

# DOES THE FEDERAL BUDGET TRUMP CONSTITUTIONAL RIGHTS?

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## ABSTRACT

*Even though most Americans living outside the United States do not owe U.S. federal income tax, the U.S. nationality-based income tax system nevertheless places considerable burdens on them. In doing so, the system violates Fourteenth Amendment equal protection as well as other constitutional and human rights.*

*The purpose of the system is not to raise revenue. Instead, its purpose is to punish and scapegoat American nationals living outside the United States, for no reason other than the fact that they live outside the United States. This is evidenced by the statements and actions of policymakers as well as by Internal Revenue Service (“IRS”) data and the approach the IRS takes with respect to international taxpayers. The amounts collected by the system are insignificant, as compared both to income tax revenue from all individuals and to government spending.*

*Congress has abdicated to two unelected bodies—the Congressional Budget Office (“CBO”) and the Joint Committee on Taxation (“JCT”)—considerable power to determine the outcome of policy initiatives. If these bodies do not assign a positive budget score, the initiative is likely to die.*

*This has devastating consequences for reform of the U.S. nationality-based tax system. Reform is desperately needed. But, as long as a positive budget score is required, true reform—reform that will end*

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*the system's violations of constitutional and other fundamental rights for all Americans—is impossible.*

*Instead of a budget score, there are many other factors that should be considered—factors that will actually make a difference for Americans living both outside and inside the United States. Will the policy initiative: (i) end the discrimination on its face, in the text of the relevant statutes and regulations; (ii) allow overseas Americans to live normal lives, freed of the limitations that the U.S. federal tax system places on no one except them; (iii) allow overseas Americans to open and maintain bank accounts in the countries where they live and under the same conditions as the other residents of the countries where they live; (iv) relieve overseas Americans of the inordinate stress, expense, and danger of complying with U.S. federal taxation; and (v) enable overseas Americans to remain U.S. citizens?*

*Ultimately, the most important question is: Will the proposed legislation accord to all Americans, regardless of where they live today, individual self-determination?*

*Should the federal budget trump constitutional and human rights? Should constitutional and human rights be protected only if and to the extent the initiative receives a positive budget score? When constitutional and human rights are at stake—such as equal protection before the law—should a budget score matter at all?*

*Surely the response to each of these questions must be no. Otherwise, Congress will have abdicated to the CBO and JCT both its power and its duty to protect constitutional and other fundamental rights—when neither the CBO nor the JCT has the mandate, expertise, or processes to do so. It would prioritize the federal budget over constitutional and other fundamental rights. It would deny the protection of fundamental rights if doing so would negatively impact the federal budget.*

*This article examines one example of how Fourteenth Amendment equal protection rights (among other rights) are sacrificed on the altar of the budget score. Which—and whose—rights will be sacrificed next?*

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I. INTRODUCTION

For decades overseas Americans have appealed to Congress to address the problems of the U.S. nationality-based tax system.<sup>1</sup> But their

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1. See, e.g., Laura Snyder, *The Unacknowledged Realities of Extraterritorial Taxation*, 47 S. ILL. U. L.J. 243, 275-85 (2023) [hereinafter *Unacknowledged Realities*].

appeals are largely disregarded.<sup>2</sup> In meetings on Capitol Hill, congressional staffers explain that any changes to the system require a positive budget score or, at least, they must be revenue neutral.<sup>3</sup>

The Congressional Budget Office (“CBO”) scores a wide range of policy proposals.<sup>4</sup> Senator Chuck Grassley (R-IA) has described the CBO as “God around here . . . [P]olicy lives and dies by CBO’s word.”<sup>5</sup> A survey of congressional staffers found that CBO reports figure “prominently in their minds when drafting legislation.”<sup>6</sup> Staffers also explained that “they would repeatedly redraft and resubmit” a bill until the CBO no longer reported that it would have a negative budget score.<sup>7</sup>

The Joint Committee on Taxation (“JCT”) serves a role parallel to the CBO’s, but with a focus on scoring policy proposals related to taxation (proposals that “affect major revenue sources”).<sup>8</sup> A former director of the CBO explained that regardless of whether a policy proposal was scored by the CBO or JCT, “[I]f a policy initiative cannot be shoehorned into a preagreed numerical limit, it is likely to die.”<sup>9</sup>

The CBO and JCT have considerable power to influence legislation based upon a bill’s budgetary impact. Appreciating that power and seeking a counterweight to it,<sup>10</sup> more than one commentator has

2. *Id.* at 296.

3. *See, e.g., ACA Voice Q4 2022*, AM. CITIZENS ABROAD (Jan. 20, 2023), <https://mailchi.mp/americansabroad/aca-voice-q4-2022-update> [<https://perma.cc/R2GG-8CZJ>] (asserting that the U.S. nationality-based tax system cannot be changed if it would result in the loss of revenue for the U.S. Treasury: “Congress and the tax writing committees will be highly focused on the actual cost . . . Pretending [this is] not important and can be glossed over is simply putting your head in the sand”); *see also* Rebecca Lammers, *Taxation Task Force Submission for Oversight Hearing Tomorrow*, DEMOCRATS ABROAD (Feb. 7, 2022), [https://www.democratsabroad.org/taxation\\_task\\_force\\_oversight\\_hearing\\_submission\\_20220207](https://www.democratsabroad.org/taxation_task_force_oversight_hearing_submission_20220207) [<https://perma.cc/XDD4-Q8TD>].

4. *See Introduction to CBO*, CONG. BUDGET OFF., <https://www.cbo.gov/about/overview> [<https://perma.cc/Y7C3-F6F5>] (last visited Feb. 21, 2024).

5. Andrew Prokop, *The Congressional Budget Office, Explained*, VOX (June 26, 2017, 4:34 PM), <https://www.vox.com/policy-and-politics/2017/3/13/14860856/congressional-budget-office-cbo-explained> [<https://perma.cc/R5P6-4QB3>] (quoting Senator Grassley).

6. Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 731, 763-64 (2014); *see also* Joanne Sweeny, *Breaking Through Gridlock to Protect Human Rights: The Case for a Congressional Human Rights Committee*, 54 SAN DIEGO L. REV. 21, 71 (2017).

7. Bressman & Gluck, *supra* note 6, at 764; Sweeny, *supra* note 6, at 71.

8. Rudolph G. Penner, *The Dynamics of Scoring: A Congressional Tale*, MILKEN INST. REV., 2003, at 26, 27.

9. *Id.* at 28.

10. Andre M. Perry & Darrick Hamilton, *Just as We Score Policies’ Budget Impact, We Should Score For Racial Equity as Well*, BROOKINGS (Jan. 25, 2021), <https://www.brookings.edu/articles/just-as-we-score-policies-budget-impact-we-should-score-for-racial-equity-as-well> [<https://perma.cc/JVR3-7TUF>]; Sweeny, *supra* note 6, at 70-72.

recommended that Congress also develop the means to evaluate a bill based upon its impact on constitutional and other fundamental rights.<sup>11</sup>

For example, in 2017 Sweeny proposed that the United States look to the United Kingdom’s Joint Committee on Human Rights as a prototype for the creation of a congressional human rights committee that would “provide momentum for Congress, courts, the executive, and the public to ensure that Congress can prevent or quickly correct American human rights abuses.”<sup>12</sup>

Interestingly, for two Congresses (the 116th<sup>13</sup> and 117th<sup>14</sup>), the House Oversight and Accountability Committee had a Subcommittee on Civil Rights and Civil Liberties.<sup>15</sup> However, the subcommittee was disbanded in January 2023 at the beginning of the 118th Congress.<sup>16</sup> At any rate, given it was a House subcommittee, not a standalone joint committee, it did not correspond to Sweeny’s proposal for a committee that would have the power to “[break through] congressional gridlock.”<sup>17</sup>

In 2021, Perry and Hamilton proposed the development of a scoring system designed to “hold government accountable” for potential policy impacts on racial equity.<sup>18</sup> “Just as we score policies’ impact on the budget, we need to account for their potential impacts on racial equity,” they wrote.<sup>19</sup> “[W]e must,” they continued, “take on an anti-racist orientation to policymaking and implementation—a proactive weeding-out of racism.”<sup>20</sup> (As discussed below, race and nationality are inextricably linked.)<sup>21</sup>

Unfortunately, nothing along the lines of these proposals has come to fruition. Today, there exist in Congress two power centers—the CBO and JCT—to whom members of Congress and their staff defer on policy

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11. Sweeny, *supra* note 6, at 64.

12. *Id.* at 22.

13. *Civil Rights and Civil Liberties*, COMM. ON OVERSIGHT & ACCOUNTABILITY DEMOCRATS, <https://oversightdemocrats.house.gov/subcommittees/civil-rights-civil-liberties-116th-congress> [<https://perma.cc/7SYH-D2AU>] (last visited Feb. 21, 2024) [hereinafter *116th Congress*].

14. *Civil Rights and Civil Liberties*, COMM. ON OVERSIGHT & ACCOUNTABILITY DEMOCRATS, <https://oversightdemocrats.house.gov/subcommittees/civil-rights-and-civil-liberties-117th-congress> [<https://perma.cc/L2JT-U2R3>] (last visited Feb. 21, 2024) [hereinafter *117th Congress*].

15. See *116th Congress*, *supra* note 13; *117th Congress*, *supra* note 14.

16. Cheyenne M. Daniels, *Republican House Oversight Committee Disbands Subcommittee on Civil Rights and Civil Liberties*, HILL (Jan. 31, 2023, 1:59 PM), <https://thehill.com/homenews/house/3837893-republican-house-oversight-committee-disbands-subcommittee-on-civil-rights-and-civil-liberties> [<https://perma.cc/V3QW-L9MK>].

17. Sweeny, *supra* note 6, at 21-22.

18. Perry & Hamilton, *supra* note 10.

19. *Id.*

20. *Id.*

21. See *infra* notes 36-47 and accompanying text.

proposals.<sup>22</sup> These power centers have mandates to consider economic and budgetary impacts.<sup>23</sup> Neither has a mandate to consider other types of policy impacts—and notably not those relating to constitutional and other fundamental rights.<sup>24</sup> Nor does either have the organizational expertise<sup>25</sup> or the processes in place to do so.<sup>26</sup> This creates the situation of the tail wagging the dog. That is, given this situation, it is entirely predictable that when the CBO and/or JCT analyze a policy that raises not only economic and budgetary issues but also issues relating to constitutional and other fundamental rights, their reports will focus on the policy's economic and budgetary issues while minimizing if not entirely ignoring the rights issues.<sup>27</sup> That is, after all, their respective mandates. At

22. See *supra* notes 4-9 and accompanying text.

23. See, e.g., *Cost Estimates*, CONG. BUDGET OFF., <https://www.cbo.gov/cost-estimates> [<https://perma.cc/QY8P-LZAJ>] (last visited Feb. 21, 2024) (“CBO is required to produce a cost estimate for nearly every bill approved by a full committee of the House of Representatives or the Senate”); *Statutory Basis*, JOINT COMM. TAX’N, <https://www.jct.gov/about-us/statutory-basis> [<https://perma.cc/7N57-FXKH>] (last visited Feb. 21, 2024) (explaining that the “statutorily prescribed duties” of the JCT include: (i) investigating “the operation and effects of internal revenue taxes and the administration of such taxes”; (ii) investigating “measures and methods for the simplification of such taxes”; and (iii) making reports and recommendations on the results of such investigations and studies).

24. See *Cost Estimates*, *supra* note 23; *Statutory Basis*, *supra* note 23.

25. See, e.g., *Organization and Staffing*, CONG. BUDGET OFF., <https://www.cbo.gov/about/organization-and-staffing> [<https://perma.cc/EZT6-2SBJ>] (last visited Feb. 21, 2024) (explaining that of the CBO’s nearly 275 staff members, most are “economists or public policy analysts”). The nine divisions of the CBO include: (i) budget analysis; (ii) financial analysis; (iii) health analysis; (iv) labor and income analysis; (v) macroeconomic analysis; (vi) management, business, and information services; (vii) microeconomic studies; (viii) national security; and (ix) tax analysis. *Current Staff*, JOINT COMM. TAX’N, <https://www.jct.gov/about-us/current-staff> [<https://perma.cc/L9J2-LB6W>] (last visited Feb. 21, 2024) (listing staff titles as “Economist,” “Senior Economist,” “Refund Counsel,” “Senior Refund Counsel,” “Legislation Counsel,” “Senior Legislation Counsel,” “Economic Research Analyst,” “Economic Research Assistant,” and “Information Technology Specialist”).

26. See, e.g., *Processes*, CONG. BUDGET OFF., <https://www.cbo.gov/about/processes#studies> [<https://perma.cc/29GG-WPHZ>] (last visited Feb. 21, 2024) (describing the CBO’s processes, which make no mention of consideration of constitutional or other fundamental rights, nor of any other non-economic or non-budgetary considerations); *Role of JCT*, JOINT COMM. TAX’N, <https://www.jct.gov/operations/role-of-jct> [<https://perma.cc/9QS3-NNH9>] (last visited Feb. 21, 2024) (describing the JCT’s role in the legislative process, which makes no mention of consideration of constitutional or other fundamental rights, nor of any other non-economic or non-tax-related considerations).

27. A direct case in point is JOINT COMM. ON TAX’N STAFF, JCX-35R-23, BACKGROUND AND ANALYSIS OF THE TAXATION OF INCOME EARNED BY MULTINATIONAL ENTERPRISES (2023), <https://www.jct.gov/publications/2023/jcx-35r-23> [<https://perma.cc/2Y66-XHUU>]. This 92-page JCT commentary was prepared in connection with a House Ways and Means Committee public hearing (Subcommittee on Taxation) titled “Biden’s Global Tax Surrender Harms American Workers and Our Economy.” The document makes no mention of how the U.S. nationality-based tax system harms Americans living overseas. See *Re: “Biden’s Global Tax Surrender Harms American Workers and Our Economy,” STOP EXTRATERRITORIAL AM. TAX’N* (July 21, 2023), <http://seatnow.org/wp-content/uploads/2023/07/Revised-SEAT-Submission-Hearing-19-July-2023->

the same time, there exists no other congressional office, committee, or process with influence remotely comparable to that of the CBO's or JCT's to act as a counterweight and deliver its own report focused on rights. The result, necessarily, is a Congress that refuses to remedy violations of constitutional and other fundamental rights because a bill seeking to do so would receive a negative budget score from the CBO and/or JCT.

This article: (II) summarizes how the U.S. nationality-based tax system violates the Fourteenth Amendment Equal Protection Clause as well as other fundamental rights; (III) explains that the purpose of the system is not and has never been to raise revenue; (IV) explains why conditioning reform of the system on a positive budget score (or revenue neutrality) denies the true nature of the system and creates an irresolvable paradox that perpetuates the system's violation of multiple constitutional and human rights; (V) describes some of the factors that *should* be considered in evaluating relevant policy initiatives; and (VI) concludes by answering these questions: Should the federal budget trump constitutional and human rights? Should constitutional rights be protected only if and to the extent it has a positive budgetary effect? When constitutional and human rights are at stake, should a budget score matter at all?

## II. MULTIPLE RIGHTS VIOLATIONS

The United States has three tax systems, which this article will refer to as Systems One, Two, and Three. System One is a domestic system for U.S. residents, regardless of nationality. The remaining two are for persons who do not live in the United States. They draw distinctions based on alienage and nationality. System Two is based upon source; it applies to nonresident non-American nationals (aliens). System Three is extraterritorial; it applies to nonresident American nationals.<sup>28</sup> Systems One and Two are comparable to the tax systems of nearly every other country in the world. System Three is unique; no other country in the world taxes its nonresident nationals in the same manner as the United States.<sup>29</sup>

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Bidens-Global-Tax-Surrender-Harms-American-Workers-and-Our-Economy.pdf  
[<https://perma.cc/B84Q-C8VK>].

28. See Laura Snyder et al., *Mission Impossible: Extraterritorial Taxation and the IRS*, 170 TAX NOTES FED. 1827, 1827 (2021) [hereinafter *Mission Impossible*].

29. 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. For more information, see *Unacknowledged Realities*, *supra* note 1, at 246 n.11.

The 1924 U.S. Supreme Court decision *Cook v. Tait*<sup>30</sup> is considered a seminal case establishing the power of the federal government to tax American nationals living outside the United States based on their worldwide income.<sup>31</sup> Nearly all who comment on this topic appear to perceive *Cook* as the definitive and unquestionable authority on the constitutionality of the current U.S. nationality-based tax system.<sup>32</sup> However, this reflexive deference to *Cook* ignores dramatic changes that have occurred during the past century: changes regarding equal protection and citizenship,<sup>33</sup> human rights,<sup>34</sup> and the nature of the U.S. tax system.<sup>35</sup> For simplicity, the discussion below will focus on just one aspect of the changes regarding equal protection—that of distinctions based upon nationality/country of origin.

For decades—all after *Cook*—the U.S. Supreme Court has held that distinctions based on alienage or nationality/country of origin are, like distinctions based on race, inherently suspect and subject to strict

30. 265 U.S. 47 (1924).

31. See *Unacknowledged Realities*, *supra* note 1, at 256-57.

32. See, e.g., Mindy Herzfeld, Moore, *Part 2: How to Tax Foreign Earnings*, 180 TAX NOTES FED. 1975, 1975-76 (2023) (“[Under *Cook*], it’s Congress’s right and sovereign authority to tax U.S. persons on their income, wherever earned . . .”); Bernard Schneider, *The End of Taxation Without End: A New Tax Regime for U.S. Expatriates*, 32 VA. TAX REV. 1, 5 (2012) (“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.”).

33. Laura Snyder, *Extraterritorial Taxation #6: No Compelling Governmental Interest* 13-14 (Stop Extraterritorial Am. Tax’n, Working Paper No. 6, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4465450](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4465450) [<https://perma.cc/63ZN-ES3B>] [hereinafter *Extraterritorial Taxation #6*]; Laura Snyder, *Extraterritorial Taxation #7: Inherently Suspect* 2-4 (Stop Extraterritorial Am. Tax’n, Working Paper No. 7, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4465558](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4465558) [<https://perma.cc/J43X-CNKR>] [hereinafter *Extraterritorial Taxation #7*]; Laura Snyder, *Extraterritorial Taxation #8: More Violations of Equal Protection* 2-4 (Stop Extraterritorial Am. Tax’n, Working Paper No. 8, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4465589](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4465589) [<https://perma.cc/6J8C-GT5E>] [hereinafter *Extraterritorial Taxation #8*]; Laura Snyder, *Extraterritorial Taxation #9: Forcible Destruction of Citizenship* 4-6 (Stop Extraterritorial Am. Tax’n, Working Paper No. 9, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4465596](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4465596) [<https://perma.cc/4U9M-GCLM>] [hereinafter *Extraterritorial Taxation #9*]; see also *Unacknowledged Realities*, *supra* note 1, at 256-58, 261-62; Laura Snyder, *The Myths and Truths of Extraterritorial Taxation*, 32 CORNELL J.L. & PUB. POL’Y 185, 189-90, 193-94, 196-98 (2022) [hereinafter *Myths & Truths*].

34. See *Myths & Truths*, *supra* note 33, at 248-63. See generally Laura Snyder, *Extraterritorial Taxation #10: Violating Human Rights* (Stop Extraterritorial Am. Tax’n, Working Paper No. 10, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4465610](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4465610) [<https://perma.cc/7XQ6-8KPR>] [hereinafter *Extraterritorial Taxation #10*] (explaining the dramatic changes that have taken place with respect to fundamental human rights).

35. *Unacknowledged Realities*, *supra* note 1, at 256-61; Laura Snyder, *Extraterritorial Taxation #16: Cook Is Ripe for Revisiting* 4-35 (Stop Extraterritorial Am. Tax’n, Working Paper No. 16, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4466275](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4466275) [<https://perma.cc/6SFK-F7HZ>] [hereinafter *Extraterritorial Taxation #16*]; see also *Myths & Truths*, *supra* note 33, at 270-303.



scrutiny.<sup>36</sup> This—the highest level of equal protection scrutiny under the Fourteenth Amendment—dictates that such laws are valid only if they are necessary and narrowly tailored to serve a compelling governmental interest.<sup>37</sup> “This level of scrutiny is so high that once a court decides it is applicable to the law in question, it is highly likely the law will be found unconstitutional. The burden is on the government to demonstrate a compelling governmental interest.”<sup>38</sup>

In *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>39</sup> the Court explained the reason for subjecting to strict scrutiny distinctions based upon nationality, alienage, or race:

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>40</sup>

In sum, for the *Cleburne* Court, there is hardly ever a legitimate reason for a legislature to draw distinctions among persons based on nationality/country of origin, alienage, or race. When a legislature does draw such distinctions, it is far more likely than not that it does so because of “prejudice and antipathy,” and because of a view that those of one (or more) nationality(ies) are less worthy and less deserving as compared to those of another. The Court makes clear that, under the Fourteenth Amendment, there are no circumstances under which it is acceptable for legislation (or regulation) to reflect such an attitude.<sup>41</sup>

In 2023 the Court again applied this approach. In *Students for Fair Admissions, Inc. v. Harvard College*,<sup>42</sup> the Court held that race-based admissions policies at two U.S. universities violated the Equal Protection Clause of the Fourteenth Amendment.<sup>43</sup> In explaining that the policies were inherently suspect<sup>44</sup> and subject to strict scrutiny,<sup>45</sup> the

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36. See *Extraterritorial Taxation #7*, *supra* note 33, at 3-4; see also *Myths & Truths*, *supra* note 33, at 205.

37. *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

38. *Extraterritorial Taxation #7*, *supra* note 33, at 2; see also *Myths & Truths*, *supra* note 33, at 209.

39. 473 U.S. 432 (1985).

40. *Id.* at 440.

41. See *id.* at 446-47.

42. No. 20-1199 (U.S. June 29, 2023).

43. *Id.* at 39.

44. *Id.* at 18.

majority as well as two concurring opinions make clear that race and nationality are inextricably linked.<sup>46</sup> “[A]ntipathy” toward distinctions based on race or nationality, the Court further explains, is “deeply ‘rooted in our Nation’s constitutional and demographic history.’”<sup>47</sup>

Given the Court’s teaching that laws drawing distinctions based on nationality or race reflect “prejudice and antipathy”<sup>48</sup> on the part of the legislature and “a view that those in the burdened class are not as worthy or deserving as others,”<sup>49</sup> it should not come as a surprise that the U.S. nationality-based tax system (System Three) burdens American nationals living outside the United States in manners that neither U.S. residents (under System One) nor non-American nationals living outside the United States (under System Two) are burdened. The multitude of ways this occurs is catalogued in the Appendix to this article.<sup>50</sup>

As explained in detail elsewhere, there are three additional ways that the U.S. nationality-based tax system violates the Fourteenth Amendment: (i) by causing the forcible destruction of citizenship;<sup>51</sup> (ii) by creating a second class of citizenship;<sup>52</sup> and (iii) because the system was conceived and is maintained in animus.<sup>53</sup>

45. *Id.* at 15.

46. The majority opinion recalls that “hostility to . . . race and nationality . . . in the eye of the law is not justified.” *Id.* at 11 (quoting *Yick Wo v. Hopkins*, 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,” while *Truax v. Raich* applied the Clause to “a native of Austria,” and *Strauder v. West Virginia*, in dictum, applied it to “Celtic Irishmen.” *Id.* at 11 (internal citations omitted). The concurring opinion of Justice Thomas refers to “the Mexican or Chinese race.” *Id.* at 15 (Thomas, J., concurring) (quoting *Slaughter-House Cases*, 83 U.S. 36, 72 (1872)). Justice Thomas later mentions Japanese Americans who were interned in relocation camps following the bombing of Pearl Harbor, Holocaust survivors, and Irish immigrants. *Id.* 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, and Filipino. *Id.* 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. *Id.* at 7, 13 (Gorsuch, J., concurring).

47. *Id.* at 18 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978)); see also *id.* at 11, 15 (where the majority opinion equates race and nationality). For a more detailed discussion of the significance of *Students* for the U.S. nationality-based tax system, see generally Laura Snyder, *What a Decision on Affirmative Action Teaches About Taxation*, 51 RUTGERS L. REC. 102 (2023).

48. *Supra* note 40 and accompanying text (quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985)).

49. *Id.* (quoting *Cleburne*, 473 U.S. at 440).

50. See *infra* notes 350-77 and accompanying text.

51. *Extraterritorial Taxation #9*, *supra* note 33, at 10; see also *Myths & Truths*, *supra* note 33, at 198-203.

52. *Extraterritorial Taxation #8*, *supra* note 33, at 2-7; see also *Myths & Truths*, *supra* note 33, at 219-23.

53. *Extraterritorial Taxation #8*, *supra* note 33, at 7-14; see also *Myths & Truths*, *supra* note 33, at 223-26.

Further, and as also explained in detail elsewhere, the system violates multiple human rights established in multiple human rights instruments that the United States has signed and ratified. These include (i) the right to leave one's country;<sup>54</sup> (ii) the right to work: free choice of work and freedom from discrimination in work;<sup>55</sup> (iii) equality in dignity and rights;<sup>56</sup> (iv) freedom from the arbitrary deprivation of nationality and the right to return to one's country;<sup>57</sup> and (v) the right of other countries of self-determination.<sup>58</sup>

### III. THE SYSTEM IS NOT ABOUT REVENUE

Many (perhaps most) people reflexively believe that the purpose of taxation—of most if not all taxation—is to raise revenue. This belief is demonstrated in statements such as this: “Logically, any imposition of any tax is rationally related to raising revenue,” which is “a singular and uncontroversially legitimate end.”<sup>59</sup>

The reality, however, is quite different. This Part III explains that: (A) generally, the purpose of any given federal tax is often—if not always—something other than revenue; (B) specifically, the purpose of nationality-based taxation is to punish and scapegoat; (C) the fact that nationality-based taxation has nothing to do with revenue is demonstrated by Internal Revenue Service (“IRS”) data; and (D) the IRS, through both its actions and inactions, confirms that the purpose of nationality-based taxation is not to raise revenue.

#### *A. Taxation Not About Revenue*

It is axiomatic that any given tax will charge (usually) money in some amount (however small or large) from some percentage of a populace (however small or large). Merriam-Webster defines “tax” as “a charge usually of money imposed by authority on persons or property

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54. *Extraterritorial Taxation #10*, *supra* note 34, at 3-6; *see also Myths & Truths*, *supra* note 33, at 249-52.

55. *Extraterritorial Taxation #10*, *supra* note 34, at 6-7; *see also Myths & Truths*, *supra* note 33, at 252-54.

56. *Extraterritorial Taxation #10*, *supra* note 34, at 7-9; *see also Myths & Truths*, *supra* note 33, at 254-56.

57. *Extraterritorial Taxation #10*, *supra* note 34, at 9-12; *see also Myths & Truths*, *supra* note 33, at 257-61.

58. *Extraterritorial Taxation #10*, *supra* note 34, at 13-14; *see also Myths & Truths*, *supra* note 33, at 261-63.

59. Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1657 (2016).

for public purposes.”<sup>60</sup> Charging (usually) money is the necessary and fundamental operating feature of a tax. Inversely, any legislation whose fundamental operating feature is something other than charging (usually) money from a given populace is not a tax.

This axiom does not necessarily mean, however, that for any given tax the legislative purpose is to raise revenue. To the contrary, (1) an important body of scholarship referred to as Modern Monetary Theory (“MMT”) teaches that while federal taxation does serve one or more purposes, it is never to raise revenue. In addition, (2) even if the teachings of MMT are rejected, Congress often enacts federal taxation with objectives other than raising revenue. The amounts (again, however small or large) that are axiomatically charged are incidental if not entirely irrelevant to the tax’s legislative purpose. Sometimes Congress goes even further: (3) it adopts tax-based provisions that necessarily result in the reduction of tax revenue.

### 1. Modern Monetary Theory

MMT teaches that when Congress decides to spend money, it does not first have to check its bank account to make sure it has the necessary funds, like any household (or eurozone country) would have to do.<sup>61</sup> Instead, the United States—along with many other countries—is in the privileged position of being a sovereign currency issuer.<sup>62</sup> This means that the country exercises exclusive legal control over its currency. (In contrast, for example, to the eurozone, which has divorced its currency from the nation-state).<sup>63</sup> The U.S. Constitution assigns to the U.S.

60. *Tax*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/tax> [https://perma.cc/HE7Q-4YKJ] (last visited Feb. 21, 2024).

61. See Melanie Lockert, *What Is Modern Monetary Theory? Understanding the Alternative Economic Theory That’s Becoming More Mainstream*, INSIDER (July 22, 2022, 4:05 PM), <https://www.businessinsider.com/personal-finance/modern-monetary-theory> [https://perma.cc/X7HJ-7XHS]; *Modern Monetary Theory, and Why You’re About to Hear a Lot More About It: Part I – The Government*, QUAY GLOB. INVS. (Apr. 2019), <https://www.quaygi.com/sites/default/files/2019-12/Quay-Investment-Perpectives-44-Modern-Monetary-Theory-part-1-Apr-19.pdf> [https://perma.cc/54NX-MH9U]; see also Daniel José Camacho, *Thinking Morally About The Economy with Stephanie Kelton*, CHRISTIAN CENTURY (Jan. 4, 2018), <https://www.christiancentury.org/blog-post/practicing-liberation/deficit-doesnt-matter> [https://perma.cc/2CQG-GRQT]; STEPHANIE KELTON, *THE DEFICIT MYTH: MODERN MONETARY THEORY AND THE BIRTH OF THE PEOPLE’S ECONOMY* 19 (2020).

62. For an explanation of sovereign currency, see J.D. Alt, *Bank Dollars & Sovereign Spending*, NEW ECON. PERSPS. (Sept. 3, 2014), <https://neweconomicperspectives.org/2014/09/bank-dollars-sovereign-spending.html> [https://perma.cc/74R8-F7U4]; see also KELTON, *supra* note 61, at 17-20.

63. See Christophe Strassel, *The Euro Crisis: A Crisis of European Sovereignty*, 151 HÉRODOTE 12, 16-19 (2013); see also Dirk Ehnts, *Modern Monetary Theory: The Right Compass for Decision-Making*, 57 INTERECONOMICS 128, 129-31 (2022),

Congress the sole authority to create U.S. currency.<sup>64</sup> Stated in the simplest of terms, when Congress authorizes spending for any purpose it writes a check to the recipient of the funds. It is then the job of the Federal Reserve, acting under the authority of Congress, to create the money—typically by computer keystroke—needed to credit the recipient’s account.<sup>65</sup> (Alternatively, Congress instructs the Federal Reserve to credit the recipient’s account directly, skipping the step of issuing a paper check.)

Assuming this money the Federal Reserve creates is deposited into an account at a commercial bank, then the effect is to increase aggregate bank reserves. (Or, put another way, its effect is to increase the amount of currency in circulation.) Inversely, when an amount of money is paid to the U.S. government, most notably in the form of taxes, then the effect is the opposite. It is not just the taxpayer who loses that money, but the entire banking system because aggregate bank reserves also decline. In essence, when tax is paid to the U.S. government, the money is destroyed (the amount of currency in circulation is decreased).<sup>66</sup>

Given that the money collected by the United States in the form of taxation is, effectively, destroyed, then it necessarily follows that the purpose of any U.S. federal income tax, including that imposed on American nationals living overseas, is not to collect revenue.<sup>67</sup>

This does not mean, however, that federal taxation serves no purpose. On the contrary, as explained in a 1946 paper by Beardsley Ruml, a chairman of the Federal Reserve Bank of New York, federal taxation can serve these important purposes:

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<https://www.intereconomics.eu/contents/year/2022/number/2/article/modern-monetary-theory-the-right-compass-for-decision-making.html> [<https://perma.cc/Z58G-LNWJ>] (explaining how governments in the eurozone are financed).

64. U.S. CONST. art. I, § 8, cl. 5 (“[The Congress shall have Power . . . ] To coin Money . . .”).

65. See Stephanie Bell, *Do Taxes and Bonds Finance Government Spending?*, 34 J. ECON. ISSUES 603, 604-05 (2000); see also Ehnts, *supra* note 63, at 129-30.

66. For a succinct and easy-to-understand explanation of this process, see Bell, *supra* note 65, at 605; see also 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> [<https://perma.cc/PQ2S-TN97>]; Richard Murphy, *Modern Monetary Theory: An Explanation*, FUNDING THE FUTURE 2, 6-7 (Apr. 2023), <https://www.taxresearch.org.uk/Blog/wp-content/uploads/2023/04/Modern-monetary-theory-v2a.pdf> [<https://perma.cc/M82E-XUSG>]; TED, *Stephanie Kelton: The Big Myth of Government Deficits | TED*, YOUTUBE (Oct. 13, 2021), <https://www.youtube.com/watch?v=FATQ0Yf0Fhc> [<https://perma.cc/7W48-BQNA>].

67. This is how Stephanie Kelton demonstrates that spending by the U.S. federal government cannot be financed by tax revenue, because tax revenue is money that is destroyed as soon as it is paid. Instead, federal spending can only be financed by the direct creation of money. See TED, *supra* note 66; Bell, *supra* note 65, at 616-17; see also Murphy, *supra* note 66, at 2, 6-7, 10.

- 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 (securities) 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>68</sup>

This list provides a useful framework for understanding the purpose of the U.S. nationality-based tax system. Taxing to keep track of a specific program can be quickly eliminated. Taxing persons outside the United States would have 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. Taxing to alleviate inequality makes little sense when the taxpayer resides outside of the United States; on the contrary, the U.S. nationality-based tax system exacerbates inequality by causing the transfer of resources to the United States—said to be the richest country in the world<sup>69</sup>—from other countries which, by definition, are poorer.

This leaves taxing to encourage or discourage specific behaviors. This purpose is discussed further below.<sup>70</sup>

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68. Beardsley Ruml, *Taxes for Revenue Are Obsolete*, 8 AM. AFFS. 35, 36 (1946); see also Gar Alperovitz et al., *Money Matters! Why Monetary Theory and Policy Is a Critical Terrain for the Left*, NEXT SYS. PROJECT (July 5, 2018), <https://thenextsystem.org/learn/stories/money-matters-why-monetary-theory-and-policy-critical-terrain-left> [<https://perma.cc/55MV-QU4T>]; see also Ehnts, *supra* note 63, at 132 (explaining that taxes have essentially two purposes: (i) to reduce the purchasing power of the private sector, freeing up resources in the economy so the government can purchase goods and services in a non-inflationary way to meet its social and political objectives; and (ii) to give the currency value); Murphy, *supra* note 66, at 10 (listing six purposes of taxation, none of which is to raise revenue).

69. Jack Ewing, *United States Is the Richest Country in the World, and It Has the Biggest Wealth Gap*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/09/23/business/united-states-is-the-richest-country-in-the-world-and-it-has-the-biggest-wealth-gap.html> [<https://perma.cc/LL4J-MTUP>].

70. See *infra* notes 95-134 and accompanying text.

## 2. Incidental or Irrelevant

Even if the teachings of MMT are rejected,<sup>71</sup> multiple federal taxes have been adopted without any purpose of raising revenue. To the extent they did, it was incidental if not entirely irrelevant. Their principal purpose was, in the words of the IRS, to “influence behavior.”<sup>72</sup>

One example is the high marginal tax rates (over ninety percent) that Congress adopted in the mid-twentieth century.<sup>73</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>74</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

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71. See, e.g., Jason J. Fichtner & Kody Carmody, *Does the National Debt Matter? A Look at Modern Monetary Theory, or MMT*, BIPARTISAN POL’Y CTR. (Nov. 15, 2019), <https://bipartisanpolicy.org/blog/does-the-national-debt-matter-a-look-at-modern-monetary-theory> [<https://perma.cc/LL4J-MTUP>].

72. *How Taxes Influence Behavior*, INTERNAL REVENUE SERV., [https://apps.irs.gov/app/understandingTaxes/student/whys\\_thm05\\_les01.jsp](https://apps.irs.gov/app/understandingTaxes/student/whys_thm05_les01.jsp) [<https://perma.cc/AS5P-X35H>] (last visited Feb. 21, 2024); see also Press Release, Congressman Brad Sherman, Congressman Sherman Commends Chief Justice Roberts (June 28, 2012), <https://sherman.house.gov/media-center/press-releases/congressman-sherman-commends-chief-justice-roberts> [<https://perma.cc/5AKR-54CU>] (praising U.S. Supreme Court Chief Justice John Roberts’s acknowledgment that taxes have long been “designed to influence behavior” and stating that “almost every tax influences behavior, and often influencing behavior is the primary intent”).

73. See Joseph Bishop-Henchman, *Top Federal Income Tax Rate Was Once Over 90 Percent*, TAX FOUND. (Oct. 1, 2008), <https://taxfoundation.org/top-federal-income-tax-rate-was-once-over-90-percent> [<https://perma.cc/UNK7-T4MD>]; Andrew Syrios, *The Good Ol’ Days: When Tax Rates Were 90 Percent*, MISES INST. (Nov. 24, 2015), <https://mises.org/library/good-ol-days-when-tax-rates-were-90-percent> [<https://perma.cc/LWH5-WDMA>].

74. See, e.g., Jordan Weissmann, *Did the Rich Really Pay Much Higher Taxes in the 1950s? The Answer Is a Little Complicated.*, SLATE (Aug. 7, 2017, 7:19 PM), <https://slate.com/business/2017/08/the-history-of-tax-rates-for-the-rich.html> [<https://perma.cc/Y9VW-293W>]; Joe Nocera, *How a 91% Rate Sparked the Golden Age of Tax Avoidance in 1950s Hollywood*, L.A. TIMES (Jan. 30, 2019, 6:00 AM), <https://www.latimes.com/business/la-fi-nocera-tax-avoidance-20190129-story.html> [<https://perma.cc/C89L-N6PY>]; see also Alan Reynolds, *The Economic Impact of Tax Changes, 1920-1939*, 41 CATO J. 159, 161 (2021) (“[L]arge 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.”) (emphasis in original).

enrichment.<sup>75</sup> At least some such taxes proved to be “spectacularly productive” of revenue.<sup>76</sup> Nevertheless, when the situation motivating such a tax ended, the tax was repealed or allowed to expire, without consideration of the resulting loss of revenue.<sup>77</sup>

Tax-based initiatives have also been proposed or adopted as means to address the climate crisis. An often-discussed federal carbon tax is a primary example: its purpose would be to incentivize cleaner energy sources.<sup>78</sup> The amounts that would be raised by a carbon tax are considered to be so irrelevant to/unneeded for federal revenue that multiple proposals for the tax recommend that the amounts collected “be returned to consumers as cash payments”;<sup>79</sup> be paid to low- and middle-income households as “dividends”;<sup>80</sup> be used to lower other federal taxes, such as payroll or income taxes;<sup>81</sup> or be used for social security beneficiary payments.<sup>82</sup>

### 3. Necessary *Reduction* in Revenue

Another tax-based initiative seeking to address the climate crisis is the electric vehicle tax credit. Its purpose is to incentivize the use of electric cars.<sup>83</sup> It allows purchasers of electric vehicles to claim a federal

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75. See Reuven Avi-Yonah, *Time to Tax Excessive Corporate Profits*, AM. PROSPECT (Apr. 18, 2022), <https://prospect.org/economy/time-to-tax-excessive-corporate-profits> [<https://perma.cc/3C4J-RXUR>] (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.*

76. Alfred G. Buehler, *The Taxation of Corporate Excess Profits in Peace and War Times*, 7 L. & CONTEMP. PROBS. 291, 291-93 (1940).

77. See, e.g., Scott Hodge, *The History of Excess Profits Taxes Not as Effective or Harmless as Today’s Advocates Portray*, TAX FOUND. (July 22, 2020), <https://taxfoundation.org/blog/excess-profits-tax-pandemic-profits-tax> [<https://perma.cc/N9VJ-SYQZ>].

78. Timothy Gardner et al., *White House Does Not Rule Out Carbon Tax Despite Manchin Comment*, REUTERS (Oct. 19, 2021, 4:59 PM), <https://www.reuters.com/world/us/manchin-says-carbon-tax-not-board-us-spending-bill-talks-2021-10-19> [<https://perma.cc/46JX-GM37>]; see also Noah Kaufman, *What You Need to Know About a Federal Carbon Tax in the United States*, CTR. ON GLOB. ENERGY POL’Y (Apr. 2, 2019), <https://www.energypolicy.columbia.edu/publications/what-you-need-to-know-about-a-federal-carbon-tax-in-the-united-states> [<https://perma.cc/235A-4BJT>].

79. Gardner et al., *supra* note 78.

80. Kaufman, *supra* note 78; Mollie Simon, *Teeming with Carbon Taxes*, KLEINMAN CTR. FOR ENERGY POL’Y (Aug. 12, 2019), <https://kleinmanenergy.upenn.edu/news-insights/teeming-with-carbon-taxes> [<https://perma.cc/ZEB9-BHTS>].

81. Simon, *supra* note 80.

82. *Id.*

83. Daniel Liberto, *Electric Vehicle Tax Credits: What’s New in 2024*, INVESTOPEDIA, <https://www.investopedia.com/electric-vehicle-tax-credits-6500157> [<https://perma.cc/DTZ4-N79R>] (Dec. 21, 2023).



tax credit in an amount up to \$7,500, subject to certain conditions.<sup>84</sup> Clearly, in this case, raising federal tax revenue cannot even be incidental; it is entirely irrelevant. The necessary and easily foreseeable consequence of this and other tax credits is the *reduction* of federal tax revenue.

At the time this article is being published, there are in effect seven different federal tax incentives whose purpose is to encourage the use of alternative fuels and advanced vehicles.<sup>85</sup> For each credit, there is no record that Congress gave anything more than cursory thought to the fact that the necessary result of each would be a reduction of tax revenue.<sup>86</sup> Nor, in the adoption of each credit, is there evidence that the absence of revenue neutrality was considered a problem that needed to be addressed.<sup>87</sup>

For example, on April 27, 2021, the Senate Finance Committee held a hearing entitled “Climate Challenges: The Tax Code’s Role in Creating American Jobs, Achieving Energy Independence, and Providing Consumers with Affordable, Clean Energy.”<sup>88</sup> In the resulting 165 pages of hearing testimony and related communications, “electric vehicle(s)” are mentioned 85 times; “alternative fuel(s),” “renewable fuel(s),” “biodiesel(s),” or “biofuel(s)” are mentioned 69 times; and “tax credit(s)” are mentioned 214 times, but revenue neutrality is mentioned just twice, in both instances in relation to a carbon tax.<sup>89</sup> “Paygo”<sup>90</sup> is not mentioned at all.

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84. Greg Iacurci, *That \$7,500 Electric Vehicle Tax Credit May Soon Be Harder to Get. Here Are 2 Workarounds*, CNBC (Apr. 10, 2023, 10:58 AM), <https://www.cnbc.com/2023/04/10/7500-new-ev-tax-credit-workarounds-to-irs-rules.html> [<https://perma.cc/DTZ4-N79R>].

85. *Search Federal and State Laws and Incentives*, U.S. DEP’T OF ENERGY: ALT. FUELS DATA CTR., <https://afdc.energy.gov/laws/search> [<https://perma.cc/XZA2-PNYW>] (last visited Feb. 21, 2024) (displaying search criteria “Federal” and “Tax Incentives”).

86. In relation to a sustainable aviation fuel credit, see, e.g., H.R. REP. NO. 117-130, at 119-25 (2021); see also Philip Rossetti, *Potential Effects of the Inflation Reduction Act on Greenhouse Gas Emissions*, R ST. (Sept. 27, 2022), <https://www.rstreet.org/commentary/potential-effects-of-the-inflation-reduction-act-on-greenhouse-gas-emissions> [<https://perma.cc/8GRY-FD38>]; Debra Kahn, *Treasury’s Brewing Fight Over Sustainable Aviation Fuel*, POLITICO (Apr. 7, 2023, 12:00 PM), <https://www.politico.com/newsletters/the-long-game/2023/04/07/treasurys-brewing-fight-over-sustainable-aviation-fuel-00091005> [<https://perma.cc/RXJ4-WMGS>]; Robbie Bourke & David Kaplan, *Why the Inflation Reduction Act’s SAF Tax Credit Won’t Be Enough to Stop Airline Emissions’ Rise*, FORBES (Aug. 18, 2022, 10:34 AM), <https://www.forbes.com/sites/oliverwyman/2022/08/18/why-the-inflation-reduction-acts-saf-tax-credit-wont-be-enough-to-stop-airline-emissions-rise> [<https://perma.cc/LG6R-F6CG>].

87. See sources cited *supra* note 86.

88. *Climate Challenges: The Tax Code’s Role in Creating American Jobs, Achieving Energy Independence, and Providing Consumers with Affordable, Clean Energy: Hearing Before the S. Comm. on Fin.*, 117th Cong. (2021).

89. See *id.* at 99, 125; see generally *id.* (mentioning listed terms).

90. The term “paygo” is explained *infra* note 117 and accompanying text.

#### 4. Summary

MMT teaches that the purpose of federal taxation is never to raise revenue.<sup>91</sup> Even if the teachings of MMT are rejected, there exist multiple examples of federal taxes whose purpose is unrelated to the collection of revenue.<sup>92</sup> And some tax-related provisions, such as tax credits, necessarily result in a reduction of federal tax revenue.<sup>93</sup> Given all this, clearly and “logically,” it is *not* the case that “any imposition of any tax is rationally related to raising revenue.”<sup>94</sup>

##### *B. Purpose to Punish and Scapegoat*

Section A above<sup>95</sup> explained that, generally, the purpose of any given federal tax is often—if not always—something other than to raise revenue. The revenue that is raised by such taxes is, in most if not all cases, incidental if not entirely irrelevant. This Section B examines the specific case of the U.S. nationality-based tax system. The examination demonstrates that its purpose is not to raise revenue but to (1) punish and (2) scapegoat American nationals when they live outside the United States.

##### 1. Punish

Legislative history reveals that when the United States first began taxing the worldwide income of American nationals living outside the country, such taxation was justified not because it served any one or more governmental interests (such as to collect revenue), but because U.S. legislators felt that persons holding U.S. citizenship—regardless of what their life circumstances may be—should not live outside the United States.<sup>96</sup> Senator Jacob Collamer of Vermont stated that citizens “skulking away” to Paris and “avoiding the risk of being drafted” should not “get off with as low a tax as anybody else.”<sup>97</sup> And Senator George Hoar of Massachusetts stated there exists “a great many people” 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

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91. See *supra* notes 61-70 and accompanying text.

92. See *supra* notes 71-82 and accompanying text.

93. See *supra* notes 83-90 and accompanying text.

94. Nachbar, *supra* note 59; see also *supra* note 59 and accompanying text.

95. See *supra* notes 60-94 and accompanying text.

96. See *Unacknowledged Realities*, *supra* note 1, at 247-48.

97. CONG. GLOBE, 38th Cong., 1st Sess. 2661 (1864) (statement of Sen. Jacob Collamer), <https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=066/llcg066.db&recNum=2> [<https://perma.cc/6R5Z-VPXQ>].

“none of the voluntary obligations which rest upon citizens, of charity, or contributions, or supporting churches, or anything of that sort.”<sup>98</sup> Senator Hoar made clear that the only reason to tax American nationals living outside the country was not just to discourage them, but also to punish them for doing so: “*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>99</sup>

In 1996, when Congress expanded penalties for expatriation, its purpose was, again, to punish rather than to raise revenue.<sup>100</sup> This was evident in statements such as “Let us not allow more of these rich free-loaders to get away” (Senator Max Baucus),<sup>101</sup> “[How can we] allow these sleazy bums, who don’t want to pay their taxes, to leave this country, and renounce their citizenship, and expect me to have one iota of sympathy for them[?]” (Rep. Neil Abercrombie);<sup>102</sup> and “These expatriates are really like economic Benedict Arnolds” (Leslie B. Samuels, Assistant Secretary for tax policy at the U.S. Department of the Treasury).<sup>103</sup>

The U.S. nationality-based tax system has evolved considerably since it was conceived during the Civil War.<sup>104</sup> Today the system severely penalizes nearly every aspect of the financial lives of American nationals, merely because their lives take place outside the United States.<sup>105</sup> This includes retirement planning and other investments, home and business ownership, bank accounts, employment, and community service.<sup>106</sup> In this manner, the system punishes American nationals not just for living in another country, but for seeking to integrate—economically and socially—in the places where they live.<sup>107</sup>

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98. 26 CONG. REC. S6632-33 (daily ed. June 21, 1894) (statement of Sen. George Hoar).

99. *Id.* (emphasis added).

100. See Laura Snyder, *Can Extraterritorial Taxation Be Rationalized?*, 76 TAX LAW. 535, 596-97 (2023) [hereinafter *Rationalized*].

101. *Tax Treatment of Expatriated Citizens: Hearing on S. 453, S. 700, H.R. 831, H.R. 981, H.R. 1535, and H.R. 1812 Before the S. Comm. on Fin.*, 104th Cong. 2 (1995) (statement of Sen. Max Baucus).

102. 141 CONG. REC. H3850 (daily ed. Mar. 28, 1995) (statement of Rep. Neil Abercrombie).

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

104. See sources cited *supra* note 35.

105. See, e.g., *Unacknowledged Realities*, *supra* note 1, at 251-68; Laura Snyder, *The Criminalization of the American Emigrant*, 167 TAX NOTES FED. 2279, 2280-87 (2020) [hereinafter *Criminalization*].

106. See sources cited *supra* note 105; see also *Rationalized*, *supra* note 100, at 566-69.

107. *Unacknowledged Realities*, *supra* note 1, at 266; *Rationalized*, *supra* note 100, at 571. For a discussion of how the U.S. nationality-based tax system was conceived in and is maintained by

## 2. Scapegoat

A superficial understanding of the Foreign Account Tax Compliance Act (“FATCA”)<sup>108</sup> would suggest that it was about, at least in part, collecting tax revenue from American nationals living overseas. However, a more thorough examination reveals that, while FATCA has had a profound effect on overseas Americans, the motivating factors in its adoption, including any intent with respect to tax revenue, had nothing to do with them.<sup>109</sup>

FATCA was adopted in 2010 on the heels of congressional investigations exposing the practice by some banks in Switzerland, Liechtenstein, and the Cayman Islands of assisting persons *residing in the United States*—regardless of citizenship—with hiding their assets to avoid U.S. taxation.<sup>110</sup>

A congressional report on the investigations opened with the statement: “Each year, the United States loses an estimated \$100 billion in tax revenues due to offshore tax abuses.”<sup>111</sup> This claim—for an astounding amount—was supported by just one footnote. A careful examination of the ten sources cited in that footnote reveals that only one contains any information relating to estimates of the tax revenue lost by the United States because of U.S. taxpayers hiding money in offshore accounts.<sup>112</sup> That one source estimates that amount to be \$40 to \$70 billion annually<sup>113</sup>—nowhere near the congressional report’s claim of \$100 billion. Further, and more importantly, that source examined money held by U.S. *residents* in offshore bank accounts. It did not examine money held by overseas Americans in the countries where they live (so,

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animus toward overseas Americans, see *Extraterritorial Taxation* #8, *supra* note 33, at 7-14; see also *Myths & Truths*, *supra* note 33, at 223-31.

108. Hiring Incentives to Restore Employment (HIRE) Act, Pub. L. No. 111-147, §§ 501–562, 124 Stat. 71, 97-106 (2010).

109. See, e.g., *Criminalization*, *supra* note 105, at 2285-87; *Unacknowledged Realities*, *supra* note 1, at 253-56.

110. See *Criminalization*, *supra* note 105, at 2283-85; *Unacknowledged Realities*, *supra* note 1, at 253-54.

111. STAFF OF S. COMM. ON HOMELAND SEC. & GOV’T AFFS., PERMANENT SUBCOMM. ON INVESTIGATIONS, 110TH CONG., REP. ON TAX HAVEN BANKS AND U.S. TAX COMPLIANCE I (July 17, 2008), <https://americansfortaxfairness.org/files/REPORTTaxHavenBanksJuly1708FINALwPatEliseChgs92608.pdf> [<https://perma.cc/CM9N-F7A8>]; see *Criminalization*, *supra* note 105, at 2284.

112. The other nine sources either offer estimates that are not specific to the United States, or relate to multinational companies engaged in fraudulent transfer pricing arrangements involving intangible property. For a more detailed examination of the ten sources cited in the congressional report’s footnote, see *Criminalization*, *supra* note 105, at 2283-84.

113. Joseph Guttentag & Reuven Avi-Yonah, *Closing the International Tax Gap*, in BRIDGING THE TAX GAP: ADDRESSING THE CRISIS IN FEDERAL TAX ADMINISTRATION 99, 101 (M.B. Sawicky ed., 2005).

accounts that are not offshore), nor did it offer any estimate as to any tax revenue that the United States may (or may not) be losing in connection with those accounts. Finally, that source examined assets held offshore not in just any country, or even in most countries (much less in the countries where the majority of overseas Americans live), but in the Cayman Islands, a well-reputed tax haven where relatively few overseas Americans live.<sup>114</sup> In sum, the evidence cited in the congressional report demonstrates that overseas Americans had nothing to do with the report's claim of a tax gap (in a grossly inflated number) due to *offshore* tax abuses. (Again, the accounts held by overseas Americans in the countries where they live are not "offshore"; they are in a country where the American lives and is a tax resident.)

Unfortunately, these failures and lack of evidence did not stop Congress from adopting a far-reaching proposal: a law affecting all persons considered U.S. citizens, including those who live in countries with ordinary tax systems and including the bank and other financial accounts in their countries of residence that they need to live in the modern world.<sup>115</sup>

FATCA was adopted shortly after the enactment of the Statutory Pay-As-You-Go Act of 2010<sup>116</sup> ("PAYGO"), which sought to ensure that any reduction to revenue was offset either by a reduction in spending or an increase in other revenue and vice versa—that any increase in spending was offset by either an increase in revenue or a decrease in other spending.<sup>117</sup> FATCA was adopted not as a standalone bill but as Subtitle A of the Hiring Incentives to Restore Employment Act of 2010.<sup>118</sup> This Act contained payroll tax breaks and incentives for businesses in the United States to hire unemployed workers. As this would result in reduced tax revenue, FATCA was portrayed as the way to

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114. *See id.* at 99-100.

115. For more information about the effects of FATCA for overseas Americans, see *Criminalization*, *supra* note 105, at 2285-87; LAURA SNYDER, STOP EXTRATERRITORIAL AM. TAX'N, "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 3 237-66 (2021), [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) [<https://perma.cc/7H3J-D7JD>] [hereinafter SEAT SURVEY COMMENTS].

116. Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, 124 Stat. 8.

117. *See What Is PAYGO?*, TAX POL'Y CTR., <https://www.taxpolicycenter.org/briefing-book/what-paygo> [<https://perma.cc/RKY4-ZM84>] (May 2020).

118. Hiring Incentives to Restore Employment (HIRE) Act, Pub. L. No. 111-147, §§ 501–562, 124 Stat. 71, 97-106 (2010).

compensate, in conformity with PAYGO.<sup>119</sup> That is, American nationals living outside the United States were the sacrificial scapegoat for the benefit of U.S. businesses and U.S. residents (of any nationality).<sup>120</sup> Today, the tax revenue attributed to FATCA falls far short of projections.<sup>121</sup> Further, recent Treasury Inspector General for Tax Administration reports evidence that, thirteen years after FATCA's adoption, the IRS is still unable to demonstrate compliance.<sup>122</sup>

There are additional examples of how the U.S. nationality-based tax system scapegoats overseas Americans. They include:

- The Health Insurance Portability and Accountability Act of 1996,<sup>123</sup> the American Jobs Creation Act of 2004,<sup>124</sup> and the Heroes Earnings Assistance and Relief Tax Act of 2008.<sup>125</sup> Each of these three Acts adopted as a “revenue offset”<sup>126</sup> or a “revenue provision”<sup>127</sup> expanded tax penalties in the event of expatriation. To justify this, persons renouncing U.S. citizenship were vilified as “greedy, unpatriotic . . . malefactors of great wealth,”<sup>128</sup> and “economic Benedict Arnolds”;<sup>129</sup> and

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119. *Criminalization*, *supra* note 105, at 2285; Laura Snyder, *Taxing the American Emigrant*, 74 TAX LAW. 299, 309 (2021) [hereinafter *Taxing the American Emigrant*].

120. *Taxing the American Emigrant*, *supra* note 119, at 310.

121. TREASURY INSPECTOR GEN. FOR TAX ADMIN., REP. NO. 2022-30-019, ADDITIONAL ACTIONS ARE NEEDED TO ADDRESS NON-FILING AND NON-REPORTING COMPLIANCE UNDER THE FOREIGN ACCOUNT TAX COMPLIANCE ACT 21-22 (2022) [hereinafter ADDITIONAL ACTIONS ARE NEEDED] (“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.”).

122. See TREASURY INSPECTOR GEN. FOR TAX ADMIN., REP. NO. 2018-30-040, DESPITE SPENDING NEARLY \$380 MILLION, THE INTERNAL REVENUE SERVICE IS STILL NOT PREPARED TO ENFORCE COMPLIANCE WITH THE FOREIGN ACCOUNT TAX COMPLIANCE ACT 5 (2018); ADDITIONAL ACTIONS ARE NEEDED, *supra* note 121, at 27.

123. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, §§ 511–512, 110 Stat. 1936, 2093-2102.

124. American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 804, 118 Stat. 1418, 1569-73.

125. Heroes Earnings Assistance and Relief Tax Act of 2008, Pub. L. No. 110-245, § 301, 122 Stat. 1624, 1638-47.

126. This is the terminology of the Health Insurance Portability and Accountability Act. See § 500, 110 Stat. at 2089.

127. This is the terminology of the American Jobs Creation Act and the Heroes Earnings Assistance and Relief Tax Act. See § 801, 118 Stat. at 1562; § 301, 122 Stat. at 1638.

128. *Tax Treatment of Expatriated Citizens: Hearing on S. 453, S. 700, H.R. 831, H.R. 981, H.R. 1535, and H.R. 1812 Before the S. Comm. on Fin., supra* note 101, at 2 (statement of Sen. Max Baucus); see also *Unacknowledged Realities*, *supra* note 1, at 297-98.

129. de Witt, *supra* note 103.

- The Fixing America’s Surface Transportation (“FAST”) Act<sup>130</sup>: This 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” (greater than \$50,000).<sup>131</sup> This was adopted as an “offset” for the spending on surface transportation authorized by the Act.<sup>132</sup>

### 3. Summary

From the inception of the U.S. nationality-based tax system, the statements made by policymakers demonstrate that the system was conceived not for the purpose of collecting revenue, but for the purpose of punishing persons who have the audacity to live outside the country.<sup>133</sup> Any revenue collected is incidental. In recent decades, the system has been used to scapegoat American nationals living overseas, so that they may bear the burden of benefits accorded to U.S. residents, regardless of nationality.<sup>134</sup>

#### *C. Demonstrated by IRS Data*

Section B above<sup>135</sup> explains why any federal revenue raised by the U.S. nationality-based system is incidental and irrelevant to the purpose of the system. This reality is underscored by IRS data.

To begin, as seen in Table 1,<sup>136</sup> based on IRS data for tax year 2020, sixty-four percent of returns filed from outside the United States show that no U.S. tax is owed.<sup>137</sup> This compares to thirty-three percent of returns filed from within the United States.<sup>138</sup> IRS data for “Other Areas” includes returns filed by overseas military personnel.<sup>139</sup> If their

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130. Fixing America’s Surface Transportation Act, Pub. L. No. 114-94, § 32101, 129 Stat. 1312, 1729-33 (2015).

131. *Id.* at 1729-30.

132. *Id.* at 1729; *see also* AASHTO SUMMARY OF THE NEW SURFACE TRANSPORTATION BILL: FIXING AMERICA’S SURFACE TRANSPORTATION (FAST) ACT, AM. ASS’N OF STATE HIGHWAY & TRANSP. OFFICIALS 8 (2015), <https://dot.ca.gov/-/media/dot-media/programs/federal-liaison/documents/aashto-sum-fastact-121615v2-a11y.pdf> [<https://perma.cc/2D82-6J7H>].

133. *See supra* notes 96-107 and accompanying text.

134. *See supra* notes 108-32 and accompanying text.

135. *See supra* notes 95-134 and accompanying text.

136. *See infra* note 140 and accompanying text.

137. *See infra* note 140 and accompanying text.

138. *See infra* note 140 and accompanying text.

139. More specifically, it includes returns filed from Army Post Office and Fleet Post Office addresses by members of the armed forces stationed overseas. *SOI Tax Stats - Historic Table 2, INTERNAL REVENUE SERV.*, <https://www.irs.gov/statistics/soi-tax-stats-historic-table-2>

returns were removed from the data set, the percentage of returns showing no tax owed would likely be higher.

Table 1: Percentage of U.S. Federal Tax Returns Demonstrating No Tax Owed<sup>140</sup>

	Filed from United States	Filed from “Other Areas”
Total number of returns filed	164,041,940	777,920
Returns with tax after credits	109,635,320	278,810
Returns without tax after credits	54,406,620	499,110
Percent of returns without tax after credits	33.17%	64.16%

A 2021 IRS working paper adds interesting insight. The author, Paul Organ, had access to IRS data not available to the public.<sup>141</sup> Based upon that data, he observes that of persons renouncing U.S. citizenship, most had “no or little tax liability in the years prior to expatriation.”<sup>142</sup> (This observation underscores the fact that Americans who renounce U.S. citizenship do not do so because they do not want to pay U.S. taxes—IRS data demonstrates that they already don’t<sup>143</sup>—but because they cannot live under such a punishing system.)<sup>144</sup> And Organ goes further,

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[<https://perma.cc/BJK2-PGYM>] (Oct. 24, 2023) (citing table for “Other Areas,” Cell A194, note 20).

140. Based on raw data for 2020 provided by the IRS. *Id.* (referencing tables for “United States” and “Other Areas,” cells B9 and B154). These calculations are roughly confirmed by the National Taxpayer Advocate, who reports that for tax year 2020, 62.8% of returns filed by individual international taxpayers showed no tax owed, as compared to 27.6% of individual domestic taxpayers. TAXPAYER ADVOC. SERV., NATIONAL TAXPAYER ADVOCATE’S 2023 ANNUAL REPORT TO CONGRESS 122 (2024), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/01/ARC23\\_MSP\\_09\\_Compliance-Abroad.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/01/ARC23_MSP_09_Compliance-Abroad.pdf) [<https://perma.cc/9SC2-94AR>].

141. Paul R. Organ, Citizenship and Taxes: Evaluating the Effects of the U.S. Tax System on Individuals’ Citizenship Decisions 1, n.+ (Aug. 23, 2021) (unpublished manuscript), <https://www.irs.gov/pub/irs-soi/21rpcitizenshipandtaxes.pdf> [<https://perma.cc/94LS-FCRR>].

142. *Id.* at 4.

143. *See id.* at 8, 39-41.

144. LAURA SNYDER, STOP EXTRATERRITORIAL AM. TAX’N, “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 62-65 (2021), [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) [<https://perma.cc/7S3B-FH4D>] [hereinafter SEAT SURVEY DATA PART 2] (explaining that among former U.S. citizens: (i) when they were U.S. citizens, fifty-five percent paid significant fees for the preparation of U.S. tax returns but owed nothing in U.S. taxes, and (ii) sixty-six percent renounced U.S. citizenship not in order to stop paying U.S. federal taxes but because of difficulties with the extraterritorial application of U.S. taxation and banking policies).



finding that, because they owed so little U.S. federal tax, “for most renunciations the revenue impact is probably negligible.”<sup>145</sup>

As seen in Table 2,<sup>146</sup> IRS data further demonstrates that, from the perspective of the United States, the amount it collects in federal income tax from persons living overseas is so low it can only be described as insignificant, as compared both to income tax revenue from all individuals (0.50%)<sup>147</sup> and as compared to government spending (0.18%).<sup>148</sup> Again, this data includes returns filed by overseas military personnel.<sup>149</sup> If their returns were removed from the data set, the amount of tax liability from “Other Areas” would be even lower.

Table 2: Total Individual Income Tax Liability for “Other Areas” and “United States” and Total Spending by U.S. Federal Government for 12-Year Period 2009-2020

Year	Number of Individuals Included in Returns Filed from “Other Areas”	Total Tax Liability “Other Areas”*	Total Tax Liability “United States”*	Total Tax Liability for “Other Areas” as Percentage of Total Tax Liability for “United States”	Total Spending by U.S. Federal Government*	Total Tax Liability for “Other Areas” as Percentage of Total Spending by U.S. Federal Government
2020	1,388,740	6,381	1,813,509	0.35%	6,553,621	0.10%
2019	1,450,030	6,972	1,672,344	0.42%	4,446,960	0.16%
2018	1,338,350	6,614	1,631,748	0.41%	4,109,044	0.16%
2017	1,478,290	6,815	1,696,149	0.40%	3,981,630	0.17%
2016	1,454,150	8,157	1,528,418	0.53%	3,852,615	0.21%
2015	1,435,880	11,149	1,534,501	0.73%	3,691,850	0.30%
2014	1,388,940	6,266	1,448,842	0.43%	3,506,284	0.18%
2013	1,380,420	5,764	1,307,975	0.44%	3,454,881	0.17%
2012	1,355,510	6,278	1,249,911	0.50%	3,526,563	0.18%

145. Organ, *supra* note 141, at 4.

146. See *infra* note 150 and accompanying text.

147. See *infra* note 150 and accompanying text.

148. See *infra* note 150 and accompanying text.

149. See *SOI Tax Stats - Historic Table 2*, *supra* note 139.

2011	1,909,223	6,092	1,109,317	0.55%	3,603,065	0.17%
2010	1,895,353	6,568	1,053,872	0.62%	3,457,079	0.19%
2009	1,894,283	5,570	968,054	0.58%	3,517,677	0.16%
Mean	1,530,764	6,886	1,417,887	0.50%	3,975,106	0.18%
Median	1,442,955	6,475	1,448,630	0.47%	3,647,458	0.17%

\*Money amounts are in millions of U.S. dollars.<sup>150</sup>

In sum, most overseas Americans do not owe U.S. federal taxes.<sup>151</sup> Most of the persons who renounce U.S. citizenship (which most do because of the U.S. nationality-based tax system)<sup>152</sup> owe little to no U.S. federal taxes in the years prior to renouncing.<sup>153</sup> Indeed, they owe so little that one analyst has observed that the revenue impact of their renunciation is “probably negligible.”<sup>154</sup> The amount the United States collects from persons living overseas is so low it is insignificant, as compared both to income tax revenue from all individuals and to government spending.<sup>155</sup> Considered as a whole, IRS data demonstrates that, while some tax is collected from persons living overseas, it is insignificant in amount and irrelevant to the purpose and effect of the U.S. nationality-based tax system.

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150. See Laura Snyder et al., *Should Overseas Americans Be Required to Buy Their Freedom?*, 172 TAX NOTES FED. 223, 234 (2021) [hereinafter *Buy Their Freedom*]. For the data for the year 2020, see *SOI Tax Stats - Historic Table 2*, *supra* note 139 (citing table for “United States,” Cell B157 and table for “Other Areas,” Cells B18 and B157); *Table 1.1—Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1789–2028*, WHITE HOUSE OFF. OF MGMT. & BUDGET, <https://www.whitehouse.gov/omb/budget/historical-tables> [<https://perma.cc/B29W-2AY3>] (citing Cell C127). For the data for the year 2019, see *SOI Tax Stats - Historic Table 2 (2015-2019)*, INTERNAL REVENUE SERV., <https://www.irs.gov/statistics/soi-tax-stats-historic-table-2-2015-2019> [<https://perma.cc/4FGM-ZUY5>] (Oct. 31, 2023) (citing table for “United States,” Cell B144 and table for “Other Areas,” Cells B17 and B144); *Table 1.1—Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1789–2028*, *supra* (citing Cell C126). Data regarding the “Number of Individuals Included in Returns Filed from ‘Other Areas’” was derived from the 2009-20 historic tables provided by the IRS, accessible from *SOI Tax Stats - Historic Table 2*, *supra* note 139 (citing, within the tables for “Other Areas,” the “Number of individuals” cell for the years 2020, 2019, and 2018 and the “Number of exemptions” cell for all other years). The “Other Areas” table for the tax year 2020 provides: “Beginning in 2018, personal exemption deductions were suspended for the primary, secondary, and dependent taxpayers. However, the data used to create the ‘Number of individuals’—filing status, dependent status indicator, and identifying dependent information—are still available on the Form 1040. This field is based on these data.” *Id.*

151. See *supra* notes 136-40 and accompanying text.

152. See *supra* note 144 and accompanying text.

153. See *supra* note 142 and accompanying text.

154. Organ, *supra* note 141, at 4.

155. See *supra* notes 146-48 and accompanying text.

#### D. Confirmed by IRS Approach

The approach the IRS takes with respect to overseas Americans also reflects the legislative purpose of the U.S. nationality-based tax system. On the one hand, the IRS provides considerably reduced services to overseas Americans as compared to what is offered to domestic taxpayers.<sup>156</sup> The IRS systematically rejects requests to improve services for overseas Americans to bring them on par with those provided to those living in the United States.<sup>157</sup> In doing so, it offers excuses such as “it would be nice” to provide such services, but that it would be “unfeasible” or “not technically viable,” or that it would “increase the overall cost” or “require modification to a contract.”<sup>158</sup>

When the Taxpayer First Act was signed into law in July 2019,<sup>159</sup> the IRS had the opportunity to request additional resources for the purpose of improving services for overseas taxpayers, but it declined to do so.<sup>160</sup> Since that time it still has not made any such request.<sup>161</sup>

The considerable additional funding (approximately \$80 billion) the IRS received under the 2022 Inflation Reduction Act (“IRA”)<sup>162</sup> arguably offered the IRS the opportunity to improve services for international taxpayers. However, the IRS’s eight-year, 150-page “Strategic Operating Plan”<sup>163</sup> (“the Plan”) describing how it intends to spend the additional funding scarcely acknowledges the existence of international taxpayers.<sup>164</sup> In relation to improving services, the Plan mentions them just twice, with respect to enabling payments<sup>165</sup> and expanding credentialing

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156. For a detailed comparison of the respective service levels, see generally *Mission Impossible*, *supra* note 28 (explaining the systematic pattern of discriminatory treatment of international taxpayers as compared to domestic taxpayers). For a summary comparison, see *id.* at 1829-30.

157. *See generally id.*

158. *Id.* at 1839.

159. Taxpayer First Act, Pub. L. No. 116-25, 133 Stat. 981 (2019).

160. INTERNAL REVENUE SERV., TAXPAYER FIRST ACT REPORT TO CONGRESS 134 (2021), <https://www.irs.gov/pub/irs-pdf/p5426.pdf> [<https://perma.cc/T58U-NS9B>]; *Mission Impossible*, *supra* note 28, at 1843-50.

161. *See News Release and Fact Sheet Archive*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/news-release-and-fact-sheet-archive> [<https://perma.cc/Q3ZP-ENA4>] (last visited Feb. 21, 2024) (showing that there have been very few news releases since 2019 that concerned international taxpayers, and none of those describe any request for adequate resources to serve international taxpayers).

162. BRENDAN McDERMOTT, CONG. RSCH. SERV., IN11977, IRS-RELATED FUNDING IN THE INFLATION REDUCTION ACT 1, <https://crsreports.congress.gov/product/pdf/IN/IN11977> [<https://perma.cc/PTZ3-HHGA>] (Oct. 20, 2022).

163. INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE INFLATION REDUCTION ACT STRATEGIC OPERATING PLAN FY2023-2031 (2023), <https://www.irs.gov/pub/irs-pdf/p3744.pdf> [<https://perma.cc/7UWJ-KMVK>] [hereinafter IRS PLAN].

164. In 150 pages, they are mentioned just three times. *Id.* at 40, 44, 132.

165. *Id.* at 40.

access.<sup>166</sup> Further, the detailed “report card” the IRS issued one year after the adoption of the IRA failed to even mention international taxpayers, let alone describe any efforts to improve services for them.<sup>167</sup>

The only possible conclusion to draw from this inaction is that, for the IRS, it is not worthwhile to request, let alone to expend, the resources required to bring its services for overseas Americans up to the same standard as those provided to U.S. residents (again, regardless of nationality). While this approach is unconscionable, it is also rational, given that if the IRS were to expend the needed resources, it would collect little additional tax revenue (because, again, most federal tax returns filed from outside the United States show no tax owed).<sup>168</sup>

The 2023 Plan’s mention of enabling payments should be shocking: “We will . . . enable payments . . . from international taxpayers.”<sup>169</sup> Surely receiving payments from taxpayers is such a fundamental component of IRS operations that it—if nothing else—should have been “enabled” long ago? This mention in the Plan, alone, is an admission on the part of the IRS that revenue from overseas Americans is insignificant. It is so insignificant that, even though well over one century has passed since the 1913 ratification of the Sixteenth Amendment,<sup>170</sup> the IRS is only now getting around to—not actually “enabl[ing] payments”—but merely *planning* to do so, presumably<sup>171</sup> at some point over the next eight years.

While, as discussed immediately above,<sup>172</sup> the IRS holds back when it comes to providing services to overseas Americans, it does not hold back when it comes to penalizing them. This is the case even when, faced with confusing rules that not even professional return preparers could understand, the taxpayers acted in good faith.<sup>173</sup> The IRS’s

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166. *Id.* at 44.

167. See *Inflation Reduction Act 1-Year Report Card: IRS Delivers Dramatically Improved 2023 Filing Season Service, Modernizes Technology, Pursues High-Income Individuals Evading Taxes*, INTERNAL REVENUE SERV. (Aug. 16, 2023), <https://www.irs.gov/newsroom/inflation-reduction-act-1-year-report-card-irs-delivers-dramatically-improved-2023-filing-season-service-modernizes-technology-pursues-high-income-individuals-evading-taxes> [https://perma.cc/98PM-76X3].

168. See *supra* notes 136-40 and accompanying text.

169. IRS PLAN, *supra* note 163, at 40.

170. U.S. CONST. amend. XVI (giving Congress the authority to enact an income tax).

171. “Presumably” because the Plan’s schedule of milestones for “mak[ing] payments easy” does not mention payments from international taxpayers. IRS PLAN, *supra* note 163, at 40.

172. See *supra* notes 156-71 and accompanying text.

173. See, e.g., Jeanne Sahadi, *You’ve Never Seen IRS Penalties Like These*, CNN MONEY (June 4, 2015, 10:40 AM), <https://money.cnn.com/2015/04/01/pf/taxes/irs-penalties/index.html> [https://perma.cc/2WSZ-8MNL]; William Baldwin, *The IRS Versus the Clumsy Taxpayer*, FORBES (Dec. 11, 2022, 6:30 AM), <https://www.forbes.com/sites/baldwin/2022/12/11/the-irs-versus-the-clumsy-taxpayer> [https://perma.cc/C8Q5-R55X]; Lauren Vella, *Foreign Account Reports a ‘Financial Trap’ for Americans Overseas*, BLOOMBERG TAX (Jan. 11, 2023, 10:03 AM),

approach to international reporting penalties has been described as “especially harsh.”<sup>174</sup> The Internal Revenue Manual explaining how IRS employees should apply such penalties shows that for

anyone who’s swimming in the international waters—if you have a foreign account, if you have a foreign entity, if you are engaged in foreign activities—you are presumed to know everything that you should know about this area. [A] lack of knowledge, even if it’s a negligent mistake or inadvertence, doesn’t matter.<sup>175</sup>

A 2023 audit by the Treasury Inspector General for Tax Administration criticized the IRS for focusing its auditing resources on lower-income (under \$200,000 annually) international taxpayers, because such audits are “less productive when measured by dollars returned per hour.”<sup>176</sup> The IRS defended its approach by stating that “the Dollars per Hour metric does not include the assessment of penalties, and that *penalties are a significant focus of [the IRS’s] compliance effort.*”<sup>177</sup>

A study conducted by the National Taxpayer Advocate (“NTA”) demonstrates that the IRS penalty regime for international information returns (that is, returns that do not state a tax liability) disproportionately affects individuals with “moderate” resources.<sup>178</sup> It is, the NTA explains, “by no means just a rich person’s problem.”<sup>179</sup> Specifically regarding informational penalties under Internal Revenue Code (“IRC”) sections 6038<sup>180</sup> and 6038A,<sup>181</sup> the NTA found that seventy-one percent are

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<https://news.bloombergtax.com/daily-tax-report/foreign-account-reports-a-financial-trap-for-americans-overseas> [<https://perma.cc/29P4-HRFS>]. See generally Paul Atkinson & Doris Speer, *FBAR and Other Financial Reporting Cases: Selected Cases Show Wide Range of Violations and Penalties*, ASS’N OF AMS. RESIDENT OVERSEAS, <https://aaro.org/images/Financial-Reporting-Chart-03MAY23.pdf> [<https://perma.cc/PF5J-JY5D>] (May 3, 2023) (summarizing multiple cases in which taxpayers were fined, even in non-willful cases).

174. Kristen A. Parillo, *IRS Penalty Practice May Be Due for Reset*, TAX NOTES (Aug. 16, 2023), <https://www.taxnotes.com/tax-notes-today-federal/penalties/irs-penalty-practice-may-be-due-reset/2023/08/16/7h2y1> [<https://perma.cc/9UQD-EBT8>] (quoting Caroline D. Ciralo of Kostelanetz LLP).

175. *Id.* (quoting Ciralo).

176. TREASURY INSPECTOR GEN. FOR TAX ADMIN., REP. NO. 2023-30-019, THE IRS LARGE BUSINESS AND INTERNATIONAL DIVISION SHOULD CONSIDER SHIFTING INDIVIDUAL EXAMINATION RESOURCES TO MORE PRODUCTIVE EXAMINATIONS 5 (2023), <https://www.tigta.gov/sites/default/files/reports/2023-05/202330019fr.pdf> [<https://perma.cc/AB8W-UK48>].

177. *Id.* at 6 (emphasis added).

178. NTA Blog: *International Information Return Penalties Impact a Broad Range of Taxpayers*, TAXPAYER ADVOC. SERV. (Nov. 1, 2023), <https://www.taxpayeradvocate.irs.gov/news/nta-blog-international-information-return-penalties> [<https://perma.cc/C5BA-5M7P>].

179. *Id.*

180. Pertaining to “[i]nformation reporting with respect to certain foreign corporations and partnerships.” 26 U.S.C. § 6038.

assessed against taxpayers with income of \$400,000 or less.<sup>182</sup> The average penalty amount for these individuals is more than \$40,000.<sup>183</sup>

In sum, through its actions<sup>184</sup> and its failures to act,<sup>185</sup> as well as through its explicit statements,<sup>186</sup> the IRS makes clear that, for it, the purpose of the U.S. nationality-based tax system is to punish American nationals living outside the United States—not to collect revenue from them.

#### IV. REFORM MADE IMPOSSIBLE

Part II of this article explained that the U.S. nationality-based tax system violates the Fourteenth Amendment Equal Protection Clause (among other rights) because it discriminates against overseas Americans based on nationality.<sup>187</sup> The Appendix to this article demonstrates that the system burdens American nationals living outside the United States in manners that neither U.S. residents (regardless of nationality) nor non-American nationals (aliens) living outside the United States are burdened.<sup>188</sup>

Part III of this article explained that, like many other kinds of taxes (MMT argues all other kinds),<sup>189</sup> the purpose of the U.S. nationality-based tax system is not to raise revenue.<sup>190</sup> Instead, the evidence shows that its purpose is to punish persons living overseas<sup>191</sup> and sacrifice them as scapegoats for the benefit of U.S. businesses and U.S. residents (of any nationality).<sup>192</sup>

Nevertheless, as the Introduction to this article explained, in the absence of a positive budget score (or at least revenue neutrality), congressional reform of the U.S. nationality-based tax system is blocked.<sup>193</sup> This is because, with respect to the system, there are members of Congress and their staff who choose to defer to the JCT; they reject any proposal for reform to which the JCT would assign a negative budget score. The

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181. Pertaining to “[i]nformation with respect to certain foreign-owned corporations.” *Id.* § 6038A.

182. *NTA Blog: International Information Return Penalties Impact a Broad Range of Taxpayers*, *supra* note 178.

183. *Id.*

184. *See supra* notes 172-83 and accompanying text.

185. *See supra* notes 156-71 and accompanying text.

186. *See supra* note 177 and accompanying text.

187. *See supra* notes 28-57 and accompanying text.

188. *See infra* notes 350-77 and accompanying text.

189. *See supra* notes 61-70 and accompanying text.

190. *See supra* notes 71-82 and accompanying text.

191. *See supra* notes 96-107 and accompanying text.

192. *See supra* notes 108-32 and accompanying text.

193. *See supra* notes 1-3 and accompanying text.

constitutional and human rights violations perpetrated by the system are secondary if they are considered relevant at all.

This Part explains why the paradigm of revenue neutrality (or a budget score): (A) denies the true nature of the U.S. nationality-based tax system; and (B) results in an irresolvable paradox that necessarily perpetuates the system's violations of fundamental rights.

#### A. Denial of True Nature

Constitutional rights are rights accorded to individuals by virtue of their citizenship of or residence in a certain country (in this case, the United States).<sup>194</sup> Human rights are rights accorded to individuals by virtue of their membership in the human family.<sup>195</sup> Normally, neither constitutional nor human rights can (or at least should) be bought or sold, nor do they need to be earned or deserved.<sup>196</sup>

But what about a constitutional or human right that, if protected, produces a negative budget score? Should a fundamental right drop in status to something less than fundamental—or cease being a right—when confronted with a negative budget score? Constitutional and human rights do not need to be earned or deserved—okay—but shouldn't they at least be revenue neutral? Does the collection of revenue justify and thereby permit a violation—if not an outright denial—of fundamental rights?

Consider other situations of rights violations. If slavery existed today in the United States, ending it would presumably have a budgetary effect. Could it be ended only with a positive budget score? Forced penal labor does exist in the United States today,<sup>197</sup> as does civil asset

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194. See, e.g., Lyle Denniston, *Constitution Check: Do Individual Rights Stop at the U.S. Border?*, NAT'L CONST. CTR. (Oct. 29, 2015), <https://constitutioncenter.org/blog/constitution-check-do-individual-rights-stop-at-the-u-s-border> [<https://perma.cc/H6FD-6F6H>]; see also Alina Veneziano, *Applying the U.S. Constitution Abroad, from the Era of the U.S. Founding to the Modern Age*, 46 *FORDHAM URB. L.J.* 602, 614 (2019); *Reid v. Covert*, 354 U.S. 1, 5-6 (1956).

[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.

*Reid*, 354 U.S. at 5-6 (footnotes omitted).

195. *Part I A: What Are Human Rights*, U. MINN. HUM. RTS. RES. CTR., <http://hrlibrary.umn.edu/edumat/hreduseries/hrhandbook/part1A.html> [<https://perma.cc/U6GS-HBPE>] (last visited Feb. 21, 2024).

196. *Id.*

197. See, e.g., Michael Sainato, 'Slavery by Any Name Is Wrong': The Push to End Forced Labor in Prisons, *GUARDIAN* (Sept. 27, 2022, 6:00 PM), <https://www.theguardian.com/us->

forfeiture (argued to violate the Fifth<sup>198</sup> and Eighth Amendments<sup>199</sup>). Both contribute directly to federal coffers.<sup>200</sup> Will reforming or abolishing either require a positive budget score?

Surely the response to these questions must be no. Conditioning the right of equal protection or any other fundamental right on a budget score is a denial of the right. Conditioning reform of the U.S. nationality-based tax system on a positive budget score is, at best, a denial that the system violates multiple fundamental rights. At worst, it is a refusal to accord those rights to overseas Americans.

### B. Irresolvable Paradox

A former chief economist for the Senate Budget Committee Democratic staff described the role of the CBO and JCT in this manner:

The [JCT and CBO] are the guardians at the gate for legislation in Washington, D.C. They effectively hand out the permission slips. It is a huge problem that there is so much reverence within Washington, D.C. for the raw budget scores handed out by these agencies. We're in real trouble, as a species, if we're waiting around for a budget score from CBO that tells us we can do something . . . because it won't add too much to future deficits. In that case, we're doomed. That's where

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news/2022/sep/27/slavery-loophole-unpaid-labor-in-prisons [https://perma.cc/W36K-4GCS]; Aaron M. Kinzer, *I Worked in Federal Prison Sweatshops for 23 Cents an Hour*, INTERCEPT (Sept. 4, 2023, 6:00 AM), <https://theintercept.com/2023/09/04/prison-labor-exploitation-america> [https://perma.cc/2RSW-CV52].

198. Fifth Amendment unjust seizure. *See, e.g.*, Benjamin S. Weiss, *House Advances Bipartisan Measure to Reshape Civil Forfeiture Laws*, COURTHOUSE NEWS SERV. (June 14, 2023), <https://www.courthousenews.com/house-advances-bipartisan-measure-to-reshape-civil-forfeiture-laws> [https://perma.cc/6RKE-RR2B] (“As currently written, our federal asset forfeiture laws lack significant Fifth Amendment due process protections and create a set of perverse incentives for federal agencies to pursue civil forfeiture in cases where it is unwarranted[.]”) (quoting Rep. Jerry Nadler (D-NY)).

199. Eighth Amendment excessive fines. *See, e.g.*, Emma Andersson, *The Supreme Court Didn't Put the Nail in Civil Asset Forfeiture's Coffin*, ACLU (Mar. 15, 2019), <https://www.aclu.org/news/criminal-law-reform/supreme-court-didnt-put-nail-civil-asset> [https://perma.cc/6GR8-MZC8].

200. *See, e.g.*, *Profiting off of Prison Labor*, BUS. REV. BERKELEY (July 6, 2020), <https://businessreview.berkeley.edu/profitting-off-of-prison-labor> [https://perma.cc/KJX5-F56S] (explaining that the Federal Prison Industries program “makes nearly half a billion dollars in net sales annually using prison labor, paying inmates between 23¢ to \$1.15 per hour”); Louis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. PA. J. CONST. L. 1111, 1120 (2017) (“The very authorities entrusted with discretion over when to use civil forfeiture laws now had a direct financial stake in the outcome of the cases they filed. In a short amount of time, the Department of Justice’s federal asset forfeiture fund grew from \$338 million in 1996 to \$1.3 billion in 2008 to more than \$2.0 billion today.”).



we are. If we can't pass anything legislatively unless the CBO gives you a permission slip, we're going to be in real trouble.<sup>201</sup>

If you were to seek to develop a proposal for reform of the U.S. nationality-based tax system that both ended its violations of constitutional and human rights and was revenue neutral (if not revenue positive), how would you go about it?

As discussed above,<sup>202</sup> it is axiomatic that a tax system—any tax system—seeks to charge money in some amount—regardless of how much is actually collected. Further, it is axiomatic that reforming any tax—let alone an entire tax system—will change the amount of tax collected. In the case of reform of the U.S. nationality-based tax system, the objective is to alleviate a given population (American nationals living outside the United States) from the burden of discriminatory taxation.<sup>203</sup> Given that, it is axiomatic that the amount of at least some forms of revenue collected from overseas Americans will decrease.<sup>204</sup>

Because the proposal must be revenue neutral (if not revenue positive), a way to offset the reduction in revenue must be identified. This means either increasing some other tax, creating a new tax, or reducing some kind of federal expenditure.<sup>205</sup> Each of these requires identifying targets to bear the burden of either the increased or new taxation or the reduced expenditure.<sup>206</sup> Who or what could be scapegoated for this purpose?

Theoretically, it could be any population other than overseas Americans. For example, the United States could increase rates of taxation for U.S. residents and/or U.S. corporations. Or, if a carbon tax were implemented, rather than returning the revenue collected to U.S. taxpayers in the form of dividends (as discussed above),<sup>207</sup> it could instead be used to offset the revenue lost because of the reform of the U.S. nationality-based tax system. Or, some federal expenditure or tax credit could be

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201. Camacho, *supra* note 61 (quoting Stephanie Kelton).

202. See *supra* note 60 and accompanying text.

203. See, e.g., News Team, *Overseas Americans Urged to Unite Against Unfair Taxation*, AMERICAN (Mar. 23, 2023), <https://www.theamerican.co.uk/pr/ne-AAA-Fundraise-Against-CBT> [<https://perma.cc/U8RE-NVG2>] (explaining how the U.S. is one of two countries that still tax income regardless of residency).

204. If a consequence of the reform is to tax overseas Americans in the same way that nonresident aliens (“NRAs”) are currently taxed, then arguably at least one form of tax revenue would likely increase because withholding on overseas Americans’ U.S.-source income would increase. This analysis, however, is beyond the scope of this article.

205. See *Buy Their Freedom*, *supra* note 150, at 236.

206. *Id.*

207. See *supra* notes 78-82 and accompanying text.

reduced, such as aid to Ukraine<sup>208</sup> or the electric vehicle tax credit (discussed above).<sup>209</sup> These are just a handful of examples. In theory, there is a multitude of potential targets.

The reality, of course, is considerably different. It is difficult to imagine any political will to implement any such tax increase or expenditure reduction. What member of Congress would be willing to explain to their constituents that they had to increase their constituents' taxes or reduce spending on their constituents' programs to alleviate the tax burdens of overseas Americans?<sup>210</sup> Indeed, for decades the opposite has occurred. As discussed above,<sup>211</sup> on many occasions when some form of federal taxation was reduced, or some form of federal spending was increased, overseas Americans were targeted as the convenient scapegoats upon whom the responsibility to compensate for that lost revenue or increased spending was placed. Any scenario in which Congress would accept to reverse such scapegoating is nearly impossible to imagine.

This means that there is only one possible target to establish revenue neutrality: overseas Americans themselves.<sup>212</sup>

But how could this be? How could it be possible to—simultaneously—both end discriminatory nationality-based taxation while also continuing to tax the very same persons based on their nationality? Whatever new form the taxation might take, no matter how different its triggering points might be, if the tax continues any distinction among persons based upon nationality, violations of constitutional and other fundamental rights will necessarily also continue.<sup>213</sup>

In sum, you can try all you would like to develop a proposal for reform of the U.S. nationality-based tax system that both truly ends its

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208. See Jonathan Masters & Will Merrow, *How Much Aid Has the U.S. Sent Ukraine? Here Are Six Charts.*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/article/how-much-aid-has-us-sent-ukraine-here-are-six-charts> [<https://perma.cc/DC2S-Q5BM>] (Sept. 21, 2023, 9:00 AM) (noting that the Biden administration and the U.S. Congress have provided Ukraine with over \$75 billion in assistance).

209. See *supra* notes 83-84 and accompanying text.

210. See *Buy Their Freedom*, *supra* note 150, at 236.

211. See *supra* notes 108-32 and accompanying text; see also *Buy Their Freedom*, *supra* note 150, at 236-38.

212. See *Buy Their Freedom*, *supra* note 150, at 237-38.

213. See Laura Snyder, *Extraterritorial Taxation #14: Revenue Neutrality Makes No Sense* 3-9 (Stop Extraterritorial Am. Tax'n, Working Paper No. 14, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4466208](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4466208) [<https://perma.cc/75F6-STUT>] [hereinafter *Extraterritorial Taxation #14*]; Laura Snyder, *Extraterritorial Taxation #15: Taxing in Respect of Rights* 3-7 (Stop Extraterritorial Am. Tax'n, Working Paper No. 15, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4466241](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4466241) [<https://perma.cc/FH3J-UYD8>] [hereinafter *Extraterritorial Taxation #15*] (describing a proposal purporting to move the United States to residency-based taxation but which instead re-packages the current U.S. nationality-based tax system, continuing its violations of fundamental rights).

violations of constitutional and human rights and produces a positive budget score (or at least revenue neutrality). But you will never succeed. You will be “doomed”<sup>214</sup>—trapped in an irresolvable paradox. And overseas Americans will remain in “real trouble.”<sup>215</sup>

#### V. FACTORS THAT *SHOULD* BE CONSIDERED IN EVALUATING PROPOSED LEGISLATION

The former chief economist for the Senate Budget Committee Democratic staff quoted above<sup>216</sup> described the role the CBO *should* play:

The CBO was created by Congress. Congress needs to tell CBO: give us feedback, give us assistance, help us evaluate the impact of proposed legislation. Tell us: if we do this, are we at risk of creating an inflation problem? If we do this, how many kids are going to be lifted out of poverty? If we do this, what’s going to happen to the Gini coefficient [measure of inequality] in this country? Ask them to produce metrics that matter. . . . Start evaluating and judging policy on mean-  
in[g]ful information.<sup>217</sup>

Put another way, legislation has important consequences far beyond a budget score—consequences that affect people’s lives in ways that a budget score cannot. Those consequences need to be fully considered when evaluating any proposed legislation.

When it comes to legislation addressing the problems of the U.S. nationality-based tax system, what factors *should* be considered? In answering this question, it is helpful to recall why the Supreme Court repeatedly holds that distinctions based on nationality, like those based on race, should be treated with “antipathy.”<sup>218</sup> It is because: “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.”<sup>219</sup>

As these words expose, when a law makes distinctions based upon nationality, the result is one class—identified by nationality—that is

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214. See *supra* note 201 and accompanying text.

215. See *supra* note 201 and accompanying text.

216. See *supra* note 201 and accompanying text.

217. Camacho, *supra* note 61 (quoting Stephanie Kelton).

218. See *supra* notes 38-49 and accompanying text.

219. *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985); see *supra* notes 36-37; see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978); *Students for Fair Admissions, Inc. v. Harvard Coll.*, No. 20-1199, slip op. at 18 (U.S. June 29, 2023).

burdened more than another class.<sup>220</sup> As the Appendix to this article demonstrates, this is the case with respect to the U.S. nationality-based tax system: American nationals living outside the United States are burdened by U.S. federal taxation in ways that U.S. residents (of any nationality) and nonresident aliens are not.<sup>221</sup>

Understood in this context, when seeking to address the problems of the U.S. nationality-based tax system, what needs to be evaluated is the extent to which the proposed legislation both ends the nationality-based discrimination and remedies the multitude of burdens suffered by the targeted class.

More specifically, what should be evaluated is the extent to which the proposed legislation will: (A) end the discrimination on its face, in the text of the relevant statutes and regulations; (B) allow overseas Americans to live normal lives, freed of the limitations that the U.S. federal tax system places on no one except them; (C) allow overseas Americans to open and maintain bank accounts in the countries where they live and under the same conditions as the other residents of the countries where they live; (D) relieve overseas Americans of the excessive stress and expense of complying with U.S. federal taxation; and (E) enable overseas Americans to remain U.S. citizens. The ultimate question is: (F) will the proposed legislation accord to *all* Americans, regardless of where they live today, individual self-determination?

#### *A. Does It End Discrimination on Its Face?*

As explained above,<sup>222</sup> the United States has three tax systems: System One is a domestic system for U.S. residents, regardless of nationality. System Two, based on source, is for nonresident non-American nationals (aliens). System Three is extraterritorial; it is for nonresident American nationals. As also described above<sup>223</sup> and exemplified in the Appendix to this article,<sup>224</sup> System Three burdens American nationals living outside the United States in multiple ways that neither U.S. residents (of any nationality) nor non-American nationals living outside the United States are burdened.

The source of this discrimination lies in the interaction of laws adopted by Congress and regulations adopted by Treasury. In a nutshell, the IRC, together with Treasury regulations, impose worldwide taxation

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220. See *supra* notes 38-49 and accompanying text.

221. See *infra* notes 350-77 and accompanying text.

222. See *supra* notes 28-29 and accompanying text.

223. See *supra* notes 36-58 and accompanying text.

224. See *infra* notes 350-77 and accompanying text.

on “every individual who is a citizen or resident of the United States.”<sup>225</sup> The term “resident” encompasses all persons who live in the United States, regardless of nationality and regardless of legal status in the country. Consequently, the term “citizen” has meaning and effect only regarding persons living outside the United States.<sup>226</sup> Those persons are classified based on their nationality: Among all persons living outside the United States, U.S. tax rules subject American nationals to far more onerous federal tax burdens as compared to those who are not American nationals.<sup>227</sup>

The only way to end this nationality-based discrimination is to sever citizenship (*nationality*) from U.S. tax residency. The relevant provisions of both the IRC and Treasury regulations need to be amended in a manner that makes a person’s nationality irrelevant to their tax status. At a minimum, the legal texts, on their face, cannot treat American nationals worse than nonresident aliens. This is the standard against which any proposed legislation should be evaluated.

### *B. Does It Allow Overseas Americans to Live Normal Lives?*

As demonstrated in the Appendix to this article,<sup>228</sup> the U.S. nationality-based tax system burdens overseas Americans in multiple ways. This includes—without limitation—difficulty planning for retirement,<sup>229</sup> difficulty with other investments,<sup>230</sup> penalizing taxation of capital gains,<sup>231</sup> difficulty owning a small business,<sup>232</sup> difficulty holding title to family assets (such as one’s home),<sup>233</sup> difficulty obtaining a mortgage,<sup>234</sup> penalizing taxation of welfare benefits,<sup>235</sup> and the inability to hold certain positions of employment<sup>236</sup> and of community service.<sup>237</sup>

As a result of these burdens, overseas Americans cannot live normal lives in the places where they live. In evaluating any proposed

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225. Treas. Reg. § 1.1-1(a)(1) (as amended in 2022); *see also* I.R.C. § 1.

226. For a more detailed discussion, *see Extraterritorial Taxation #7, supra* note 33, at 4-5; *see also Myths & Truths, supra* note 33, at 198, 209.

227. *See* sources cited *supra* note 226.

228. *See infra* notes 350-77 and accompanying text.

229. *See infra* note 358 and accompanying text.

230. *See infra* notes 359, 372 and accompanying text.

231. *See infra* note 359 and accompanying text.

232. *See infra* note 360 and accompanying text.

233. *See infra* note 374 and accompanying text.

234. *See infra* note 373 and accompanying text.

235. *See infra* note 361 and accompanying text.

236. *See infra* note 375 and accompanying text.

237. *See infra* note 376 and accompanying text.

legislation, the extent to which these problems will be remedied needs to be examined.

*C. Does It Allow Overseas Americans to Open and Maintain Bank Accounts (Free from Discrimination and Fear)?*

The Appendix to this article also demonstrates that overseas Americans have difficulties opening and maintaining bank and other financial accounts in the countries where they live.<sup>238</sup>

The principal reason for this is FATCA, discussed above.<sup>239</sup> FATCA places account reporting obligations not only on American nationals living overseas, but also on the banks and other financial institutions holding their accounts.<sup>240</sup> “Foreign financial institutions”<sup>241</sup> (which are in fact not foreign but local for overseas Americans in the countries where they live) are subject to draconian penalties for noncompliance.<sup>242</sup> As a result, many prefer to not have American nationals as clients. They refuse requests to open new accounts and/or close existing accounts.<sup>243</sup> Some overseas Americans find they are only able to have a basic checking account because this, as a minimum, is guaranteed by local law.<sup>244</sup>

Overseas Americans know that their existing account(s) could be closed at any time, for no reason other than their American nationality. They live with this constant fear, regardless of whether they have yet had the experience of an account closure or of not being able to open a new account.<sup>245</sup>

They also live with another fear: that they will be subject to draconian fines merely for holding one or more bank accounts in the country where they live.<sup>246</sup> The source of this fear lies in the Currency and Foreign Transactions Reporting Act of 1970, also known as the Bank

238. See *infra* notes 365-66, 371 and accompanying text.

239. See *supra* notes 108-22 and accompanying text.

240. See *Unacknowledged Realities*, *supra* note 1, at 255.

241. *Foreign Account Tax Compliance Act*, U.S. DEP'T TREAS., <https://home.treasury.gov/policy-issues/tax-policy/foreign-account-tax-compliance-act> [<https://perma.cc/8W4U-XH4W>] (last visited Feb. 21, 2024).

242. See *Unacknowledged Realities*, *supra* note 1, at 255; see also Lynnley Browning, *Analysis: Critics Say New Law Makes Them Tax Agents*, REUTERS (Aug. 19, 2011, 8:12 AM), <https://www.reuters.com/article/us-usa-tax-fatca-idUSTRE77138220110819> [<https://perma.cc/6CUH-9MHR>].

243. Laura Snyder, *Extraterritorial Taxation #2: How It Is Experienced* 7-8 (Stop Extraterritorial Am. Tax'n, Working Paper No. 2, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4465003](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4465003) [<https://perma.cc/HA8Z-HW9M>] [hereinafter *Extraterritorial Taxation #2*].

244. See, e.g., SEAT SURVEY COMMENTS, *supra* note 115, at 13, 44, 264, 630.

245. See, e.g., *id.* at 5, 12, 22, 26, 31, 96, 238, 244, 376.

246. See, e.g., *id.* at 3, 5, 7, 10, 16, 17, 19-21, 26, 32, 38, 40, 43, 44, 49, 51, 73, 95, 103.

Secrecy Act.<sup>247</sup> It created various financial reporting obligations purportedly to identify and collect evidence of money laundering, tax evasion, and other criminal activities. However, the law includes the obligation for not only all U.S. residents but also all American nationals living outside the United States to report to the Treasury's Financial Crimes Enforcement Network on an annual basis on all the financial accounts they hold with any "foreign" financial institutions.<sup>248</sup> Any account held in a non-U.S. financial institution is considered "foreign" and thus subject to the reporting requirement referred to as the FBAR, even when the bank in question is local to the account holder.<sup>249</sup>

While the FBAR ostensibly is not linked to U.S. taxation, it is administered by the IRS.<sup>250</sup> In recent years, the IRS has been on a veritable warpath, imposing heavy—draconian—fines for failure to make one or more FBAR filings.<sup>251</sup> "No mercy is shown, not even when the taxpayer acted in good faith, and not even when the amounts involved are modest if not nearly negligible."<sup>252</sup>

Any proposed legislation must be evaluated based on the extent to which it will allow American nationals living outside the United States to hold bank and other financial accounts under the same conditions as the other residents of the country where they live, free from both discrimination and the threat of fines—let alone draconian fines—for failure to report their accounts to a country where they do not live.

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247. Currency and Foreign Transactions Reporting Act of 1970, Pub. L. No. 91-508, §§ 241–242, 84 Stat. 1118, 1124.

248. The Report of Foreign Bank and Financial Accounts ("FBAR") has a filing threshold of \$10,000 in the aggregate across all the overseas American's non-U.S. accounts during the year in question. *Unacknowledged Realities*, *supra* note 1, at 251-52.

249. *Criminalization*, *supra* note 105, at 2283; *Taxing the American Emigrant*, *supra* note 119, at 306-07.

250. *Report of Foreign Bank and Financial Accounts (FBAR)*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/report-of-foreign-bank-and-financial-accounts-fbar> [<https://perma.cc/FCK6-3K7S>] (July 5, 2023).

251. See, e.g., Andrew Velarde, *Case Termination on FBAR Penalty Remand Proper*, *Court Holds*, 178 TAX NOTES FED. 1595, 1595 (2023); Andrew Velarde, *Ex-CEO of Shipping Container Company Faces \$1 Million in FBAR Fines*, 178 TAX NOTES FED. 1594, 1594-95 (2023); Andrew Velarde, *Schwarzbaum FBAR Assessment Dispute Again at Appeal*, 178 TAX NOTES FED. 1228, 1228 (2023); see also Atkinson & Speer, *supra* note 173 (summarizing selected FBAR and other financial reporting penalty cases).

252. Laura Snyder, *Extraterritorial Taxation #12: It's Not About Paying Taxes* 8 (Stop Extraterritorial Am. Tax'n, Working Paper No. 12, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4466128](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4466128) [<https://perma.cc/5U5K-2VLD>].

*D. Does It Relieve Overseas Americans of the Inordinate Complexity, Expense, and Danger of Compliance?*

While no one would argue that the preparation of a domestic U.S. tax return is simple or stress-free, the complexity, expense, and danger involved pale in comparison to an international return.<sup>253</sup> U.S. rules governing foreign investments and retirement planning, business ownership, and the acquisition and sales of assets—just to name a few—are highly complex.<sup>254</sup> Again, while these may be foreign from the perspective of the United States, they are local to the American nationals living overseas.

Equally complex are the rules governing the application of the Foreign Earned Income Exclusion and the use of foreign tax credits.<sup>255</sup> Mistakes—even inadvertent—are fraught with peril because of the IRS's punishing approach.<sup>256</sup>

Because of the inordinate complexity combined with, as discussed above,<sup>257</sup> the ever-present and considerable danger in making a mistake, many American nationals living overseas feel they have no choice but to engage a professional to prepare their U.S. tax returns.<sup>258</sup> In doing so, they find themselves required to pay fees upward of \$3,000 per year.<sup>259</sup> (This compares with an average of \$220 to \$323 for domestic taxpayers.)<sup>260</sup> These fees are incurred regardless of whether any U.S. federal tax is ultimately owed, and as discussed above,<sup>261</sup> in most cases none is owed. The fees are incurred regardless of income; for low-income persons, the fees can easily represent a large percentage of their annual income, if not surpass it, given the exceptionally low filing threshold of \$5 for the status Married Filing Separately.<sup>262</sup> It is no surprise, then, that some report incurring debt to pay the fees.<sup>263</sup>

253. See, e.g., *Unacknowledged Realities*, *supra* note 1, at 302-04.

254. See *id.* at 304-07.

255. See *id.* at 301-04.

256. See *supra* notes 172-77 and accompanying text.

257. See *supra* notes 172-77 and accompanying text.

258. See SEAT SURVEY COMMENTS, *supra* note 115, at 173-222.

259. See SEAT SURVEY DATA PART 2, *supra* note 144, at 53 (showing that of survey participants who engaged a professional to prepare their most recent tax return, forty-one percent paid fees of more than \$1,000, and eleven percent paid more than \$3,000).

260. Barbara Weltman, *What Will I Pay for Tax Preparation Fees?*, INVESTOPEDIA, <https://www.investopedia.com/articles/taxes/021717/what-will-i-pay-tax-preparation-fees.asp> [<https://perma.cc/5WLG-233A>] (Nov. 15, 2023).

261. See *supra* notes 135-40 and accompanying text.

262. INTERNAL REVENUE SERV., PUB. NO. 501, DEPENDENTS, STANDARD DEDUCTION, AND FILING INFORMATION FOR USE IN PREPARING 2023 RETURNS 2 (2024), <https://www.irs.gov/pub/irs-pdf/p501.pdf> [<https://perma.cc/UG8Y-XR7X>].

263. SEAT SURVEY COMMENTS, *supra* note 115, at 46-47, 98.



Any proposed legislation must be evaluated on the extent to which it relieves American nationals living overseas of inordinately complex, expensive, and dangerous U.S. tax filings.

*E. Does It Enable Overseas Americans to Remain U.S. Citizens?*

From 1996 to 2012, an average of 722 Americans renounced U.S. citizenship each year.<sup>264</sup> From 2013 to 2020, this average shot up to 4,249 each year.<sup>265</sup> The reason for this nearly sixfold increase is not a secret. It is directly linked to the U.S. nationality-based tax system and, more specifically, to the implementation of FATCA.<sup>266</sup> The U.S. government—or, at least, its Executive Branch—acknowledges this direct link. This is evidenced by postings on the websites of the U.S. State Department<sup>267</sup> and the IRS.<sup>268</sup>

When overseas Americans renounce U.S. citizenship, 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.”<sup>269</sup> One did “burst into tears,” and another vomited.<sup>270</sup>

One overseas American explained: “I would love to keep my citizenship with the [U.S.], but that is out of the question the way things are now.”<sup>271</sup> 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

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264. *Extraterritorial Taxation* #9, *supra* note 33, at 7; *see also Myths & Truths*, *supra* note 33, at 199-200.

265. *Extraterritorial Taxation* #9, *supra* note 33, at 7; *see also Myths & Truths*, *supra* note 33, at 199-200.

266. *See, e.g.,* Alice Kantor, *Americans Abroad Renounce Citizenship to Escape Tax Law's Clutches*, WEALTH MGMT. (Sept. 30, 2022), <https://www.wealthmanagement.com/high-net-worth/americans-abroad-renounce-citizenship-escape-tax-law-s-clutches> [<https://perma.cc/664Q-8BZE>]; Robert W. Wood, *Fee to Renounce Citizenship to Drop, Reversing 422% Hike*, FORBES (Jan. 12, 2023, 10:58 AM), <https://www.forbes.com/sites/robertwood/2023/01/12/fee-to-renounce-citizenship-to-drop-422> [<https://perma.cc/H2Z6-S3YY>].

267. *Joint Foreign Account Tax Compliance Act (FATCA) FAQ*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/international-travel/while-abroad/Joint-Foreign-Account-Tax-Compliance-FATCA-FAQ.html> [<https://perma.cc/Y474-7FVU>] (Nov. 22, 2022).

268. Organ, *supra* note 141, at 1 (“I show that 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 that these renunciations are primarily a response to increased compliance costs, not tax liabilities.”).

269. *Taxing the Emigrant*, *supra* note 119, at 312.

270. *Id.*

271. SEAT SURVEY COMMENTS, *supra* note 115, at 499.

all related to taxation because I love(d) my country and have always supported the [U.S.]. It just can't go on."<sup>272</sup>

In the 1967 decision *Afroyim v. Rusk*,<sup>273</sup> the U.S. Supreme Court held that Congress does not have the power to “abridge or affect” citizenship.<sup>274</sup> It further held that the Fourteenth Amendment protects “every citizen” against a “congressional forcible destruction of his citizenship.”<sup>275</sup> The U.S. nationality-based tax system drives American nationals living overseas to feel that they have no choice but to renounce U.S. citizenship, as the only means to escape the penalizing policies.<sup>276</sup>

Ultimately, the teaching of *Afroyim* is that citizenship belongs to the individual and not to the government.<sup>277</sup> While Congress may, under the power of naturalization, have the power to confer citizenship, it does not have the power to take it away,<sup>278</sup> through legislative or other means.<sup>279</sup>

Today, the U.S. nationality-based tax system, which is rooted in Acts of Congress, clearly “abridge[s]” and “affect[s]”<sup>280</sup> and causes the “forcible destruction of citizenship.”<sup>281</sup> It does this in violation of *Afroyim* and the Fourteenth Amendment. A criterion for evaluation of proposed legislation seeking to reform the system must be the extent to which the legislation would end the conditions that cause American nationals to feel they have no choice but to renounce U.S. citizenship.

#### *F. Does It Accord to All Americans Individual Self-Determination?*

As discussed above,<sup>282</sup> the U.S. Supreme Court has explained that when a law makes distinctions based upon nationality, the result is one

272. *Id.* at 505; see also Rachel Heller, *The Irony of Renouncing Under Duress*, RACHEL'S RUMINATIONS, <https://rachelsruminations.com/renouncing-under-duress> [<https://perma.cc/UM2Z-9PY7>] (last visited Feb. 21, 2024).

273. 387 U.S. 253 (1967).

274. *Id.* at 266-67 (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898)).

275. *Id.* at 268.

276. See *Extraterritorial Taxation #9*, *supra* note 33, at 6-10; see also *Myths & Truths*, *supra* note 33, at 199.

277. *Afroyim*, 387 U.S. at 268; *Extraterritorial Taxation #9*, *supra* note 33, at 10; see also *Myths & Truths*, *supra* note 33, at 203.

278. *Afroyim*, 387 U.S. at 266-67.

279. See Nora Graham, *Patriot Act II and Denationalization: An Unconstitutional Attempt to Revive Stripping Americans of Their Citizenship*, 52 CLEV. ST. L. REV. 593, 603 (2004-05). See generally Alan G. James, *Expatriation in the United States: Precept and Practice Today and Yesterday*, 27 SAN DIEGO L. REV. 853 (1990) (explaining attempts made by Congress to take away citizenship through legislative or other means and why they were unsuccessful).

280. *Afroyim*, 387 U.S. at 266-67 (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898)).

281. *Id.* at 268.

282. See *supra* notes 218-21 and accompanying text.

class—identified by nationality—that is burdened more than another class. This Part V,<sup>283</sup> together with the Appendix,<sup>284</sup> provide clear evidence of this: they describe the variety of ways that American nationals living outside the United States are burdened in ways that neither U.S. residents (of any nationality) nor non-American nationals living outside the United States are burdened.

What is the ultimate consequence of all these burdens, considered as a whole? It is the loss of freedom. As the U.S. Supreme Court first stated in 1943 and has repeated several times since, including as recently as 2023: “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>285</sup>

What is freedom? In this context, it should be understood as individual self-determination. It is the power and the ability to make decisions for oneself, based upon one’s values and the kind of life one wishes to lead.<sup>286</sup> It is the ability to control one’s life rather than it being controlled by others.<sup>287</sup>

According to the U.S. Department of State, self-determination is a core American value. A pamphlet directed specifically to overseas Americans<sup>288</sup> opens with these words: “Americans value independence and self-determination, placing importance on the role of the individual in shaping his or her own identity and destiny through one’s choices, abilities, and efforts.”<sup>289</sup> The American value of “independence,” the

283. See *supra* notes 216-82; *infra* notes 284-332 and accompanying text.

284. See *infra* notes 350-77 and accompanying text.

285. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *Oyama v. California*, 332 U.S. 633, 646 (1948) (quoting *Hirabayashi*, 320 U.S. at 100); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223-24 (1995) (quoting *Hirabayashi*, 320 U.S. at 100); *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (quoting *Hirabayashi*, 320 U.S. at 100); *Students for Fair Admissions, Inc. v. Harvard Coll.*, No. 20-1199, slip op. at 5 (U.S. June 29, 2023) (quoting *Rice*, 528 U.S. at 517).

286. See Kendra Cherry, *What Is Self-Determination Theory?*, VERYWELL MIND (Nov. 8, 2022), <https://www.verywellmind.com/what-is-self-determination-theory-2795387> [<https://perma.cc/8CC2-B5EP>].

287. See *id.*

288. U.S. DEP’T OF STATE, “SO YOU’RE AN AMERICAN?”: A GUIDE TO ANSWERING DIFFICULT QUESTIONS ABROAD, <https://www.state.gov/courses/answeringdifficultquestions/assets/m/resources/DifficultQuestions-AmericanValues.pdf> [<https://perma.cc/HHL5-HFP7>] (last visited Feb. 21, 2024) [hereinafter STATE DEP’T GUIDE]. The pamphlet is an “online resource created by the Department of State’s Foreign Service Institute for all Americans living and working abroad who are eager to prepare for the many informal and unofficial questions they will receive while overseas.” *So You’re an American? A Guide to Answering Difficult Questions Abroad*, U.S. DEP’T OF STATE, <https://2017-2021.state.gov/so-youre-an-american-a-guide-to-answering-difficult-questions-abroad> [<https://perma.cc/PD6H-7VAQ>] (last visited Feb. 21, 2024).

289. STATE DEP’T GUIDE, *supra* note 288, at 1.

pamphlet continues, “represents the limited intervention and control of the government on personal lives.”<sup>290</sup>

Pollvogt brings needed nuance.<sup>291</sup> She explains that laws can always interfere with self-determination.<sup>292</sup> The laws that must be rejected are those that impose “legal burdens in a way that does not correspond to individual responsibility.”<sup>293</sup> This occurs, she further explains, when laws rely on status—such as race or nationality<sup>294</sup>—as a proxy for conduct<sup>295</sup>: “Such reliance is offensive to democracy even if there is a measure of accuracy to the stereotype.”<sup>296</sup>

Clearly, the U.S. nationality-based tax system denies to American nationals living outside the United States not only the core American value of self-determination,<sup>297</sup> but also of “independence” (as this term is defined by the U.S. Department of State).<sup>298</sup>

As examples, because of the system’s penalizing policies, American nationals living outside the United States have difficulties to:

- Invest or save for retirement:

“I have given away or closed my personal investment accounts in Canada because they are so difficult to file in the [U.S.] (designated PFICs). I do not avail myself of tax-advantages allowed under the Canadian system (TFSA) because of the complications of being a [U.S.] citizen. Therefore, I am more poorly prepared for retirement than my Canadian counterparts because I am a [U.S.] citizen.”<sup>299</sup>

- Own a small business:

“Faced with all the risks and unreasonable costs of incorporation, I have been forced to run a consultancy as a non-incorporated ‘sole trader.’ Although this simplifies [U.S.] taxation, it is not the best business structure as it creates financial risk for me as I cannot separate my business activities from my personal assets . . . It made me angry that I could not choose the optimal business structure like my co-citizens.”<sup>300</sup>

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290. *Id.*

291. Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 739 (2014).

292. *Id.* at 800.

293. *Id.*

294. *See id.* at 760.

295. *Id.* at 800.

296. *Id.*; *see also Myths & Truths*, *supra* note 33, at 247.

297. *See supra* note 288 and accompanying text.

298. *Supra* note 290 and accompanying text.

299. SEAT SURVEY COMMENTS, *supra* note 115, at 93.

300. *Id.* at 319.

- Hold bank or other financial accounts:

“Only my [non-American] husband was able to open up a bank account in Peru with his name but our money. It is not a good feeling to not have equal control.”<sup>301</sup>

- Hold title to family assets (such as their homes):

“It’s scary to think my name is not on any titles or deeds where we live. What if something happens to my husband, and nothing is in my name? What if we divorce?”<sup>302</sup>

- Obtain a mortgage:

“Exactly one bank was willing to give us a mortgage. Others refused to speak with us when they heard my American accent. Incidentally, my husband is also foreign where we live, but he’s not American so it’s fine. I am actually also a citizen of where I live, but that doesn’t remove the stain of being American.”<sup>303</sup>

- Hold certain positions of employment:

“I was turned down for a finance director position because of my [U.S.] [c]itizenship. A finance director naturally has signature authority on financial accounts exposing the (Italian) company to the [U.S.] tax system. Something company management did not want.”<sup>304</sup>

- Participate in entrepreneurial opportunities:

“I gave a presentation to an Asian-based venture capital firm to try to raise money for a business. At the end it came out that I’m a [U.S.] citizen. The VC’s vice-president stood up and cursed me in the foulest language for wasting his time. Had I mentioned my citizenship he’d have never invited me in the first place. He specifically cited the [U.S.] tax implications and FATCA. I felt furious, humiliated, and insulted. But as I later learned more about these issues, I understood his reaction (though he could have been less rude). I used this as a lesson and mentioned my nationality when sending my query to other VC firms. No one was willing to meet. I never did raise money for my business.”<sup>305</sup>

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301. *Id.* at 285.

302. *Id.* at 279.

303. *Id.* at 359.

304. *Id.* at 344.

305. *Id.* at 343.

- Hold certain positions of community service:

“The bank holding the account of my \*community choir\* could not accept me as the treasurer with signing authority for a bank account that has never had more than 2000 GBP in it at one time.”<sup>306</sup>

Further, because of the system’s penalizing policies, some American nationals living overseas:

- Avoid marriage:

“I watch my peers settle down and buy houses, but I am afraid to even get married in case it negatively affects my future partner’s finances.”<sup>307</sup>

- Contemplate divorce:

“It’s incredibly distressing and creates huge tension in my marriage. My husband would like to return [to the United States] one day and will not renounce his [U.S.] citizenship. It makes me feel like I can’t either even though I know our financial future really requires us to. This causes huge arguments and has had me considering divorce as the only option. I feel like I have to choose my husband OR my family . . . like I can’t have both.”<sup>308</sup>

- Avoid visiting family in the United States:

“[W]e do not dare travel to the [U.S.] for fear of being arrested or prevented from returning to France. I haven’t been to the [U.S.] since 2008 for my mother’s funeral. I am so afraid and sad I will never see the rest of my family again in the States.”<sup>309</sup>

- Lie to avoid disclosing their U.S. citizenship:

“On a regular basis I have discussions with my children . . . on what it means to be an American living outside the United States. . . . I stress to them the importance of hiding their [U.S.] citizenship from all banks and other financial institutions, and I coach them on how they can do that. . . . FATCA places my children in the situation where they must deny (lie about—be ashamed of) their [U.S.] citizenship and it places me in the position where I must teach my children how to lie simply so they can live a normal life. How’s that for a successful, morally wholesome policy?”<sup>310</sup>

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306. *Id.* at 350.

307. *Id.* at 98.

308. *Id.* at 89.

309. *Id.* at 277-78.

310. *Id.* at 369.

- Feel forced into financial dependence upon their non-U.S. national spouse:

“A lot of decisions are impacted in the weirdest way by U.S. tax law. They do anything at any point in time, so what’s the point? Why keep trying to make [my small business in Sweden] go? Just step back and become more dependent on my [Swedish] husband. I was extremely independent, and now I’m not nearly as much.”<sup>311</sup>

- Contemplate giving up U.S. citizenship:

“I feel desperate to find a way to live as a [U.S.] citizen in another country without having to renounce my [U.S.] citizenship due to all of these tax problems.”<sup>312</sup>

- Give up U.S. citizenship:

“I was literally shaking during my renunciation interview—and felt as though I had been hit over the head with a baseball bat when the interview was finished. I cried for a long time. I used to think that the worst day of my life was when my son died. But with my renunciation in early 2016, it was the day that I died.”<sup>313</sup>

American nationals living overseas want to:

- Make plans for their lives:

“This is hell. I can’t plan for the future”;<sup>314</sup> and

- Carry out those plans:

“These are things I would like to do in the near future but my [U.S.] citizenship is stopping me from doing so.”<sup>315</sup>

In sum, they want to control their destinies. But they cannot.<sup>316</sup> All this occurs only because of their nationality. It occurs for reasons wholly unrelated to their conduct or individual responsibility.<sup>317</sup> As the quotes above expose—and contrary to the claims of the U.S. Department of

311. Brief of Individual Taxpayers as Amici Curiae in Support of Petitioners at 22, *Moore v. United States*, No. 22-800 (U.S. Sept. 6, 2023); *see also id.* at 20-21.

312. SEAT SURVEY COMMENTS, *supra* note 115, at 94.

313. *Id.* at 524.

314. *Id.* at 36.

315. *Id.* at 40.

316. For a discussion of the litany of limitations imposed on a 33-year-old living in France because of her U.S. nationality, see Amanda Rollins (@americanfille), *The Financial Limitations of Being an American [sic] Abroad*, TIKTOK (Sept. 29, 2023), <https://www.tiktok.com/@americanfille/video/7284181638030855457> [<https://perma.cc/26PE-8EQM>].

317. *See supra* notes 96-107 and accompanying text.

State—they have lost the power and the ability to make decisions for themselves, based upon their values and the kind of lives they wish to lead.<sup>318</sup> They have lost the ability to control their lives.<sup>319</sup> They have also lost their independence.<sup>320</sup> Instead, their lives are controlled by U.S. government policies that are accomplishing their intended purpose: to punish Americans for living outside the United States.<sup>321</sup>

It is obviously true that the U.S. nationality-based tax system deprives American nationals living outside the United States of self-determination. It is equally true—albeit, at first glance, perhaps less obvious—that the system also deprives American nationals *living in the United States* of self-determination. Their values, their hopes, and their ambitions for the kind of lives they would like to have lead some to consider living overseas.<sup>322</sup> While popular media seeks to politicize—and sensationalize—the reasons why Americans emigrate from the United States (for example, their disapproval of whatever presidential administration is in place<sup>323</sup> or a political hot topic<sup>324</sup> purportedly motivates them to “flee”<sup>325</sup> or “escape”<sup>326</sup>), their real reasons are considerably more mundane: Americans move outside the United States to join a romantic partner, for family reasons, to pursue professional opportunities, for study, or simply for adventure.<sup>327</sup>

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318. See *supra* notes 286-315 and accompanying text.

319. See *supra* note 297 and accompanying text.

320. See *supra* notes 297-98 and accompanying text.

321. See *supra* notes 96-107 and accompanying text.

322. A survey conducted in 2022 indicated that thirty-eight percent of Americans living in the United States had contemplated moving overseas “permanently.” Among those under age forty-five, the amount was forty-five percent. Zoha Qamar, *Many Americans Say They Want to Relocate for Political Reasons. Few Actually Do.*, FIVETHIRTYEIGHT (Oct. 11, 2022, 11:55 AM), <https://fivethirtyeight.com/features/many-americans-say-they-want-to-relocate-for-political-reasons-few-actually-do> [<https://perma.cc/YT5R-VSVX>]; David Brady & Brett Parker, *Would You Leave the United States?*, HOOVER INST. (Mar. 4, 2022), <https://www.hoover.org/research/would-you-leave-united-states> [<https://perma.cc/DZ63-VZJN>].

323. Brady & Parker, *supra* note 322.

324. Qamar, *supra* note 322.

325. Emily Wax-Thibodeaux, *Weary from Political Strife and a Pandemic, Some Americans Are Fleeing the Country*, WASH. POST (Nov. 2, 2020, 7:08 PM), [https://www.washingtonpost.com/national/weary-from-political-strife-and-a-pandemic-some-americans-are-fleeing-the-country/2020/11/02/ee66038c-f840-11ea-89e3-4b9efa36dc64\\_story.html](https://www.washingtonpost.com/national/weary-from-political-strife-and-a-pandemic-some-americans-are-fleeing-the-country/2020/11/02/ee66038c-f840-11ea-89e3-4b9efa36dc64_story.html) [<https://perma.cc/73BH-FHM9>].

326. Laura Begley Bloom, *How to Move Out of the US (And the Best Places to Escape)*, FORBES (June 30, 2022, 10:34 AM), <https://www.forbes.com/sites/laurabegleybloom/2022/06/30/how-to-move-out-of-the-us-and-the-best-places-to-escape> [<https://perma.cc/78H5-LCTV>].

327. *Extraterritorial Taxation #2*, *supra* note 243, at 5; see also LAURA SNYDER, STOP EXTRATERRITORIAL AM. TAX’N, “BEING AN AMERICAN OUTSIDE OF AMERICA IS NO LONGER SAFE.” EFFECTS OF THE EXTRATERRITORIAL APPLICATION OF US TAXATION AND BANKING POLICIES SURVEY REPORT: DATA - PART 1 OF 2, at 10 (2021),



Whatever their reason(s), in the words of U.S. Supreme Court Justice William Douglas: “Living abroad . . . 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>328</sup>

Leaving one’s country is a human right.<sup>329</sup> But if Americans currently living in the United States seek to exercise that human right, they, too, will be confronted with the panoply of restrictions on their lives that comes with the U.S. nationality-based tax system.<sup>330</sup> Some—not immediately upon leaving the United States but eventually—will take the drastic, irreversible, and, for most, unwanted step of renouncing U.S. citizenship.<sup>331</sup> Whether, to avoid the system, they decide to remain in the United States, or, regardless of the system, they nevertheless emigrate to another country—in either case their destinies will be shaped not by themselves but by the U.S. nationality-based tax system. Again, this will occur only because of their American nationality and for reasons wholly unrelated to their conduct or individual responsibility.<sup>332</sup>

In evaluating proposed legislation seeking to reform the U.S. nationality-based tax system, the most important criterion will be the extent to which it accords to *all* Americans—regardless of where they live—individual self-determination: Will the proposed legislation fully free all Americans from penalizing taxation policies and, in doing so, enable them to control their own destinies?

### G. Summary

This Part V lays bare the multitude of ways that the U.S. nationality-based tax system restricts the lives not only of American nationals living outside the United States but also of those living in the United States. The restrictions are so severe that they deprive *all* American

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[https://seatnow.org/survey\\_report\\_intro\\_page/participant-data-downloadable-version/participant-data-part-1-of-2](https://seatnow.org/survey_report_intro_page/participant-data-downloadable-version/participant-data-part-1-of-2) [<https://perma.cc/M2AW-5JCM>] [hereinafter SEAT SURVEY DATA PART 1].

328. *Schneider v. Rusk*, 377 U.S. 163, 169 (1964). Justice Douglas delivered the majority opinion.

329. The right to leave one’s country is enshrined in four international human rights instruments. They are: G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 74 (Dec. 10, 1948) [hereinafter UDHR]; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, at 7 (Dec. 16, 1966) [hereinafter ICCPR]; G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, at 3 (Dec. 21, 1965) [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 4 (Dec. 18, 1990). The United States voted in favor of the UDHR and has signed and ratified both the ICCPR and the ICERD.

330. *See infra* notes 350-77 and accompanying text.

331. *See, e.g.*, SEAT SURVEY COMMENTS, *supra* note 115, at 498-560.

332. *See supra* notes 316-21 and accompanying text.

nationals of self-determination, regardless of where they live. This occurs only because of their American nationality—thus, in violation of Fourteenth Amendment equal protection—and for reasons wholly unrelated to their conduct or individual responsibility.

It is this full panoply of problems that should be considered in evaluating any proposed legislation seeking to reform the system: to what extent will the proposed legislation end the violations of constitutional rights; end the severe restrictions on the lives of American nationals; and accord self-determination to all Americans, wherever they may live?

Going further, when the full extent of the problems of the U.S. nationality-based tax system is exposed in this manner, the idea that Congress should accept to remedy them only in the presence of a positive budget score is, at best, misguided and, at worst, cruel. The requirement serves only to perpetuate the multitude of violations of constitutional and other fundamental rights.

## VI. CONCLUSION

Even though most American nationals living outside the United States do not owe U.S. federal income tax,<sup>333</sup> the U.S. nationality-based income tax system nevertheless places considerable burdens on them. In doing so, the system violates Fourteenth Amendment equal protection as well as other constitutional and human rights.<sup>334</sup>

The purpose of the U.S. nationality-based tax system is not to raise revenue.<sup>335</sup> Instead, its purpose is to punish and scapegoat American nationals living outside the United States, for no reason other than the fact that they live outside the United States. This is evidenced in the statements and actions of policymakers<sup>336</sup> as well as in IRS data<sup>337</sup> and the approach the IRS takes with respect to international taxpayers.<sup>338</sup> The amounts collected by the system are insignificant, as compared both to income tax revenue from all individuals and to government spending.<sup>339</sup>

Congress has abdicated to two unelected bodies, the CBO and the JCT, considerable power to determine the outcome of policy initiatives.<sup>340</sup> If these bodies do not assign a positive budget score—or, at

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333. *See supra* notes 136-37 and accompanying text.

334. *See supra* notes 28-58 and accompanying text.

335. *See supra* notes 60-94 and accompanying text.

336. *See supra* notes 95-134 and accompanying text.

337. *See supra* notes 135-55 and accompanying text.

338. *See supra* notes 156-86 and accompanying text.

339. *See supra* notes 146-55 and accompanying text.

340. *See supra* notes 3-27 and accompanying text.

least, if they do not “shoehorn[] [it] into a preagreed numerical limit”<sup>341</sup>—the initiative is likely to die.

This has devastating consequences for reform of the U.S. nationality-based tax system. Reform is desperately needed. But, as long as a positive budget score is required, true reform—reform that will end the system’s violations of constitutional and other fundamental rights for *all* Americans—is impossible.<sup>342</sup>

Instead of a budget score, there are many other factors that should be considered—factors that will actually make a difference for Americans living both outside and inside the United States. Will the policy initiative: (i) end the discrimination on its face, in the text of the relevant statutes and regulations;<sup>343</sup> (ii) allow overseas Americans to live normal lives, freed of the limitations that the U.S. federal tax system places on no one except them;<sup>344</sup> (iii) allow overseas Americans to open and maintain bank accounts in the countries where they live and under the same conditions as the other residents of the countries where they live;<sup>345</sup> (iv) relieve overseas Americans of the inordinate stress, expense, and danger of complying with U.S. federal taxation;<sup>346</sup> and (v) enable overseas Americans to remain U.S. citizens?<sup>347</sup>

Ultimately, the most important question is: will the proposed legislation accord to *all* Americans, regardless of where they live today, individual self-determination?<sup>348</sup>

Should the federal budget trump constitutional and human rights? Should constitutional and human rights be protected only if and to the extent the initiative receives a positive budget score? When constitutional and human rights are at stake—such as equal protection before the law—should a budget score matter at all?

Surely the response to each of these questions must be no. Otherwise, Congress will have abdicated to the CBO and JCT both its power and its duty to protect constitutional and other fundamental rights—when neither the CBO nor the JCT has the mandate, expertise, or processes to do so.<sup>349</sup> It would prioritize the federal budget over constitutional and other fundamental rights. It would deny the protection of fundamental rights if doing so would negatively impact the federal budget.

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341. Penner, *supra* note 8, at 28.

342. *See supra* notes 187-215 and accompanying text.

343. *See supra* notes 222-27 and accompanying text.

344. *See supra* notes 228-37 and accompanying text.

345. *See supra* notes 238-52 and accompanying text.

346. *See supra* notes 253-63 and accompanying text.

347. *See supra* notes 264-81 and accompanying text.

348. *See supra* notes 282-332 and accompanying text.

349. *See supra* notes 22-27 and accompanying text.

This article examines one example of how Fourteenth Amendment equal protection rights (among other rights) are sacrificed on the altar of the budget score. Which—and whose—rights will be sacrificed next?

#### APPENDIX

The table below catalogs the many ways the U.S. nationality-based tax system burdens American nationals living outside the United States in manners that neither U.S. residents (regardless of nationality) nor non-American nationals (aliens) living outside the United States are burdened.

	Contained in Text of U.S. Law/Regulation/Treaty	System One <sup>350</sup> U.S. Residents Regardless of Nationality	System Two <sup>351</sup> Non-Resident Aliens (“NRAs”)	System Three <sup>352</sup> American Nationals Living Outside the U.S.
1	Eligible for Earned Income Tax Credit	X <sup>353</sup>	-	-
2	Eligible for Work Opportunity Tax Credit	X <sup>354</sup>	-	-
3	Eligible for 2021 Advanced Child Tax Credit	X <sup>355</sup>	-	-

350. See *supra* notes 28-29 and accompanying text.

351. See *supra* notes 28-29 and accompanying text.

352. See *supra* notes 28-29 and accompanying text.

353. To be eligible for the Earned Income Tax Credit, a taxpayer must meet certain requirements which operate to exclude American nationals living outside the United States. 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”). *Who Qualifies for the Earned Income Tax Credit (EITC)*, INTERNAL REVENUE SERV., <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/who-qualifies-for-the-earned-income-tax-credit-eitc> [<https://perma.cc/64BF-GFP4>] (Dec. 13, 2023). Overseas taxpayers use the filing status MFS at a higher rate than domestic taxpayers (20.5% as compared to 2.5%). This is based on raw data for 2020 provided by the IRS. *SOI Tax Stats - Historic Table 2*, *supra* note 139 (tables for “United States” and “Other Areas,” cells B9, B10, B11, B12).

354. 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 *How to File a WOTC Certification Request*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/eta/wotc/how-to-file> [<https://perma.cc/V3WY-RM5J>] (last visited Feb. 21, 2024).

	Contained in Text of U.S. Law/Regulation/Treaty	System One <sup>350</sup> U.S. Residents Regardless of Nationality	System Two <sup>351</sup> Non-Resident Aliens (“NRAs”)	System Three <sup>352</sup> American Nationals Living Outside the U.S.
4	Access to in-person IRS services	X <sup>356</sup>	-	-
5	Eligible for full tax treaty benefits	X <sup>357</sup>	X	-
6	Subject to U.S. taxation based on worldwide income	X	-	X
7	Penalizing U.S. taxation of retirement savings in country of residence (“CoR”)	-	-	X <sup>358</sup>
8	Penalizing U.S. taxation of investments and capital gains in CoR	-	-	X <sup>359</sup>
9	Penalizing U.S. taxation of business operations in CoR	-	-	X <sup>360</sup>

355. 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 more than 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, and thus those children are ineligible for Social Security numbers. See *Advance Child Tax Credit Payments in 2021*, INTERNAL REVENUE SERV., <https://www.irs.gov/credits-deductions/advance-child-tax-credit-payments-in-2021> [<https://perma.cc/G3W7-B7BN>] (Dec. 26, 2023).

356. *Mission Impossible*, *supra* note 28, at 1832.

357. See *Unacknowledged Realities*, *supra* note 1, at 300.

358. See *Extraterritorial Taxation #2*, *supra* note 243, at 7-9; *Rationalized*, *supra* note 100, at 579.

359. *Rationalized*, *supra* note 100, at 578-79; see, e.g., John Richardson, *More Dual US/Canada Citizens Will Pay Capital Gains Tax on Sale of Principal Residence in Canada*, CITIZENSHIP SOLS. (Mar. 22, 2017), <https://citizenshipsolutions.ca/2017/03/22/more-americansabroad-will-pay-capital-gains-tax-on-sale-of-principal-residence-in-canada> [<https://perma.cc/HY8K-MRMM>]; John C. Coates IV, *Reforming the Taxation and Regulation of Mutual Funds: A Comparative Legal and Economic Analysis*, 1 J. LEGAL ANALYSIS 591, 610-12 (2009).

360. See *Extraterritorial Taxation #2*, *supra* note 243, at 9-10; *Rationalized*, *supra* note 100, at 581; PREP Podcaster - “Success Favours the PREPared Mind,” *Subpart F, GILTI and the Transition Tax - Fake Income: Americansabroad [sic] Are Taxed More Punitively Than US Residents*, PODBEAN (Jan. 3, 2022), <https://prep.podbean.com/e/subpart-f-gilti-and-the-transition-tax-fake->

	Contained in Text of U.S. Law/Regulation/Treaty	System One <sup>350</sup> U.S. Residents Regardless of Nationality	System Two <sup>351</sup> Non-Resident Aliens (“NRAs”)	System Three <sup>352</sup> American Nationals Living Outside the U.S.
10	Penalizing U.S. taxation of welfare benefits in CoR	-	-	X <sup>361</sup>
11	Incur taxable phantom gains based upon currency used in CoR	-	-	X <sup>362</sup>
12	Highly complex U.S. tax return	-	-	X <sup>363</sup>
13	Considerably reduced IRS services	-	-	X <sup>364</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, subject to draconian penalties	-	-	X <sup>365</sup>

income-americansabroad-are-taxed-more-punitively-than-us-residents [https://perma.cc/JUY6-KUWS].

361. *Criminalization*, *supra* note 105, at 2282; *Taxing the American Emigrant*, *supra* note 119, at 305; SEAT SURVEY DATA PART 1, *supra* note 327, at 14, 27; SEAT SURVEY COMMENTS, *supra* note 115, at 353-55.

362. 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. Rev. Rul. 90-79, 1990-2 C.B. 187.

363. *Criminalization*, *supra* note 105, at 2282; *Taxing the American Emigrant*, *supra* note 119, at 305; SEAT SURVEY COMMENTS, *supra* note 115, at 142-73; DEMOCRATS ABROAD TAX’N TASK FORCE, ONCE UNCOMFORTABLE, NOW SUFFOCATING: A 2022 UPDATE ON TAX AND FINANCIAL ACCESS ISSUES OF AMERICANS ABROAD 10-13 (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) [https://perma.cc/VB9D-8EPU] [hereinafter DA SURVEY].

364. *Rationalized*, *supra* note 100, at 569-71, 588-89; *see Mission Impossible*, *supra* note 28, at 1829-39.

365. *Criminalization*, *supra* note 105, at 2285; *Taxing the American Emigrant*, *supra* note 119, at 309.

	Contained in Text of U.S. Law/Regulation/Treaty	System One <sup>350</sup> U.S. Residents Regardless of Nationality	System Two <sup>351</sup> Non-Resident Aliens (“NRAs”)	System Three <sup>352</sup> American Nationals Living Outside the U.S.
15	Financial institutions in CoR required to submit to IRS detailed information about accounts held, subject to draconian penalties	-	-	X <sup>366</sup>

	Occur as a Consequence of U.S. Law/Regulation/Treaty	System One <sup>367</sup> U.S. Residents Regardless of Nationality	System Two <sup>368</sup> Non-Resident Aliens (“NRAs”)	System Three <sup>369</sup> American Nationals Living Outside the U.S.
16	High cost to prepare U.S. tax return	-	-	X <sup>370</sup>
17	Inability to open or keep bank/financial accounts in CoR	-	-	X <sup>371</sup>
18	Barred from certain investments in CoR	-	-	X <sup>372</sup>

366. *Criminalization*, *supra* note 105, at 2285; *Taxing the American Emigrant*, *supra* note 119, at 308-09.

367. *See supra* notes 28-29 and accompanying text.

368. *See supra* notes 28-29 and accompanying text.

369. *See supra* notes 28-29 and accompanying text.

370. *Criminalization*, *supra* note 105, at 2282; *Taxing the American Emigrant*, *supra* note 119, at 305; SEAT SURVEY DATA PART 2, *supra* note 144, at 53; SEAT SURVEY COMMENTS, *supra* note 115, at 173-222; DA SURVEY, *supra* note 363, at 11-12.

371. *Criminalization*, *supra* note 105, at 2285-86; *Taxing the American Emigrant*, *supra* note 119, at 309-10; SEAT SURVEY DATA PART 2, *supra* note 144, at 32, 35, 38-39, 41, 43; SEAT SURVEY COMMENTS, *supra* note 115, at 236-66.

372. *Criminalization*, *supra* note 105, at 2285-86; *Taxing the American Emigrant*, *supra* note 119, at 338-41; SEAT SURVEY COMMENTS, *supra* note 115, at 236-66; *see also* SEAT SURVEY DATA PART 2, *supra* note 144, at 32, 34.

19	Difficulties to obtain mortgage in CoR	-	-	X <sup>373</sup>
20	Difficulties to hold title to family assets in CoR	-	-	X <sup>374</sup>
21	Denied certain positions of employment in CoR	-	-	X <sup>375</sup>
22	Denied certain positions of community service in CoR	-	-	X <sup>376</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>377</sup>

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373. *Criminalization*, *supra* note 105, at 2286; *Taxing the American Emigrant*, *supra* note 119, at 310; SEAT SURVEY DATA PART 2, *supra* note 144, at 32, 42; SEAT SURVEY COMMENTS, *supra* note 115 at 357-61; DA SURVEY, *supra* note 363, at 23.

374. *Criminalization*, *supra* note 105, at 2281-82; *Taxing the American Emigrant*, *supra* note 119, at 305, 311; SEAT SURVEY DATA PART 1, *supra* note 327, at 14, 23; SEAT SURVEY COMMENTS, *supra* note 115, at 270-86.

375. *Taxing the American Emigrant*, *supra* note 119, at 311; SEAT SURVEY DATA PART 1, *supra* note 327, at 14, 28; SEAT SURVEY COMMENTS, *supra* note 115, at 339-50.

376. *Criminalization*, *supra* note 105, at 2286; *Taxing the American Emigrant*, *supra* note 119, at 311; SEAT SURVEY DATA PART 2, *supra* note 144, at 32, 40; SEAT SURVEY COMMENTS, *supra* note 115, at 350-53.

377. *Criminalization*, *supra* note 105, at 2286; *Taxing the American Emigrant*, *supra* note 119, at 310; SEAT SURVEY DATA PART 2, *supra* note 144, at 32, 44.