</sup> See IRS, *The Taxation of Foreign Pension and Annuity Distributions* (updated Mar. 9, 2023), <https://www.irs.gov/businesses/the-taxation-of-foreign-pension-and-annuity-distributions>.

<sup>559</sup> Revenue Act of 1962 at § 11, 76 Stat. at 1003-6.

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
1964		<i>Schneider v. Rusk</i> : This case concerned a woman who moved from Germany to the United States as a child and became a naturalized U.S. citizen along with her parents, and who, as an adult, moved back to Germany.  The court rejected the claim of the U.S. Department of State that she had lost her U.S. citizenship because she had returned to live in her country of origin for an extended period. The court held that the law cannot create a second class of citizens; that since no rule deprived natural-born Americans of their citizenship because of extended or permanent residence overseas, it was unconstitutionally discriminatory and a violation of the equal protection component of the 5 <sup>th</sup> Amendment due process clause to apply such a rule only to naturalized citizens. <sup>560</sup>	
1965	The IRS established its first toll-free telephone site. <sup>561</sup>  As of 2022 – 57 years later – toll-free access is available to all persons in the United States but remains unavailable outside the United States. <sup>562</sup>		
1966	Foreign Investors Tax Act:  For non-resident aliens: (1) elimination of taxation on interest on bank deposits, coupon payments from U.S. government debt, and portfolio		

<sup>560</sup> 377 U.S. 163, 168-9 (1964). See *supra* notes 75-77 and accompanying text.

<sup>561</sup> IRS, THE 2006 TAXPAYER ASSISTANCE BLUEPRINT: PHASE I, at 99 (April 24, 2006), <https://www.unclefed.com/IRS-Forms/PubsForTaxPros/p4525.pdf>.

<sup>562</sup> See Snyder et al., *Mission Impossible*, *supra* note 94 at 1832. See also *supra* text accompanying notes 191, 497-499. In 2019 the Taxpayer Advocacy Panel (TAP) asked the IRS to make toll-free services available to overseas taxpayers. The IRS responded that “it would be nice” to provide it but that it would “need to investigate technical viability.” *Id.* The 2019 Taxpayer First Act offered to the IRS the opportunity to plan and request the resources to better serve international taxpayers, including toll-free services. The IRS’s 2021 Taxpayer First Act Report to Congress contained no mention of extending toll-free services to international taxpayers. See Snyder et al., *Mission Impossible*, *supra* note 94 at 1845.

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
	interest paid by U.S. domestic corporations became tax-free; and (2) establishment of additional tax benefits for other kinds of U.S. investments. The result was to establish the United States as a tax haven for foreign investment. Expatriation: Introduction of an expatriation tax for former U.S. citizens. Tax applied if motive for expatriation was tax avoidance. <sup>563</sup>		
1967		<i>Afroyim v. Rusk</i> : This case concerned a naturalized U.S. citizen who moved to Israel, where he voted in an election. The U.S. Department of State later refused to renew his U.S. passport, claiming he had lost his U.S. citizenship because of his participation in a foreign election. The Court rejected this claim, holding that the 14 <sup>th</sup> Amendment protects every citizen against a “congressional forcible destruction of his citizenship,” and that every citizen has the right to remain a citizen “unless he voluntarily relinquishes that citizenship.” <sup>564</sup> This landmark case had the result of considerably increasing the number of U.S. citizens living overseas because they no longer lost U.S. citizenship by operation of law. <sup>565</sup>	
1970	Bank Secrecy Act: Financial Account Reporting: Adoption of FBAR, requiring that all the financial accounts held with any foreign financial institutions in		

563 Foreign Investors Tax Act of 1966, Pub. L. No. 89-809 § 103, 80 Stat. 1539, 1551-55. See *supra* notes 282-291 and accompanying text.

564 387 U.S. 253, 268 (1967).

565 See PETER J. SPIRO, AT HOME IN TWO COUNTRIES: THE PAST AND FUTURE OF DUAL CITIZENSHIP, 6, 56-58 (2016). See also *supra* notes 79-81 and accompanying text.

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
	cumulative amount of \$10,000 or more be re-ported annually to FinCEN. <sup>566</sup>		
1971			<i>Graham v. Richardson</i> : Court held that classifications based on alien-age, like those based upon nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a “prime” example of a “discrete and insular” minority as referenced in <i>United States v. Carolene Products</i> (1938) and for whom heightened judicial solicitude is appropriate. <sup>567</sup>
1973			<i>Frontiero v. Richardson</i> : Court stated that: (1) national origin is an “immutable characteristic determined solely by the accident of birth;” and (2) classifica-tions based upon national origin are inherently suspect and must be subjected to strict judicial scrutiny. <sup>568</sup> <i>Department of Agriculture v. Moreno</i> : Court held “if the constitutional conception of ‘equal protection of the laws’ means anything,

<sup>566</sup> Bank Secrecy Act (also known as the Currency and Foreign Transactions Reporting Act), Pub. L. No. 91-508 §§ 241-242, 84 Stat. 1118, 1124 (1970). *See* Snyder, *Criminalization*, *supra* note 3 at 2282-83; Snyder, *Unacknowledged Realities*, *supra* note 6 at 251-53.

<sup>567</sup> 403 U.S. 365, 371-2 (1971). *See supra* notes 138-139 and accompanying text. The Court confirmed this holding in *In re Griffiths*, 413 U.S. 717 (1973).

<sup>568</sup> 411 U.S. 677 (1973). *See supra* notes 143-145 and accompanying text.

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			it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” <sup>569</sup>
1974	Federal Register 1974: Modified Regulations 118’ <sup>570</sup> definition of “citizen” for the purpose of establishing the persons liable to tax, to read as follows: “Every person born or naturalized in the United States and subject to its jurisdiction is a citizen. For other rules governing the acquisition of citizenship, see chapters 1 and 2 of title III of the Immigration and Nationality Act (8 U.S.C. 1401-1459). For rules governing loss of citizenship, see sections 349 to 357, inclusive, of such Act (8 U.S.C. 1481-1489), <i>Schneider v. Rusk</i> , (1964) 377 U.S. 163, and Rev. Rul. 70-506, C.B. 1970-2, 1. For rules pertaining to persons who are nationals but not citizens at birth, e.g., a person born in American Samoa, see section 308 of such Act (8 U.S.C. 1408). For special rules applicable to certain expatriates who have lost citizenship with a principal purpose of avoiding certain taxes, see section 877. A foreigner who has filed his declaration of intention of becoming a citizen but who has not yet been admitted to citizenship by a final order of a naturalization court is an alien.” <sup>571</sup> This is the last time that the regulatory definition of U.S. citizen for the purpose of establishing the persons liable to tax has been modified. <sup>572</sup>		
1975	Tax Reduction Act of 1975: CFCs: Increased the taxation of shareholders of		

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413 U.S. 528, 534 (1973). See *supra* notes 250-253 and accompanying text. The Court confirmed this holding in *Romer v. Evans*, 517 U.S. 620, 634 (1996).

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*Supra* note 548 and accompanying text.

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39 Fed. Reg. 44210, 44216 (Dec. 23, 1974).

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See 26 CFR § 1.1-1(c).

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	foreign corporations by expanding what constituted Subpart F income and increasing the likelihood that such income would be included in a U.S. shareholder's taxable income. <sup>573</sup> Earned Income Tax Credit (EITC): First enactment of EITC; eligibility is limited to persons residing in the United States. <sup>574</sup>		
1976	Tax Reform Act of 1976: Foreign trusts: Reduced possibilities for tax deferment with respect to contributions to a foreign trust. Imposed penalizing taxation on income within the trust and on distributions. Instituted trust reporting obligations on the grantor. <sup>575</sup>		
1978	Revenue Act of 1978: EITC: Made EITC permanent, reiterating that eligibility is limited to persons residing in the United States. <sup>576</sup>	Act of Oct. 10, 1978: Ended all requirements that U.S. citizen children born overseas, to retain U.S. citizenship, live in the United States before a specified age	Foreign Relations Authorization Act, Fiscal Year 1979: Amended 22 U.S.C § 1731 to include: "The Congress finds that – (1) United States citizens

<sup>573</sup> Tax Reduction Act of 1975, Pub. L. No. 94-12 § 602, 89 Stat. 26, 58-64. See Melissa Redmiles & Jason Wenrich, *A History of Controlled Foreign Corporations and the Foreign Tax Credit*, 27 IRS SOI TAX S TATS – SOI BULLETIN 129, 133-34 (2007).

<sup>574</sup> Tax Reduction Act of 1975 at § 204, 89 Stat. at 30-32.

<sup>575</sup> Tax Reform Act of 1976, Pub. L. No. 94-455, § 1013, 90 Stat. 1520, 1614-17. See, generally, Mark S. Caldwell & Peter B. Nagel, *Foreign Situs Trusts*, 6 DENV. J. INT'L L. & POL'Y 675 (1977). A number of non-U.S. pension/retirement plans qualify as "foreign trusts." See, e.g., Alpert, *Investing with One Hand, supra* note 3 at 4-6.

<sup>576</sup> Revenue Act of 1978, Pub. L. No. 95-600, § 103, 92 Stat. 2763, 2771.

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	Foreign Earned Income Act of 1978: FEIE: Eliminated the FEIE for most Americans living overseas, replacing it with a complex series of deductions intended to compensate for excessive costs of living. <sup>577</sup>	and for a minimum number of years. <sup>578</sup>	living abroad should be provided fair and equitable treatment by the United States Government with regard to taxation, citizenship of progeny, veterans' benefits, voting rights, Social Security benefits, and other obligations, rights, and benefits; and (2) such fair and equitable treatment would be facilitated by a periodic review of statutes and regulations affecting Americans living abroad. <sup>579</sup>
1979			Department of State Authorization Act, Fiscal Years 1980 and 1981: Further amended 22 U.S.C § 1731 (§ 611(b) of

<sup>577</sup> Foreign Earned Income Act of 1978, Pub. L. No. 95-615, 92 Stat. 3098 (1978); See Jonathan M. Engram, *Income Tax - Foreign Earned Income Exclusion - Effect of the Economic Recovery Tax Act of 1981 on Citizens or Residents of the United States Living Abroad*, 12 GA. J. INT'L & COMP. L. 107, 110-11 (1982).

<sup>578</sup> An Act to Repeal Certain Sections of Title III of the Immigration and Nationality Act, and for Other Purposes, Pub. L. No. 95-432, 92 Stat. 1046 (1978), repealing § 350 of the Immigration and Nationality Act. See Andy Sundberg, *Who Is a U.S. Citizen? The Evolution of Citizenship Law in The United States of America*, OVERSEAS AMERICAN ACADEMY, updated Feb., 2012, at 15, <https://www.americansabroad.org/media/files/9aabc3e1/historyofchildcitizenship.pdf>. See also HERZOG, *supra* note 525 at 83-84.

<sup>579</sup> Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 611, 92 Stat. 963, 989-90 (1978). Just two reports were issued, one in 1979 and the other in 1980: See U.S. SENATE COMMITTEE ON FOREIGN RELATIONS, U.S. LAW AFFECTING AMERICANS LIVING AND WORKING ABROAD - PRESIDENTIAL REPORTS SUBMITTED IN RESPONSE TO SECTION 611, PUBLIC LAW 95-426 (AS AMENDED BY SECTION 407, PUBLIC LAW 96-60), A REPORT TO THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE (Aug., 1980), <https://babel.hathitrust.org/cgi/pt?id=PUr1.32754074746458&view=1&seq=1&skin=2021&q1=Equitable%20Treatment%20by%20United%20States%20of%20Its%20Citizens%20Living%20Abroad>. The reports' analyses of the equitable tax treatment of Americans Living Abroad are today out-of-date. As examples, they do not address retirement accounts, mutual funds (PFICs), controlled foreign corporations, FBAR, or FATCA. *Id.* at 23-40. See John Richardson, *President Carter Believes in Human Rights and #Americansabroad*, RENOUNCE U.S. CITIZENSHIP, Jan. 25, 2013, <https://renounceus.citizenship.wordpress.com/2013/01/25/president-carter-believes-in-human-rights-and-americansabroad/#comments>.



Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
			the Foreign Relations Authorization Act, Fiscal Year 1979) <sup>580</sup> to include: “United States statutes and regulations should be designed so as not to create competitive disadvantage for individual American citizens living abroad or working in international markets.” <sup>581</sup>
1981	Economic Recovery Tax Act of 1981: FEIE: Reinstated the FEIE with a cap on the amount of earned income that can qualify. Again excluded unearned income, and notably revenue from investments and non-U.S. pension income. <sup>582</sup>		
1982			Department of State Authorization Act, Fiscal Years 1982 and 1983:  Repealed as “obsolete” <sup>583</sup> the provisions of 22 U.S.C § 1731 relating to the fair and equitable treatment of United States citizens living abroad <sup>584</sup> and the design of laws and regulations so as to not create competitive disad-

580 Foreign Relations Authorization Act, Fiscal Year 1979 at § 611.  
581 Department of State Authorization Act, Fiscal Years 1980 and 1981, Pub. L. No. 96-60, § 407, 93 Stat 395, 405.  
582 Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 111, 95 Stat. 172, 190-96. See Snyder, *Emigrant*, *supra* note 3 at 342-43.  
583 Department of State Authorization Act, Fiscal Years 1982 and 1983, Pub. L. No. 97-241, §505, 96 Stat. 298-99 (1982).  
584 *Supra* note 579 and accompanying text.

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
			vantage for individual American citizens living abroad. <sup>585</sup>
1983	Department of State Authorization Act, Fiscal Years 1984 and 1985: Formalized the requirement that U.S. citizens evacuated from another country are required to reimburse the U.S. Department of State “to the maximum extent practicable.” <sup>586</sup>		
1985	50 Federal Register 30162: CFCs: Replaced Form 2952 with Form 5471. Form 5471 significantly increased the amount of information required to be reported for each CFC. <sup>587</sup>		<i>City of Cleburne v. Cleburne Living Center</i> : Court invalidated a requirement for a special zoning permit for a proposed group home for the cognitively disabled because the requirement for the permit was based upon animus: “requiring the permit [rests] upon an irrational prejudice against the mentally retarded.” <sup>588</sup> Court affirmed that statutes which classify persons based on alienage or national origin

<sup>585</sup> *Supra* note 581 and accompanying text.

<sup>586</sup> Pub. L. No. 98-164, § 122(a), 97 Stat. 1017, 1023 (Nov. 22, 1983), amending 22 U.S.C. § 2671. The practice of requiring U.S. citizens to sign a promissory note prior to evacuation was already in place prior to the adoption of this law. *See* testimony of Jeanne Wiley, Extensions of Remarks, Hon. John Conyers, Jr. at 32534 (Oct. 11, 1984) (promissory note for evacuation from Grenada signed Oct. 28, 1983), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1984-pt23/pdf/GPO-CRECB-1984-pt23-2-3.pdf>. *See also* Snyder, *Rationalized*, *supra* note 165 at 553-56 (explaining that the United States often refuses to evacuate its citizens from unsafe environments, or it does so after initially refusing but then relenting in the face of public pressure).

<sup>587</sup> Notably, Form 5471 included an expanded income statement schedule, a cost of goods sold schedule, a foreign taxes paid schedule, a balance sheet schedule, and earnings and profit analysis schedules. *See* Redmiles & Wenrich, *supra* note 573 at 134.

<sup>588</sup> 473 U.S. 432, 433 (1985). *See supra* note 257 and accompanying text.

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			(as well as race) are subject to strict scrutiny. Court stated: “These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others. For these reasons, and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny, and will be sustained only if they are suitably tailored to serve a compelling state interest.” <sup>589</sup>
1986	Tax Reform Act of 1986: (1) CFCs: Lowered the shareholding thresholds required for a foreign corporation to qualify as CFC, thereby expanding the scope of CFC taxation. <sup>590</sup>	Act of Nov. 14, 1986: Amends Section 349 of the Immigration and Nationality Act to make clear that an action, to result in loss of citizenship, needs to be performed voluntarily and with the intention of	

<sup>589</sup> 473 U.S. at 440. See *supra* notes 147-148 and accompanying text.  
<sup>590</sup> Tax Reform Act of 1986, Pub. L. No. 99-514, § 1222, 100 Stat. 2085, 2556-57; see Dueñas, *supra* note 556 at 5; Redmiles & Wenrich, *supra* note 573 at 134.

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
	(2) PFICs: First PFIC rules imposing penalizing taxation on foreign mutual funds. <sup>591</sup> The effect was to “wall off” U.S. investors from non-U.S. mutual funds. <sup>592</sup> (3) Functional currency: Established the U.S. dollar as the functional currency for all individuals, including those who live outside the United States. <sup>593</sup> As a result, for Americans living overseas, currency fluctuations create U.S. dollar capital gains or losses on daily transactions as well as on movements of short- and long-term investments done in local currencies. <sup>594</sup>	giving up U.S. citizenship. <sup>595</sup>	
1990	Revenue Ruling 90-79: <sup>596</sup> Ruled that persons who sell their home outside the United States are subject to tax on any “phantom income” that may result because of changes in the value of the currency with which the home	U.S. Department of States “Advice about Possible Loss of U.S. Citizenship and Dual Nationality:” Adoption of the administrative presumption that a U.S. citizen does not want to lose U.S.	

591 Tax Reform Act of 1986 at § 1235, 100 Stat. at 2566-76.

592 See John C. Coates IV, *Reforming the Taxation and Regulation of Mutual Funds: A Comparative Legal and Economic Analysis*, 1 J. LEGAL ANALYSIS 591, 611 (2009).

593 Tax Reform Act of 1986 at § 1261, 100 Stat. at 2585-91.

594 See *Legislative Proposals for Tax Reform Concerning U.S. Citizens Residing Abroad*, ASS’N OF AM. RESIDENTS OVERSEAS (Mar. 21, 2009), [https://www.aaro.org/index.php?option=com\\_content&view=article&id=24&Itemid=48](https://www.aaro.org/index.php?option=com_content&view=article&id=24&Itemid=48); See also Web, Comment to *Have Your Say! Tell the Senate Finance Committee How International Taxation Affects You...*, STOP EXTRANATERR. AM. TAX’N (April 4, 2021, 5:38 AM), <http://seatnow.org/2021/03/29/have-your-say-tell-the-senate-finance-committee-how-international-taxation-affects-you/>.

595 Act of Nov. 14, 1986, Pub. L. No. 99-653, § 18, 100 Stat. 3655, 3658 (1986). See Sundberg, *supra* note 578 at 18.

596 1990-2 C.B. 187.

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
	was purchased and sold as compared to the U.S. dollar. This unrealized income cannot be offset against any actual losses incurred in the foreign currency in connection with the sale of the home. <sup>597</sup>	citizenship even though performing a potentially expatriating act. <sup>598</sup> As a result of this presumption, the only way to effectively prove loss of U.S. citizenship is via the issuance by the Department of State of a Certificate of Loss of Nationality (CLN). <sup>599</sup>	
1992		Ratification by the United States of the International Covenant on Civil and Political Rights (ICCPR). Contains the rights: (i) to leave any country, including one's own, (ii) to return to one's country; and (iii) to equal protection of the law and to be protected from discrimination based on national origin, birth, or other status. <sup>600</sup>	
1994		Ratification by the United States of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Contains the rights: (i) to leave any country,	<i>J. E. B. v. Alabama ex rel. T. B.</i> : When the government relies upon and enforces a stereotype (in this case with respect to gender), it causes harm on multiple levels: to

597 Nick D. Hansen, Charles J. Bay & David N. Bowen, *Foreign Activities of U.S. Taxpayers*, 44 TAX LAW. 1287, 1291 (1991). See also Andrew Mitchel, *Non-Deductible Personal Currency Loss on Foreign Mortgage*, ANDREW MITCHELL LLC INTERNATIONAL TAX SERVICES (2008), [https://www.andrewmitchel.com/charts/rt\\_90\\_79.pdf](https://www.andrewmitchel.com/charts/rt_90_79.pdf).

598 See James *supra* note 539 at 895 n.169; Worster, *Renouncing*, *supra* note 5 at 3. HERZOG, *supra* note 525 at 108-09.

599 Worster, *Renouncing*, *supra* note 5 at 4; see 22 CFR § 50.40.

600 G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, at art. 12, art. 26 (Dec. 16, 1966).

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
		including one's own, (ii) to return to one's country; (iii) to nationality, and (iv) to equal protection of the law and to be protected from discrimination based on national origin. <sup>601</sup>	the affected individuals, to society and to the structure of government itself. <sup>602</sup>
1996	Small Business Jobs Protection Act: Foreign trusts: Clarified the definition of foreign trust with the effect of creating a bias towards treating a trust as a foreign trust. Increased and made more complex the reporting requirements for foreign trusts, subject to harsh penalties for failure to report. <sup>603</sup> Work Opportunity Tax Credit: First enactment of WOTC; eligibility limited to employers and employees located in United States. <sup>604</sup>		<i>Romer v. Evans</i> : Court struck down a state (Colorado) constitutional amendment forbidding the state and local governments from adopting laws seeking to protect gay men and lesbians from discrimination. Court observed: "the amendment seems inexplicable by anything but animus towards the class it affects." <sup>605</sup>
1996	Health Insurance Portability and Accountability Act of 1996: Expatriation: Expanded tax penalties for expatriation. <sup>606</sup> Created a presumption that expatriation		

<sup>601</sup> G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, at art. 1, art. 5, ¶ (d)(ii)-(iii) (Dec. 21, 1965).  
<sup>602</sup> 511 U.S. 127, 140 (1994). See Pollvogt, *Beyond, supra* note 110 at 772, also referencing *Brown v. Board of Education*, 347 U.S. 483 (1954).  
<sup>603</sup> Small Business Jobs Protection Act, Pub. L. No. 104-188, §§ 1901-07, 110 Stat. 1755, 1904-17 (1996). See Dina Kapur Sanna, *Reporting Requirements of U.S. Persons Connected to Foreign Trusts and of Delaware (Foreign) Trusts*, DELAWARE BANKERS ASSOCIATION, at 4 (2017), <https://debankers.com/Assets/2017%20DTC%20Wednesday/Risk/Reporting%20Requirements%20for%20Foreign%20Trusts.pdf>.  
<sup>604</sup> Small Business Jobs Protection Act at § 1201, 110 Stat. at 1768.  
<sup>605</sup> 517 U.S. 620, 632. See *supra* note 261 and accompanying text.  
<sup>606</sup> Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, §§ 511-12, 110 Stat. 1936, 2093-2102. See *supra* notes 292-300, 329-357 and accompanying text.

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
	<p>is for tax avoidance purposes if expatriate's income tax or net worth surpassed specified amounts. Instituted "Quarterly Publication of Individuals Who Have Chosen to Expatriate" (also referred to as the "Name and Shame List").<sup>607</sup></p> <p>Reed Amendment (contained in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996):</p> <p>Expatriation: Sought to bar entry into the United States of former U.S. citizens who are determined have renounced U.S. citizenship for the purpose of avoiding taxation by the United States.<sup>608</sup></p>		
2001	<p>Patriot Act:</p> <p>Access to financial accounts in the United States: Imposed on U.S. financial institutions increased diligence obligations ("know your client").<sup>609</sup></p>		

<sup>607</sup> *Id.* at § 512, 110 Stat. at 2100-02. See Helen Burggraf, *2020 Renunciation Total Breaks Record, In Spite of U.S. Consulate, Embassy Closures, Am. EXPAT FIN.* N. J. (Feb. 4, 2021), <https://americanexpatfinance.com/news/item/639-2020-renunciation-number-breaks-record-in-spite-of-u-s-embassies-and-consulates-being-closed>. See also *supra* notes 292-300 and accompanying text.

<sup>608</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 § 352, 110 Stat. 3009, 3009-641. The Reed Amendment appears to be rarely enforced. See Patrick W. Martin, *The 1996 Reed Amendment – The Immigration Law with ‘No Teeth’ and ‘No Bite,’ TAX-EXPATRIATION* (April 8, 2014), <https://tax-expatriation.com/2014/04/08/the-1996-reed-amendment-the-immigration-law-with-no-teeth-and-no-bite/>; Virginia La Torre Jeker, *Expatriation Numbers Skyrocket! Giving up US Citizenship – Will I be Banned from Re-entering the USA?* U.S. TAX TALK (Aug. 12, 2020), <https://us-tax.org/2020/08/12/expatriation-giving-up-us-citizenship-will-i-be-banned-from-re-entering-the-us/>. See also *supra* notes 292-300 and accompanying text.

<sup>609</sup> U.S.A. Patriot Act, Pub. L. No. 107-56, §§ 311-12, 326-27, 115 Stat. 272, 298-306, 317-19 (2001).

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
	Many institutions have interpreted the Patriot Act as prohibiting them from opening or maintaining accounts for persons living outside the United States. As a result, many Americans living overseas are unable to have a U.S. account or are subject to the constant threat of the closure of their account(s). <sup>610</sup>		
2004	American Jobs Creation Act: (i) CFCs: Allowed U.S. shareholders of CFCs a one-time 85% dividend received deduction. It was limited to cash dividends received from CFCs. A taxpayer that wanted to apply for the deduction was required to present a qualified reinvestment plan in the United States, thus overseas taxpayers could not benefit. <sup>611</sup> (ii) Financial Account Reporting: Significantly increased FBAR penalties, including the imposi-		

<sup>610</sup> *Americans Residing Overseas are Denied Bank Accounts*, ASS'N OF A.M. RESIDENT OVERSEAS (2009), <https://aaro.org/38-position-papers-2009/22-position-americans-residing-overseas-are-denied-bank-accounts-2009> [https://perma.cc/NH5T-VPAP]; Doris L. Speer, AARO 2020 Advocacy Survey Results Article 4: *Outing the US Banks*, ASS'N OF A.M. RESIDENT OVERSEAS, 2021, at 3-4, [https://aaro.org/images/pdf/AARO\\_ARTICLE\\_4\\_OUTING\\_THE\\_US\\_BANKS.pdf](https://aaro.org/images/pdf/AARO_ARTICLE_4_OUTING_THE_US_BANKS.pdf); SEAT Survey – Participant Comments, *supra* note 95 at 560-69; Creative Planning International, *Why U.S. Brokerage Accounts of American Expats are Being Closed*, (last updated June 5, 2023), <https://creativeplanning.com/international/insights/why-us-brokerage-accounts-of-american-expats-are-being-closed/#hun>.

<sup>611</sup> American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 422, 118 Stat. 1418, 1514-19. See Redmiles & Wenrich, *supra* note 573 at 134.



Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
	tion of a non-wilful penalty of up to \$10,000 per violation. <sup>612</sup> (iii) Expatriation: Expanded the application of the expatriation tax; eliminated the motive test for application of the tax; increased filing requirements and penalties for failure to file. <sup>613</sup>		
2008	Heroes Earnings Assistance and Relief Tax Act of 2008: Expatriation: Created section 877(a) imposing exit tax upon those who renounce U.S. citizenship and whose assets or income exceed certain values, regardless of motive for renunciation. Referred to as “covered expatriates,” they are treated as if they had liquidated all their assets on the date prior to their expatriation. They are assessed tax based upon the net gain and regardless of any actual sale of the assets. <sup>614</sup>		

<sup>612</sup> American Jobs Creation Act of 2004 § 821, 118 Stat. at 1586. In 2003, FinCEN delegated FBAR enforcement authority to the IRS. This cemented a shift in focus of the FBAR from money laundering to tax enforcement. See Stephan Michael Brown, *One-Size-Fits-Small: A Look at the History of the FBAR Requirement, the Offshore Voluntary Disclosure Programs, and Suggestions for Increased Participation and Future Compliance*, 18 CHAP. L. REV. 243, 248-250 (2014).

<sup>613</sup> American Jobs Creation Act of 2004 § 804, 118 Stat. at 1569-73; See, generally, Marco Blanco, *The American Jobs Creation Act: The New Expatriation Provisions*, TAX NOTES NAT'L 315 (Jan. 25, 2005). See also *supra* notes 292-300, 329-357 and accompanying text.

<sup>614</sup> Heroes Earnings Assistance and Relief Tax Act of 2008, Pub. L. No. 110-245 § 301, 122 Stat. 1624, 1638-47. See Karl L. Fava, *Expatriation and the New Mark-to-Market Rules*, 40 Tax Adviser (July, 2009), <https://www.thetaxadviser.com/issues/2009/jul/expatriationandthenewmark-to-marketrules.html>. See also *supra* notes 292-300, 329-357 and accompanying text.

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
2010	Hiring Incentives to Restore Employment (HIRE) Act: (i) Financial Account Reporting: Adoption of FATCA, imposing additional reporting requirements with respect to foreign financial accounts on both US persons and foreign financial institutions, and imposing steep penalties in event of non-compliance. <sup>615</sup> (ii) PFICs: Established a separate annual filing requirement for each PFIC owned by a U.S. person, even if there is no income to report. <sup>616</sup>	Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi: Offered a legal basis under which the Executive Branch may, in the absence of charges or a trial, order the killing of a U.S. citizen located outside the United States. <sup>617</sup> One year later (2011) the United States killed three U.S. citizens, including the one named in this memorandum and his 16-year-old son, in two drone strikes in Yemen. <sup>618</sup>	
2010	Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates (Public Notice 7068): Introduced a fee of \$450 for issuance of CLN (previously there was no fee). <sup>619</sup>		

<sup>615</sup> Hiring Incentives to Restore Employment (HIRE) Act, Pub. L. No. 111–147, § 501, 124 Stat. 71, 97–106 (2010). See Snyder, *Criminalization*, *supra* note 3 at 2283–87; Snyder, *Unacknowledged Realities*, *supra* note 6 at 253–56.

<sup>616</sup> HIRE Act § 521, 124 Stat. at 112.

<sup>617</sup> David J. Barron, *Memorandum for the Attorney General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi*, U.S. Dep’t of Justice Office of Legal Counsel (July 16, 2010), [https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16\\_-\\_olc\\_aaga\\_barron\\_-\\_al-aulaqi.pdf](https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf).

<sup>618</sup> Glenn Greenwald, *Chilling Legal Memo from Obama DOJ Justifies Assassination of U.S. Citizens*, THE GUARDIAN (Feb. 5, 2013).

<sup>619</sup> Public Notice 7068, *Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates*, 75 Fed. Reg. 36522–35 (June 28, 2010).

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
2013			<i>United States v. Windsor</i> : Court held that the Defense of Marriage Act (DOMA) violated the equal protection component of the 5 <sup>th</sup> Amendment’s due process clause because it was founded in animus: “the avowed purpose and practical effect of [DOMA] are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages.” <sup>620</sup>
2014	Financial Account Reporting: Majority of Intergovernmental Agreements (IGAs) implementing FATCA are signed in 2013–14 (approximately 60 countries) <sup>621</sup> Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates—Visa and Citizenship Services Fee Changes (Public Notice: 8850): Raised fee for issuance of CLN from \$450 to \$2,350. <sup>622</sup>		
2015	Fixing America’s Surface Transportation (FAST) Act: Established the authority for the Secretary of State to revoke a U.S. citizen’s passport upon receipt of certification by the Secretary of the Treasury of the U.S. citizen’s “seriously delinquent tax debt” (\$50,000). <sup>623</sup>		

<sup>620</sup> 570 U.S. 744, 746 (2013). See *supra* notes 263-266 and accompanying text.

<sup>621</sup> Theodore Kleinman, *Which Nations Have IGAs with the United States?* U.S. TAX HELP (accessed June 24, 2023), <https://www.ustaxhelp.com/which-nations-have-igas-with-the-united-states/>.

<sup>622</sup> Public Notice: 8850, *Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates—Visa and Citizenship Services Fee Changes*, 79 Fed. Reg. 51247-54 (2014). See *supra* note 419 regarding the State Department’s announcement of its intention to reduce this fee back to \$450. However, no timeline for implementing the reduction has been proposed.

<sup>623</sup> Fixing America’s Surface Transportation (FAST) Act, Pub. L. No. 114-94, § 32101, 129 Stat. 1312, 1729-33 (2015).

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
	National Taxpayer Advocate Annual Report to Congress: Documents the closure of the last four remaining IRS attaché offices located in U.S. consulates overseas (down from 15 in the 1980s). With these closures overseas Americans lost all access to in-person IRS assistance. <sup>624</sup>		
2015	Consolidated Appropriations Act, 2016: Enactment of the Taxpayer Bill of Rights. Requires the IRS Commissioner to ensure that IRS employees are familiar with and act in accord with taxpayer rights. This includes, among other rights, the right to a fair and just tax system. <sup>625</sup>		
2016	Treasury Decision 9806: PFICs: Finalization of highly complex regulations establishing PFIC ownership and reporting rules. Requires a separate, highly complex, Form 8621 to be filed for each PFIC owned. Establishes low de minimis thresholds for the application of the annual filing requirement (value of \$25,000 or \$5000). Exempts from the annual reporting requirement “dual resident taxpayers” who are treated as residents of another country; U.S. citizens living overseas do not qualify for this exemption. <sup>626</sup>		

624 NAT'L TAXPAYER ADVOC., 2015 ANNUAL REPORT TO CONGRESS, vol. 1, 72, 74-76 (Dec. 2015). See Snyder et al., *Mission Impossible*, *supra* note 94 at 1832 (explaining that domestic taxpayers in the United States have access to 358 Taxpayer Assistance Centers (TACs) and approximately 11,000 Volunteer Income Tax Assistance (VITA) and Tax Counseling for the Elderly (TCE) programs).

625 Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 401, 129 Stat. 2242, 3117 (2015). See *supra* notes 486-498 and accompanying text.

626 T.D. 9806, “Definitions and Reporting Requirements for Shareholders of Passive Foreign Investment Companies,” 81 Fed. Reg. 95459-70 (Dec. 28, 2016). See Rodney W. Read & Daniel W. Hudson, *PFIC: Determining Ownership and Reporting Requirements Under New Regulations*, LEXOLOGY (Jan. 13, 2017), <https://www.lexology.com/library/detail.aspx?g=833d6ea6-ecaa-4210-a9d4-90b1fc008ff>.

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
	IRS: IRS launched online tool to enable taxpayers to access account information. Use of the tool requires a U.S. cell phone number together with a U.S. credit card or U.S. loan number. These requirements bar most overseas Americans from using the tool. <sup>627</sup>		
2017	Tax Cuts & Jobs Act: CFCs: Instituted: (i) a retroactive tax on a CFC's earnings accumulated from 1987 through 2017, and (ii) an ongoing tax on the corporation's earnings from 2018 forward. Taxes are imposed not on the CFC, but on its U.S. citizen shareholder(s), regardless of whether the corporation has made any distribution. <sup>628</sup> The name of the ongoing tax is Global Intangible Low-Taxed Income, or "GILTI." <sup>629</sup> Filing threshold: Suspended the personal exemption for tax years 2018-2025, effectively reducing it to zero. As a result, taxpayers using the status married filing separately (MFS) are re-		

627 IRS, *IRS Launches New Online Tool to Assist Taxpayers with Basic Account Information* (Dec. 1, 2016), <https://www.irs.gov/newsroom/irs-launches-new-online-tool-to-assist-taxpayers-with-basic-account-information>.  
628 Tax Cuts and Jobs Act, Pub. L. No. 115-97, §§ 14103-14202, 131 Stat. 2054, 2195-2216 (2017). See, e.g., John Richardson, *Part 1: Responding to The Section 965 "Transition Tax": "Resistance is Futile" But "Compliance is Impossible"*, CITIZENSHIP SOLUTIONS, Mar. 2, 2018, <http://citizenshipolutions.ca/2018/03/02/part-1-responding-to-the-section-965-transition-tax-resistance-is-futile-but-compliance-is-impossible/>.  
629 Tax Cuts and Jobs Act at § 14201, 131 Stat. at 2208.

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
	quired to file a tax return if their income is as low as \$5 and even when they have no tax liability. <sup>630</sup> This has a disproportionate effect on overseas taxpayers because they file MFS at a higher rate than domestic taxpayers (17.64% as compared to 2.09%). <sup>631</sup>		
2020		Additional Policy and Regulatory Revisions in Response to the Covid-19 Public Health Emergency: 243-page document describing how Federal funding and other Federal government resources will be used to make Covid-19 vaccinations available to all Americans residing in the United States, free of charge. No provision is made for Americans residing outside the United States. <sup>632</sup> This failure of equal protection is underscored in the White House document “National Strategy for the Covid-19 Response and Pandemic Preparedness” (2021), which announced the intention for “all Americans [to be] vaccinated quickly.” <sup>633</sup> At the time this document was pub-	

630 NAT'L TAXPAYER ADVOC., *Legislative Recommendation #10: Adjust the Filing Threshold for Taxpayers Filing as Married Filing Separately and Nonresident Alien Individuals*, 2021 PURPLEBOOK 23-24 (2020), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20\\_PurpleBook\\_02\\_ImproveFiling\\_10.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_PurpleBook_02_ImproveFiling_10.pdf).

631 See Karen Alpert, *TCJA and US Expats*, LET'S FIX THE AUSTRALIA/US TAX TREATY! (Dec. 19, 2018), <https://fixthetaxtreaty.org/2018/12/19/tcja-and-us-expats/>.

632 T.D. 9931, “Additional Policy and Regulatory Revisions in Response to the Covid-19 Public Health Emergency,” 26 CFR Part 54 (Nov. 2, 2020), <https://public-inspection.federalregister.gov/2020-24332.pdf>. See also Kavya Sekar, *Domestic Funding for COVID-19 Vaccines: An Overview*, Congressional Research Service (Mar. 29, 2021), <https://crsreports.congress.gov/product/pdf/IN/IN11556> (explaining how federal funding is being used to make Covid-19 vaccines available in the United States).

633 President Joseph R. Biden Jr., *National Strategy for the Covid-19 Response and Pandemic Preparedness*, at 6 (Jan., 2021), [https://www.nhpc.org/wp-content/uploads/White\\_House\\_National\\_Strategy\\_for\\_the\\_COVID-19\\_Response.pdf](https://www.nhpc.org/wp-content/uploads/White_House_National_Strategy_for_the_COVID-19_Response.pdf).

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
		lished, U.S. Consulates around the world had already posted on their websites: “The United States government does not plan to provide Covid-19 vaccinations to private U.S. citizens overseas. U.S. citizens traveling or residing abroad should follow host country developments and guidelines for Covid-19 vaccination.” <sup>634</sup>	
2020		uspension by U.S. Department of State of most immigrant and U.S. citizen services by consulates around the world. As a result, those seeking to renounce U.S. citizenship are unable to do so. <sup>635</sup>	
2021	American Rescue Plan Act of 2021 <sup>636</sup> and Revenue Procedure 2021-23. <sup>637</sup> Limits the availability of the increased Child Tax Credit payments to parents who maintain a home		

<sup>634</sup> See, e.g., United States Embassy & Consulate in Spain and Andorra, *COVID-19 Information* (May 23, 2022), <https://es.usembassy.gov/covid-19-information/>.  
<sup>635</sup> See, e.g., Buztel, *Suspension of Operations of Certain U.S. Consulates in Response to the Coronavirus (COVID-19) Outbreak* (updated Mar. 17, 2020), <https://www.buztel.com/resources-alerts-suspension-of-operations-of-certain-us-consulates-in-response-to-the-coronavirus-covid-19-outbreak.html>; U.S. Embassy & Consulates in Brazil, *Cancellation of Routine Visa Interviews and U.S. Citizen Services Starting March 17, 2020*, (Mar. 17, 2020), <https://br.usembassy.gov/cancellation-of-routine-visa-interviews-and-u-s-citizen-services-starting-march-17-2020/>. Renunciations can only be performed in-person; U.S. Dep’t of State Bureau of Consular Affairs, *Renunciation of U.S. Nationality Abroad*, accessed June 3, 2022, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/renunciation-us-nationality-abroad.html>. See also Helen Burggraf, *Now France-Based ‘Accidentals’ Sue State Dept. Over Still-Shuttered Renunciation Services Around the Globe*, AM. EXPAT FIN. NEWS J. (Nov. 9, 2021), <https://americanexpatfinance.com/news/item/863-france-based-accidentals-sue-state-dept-over-still-shuttered-renunciation-services>; Ed Pilkington, *Americans Seeking to Renounce Their Citizenship Are Stuck with It for Now*, THE GUARDIAN, Dec. 31, 2021.  
<sup>636</sup> American Rescue Plan Act of 2021, Public Law No: 117-2, § 9611, 135 Stat. 4, 144-152 (2021).  
<sup>637</sup> Rev. Proc. 2021-23 Sec. 3 (2021).

Year	TAXATION	CITIZENSHIP	EQUAL PROTECTION / DUE PROCESS
	in the United States for more than half of the taxable year. <sup>638</sup>		
2022		Some U.S. consulates resume renunciation services, but with wait times as long as 18 months. <sup>639</sup> One estimate suggests there is a backlog of 30,000 Americans waiting to renounce. <sup>640</sup>	
2023			<i>Students for Fair Admissions v. Harvard</i> The Court held that race-based admissions policies at two U.S. universities violated the Equal Protection Clause of the Fourteenth Amendment. In explaining that the policies were inherently suspect and subject to strict scrutiny, the majority as well as two concurring opinions made clear that race and nationality are inextricably linked. “Antipathy” towards such distinctions, the Court explained, is “deeply ‘rooted in our Nation’s constitutional and demographic history.’” <sup>641</sup>

<sup>638</sup> See Helen Burggraf, *Most Expat Americans Ineligible for Expanded Child Tax Credit Amounts*: IRS, AM. EXPATFIN, NEWS J. (May 19, 2021).

<sup>639</sup> See, e.g., U.S. Embassy & Consulates in France, *Citizenship Services: Renounce U.S. Citizenship*, accessed June 9, 2022, <https://fr.usembassy.gov/u-s-citizen-services/citizenship-services/> (stating “Please note that the current wait time for a renunciation interview is 12-18 months”).

<sup>640</sup> Pilkington, *supra* note 635. See also Helen Burggraf, *Published Report Stating That Up to 30,000 U.S. Expats Are ‘Unable’ to Renounce Their Citizenship* *Goes Globally Viral*, AM. EXPATFIN, NEWS J. (JAN. 3, 2022).

<sup>641</sup> No. 20–11199 (U.S. 2023) (slip op.). See *supra* notes 149–154 and accompanying text.