THE UNACKNOWLEDGED REALITIES OF EXTRATERRITORIAL TAXATION

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I. INTRODUCTION

Americans living overseas are subject to multiple U.S. taxation and banking policies that apply to them on an extraterritorial basis.[1] There is no shortage of defenses to these policies. Some arguments include:

- Overseas Americans benefit from U.S. citizenship, and these benefits justify their taxation by the United States;[2]

- Overseas Americans owe allegiance to the United States, and this allegiance carries with it the duty to support the country;[3]

- As members of U.S. society, overseas Americans are able to pay;[4]

- U.S. citizenship is "worth the tax cost";[5] and

- Taxation based upon citizenship rather than domicile is more "administrable."[6]

For the most part, however, these arguments look no further than the theoretical question of whether the United States should tax the worldwide

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1 *U.S. Citizens and Resident Aliens Abroad*, INTERNAL REVENUE SERV., https://www.irs.gov/individuals/international-taxpayers/us-citizens-and-resident-aliens-abroad (Nov. 29, 2022) ("[i]f you are a U.S. citizen or resident alien, the rules for filing income . . . tax returns . . . are generally the same whether you are in the United States or abroad," and "U.S. taxpayers who own foreign financial accounts must report those accounts to the U.S. Treasury Department.").

2 Cook v. Tait, 265 U.S. 47, 56 (1924); Grace Nielsen, *Resolving the Conflicts of Citizenship Taxation: Two Proposals*, 25 FLA. TAX REV. 436, 453-57 (2021).

3 Albert Levitt, *Income Tax Predicated upon Citizenship: Cook v Tait*, 11 VA. L. REV. 607, 609-10 (1924-1925); Edward Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1324 (2011).

4 Jeffrey M. Colon, *Changing U.S. Tax Jurisdiction: Expatriates, Immigrants, and the Need for a Coherent Tax Policy*, 34 SAN DIEGO L. REV. 1, 6, 9-10 (1997); Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117, 123-26 (2014); *see also* Daniel Shaviro, *Taxing Potential Community Members' Foreign Source Income*, 70 TAX L. REV. 75 (2016).

5 Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 N.Y.U. L. REV. 443, 471-73 (2007); Kirsch, *supra* note 4, at 125; Paul R. Organ, *Citizenship and Taxes: Evaluating the Effects of the U.S. Tax System on Individuals' Citizenship Decisions*, U. MICH. 52-53 (Aug. 23, 2021), https://www.irs.gov/pub/irs-utl/21rpcitizenshipandtaxes.pdf.

6 Zelinsky, *supra* note 3, at 1293, 1324.

income of overseas Americans. The arguments fail to adequately examine the nature of the policies or how the policies affect the lives of overseas Americans and the IRS.[7] This limited approach neglects the realities of the U.S. extraterritorial tax system in place today.

The purpose of this article is to go beyond the limits of these theoretical defenses to explain the origin of the policies in question and their evolution (in section II), expose the consequences of the policies for Americans living overseas as well as for the IRS (in section III), describe the multitude of efforts to educate with respect to and to change the policies (in section IV), and explain why such efforts, thus far, have failed (in section V).

II. TAXATION AND BANKING POLICIES AND THEIR EVOLUTION

Overseas Americans live subject to the extraterritorial application of both (A) U.S. taxation and (B) U.S. banking policies.[8] This Section offers a short history of their adoption and (C) evolution.

A. Extraterritorial Taxation Policies

Many countries tax the worldwide income of their residents, regardless of citizenship status.[9] They do not, however, tax the worldwide income of persons who do not reside in the country, regardless of their citizenship status.[10] The United States is unique in how it taxes not just its residents but also its citizens living outside the United States based on their worldwide income.[11]

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7 *See generally* Laura Snyder, *Can Extraterritorial Taxation Be Rationalized?*, 76 THE TAX LAWYER, forthcoming 2023.

8 *See generally* Zelinsky, *supra* note 3, at 1291-93.

9 *See id*. at 1323-24.

10 *Citizenship-Based Taxation versus Residency-Based Taxation*, GREENBACK EXPAT TAX SERV.'S (Oct. 17, 2022), https://www.greenbacktaxservices.com/blog/difference-residency-based-taxation-citizenship-based-taxation/.

11 Three other countries—Eritrea, Myanmar, and Hungary—tax the foreign income of their non-resident citizens on an ongoing basis. These countries do so in manners that are different and considerably more limited as compared to the United States. Eritrea taxes the foreign income of its non-resident citizens at a flat rate of 2%. *See* DSP-groep BV, *The 2% Tax for Eritreans in the Diaspora: Facts, Figures and Experiences in Seven European Countries*, TILBURG U. 43 (2017), https://eritreahub.org/wp-content/uploads/2020/10/The_2_Tax_for_Eritreans_in_the_diaspora.pdf (exposing multiple problems with the legality of Eritrea's diaspora tax as well as with its enforcement). Myanmar taxes the non-salary income of its non-resident citizens at a reduced flat rate of 10%. *See Myanmar: Individual - Taxes on Personal Income*, PWC (Jan. 17, 2022), https://taxsummaries.pwc.com/myanmar/individual/taxes-on-personal-income. Hungary taxes the income of its non-resident citizens only if they (1) are not dual citizens, and (2) live in a country with which Hungary does not have a tax treaty. *Worldwide Personal Tax and Immigration Guide*, EY 622-28 (2022), https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/tax/tax-guides/2022/ey-personal-tax-and-immigration-guide-11-mar-22.pdf.

The taxation by the United States of the income of overseas Americans dates to the Civil War.[12] Initially, under the Revenue Acts of 1861 and 1862, the United States taxed citizens residing outside the United States only with respect to unearned income that was U.S.-sourced.[13] The Revenue Act of 1864 changed that by including both earned income and income sourced outside the United States (worldwide income).[14] The Wilson-Gorman Tariff Act of 1894 taxed the worldwide income of overseas Americans in the same manner.[15]

The justifications offered by legislators, first in 1864 and then again in 1894, for taxing Americans living outside the United States, and notably for taxing them based on their worldwide income rather than only U.S.-sourced, were similar.

In 1864, Senator Jacob Collamer stated:

> We do not desire that our citizens who have incomes in this country, dividends of banks, and incomes from other corporations and from interest on the public debt, should go out of the country, reside in Paris or elsewhere, avoiding the risk of being drafted, or contributing anything personally to the requirements of the country at this time, and get off with as low a tax as anybody else. [. . .] If a man draws his income from our public debt, or from property here, and resides in Paris, skulking away from contributing his personal support to the Government in this day of its extremity, he ought to pay a higher income tax.[16]

And in 1894, Senator George Hoar stated:

> If an American citizen [goes] abroad and [carries] the protection of his country, of his citizenship, with him, he [should not] escape its burdens. There are a great many people, I am sorry to say, who go abroad for that very purpose, and some of them went abroad during the late war. They lived in luxury, at the same time at less cost, in a foreign capital; they had none of the voluntary obligations which rest upon citizens, of charity, or

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12 Revenue Act of 1861, 12 Stat. 292; Revenue Act of 1862, 12 Stat. 432.

13 "Upon the income, rents, or dividends accruing upon any property, securities, or stocks owned in the United States by any citizen of the United States residing abroad, there shall be levied, collected, and paid a tax of five per centum, excepting that portion of said income derived from interest on treasury notes and other securities of the Government of the United States, which shall pay one and one half per centum." Revenue Act of 1861, 12 Stat. 292, 309; *See also* Revenue Act of 1862, 12 Stat. 432, 473.

14 "There shall be levied, collected, and paid annually upon the annual gains, profits, or income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, interests, dividends, salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, or from any other source whatever." Revenue Act of 1864, 13 Stat. 223, 281.

15 Wilson-Gorman Tariff Act of 1894, 28 Stat. 509, 553-54.

16 CONG. GLOBE, 38th Cong., 1st Sess. 2661 (1864) (statement of Sen. Jacob Collamer).

> contributions, or supporting churches, or anything of that sort, and they escaped taxation.
>
> That class of persons, in my judgment, ought to pay taxes on all their property, at home or abroad, wherever it may be. If they remain American citizens [. . .] we have something to do with their property abroad. If [an American] has invested in a Mexican railroad or a South American or Cuban mine or in the English funds, he has to report it and pay a tax on his investment, and he ought to.
>
> If a citizen goes abroad under the circumstances I have stated, he ought to do that exact thing. 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.[17]

These comments demonstrate considerable prejudice on the part of these legislators with respect to Americans living overseas. For these legislators, few, if any, Americans have legitimate reasons for living outside the United States. On the contrary, they "skulked away" for the very purpose of avoiding their duties as citizens,[18] be it during a time of war (1864) or relative peace (1894). Collamer views the use of income taxation as a rightful means not only to discourage Americans from living overseas ("we do not desire that our citizens [. . .] should go out of the country") but also to punish those who dare to do so ("he ought to pay a higher income tax").[19] As for Hoar, he struggles to see the good in income taxation as a general principle. But as it concerns overseas Americans, his vision is crystal clear: if only one "class of persons"—and one class of persons only—should be subject to income taxation by the United States, it is U.S. citizens who do not live in the United States: "*he is the one human being we ought to tax*."[20]

Given this attitude, it is no surprise that the Underwood-Simmons Tariff Act of 1913, enacted immediately upon the adoption of the Sixteenth Amendment establishing Congress's right to impose Federal income taxation, again included the taxation of overseas Americans based on their worldwide income.[21] This taxation has remained in place since then.

While it has remained in place, it has, however, since 1913, undergone considerable evolution. While a summary of that evolution appears below,[22] one specific evolution merits discussion here.

Revenue Acts adopted prior to 1918 delineated three groups of persons who were subject to federal income tax: (i) "every citizen of the United

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17 26 CONG. REC. S6632–33 (daily ed. June 21, 1894) (statement of Sen. George Hoar).
18 CONG. GLOBE, 38th Cong., 1st Sess. 2661 (1864) (statement of Sen. Jacob Collamer).
19 *Id.*
20 26 CONG. REC. S6632–33, *supra* note 17.
21 Underwood-Simmons Tariff Act of 1913, Pub. L. No. 63-16, 38 Stat. 114, 166.
22 *Infra* notes 76-124 and accompanying text.

States, whether residing at home or abroad," (ii) "every person residing in the United States, though not as a citizen thereof," and (iii) "person[s] residing elsewhere."[23] None of these Acts nor their corresponding regulations attempted to define or otherwise explain the word "citizen" for tax purposes.[24]

The Revenue Act of 1918 implemented a critical change. It reduced its identification of who is subject to federal income tax down to two simple words: "every individual."[25] Few specifics were offered to even partially narrow down this exceptionally broad terminology that seemingly includes everyone in the world. The little specificity that was offered was a clause limiting the taxation of non-resident aliens to their U.S.-source income.[26] Notably, and yet again, nothing in the 1918 Act attempted to define or otherwise explain the word "citizen" for tax purposes.[27]

Clearly, clarification was necessary. Until the late twentieth century, citizenship was a fluid concept.[28] For any given person, it may or may not have been clear if they had the status of U.S. citizen for immigration purposes, let alone for tax purposes.

The drafters of Regulations 45, adopted in 1919, appear to have recognized this need for clarification and acted accordingly. To begin, Regulations 45 clarified what persons were "liable to tax," and with respect to which sources of income:

> Every citizen of the United States, wherever resident, is liable to the tax. It makes no difference that he may own no assets within the United States and may receive no income from sources within the United States. Every resident alien is liable to tax, even though his income is wholly from sources outside the United States. Every nonresident alien individual is liable to the tax on this income from sources within the United States."[29]

In addition, Regulations 45 included a lengthy definition of "citizen" for the purpose of establishing the "persons liable to tax":

> Every person born in the United States subject to its jurisdiction, or naturalized in the United States, is a citizen. When any naturalized citizen has left the United States and resided for two years in the foreign country

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23 *See* Underwood-Simmons Tariff Act of 1913, Pub. L. No. 63-16, 38 Stat. 114, 166.

24 *See id*.

25 Revenue Act of 1918, Pub. L. 65-254, 40 Stat. 1057, 1062.

26 *Id*. at 1066.

27 *See id*.

28 *See* PATRICK WEIL, THE SOVEREIGN CITIZEN (2012); Patrick Weil, *Can a Citizen be Sovereign?* 8 HUMAN.: INT'L J. HUM. RTS. HUM., & DEV. 1, 1 (2017) for a history of the evolution of U.S. citizenship in the twentieth century; *see also infra* notes 113-124 and accompanying text.

29 Revenue Act of 1918, Pub. L. 65-254, 40 Stat. 1057, *reprinted in* Internal Revenue Acts of The United States 1909-1950 Legislative Histories, Laws, and Administrative Documents, at 12 (1979).

> from which he came, or for five years in any other foreign country, he is presumed to have lost his American citizenship; but this presumption does not apply to residence abroad while the United States is at war. An Italian, who has come to the United States and filed his declaration of intention of becoming a citizen, but who has not yet received his final citizenship papers, is an alien. A Swede who, after having come to the United States, and become naturalized here, returned to Sweden and resided there for two years prior to April 6, 1917, is presumed to be once more an alien. On the other hand, an individual born in the United States subject to its jurisdiction, of either citizen or alien parents, who has long since moved to a foreign country and established a domicile there, but who has never been naturalized in or taken an oath of allegiance to that or any other foreign country, is still a citizen of the United States.[30]

After this initial evolution took place in 1918-1919, these provisions in what is now the Internal Revenue Code ("IRC") and Code of Federal Regulations have undergone only limited change. Still today, IRC § 1 imposes federal income taxation upon "every individual."[31] Thus, still today, this requires regulatory clarification. Accordingly, as in 1919, it is still the case that it is a regulation and not a statute that both: (i) clarifies the status of citizens residing outside the United States with respect to federal income taxation;[32] and (ii) establishes the definition of "citizen" for that purpose.[33] Since 1919, the U.S. Department of the Treasury has, on at least four occasions, taken the initiative to modify the definition of "citizen" for the purpose of establishing persons liable to tax, most recently in 1974.[34]

It is in this context that Richardson et al. argue there are actions that the Treasury Department, rather than Congress, can and should take to address the situation of overseas Americans.[35] The argument recommends that the Treasury Department modify Treas. Reg. § 1.1-1 to exclude from the meaning of the terms "individual" or "citizen" persons who meet specific conditions, including (1) not living in the United States; (2) living in another country; and (3) being taxed as a resident in another country.[36] Despite the Treasury Department's both moral imperative and legal authority to take

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30 *Id*.

31 I.R.C. § 1.

32 Treas. Reg. § 1.1-1(b) (as amended in 2008).

33 Treas. Reg. § 1.1-1(c) (as amended in 2008).

34 REGULATIONS 86 RELATING TO THE INCOME TAX UNDER THE REVENUE ACT OF 1934, 3-4 (1935); T.D. 5815, 1950-2 C.B. 7 (1950); INCOME TAX REGULATIONS 118, at 13 (1953); Income Tax on Individuals, 39 Fed. Reg. 44214, 44216 (Dec. 23, 1974) (to be codified at 26 C.F.R. pt. 1).

35 Richardson et al., *A Simple Regulatory Fix for Citizenship Taxation*, 169 TAX NOTES FED. 275, 275 (2020).

36 *Id*. at 280.

such action, however, congressional action would be preferable because it would be less susceptible to reversal by a succeeding administration.[37]

B. Extraterritorial Banking Policies

As discussed above,[38] the United States adopted its first extraterritorial taxation policies in the 1860s. It adopted its first extraterritorial banking policies just over 100 years later, in the 1970s, and adopted additional policies in 2010.[39]

1. FBAR

The Bank Secrecy Act of 1970 created various financial reporting obligations purportedly to identify and collect evidence of money laundering, tax evasion, and other criminal activities.[40] However, the law includes an obligation for all U.S. residents and U.S. citizens, regardless of where in the world they reside, to report on all the financial accounts they hold (or have signature authority over) with any foreign financial institutions to the Treasury Department's Financial Crimes Enforcement Network on an annual basis.[41]

Any account held in a non-U.S. financial institution is considered to be foreign and thus subject to the reporting requirement referred to as a "Report of Foreign Bank and Financial Accounts," or "FBAR."[42] This means that the bank accounts overseas Americans hold in the countries where they live must not only be reported to the United States but must be reported to a "Crimes Enforcement Network" under the imputation that holding accounts required for day-to-day life is a crime.[43] The Bank Secrecy Act grants the Treasury Department the power to exempt from FBAR reporting requirements "any reasonable classification of persons."[44] The Treasury Department has not,

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37 *Id*.

38 Revenue Act of 1861, 12 Stat. 292; Revenue Act of 1862, 12 Stat. 432; Revenue Act of 1864, 13 Stat. 223, 281; Wilson-Gorman Tariff Act of 1894, 28 Stat. 509, 553-54; CONG. GLOBE, 38th Cong., 1st Sess. 2661 (1864) (statement of Sen. Jacob Collamer); 26 CONG. REC. S6632–33 (daily ed. June 21, 1894) (statement of Sen. George Hoar).

39 *See* Bank Secrecy Act of 1970, Pub. L. No. 91-508 §§ 241-242, 84 Stat. 1118, 1124; Foreign Account Tax Compliance Act, Pub. L. No. 111-147, 124 Stat. 71.

40 Bank Secrecy Act of 1970, Pub. L. No. 91-508, §§ 241-242, 84 Stat. 1118, 1124; *see* Laura Snyder, *Taxing the American Emigrant*, 74 TAX LAW. 299, 306-07 (2021).

41 31 C.F.R. § 1010.350(a) (2022); *Report of Foreign Bank and Financial Accounts*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/report-of-foreign-bank-and-financial-accounts-fbar (July 12, 2022).

42 *Report of Foreign Bank and Financial Accounts*, *supra* note 41.

43 *See* Snyder, *supra* note 40.

44 Bank Secrecy Act of 1970, Pub. L. No. 91-508, § 242(1), 84 Stat. 1118, 1124; Bank Secrecy Act of 1970, Pub. L. No. 91-508, § 242(4), 84 Stat. 1118, 1124.

however, used this authority to exempt the accounts that overseas Americans hold in their country of residence.[45]

The threshold triggering the filing requirement—an amount fixed in 1970—is $10,000.[46] This amount applies not per account, but to the aggregate amount across all the overseas Americans' non-U.S. accounts. Even though the Bank Secrecy Act also grants the Treasury Department the power to modify the threshold,[47] it has never done so. If, since 1970, the $10,000 reporting threshold had been adjusted for inflation, it would be over $78,000 today.[48] The civil penalty for non-willful failure to file is $13,640, and the civil penalty for willful failure to file is $136,399, or 50% of the balance in each unreported account.[49] Both types of penalties have been adjusted for inflation.[50] Further, criminal penalties of up to $250,000 or five years imprisonment (or both) may also apply.[51]

Because the filing threshold has not been adjusted for inflation, the scope of application and the penalizing nature of the FBAR have increased dramatically with the passage of time.[52] In 1970, $10,000 was enough to buy a house in some countries.[53] Today nearly all adult Americans living overseas

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[45] *See generally* Sean Ross, *The Tax Implications of Opening a Foreign Back Account,* INVESTOPEDIA (June 23, 2021), https://www.investopedia.com/articles/personal-finance/102915/tax-implications-opening-foreign-bank-account.asp.

[46] 31 C.F.R. § 1010.340 (2020).

[47] Bank Secrecy Act of 1970, Pub. L. No. 91-508, § 242(3), 84 Stat. 1118, 1124.

[48] *CPI Inflation Calculator*, U.S. BUREAU LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm (input $10,000 as of January 1970, and calculate to December 2022) (last visited Feb. 8, 2023).

[49] There is a split between the Fifth and Ninth Circuits as to whether non-willful FBAR penalties apply per account per year or per year across all accounts. In June 2022, the U.S. Supreme Court granted a petition for certiorari to address the split. *See* Paul Bonner, *Supreme Court to Resolve FBAR Penalty Dispute*, J. ACCT. (June 21, 2022), https://www.journalofaccountancy.com/news/2022/jun/supreme-court-resolve-fbar-penalty-dispute.html; *see also* John Richardson, *How Will the Supreme Court Rule on this FBAR Penalty Case?*, TAX CONNECTIONS (Nov. 4, 2022), https://www.taxconnections.com/taxblog/supreme-court-fbar-case-alexandru-bittner-petitioner-v-united-states-respondent-no-21-1195/ (discussing oral arguments held in November 2022).

[50] Sean M. Golding, *FBAR Civil Penalties Inflation Adjustment 2021*, HG.ORG LEGAL RES., https://www.hg.org/legal-articles/fbar-civil-penalties-inflation-adjustment-2021-60465 (last visited Nov. 22, 2022); *see also* Paul Atkinson, *FBARs (FinCEN Form 114s), Form 8938s and Form 8966s: Not Just One But Three Ways Uncle Sam Monitors Americans' Overseas Holdings*, AM. EXPAT FIN. NEWS J. (April 7, 2022), https://americanexpatfinance.com/opinion/item/939-fbars-fincen-form-114s-form-8938s-and-form-8966s-not-just-one-but-three-ways-uncle-sam-monitors-americans-overseas-holdings.

[51] Robert W. Wood, *IRS Can Levy Penalties—Even After You're Dead*, FORBES (Aug. 9, 2021), https://www.forbes.com/sites/robertwood/2021/08/09/irs-can-levy-penalties-even-after-youre-dead/?sh=7ab9921d13ac.

[52] With the decreasing value of $10,000, much smaller amounts of buying power are now subject to mandatory reporting. *See CPI Inflation Calculator*, *supra* note 48.

[53] *See, e.g.*, Larry Elliott, *A Brief History of British Housing*, THE GUARDIAN (May 24, 2014), https://www.theguardian.com/business/2014/may/24/history-british-housing-decade

except those of the most modest means or those residing in countries with the lowest cost of living will have $10,000 in the bank at some point during any given year. Thus today, under U.S. law, nearly every overseas American is criminally suspect simply for holding ordinary *domestic* bank accounts in the country where they live.[54]

2. FATCA

The second banking policy further criminalizing overseas Americans was adopted in 2010 following a decade of congressional investigations into the practices of certain banks in reputed tax haven countries—such as Switzerland, Lichtenstein, and the Cayman Islands—to assist persons residing in the United States in hiding assets to avoid U.S. taxation.[55] The investigations were led by Senator Carl Levin; his report asserted that "each year, the United States loses an estimated $100 billion in tax revenues due to offshore tax abuses."[56] The report justified the figure of $100 billion with references to studies of financial accounts held by persons outside the country in which they live (offshore accounts), as well as to studies of multinational companies engaged in fraudulent transfer pricing arrangements involving intangible property.[57] Notably, neither the report nor the studies it relied upon addressed overseas Americans who bank and otherwise carry out their financial affairs in the countries in which they live.[58]

Senator Levin's resolution to the problem was to develop a list of tax havens and impose special requirements upon U.S. persons who opened bank accounts or formed legal entities in those countries.[59] But this did not go far enough for other legislators, specifically Representative Charlie Rangel and Senator Max Baucus. They successfully pushed through a more extensive proposal: a law requiring all non-U.S. financial institutions to identify all

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(indicating that in 1970 Britain the average price of a home was £5000); *Parliamentary Debates*, House of Representatives, 19 Mar. 1970, 636 (Thomas Uren, Member for Reid) (Austl.) (indicating that in Australia in 1970 the average price of a home was well under AUS $10,000).

54 *See generally* Laura Snyder, *Part 3 of 4: "It Hurts My Heart:" The Case for Fairer Taxation of Non-Resident US Citizens*, CITIZENSHIP SOLS., https://citizenshipsolutions.ca/2019/05/06/part-3-of-4-it-hurts-my-heart-the-case-for-fairer-taxation-of-non-resident-us-citizens/ (last visited Nov. 22, 2022).

55 For a discussion situating FATCA in a larger enforcement context, see Shu-Yi Oei, *The Offshore Tax Enforcement Dragnet,* 67 EMORY L. J. 655 (2018).

56 STAFF OF S. COMM. ON HOMELAND SEC. & GOV'T AFF., 110TH CONG., TAX HAVEN BANKS AND U.S. TAX COMPLIANCE STAFF REPORT 1 (Comm. Print 2008).

57 *Id.*

58 Laura Snyder, *The Criminalization of the American Emigrant*, 167 TAX NOTES FED. 2279, 2284 (2020); Snyder, *supra* note 40, at 308.

59 ELISE J. BEAN, FINANCIAL EXPOSURE: CARL LEVIN'S SENATE INVESTIGATIONS INTO FINANCE AND TAX ABUSE 184 (2018).

their clients who are U.S. persons and to disclose detailed financial information about each of those persons to U.S. tax authorities.[60]

The law applies to anyone who is or is "suspected" of being a U.S. citizen, as well as to any green card holder, regardless of where in the world the person in question lives.[61] For those who live outside the United States, the law applies to accounts held in the country in which they live. That is, it applies to accounts that are not offshore.[62] The law is called the "Foreign Account Tax Compliance Act"[63] ("FATCA"), alluding to "fat cats,"[64] a derogatory expression referring to persons who have become wealthy through questionable means.[65] Implementing instructions for FATCA issued by the IRS for non-U.S. financial institutions specifically refer to overseas Americans as "suspected" U.S. persons—terminology typically reserved for persons believed to have committed a crime.[66]

FATCA was adopted in conjunction with a law granting payroll tax breaks and other incentives for businesses in the United States to hire unemployed workers, which was expected to result in a loss of tax revenue;[67] FATCA's ostensible purpose was to offset this loss by increasing the collection of taxes from sources outside the United States.[68] There is, however, no evidence that FATCA has resulted in any significant increase in tax revenue.[69] This result is not surprising considering that, even though

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[60] *Id.* at 185.

[61] Internal Revenue Serv., *Foreign Account Tax Compliance Act International Compliance Management Model (1CMM)*, REP. NOTIFICATION TECH. SUPPORT GUIDE 3 (2016), https://www.irs.gov/pub/fatca/fatcaicmmreportnotificationtechnicalsupportguidedraft.pdf.

[62] BEAN, *supra* note 59, at 185; Snyder, *supra* note 58, at 2284-85.

[63] Hiring Incentives to Restore Employment Act of 2010, Pub. L. No. 111-147, §§ 501–62, 124 Stat. 71, 72.

[64] *See, e.g.*, Lisa De Simone et al., *Transparency and Tax Evasion: Evidence from the Foreign Account Tax Compliance Act (FATCA)*, 58 J. ACCT. RES. 105, 106 n.1 (2020); *see also Closing the Tax Gap: Lost Revenue from Noncompliance and the Role of Offshore Tax Evasion: Hearing Before the Senate Subcommittee on Taxation and IRS Oversight*, 117th Cong. 33 (May 11, 2021) (illustrating Senator Sheldon Whitehouse's remark "It's too bad that we couldn't put an extra 'T' on it. Then it would say FAT CAT which would be such an appropriate acronym for it.").

[65] *What is a fat cat? Definition and examples*, MARKET BUS. NEWS, https://marketbusinessnews.com/financial-glossary/fat-cat/ (last visited Nov. 22, 2022).

[66] Internal Revenue Serv., *supra* note 61; Snyder, *supra* note 58, at 2285.

[67] *See generally* Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, 124 Stat. 71.

[68] Snyder, *supra* note 58, at 2285; Snyder, *supra* note 40, at 309.

[69] Snyder, *supra* note 58, at 2286; Snyder, *supra* note 40, at 309; *see also* TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, DESPITE SPENDING NEARLY $380 MILLION, THE INTERNAL REVENUE SERVICE IS STILL NOT PREPARED TO ENFORCE COMPLIANCE WITH THE FOREIGN ACCOUNT TAX COMPLIANCE ACT, Reference No. 2018-30-040, at 1 (July 5, 2018) (reporting that the IRS is "still not prepared to enforce compliance" of FATCA); TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, ADDITIONAL ACTIONS ARE NEEDED TO ADDRESS NON-FILING AND NON-REPORTING COMPLIANCE UNDER THE FOREIGN ACCOUNT TAX COMPLIANCE ACT, Reference No. 2022-30-019, at ii (April 7, 2022) (confirming this conclusion).

overseas Americans are required to comply with U.S. tax rules and file U.S. tax returns, most do not owe any U.S. tax.[70]

FATCA obliges non-U.S. financial institutions to (1) identify their "suspected U.S. person" clients and (2) report to the IRS detailed information about all accounts held by those clients.[71] The information includes the account holders' U.S. tax identification (Social Security) numbers, names and addresses, and the accounts' balances. Institutions that fail to comply risk a severe penalty: a withholding tax of 30% on all payments of the institutions' U.S.-source income as well as on gross proceeds from the sale of assets that produce U.S.-source income.[72]

FATCA also imposes reporting obligations on U.S. persons, separately from, and in addition to, the FBAR. More specifically, FATCA requires U.S. citizens holding financial assets outside the United States—so, for overseas Americans, assets in the countries in which they live—with an aggregate value of more than $200,000 to include a report about those assets with their annual tax return.[73] The penalties for failure to file also exist separately from, and in addition to, FBAR penalties: the non-willful failure to file can incur a penalty of $10,000 per year and per account (to a maximum of $50,000 per year); the willful failure can incur penalties in the amount of 50% of the value of the asset or $100,000, whichever is greater.[74]

In each of the five Purple Books issued since 2017, the National Taxpayer Advocate ("NTA") has called for eliminating the duplication of FBAR and FATCA reporting and for the exemption of accounts maintained by overseas Americans in their country of residence. The appeals cite IRC § 1471(d)(1), authorizing the Treasury Department to issue regulations to eliminate duplicative reporting requirements, and IRC § 6038D, similarly authorizing the Treasury Department to issue regulations or other guidance to provide appropriate exceptions from FATCA reporting when such reporting would be duplicative of other disclosures.[75] Despite the NTA's

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70 For an explanation of why most overseas Americans do not owe any U.S. tax, see Laura Snyder et al., *Mission Impossible: Extraterritorial Taxation and the IRS*, 170 TAX NOTES FED. 1827, 1832 n.14 (2021); *see also* Oei, *supra* note 55, at 697-98; Organ, *supra* note 5 (observing that most overseas Americans who renounce U.S. citizenship "had no or little tax liability in the years prior to expatriation").

71 Snyder, *supra* note 58, at 2285.

72 Bean, *supra* note 59, at 185; Snyder, *supra* note 58, at 2285; I.R.C. § 1473(1)(A)(i)–(ii); *see also* Oei, *supra* note 55, at 682-84.

73 26 U.S.C. § 6038D(a) (2022); *see also Summary of FATCA Reporting for U.S. Taxpayers*, INTERNAL REVENUE SERV. (Sep. 22, 2022), https://www.irs.gov/businesses/corporations/summary-of-fatca-reporting-for-us-taxpayers.

74 Snyder, *supra* note 58, at 2285; Snyder, *supra* note 40, at 309; s*ee also* Oei, *supra* note 55, at 684-88.

75 NAT'L TAXPAYER ADVOC., *Harmonize Reporting Requirements for Taxpayers Subject to Both FBAR and FATCA by Eliminating Duplication and Excluding Accounts a U.S. Person Maintains in the Country Where He or She Is a Bona Fide Resident*, PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX

continual appeals, neither the Treasury Department nor Congress has acted in this regard.

C. Evolution of Extraterritorial Taxation and U.S. Citizenship

The U.S. Supreme Court decision *Cook v. Tait*[76] is considered to underpin the U.S. extraterritorial tax system. The Plaintiff in *Cook* was a U.S. citizen residing in Mexico.[77] The Plaintiff argued that Congress did not have the power to tax income received by a U.S. citizen who was a resident outside the United States and whose income was derived from real and personal property located outside the United States.[78] The Court disagreed, rejecting the Plaintiff's assertion that such taxation violated not only his rights under the Constitution of the United States, but also under international law.[79] The Court justified its decision by citing a presumption "that the government, by its very nature, benefits the citizen and his property wherever found, and

ADMINISTRATION 29-30 (2017), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC17_PurpleBook.pdf; NAT'L TAXPAYER ADVOC., *Harmonize Reporting Requirements for Taxpayers Subject to Both FBAR and FATCA by Eliminating Duplication and Excluding Accounts a U.S. Person Maintains in the Country Where He or She Is a Bona Fide Resident*, 2019 PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX ADMINISTRATION 25-26 (2018), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_PurpleBook.pdf; NAT'L TAXPAYER ADVOCATE, *Harmonize Reporting Requirements for Taxpayers Subject to Both the Report of Foreign Bank and Financial Accounts and the Foreign Account Tax Compliance Act by Eliminating Duplication and Excluding Accounts a U.S. Person Maintains in the Country Where He or She Is a Bona Fide Resident*, 2020 PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX ADMINISTRATION 26-27 (2019), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19_PurpleBook.pdf; NAT'L TAXPAYER ADVOC., *Harmonize Reporting Requirements for Taxpayers Subject to Both the Report of Foreign Bank and Financial Accounts and the Foreign Account Tax Compliance Act by Eliminating Duplication and Excluding Accounts a U.S. Person Maintains in the Country Where He or She Is a Bona Fide Resident*, 2021 PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX ADMINISTRATION 21-22 (2020), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_PurpleBook.pdf [hereinafter *2021 Purple Book*]; NAT'L TAXPAYER ADVOC., *Harmonize Reporting Requirements for Taxpayers Subject to Both the Report of Foreign Bank and Financial Accounts and the Foreign Account Tax Compliance Act by Eliminating Duplication and Excluding Accounts a U.S. Person Maintains in the Country Where He or She Is a Bona Fide Resident*, 2022 PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX ADMINISTRATION 17-18 (2021), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2022/01/ARC21_PurpleBook.pdf; *see* Helen Burggraf, *Nat'l Taxpayer Advocate, in Annual Report: 'Harmonize Reporting Requirements for Taxpayers Subject to Both FBARs and FATCA'*, AM. EXPAT FIN. NEWS J. (Jan. 24, 2022), https://americanexpatfinance.com/news/item/880-national-taxpayer-advocate-in-annual-report-harmonize-reporting-requirements.

76 *Cook*, 265 U.S. 47.

77 *Id.* at 54.

78 *Id.* at 54-55.

79 *Id.* at 55-56.

therefore has the power to make the benefit complete,"[80] regardless of where the property is located or where the citizen resides.

Cook is regularly cited in support of assertions such as "[i]t is settled law that the United States has the power to impose an income tax on the basis of citizenship alone, regardless of residence,"[81] and "[i]t has long been established that the U.S. Constitution permits the federal government's worldwide taxation of nonresident U.S. citizens."[82]

In 1924, the year *Cook* was handed down, the situation of overseas Americans was considerably different as contrasted with today.[83] This was the case both in regard to the components of the U.S. tax system as well as who was subjected to it. As a result of these differences, the consequences of *Cook* for Americans overseas were quite different from what they are today.[84]

Table 1 demonstrates that in 1924, filing thresholds and exemptions were high relative to average incomes for the time.[85] As a result, few—as little as 6.56% of the American population[86]—filed a tax return, let alone paid any federal income tax. Further, the tax system itself was considerably less complex and less penalizing, especially for overseas Americans. Notably, in 1924 there were none of the reporting requirements or penalizing taxation with respect to foreign corporations, mutual funds ("PFICS"), retirement accounts (foreign trusts), or phantom gains that exist today. There were no reporting requirements for non-U.S. financial accounts, let alone draconian penalties for failure to report. Nor was there any tax penalty, exit tax, or renunciation fee in the event of expatriation.

Further, as Table 2 demonstrates, in 1924, many, if not most Americans, who lived outside the United States for anything more than a short period lost their U.S. citizenship by operation of law.[87] This was especially the case for naturalized U.S. citizens and women who married non-U.S. citizens. They lost their U.S. citizenship after residing outside the United States for either two or five years, depending upon the country where they resided. American children born and residing outside the United States lost their U.S. citizenship if, upon turning eighteen, they did not record at a U.S. consulate their intention to reside in the United States and retain U.S. citizenship and take an oath of allegiance to the United States. In essence, in 1924, the only Americans who could reside overseas on a long-term basis without losing

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80 *Id.* at 56; *see supra* text accompanying note 2.

81 Bernard Schneider, *The End of Taxation Without End: A New Tax Regime for U.S. Expatriates*, 32 VA. TAX REV. 1, 5 (2012).

82 Zelinsky, *supra* note 3, at 1302.

83 *See infra* Tables 1 and 2.

84 *Id.*

85 This paragraph discusses the information found in Table 1. *See infra* Table 1.

86 INTERNAL REVENUE SERV., STATISTICS OF INCOME FROM RETURNS OF NET INCOME FOR 1924, at 4 (1926).

87 This paragraph discusses the information found in Table 2. *See infra* Table 2.

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

In sum, the U.S. extraterritorial tax system has considerably evolved. One century ago, not only was the system considerably less complex and less penalizing than it is today, especially for overseas Americans, but it also did not concern many overseas Americans because they lost U.S. citizenship by operation of law. Today the U.S. extraterritorial tax system is highly complex and highly penalizing. The system is separate from and more punitive than the domestic tax system applied within the United States. It concerns all overseas Americans except those who take the active step to renounce U.S. citizenship, thereby incurring a high renunciation fee[88] as well as, depending upon their circumstances, a penalizing exit tax.[89] Because of these developments, the U.S. extraterritorial tax system is far-reaching and highly consequential for overseas Americans.

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[88] A renunciation fee of $450 was first introduced in 2010. The fee was raised to $2,350 in 2014. In reaction to a lawsuit brought by the Association of Accidental Americans, the U.S. Department of State announced in January 2023 that it would seek to reduce the fee to the original amount of $450. *See* Helen Burggraf, *BREAKING: U.S. Gov't Announces Intent to Slash Citizenship Renunciation Fee by Four-Fifths, Ahead of Monday Hearing*, AM. EXPAT FIN. NEWS J. (Jan. 7, 2023), https://www.americanexpatfinance.com/news/item/1089-us-govt-announces-intent-to-slash-citizenship-renunciation-fee; *see also infra* note 237 and accompanying text.

[89] *See* Robert W. Wood, *Renounce U.S., Here's How IRS Computes 'Exit Tax'*, FORBES (Feb. 27, 2017), https://www.forbes.com/sites/robertwood/2017/02/27/renounce-u-s-heres-how-irs-computes-exit-tax/; *see also* Anthony N. Verni, *Renunciation of Citizenship and Termination of Long Term Resident Status*, VERNI TAX L., https://www.vernitaxlaw.com/expat-tax-advice/renunciation-of-citizenship-expatriation/ (last visited Nov. 19, 2022).

Table 1: Contrasting U.S. Taxation in 1924 and 2019

	1924	2019
Average annual household income	$2,196[90]	$68,703[91]
Filing thresholds	Single: $5000 gross or $1000 net Married couple: $5000 gross or $2500 net[92]	Single: $12,200 Married filing jointly or Qualifying widow(er): $24,400 Married filing separately: $5 Head of household: $18,350[93]
Exemptions/Standard deductions	Single: $1000 Head of family or married couple: $2500 Each dependent: $400[94]	Single or Married filing separately: $12,200 Married filing jointly or Qualifying widow(er): $24,400 Head of household: $18,350[95]
Number of households	24,351,676[96]	120,756,048[97]
Number of returns filed	7,369,788[98]	157,705,360[99]

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

91 Jessica Semega et al., *Income and Poverty in the United States: 2019*, U. S. CENSUS BUREAU (Sep. 15, 2020), https://www.census.gov/library/publications/2020/demo/p60-270.html (showing the median household income in 2019).

92 Revenue Act of 1924, Pub. L. No. 68-176 § 223, 43 Stat. 253, 280; INTERNAL REVENUE SERV., REGULATIONS 65 RELATING TO THE INCOME TAX UNDER THE REVENUE ACT OF 1924, at 134-35 (1924).

93 *1040 and 1040-SR Instructions*, INTERNAL REVENUE SERV. (Jan. 8, 2020) https://www.irs.gov/pub/irs-prior/i1040gi--2019.pdf (differentiating thresholds apply in the case of taxpayers over age 65).

94 Revenue Act of 1924, Pub. L. No. 68-176 § 216, 43 Stat. 253, 272.

95 *1040 and 1040-SR Instructions*, *supra* note 93.

96 U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 61 (1921) (showing the number of households based upon 1920 census).

97 U.S. CENSUS BUREAU, US CENSUS 2020 QUICKFACTS 1 (2019) (looking at households, 2015-2019).

98 INTERNAL REVENUE SERV., *supra* note 92, at 116, 272.

99 *SOI Tax Stats — Historic Table 2*, INTERNAL REVENUE SERV. (Mar. 16, 2022), https://www.irs.gov/statistics/soi-tax-stats-historic-table-2 (cell B9 of form titled "Total File, All States."

% of households filing a return[100]	30.26%	130.6%[101]
Average income per return	$3,481[102]	$76,668[103]
Lowest / highest tax bracket	2% / 46%[104]	10% / 37%[105]
Reporting and taxation of non-U.S. source income of non-U.S. corporations (CFCs)	No	Yes (via U.S.-person shareholder)[106]
Reporting and taxation of retirement accounts (foreign trusts)	No	Yes[107]
Reporting and punitive taxation of mutual funds (passive foreign investment companies, or PFICs)	No	Yes[108]
Taxation of phantom gains	No	Yes[109]

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100 This is calculated by dividing the number of returns filed by the number of households).

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

102 INTERNAL REVENUE SERV., *supra* note 92, at 4 (looking at column "Average net income per return").

103 *SOI Tax Stats — Historic Table 2*, *supra* note 99 (form titled "Total File, All States," Total adjusted gross income $ 12,090,994,318,000 [Cell B27] divided by Total number of returns 157,705,360 [Cell B9]).

104 Revenue Act of 1924, Pub. L. No. 68-176 §§210-211, 43 Stat. at 264-267; *see also Historical U.S. Federal Individual Income Tax Rates & Brackets, 1862-2021*, TAX FOUND. (Aug. 24, 2021), https://taxfoundation.org/historical-income-tax-rates-brackets/.

105 *1040 and 1040-SR Instructions*, *supra* note 93.

106 The Revenue Act of 1962 introduced Subpart F to the I.R.C. and expanded the definition of "Controlled Foreign Corporation" ("CFC") to include not just corporate shareholders of foreign companies but also individuals. Revenue Act of 1962, Pub. L. No. 87-834 § 12, 76 Stat. 960, 1006-31; *see* Sebastian Dueñas, *CFC Rules Around the World*, TAX FOUND. 4 (June 2019), https://files.taxfoundation.org/20190617100144/CFC-Rules-Around-the-World-FF-659.pdf.

107 The Revenue Act of 1962 introduced the first requirements for filing of informational returns for foreign trusts. Revenue Act of 1962, Pub. L. No. 87-834, §§ 7(f)-(g), 76 Stat. 988-89 (adding to the Code new § 6048 (requirement to file) and § 6677 (penalties for failure to file)).

108 The Tax Reform Act of 1986 introduced the first PFIC rules imposing penalizing taxation on foreign mutual funds. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1235, 100 Stat. 2566-76.

109 Rev. Rul. 90-79, 1990-2 C.B. 187 (ruling that persons who sell their home outside the United States are subject to tax on any "phantom income" that may result because of changes in the value of the currency with which the home was purchased and sold as compared to the U.S. dollar). *See* Nick

Reporting of non-U.S. financial accounts and penalties for failure to report	No	Yes[110]
Expatriation/exit tax	No	Yes[111]
Renunciation fee	No	Yes[112]

Table 2: Contrasting Loss of U.S. Citizenship by Operation of Law in 1924 and 2019

		Loss of U.S. citizenship by operation of law?	
	Categories of persons	In 1924	In 2019
1	Persons who acquire citizenship of another country by naturalization	Yes[113]	No[114]
2	Naturalized U.S. citizens who reside for more than 2 years in originating country	Yes[115]	No[116]

D. Hansen et al., *Foreign Activities of U.S. Taxpayers*, 44 TAX LAW. 1287, 1291 (1991); *see also* Andrew Mitchel, *Non-Deductible Personal Currency Loss on Foreign Mortgage*, ANDREW MITCHEL INT'L TAX SERV. (2008), https://www.andrewmitchel.com/charts/rr_90_79.pdf.

[110] The Bank Secrecy Act of 1970 introduced FBAR and the HIRE Act of 2010 introduced FATCA. *See supra* notes 40-74 and accompanying text.

[111] The Foreign Investors Tax Act of 1966 introduced the first expatriation tax and the Heroes Earnings Assistance and Relief Tax Act of 2008 introduced the first exit tax. Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, § 103, 80 Stat. 1539, 1551-55; Heroes Earnings Assistance and Relief Tax Act of 2008, Pub. L. No. 110–245, § 301, 122 Stat. 1624, 1638-47; *see* Karl L. Fava, *Expatriation and the New Mark-to-Market Rules*, TAX ADVISOR (July 1, 2009), https://www.thetaxadviser.com/issues/2009/jul/expatriationandthenewmark-to-marketrules.html.

[112] The *Schedule of Fees for Consular Services*, issued in 2010, introduced the first fee for the issuance of a Certificate of Loss of Nationality. Public Notice 7068, Schedule of Fees for Consular Services, 75 Fed. Reg. 36522-35 (to be codified at 22 C.F.R. 22, 51).

[113] Expatriation Act of 1907, Pub. L. No. 59-193, § 2, 34 Stat. 1228, 1228-29, and later the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 349, 66 Stat. 163, 267-68.

[114] In 1990, the U.S. Department of State issued an information sheet entitled "Advice about Possible Loss of U.S. Citizenship and Dual Nationality." It confirmed the position taken by the Supreme Court in *Vance v. Terrazas*, 444 U.S. 252 (1980) that dual nationality was not a reason for expatriation. The sheet specified that there is a presumption that persons who naturalize in another country intend to retain U.S. citizenship. BEN HERZOG, REVOKING CITIZENSHIP: EXPATRIATION IN AMERICA FROM THE COLONIAL ERA TO THE WAR ON TERROR 108-09 (2015).

[115] Expatriation Act of 1907, Pub. L. No. 59-193, § 2, 34 Stat. at 1228, and later the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, §§ 352-354, 66 Stat. at 269-272 (specifying three years rather than two). Such a person was presumed to have ceased being an American citizen. The presumption could be overcome upon presentation of "satisfactory evidence" to a consular officer.

[116] In 1964, in *Schneider v. Rusk*, 377 U.S. 163, 168 (1964), the U.S. Supreme Court ruled that the relevant provision of the Immigration and Nationality Act of 1952 was violative of due process under the Fifth Amendment of the Constitution.

3	Naturalized U.S. citizens who reside for more than 5 years in any other country (other than originating country)	Yes[117]	No[118]
4	Women who marry a non-U.S. citizen and reside overseas for 2 years in the country where her husband is a citizen	Yes[119]	No[120]
5	Women who marry a non-U.S. citizen and reside overseas for 5 years in any other country (other than the country where her husband is a citizen)	Yes[121]	No[122]
6	Children born outside the United States as U.S. citizens and residing overseas who, upon their 18th birthday, do not record at a U.S. consulate their intention to reside in the United States and retain U.S. citizenship and take an oath of allegiance to the United States	Yes[123]	No[124]

III. CONSEQUENCES FOR OVERSEAS AMERICANS AND FOR THE IRS

Today the U.S. extraterritorial tax system is separate from and more punitive than the domestic system applied within the United States.[125] The

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117 *See Schneider*, 377 U.S. at 165.

118 *See id.* at 165.

119 Married Women's Independent Nationality Act (also referred to as the Cable Act), Pub. L. No. 67-346, § 3, 42 Stat. 1021, 1022 (1922).

120 Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 357, 66 Stat. at 272 (ending for women the automatic loss of U.S. citizenship by reason of marriage to an alien and residence overseas).

121 Married Women's Independent Nationality Act, Pub. L. No. 67-346, § 3, 42 Stat. 1021, 1022 (1922).

122 Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 357, 66 Stat. at 272.

123 Expatriation Act of 1907, Pub. L. No. 59-193, § 6, 34 Stat. at 1229.

124 After 1924, U.S. nationality law evolved to require U.S. citizen children born overseas to live in the United States before a specified age and for a minimum number of years to retain U.S. citizenship. All such requirements were ended in 1978. An Act to Repeal Certain Sections of Title III of the Immigration and Nationality Act, and for Other Purposes, Pub. L. No. 95-432, 92 Stat. 1046 (1978), *repleaded by* § 350 of the Immigration and Nationality Act. *See* Andy Sundberg, "*Who Is a U.S. Citizen?": "The Evolution of Citizenship Law in The United States of America*", AM. CITIZENS BOARD 1 (Feb. 2012), https://www.americansabroad.org/media/files/files/9aabe3e1/historyofchildcitizenship.pdf; *see also* Herzog, *supra* note 114, at 83-84.

125 John Richardson, *The United States Imposes a Separate and Much More Punitive Tax on U.S. Citizens Who Are Residents of Other Countries*, TAX CONNECTIONS (Mar. 13, 2019), https://www.taxconnections.com/taxblog/the-united-states-imposes-a-separate-and-more-punitive-tax-system-on-us-dual-citizens-who-live-in-their-country-of-second-citizenship/.

extraterritorial application of U.S. taxation and banking policies has severe consequences both for (A) overseas Americans and (B) the IRS.

A. Consequences for Overseas Americans

Because of the extraterritorial application of U.S. taxation policies, overseas Americans are U.S. tax residents regardless of how long they have lived outside the United States and even if they have never resided in the United States at any time in their lives. They cannot lose U.S. tax residency without renouncing U.S. citizenship.[126] At the same time, they are also tax residents of the country in which they live.[127] The result is that overseas Americans are subjected to two tax systems, which continues as long as they remain U.S. citizens. This situation is in stark contrast to the citizens of nearly all other countries in the world;[128] when they live outside their country of citizenship, they can end their tax residency in that country to be tax residents of just one country—their country of actual residence.[129]

The consequences of being subjected to two tax systems simultaneously are tremendous. Living as an American outside the United States means living with severe financial, psychological, and social limitations.[130] Overseas Americans face the following difficulties because of the extraterritorial application of U.S. taxation policies:

(i) Difficulties participating in tax-advantaged retirement savings plans that are not recognized under U.S. tax rules, with the risk that, upon retirement, they become public charges (burdens) in the countries in which they live;[131]

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126 Since June 3, 2004, severing tax residency has required a relinquishment of U.S. citizenship coupled with notice to the IRS and/or the U.S. Department of State. Prior to June 3, 2004, non-renunciatory relinquishment severed tax residency. *See* John Richardson, *Part 14 – Understanding "Exit Taxes"*, TAX CONNECTIONS (Nov. 27, 2015), https://www.taxconnections.com/taxblog/part-14-understanding-exit-taxes/.

127 *See id.*

128 *See supra* note 11.

129 *See generally* Karen Alpert et al., *The Implications of Tax Residence for Human Rights*, TAX RESIDENT & HUM. RTS., Feb. 10, 2020, at 2-10 (prepared for the "Accounting & Finance Association of Australia and New Zealand" (AFAANZ) 2020 Annual Conference).

130 *See generally id.*

131 Snyder, *supra* note 58, at 2281; Snyder, *supra* note 40; *see also* Doris L. Speer, *AARO 2020 Advocacy Survey Results Article 8: Citizenship-Based Taxation*, ASS'N OF AM. RESIDENT OVERSEAS 3-4 (May 25, 2021), https://www.aaro.org/images/pdf/survey/ARTICLE_08_CBT_2021_MAY_25_DLS.pdf [hereinafter *AARO Survey Article 8*]; Doris L. Speer, *AARO 2020 Advocacy Survey Results Article 10: It's So Difficult to Save for Retirement!*, ASS'N OF AM. RESIDENT OVERSEAS 4-9 (July 5, 2021), https://www.aaro.org/images/pdf/survey/ARTICLE_10_RETIREMENT_ACCOUNTS_2021_JULY_5_DLS.pdf [hereinafter *AARO Survey Article 10*]; Laura Snyder, *Effects of the Extraterritorial Application of US Taxation and Banking Policies: Part 1 of 2*, STOP EXTRATERR. AM. TAX'N 16-17 (May 4, 2021) [hereinafter *Part 1 of 2*]; Laura Snyder, *Effects of the Extraterritorial Application of US Taxation and Banking Policies: Part 2 of 2*, STOP

(ii) Difficulties making many other kinds of investments as U.S. tax rules heavily penalize non-U.S. (so-called "foreign") investments, regardless of where the investor lives;[132]

(iii) Difficulties creating and owning a small business outside the United States as U.S. tax rules heavily penalize ownership by an American of any business located outside the United States;[133]

(iv) Difficulties holding title to real estate and other family assets outside the United States because of penalizing U.S. taxation, including taxation resulting solely from fluctuations in the value of the currency of the country or region in which the American lives as compared to the U.S. dollar;[134]

(v) The taxation by the United States of social welfare benefits that overseas Americans receive from their countries of residence, such as unemployment, maternity, and disability payments;[135]

(vi) The need to expend considerable time and money to complete U.S. tax declarations, often made overly complex because of U.S. tax rules' inherent distrust for anything "foreign" (again, anything outside the United States, regardless of where the taxpayer lives,

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EXTRATERR. AM. TAX'N 63 (May 4, 2021) [hereinafter *Part 2 of 2*]; Laura Snyder, *"Being an American Outside of America is No Longer Safe." Survey Report: Effects of the Extraterritorial Application of U.S. Taxation and Banking Policies – Participant Comments – Version 1 of 3*, STOP EXTRATERR. AM. TAX'N 502 (May 4, 2021), http://seatnow.org/wp-content/uploads/2021/05/Comments-by-topic.pdf_ [hereinafter SEAT Survey – Participant Comments]; Carmelan Polce, *Tax Filing From Abroad: Research on Non-resident Americans and U.S. Taxation*, DEMOCRATS ABROAD (Mar. 1, 2019), https://www.democratsabroad.org/carmelan/tax_filing_from_abroad_2019_research_on_non-resident_americans_and_u_s_taxation. For a detailed account by one overseas American living in Australia, see *A Senior Citizen's Story*, LET'S FIX THE AUSTRALIA/US TAX TREATY! http://fixthetaxtreaty.org/about/our-stories/a-senior-citizens-story/ (last visited Nov. 19, 2022).

132 Snyder, *supra* note 58, at 2281; Snyder, *supra* note 40, at 304, 338-41; *see also* Doris L. Speer, *AARO 2020 Advocacy Survey Results Article 6: Taxation and Banking*, ASS'N OF AM. RESIDENT OVERSEAS 1, 3 (Apr. 26, 2021), https://www.aaro.org/images/pdf/survey/ARTICLE_06_TWO_SYSTEMS_2021_APR_26_DLS.pdf [hereinafter *AARO Survey Article 6*]; *AARO Survey Article 8*, *supra* note 131, at 3-4; *AARO Survey Article 10*, *supra* note 131, at 5-6; *Part 1 of 2*, *supra* note 131, at 14, 16-17; SEAT Survey – Participant Comments, *supra* note 131, at 92-141; Polce, *supra* note 131, at 5, 13, 17, 20, 22, 23, 27, 31, 34-35.

133 Patrick Riley Murray, *Size Matters (Even If the Treasury Insists It Doesn't): Why Small Taxpayers Should Receive a De Minimis Exemption from the GILTI Regime*, 106 MINN. L. REV. 1625 (2022). In 2017, Congress adopted especially punishing rules for taxpayers who own interests in non-U.S. companies. In addition to imposing retroactive taxation on retained earnings (referred to as the "Transition Tax" or "Repatriation Tax"), the rules also impose ongoing taxation on companies' income. Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054. The name assigned to the ongoing taxation leaves no doubt as to the stigmatizing intent: Global Intangible Low-Taxed Income ("GILTI"). Snyder, *supra* note 58, at 2281; Snyder, *supra* note 40, at 305; *see also* AARO Survey Article 6, *supra* note 132, at 1, 3-4, 6-7; *Part 2 of 2*, *supra* note 131, at 48-50; SEAT Survey – Participant Comments, *supra* note 131 at 316-50; Polce, *supra* note 131, at 5, 6, 20, 25-27.

134 Snyder, *supra* note 58, at 2281-82; Snyder, *supra* note 40, at 305; *see also Part 1 of 2*, *supra* note 131, at 14, 23; SEAT Survey – Participant Comments, *supra* note 131, at 270-86.

135 Snyder, *supra* note 58, at 2282; Snyder, *supra* note 40, at 305; *see also Part 1 of 2*, *supra* note 131, at 14, 27; SEAT Survey – Participant Comments, *supra* note 131 at 353-57.

is "foreign"), with errors resulting in severe penalties when, in most cases, no U.S. tax is owed.[136]

As if these consequences of U.S. tax policies were not enough, overseas Americans also face the following consequences of U.S. banking policies:

(i) Difficulties opening or keeping bank and other financial accounts in the country in which they live: Many financial institutions outside the United States, fearing draconian penalties for failure to comply with FATCA, find it easier to simply refuse U.S. citizens as clients;[137]

(ii) Removal as a joint account holder with the overseas American's non-U.S. citizen spouse: Because many spouses of overseas Americans do not want their accounts to be reported to the United States, they refuse to hold joint accounts;[138]

(iii) The inability to hold certain jobs: Many non-U.S. employers refuse to hire U.S. citizens in jobs that include bank account authority because this would trigger the need to report the employer's accounts to the United States. Overseas Americans are refused entrepreneurial opportunities for the same reason;[139]

(iv) The inability to volunteer as an executive officer or in another position with signature authority for a non-U.S. not-for-profit organization (including the local equivalent of a scout group or Parent Teacher Association);[140]

(v) The inability to serve as trustee or hold power of attorney for a family member or to serve as executor for a family member's estate;[141]

(vi) The inability to obtain a mortgage either entirely or without having to pay a higher rate.[142]

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[136] Snyder, *supra* note 58, at 2282; Snyder, *supra* note 40, at 305; *see also AARO Survey Article 6*, *supra* note 132, at 3-4, 6; *AARO Survey Article 8*, *supra* note 131, at 3-4; *AARO Survey Article 10*, *supra* note 131, at 4-8; *Part 1 of 2*, *supra* note 131, at 14, 18-21; *Part 2 of 2*, *supra* note 131, at 52-56, 63; SEAT Survey – Participant Comments, *supra* note 131, at 142-222; Polce, *supra* note 131, at 4, 11, 13, 14, 17. For a detailed discussion of high compliance costs, see Oei, *supra* note 55, at 709, 713-14, 720-22.

[137] Snyder, *supra* note 58, at 2285-86; Snyder, *supra* note 40, at 309; *see also Part 2 of 2*, *supra* note 131, at 32, 34, 38, 41, 43, 64; SEAT Survey – Participant Comments, *supra* note 131 at 236-66; Polce, *supra* note 131, at 5, 12, 20, 31, 34.

[138] Snyder, *supra* note 58, at 2286; Snyder, *supra* note 40, at 309-10; *see also Part 2 of 2*, *supra* note 131, at 32, 39, 63, 68; SEAT Survey – Participant Comments, *supra* note 131, at 26, 32, 35, 39, 49, 55, 59, 65, 146, 240, 270-86, 381, 572, 576; Polce, *supra* note 131, at 19, 31, 34.

[139] Snyder, *supra* note 58, at 2286; Snyder, *supra* note 40, at 310; *see also* AARO Survey Article 6, *supra* note 132, at 3-4, 6; *Part 1 of 2*, *supra* note 131, at 28; *Part 2 of 2*, *supra* note 131, at 45; SEAT Survey – Participant Comments, *supra* note 131, at 339-50.

[140] Snyder, *supra* note 58, at 2286; Snyder, *supra* note 40, at 310; *see also Part 2 of 2*, *supra* note 131, at 40; SEAT Survey – Participant Comments, *supra* note 131, at 350, 353.

[141] Snyder, *supra* note 58, at 2286; Snyder, *supra* note 40, at 310; *see also Part 2 of 2*, *supra* note 131, at 44.

[142] Snyder, *supra* note 58, at 2286; Snyder, *supra* note 40, at 310; *see also Part 2 of 2*, *supra* note 131, at 42, 64; SEAT Survey – Participant Comments, *supra* note 131, at 357-61; Polce, *supra* note 131.

In essence, while double taxation does sometimes occur,[143] the more consequential and far-reaching problem is that U.S. tax and banking policies expect overseas Americans to carry out their financial lives as if they were living in the United States. For most overseas Americans, especially those living outside the United States on a long-term basis, this is impossible.[144] As a result, they are heavily penalized financially and are prevented from fully integrating into their families and into the communities in which they reside.

Many also suffer severe psychological and even physical consequences because of these policies. The testimony of overseas Americans to this effect includes:

> I became extremely anxious and afraid of my situation. It eventually cost me my relationship and my health. I lost my appetite and became dangerously underweight. I couldn't sleep. Worst of all I felt so alone. I didn't mention my place of birth, or being American, to anyone. And I didn't even dare speak to accountants, since I was told they are not obliged to maintain confidentiality. I am still trying to figure out what to do, and still unable to sleep at night. I feel extremely depressed, helpless and hopeless.[145]

> The anxiety [I experienced] after I discovered I should be declaring my U.K. income to the IRS was making me physically ill, even though I knew that my income was massively below the foreign earned income exclusion. Stress is the main contributor to autoimmune disease inflammation. It was destroying my joints and internal organs.[146]

> I am a retired 74-year-old single expat American, living on my own in New Zealand and I am having difficulty both cognitively and emotionally with continuing to cope with the complexities and the demands of reporting and paying tax on worldwide income to two countries with different definitions of taxable income and different means of calculating that income. The anxiety it creates every year to get it right is overwhelming and it is affecting my mental health. I can't keep doing this and I cannot afford to give up my U.S. citizenship.[147]

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143 See, for example, Snyder, *supra* note 40, at 335-38, which describes double taxation with respect to Australia's superannuation and the application in Canada of the U.S. 2017 Tax Cuts and Jobs Act.

144 This is impossible because other countries have their own rules regarding employment, business organization, asset ownership, investment, and taxation that all residents must respect regardless of citizenship. For an explanation specially with respect to Americans living in France, see Snyder, *supra* note 40, at 306 n. 22. Indeed, it is in ignoring the rules of other countries that the U.S. extraterritorial tax system violates their sovereignty. *See* Snyder, *supra* note 40, at 326-44. For an additional discussion of why this is impossible, see Oei, *supra* note 55, at 698-700.

145 SEAT Survey – Participant Comments, *supra* note 131, at 396.

146 *Id.* at 14.

147 *Id.* at 25.

> I feel as if I am a hunted criminal.[148]
>
> My life has been turned upside down since 2016, a real paradigm shift in my consciousness of having thought of the U.S. as the greatest country in the world and I was very proud to be a citizen, now I feel threatened by my very identity.[149]
>
> Fighting with my US born husband about this arcane system regularly. Feelings of frustration, sadness, fear for our futures, fear of large penalties for accidental mistakes. Feeling trapped in an unfair system. Financial stress. Anger at being unable to plan or save for retirement without double taxation, defeating the purpose of the savings. Unable to be a signatory on my ageing mother's accounts because they have to be reported.[150]
>
> I suffered a severe nervous breakdown which destroyed my marriage and my health and contributed to losing my job. My bank [. . .] subjected me to an endless series of forms before reluctantly letting me keep my account. Another bank would not accept me because of my USA connection. For a while I was suicidal and had to seek medical help. The doctor did not know about [U.S. extraterritorial taxation] and FATCA but could understand how and why it was ruining my life. This situation is absolute hell. I was proud to be an American, now I can't wait to renounce.[151]

Many overseas Americans have felt they had no choice but to renounce their U.S. citizenship as the only path available to escape the policies. Renouncing was not a cause for celebration: on the day they renounced, they felt "angry," "sad," "torn up," "grief," "sick in my stomach," "heavy heart," "devastated," "fraught," and "holding back tears."[152] One did "burst into tears," and another vomited.[153]

One former U.S. citizen wrote:

> It was an immeasurably emotional decision. But I had to be realistic. (1) need to have a bank; (2) preparation fees represented 1/3 of my gross annual income!! Now retired, if I still had to pay these preparation fees, it would represent 8 months of my retirement income!! No one can handle such a situation. 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

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148 Laura Snyder, *"I Feel Threatened by My Very Identity": Report on US Taxation and FATCA Survey—Part 2 Comments*, CITIZENSHIP SOLS. 26-27 (Oct. 25, 2019), http://www.citizenshipsolutions.ca/wp-content/uploads/2019/10/Part-2-Comments.pdf [https://perma.cc/9BTA-CQ8U].

149 *Id.* at 8-9.

150 *Id.* at 43.

151 *Id.* at 3.

152 *See* Snyder, *supra* note 40, at 312-13.

153 *Id.* at 312.

> my life was when my son died. But with my renunciation in early 2016, it was the day that I died.[154]

Another wrote:

> The officer at consulate was flat and businesslike, process quick and easy. I however was vacillating between homicidal rage and indescribable sorrow. Seeing the officer so indifferent to issuing my renouncing pledge rendered me wanting to knock-out punch the insensitive witch and every member of [the House Ways & Means] Committee.[155]

And another recounted:

> Renouncing was by far the most painful experience in my adult life. Due to the stresses associated with the constantly expanding IRS reporting requirements (FBAR, FATCA, GILTI etc.), both as an individual and as a small business owner, I felt I had no choice. I didn't owe the US government any tax; it was the forms, the complexity of those forms, and the fear of errors in filling out those forms that kept me up at night. Plus, the growing problem with maintaining banking services in the country I now reside. And yet I owed nothing. [. . .] In a way, it was a choice between the lesser of two evils: living with the anxiety [that] my US citizenship entailed, or living with the depression, the sadness, of having given up my US citizenship. In the end, I decided I could probably live with the sadness.[156]

Clearly, the extraterritorial application of U.S. taxation and banking policies inflicts considerable suffering upon overseas Americans.[157] For many, the suffering becomes unbearable, with the renunciation of their U.S. citizenship offering the only possibility for escape.

B. Consequences for the IRS

Most countries tax based on residence and source. While the U.S. practice of taxing non-resident citizens is often seen as an extension of "residence," in practice, it is quite different. What the United States really has is three separate income tax systems:

(i) Residence: Residency-based taxation imposed on individuals who physically live in the United States, regardless of citizenship and legal residency status. This is a system of worldwide taxation. The

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[154] SEAT Survey – Participant Comments, *supra* note 131, at 523-24.

[155] *Id.* at 531.

[156] *Id.* at 535.

[157] *See id.* at 523-35.

jurisdictional claim follows the international standard of residency-based taxation.

(ii) Source: Taxation of non-resident aliens on their U.S.-source income. The jurisdictional claim follows international standards, under which countries (generally) have the first right of taxation on income sourced in their jurisdictions.

(iii) Extraterritorial: The imposition of worldwide taxation, according to U.S. tax rules, on non-U.S.-source income earned by tax residents of other countries who do not live in the United States.[158]

The uniquely American system of extraterritorial taxation does not just have one category of victims, but four:

As explored immediately above, the most obvious category is overseas Americans. Their lives are regulated by the tax laws of a country in which they do not live.[159] They are subject to a tax system that is more penalizing compared both to persons residing in the United States as well as to the other residents of the countries where they live (including those who are not U.S. citizens but have U.S.-source income).[160]

The second category is the countries whose tax residents are subject to U.S. tax claims. The U.S. system violates their sovereignty[161] and results in the reduction of their tax base by the "taxing away" of capital from those countries to the United States.[162]

The third category is Americans living in the United States. Although they may not encounter physical restraints at the border, they are not free. If they venture outside the border, their "Americanness"[163] will carry a taint. They will be met with a harsh, penalty-laden system of taxation and reporting, making it difficult to live a normal life in a new country of residence, let alone enjoy the benefits of its tax system that are available to the other residents of that country.[164]

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158 *See generally* Snyder et al., *supra* note 70.

159 *Id.* at 1828.

160 *Id.* at 1831.

161 *See* Snyder, *supra* note 40, at 326-44.

162 *See id.* at 326-44.

163 *See A FATCA Complaint Filed Against BNP Paribas Bank in France*, ASS'N OF AM. RESIDENT OVERSEAS (Apr. 27, 2018), https://www.aaro.org/issues/fatca/657-a-fatca-complaint-filed-against-bnp-paribas-bank (reporting that "BNP Paribas Bank is routinely blocking the accounts of expatrated clients subject to the U.S. FATCA law without sufficient legal basis, and is engaged in discriminatory practices vis-à-vis expatriates trying to identify customers with 'signs of Americanness.'"); *see also* FM, *A New Report on 'Accidental Americans' Puts Pressure on France to Take Action*, FRENCHLY (May 20, 2019), https://frenchly.us/a-new-report-on-accidental-americans-puts-pressure-on-france-to-take-action/ (stating that "Some French banks, anxious to avoid heavy penalties for failing to communicate their customers' banking data to the US authorities, have preferred to restrict services or close the accounts of individuals with links to the United States ('clues of Americanness').").

164 *See generally* Snyder et al., *supra* note 70.

The fourth victim is the IRS. Administering an extraterritorial tax system is an impossible task, both procedurally and substantively.[165] "The IRS cannot [ ] pretend to serve U.S. tax residents in the more than 100 countries in the world where they live, let alone in the languages they speak."[166] "Nor can the IRS know how U.S. tax laws apply to the investment vehicles, business structures, welfare benefits, and retirement plans that are common in all those other countries."[167] At the same time, because of this very complexity, combined with the ever-present threat of excessive penalties in the event of even inadvertent error, many overseas Americans require support from the IRS.[168]

The IRS is not able either to administer or to adequately enforce the U.S. extraterritorial tax system:

1. Failure to Administer

As Snyder et al. have demonstrated, the IRS either does not recognize its responsibility to administer an extraterritorial tax system, or it categorically rejects that responsibility.[169] This is evidenced in a multitude of ways. Just some examples include: (1) the failure to train IRS agents regarding the unique issues faced by international taxpayers;[170] (2) the refusal to establish adequate channels of communication with international taxpayers, whether by phone, postal mail, or electronic means;[171] (3) the inability to communicate with non-English-speaking international taxpayers in the languages they understand;[172] (4) the failure to adopt adequate means to either receive payments from or effect payment to international taxpayers;[173] and (5) the highly discriminatory treatment of international taxpayers (compared with domestic) regarding access to in-person assistance and low-income taxpayer clinics.[174]

The Taxpayer Advocacy Panel ("TAP"), a federal advisory committee to the IRS, has submitted multiple recommendations to the IRS addressing many of these issues.[175] The IRS has rejected nearly every such recommendation.[176] Its rejections nearly always cite budgetary concerns, stating, as examples, that the implementation of the recommendation "would

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165 *Id.* at 1829.
166 *Id.* at 1829.
167 *Id.* at 1829.
168 *Id.* at 1828-89.
169 *Id.*
170 Snyder et al., *supra* note 70, at 1829, 1832, 1850-51.
171 *Id.* at 1829, 1832-35, 1844-45.
172 *Id.* at 1828, 1830, 1834-35, 1845-47.
173 *Id.* at 1830, 1836-37, 1848-49.
174 *Id.* at 1829-30, 1832, 1852-53.
175 *Id.* at 1833-39.
176 Snyder et al., *supra* note 70, at 1833-39.

increase the overall cost" or is "unfeasible" given the resources required.[177] These responses are an admission that the IRS has neither the resources nor the expertise to effectively administer a tax system for residents of other countries whose entire existence—economically, and in many cases, linguistically—is "foreign" to the United States.[178]

To adequately administer the U.S. system of extraterritorial taxation, the IRS would need, at a minimum, to develop the following:

(i) a full understanding of how the tax system, typical business structures, normal investment and retirement accounts, and welfare benefits of each country where U.S. taxpayers live interact with the U.S. tax system and the consequences of that interaction for the taxpayers living in that country, as well as a full range of written materials to communicate this information (per country) and training for IRS employees regarding this information;[179]

(ii) the ability to communicate with international taxpayers in a secure, timely, reliable, and inexpensive manner during normal hours in all the countries where the taxpayers reside;[180]

(iii) up-to-date written materials in each of the multitude of languages spoken natively by taxpayers in the countries where they live, as well as the ability for IRS employees to interact with taxpayers in each of those languages;[181]

(iv) the ability to receive payments from and make payments to taxpayers in all other countries—including taxpayers with no bank account in the United States—securely, reliably, timely, and for no or low fees;[182] and

(v) in-person support to overseas Americans in the countries where they live, in a manner comparable to what is available to domestic taxpayers: taxpayer assistance centers ("TACs"), Volunteer Income Tax Assistance and Tax Counseling for the Elderly programs, and low-income taxpayer clinics.[183]

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177 *Id.* at 1839. TAP was not the first to submit such recommendations to the IRS. A 1979 report by ACA describes many of the same problems, as well as many of the same kinds of responses from the President of the United States, speaking on behalf of the IRS. *Report Submitted by American Citizens Abroad: "Laws and Regulations of the United States That Discriminate Against American Citizens Living Abroad, or That Make Overseas American Noncompetitive in the Markets of the World,"* contained as Appendix B to STAFF OF S. COMM. ON FOREIGN RELATIONS, 96TH CONG., U.S. LAW AFFECTING AMERICANS LIVING AND WORKING ABROAD 89-93 (Comm. Print 1980).

178 It is difficult to imagine any critical service provided by the IRS outside of the United States that would not "increase the overall cost."

179 Snyder et al., *supra* note 70, at 1843.

180 *Id.* at 1843.

181 *Id.* at 1843.

182 *Id.* at 1843.

183 *Id.* at 1854.

Setting aside the extent to which the development of these capacities is humanly possible—it is unclear that it is—the failure of the IRS to develop these capacities and thus to adequately administer the U.S. extraterritorial tax system results in multiple violations of the Taxpayer Bill of Rights.[184] The rights in question include: the right to be informed, the right to quality service, the right to pay no more than the correct amount of tax, the right to finality, the right to retain representation, and the right to a fair and just tax system.[185]

2. Failure to Effectively Enforce

There are an estimated 5.5 to 9 million Americans living overseas.[186] For 2019, 1.45 million individual taxpayers and dependents were included in tax returns filed from outside the United States.[187] This means that only 16% to 26% of all overseas Americans are included in a U.S. tax return. This contrasts with the 89% of the U.S. domestic population that was included in tax returns for the same year.[188] These statistics demonstrate the failure of the IRS to adequately enforce the U.S. extraterritorial tax system.

The implementation of FATCA has not made a discernible difference. As discussed above, it was adopted in conjunction with a law granting payroll tax breaks and other incentives for businesses in the United States to hire unemployed workers, which was expected to result in a loss of tax revenue;[189] FATCA's ostensible purpose was to offset this loss by increasing the collection of taxes from sources outside the United States.[190] Given Levin's

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[184] *See Taxpayer Bill of Rights*, INTERNAL REVENUE SERV., https://www.irs.gov/taxpayer-bill-of-rights (Aug. 25, 2022).

[185] Snyder et al., *supra* note 70, at 1829-30.

[186] *See* Federal Voting Assistance Program, *Study Findings: Volume 1*, 2016 OVERSEAS CITIZEN POPULATION ANALYSIS REP. 6 (Sept. 2018), https://www.fvap.gov/uploads/FVAP/Reports/FVAP-2016-OCPA-FINAL-Report.pdf (estimating a population of 5.5 million); and U.S. Dep't State, *Strengthen Border Security*, CONSULAR AFFAIRS BY THE NUMBERS 1 (Jan. 2020), https://travel.state.gov/content/dam/travel/CA-By-the-Number-2020.pdf (estimating a population of 9 million).

[187] *SOI Tax Stats — Historic Table 2*, *supra* note 99 (cell B17 of the form titled "Other Areas" indicates that 1,450,030 individual taxpayers and dependents were included in tax returns filed for 2019).

[188] This is based on data provided by the IRS for tax year 2019. Cell B17 of the form titled "Total File, All States," showing that a total of 293,591,230 individual taxpayers and dependents were included in tax returns filed for 2019. *Id.* Subtracting from that the number of people filing from "other areas" (1,450,030 individuals), a total of 292,141,200 individuals were included in returns filed domestically in 2018. *Id.* This is also based on a total U.S. population for 2019 of 328,239,523. *See* Leslie Malone, *2019 U.S. Population Estimates Continue to Show the Nation's Growth Is Slowing*, U.S. CENSUS BUREAU (Dec. 30, 2019), https://www.census.gov/newsroom/press-releases/2019/popest-nation.html.

[189] Snyder, *supra* note 58, at 2285; Snyder, *supra* note 40, at 309.

[190] S. COMM. ON HOMELAND SEC. & GOV'T AFF., *supra* note 56, at 1; *see also* William Byrnes, *Background and Current Status of FATCA and CRS*, Tex. A&M U. Sch. Of L., Legal Studies

report estimating that the United States loses $100 billion in tax revenues due to offshore tax abuses,[191] surely the amount of taxes the IRS collects from outside the United States should have shot up after FATCA's adoption in 2010? But this did not occur. As Table 3 demonstrates, while 2015 and 2016 did see significant increases in revenue from outside the United States, revenue for 2017 and 2018 returned to levels comparable to that of 2010. The amount collected from outside the United States in 2019 was just 6% greater than the amount collected in 2010. At the same time, the total amount collected from all sources (both inside and outside the United States) in 2019 was 58.7% greater than the amount collected in 2010.[192]

The number of individuals included in tax returns filed from outside the United States also demonstrates FATCA's failure. From 2010 to 2019, this number not only did not increase, but it *fell* by 23%.[193] This drop is consistent with both the 2018 and 2022 reports issued by the Treasury Department's Inspector General for Tax Administration after audits of the IRS.[194] Both reports concluded that despite considerable spending (nearly $380 million by 2018 that had risen to $574 million by 2020), the IRS is still unable to enforce compliance with FATCA.[195] The data in Table 3 bears out this conclusion.

In sum, the IRS fails both to administer as well as to effectively enforce the U.S. extraterritorial tax system. Given the immense complexity of the system combined with the immense resources required both to administer and enforce it, this is understandable.[196] However, it is also unconscionable. It results in multiple and egregious violations of the Taxpayer Bill of Rights[197] and abandons overseas Americans to fend for themselves, subject to severe penalties for even inadvertent mistakes.[198]

Research Paper No. 17-75, at 1-5 (Sept. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3045459.

191 S. COMM. ON HOMELAND SEC. & GOV'T AFF., *supra* note 56, at 1.

192 *Infra* Table 3.

193 *Infra* Table 3.

194 *See* sources cited *supra* note 69

195 *See* sources cited *supra* note 69. The drop in the number of individuals included in returns filed from overseas is also likely attributable, at least in part, to a significant reduction since 2011 in the number of U.S. military personnel stationed overseas. *See* Karen Alpert, *Does FATCA Stop Tax Evasion?*, LET'S FIX THE AUSTRALIA/US TAX TREATY (May 10, 2018), https://fixthetaxtreaty.org/2018/05/10/does-fatca-stop-tax-evasion/.

196 For a highly detailed discussion of the enforcement challenges presented by the U.S. extraterritorial tax system, *see* Oei, *supra* note 55.

197 For a discussion of how the IRS's failed administration of the U.S. extraterritorial tax system violates multiple elements of the Taxpayer Bill of Rights, see Snyder et al., *supra* note 70, at 1829-30.

198 This was recently demonstrated when hundreds of overseas Americans were fined $10,000 or more for failing to make a purely informational filing (no tax was owed) by a deadline that was confusing even for professional tax practitioners. *See* Gary Carter, *Foreign Trusts: IRS Penalty Notices for Late Forms 3520-A Traumatize Many Innocent Taxpayers!*, TAX CONNECTIONS (July 5, 2019), https://www.taxconnections.com/taxblog/foreign-trust-irs-penalty-notices-for-late-forms-3520-a-are-scaring-innocent-taxpayers/; Gary Carter, *Great News for IRS Form 3520-A Filers Effecting*

Table 3: Total Individual Income Tax Liability for "Other Areas" and "United States" and Total Spending by U.S. Federal Government for 11-Year Period 2009-2019[199]

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 % of total tax liability for "United States"	Total spending by U.S. Federal Gov't*	Total tax liability for "Other Areas" as % of total spending by U.S. Federal Gov't
2019	1,450,030	6,972	1,672,344	0.42%	4,448,316	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%	3,852,616	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%
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	1,543,675	6,931	1,381,921	0.51%	3,740,819	0.19%
Median	1,450,030	6,568	1,448,842	0.50%	3,603,065	0.17%

*Money amounts are in millions of U.S. dollars.

Thousands of Taxpayers, TAX CONNECTIONS (Dec. 4, 2019), https://www.taxconnections.com/taxblog/great-news-for-irs-form-3520-a-filers-that-effects-thousands-of-taxpayers/.

[199] IRS, *SOI Tax Stats — Historic Table 2*, *supra* note 99 (cell B17 of the form titled "Other Areas" indicates that 1,450,030 individual taxpayers and dependents were included in tax returns filed for 2019); Gov. Printing Ofc., *Contents of Historical Tables*, 2021 BUDGET 25 (2021), https://www.govinfo.gov/content/pkg/BUDGET-2021-TAB/pdf/BUDGET-2021-TAB.pdf; *see also* Laura Snyder, Karen Alpert & John Richardson, *Should Overseas Americans Be Required to Buy Their Freedom?* 172 TAX NOTES FED. 223, 234 (2021).

IV. EFFORTS TO EDUCATE AND CHANGE THE POLICIES

In the past decades and especially since 2010 (the adoption of FATCA), many different organizations, as well as individuals, have sought changes to the U.S. extraterritorial tax system to lessen its burden on overseas Americans. The changes they have sought range from those targeting one or more specific aspects of the system to the end of the entire system.

It is beyond the scope of this paper to exhaustively describe each of these efforts. Below are brief descriptions of examples, notably of: (A) the actions of multiple organizations and individuals, (B) the variety of surveys that have been conducted, and (C) the research articles that have been published exposing the problems of the U.S. extraterritorial tax system.

A. Efforts by Organizations and Individuals

Set forth below are descriptions of the efforts of some organizations as well as individuals:

1. Association of Americans Resident Overseas

The Association of Americans Resident Overseas ("AARO") was founded in 1973 with the mission to research issues that significantly affect the lives of overseas Americans and to keep its members informed on those issues.[200] Non-partisan, AARO's mission also includes advocacy on behalf of overseas Americans; this encompasses the education of Congress and other branches of government, the media, and the public on issues of importance to overseas Americans, such as voting, citizenship, Social Security, and Medicare.[201] AARO's advocacy work focuses notably on taxation and banking issues.[202] To this end, AARO regularly sends a delegation to Washington, D.C. for what it calls "Overseas Americans Week."[203] During this time, AARO delegates meet with congressional staffers as well as representatives of the IRS and other federal agencies to inform them about the taxation, banking, and other issues faced by overseas Americans and ask for legislative and regulatory reforms.[204] In particular,

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200 *Who We Are*, ASS'N AM. RESIDENT OVERSEAS, https://www.aaro.org/about-aaro/who-we-are (last visited Nov. 19, 2022).

201 *AARO Advocacy*, ASS'N AM. RESIDENT OVERSEAS, https://www.aaro.org/advocacy/aaro-advocacy (last visited Nov. 19, 2022).

202 *AARO's Historic Achievements*, ASS'N AM. RESIDENT OVERSEAS, https://www.aaro.org/about-aaro/aaros-historic-achievements (last visited May 15, 2022).

203 *Overseas Americans Week*, ASS'N AM. RESIDENT OVERSEAS, https://aaro.org/185-overseas-americans-week (last visited Nov. 8, 2022).

204 *Id.*

AARO advocates for the end of both the U.S. extraterritorial tax system and the application of FATCA to overseas Americans.[205]

AARO regularly publishes position papers on the relevant issues, which it distributes during Overseas Americans Week and maintains on its website.[206] AARO takes advantage of other opportunities to inform Congress about the problems overseas Americans experience because of the U.S. extraterritorial tax system. For example, it responds to calls for submissions for inclusion in hearing records.[207] Finally, AARO conducts surveys of overseas Americans to better understand and document the issues they face; AARO's most recent survey report is discussed below.[208]

2. Democrats Abroad

The first organized activities of Democrats Abroad ("DA") took place in 1964 when groups of Americans in London and Paris held parades and raised funds in support of the 1964 Presidential election.[209] They also solicited votes, but with little chance for success given the considerable restrictions on voting from overseas.[210] This reality motivated DA to conduct a twenty-year campaign to expand voting rights to overseas Americans, their efforts culminating in the 1986 adoption of the Uniformed and Overseas Citizens Absentee Voting Act.[211]

While the overseas American vote remains today a focus for DA, the organization has expanded its priorities to include taxation and banking issues.[212] The platform of DA's Taxation Task Force includes the end of the U.S. extraterritorial tax system and the elimination of FATCA reporting for overseas Americans.[213]

On a regular basis, the Task Force: (i) travels to Washington DC to meet with congressional and other policymakers to educate them about the

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205 *2019 OAW Report*, ASS'N OF AM. RESIDENT OVERSEAS (Sept. 3, 2019), https://www.aaro.org/advocacy/aaro-advocacy/796-2019-oaw-report.

206 *Position Papers 2022: Taxation,* ASS'N OF AM. RESIDENT OVERSEAS (Sept. 17, 2020), https://www.aaro.org/position-papers-2022.

207 *See, e.g.*, *Creating Opportunity Through a Fairer Tax System Subcommittee on Fiscal Responsibility and Economic Growth Tuesday,* ASS'N AM. RESIDENT OVERSEAS 1 (April 27, 2021), https://www.aaro.org/images/pdf/Senate_Finance_Committee_Submission_May_11_2021.pdf; *How U.S. International Tax Policy Impacts American Workers, Jobs and Investment Thursday*, ASS'N AM. RESIDENT OVERSEAS 1 (March 25, 2021), https://www.aaro.org/images/pdf/Senate_Finance_Committe_Submission_7_April_2021.pdf.

208 *Infra* notes 284-288 and accompanying text.

209 *History & Charter*, DEMOCRATS ABROAD, https://www.democratsabroad.org/history#creation (last visited Nov. 22, 2022).

210 *Id.*

211 *Taxation,* DEMOCRATS ABROAD, https://www.democratsabroad.org/taxation (last visited Nov. 22, 2022).

212 *Id.*

213 *Id.*

taxation and banking issues faced by overseas Americans and ask for relief, (ii) conducts letter-writing campaigns and "call storms" to encourage overseas Americans to contact their congressional representatives; and (iii) submits recommendations to Washington-based policymakers seeking to alleviate the taxation and banking issues faced by overseas Americans.[214] Like AARO, the Task Force also conducts surveys of overseas Americans to better understand and document the issues they face; the Task Force's most recent survey report addressing taxation and banking issues is discussed below.[215]

3. Republicans Overseas

Republicans Overseas ("RO") was created in 2013 after the dissolution of Republicans Abroad.[216] RO's principal focus is on taxation and banking issues.[217] For many years, a co-founder of RO, Solomon Yue, was one of the most visible campaigners on behalf of overseas Americans, advocating both for the adoption of a territorial tax system and the repeal of FATCA.[218] In 2017, RO played an instrumental role in the organization of a Senate hearing on the unintended consequences of FATCA.[219] RO played an equally instrumental role in the 2018 introduction by then Representative George Holding of the Tax Fairness of Americans Abroad Act, which sought to allow overseas Americans who met certain conditions to be taxed by the United States only with respect to their U.S.-source income.[220] Given the lack of congressional action, in 2020, RO delivered to the then White House Chief of Staff Mark Meadows a letter requesting the adoption of an Executive Order to alleviate taxation and regulatory burdens placed upon overseas

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[214] *Id.*

[215] *Infra* notes 306-307 and accompanying text.

[216] *RO Timeline*, REPUBLICANS OVERSEAS, https://republicansoverseas.com/ro-timeline/ (last visited Nov. 19, 2022); *About Us*, REPUBLICANS OVERSEAS FRANCE, https://www.republicansoverseasfrance.com/ABOUT.html (last visited Nov. 19, 2022).

[217] The organization's website lists "FATCA" and "Tax" behind "About" on its banner. REPUBLICANS OVERSEAS, https://republicansoverseas.com/ (last visited Nov. 19, 2022).

[218] *See Interview with Swiss Financial Newspaper Lágefi on FATCA in Franch* [sic], REPUBLICANS OVERSEAS (April 30, 2014), https://republicansoverseas.com/interview-swiss-financial-newspaper-lagefi-fatca-franch/; Bruce Ash, *Chairman's Corner*, REPUBLICANS OVERSEAS (Feb. 17, 2017), https://republicansoverseas.com/chairmans-corner/.

[219] Its efforts produced a congressional review, captured in *Reviewing the Unintended Consequences of the Foreign Account Tax Compliance Act: Hearing before the House Subcommittee on Government Operations of the Committee on Oversight and Government Reform*, 105th Cong. 115-45 (2017).

[220] Helen Burggraf, *Breaking: Congressman Holding Scrapes Through with 'Tax Fairness for Americans Abroad Act*,' AM. EXPAT FIN. NEWS J. (Dec. 20, 2018), https://americanexpatfinance.com/legislation/item/82-congressman-holding-scrapes-through-with-tax-fairness-for-americans-abroad-act.

Americans.[221] The letter requested an instruction to the Department of Treasury to adopt regulations to end the extraterritorial tax system.[222]

4. Stop Extraterritorial American Taxation

Stop Extraterritorial American Taxation ("SEAT") was formed in 2020.[223] Non-partisan, its mission is to provide an educational platform for individuals, politicians, governments, scholars, and professionals about the effects of U.S. extraterritorial taxation.[224]

SEAT maintains a website where it regularly posts information and commentary.[225] SEAT's website contains a listing of the many activities undertaken around the world to educate about the U.S. extraterritorial tax system and advocate for change.[226] SEAT maintains a wiki, which collects crowd-sourced, verified information pertaining to the U.S. extraterritorial tax system.[227] Like AARO, SEAT also takes advantage of opportunities to inform Congress about the problems overseas Americans experience because of the U.S. extraterritorial tax system.[228] It does this both by responding to calls for submissions for inclusion in hearing records,[229] and by encouraging all overseas Americans to make their own submissions.[230] SEAT conducted an in-depth survey of how overseas Americans (current and former) and their family members experience the U.S. extraterritorial tax system; SEAT's survey report is discussed below.[231]

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221 Helen Burggraf, *Republicans Overseas Calls for Executive Order to Help Expats Ahead of Prez Election*, AM. EXPAT FIN. NEWS J. (Sept. 5, 2020), https://americanexpatfinance.com/news/item/514-republicans-overseas-calls-for-executive-order-to-help-expats.

222 *Id.*

223 Helen Burggraf, *New anti-extraterritorial taxation expat organization forms; launches survey*, AM. EXPAT FIN. NEWS J. (Oct. 22, 2020), https://www.americanexpatfinance.com/tax/item/556-new-anti-extraterritorial-tax-expat-organization-forms-launches-survey.

224 *About SEAT: Education to Facilitate Change*, STOP EXTRATERR. AM. TAX'N, http://seatnow.org/about-seat/ (last visited Nov. 19, 2022).

225 *What's New*, STOP EXTRATERR. AM. TAX'N, http://seatnow.org/whats-new/ (last visited Nov. 19, 2022).

226 *See id.*

227 *Welcome to the Stop Extraterritorial American Taxation (SEAT) Wiki*, STOP EXTRATERR. AM. TAX'N, https://seatnow.org/wiki/index.php?title=Main_Page (last visited Nov. 19, 2022).

228 *SEAT Submissions*, STOP EXTRATERR. AM. TAX'N, http://seatnow.org/seat-home/seat-submissions/ (last visited Nov. 7, 2022).

229 *See id.* (listing multiple submissions made to the Senate Committee on Finance and the House Committee on Ways and Means, among others).

230 See, for example, *Have Your Say!*, STOP EXTRATERR. AM. TAX'N, (April 12, 2022), http://seatnow.org/2022/04/12/have-your-say/ (encouraging overseas Americans to make their own submissions to the Senate Finance Committee in relation to the Fiscal Year 2023 Budget and IRS service issues regarding overseas Americans); *see also Another Chance to Tell Congress What You Think*, STOP EXTRATERR. AM. TAX'N (Mar. 28, 2022) http://seatnow.org/2022/03/28/another-chance-to-tell-congress-what-you-think/ (inviting overseas Americans to express their views about U.S. extraterritorial taxation to the House Committee on Ways and Means).

231 *See infra* notes 289-304.

5. Association of Accidental Americans

The Association of Accidental Americans (Association des Américains Accidentels, or "AAA") was created by Fabien Lehagre, who was born in the United States in 1984 and left at age 18 months to grow up in his father's home country of France. Like many others in a comparable situation, his U.S. citizenship was little more than an interesting anecdote, or "accident," by reason of his birth in the United States to non-U.S. citizen parents. But his U.S. citizenship, which at first had seemed benign at best and inconsequential at worst, transformed into a threat when, in 2014, after the adoption of FATCA, his local (French) bank contacted him to request his U.S. Social Security Number for U.S. tax purposes. In that manner, Lehagre learned that because he had been born in the United States and thus was a U.S. citizen, he was subject to the U.S. extraterritorial tax system. This was the case, he learned, regardless of the fact that he also held French citizenship and that, except for the first eighteen months of his life, he had always lived in France.[232]

In order to bring together other French citizens who consider themselves "accidentally American," Lehagre created AAA in 2017.[233] The purpose of the organization is to fight against the extraterritorial application of U.S. taxation and banking policies, and especially to fight against their application to dual French-U.S. citizens.[234] AAA's actions include media campaigns,[235] enlisting the assistance of European Union officials,[236] and lawsuits, including one brought against the U.S. Department of State in relation to the high fee to renounce U.S. citizenship.[237]

[232] *How the project began*, ASSOCIATION DES AMÉRICAINS ACCIDENTELS, https://www.americains-accidentels.fr/page/222256-qui-sommes-nous (last visited Nov. 19, 2022).

[233] *Id.*

[234] *L'Association des Américains Accidentels (AAA)*, ASSOCIATION DES AMERICAINS ACCIDENTELS, https://www.americains-accidentels.fr/page/222256-qui-sommes-nous_(last visited Nov. 19, 2022).

[235] *Dans la Presse*, ASSOCIATION DES AMERICAINS ACCIDENTELS, https://www.americains-accidentels.fr/page/227627-dans-la-presse_(last visited Nov. 19, 2022).

[236] Helen Burggraf, *FATCA Hearing: Europe's 'Accidentals' Unleash Frustration Over Official EU 'Ignoring' of Their Struggles*, AM. EXPAT FIN. NEWS J. (Nov. 13, 2019), https://americanexpatfinance.com/news/item/304-fatca-hearing-europe-s-accidentals-unleash-frustration.

[237] Helen Burggraf, *'Accidental Americans' Take U.S. State Dept to Court Over 'Unconstitutional, Illegal' Renunciation Fee*, AM. EXPAT FIN. NEWS J. (Dec. 9, 2020), https://americanexpatfinance.com/news/item/598-accidental-americans-take-us-state-dept-to-court.

6. American Citizens Abroad

American Citizens Abroad ("ACA") was created in 1978.[238] Its co-founders included Andy Sundberg, a 1988 U.S. Presidential candidate.[239] Like AARO, ACA advocates on many issues that affect the lives of overseas Americans, such as citizenship, voting, Social Security, and Medicare.[240] In 1979, ACA submitted to then President of the United States, Jimmy Carter, a detailed report on the U.S. laws and regulations that discriminate against overseas Americans.[241] The report, which was contained in a 1980 Presidential Report to the Committee on Foreign Relations, describes many problems of the U.S. extraterritorial tax system, including IRS service failures, that remain problems today.[242]

Later, ACA's then Executive Director Jackie Bugnion developed detailed proposals for a purely residence-based tax system, and she has actively advocated for it to policymakers in Washington as well as overseas.[243] In 2005, Bugnion led a team that published the book *So Far and Yet So Near: Stories of Americans Abroad*, in which forty-seven Americans discuss their experiences and impressions living overseas.[244] A copy of the book was sent to every member of Congress to help them to understand that overseas Americans are like those living in the United States and that their issues must be heard and addressed by Congress.[245]

More recently, ACA has appealed to Congress to implement limited reforms to the U.S. extraterritorial tax system,[246] arguing that such reforms can be revenue neutral.[247]

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238 *American Citizens Abroad Founder Dies*, SWISS INFO (Aug. 31, 2012), https://www.swissinfo.ch/eng/andy-sundberg_american-citizens-abroad-founder-dies/33422364.

239 *Id.*

240 *Information for Citizens*, AM. CITIZENS ABROAD, https://www.americansabroad.org/about-us/who-we-are/ (last visited Nov. 8, 2022).

241 *Report Submitted by American Citizens Abroad*, *supra* note 177, at 89-93.

242 *See id.*; *see Taxpayer Bill of Rights*, *supra* note 184.

243 *Jackie Bugnion Receives Award for Exceptional Service to Americans Abroad*, AM. CITIZENS ABROAD (March 27, 2017), https://www.americansabroad.org/news/jackie-bugnion-receives-award-for-exceptional-service-to-americans-abroad/.

244 AMERICAN CITIZENS ABROAD, SO FAR AND YET SO NEAR: STORIES OF AMERICANS ABROAD (2005).

245 *Jackie Bugnion Receives Award for Exceptional Service to Americans Abroad*, *supra* note 243,

246 *Taxation and the RBT Tax Fairness for Americans Abroad Act (TFAA)*, AM. CITIZENS ABROAD, https://www.americansabroad.org/old/taxation/ (last visited Nov. 19, 2022).

247 Charles Bruce, *American Citizens Abroad/District Economics Group Analysis of Revenue Effects of Residence-Based Taxation*, AM. CITIZENS ABROAD (May 2, 2022), https://www.americansabroad.org/news/aca-district-economics-group-analysis-of-revenue-effects-of-residence-based-taxation/; *but see* Snyder et al., *supra* note 199, at 223-27 (arguing that the requirement for revenue neutrality is an impediment to ending the U.S. extraterritorial tax system).

7. Let's Fix the Australia/U.S. Tax Treaty!

Let's Fix the Australia/U.S. Tax Treaty! is a website[248] created by Dr. Karen Alpert.[249] The purpose of the site is to educate both the affected individuals and governments about the inadequacies of the tax treaty between Australia and the United States and the inequities experienced by individuals simultaneously subject to both U.S. and Australian tax rules. In addition to the articles written by Alpert, the site contains strategic analysis spearheaded by Carl Greenstreet, a dual citizen and former executive who has been a contributor since the site was established in 2016.[250]

The tax treaty between Australia and the United States was last amended in 2002.[251] As amended, it does not contain any specific mention of Superannuation, a major pillar of the Australian retirement system that has mandated employer contributions to individual retirement accounts since 1992.[252] The resulting uncertainty about the U.S. tax treatment of Superannuation has led to aggressive marketing by the U.S. tax compliance industry with several competing interpretations.[253]

8. Various Organs of the European Union

Various organs and officials of the European Union have approached the U.S. Department of Treasury and members of Congress seeking relief from the application of FATCA to Accidental Americans and other dual nationals. Their approaches include letter-writing as well as in-person visits in Washington, D.C. For example, in 2019 and again in 2020, the Presidency of the European Union Council sent letters to the U.S. Department of the Treasury and the IRS describing the problems experienced by European Union residents because of the U.S. extraterritorial tax system.[254] The letters

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[248] LET'S FIX THE AUSTRALIA/US TAX TREATY!, http://fixthetaxtreaty.org/ (last visited Nov. 19, 2022).

[249] *Id.*

[250] For a compilation of articles submitted by this author, see *Carl Greenstreet*, LET'S FIX THE AUSTRALIA/US TAX TREATY!, http://fixthetaxtreaty.org/author/carl/ (last visited Nov. 19, 2022).

[251] S. TREATY DOC. NO. 107-20.

[252] *Id.*

[253] *See* Karen Alpert, *When Tax Professionals Disagree*, LET'S FIX THE AUSTRALIA/US TAX TREATY! (Dec. 4, 2016), http://fixthetaxtreaty.org/2016/12/04/when-tax-professionals-disagree/; *see also* Karen Alpert, *Is Super equivalent to Social Security?*, LET'S FIX THE AUSTRALIA/US TAX TREATY! (Sept. 10, 2016), http://fixthetaxtreaty.org/2016/09/10/is-super-equiv-to-social-security/; Karen Alpert, *How do US Tax Rules Constrain the Investment Choices of US Taxpayers Living in Australia?*, LET'S FIX THE AUSTRALIA/US TAX TREATY! (June 19, 2017), http://fixthetaxtreaty.org/2017/06/19/investment-constraints-1/.

[254] Letter from Terhi Järvikare, Finnish Presidency of the Council of the E.U., to Steve Mnuchin, Secretary of the Treasury (Dec. 3, 2019) (on file with Council of European Union); Letter from Martin Kreienbaum, German Presidency of the Council of the E.U., to IRS Commissioner Charles P. Rettig (Dec. 8, 2020) (on file with council of European Union); *see* Helen Burggraf, *Accidental Americans, Others React, as U.S. Treasury Official's Response to EU FATCA Concerns Emerges*,

sought relief from the problems, such as the removal of the administrative and financial obstacles to the renunciation of U.S. citizenship.[255] As another example, in 2022, the European Parliament's committee on petitions ("PETI") sent a seven-person delegation to Washington D.C. on a one-week mission to "raise awareness and discuss the impact of [FATCA] on E.U. citizens."[256]

9. John Richardson

For over a decade, Toronto-based lawyer John Richardson has been a tireless campaigner on behalf of overseas Americans. His website, Citizenship Solutions, is an invaluable source of insightful information for anyone seeking to understand the situation of overseas Americans.[257] It addresses a wide range of issues relating to the U.S. extraterritorial tax system, such as the Transition Tax,[258] Controlled Foreign Corporations,[259] the Foreign Earned Income Exclusion,[260] retirement accounts (foreign

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AM. EXPAT FIN. NEWS J. (March 31, 2020), https://americanexpatfinance.com/news/item/405-accidentals-react-to-u-s-treasury-officials-fatca-response; *see also* Helen Burggraf, *EU Council's Kreienbaum, to IRS Commissioner Rettig: We Need to Talk About FATCA*, AM. EXPAT FIN. NEWS J. (Dec. 17, 2020), https://americanexpatfinance.com/tax/item/605-eu-councils-kreienbaum-to-irs-commissioner-rettig.

[255] *See* sources cited *supra* note 254.

[256] *Fact Finding Mission to Washington D.C.*, EUR. PARLIAMENT (July 18, 2022), https://www.europarl.europa.eu/committees/en/fact-finding-mission-to-washington-d.c./product-details/20220712MIS01401; *see also* Helen Burggraf, *BREAKING: As EU Parliament's Petitions Committee 'Mission' to DC Ends, FATCA Critics Speculate on Its Long-Term Impact*, AM. EXPAT FIN. N. J. (July 22, 2022), https://americanexpatfinance.com/news/item/1014-as-eu-parliament-s-petitions-committee-dc-mission-ends-fatca-critics-skeptical. With respect to meetings held in Washington D.C. in 2020, see Cristian Angeloni, *US and EU Meet to Discuss Impact of FATCA*, INT'L ADVISER (Feb. 21, 2020), https://international-adviser.com/us-and-eu-meet-to-discuss-impact-of-fatca/.

[257] John Richardson, *Welcome to Citizenship Solutions (and Green Card solutions)*, CITIZENSHIP SOLS., http://citizenshipsolutions.ca/ (last visited Nov. 19, 2022).

[258] *See, e.g.*, John Richardson, *U.S. Tax Reform and the "Nonresident" Corporation Owner: Does the Sec. 965 Transition Tax Apply?*, CITIZENSHIP SOLS. (Feb. 13, 2018), http://citizenshipsolutions.ca/2018/02/13/u-s-tax-reform-and-the-nonresident-corporation-owner-does-the-sec-965-transition-tax-apply/.

[259] *See, e.g.*, John Richardson, *TCJA and Expanding the Definition of and Number of 'Controlled Foreign Corporations' Subject to Subpart F*, CITIZENSHIP SOLS. (Feb. 25, 2018), http://citizenshipsolutions.ca/2018/02/25/tcja-and-expanding-the-definition-of-and-number-of-controlled-foreign-corporations-subject-to-subpart-f/.

[260] *See, e.g.*, John Richardson, *The S. 911 Foreign Earned Income Exclusion: It's Origins, Journey, Opportunities and Limitations*, CITIZENSHIP SOLS. (May 12, 2020), http://citizenshipsolutions.ca/2020/05/12/the-s-911-foreign-earned-income-exclusion-its-origins-journey-opportunities-and-limitations/.

trusts),[261] renunciation,[262] and the exit tax.[263] Richardson breaks down the different profiles of U.S. citizens living overseas (the expat,[264] the emigrant,[265] the retiree,[266] and the Accidental[267]) and explains the contrasts in their situations. Richardson also organizes and leads podcasts and webinars, which serve to make the information more accessible to a larger audience.[268]

Richardson's approach is not about promoting compliance but about seeking to understand the full implications of being an overseas American—about how the extraterritorial application of U.S. laws limits the overseas American's financial options and about how this, in turn, limits their life options. Accordingly, Richardson has repeatedly called for the end of the U.S. extraterritorial tax system in favor of one based purely upon residence and source.[269]

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[261] *See, e.g.*, John Richardson, *The Form 3520 Penalty Debacle: Podcast and Discussion with CPA Gary Carter*, CITIZENSHIP SOLS. (Nov. 8, 2021), http://citizenshipsolutions.ca/2021/11/08/the-form-3520-penalty-debacle-podcast-and-discussion-with-cpa-gary-carter/.

[262] *See, e.g.*, John Richardson, *Changes to the Filing Threshold for 'Married Filing Separately' Filing Category Likely to Pressure More Americans Abroad to Renounce US Citizenship*, CITIZENSHIP SOLS. (April 20, 2019), http://citizenshipsolutions.ca/2019/04/20/changes-to-the-filing-threshold-for-married-filing-separately-filing-category-likely-to-pressure-more-americans-abroad-to-renounce-us-citizenship/.

[263] *See, e.g.*, John Richardson, *Tax Haven or Tax Heaven 5: How the 1966 Desire to "Poach" Capital From Other Nations Led to the 2008 S. 877A Exit Tax*, CITIZENSHIP SOLS. (April 17, 2016), http://citizenshipsolutions.ca/2016/04/17/tax-haven-or-tax-heaven-5-how-the-desire-to-poach-capital-from-other-nations-led-to-the-s-877a-exit-tax/.

[264] John Richardson, *American Expatriates*, CITIZENSHIP SOLS., http://citizenshipsolutions.ca/ina-349/american-expatriates/ (last visited Nov. 8, 2022) (explaining that because American expatriates reside overseas only temporarily and their retirement and financial planning tend to be U.S.-centric, they are unlikely to renounce U.S. citizenship).

[265] John Richardson, *American Emigrants*, CITIZENSHIP SOLS., http://citizenshipsolutions.ca/ina-349/american-emigrants/ (last visited Nov. 8, 2022) (explaining that because American emigrants live overseas on a long-term/permanent basis, their likelihood of renunciation of U.S. citizenship is high because "they simply cannot live under two tax systems").

[266] John Richardson, *American Retirees Abroad*, CITIZENSHIP SOLS., http://citizenshipsolutions.ca/ina-349/american-retirees-abroad/ (last visited Nov. 19, 2022) (explaining that because the income of American retirees living overseas is essentially, if not entirely U.S. based, they have little interest in tax reform and, in some cases, would not benefit from it).

[267] John Richardson, *Accidental Americans*, CITIZENSHIP SOLS., http://citizenshipsolutions.ca/ina-349/accidental-americans/ (last visited Nov. 19, 2022) (explaining that Accidental Americans do not accept the notion that they are U.S. citizens and do not accept that the U.S. extraterritorial tax system should apply to them).

[268] *See Success Favours the PREPared Mind*, PREP PODCASTER (Nov. 20, 2022) (downloaded using PodBean).

[269] *See, e.g.*, John Richardson, *Toward a Movement for Residence-Based Taxation for Americans Abroad*, CITIZENSHIP SOLS. (June 4, 2021), http://citizenshipsolutions.ca/2021/06/04/toward-a-movement-for-residence-based-taxation-for-americans-abroad/; John Richardson, *Toward a Definition of Residence-Based Taxation for Americans Abroad*, CITIZENSHIP SOLS. (May 29, 2021), http://citizenshipsolutions.ca/2021/05/29/toward-a-definition-of-residence-based-taxation-for-americans-abroad/.

10. "Jenny"

"Jenny" is a U.S.-born British citizen who moved to the United Kingdom in her 20s, where she has lived and worked since.[270] Two decades after her arrival in the United Kingdom, she learned from her U.K.-based bank that, because of her U.S. citizenship, her account details and other personal information would be transmitted to U.S. tax authorities on an annual basis.[271] Jenny has brought a claim against U.K. tax authorities (HM Revenue & Customs) to prevent the sharing of personal data in this manner on the grounds that it is a violation of fundamental human rights to privacy and data protection.[272] She further argues that FATCA is disproportionate in relation to its objective to limit tax evasion.[273]

11. "J.R."

"J.R." is a French-Irish citizen who was born in the United States but moved to Europe with his non-U.S. citizen parents as a baby.[274] Upon his receipt of a "FATCA letter" from his non-U.S. bank,[275] J.R. filed a petition with the European Union Parliament complaining that the implementation of FATCA in the European Union violates various fundamental principles of European law, including the right to respect for private and family life, the prohibition of discrimination and data privacy, and the Payment Accounts Directive.[276] The European Parliament has organized multiple hearings in connection with J.R.'s petition, but to date, the European Commission has taken no action (a fact that has been strongly condemned by several members of the European Union Parliament).[277]

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270 Jenny, *FATCA & HMRC: Breaching My Human Rights to Data Protection and Privacy*, CROWD JUST., https://www.crowdjustice.com/case/fatcahmrcprivacybreach/ (last visited Nov. 19, 2022).

271 *Id.*

272 *Id.*

273 *See id.*; *see also* Helen Burggraf, *Now 'Jenny' (Webster) Takes Her FATCA Data-Sharing Case to UK's High Court*, AM. EXPAT FIN. NEWS J. (Oct. 27, 2021), https://americanexpatfinance.com/news/item/859-now-jenny-takes-her-fatca-case-to-uks-high-court.

274 *John Richardson Interviews 'JR': Architect of the Anti-FATCA Petition to the EU Parliament: Why the FATCA Lawsuits Must Be Supported,* PREP PODCASTER (June 26, 2020 at 2:11) (downloaded using PodBean).

275 J.R. describes his receipt of his "FATCA letter" as a "shock horror" moment. *Id.*

276 *Petition No 1088/2016 by Mr J.R. (French) on the US' Foreign Account Tax Compliance Act's (FATCA) Alleged Infringement of EU Rights and the Extraterritorial Effects of US Laws in the EU*, EUR. PARLIAMENT (2016), https://www.europarl.europa.eu/petitions/en/petition/content/1088%252F2016/html/missinglink.

277 *See* Helen Burggraf, *MEPs, European 'Accidental' Petitioner Slam Lack of Response by EU Commission to U.S. 'Extraterritoriality,'* AM. EXPAT FIN. NEWS J. (Nov. 11, 2020), https://americanexpatfinance.com/news/item/568-meps-european-accidental-petitioner-slam-lack-of-response; Burggraf, *supra* note 236.

12. Other Overseas Americans

While there is no precise data with respect to either the number of persons or the frequency, many overseas Americans regularly attempt to contact their congressional representatives to explain to them their own personal experiences with the U.S. extraterritorial tax system and to ask for legislative change.[278] Many of these attempts are unsuccessful because the required webform only accepts U.S. addresses (or phone numbers).[279] Of those who are able to make a submission of some kind, most report receiving no response. Of those that do receive a response, most report that they received a form letter that did not address the issues the constituent raised, or the response defended current policies, refuting the need for any change.[280]

In a 2015 report, the Senate Committee on Finance's International Tax Reform Working Group observed that of the 347 submissions it received, nearly three-quarters dealt with the international taxation of individuals, mainly focusing on citizenship-based taxation, FATCA, and FBAR.[281] The report explained that while the Working Group did not have the time to "produce a comprehensive plan to overhaul the taxation of individual Americans living overseas," the Working Group urges "the Chairman and Ranking Member to carefully consider the concerns articulated in the submissions moving forward."[282] There is no record of any follow-up to that recommendation.

B. Surveys

A number of organizations and individuals have conducted a variety of surveys examining how overseas Americans experience the extraterritorial application of U.S. policies.[283] Three examples include:

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[278] SEAT has begun an attempt at compiling letters written by American expats to representatives in Congress to be included in a later book. *Proposed Publication: Letters From Americans Abroad To Their Congressmen and Women*, SEAT (Aug. 16, 2022), http://seatnow.org/2022/08/16/proposed-publication-letters-from-americans-abroad-to-their-congressmen-and-women/.

[279] The U.S. House of Representatives, for example, offers a "Find Your Representative" function based solely on the user's zip code (which of course is applicable only to United States addresses). *Find Your Representative*, U.S. HOUSE OF REP., https://www.house.gov/representatives/find-your-representative (last visited Nov. 19, 2022).

[280] See, for example, SEAT Survey – Participant Comments, *supra* note 131, at 46, 62, 70, 75, 76, 78, 81, 387, 526, 667, 684.

[281] STAFF OF S. FIN. COMM., INT'L TAX REFORM WORKING GRP., FINAL REPORT 80-81 (Comm. Print July 7, 2015).

[282] *Id.*

[283] Snyder, *supra* note 58, at 2287 n.41-46.

1. AARO's 2020 Advocacy Survey

In late 2020, AARO conducted a survey to more extensively explore the issues faced by overseas Americans.[284] AARO's survey report exposes that while overseas Americans experience problems in relation to a wide range of issues, such as Social Security, Medicare, and voting, by far, the most serious and urgent problems they face are related to taxation and banking.[285] Eighty-five percent of the survey's 440 participants reported being "caught" between two systems and, as a result, suffering from penalizing taxation, the denial of banking services, inadequate retirement savings, restricted employment and business opportunities, and excessive expense to file a U.S. tax return.[286] Many reported that their non-U.S. spouses were also "caught up" in the U.S. system merely because of their marriage to an American, a situation leading some to contemplate divorce.[287]

AARO's survey concludes:

> AARO advocates ending [citizenship-based taxation (CBT)] and aligning the U.S. with the universal practice of residency-based taxation, i.e., that there be changes to U.S. law so that that the U.S. no longer taxes persons based solely on citizenship or green cards. Although there would still remain other taxation issues which would require tax treaties, elimination of CBT would go a long way to mitigate the significant costs of tax preparation and reporting, double taxation, employment discrimination and competitive business disadvantages suffered by the vast majority of Americans overseas.[288]

2. SEAT's Survey Report: "Being an American Outside of America is No Longer Safe"

From late October until early December 2020, Stop Extraterritorial American Taxation ("SEAT") carried out a study to better understand the effects of the extraterritorial application of U.S. taxation and banking policies on persons living overseas.[289] The study was conducted in the form of a

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[284] *AARO 2020 Advocacy Survey*, ASS'N OF AM. RESIDENT OVERSEAS, (Feb. 24, 2021), https://www.aaro.org/issues/2020-advocacy-survey.

[285] Doris L. Speer, *AARO 2020 Advocacy Survey Results Article 1: The Top 3 Issues (plus a 4th!)*, ASS'N OF AM. RESIDENT OVERSEAS 1 (Feb. 20, 2021), https://www.aaro.org/images/pdf/survey/ARTICLE_01_ISSUES_CONGRESS_2021_FEB_20_DLS.pdf.

[286] *AARO Survey Article 6*, *supra* note 132, at 1.

[287] *Id.*

[288] Doris L. Speer, *AARO 2020 Advocacy Survey Results Article 9: Citizenship-Based Taxation, Part 2*, ASS'N OF AM. RESIDENT OVERSEAS 8 (June 7, 2021), https://www.aaro.org/images/pdf/survey/ARTICLE_09_CBT_PART_II_2021_JUNE_7_DLS.pdf.

[289] Laura Snyder, *"Being an American Outside of America is No Longer Safe." Survey Report: Effects of the Extraterritorial Application of U.S. Taxation and Banking Policies – Introduction*, STOP

survey open to current and former U.S. citizens and green card holders, as well as their spouses and partners, living outside the United States.[290] A total of 1,564 persons participated; they came from every state in the country as well as the District of Columbia and were living in sixty-eight countries around the world.[291]

The survey report is wide-ranging and detailed. Among its findings:

(i) Few survey participants are wealthy: 66% have an individual annual income of less than $75,000, and 25% less than $25,000. Forty-seven percent have savings of less than $50,000.[292]

(ii) Sixty-three percent refrained from making certain investments because of penalizing U.S. taxation,[293] 58% have trouble planning their finances in a way that makes sense and, as a result, are penalized financially,[294] and 46% pay significant fees for the preparation of a U.S. tax return but owe nothing in U.S. taxes[295] (41% paid more than $1000 in fees for their most recently filed return).[296]

(iii) Forty-two percent have been barred from making certain investments because of their U.S. citizenship, 41% have not been able to open one or more bank or other financial accounts, and 13% have not been able to hold one or more joint accounts with their spouse.[297]

(iv) Thirty percent said it was likely or extremely likely that they would renounce U.S. citizenship in the next three years. Of those persons, 70% explain this is because of difficulties with the extraterritorial application of U.S. taxation and banking policies. (In contrast, just 6% stated they would renounce to avoid paying U.S. taxes).[298]

SEAT's survey report contains extensive participant comments, compiled in more than 700 pages.[299] They include:

EXTRATERR. AM. TAX'N 1 (May 4, 2021), http://seatnow.org/wp-content/uploads/2021/05/Introduction-to-survey-v2-4-May-2021.pdf.

290 *Id.*

291 *Id.*

292 *Part 1 of 2*, *supra* note 131, at 7-8.

293 *Id.* at 7-8.

294 *Id.* at 7-8.

295 *Id.* at 7-8.

296 *Part 2 of 2*, *supra* note 131.

297 *Id.*

298 *Id.* at 69-70.

299 This survey organizes the participants' comments in three different ways—by topic, by state, and by country. The version by topic is 694 pages; the version by state is 722 pages; the version by country is 712 pages. *Effects of the Extraterritorial Application of U.S. Taxation and Banking Policies: Participant Comments (All)*, SEAT, http://seatnow.org/survey_report_intro_page/comments_downloadable/ (last visited Jan. 9, 2023).

> The difficulties I have experienced in becoming and maintaining US tax compliance to owe or not owe US tax is not sustainable, both financially and emotionally for me.[300]
>
> Recently, my husband and I decided we wanted to buy a house and have been fighting bad about what that would mean for me.[301]
>
> I have refrained from opening a business and becoming a freelancer because of taxation. My partner is a business owner and encourages me to be a business owner as well and we have a lot of fights about this.[302]
>
> I am unable to find competent accountants or investment advisers. I have had to refile incorrect returns over and over. I have lost a lot of money to investment in PFICs, always by advisors who claimed they could act for U.S. citizen investors. Even the professionals can't understand the rules. This has caused me so much stress it is hard to express it emphatically enough. It has put a huge strain on every aspect of my personal life.[303]
>
> Being an American outside of America is no longer safe, and has no benefits moving forward.[304]

3. Democrats Abroad Survey Report

In early 2019 Democrats Abroad ("DA") invited overseas Americans to participate in research into their experiences complying with a range of laws and regulations that impact them uniquely because they reside outside of the United States.[305] DA received submissions from 9,885 Americans from all U.S. states living in 123 countries across six continents.[306]

Among DA's main findings:

- 57% of the participants moved outside the United States for marriage/a relationship or work/employment;
- 64% live overseas indefinitely;
- 97% have serious problems addressing their U.S. tax filing obligations;
- 55% hire tax return professionals to prepare their filings;

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300 SEAT Survey – Participant Comments, *supra* note 131, at 502.

301 *Id.* at 84.

302 *Id.* at 86.

303 *Id.* at 9.

304 *Id.* at 506.

305 Polce, *supra* note 131, at 1.

306 *Id.* at 4. Democrats Abroad conducted another comprehensive survey in 2022. *Once Uncomfortable, Now Suffocating: A 2022 Update on Tax and Financial Access Issues of Americans Abroad*, DEMOCRATS ABROAD (Nov. 30, 2022), https://assets.nationbuilder.com/democratsabroad/pages/31033/attachments/original/1669430637/Democrats_Abroad_2022_Update_on_Tax_and_Financial_Access_Issues_of_Americans_Abroad.pdf?1669430637.

- 33% incur personal and financial harm by discriminatory tax code treatment;
- 30% receive foreign government social welfare payments, which are fully taxable by the United States even if they are not taxed in their country of residence;
- 31% have been refused foreign financial products.[307]

C. Research Articles

Numerous research articles have been published, exposing the problems of the U.S. extraterritorial tax system and, in some cases, proposing solutions. Examples include:

The Case Against Taxing Citizens, by Reuven S. Avi-Yonah (2010): Avi-Yonah argues that in a globalized world, the extraterritorial tax system is "an anachronism which should be abandoned."[308] He explains that the system was created at a time when the income tax applied only to the rich and when some of the rich moved overseas to avoid the draft.[309] There is no longer a draft, the income tax applies to the middle class, and many more U.S. citizens live permanently overseas for reasons unrelated to taxation.[310] Further, the extraterritorial system requires the adoption of complex foreign tax credits and income exclusions that are difficult to administer and are often ignored in practice and creates incentives for Americans to renounce their U.S. citizenship.[311]

The End of Taxation Without End: A New Tax Regime for U.S. Expatriates, by Bernard Schneider (2012): Schneider concludes that U.S. extraterritorial taxation is no longer justified, and, in an era of economic globalization and increased personal mobility, it is increasingly dysfunctional.[312] Further, it cannot be justified on economic or moral grounds; "it is difficult, if not impossible, to enforce; and it sends the wrong message regarding the value of citizenship."[313] Schneider proposes that the United States eliminate its extraterritorial tax system, including the exit tax, in favor of a departure tax regime that would apply to those who emigrate from the United States.[314]

Citizenship Taxation, by Ruth Mason (2015): Mason describes the U.S. extraterritorial tax system as "inadministrable, inefficient, and often

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307 Polce, *supra* note 131, at 4-5.
308 Reuven S. Avi-Yonah, *The Case Against Taxing Citizens*, U. Mich. L. Sch. Pub. L. & Legal Theory Working Paper Ser., Paper No. 190, 2010, at 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1578272 [https://perma.cc/L39L-L5VD].
309 *Id.* at 2-4.
310 *Id.* at 2-4.
311 *Id.* at 2-4.
312 Schneider, *supra* note 81, at 1.
313 *Id.* at 1.
314 *Id.* at 1.

unfair."[315] Further, it puts the United States at a disadvantage when competing with other countries for highly skilled migrants.[316]

Reasons for Citizenship-Based Taxation? by Montano Cabezas (2016): Cabezas argues that the world has changed significantly since the United States first taxed its overseas citizens.[317] The justifications last offered by the U.S. government—in *Cook* in 1924—no longer apply, and the system is today perceived as unfair and unjustified.[318] For those reasons, the U.S. government should either clearly articulate its reasons for continuing to tax its overseas citizens or, if it is unable to do so, should discontinue the practice.[319]

A Global Perspective on Citizenship-Based Taxation, by Allison Christians (2017): Christians explains how the global assistance sought under FATCA to enforce U.S. income taxation on the sole basis of citizenship violates international law, as "inconsistent with both international legal standards and the principle of nonintervention."[320] She further argues that, as an enabler of citizenship-based taxation, FATCA is incompatible with the principles of residence and source.[321]

Background and Current Status of FATCA and CRS, by William J. Byrnes (2017): Byrnes exposes the false premises upon which FATCA was adopted and FATCA's failure to result in a statistically significant increase in tax revenue.[322] For Byrnes, "the primary purpose of FATCA was for the U.S. government to obtain otherwise private financial information and control of the global financial industry."[323] It does this by forcing foreign financial institutions to disclose private financial information to the IRS unilaterally and submit to governmental control.[324]

Foreign Account Tax Compliance Act: What It Could Mean for the Future of Financial Privacy and International Law, by John S. Wisiackas (2017): Wisiackas explains both that FATCA requires countries to obtain financial information in a manner that violates their privacy laws and that they are being forced to do so because of the threat of exorbitant fines.[325] These issues, together with FATCA's conflicts with U.S. law, demand

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[315] Ruth Mason, *Citizenship Taxation*, 89 SO. CAL. L. REV. 169, 238 (2015).
[316] *Id.* at 228-30.
[317] Montano Cabezas, *Reasons for Citizenship-Based Taxation?*, 121 PENN ST. L. REV. 101 (2016).
[318] *Cook*, 265 U.S. 56.
[319] Cabezas, *supra* note 317, at 110–25, 141–42.
[320] Allison Christians, *A Global Perspective on Citizenship-Based Taxation*, 38 MICH. J. INT'L L. 193, 234 (2017).
[321] *Id.* at 242.
[322] Byrnes, *supra* note 190.
[323] *Id.*
[324] *Id.*
[325] John S. Wisiackas, *Foreign Account Tax Compliance Act: What It Could Mean for the Future of Financial Privacy and International Law*, 31 EMORY INT'L L. REV. 585, 606 (2016).

judicial analysis of FATCA's legality.[326] Wisiackas argues that because FATCA contains a plethora of legal issues and mandates compliance by financial threat, it needs to be challenged both in domestic courts and on the international stage.[327] If FATCA does not face legal opposition, or is at least not given further scrutiny, it has the potential to end financial privacy and calls into question the traditional process by which a domestic law can become international law.[328]

The Future of FATCA: Concerns and Issues, by John Paul (2018): While Paul acknowledges that tax evasion is an "enormous problem,"[329] FATCA is not, he argues, a solution.[330] FATCA is a massive and costly system that is of questionable constitutionality, infringes upon the rights of many, and threatens their security.[331] For many Americans living abroad, it has resulted in their being singled out because of their U.S. citizenship, and in denial of access to pensions, insurance contracts, and bank accounts.[332] For these and other reasons, Paul argues, FATCA should be repealed.[333]

The Foreign Account Tax Compliance Act: A Constitutional Analysis, by Samantha McKay (2018): McKay explains that while FATCA was implemented as a solution to offshore tax evasion, it does not specifically target tax evaders.[334] Its strict, automatic reporting requirements have resulted in a sharp increase in renunciations of U.S. citizenship, and it is arguably unconstitutional as an unreasonable search under the Fourth Amendment.[335] For these reasons, FATCA should be repealed, or at least modified in a way that better achieves its targets of those U.S. citizens using offshore accounts to evade taxes while protecting Fourth Amendment Constitutional rights.[336]

The Mandatory Repatriation Tax Is Unconstitutional, by Sean P. McElroy (2018): McElroy argues that the Repatriation Tax is unconstitutional for two reasons: (i) because it is a wealth tax rather than an income tax, it violates the Sixteenth Amendment, and (ii) its unprecedented retroactivity violates due process under the Fifth Amendment.[337]

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[326] *Id.* at 585.
[327] *Id.* at 617.
[328] *Id.* at 585.
[329] John Paul, *The Future of FATCA: Concerns and Issues*, 37 N.E. J. LEGAL STUDIES 52, 67 (2018).
[330] *Id.* at 67.
[331] *Id.* at 67.
[332] *Id.* at 67.
[333] *Id.* at 67.
[334] Samantha McKay, *The Foreign Account Tax Compliance Act: A Constitutional Analysis*, SETON HALL L. SCH. STUDENT SCHOLARSHIP 1, 16, 34 (2018), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1947&context=student_scholarship.
[335] *Id.* at 16, 34.
[336] *Id.* at 16, 34.
[337] Sean P. McElroy, *The Mandatory Repatriation Tax Is Unconstitutional*, 36 YALE J. REG. BULL. 69 (2018).

Investing with One Hand Tied Behind Your Back—An Australian Perspective on United States Tax Rules for Non-Resident Citizens, by Karen Alpert (2018): Alpert describes how the U.S. tax code discriminates against and punitively taxes non-U.S. investments and business structures.[338] This leaves U.S. citizens living in Australia (including dual Australian-U.S. citizens), unable to save for retirement or otherwise invest, unable to operate small businesses, and unable to engage in tax planning in accordance with the Australian tax system.[339] Alpert explains that while her paper focuses on Australia and the interplay between U.S. and Australian tax rules, the issues raised are broadly applicable to U.S. citizens residing anywhere outside the United States.[340]

The Offshore Tax Enforcement Dragnet, by Shu-Yi Oei (2018): Oei catalogs in detail a litany of problems with the U.S. extraterritorial tax system and with FATCA in particular.[341] She lays out the multitude of reasons why enforcement is especially difficult[342] and why compliance is especially costly.[343] She explains that there is a disconnect between the persons U.S. tax and banking policies were intended to target—high net worth tax evaders[344]––and the persons who are disproportionally burdened: "immigrants and expatriates who have less ability to complain, comply, or 'substitute out' of the law's grasp."[345] She recommends the repeal of FATCA[346] or, if that is not possible, she recommends a variety of other reforms, including a softening of the penalties for non-compliance with FATCA,[347] the implementation of a same country exception,[348] reducing the categories of reportable assets,[349] eliminating duplicative reporting,[350] and better regulation of tax preparers located outside the United States.[351]

The Implications of Tax Residence for Human Rights, by Karen Alpert, Laura Snyder & John Richardson (2020): The authors explain the multiple and complex issues that arise when a person has more than one tax residence

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338 Karen Alpert, *Investing with One Hand Tied Behind Your Back—An Australian Perspective on United States Tax Rules for Non-Resident Citizens*, UNIV. N.S.W. 1, 1 (Jan. 8, 2018), https://www.business.unsw.edu.au/About-Site/Schools-Site/Taxation-Business-Law-Site/Documents/20-Alpert-ATTA2018.pdf.

339 *Id.* at 2.

340 *Id.* at 3.

341 Oei, *supra* note 55.

342 *Id.* at 663-93.

343 *Id.* at 709-18.

344 *Id.*

345 *Id.*

346 *Id.* at 722-23.

347 Oei, *supra* note 55, at 723-24.

348 Oei describes this as allowing foreign financial institutions to treat the accounts of overseas Americans as domestic accounts. *Id.* at 724-26.

349 *Id.* at 726-27.

350 *Id.* at 729-30.

351 *Id.* at 731-32.

at a time.[352] The authors explain how the U.S. extraterritorial tax system violates fundamental human rights as set forth in a variety of international human rights instruments. The rights in question include the right to leave any country, including one's own, and to return to one's country; the right to work, to free choice of work, and to freedom from discrimination in work; equality in dignity and rights; and freedom from the arbitrary deprivation of nationality.[353] Further, the U.S. extraterritorial tax system results in the violation of the Taxpayer Bill of Rights, most notably the right to a fair and just tax system and the right to be informed.[354] Finally, the extraterritorial application of U.S. law in a manner that overrides the tax systems of the countries where U.S. citizens live violates those countries' right to self-determination.[355] The authors argue in favor of an international consensus that individuals should generally be tax residents in only one jurisdiction at a time.[356]

The Criminalization of the American Emigrant, by Laura Snyder (2020): Snyder explains (i) how prejudice towards emigrants from the United States has shaped the country's extraterritorial tax policies since the 1860s,[357] then (ii) exposes how FATCA both reinforced that prejudice and amplified its effects on emigrants from the United States,[358] and finally (iii) argues that an important reason why the punishing policies remain in place is the continued stigmatization of American emigrants as necessarily wealthy persons who live overseas for the purpose of avoiding U.S. taxation.[359]

A Simple Regulatory Fix for Citizenship Taxation, by John Richardson, Laura Snyder & Karen Alpert (2020): As discussed above,[360] the authors explain that while legislative action would be preferable, in its absence, the U.S. Department of Treasury has both the legal authority and the moral imperative to take regulatory action to alleviate the effects of the U.S. extraterritorial system.[361] Among other actions, the authors call upon the Treasury Department to amend Treas. Reg. § 1.1-1 to exempt from taxation the non-U.S. sourced income of persons who reside outside the United States and are tax residents of the country where they live.[362]

Taxing the American Emigrant, by Laura Snyder (2021): Snyder examines in detail the relationship between U.S. extraterritorial taxation and

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352 Alpert et al., *supra* note 129.
353 *Id.* at 2-10.
354 *Id.* at 2-10.
355 *Id.* at 10-23.
356 *Id.* at 2.
357 Snyder, *supra* note 58, at 2279-80.
358 *Id.* at 2283-87.
359 *Id.* at 2287-88.
360 *See supra* notes 35-37 and accompanying text.
361 *Id.*
362 *Id.*

banking policies and the stigmatization of overseas Americans,[363] and explains how the policies undermine the sovereignty of other countries.[364]

Mission Impossible: Extraterritorial Taxation and the IRS, by Laura Snyder, Karen Alpert & John Richardson (2021): The authors expose the IRS's failure to administer the U.S. extraterritorial tax system and, as a result, its additional failure to respect the Taxpayer Bill of Rights.[365] The authors explain the devastating effect these failures have on overseas Americans and call upon the Treasury Department to take the needed regulatory actions to relieve both the IRS and overseas Americans of the impossible burdens the U.S. extraterritorial tax system places on them.[366]

Is Residence-Based Taxation Compatible with Progressive Idealism? by Robert Goulder (2021): Goulder argues that it is neither fair nor just for overseas Americans to be subject to U.S. tax on their non-U.S.-sourced income.[367] He argues that a system based purely upon residence is better and that this is the case regardless of the wealth of the taxpayers in question as well as of the adequacy of the tax regime where they live.[368] Further, Goulder observes that contrary to the stereotype, research demonstrates that few overseas Americans are wealthy (most are middle class), and few live overseas for the purpose of avoiding U.S. taxation (most moved for marriage or a relationship, or for employment, and many others moved as children with their families).[369]

Should Overseas Americans Be Required to Buy Their Freedom? by Laura Snyder, Karen Alpert & John Richardson (2021): The authors observe that the U.S. extraterritorial tax system is a separate and more punitive tax system than the one applied to U.S. residents, and it imposes unwarranted restrictions on the right of U.S. citizens to live where they choose.[370] For these reasons, the taxation of non-resident citizens must end.[371] Among the impediments to ending extraterritorial taxation is the widespread assumption that any legislative solution must be revenue neutral.[372] This assumption, however, "misconstrues the problem as one of mere payment of tax rather than of fundamental immorality and injustice, and it demonstrates a

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363 Snyder, *supra* note 40, at 313-26.
364 *Id.* at 326-44.
365 Snyder et al., *supra* note 70, at 1843-53.
366 *Id.* at 1827-40, 1843-53.
367 Robert Goulder, *Is Residence-Based Taxation Compatible with Progressive Idealism?*, FORBES (June 7, 2021, 3:49 P.M.), https://www.forbes.com/sites/taxnotes/2021/06/07/is-residence-based-taxation-compatible-with-progressive-idealism/?sh=7b31a9ae1bfd.
368 *Id.*
369 *Id.*
370 Snyder et al., *supra* note 199.
371 *Id.* at 223-27.
372 *Id.* at 224.

misunderstanding of the purpose of taxation and of how the U.S. federal government is funded."[373]

Updating Citizenship-Based Taxation (1), by Elliot Bramham (2021): Bramham observes that FATCA has "wreaked havoc" on overseas Americans.[374] He further observes that the U.S. extraterritorial tax system is "an unruly machine that neither those tasked with enforcement, nor the affected citizens can possibly be expected to fully understand. The unintended consequences and collateral damage impact both citizens and the IRS itself."[375] Bramham advocates for the regulatory solution proposed by Richardson et al.[376] In the absence of such a solution, he advocates for raising the thresholds that trigger FBAR and FATCA filing obligations.[377]

Resolving the Conflicts of Citizenship Taxation: Two Proposals, by Grace Nielsen (2021): Unlike the others in this list, Nielsen defends the taxation of overseas Americans. She does so by parroting others who defend the current system, such as Kirsch ("at the end of the day, American citizens abroad do receive some benefits from their citizenship"[378]) and Zelinsky (the system may have endured because "like other longstanding legal principles, 'it serves a new, if as yet unrecognized, function' different from that when it was first adopted"[379]). However, after asserting her defense, Nielsen expresses concern about the "fundamental fairness" of "perpetual tax jurisdiction on long-term nonresidents."[380] To remedy this while still "taking reasonable steps to avoid tax-motivated expatriations," Nielsen makes two alternative proposals.[381] Either: (i) exempt the foreign-source income of non-resident citizens after a five-year extended residency period in order, Nielsen explains, "to more closely correlate tax jurisdiction and nonresidents' meaningful connections to the American taxing community;"[382] or, if that proposal is "politically infeasible,"[383] then (ii) uncap the existing foreign earned-income exclusion for overseas American living in high-tax countries, which would reduce "their substantial compliance burdens" without

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373 *Id.* at 228-38.
374 Elliot Bramham, *Updating Citizenship-Based Taxation (1)*, BLOOMBERG TAX (Sept. 8, 2021) https://news.bloombergtax.com/daily-tax-report/updating-citizenship-based-taxation.
375 *Id.*
376 *See* Richardson et al., *supra* note 35.
377 Bramham, *supra* note 374 (discussing the applicable thresholds); *see* Golding, *supra* note 50; *see also* Atkinson, *supra* note 50; Wood, *supra* note 51; Snyder, *supra* note 58, at 2285; Snyder, *supra* note 40, at 309.
378 Nielsen, *supra* note 2, at 453-56 (citing Kirsch, *supra* note 5, at 471-73, 476).
379 *Id.* at 451-52 (quoting Zelinsky, *supra* note 3, at 1350).
380 *Id.* at 479.
381 *Id.* at 479.
382 *Id.*
383 *Id.*

"sacrificing revenue" or "creating new opportunities for tax-motivated expatriations."[384]

Size Matters (Even If the Treasury Insists It Doesn't): Why Small Taxpayers Should Receive a De Minimis Exemption from the GILTI Regime, by Patrick Riley Murray (2022): Murray explains the highly complex and onerous nature of GILTI and exposes the incongruency between GILTI's purposes and its effects on U.S. citizens who reside abroad and own a business.[385] Riley argues that either Congress or the Treasury Department should implement a de minimis exception to render GILTI a better reflection of its purpose.[386]

Can Extraterritorial Taxation Be Rationalized?, by Laura Snyder (2023): Snyder challenges the rationales most commonly offered to justify the U.S. extraterritorial tax system[387] and confronts the theory of the rationales with the reality of the system in place today.[388]

The Myths and Truths of Extraterritorial Taxation, by Laura Snyder (2023): Snyder demonstrates how the U.S. extraterritorial tax system violates multiple fundamental rights, including (i) protection against the forcible destruction of citizenship, (ii) equal protection under the 5th and 14th Amendments, (iii) the right to leave one's country, and (iv) freedom from the arbitrary deprivation of nationality and the right to return to one's country.[389]

V. WHY EFFORTS TO CHANGE THE POLICIES FAIL

As described immediately above, for more than a decade, many have been and continue to work to seek changes to the U.S. extraterritorial tax system, if not to end the system entirely. To date, however, their efforts have failed. Neither Congress nor the Executive Branch has demonstrated a willingness to fully hear the concerns of overseas Americans, let alone a willingness to take action to alleviate their concerns.[390] On the contrary, both Congress and the Executive Branch regularly propose legislation and regulations that would both further entrench the U.S. extraterritorial tax system and make the situation for overseas Americans even more difficult.[391]

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384 Nielsen, *supra* note 2. Unfortunately, neither proposal addresses the real problems of the U.S. extraterritorial tax system as they are described in this paper, *supra* notes 130-198 and accompanying text.

385 Murray, *supra* note 133.

386 *Id.*

387 *Supra* notes 2-6 and accompanying text.

388 Snyder, *supra* note 7.

389 Laura Snyder, *The Myths and Truths of Extraterritorial Taxation*, 32 CORNELL J. L. PUB. POL'Y, forthcoming 2023.

390 *See* Nielsen, *supra* note 2, at 483 (stating "there does not seem to be much political will to end U.S. citizenship taxation.").

391 Examples include: (i) Senator Elizabeth Warren's proposal to increase the exit tax and strengthen FATCA in order to pay for Medicare for All; (*see* Snyder, *supra* note 40, at 321), and (ii) then

Why have the long-time efforts of so many people and organizations failed, and why do they continue to do so? It is due to several reasons: (A) the stigmatization of and entrenched prejudice towards overseas Americans, (B) the pervasiveness of myths regarding how overseas Americans are taxed and the high complexity of the subject matter, and (C) the lack of political influence.

A. Stigmatization

Overseas Americans are often stigmatized as people who are necessarily wealthy (how else could they afford to leave the United States?) and whose purpose in living outside the United States is to avoid U.S. taxation (what other legitimate reason could they have for living outside the country?). Past decades have seen American society treat certain forms of prejudice, such as racism, sexism, or homophobia, as unacceptable. However, prejudice towards Americans who live outside the United States––prejudice of place, or placism—remains entirely acceptable.[392]

This prejudice is evident in statements that U.S. policymakers and public figures have made about overseas Americans.[393] As discussed above, it was seen with the first inceptions of the extraterritorial tax system in the 1860s and its renewal in the 1890s.[394] It continues to the modern day. Examples include:

> These miserable souls are not fleeing conventional forms of oppression, such as the famine, dictatorship, torture, and murder that have caused millions to seek haven in the U.S. through the generations. These are rich folks who . . . are giving up their American citizenship [because] they "can't pay the federal tax rate and live in the style they want." Poor babies![395]

> [Americans] are going to great lengths, thousands of miles to other countries, to avoid paying their fair share. In a metaphorical sense, burning the flag, giving up what should be their most sacred possession, their

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Presidential Candidate Biden's campaign proposal to double the GILTI tax. *See* John Richardson, *Proposal by @JoeBiden to Increase the GILTI Tax Has Particularly Vicious Implications for #Americansabroad*, CITIZENSHIP SOLS. (June 29, 2020), http://citizenshipsolutions.ca/2020/06/29/tax-proposal-by-joebiden-has-particularly-vicious-implications-for-americansabroad/; *see also* Emma Agyemang, *U.S. Bill Threatens 'Double Taxation for American Expats in U.K.*, FIN. TIMES (Dec. 17, 2021), https://www.ft.com/content/4c6d002d-5486-478d-88cf-83ff3847531d.

392 Snyder, *supra* note 40, at 313-26.

393 *See infra* notes 395-401.

394 *Statement of Senator Jacob Collamer (June 2, 1864), in* THE CONG. GLOBE: THE DEBATES & PROC. OF THE FIRST SESS. OF THE THIRTY-EIGHTH CONG. 1, 2661 (John C. Rives ed., 1864); 26 CONG. REC. S6632–33 (daily ed. June 21, 1894) (statement of Sen. George Hoar).

395 Michael Kinsley, *Love It or Leave It*, TIME (Nov. 28, 1994), http://content.time.com/time/subscriber/article/0,33009,981886-2,00.html.

> American citizenship, to find a tax loophole. . . . These are precisely the sort of greedy, unpatriotic people that FDR called malefactors of great wealth. . . . Let us not allow more of these rich freeloaders to get away.[396]

> I would hope that one day we will just publish the names of people that America has given so much to and that they care so little about that citizenship that they would flee in order to avoid taxes.[397]

> How can you say that we should all do our share in America, including making all the kids, and the elderly people, and everybody else, have to contribute to the deficit, to bring it down, and at the same time allow these sleazy bums, who don't want to pay their taxes, to leave this country, and renounce their citizenship, and expect me to have one iota of sympathy for them?[398]

> If you've gotten your riches from America, you should pay your fair share of taxes. These expatriates are really like economic Benedict Arnolds.[399]

> When Silicon Valley billionaires run abroad, they go to Bermuda to avoid paying their fair share of taxes. What patriotism! What love of country![400]

> As a Consular Officer, I visited a lot of Americans in jail or hospitals overseas. Many of those people were dirtbags.[401]

These comments expose longstanding and deep-seated prejudices against Americans who live outside the United States. For these policymakers and public figures, overseas Americans are rich, unpatriotic, lazy tax dodgers who deserve punishing policies.

If today a U.S. policymaker made a comparable statement with respect to persons of a particular race, gender, or sexual orientation, the policymaker would be immediately called out and could suffer serious consequences, such as pressure to resign.[402] This is because, for the most part, the American

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

397 H.R. REP. NO. 104-59 (1995) (Conf. Rep.) (statement of Rep. Charles Rangel).

398 H.R. REP. NO. 104-57 (1995) (Conf. Rep.) (statement of Rep. Neil Abercrombie).

399 Karen de Witt, *Some of Rich Find a Passport Lost is a Fortune Gained*, N.Y.TIMES, Apr. 12, 1995 at A1 [https://perma.cc/AF5X-GGKU].

400 Bernie Sanders (@SenSanders), TWITTER (Dec. 8, 2019, 4:05 PM), https://twitter.com/SenSanders/status/1203797762082590720.

401 Max Steiner (@MaxSteinerCA), TWITTER (Dec. 27, 2021, 4:45 PM), https://twitter.com/MaxSteinerCA/status/1475598854158311425.

402 A local politician recently faced calls to resign after making disparaging comments about race. *See* Danielle Wallace, *LA City Council President Nury Martinez faces calls to resign after racist remarks emerge in leaked audio*, FOX NEWS (Oct. 10, 2022, 2:02 P.M.), https://www.foxnews.com/us/la-city-council-president-nury-martinez-faces-calls-resign-racist-remarks-emerge-leaked-audio.

public today rejects prejudices such as racism, sexism, and homophobia. Accordingly, the American public (again, for the most part) no longer accepts overt expressions of these prejudices, nor does it accept policies that obviously manifest them.

In stark contrast, few Americans residing in the United States reject the stigmatization of overseas Americans. Instead, they share in the prejudice towards overseas Americans that is exposed in the comments above. Accordingly, to the extent Americans residing in the United States are aware of the U.S. extraterritorial tax system, many support it. In justifying their support, they reject reports about the negative effects of the system as either exaggerated or untrue,[403] they minimize their importance,[404] or they conclude that the negative effects are a necessary evil, as the only means to prevent the potential development of a "permanent class of wealthy U.S. citizens abroad who would not be subject to taxation."[405]

Consequently, for any legislative or regulatory change to take place, U.S. policymakers will have to overcome considerable prejudice towards overseas Americans.[406] They will have to overcome this prejudice not just once, but twice: first in themselves and then in the American public. This is a formidable hurdle.

B. Pervasive Misunderstandings

There exist several pervasive misunderstandings about how overseas Americans are taxed. These misunderstandings create the false impression that overseas Americans are not harmed by the U.S. extraterritorial tax system, and thus no change is needed. The misunderstandings relate to tax treaties, foreign tax credits, and the foreign-earned income exclusion.

1. Tax Treaties

It is a commonly held impression that the tax treaties the United States holds with approximately sixty other countries operate to protect overseas

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403 "I am [. . .] unimpressed by the alleged horror stories of U.S. citizens renouncing their citizenships because of U.S. income tax burdens." Edward A. Zelinsky, *Defining Residence for Income Tax Purposes: Domicile as Gap-Filler, Citizenship as Proxy and Gap-Filler*, 38 MICH. J. INT'L L. 271, 272 (2017); *see also* Kirsch, *supra* note 4, at 130 (implying that reports by overseas Americans of how they experience the U.S. extraterritorial tax system should be discounted because, as the persons directly experiencing the policies, they are not sufficiently "neutral").

404 "Still, the total number of renunciations remains relatively small." Organ, *supra* note 5.

405 Michael Kirsch, *Citizens Abroad and Social Cohesion at Home: Refocusing a Cross-Border Tax Policy Debate*, 36 VA. TAX REV. 205, 205-06 (2017); *see also* Nielsen, *supra* note 2, at 468 (stating that "a pure [residency-based] regime is probably too easy for sophisticated, wealthy taxpayers to game").

406 *See supra* notes 395-401.

Americans from double or otherwise unfair taxation. The reality, however, is that U.S. tax treaties benefit essentially just two categories of persons: (i) U.S. residents who have income from sources outside the United States, and (ii) residents of other countries who are not citizens or permanent residents of the United States and who have U.S.-sourced income. In both cases, a tax treaty typically serves to reduce the rate or to exempt from taxation income sourced from outside the taxpayer's country of residence.[407] Examples are dividends or royalties sourced outside the taxpayer's country of residence (or, for companies, outside their country of incorporation). A tax treaty can serve to reduce or eliminate taxation of the dividends or royalties by the (foreign) country where the dividends or royalties were sourced in favor of taxation by the taxpayer's country of residence (or incorporation).

All U.S. tax treaties contain what is referred to as a "savings clause." As an example, in the Canada-United States tax treaty, this clause reads as follows:

> [N]othing in the Convention shall be construed as preventing a Contracting State from taxing its residents [. . .] and, in the case of the United States, its citizens [. . .] as if there were no convention between the United States and Canada with respect to taxes on income and on capital.[408]

By including this clause in tax treaties with the United States, other countries are agreeing that their own tax residents are also tax residents of the United States. They agree to this with respect to all U.S. citizens residing in their country, regardless both of how short a time those persons lived in the United States (if they lived there at all) and of how long a time those persons have lived in the country in question.[409]

The IRS defends the savings clause as necessary to prevent a citizen or resident of the United States from "using the provisions of a tax treaty in order to avoid taxation of U.S. source income."[410] This defense considerably understates the full consequences, however. As explained above, it means overseas Americans are fully taxable by the United States on their worldwide income, regardless of source and regardless of where they live in the world. The result is that overseas Americans are not permitted to benefit from U.S.

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407 *See generally Tax Treaties*, INTERNAL REVENUE SERV., https://www.irs.gov/individuals/international-taxpayers/tax-treaties (July 26, 2022).

408 CONVENTION BETWEEN CANADA AND THE UNITED STATES OF AMERICA WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL, Art. XXIX(2), Sept. 26, 1980, as amended.

409 "And, in the case of the United States, its *citizens*." *Id.* (emphasis added).

410 *United States Income Tax Treaties - A to Z*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z (Apr. 28, 2022).

tax treaties in any manner comparable to how U.S. residents and residents of other countries who are not U.S. citizens are able to benefit from them.[411]

2. Foreign Tax Credit and Foreign Earned Income Exclusion

Another commonly held impression is that overseas Americans do not suffer harm from the U.S. extraterritorial tax system because of the availability of foreign tax credits and the Foreign Earned Income Exclusion ("FEIE").[412] The reality is quite different.

To begin, some confuse the availability of the FEIE with a requirement to file a U.S. tax return. They are under the impression that if the overseas American's income is less than the maximum amount overseas Americans are allowed to exclude from U.S. taxation in accordance with the FEIE (i.e., $120,000 for 2023)[413], then the overseas American is not required to file a U.S. tax return.

In fact, the availability of the FEIE has no bearing on the question of whether an overseas American is required to file a U.S. tax return.[414] Overseas Americans are subject to the same filing thresholds as U.S. residents, entirely independent of the question of the applicability of the FEIE.

On a superficial level, this may appear equitable, but it is not for two reasons:

(i) At the time of this publication, the filing threshold for the status Married Filing Separately ("MFS") was just $5 for all ages.[415] In contrast, the threshold for Married Filing Jointly ("MFJ") ranged from $24,800 to $27,400, depending on age.[416] Because many overseas Americans are married to non-resident aliens who are not required to file a U.S. tax return, the percentage of overseas Americans who file

411 *See, e.g.*, Karen Alpert, *Saving Clause*, LET'S FIX THE AUSTRALIA/US TAX TREATY!, https://fixthetaxtreaty.org/problem/saving-clause/ (last visited Nov. 19, 2022).

412 *See, e.g.*, Nielsen, *supra* note 2, at 445, 468 (stating that the operation of the foreign tax credit and FEIE "can substantially reduce or even completely eliminate nonresident citizen taxpayers' tax liability," and that the foreign tax credit "is extremely helpful to the many U.S. citizens living abroad").

413 *IRS provides tax inflation adjustments for tax year 2023*, INTERNAL REVENUE SERV., https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2023 (Oct. 18, 2022).

414 *Foreign Earned Income Exclusion*, INTERNAL REV. SERVICE, https://www.irs.gov/individuals/international-taxpayers/foreign-earned-income-exclusion (Nov. 14, 2022) (explaining the process of claiming an exclusion for foreign income below the cap; claiming this deduction requires the filing of a return).

415 *See* 2021 Purple Book, supra note 75, at 23-24.

416 *IRS provides tax inflation adjustments for tax year 2020*, INTERNAL REVENUE SERV. (Nov. 6, 2019), https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2020 (indicating the MFJ standard deduction is $24,800).

under the status MFS is considerably greater than the percentage of U.S. residents who file under the same status.[417] Further, because of the difference in the filing thresholds for MFS as compared to MFJ, more married overseas Americans who are low-income are required to file as compared to married U.S. residents of comparably low income. Filing MFS rather than MFJ results in further disadvantages, such as a higher tax rate, a less advantageous standard deduction (notably if the overseas American's spouse has a low income), reduced eligibility for certain tax credits,[418] and lower filing thresholds for certain IRS forms.[419]

(ii) The complexity of the federal tax return of a U.S. resident pales in comparison with that of an overseas American, regardless of income. The return of an overseas American often averages forty to fifty-plus pages in length and requires specialized knowledge to complete.[420] Few have that knowledge, leaving many overseas Americans with little choice but to pay upwards of $3,000 per year for professional tax return preparation.[421] These fees are incurred regardless of whether any tax is ultimately owed, and in many cases, no tax is owed (about 55% of tax returns filed from outside the United States show zero tax owed, as compared to 26% of returns filed from all places).[422] These fees are incurred regardless of the overseas American's income; for low-income overseas Americans, 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 MFS. And even if an overseas American does engage a professional return preparer, they are not shielded from penalties. This was demonstrated on a large scale in 2019, when hundreds, if not thousands, of overseas Americans received penalty notices from the IRS for $10,000 for failure to file an

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417 In 2016, 2.09% of all US individual tax returns were filed with MFS filing status – but 17.64% of returns filed from outside the United States were MFS returns. Karen Alpert, *TCJA and US Expats*, LET'S FIX THE AUSTRALIA/US TAX TREATY! (Dec. 19, 2018), https://fixthetaxtreaty.org/2018/12/19/tcja-and-us-expats/.

418 *Should You and Your Spouse File Taxes Jointly or Separately?*, TURBO TAX (Feb. 17, 2022, 2:28 PM), https://turbotax.intuit.com/tax-tips/marriage/should-you-and-your-spouse-file-taxes-jointly-or-separately/L7gyjnqyM.

419 Such as Forms 8938 (Statement of Specified Foreign Financial Assets) and 8960 (Net Investment Income Tax). *See Do I Need to File Form 8938, Statement of Specified Foreign Financial Assets?*, INTERNAL REVENUE SERV. (Nov. 9, 2022), https://www.irs.gov/businesses/corporations/do-i-need-to-file-form-8938-statement-of-specified-foreign-financial-assets; *Instructions for Form 8960*, INTERNAL REVENUE SERV. (Dec. 14, 2021), https://www.irs.gov/instructions/i8960.

420 See INTERNAL REVENUE SERV., U.S. DEP'T OF TREASURY, PUB. NO. 54, TAX GUIDE FOR U.S. CITIZENS AND RESIDENT ALIENS ABROAD 3 (2021) for detailed instructions about filing an overseas tax return. These citizens and residents need to complete a number of additional forms not required of domestic filers.

421 *See Part 2 of 2*, *supra* note 131, at 53 (showing that of survey participants who engaged a professional to prepare their most recent tax return, 41% paid fees of more than $1,000 and 11% paid more than $3,000); *but see* Polce, *supra* note 131, at 16 (comparing average fees for U.S. domestic taxpayers of $175-$275).

422 *See* Snyder et al., *supra* note 199, at 236 n.68.

> informational form regarding their ordinary retirement plans.[423] Many, if not most, of the Americans who received such a notice had engaged the services of a professional return preparer.[424] (This problem occurs because U.S. tax law considers many ordinary retirement plans of other countries to be "foreign trusts." These plans are generally tax favored in the American's country of residence, and participation in them is often required by law).[425]

Further, while overseas Americans can be eligible to use foreign tax credits and FEIE, neither is as beneficial as some believe them to be.

Living subject to two tax systems means that an overseas American will pay the higher of the two tax rates applicable under each system. If, for any given income, the applicable tax in the overseas American's country of residence is higher than that of the United States, then the overseas American pays that higher amount in their country of residence and claims a tax credit for U.S. tax purposes; in many (but not all) cases, no tax will then be due to the United States with respect to that income. (If the tax rate of the overseas American's country of residence is higher than the U.S. tax rate, the overseas American may not elect to pay tax at the lower U.S. rate. Instead, the overseas American must pay the higher taxes in the country of residence at the same rate as other residents of that country, even when the applicable rate exceeds the U.S. tax rate).[426]

If, however, for any given income, the applicable tax rate in the overseas American's country of residence is lower than that of the United States, or if that country does not tax the income at all, then the overseas American will still be liable to the United States for the difference between the lower foreign rate and the U.S. rate. A foreign tax credit will not alleviate this taxation discrepancy as the credit is limited to the amount of foreign tax that is actually paid.[427]

It is at this stage that many persons who consider themselves knowledgeable with respect to U.S. taxation contend that the FEIE (which, again, allows Americans living overseas to exclude from U.S. taxation a

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[423] U.S. tax persons face a penalty of up to $10,000 for failing to file an IRS Form 3520-A, involving information about a foreign trust. *See Instructions for Form 3520-A*, INTERNAL REVENUE SERV., https://www.irs.gov/pub/irs-pdf/i3520a.pdf (Jan. 2022); *Foreign Trusts: IRS Penalty Notices for Late Forms 3520-A Traumatize Many Innocent Taxpayers!*, *supra* note 198; *Great News for IRS Form 3520-A Filers Effecting Thousands of Taxpayers*, *supra* note 198; *see also* Richardson, *supra* note 261.

[424] *See* sources cited *supra* note 423.

[425] *See, e.g.*, Alpert, *supra* note 338.

[426] *See* Snyder, *supra* note 40, at 341-43; *see also US Taxation of Americans Abroad: Do the Foreign Tax Credit Rules Work? - Sometimes yes and sometimes no*, PREP PODCASTER (May 7, 2020) (downloaded using PodBean); *US Taxation of Americans Abroad: The confusing world of foreign tax credits and why Americans abroad may pay more tax than their neighbours and more than Homeland Americans* PREP PODCASTER (May 7, 2020) (downloaded using PodBean).

[427] *See* Snyder, *supra* note 40, at 341-43.

maximum amount each year—$120,000 for 2023), would solve the problem. However, the FEIE applies only to earned income and not to interest, capital gains, insurance proceeds, or many forms of pension income or welfare benefits, such as unemployment, maternity, and disability.[428] That is, the FEIE does not apply to the types of income that overseas Americans are likely to have the longer they live—and grow their families, grow ill, and grow old—outside of the United States. At the same time, many countries either tax many of those forms of income at low rates or do not tax them at all.[429]

In sum, as compared to U.S. residents, for overseas Americans, the preparation of a U.S. tax return is considerably more time-consuming, expensive, and risky, even when no tax is owed. While some overseas Americans can claim foreign tax credits and the FEIE, neither is the panacea that some believe them to be.

For any legislative or regulatory change to take place, it will be necessary to correct widespread misperceptions that tax treaties, foreign tax credits, and the FEIE protect overseas Americans from the harm caused by the U.S. extraterritorial tax system. This, also, is a formidable hurdle.

3. High Complexity

As this paper already evinces, the U.S. extraterritorial tax system is highly complex. Its consequences for overseas Americans are equally complex. Achieving an even passing, let alone full, familiarity with either requires considerable intellectual investment.[430] It is an investment that few persons outside of the overseas American community are willing to make. Because the U.S. extraterritorial tax system is so poorly understood, its consequences are easy to downplay, if not entirely dismissed by policymakers as well as by the American public.[431]

Just some of the system's complexities are as follows:

(i) Rules complicating investment outside the United States, notably investment in mutual funds, referred to as "Passive Foreign Investment Companies" ("PFICs"): the rules impose complicated reporting requirements as well as penalizing taxation.[432] The rules are so

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428 *Foreign Earned Income Exclusion*, *supra* note 414 (stating the application is to "income" and specifically excluding pension payments and the like).

429 *See* Snyder, *supra* note 40, at 341-43.

430 INTERNAL REVENUE. SERV., *supra* note 420.

431 One commentator expressly refused to consider any complexity beyond the FEIE, and particularly refused to consider any complexity regarding "capital" because "after all, the FEIE applies only to '*earned* income attributable to services performed.'" Nielsen, *supra* note 2, at 450 (citing I.R.C. § 911(b)(1)(A)).

432 *See, e.g.*, Monica Gianni, *PFICs Gone Wild!* 29, 30 AKRON TAX J. 29 (2014).

complex and burdensome that most financial advisors steer their overseas American clients away from investing in their country of residence or elsewhere outside the United States in favor of investing in the United States.[433]

(ii) Rules complicating retirement planning outside the United States: U.S. rules do not recognize non-U.S. tax-advantaged retirement schemes. As a result, many overseas Americans either cannot engage in retirement planning in their country of residence or, if they do (as some are required by the rules of their resident country), they must contend with complex as well as highly uncertain U.S. tax consequences for any action. This is the case for contributions to the scheme, earnings within the scheme, transfers from one scheme to another, and withdrawals: each action requires careful study and planning.[434]

(iii) Lack of guidance concerning the application of the FEIE: As mentioned above,[435] the FEIE applies only to earned income and not to unearned income.[436] While it is clear the FEIE does not apply to income such as interest capital gains or insurance proceeds, its applicability to income such as unemployment, disability, and maternity benefits is not always clear, given these forms of income have a connection to work. Further, different countries disburse these benefits in different ways.[437] Some are paid directly by a governmental agency in the country where the overseas American lives, while others are paid by the overseas American's employer.[438] The IRS provides little guidance in this regard, leaving overseas Americans—at a vulnerable time in their lives—to figure it out for themselves, subject, as always, to penalties in the event of an error.[439]

(iv) Rules complicating the use of foreign tax credits: As explained above, the availability of foreign tax credits is not as beneficial for overseas Americans as some believe it to be.[440] In addition, the use and calculation of foreign tax credits can often be complex. The foreign tax paid must be characterized, and it is not always clear if a U.S. credit

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433 *See supra* note 132; *see also* John C. Coates IV, *Reforming the Taxation and Regulation of Mutual Funds: A Comparative Legal and Economic Analysis*, 1 J. LEGAL ANALYSIS 591, 611 (2009) (explaining that PFIC rules "wall off" U.S. investors from non-U.S. mutual funds); Fredric Behrens, *The PFIC Problem*, ROUND TABLE WEALTH MGMT., https://roundtablewealth.com/resources/the-pfic-problem/ (last visited Nov. 19, 2022) (stating "U.S. taxable persons [should] avoid PFIC funds and focus on building a global investment portfolio through U.S.-based investment options. This is certainly the best way for Americans abroad to invest to avoid PFIC reporting complications and additional tax costs"). But, this ignores the fact that U.S investments are foreign to the overseas American's country of residence, and may, therefore, be punitively taxed by that country or be unavailable due to securities registration rules.

434 *See* Alpert, *supra* note 338; *see also* Snyder, *supra* note 40, at 335-37.

435 *Supra* notes 417-429 and accompanying text.

436 *See* Snyder, *supra* note 58; s*ee also US Taxation of Americans Abroad: Does the FEIE (Foreign Earned Income Exclusion Work)?—Sometimes yes and sometimes no*, *supra* note 426.

437 *See* sources cited *supra* note 436.

438 *See* sources cited *supra* note 436.

439 *See* sources cited *supra* note 436.

440 *Supra* notes 412-429 and accompanying text.

is available for that specific characterization. If it is, determining the exact amount available requires complex calculations.[441]

(v) Rules complicating acquisition and sale of assets: Overseas Americans purchase and sell assets, such as their principal residence, in the currency of the country where they live. U.S. rules require that the capital gain on the sale of a non-U.S. asset be calculated in U.S. dollars,[442] using the exchange rate in effect when the asset was purchased to determine the basis and the rate in effect when the asset was sold to determine the proceeds. Depending upon currency fluctuations, this can result in taxable income, even if there was no gain in the local currency and in some cases, even if there was a loss in the local currency (this is referred to as "phantom gains" and "phantom losses").[443]

(vi) Rules complicating ownership of a small business: U.S. extraterritorial tax rules do not differentiate between small, local businesses operated by Americans living overseas and large, multinational corporations.[444] As a result, overseas Americans who attempt to operate a small business in the country where they live are subject to highly burdensome and expensive U.S. reporting requirements as well as additional tax obligations. These obligations are placed not upon the non-U.S. business but directly upon the individual overseas American taxpayer. The obligations have included not only taxation imposed retroactively, but also taxation of retained corporate income that has not been distributed to the taxpayer and is not eligible for a tax credit.[445]

(vii) Complicated interactions between U.S. and local rules: As discussed above, overseas Americans are tax residents of two countries: the United States and the country where they live.[446] This results in the interaction of the two systems. This has multiple repercussions with respect to, for example, business structures, investments, and retirement accounts. Because the tax system of each country is different, for each country, the interaction with the U.S. system is different. As a result, there is no one-size-fits-all approach to compliance with the U.S. extraterritorial tax system, which requires as many approaches as there are countries where Americans live. The IRS has, on occasion, been called upon to provide specific clarification

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[441] *Foreign Tax Credits Individuals,* BELFINT, https://www.belfint.com/foreign-tax-credits-individuals/ (last visited Nov. 19, 2022).

[442] *Own Foreign Property? Beware of Phantom Gains*, EXPAT NETWORK, https://www.expatnetwork.com/own-foreign-property-beware-of-phantom-gains/ (last visited Nov. 19, 2022); *see also* John Richardson, *How Fluctuating FX Rates Generate Capital Gains Taxes on the Discharge of Debt and the Sale of Property – US Citizens Abroad!*, RENOUNCE U.S. CITIZENSHIP (Oct. 11, 2012) https://renounceuscitizenship.wordpress.com/2012/10/11/how-fluctuating-fx-rates-generate-capital-gains-taxes-on-the-discharge-of-debt-us-citizens-abroad/.

[443] *See* sources cited *supra* note 442.

[444] Forms for reporting income from foreign businesses typically refer to them as "entities." A small business is an entity as much as a multinational corporation.

[445] *See* Murray, *supra* note 133.

[446] *Supra* text accompanying notes 74-131.

> of how U.S. tax rules interact with the laws of another country;[447] the IRS generally does not respond to such requests. This leaves the overseas Americans in that country with little choice but to guess, subject to severe penalties in the event they guess incorrectly.[448]

These complexities—which are by no means exhaustive—expose how difficult it is to understand the U.S. extraterritorial tax system.[449] Those who defend the system rarely—if ever—discuss these complexities,[450] save to belittle or deny them.[451] Because the system is so poorly understood, it is difficult to convince policymakers, let alone the American public, that change to the system is needed.

C. Lack of Political Influence

As described above,[452] for more than a decade, overseas Americans and others have sought legislative change from the U.S. Congress. For the most part, they are ignored. There are multiple reasons for this.

Some members of Congress likely perceive the issues faced by Americans living overseas as lower in priority than those faced by U.S. residents. Why, a member of Congress or their staff may ask, should we devote time and resources to solve problems faced by Americans living overseas when we have a multitude of unsolved problems faced by Americans living in the United States? Some might even think—consciously or not—that compared with U.S. residents, Americans living overseas are less worthy of congressional problem solving because they live overseas.[453]

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447 *See, e.g.*, Dennis N. Brager, *Even the IRS is Confused About Australian Superannuation Accounts*, BRAGGER TAX L. GRP. (March 31, 2016), https://www.taxproblemattorneyblog.com/even-irs-confused-australian-superannuation-accounts/ (explaining that his firm was able to obtain an IRS opinion regarding a classification of Australia's superannuation only by invoking the Freedom of Information Act).

448 Describing their interactions with the IRS, survey participants stated "The people I was dealing with were just not able to help with issues involving 2 tax codes." SEAT Survey – Participant Comments, *supra* note 131, at 423. "The people I spoke to had little experience and competence with my questions. I get the feeling that the IRS has no idea what to do with foreign tax filers." *Id.* at 429. "The IRS person read to me a text where it said they could not answer my questions and that I had to consult a lawyer specialist in this area." *Id.* at 423.

449 For an additional discussion of the complexities, see Oei, *supra* note 55, at 667-68.

450 *See generally* Colon, *supra* note 4; Zelinsky, *supra* note 3; Kirsch, *supra* note 5; Kirsch, *supra* note 4; Nielsen, *supra* note 2; De Simone et al., *supra* note 64; Young Ran (Christine) Kim, *Considering "Citizenship Taxation": In Defense of FATCA,* 20 FLA. TAX REV. 335 (2017).

451 *Supra* notes 403-405 and accompanying text.

452 *Supra* notes 202-386 and accompanying text.

453 *See* Oei, *supra* note 55, at 718-20 (observing "[E]xpatriates and accidental Americans [. . .] were not well positioned to raise concerns. [. . .] Americans living abroad were not physically present, and accidental Americans by definition did not even know they were American. These populations were thus not well organized to lobby for their interests or to protest unfair treatment at the outset. They are also relatively small groups, which has likely made them easy to ignore or discount.").

Compounding this problem is the fact that the millions of Americans living overseas cannot vote as a block—they can only vote where they last lived in the United States[454] (and some cannot vote at all).[455] This means that their votes are heavily diluted across the entire country. This can lead members of Congress to see their overseas constituents as peripheral. This means, in turn, that they also see the issues of those constituents as peripheral—that they do not sufficiently affect their "real" constituents to merit attention.

Overseas Americans cannot, themselves, be elected to Congress. They are barred by Article I of the Constitution, which requires that candidates "be an Inhabitant of that State in which he shall be chosen."[456]

The United States could follow the example of other countries, such as France,[457] and establish congressional representation specifically for overseas Americans. However, the Constitution provides for congressional representation to be allocated only "among the several states."[458] Thus, in the absence of a Constitutional amendment, such person(s) could, at best, hold the role of non-voting Delegate, alongside those from the District of Columbia and a variety of U.S. territories. Establishing this limited representation would require an act of Congress.[459]

Finally, surveys of overseas Americans evidence that, contrary to the stereotype, few are wealthy. They have modest incomes and limited assets.[460] They do not have the funds necessary to wield financial influence with members of the U.S. Congress.

In sum, overseas Americans have little to no political power and little to no prospect of gaining any. This is yet another formidable hurdle to legislative change of the U.S. extraterritorial tax system.

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[454] *See Voting Residence for Citizens Residing Outside the U.S.*, FED. VOTING ASSISTANCE PROGRAM, https://www.fvap.gov/citizen-voter/voting-residence (last visited Nov. 19, 2022).

[455] This is the case for U.S. citizens who have never lived in the United States. Some – but not all – states will allow such persons to register in that state if one of their U.S. citizen parents were registered there. *See Never Resided in the U.S.?*, FED. VOTING ASSISTANCE PROGRAM, https://www.fvap.gov/citizen-voter/reside (last visited Nov. 19, 2022).

[456] U.S. CONST. art I, § 2, cl. 2 (about the House of Representatives) and U.S. CONST. art I, § 3, cl. 3 (about the Senate).

[457] *See* Marc Albert Cormier, *Political Representation of Citizens Abroad – The French Example*, MARC CORMIER (Feb. 21, 2017), http://marccormier.org/en/2017/02/21/citizens-abroad/.

[458] U.S. CONST. art I, § 2, cl. 3.

[459] *See generally*, BETSY PALMER, CONG. RSCH. SERV., RL32340, TERRITORIAL DELEGATES TO THE U.S. CONGRESS (2006).

[460] *See Part 1 of 2*, *supra* note 131, at 7-8 (showing that 66% of survey participants have annual individual income of less than $75,000 and 47% have assets of less than $50,000); *see also* Polce, *supra* note 131, at 16 (showing 61% of participants have annual household income of less than $100,000).

VI. CONCLUSION

The U.S. extraterritorial tax system was conceived in the stigmatization of overseas Americans.[461] The policies, along with the scope of U.S. citizenship, have evolved such that today the system is considerably further reaching and more consequential than it was one century ago.[462] The system consists of highly penalizing taxation and banking policies that make it difficult for overseas Americans to live normally and prevent them from fully integrating into their families and the communities where they reside.[463] The IRS is also a victim, unable to administer or enforce the U.S. extraterritorial tax system.[464]

Many organizations and individuals have devoted considerable resources seeking to educate policymakers and the public with respect to the system, with the goal of effecting change.[465] Multiple and highly detailed survey reports documenting how overseas Americans experience the system have been issued.[466] Scholars have published research articles exposing problems of the system and, in some cases, proposing limited solutions.[467]

To date, all such efforts have failed to effect change. There are several reasons for this: the continued stigmatization of overseas Americans,[468] multiple misunderstandings about the U.S. extraterritorial tax system and its high complexity,[469] and lack of political influence.[470]

The academic press is replete with theories about why overseas Americans should be subject to worldwide taxation by the United States.[471] It is important to look beyond those theories to acknowledge the full import, complexities, and consequences of the system in place today.

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461 *Supra* notes 16-20 and accompanying text.
462 *Supra* notes 76-124 and accompanying text.
463 *Supra* notes 40-75, 128-157 and accompanying text.
464 *Supra* notes 158-199 and accompanying text.
465 *Supra* notes 200-282 and accompanying text.
466 *Supra* notes 284-307 and accompanying text.
467 *Supra* notes 308-386 and accompanying text.
468 *Supra* notes 392-405 and accompanying text.
469 *Supra* notes 407-451 and accompanying text.
470 *Supra* notes 452-460 and accompanying text.
471 *Supra* notes 2-6 and accompanying text.