Winter 2010

The Constitutionality of the Taxation Consequences for Renouncing US Citizenship

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THE CONSTITUTIONALITY OF THE TAXATION CONSEQUENCES
FOR RENOUNCING U.S. CITIZENSHIP

by

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I. INTRODUCTION

U.S. citizens are held to a special taxation regime as a consequence for renouncing citizenship that is unique in the world and, this article will argue, unconstitutional. Originally, renunciation of citizenship was seen as the ultimate income tax reduction device, but this option has now lost much of its attractiveness as Congress has passed “exit tax” provisions that impose a tax liability on individuals who have renounced U.S. citizenship similar to that imposed on U.S. citizens.

This article will argue that, as it currently stands, the exit tax is not constitutional because it is not narrowly tailored to achieve a compelling government interest and must be judged at that standard because it infringes on the fundamental right to expatriate and discriminates based on national origin. Although it is not specifically stated in the Constitution, the fundamental right to expatriate oneself has been recognized and acknowledged for more than 100 years as such. Furthermore, it also satisfies other traditional bases for assessing fundamental rights, such as its nexus to the existing constitutional political rights and right to travel.

In addition to demanding strict scrutiny for infringing on a fundamental right, the exit tax also discriminates on the basis of national origin, in this case, U.S. national origin. Although the individual has expatriated and, under immigration law, falls into the general class of aliens, the government is making a classification between types of aliens for different tax treatment based on whether the person once had American nationality. Although national origin discrimination is often seen as a kind of ethnicity discrimination, this is not necessarily the case. National origin discrimination is treatment based on where a person is “from” and is broad enough to encompass a variety of measures of national origin, including both ethnicity and former nationality.

If we apply strict scrutiny to the expatriate tax provisions, examining the several justifications for the tax that have been advanced, we find that none of the potential justifications involve a compelling governmental interest, and moreover, the measure is not narrowly tailored to achieve any of them if they were.

II. EXPATRIATION UNDER IMMIGRATION LAW

We are, of course, not speaking about “expats” who are U.S. citizens that live abroad for an extended period without losing their citizenship. We are speaking about U.S. citizens who leave the U.S. to live abroad, take up another country’s citizenship, voluntarily renounce their U.S. citizenship, relinquish their U.S. passport, and no longer claim any benefit or protection from the U.S. The intentional loss of U.S. citizenship and nationality is usually termed “expatriation,” in contrast to situations in which citizenship is
revoked (usually based on fraud in the naturalization process), which is termed “denaturalization” or “revocation of citizenship.” 1 Every year anywhere from 300 to 400 individuals renounce U.S. citizenship. 2 From 1980 to 1994, the numbers of American giving up U.S. citizenship ranged from a low of 489 in 1988 to a high of 1,446 in 1981. 3 As per the requirements of U.S. law, the names of all individuals who renounce their U.S. citizenship are published each quarter in the Federal Register. 4

U.S. immigration law makes a fundamental distinction between citizens and aliens. A citizen is “a member of the political community, owing allegiance and being entitled to the enjoyment of full civil rights.” 5 Alienage is defined in the negative, i.e. “[t]he term ‘alien’ means any person not a citizen or national of the United States.” 6 There are no degrees of citizenship, nor are there degrees of alienage under the Immigration and


5. See Perkins v. Smith, 370 F. Supp. 134 (D.C. Md., 1974.); 7 For. Aff’rs Manual (hereinafter “FAM”) § 1203(1) (“Citizen” means a person who acquired U.S. citizenship at birth or upon naturalization as provided by law. All U.S. citizens are nationals of the United States”); 7 FAM § 1203(2) (“citizenship” is generally used rather than ‘nationality’ because the former is more widely understood. References to loss of U.S. citizenship also mean loss of nationality”). There is often some question of what a “national” is in this context as opposed to a “citizen.” Under U.S. immigration law, all U.S. citizens are nationals. See INA §§ 101(a)(21), (22)(A); Black’s Law Dictionary (8th ed., 2004) (“national of the United States. A citizen of the United States or a noncitizen who owes permanent allegiance to the United States”). There are a few individuals who are nationals but not citizens including persons born in American Samoa and Swains Island. See INA §§ 101(a)(21), (22)(B), 308; 7 FAM § 1203(8).

6. INA § 101(a)(3); Haitian Ctrs. Council, Inc. v. McNary, 969 F. 2d 1350 (2d Cir., 1992.); U.S. v. Cruikshank, 92 U.S. 542 (1875) (“[a]lienage … signifies a condition of not belonging to the nation. The allegiance required of non-citizens is temporary and consists of willingness to comply with the nation’s laws while residing in its territory”).
Nationality Act (hereinafter “INA”); a person must be one or the other entirely. Thus, upon expatriation an individual must be only an alien and retains no benefits of the former U.S. citizenship.

Renunciation of citizenship is accomplished by “voluntarily performing [one of the expatriating] acts with the intention of relinquishing United States nationality.” Those acts include obtaining naturalization in a foreign state; taking an oath to a foreign state; serving in the armed forces of a foreign state; accepting employment with a foreign government if one has or acquires the nationality of that foreign state or if a declaration of allegiance is required; conviction for an act of treason; or formally renouncing U.S. citizenship, either before a designated officer in the U.S. during wartime or a diplomatic or consular officer abroad anytime.

Of the several acts listed above, the most clear and unambiguous is making a sworn declaration of renunciation. Other acts are less clear in that

9. INA § 349(a)(1)-(7).
10. INA § 349(a)(1); but see 7 FAM § 1217.2(1)-(3), (7)-(8) (stating that “[m]arriage to an alien … [d]erivative naturalization in a foreign state … [a]cceptance of a nationality acquired automatically … [s]eeking or claiming the benefit of the nationality of a foreign state … [and] [r]esumption of foreign nationality” are “not by themselves indicative of intent to relinquish U.S. citizenship”).
11. See INA § 349(a)(2); but see 7 FAM § 1217.2(4) (stating that “[o]aths of allegiance” are “not by themselves indicative of intent”).
12. See INA § 349(a)(3)(A)-(B); but see 7 FAM § 1217.2(5) (stating that “[s]ervice in the armed forces of a foreign state” is not in itself “indicative of intent”).
13. See INA § 349(a)(4)(A)-(B); but see 7 FAM § 1217.2(6) (stating that “[s]ervice under the government of a foreign state” is not in itself “indicative of intent”).
14. See INA § 349(a)(7).
15. See INA § 349(a)(5)-(6).
16. See INA § 349(a)(5); 22 C.F.R. § 50.50(a) (2008); Kahane v. Sec’y of St., No. CIV.A. 88-3093, 700 F. Supp. 1162 (D.D.C., Dec. 6, 1988). Also see John C. Yoo, Dep’y Asst. Att’y Gen., Ofc. of Legal Counsel, Memo. Op. for the Solicitor Gen., Survey of the Law of Expatriation, n. 9 (Jun. 12, 2002) (hereinafter “Yoo, Expatriation Memo”) (citing Letter, Todd David Peterson, Dep’y Asst. Att’y Gen., Ofc. of Legal Counsel, to Catherine W. Brown, Asst. Legal Adv. for Consular Aff’rs, DOS, Re: Voluntary Expatriation of Puerto Rican Nationalists, at 3 (Oct. 31, 1997) (the renunciation statement is referred to as “Oath of Renunciation of the Nationality of the United States” and is accompanied by a “Statement of Understanding” noting that the expatriating citizen was informed that he will be an
they may potentially be performed involuntarily or without the specific intent to give up U.S. citizenship. The standard and burden of proof in voluntary expatriation cases is that the proponent of the expatriation must “establish such claim by a preponderance of the evidence.” Any doubts “are to be resolved in favor of citizenship.” If an individual makes a declaration of intent to preserve U.S. citizenship, even though performing one of the expatriating acts, the declaration is sufficient to preserve U.S. citizenship. The Department of State (hereinafter “DOS”) has accordingly promulgated an administrative presumption for adjudicating loss of citizenship cases that a U.S. citizen does not want to lose U.S. citizenship. Generally, the consul will simply ask the person who has committed the expatriating act if the act was done with the intent to renounce. If the individual states that there was no such intent, then this statement, combined with the presumption, will lead to the consul certifying that the person remains a citizen. If the person confirms that there was an intention to renounce, then the DOS must be satisfied that the presumption has otherwise been overcome. The consul will

17. See INA § 349(b) (providing that “any act of expatriating under the provisions of this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted”).

18. See id. (providing that “[w]henever the loss of United States nationality is put in issue … the burden shall be upon the person or party claiming that such loss occurred, to establish such claim”); Vance v. Terrazas; 444 U.S. 252, 264-8 (1980) (upholding preponderance of the evidence standard).


22. See 7 FAM §§ 1216(b) (discussing types of evidence that are useful to establish voluntary intent including “a detailed sworn statement”), 1217.3(e) (discussing completion of the “Information for Determination of U.S. Citizenship” questionnaire), 1218.2(b) (discussing the letter to the renouncing citizen permitting an interview).

23. See 7 FAM § 1217.3(e) (“If satisfied that the person lacked the intent to relinquish U.S. citizenship, the consular officer is authorized to find that loss of citizenship has not occurred”).
make a determination and, if necessary, forward a “Certificate of Loss of Nationality” (hereinafter “CLN”) to the DOS for consideration and a final decision. In making renunciation difficult for the government to prove, the U.S. has also made it difficult for the individual to prove his intent to renounce. For example, the DOS is generally reluctant to recognize renunciation if the individual does not have another citizenship. Nonetheless, if the consul is satisfied that the presumption has been overcome, the expatriation will be effective, even if the person is rendered stateless.

The last step in the administrative process of expatriation is receipt of the CLN by the individual. This certificate confirms that the renunciation was successfully accomplished and that the person is no longer regarded as a citizen. Although there is a time delay for processing and issuance of the CLN, the expatriation will be considered effective as of the date of the renouncing act, not receipt of the certificate. Although the processing is essentially ministerial, the DOS has in the past refused to issue a CLN, and thus to release an individual from citizenship. Many of these cases, however, were determinations that the statutory requirements for expatriation were not met. In other cases, the refusal was based on the U.S. mission simply not being able to believe that the person truly wanted to renounce.

24. See 7 FAM § 1211(a) (“When approved, the CLN is the Department’s administrative finding on loss of nationality. A copy of the approved CLN is forwarded to the Attorney General, and the diplomatic or consular officer sends a copy to the expatriate”).

25. See generally Davis v. Dist. Dir., 481 F. Supp. 1178 (renunciation of U.S. citizenship without a pre-existing dual citizenship, rendering person stateless, was nonetheless effective); but see John L.A. de Passalacqua, Voluntary Renunciation of United States Citizenship by Puerto Rican Nationals, 66 Rev. Jur. U.P.R. 269, n. 37 (1997) (noting that Davis was decided before the U.S. become a party to the International Covenant on Civil and Political Rights, infra).

26. See Davis, 481 F. Supp. at 1183 (finding that a U.S. citizen who renounces his citizenship is rendered an alien).

27. See INA § 358; 22 C.F.R. § 50.40(c) (2008). Also see Sherman Letter, supra note 21 (stating that DOS processing of CLN is approximately two weeks to six months); Michael S. Kirsch, The Tax Code as Nationality Law, 43 Harv. J. on Legis. 375 (Summer 2006).

28. See e.g. Lozada Colon v. U.S. DOS, Civ. Act. No. 97-1831, 2 F. Supp. 2d 43 (D.D.C., Apr. 23, 1998) (upholding the denial of the CLN because the person, a member of a Puerto Rican independence movement, did not wish to renounce Puerto Rican citizenship when he renounced U.S. citizenship, an untenable position given that the two citizenships are linked). Also see De Passalacqua, Voluntary Renunciation, supra note 25.

In either situation, the refusals did not deny the right to expatriate, but denied that the right had been exercised. What is not clear is whether the DOS would cooperate and issue a CLN if it believed that the citizen was actually or potentially wanted in the U.S. on criminal charges, for evading child support payments, or some similar issue.

Once expatriated, the former U.S. citizen becomes an alien. If the individual wishes to re-acquire U.S. citizenship, then he must apply for lawful permanent residence (a “green card”) and eventually naturalize just like any other alien. If the person wishes to merely visit the U.S., then the person, as an alien, must first receive a visa. Although some other countries may provide for special procedures and rights for individuals who formerly held their nationality, such as an accelerated process for re-acquisition of citizenship, the U.S. does not.

Far from being an obscure provision in immigration law, many U.S. citizens, including well-known individuals, have renounced their citizenship, for tax savings or other reasons. Examples of individuals who renounced U.S. citizenship include Henry James, Terry Gilliam, Bobby Fischer, Juan Mari Brás, Kenneth Nichols O’Keefe, and Vince Cate, as well as a number of wealthy business leaders.

U.S. consulate in Africa remembers an American woman who would come in every few months asking to turn her passport in. She was sent away’.

30. See Davis, 481 F. Supp. at 1183.
31. See generally INA § 204.
32. See generally INA § 310 et seq.
37. See Bryant Urstadt, Electing to Leave: A Reader’s Guide to Expatriating on November 3, Harper’s Mag. (Oct. 2004) (stating that the motivating intent for the ex-Marine was to serve as a “world citizen” human shield in Baghdad).
38. See e.g. Peter Wayner, Encryption Expert Says U.S. Laws Led to Renouncing of Citizenship, The N.Y. Times (Sep. 6, 1998) (stating that the
III. TAXATION OF ALIENS AND EXPATRIATES

The subject of this article is the constitutionality of the tax consequences that a person incurs when exercising their right to expatriate. Thus a brief overview of the U.S. tax system as applied to expatriates is necessary.

A. Residence and Source Taxation

There are two generally accepted bases for taxation in the international sphere: residence and source. Residence, as the term suggests, is the taxation of all income of the taxpayer by the sovereign over the place of the taxpayer’s residence. This theory emphasizes that income and increase in net worth are attributes of the individual, so the local sovereign has jurisdiction over that income as an aspect of having jurisdiction over the person. This theory also generally supports the ability-to-pay taxing method of progressive tax rates since the income is a personal attribute and the person is participating in the local sovereign in joint effort with his neighbors.

Source taxation places the taxing authority in the hands of the sovereign of the place where the income was earned. The theory looks to

motivating intent was to avoid laws applicable to U.S. citizens on the export of encryption software technology).


41. See Seligman Report, supra note 39 at 18 (stating that taxation is not an exchange of services but the contribution to the nation of ability); Edwin R.A. Seligman, Double Taxation and International Fiscal Cooperation (1928). Also see
the sovereign who protected the conditions allowing for the creation of income as the actor seeking compensation for the local regime, and taxes income arising and property located in its territory. Source theory is, however, less supportive of the progressive rates of taxation since the tax is more closely characterized as a fee for benefits and less of a contribution to a mutual governing endeavor.  

B. Worldwide Taxation of U.S. Citizens

Most countries, including the U.S., use a combination of taxation approaches, embracing both theories to limited degrees, despite any potential intellectual incoherence. In general, the U.S. has historically viewed source taxation as not a proper method of taxation because it was not based on the taxpayer’s ability to pay and improperly characterized U.S. taxes as a fee.
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for benefits. On the other hand, the justification of U.S. taxation has not been consistent and courts and commentators have often referred to an individual’s receipt of benefits as the justification for the imposition of tax, rather than the individual’s role in government.45

Rare among the world’s nations, the U.S. taxes the worldwide income of residents rather than only the income earned by residents locally or remitted to the nation, as most other states do.46 The U.S. also applies a combination of residence and source based taxation to tax the U.S.-source income of non-residents. Also fairly unique in the world, Congress has asserted the right to tax the worldwide income of citizens, including non-U.S.-source income even if those citizens do not reside in the U.S.47

45. See Cook, 265 U.S. at 55 (finding the power to tax “is based on the presumption that government by its very nature benefits the citizen and his property wherever found”); but see U.S. v. Rice, 17 U.S. (Wheat.) 246 (1819) (find that while U.S. territory was held by foreign military forces during the War of 1812, U.S. sovereignty over the territory was “suspended” and thus residents and property therein were not liable for U.S. taxes); U.S. v. Benitez Rexach, 558 F. 2d 37, 40 (1st Cir., June 20, 1977) (finding that “[s]ince the expatriate in fact received benefits of citizenship, the equities favor the imposition of federal income tax liability”); Benitez Rexach, 390 F. 2d 631 (finding that “Lucienne cannot be dunned for taxes to support the United States government during the years in which she was denied its protection”); Kirsch, Tax Code, supra note 27 (citing U.S. v. Bennett, 232 U.S. 299, 307 (1914) (“the power to tax [is] limited by the capacity of the taxing government to afford that benefit and protection which is the true basis of the right to tax,” … the Court has justified taxation of a citizen’s worldwide income regardless of residence because the federal government “by its very nature benefit[s] the citizen and his property wherever found””); Kenneth D. Heath, The Symmetries of Citizenship: Welfare, Expatriate Taxation, and Stakeholding, 13 Geo. Immigr. L.J. 533 (Summer 1999) (stating that most Americans “measure government services against their annual tax payments … if citizenship is irrelevant to receiving benefits, why consider it in the taxation of those seeking to avoid burdens?”).

46. See Cook, 265 U.S. 47; 26 C.F.R. § 1.1-1(b) (2008) (“in general, all citizens of the United States, wherever resident, and all resident alien individuals are liable to the income taxes imposed by the Code whether the income is received from sources within or without the United States”); The President’s Tax Proposals to the Congress for Fairness, Growth, and Simplicity 383 (May 1985) (stating that the “long standing position of the United States that, as the country of residence, it has the right to tax worldwide income is considered appropriate to promote tax neutrality in investment decisions”).

47. See Cook, 265 U.S. 47; 26 C.F.R. §§ 1.1-1(a), (b) (2008) (“In general, all citizens of the United States, wherever resident, and all resident alien individuals are liable to the income taxes imposed by the Code whether the income is received from sources within or without the United States”). Also see Colón, Changing, supra
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is one of only a select number of countries that asserts the right to tax non-source income earned by non-resident citizens. The only other counties that have asserted a similar right have been Eritrea and the Philippines. Despite this unique approach to taxation and virtual unanimity of nations on international taxation principles, there is no clear opinion on whether the U.S.’ tax scheme violates a norm of customary international law on the matter. This taxing scheme means that leaving the U.S. and renouncing U.S. citizenship would be the only effective method to escape taxation.

C. Taxation of U.S. Persons

The modern U.S. international taxing regime subjects all persons, citizen and alien alike, to essentially the same tax system, distinguishing between U.S. “persons” and non-U.S. persons, based on a combination of the immigration system and time physically present in the U.S. If a person is a U.S. citizen or has acquired a green card, then the person is per se a U.S. person, regardless of country of residence. A person who does not have U.S. citizenship or a green card may still be considered a U.S. person.


51. See Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920) (stating, “[t]he U.S.] can extend personal taxes to those over whom it has personal jurisdiction, compelling them to submit or move out”).

52. See IRC § 7701.

53. See IRC § 7701(b)(6) (A)-(B).
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depending on a calculation of his annual number of days of physical presence in the U.S.\footnote{See IRC § 7701(b)(1)(A)(i)-(iii), (3)(A); Schoneberger v. Comm’r, 74 T.C. 1016 (Tax Ct., Aug. 7, 1980); Croyle v. Comm’r, T.C. Memo. 1980-501 (Tax Ct., 1980); Marsh v. Comm’r, 68 T.C. 68 (Tax Ct., Apr. 25, 1977); Dillin v. Comm’r, 56 T.C. 228, 242 (Tax Ct., May 6, 1971).}

Based on the above rules, the advantage of expatriation for tax savings can be seen. The expatriate would no longer be subject to taxation based on citizenship and would be able to avoid qualifying as a U.S. person by properly limiting periods of presence in the U.S., just as any other alien would do. This person could then avoid taxation on worldwide income and instead be subjected only to U.S.-source taxation, and also possibly take advantage of lower tax rates on dividend and similar passive income.

\section*{D. Taxation of Expatriates}

Before the tax reforms of 1936, non-U.S. persons were taxed at the same rates as U.S. persons on U.S. source income,\footnote{See Revenue Act of 1934, §§ 211(a), 212, ch. 277, 48 Stat. 680, 735, 736; Comm’r v. Wodehouse, 337 U.S. 369, 380-1 (1949); Barba v. U.S., 2 Cl. Ct. 674 (Cl. Ct., Jun. 10, 1983).} so there was no advantage for a citizen to renounce. Today, to encourage foreign investment, non-U.S. persons are taxed at lower, more favorable, rates for investments in the U.S. than are U.S. persons, and thus there is now an incentive for a citizen to renounce in order to qualify for the lower rates.

Initially in interpreting the tax code, the courts found that once an individual expatriates, he becomes an alien, falling under the non-U.S. person tax regime, and, provided he did not otherwise qualify as a U.S. person, he was not subject to U.S. person tax rates.\footnote{See Dillin, 56 T.C. 228 (Tax Ct. May 6, 1971).} This interpretation held even if the person had performed services while a U.S. citizen but was only paid for the services after expatriation, paying much lower rates at that time.\footnote{See id.}

the modern concern with the expatriate tax problem has been traced to a series of articles in Forbes and other magazines detailing the quiet departures of some prominent, exceeding wealthy individuals, who clearly renounced their U.S. citizenship for that of more favorable taxing regimes.\textsuperscript{60} Forbes reported that 157 citizens expatriated in 1992, but, most likely due to the increase in tax rates, 306 people expatriated in 1993.\textsuperscript{61} Some of the individuals cited as examples were Michael Dingman (a director of Ford Motor company), John “Ippy” Dorrance III (the heir to Campbell Soup), J. Mark Mobius (the billionaire emerging market investment manager), Kenneth Dart (the billionaire heir to Dart Container), and Ted Arison (founder of Carnival Cruise Lines).\textsuperscript{62} Following the renewed attention to the expatriate tax regime, the rules have been subsequently modified several times to be more effective, most recently by the Health Insurance Portability and Accountability Act of 1996 (hereinafter “HIPAA”),\textsuperscript{63} the American Jobs Creation Act of 2004 (hereinafter “AJCA”),\textsuperscript{64} and the Heroes Earnings Assistance and Relief Tax Act of 2008 (hereinafter “HEART Act”).\textsuperscript{65}

The strengthened expatriation tax rules demand that a person who renounces U.S. citizenship continue to be subjected to the special expatriate tax regime for ten years, notwithstanding the fact that the person was now an alien, resided permanently abroad, perhaps never set foot in the U.S. during the tax year, and did not receive any protection or benefit from the U.S. other than U.S. source income. The expatriate tax regime requires the person to pay the higher amount rendered by either the special expatriate provisions or the regular U.S. person provisions\textsuperscript{67} on U.S. source income and income “effectively connected” with a U.S. trade or business.\textsuperscript{68} This regime

\textsuperscript{60} See e.g. Robert D. Hershey, Jr., Closing a Tax Loophole and Opening Another, The N.Y. Times (Jul. 10, 1995) at A1 (discussing legislative proposals to remedy expatriation problem); Editorial, Tax Refugees?, Wash. Times (Apr. 20, 1995) at A20 (arguing legislative proposals reveal “confiscatory levels of taxation in this country and the level of government coercion required to maintain them”); Michael Kinsley, Love It or Leave It, Time (Nov. 28, 1994) at 96 (comparing “taxpatriates” to draft dodgers); Brigid McMenamin, Flight Capital: Avoiding U.S. Taxes by Renouncing Citizenship, 153(5) Forbes 55(2) (Feb. 28, 1994).


\textsuperscript{62} See Lenzner & Mao, New Refugees, supra note 61. Also see Laurie P. Cohen, Kenneth Dart Forsakes U.S. for Belize, Wall St. J. (Mar. 28, 1994) at C1.


\textsuperscript{66} See generally IRC § 877.

\textsuperscript{67} See generally IRC § 871.

\textsuperscript{68} See Kirsch, Tax Code, supra note 27.
essentially results in taxes being imposed to a higher degree on investment portfolio income, interest, and capital gains from U.S. stocks and bonds. It also imposes an estate tax on the expatriate’s U.S.-situs assets and a gift tax on U.S.-situs intangible property.


Until HIPAA, not all expatriates were caught in the expatriate tax system, only those whose “principle purpose” in renouncing citizenship was to avoid taxation. Under HIPAA, the test for determining whether a person had the intent to avoid taxation when expatriating was modified to significantly benefit the Internal Revenue Service. Wealthy persons were presumed to have the intent to avoid taxes based on either their average annual income tax or their net worth, so if the person meets either of these tests, then the burden of proving contrary intent was on the expatriate. In addition, even people who were not wealthy were still caught in the expatriate tax as long as tax savings was one of the expatriate’s motivations, although in those cases, the IRS did not benefit from shifting the burden to the taxpayer. These provisions were passed despite some concerns expressed by the Ways and Means Committee of the House of Representatives that

69. See id.
70. A higher rate than would be imposed under IRC §871(h).
71. Gains that are not taxed for non-resident aliens under IRC §§865, 871(a)(2).
72. See IRC §2107(b) (imposing tax on gains that are exempt from tax for non-resident aliens, see IRC §§2101, 2104, 2105).
73. See IRC § 2501(a)(3) (imposing tax on gains that are exempt from tax for non-resident aliens, see IRC §2501(a)(2)).
75. See 110 Stat. 2093; IRC §877. Also see Furstenberg v. Comm’r, 83 T.C. No. 43, 83 T.C. 755 (Tax Ct., Nov. 26, 1984).
76. See 110 Stat. 2093.
77. See IRC §877(a)(2); Jerry R. Dagarella, Comment, Wealthy Americans Planning to Renounce Their Citizenship to Save on Taxes Have a New Problem to Consider: This Time Congress Means Business, 13 Transnat’l Law. 363 (Fall 2000) (noting the current cost of living adjustments).
78. See IRC § 877; Dagarella, Wealthy Americans, supra note 76; Newman, Taxing Issue, supra note 29 (describing the difficulty of one taxpayer’s attempt to prove sufficiently strong ties to his country of citizenship, requiring at a minimum U.S. and translated foreign income tax returns for the following three years, proposed U.S. and foreign estate returns contemplating death on the date of expatriation, and a listing of proposed gifts for the following ten years, amounting to a legal tax preparation fee of at least $10,000).
they inappropriately impeded the exercise of the right to expatriate. The existence and nature of the right to expatriate will be discussed in greater detail below.

The expatriate could rebut the presumption of tax avoidance if the person was a dual citizen, under 18½ years of age, or suffering from involuntary denaturalization. If the person argued dual citizenship, then the dual citizenship must have resulted from birth or by naturalization within a reasonable period in the same state where the individual was born, the state of his or her spouse’s nationality, or the state where his or her parents were born. In addition, the expatriate had to request a revenue ruling from the IRS on their particular case within one year of the expatriation to benefit.

In addition to the above, HIPAA extending the applicability of look-through provisions for estate taxes to gift taxes. This provision means that if an expatriate makes a gift of stock of a controlled non-U.S. company that owns U.S.-situs assets, the gift tax will be imposed by the U.S. to cover the portion of the gift involving U.S. situs assets.

2. American Jobs Creation Act of 2004

By 2004 the IRS admitted that found it exceeding difficult to make the individualized revenue ruling determinations of expatriate tax motivation that were required under the Internal Revenue Code (hereinafter “IRC”) despite the presumption and burden shifting in its favor. In addition, the IRS was also finding it difficult to cope with the number of requested revenue rulings. Congress as well was dissatisfied with the ineffectiveness

80. See IRC § 877(c)(1)(B).
81. See IRC § 877(c)(2)(A)(i).
82. See IRC § 877(c)(2)(C).
83. Involuntary expatriation will not be discussed in this article, and is debatable whether it even exists any longer under the Constitution. See e.g. Afroyim v. Rusk, 387 U.S. 253 (1967).
84. See IRC § 877(c)(2)(A)(i).
85. See IRC § 877(c)(2)(A)(ii).
86. See Dagrella, Wealthy Americans, supra note 76.
87. See id.
88. See IRC §2107(b).
89. See IRC §2501(a)(5).
90. See Newman, Taxing Issue, supra note 29 (“the inherently factual and subjective nature of the inquiry” made it too difficult).
of the scheme, so it ordered an in-depth report on the matter by the House, and subsequently passed the AJCA, based on the findings of the report. This act changed the determination of intent from a subjective to an objective test, and shifted the burden further from the IRS to the taxpayer.

An expatriate will now be taxed under the higher expatriate regime regardless of intent as long as the person is “wealthy.” Wealthy persons are taxpayers with either (1) an average tax of $124,000 for last 5 years, or (2) a net worth of $2 million. An expatriate, even one who does have a tax motivation for expatriation, will no longer be taxed under the expatriate rules if he is not wealthy. However, conversely, a wealthy expatriate who acted in ignorance of the tax savings will be taxed under the expatriate rules, regardless of intent. The option to request a revenue ruling to relieve the expatriate from taxation has now been eliminated. Also, although under U.S. immigration and naturalization law, citizenship is terminated on the date of the expatriating act, under tax law, taxation as a U.S. person will continue until the DOS issues the CLN, resulting in a period of time during which the taxpayer is an alien, but is taxed identically to a U.S. citizen.

The expatriate can now only escape the tax if one of two exceptions apply: either (1) the individual was a dual citizen at birth and has not had substantial contacts with the U.S., was never resident in the U.S., and never held a U.S. passport; or (2) the individual is under the age of 18 ½ years, still a minor, was merely a U.S. citizen by birth, and neither parent was a U.S. citizen at the time of the child’s birth. In order for either of these two exceptions to apply, the individual must document to the IRS that the person has been in full compliance with any other provisions of the IRC during the preceding five years and may not have been present in the U.S.

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92. See Dagarella, Wealthy Americans, supra note 76.
93. See JCT Report, supra note 3.
95. See Kirsch, Tax Code, supra note 27.
96. See id.
97. See IRC § 877(a)(2) (providing for an annual cost of living adjustment thereafter).
98. See id. (however, the net worth measure does not benefit from an annual cost of living adjustment).
99. See IRC § 877(a)(1).
100 See id.
102. See IRC § 877(c)(2)(B).
103. See IRC § 877(c)(3).
104. See IRC § 877(a)(2)(C).
for more than thirty days during any of the ten calendar years preceding expatriation.\textsuperscript{105}

Lastly, the above benefit will be lost and the expatriate may face a penalty of $1,000 per year (or the greater of 5% of the amount of tax owed) if the expatriate fails to file IRS Form 8854, “Expatriation Information Statement” (sometimes known as an “IRC section 6039G” statement) every year for ten years following expatriation,\textsuperscript{106} which includes, among other information: income, assets, liabilities, number of days physically present in U.S. during tax year, and “[a]ny other information the Secretary prescribes.”\textsuperscript{107} In addition to the delay in receipt of the CLN, the expatriation is also not considered effective for tax purposes until the expatriate notifies the Secretary of State or Homeland Security and files his first IRC section 6039G statement.\textsuperscript{108} Of course, filing this statement provides the IRS with notice to conduct an audit.\textsuperscript{109}

In addition, if the expatriate is present in the U.S. for thirty days in any one year, the person will be treated “for purposes of [taxation] as a citizen or resident of the United States,” and taxed as a U.S. person on all worldwide income,\textsuperscript{110} but will not consequently be considered a de facto citizen or green card holder under any other provision of law. Presumably, this provision will be interpreted to also treat the individual as a resident alien for estate and gift taxes. This is a significant change since U.S. tax laws have never previously sought to tax a non-resident alien’s worldwide income, including all income derived from foreign sources or assets located in foreign jurisdictions. How the U.S. plans to effectively enforce such a broad tax power extraterritorially, very much at odds with the practice of any other country, remains unclear.

3. Heroes Earnings Assistance and Relief Tax Act of 2008

Lastly, Congress recently passed the HEART Act that further amends the expatriate tax provisions of IRC § 877 to provide for a true “mark-to-market” tax on citizens renouncing citizenship.\textsuperscript{111} This tax scheme means that expatriates must pay tax, at income tax rates, on all unrealized gains that exceeds $600,000 (indexed for inflation) on their worldwide

\textsuperscript{105}See IRC § 877(g)(1).
\textsuperscript{106}See IRC § 6039G(c).
\textsuperscript{107}See id.
\textsuperscript{108}See id.
\textsuperscript{109}See Westin, Expatriation, supra note 2.
\textsuperscript{110}See IRC § 877(g)(1).
\textsuperscript{111}See HEART Act § 301 codified at IRC § 877A (2008).
assets.\textsuperscript{112} In order for this additional tax rule to apply, the person must be wealthy in the sense established by the AJCA: that he (1) has a certain average annual net income tax liability for the five-year prior to expatriation;\textsuperscript{113} or (2) net worth of at least $2 million as of the date of expatriation.\textsuperscript{114} Anyone who fails to certify that he has complied with all tax obligations in the prior five years, or certifies but fails to document such compliance, will also be held subject to the tax.\textsuperscript{115}

In addition, the new tax rules also provide for the taxation of distributions from certain retirement plans to expatriates whenever they are taken, not limited to ten years following the expatriating act.\textsuperscript{116} The entity distributing the payment must withhold tax at a 30\% rate to any expatriate payee\textsuperscript{117} and it must also follow the standard withholdings required for payment to any non-resident alien individual.\textsuperscript{118} Individual retirement accounts, however, are subjected to the mark-to-market system and tax is not postponed until distribution.\textsuperscript{119}

The individual may escape the mark-to-market tax if he has been a dual citizen since birth, continues to retain that other citizenship, is taxed as a resident of that other nation, and has been a resident of the U.S. for ten or fewer years during the fifteen years preceding the expatriating act;\textsuperscript{120} or the individual expatriates himself prior to the age of 18 \( \frac{1}{2} \) and has been a resident of the U.S. for ten or fewer years preceding the expatriating act.\textsuperscript{121} It should be observed that this standard is slightly different from that established by the AJCA.\textsuperscript{122}

4. Exclusion from the U.S.

Lastly, although not a taxation provision, one other major penalty is levied on an expatriate that deserves mention. Tax-motivated expatriates are

\begin{itemize}
\item \textsuperscript{112} See IRC § 877A(a)(3)(A)-(B). Also see IRC § 877A(h)(2) (providing that long-term permanent residents who fall under the expatriation rules receive a stepped-up basis equivalent to the fair market value of the asset on the date of acquisition of permanent residency rather than the date of purchase).
\item \textsuperscript{113} See IRC §§ 877A(g)(1), 877(a)(2) (initially establishing the amount as $124,000, but as of 2008 it is now $139,000 and continues to be indexed for inflation).
\item \textsuperscript{114} See IRC §§ 877A(g)(1), 877(a)(2).
\item \textsuperscript{115} See IRC § 877A.
\item \textsuperscript{116} See IRC § 877A.
\item \textsuperscript{117} See IRC § 877A(d)(1)(A).
\item \textsuperscript{118} See IRC § 877A.
\item \textsuperscript{119} See IRC § 877A(d)(6)(C)(e).
\item \textsuperscript{120} See IRC § 877A(g)(1)(B)(i).
\item \textsuperscript{121} See IRC § 877A(g)(1)(B)(ii).
\item \textsuperscript{122} See IRC §§ 877(c)(2)(B), (3).
\end{itemize}
barred from entering the U.S. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter “IIRAIRA”) which provided that former U.S. citizens who renounced citizenship after September 30, 1996 with the intent of avoiding taxation must be excluded from the U.S. They would not be eligible to receive a visa and may not otherwise be admitted (although there is a discretionary waiver available). All routine visa applications at U.S. Embassies and Consulates now require a written response to a question whether the applicant has ever renounced U.S. citizenship for tax reasons. That being said, the Department of Homeland Security (hereinafter “DHS”) and DOS have not yet promulgated regulations to implement this rule and may not even be enforcing it at this time. When they do, it is unclear what standards they will apply to judge intent, especially since this law is independent of the change in IRS rules that abolished the subjective intent requirement. Moreover, regardless of the whether the expatriate complies with the expatriate tax and pays the liability, that act has no effect on the exclusion provision; the person may continue to be excluded even if the liability is fully satisfied. However, it is difficult to understand how the system recently developed by the IRS and DHS to share information about tax-motivated expatriation is lawful when tax records may not be shared by the IRS with any person or other government agency.

123. See INA § 212(a)(10)(E).
125. See INA § 212(a)(10)(E).
127. See Newman, Taxing Issue, supra note 29 (“Nor has the INS managed to write rules to enforce the immigration law. In prickly consultations with the State Department and the IRS, nobody can agree on the precise mechanics of an ‘official’ renunciation … For now … it is probably still safe for expatriated un-Americans to enter their forsaken land”).
128. See Newman, Taxing Issue, supra note 29 (“Even if they chip in all the taxes the IRS says they owe, the law allows the INS to banish them anyway”).
129. See Westin, Expatriation, supra note 2 (citing U.S. Treasury Department Examines Income Tax Compliance by Citizens Living Abroad, 98 Tax Notes Int’l 88-23 (1998)).
130. See Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2005 § 5512, H.R. 3 (providing statutory authority for sharing tax records to enforce expatriate inadmissibility); Newman, Taxing Issue, supra note 29 (“And nobody knows how Congress could have given the INS the enormous power to brand people who give up U.S. citizenship as tax dodgers and banish them – without appeal – when the IRS can’t legally let other agencies snoop through anybody’s tax returns”).
IV. CONSTITUTIONALITY OF THE EXPATRIATION TAXATION REGIME

In examining the constitutionality of the expatriate tax this article will argue that it must be subjected to strict scrutiny based on two substantive due process grounds: (1) infringement of a fundamental right and (2) discrimination on the basis of national origin. Once triggering strict scrutiny, this article will secondly argue that there are no compelling government interests and that the law is not narrowly tailored to achieve any interests that are arguably compelling.

A. Substantive Due Process

The 5th Amendment provides that “[n]o person shall be ... deprived of life, liberty, or property without due process of law” and incorporates a substantive aspect to “bar certain government actions regardless of the fairness of the procedures used to implement them” in order to “[prohibit government] restraints on liberty that are arbitrary and purposeless.” As such, fundamental rights to life, liberty or property are protected.

Of the many fundamental rights protected by the 5th Amendment, one right in particular is so significant that it demands separate consideration: the right to equal protection of the laws. The 5th Amendment itself has no guarantee of equal protection; that protection lies in the 14th Amendment, which states, “[n]o State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Initially the 14th Amendment only applied to the states, but the Supreme Court later found that the 5th Amendment, as applied to the federal government, includes a concept of equal protection similar to that in the 14th Amendment.

131. U.S. Const. Amend. V.
136. See Lewis v. U.S., 445 U.S. 55 (1980); Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976); Buckley v. Valeo, 424 U.S. 1 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n. 2 (1975) (“This court’s approach to 5th Amendment equal protection claims has always been precisely the same as to equal protection claims under the 14th Amendment”); Schneider v. Rusk, 377 U.S. 163,
Accordingly, the protections of the 5th Amendment resemble the protections of the Fourteenth and today “the guarantees of the fourteen and fifth are highly similar,”\textsuperscript{137} despite their different sources in the text. Thus, one of the most important fundamental rights that the 5th Amendment now protects includes the freedom from arbitrary and invidious discriminatory classification by the federal government.\textsuperscript{138}

As a threshold matter to being a right protected by the 5th Amendment, there must be a deprivation of life, or a recognized liberty or property interest, within the terms of the Constitution, to give rise to a claim.\textsuperscript{139} The tax consequences of expatriation encompass both liberty and property interests. A property interest in that the individual is subjected to taxation.\textsuperscript{140} A liberty interest as well in that the taxation may chill the exercise of the fundamental right of expatriation.\textsuperscript{141} Therefore, an analysis of protection by the 5th Amendment is appropriate.

\textbf{B. Substantive Due Process and Tax Laws}

Even though an exercise of the taxation power, taxation provisions must still satisfy substantive due process. Although initially equal protection was not thought to apply to tax legislation,\textsuperscript{142} that view has changed and

\begin{itemize}
  \item \textsuperscript{137} Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Mow Sun Wong, 426 U.S. 88; Buckley, 424 U.S. at 93; Weinberger, 420 U.S. at 638, n. 2.
  \item \textsuperscript{138} See Bolling, 347 U.S. at 499-500 (1954) (finding that “[the] Court has recognized, discrimination may be so unjustifiable as to be violative of due process”).
  \item \textsuperscript{140} See Mathews v. Eldridge, 424 U.S. 319 (1976).
  \item \textsuperscript{141} See Regents v. Roth, 408 U.S. at 572 (“’liberty’ … include[s] ‘the right of the individual to contract, to engage in any of the common occupations of life, … and generally to enjoy those privileges long recognized … as essential to the orderly pursuit of happiness by free men’); Bolling, 347 U.S. at 499 (“Liberty … is ‘not confined to mere freedom from bodily restraint,’ but ‘extends to the full range of conduct which the individual is free to pursue’”); Scott v. Kewaskum, 786 F. 2d 338, 340 (7th Cir. 1986) (finding that, in general, liberty interests are those “human abilities that do not depend on the government … The due process clauses are designed to establish regular procedures for governmental intervention in private affairs, and so the claim to process is at its strongest when a person simply wishes to go about life – be it personal or economic life – without encountering the prohibition of the state”).
  \item \textsuperscript{142} See e.g. Davidson v. New Orleans, 96 U.S. 97 (1878).
\end{itemize}
today there is no special exception. “The taxing power of Congress … is exhaustive and embraces every conceivable power of taxation;” however, that power is subject to the limits imposed by the Constitution, such as due process and equal protection. Nonetheless, the court will still give Congress wide latitude to make classifications so those laws are generally held only to the rational review standard.

Under the rational review standard, the individual has the burden of challenging the law, which will be upheld if there is any reasonable set of facts that could show that the measure is based on a legitimate governmental objective and has a rational relation between the law and that objective. Since laws are generally upheld under this standard, complaints about tax treatment are usually best made through the political branches. In fact, no legislation on economic issues has been found violative of the due process since 1937 when the Supreme Court began to be far more deferential to Congress. As a result very few tax laws have been stricken due to substantive due process concerns. The court has upheld the graduated income

143. See e.g. Bell's Gap RR Co. v. Penn., 134 U.S. 232, 237 (1890). Also see Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates and Gifts, ¶ 1.2.1 (3d ed., 1999) (“Like all other federal powers, the right of Congress to levy and collect taxes is subject to a wide range of constitutional limits, including the due process clause”); Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law, Substance and Procedure § 5.2 (3d ed., 1999).


145. See Travis v. Yale & Towne Mfg. Co., 252 U.S. at 75 (“The only constitutional questions that ordinarily arise in respect to modern taxation are (1) those of the situs of intangibles, (2) those of the equal application of taxing statutes under Art. IV of Constitution and the 14th Amendment, and (3) those of due process of law”); Lunding v. N.Y. Tax Appls. Trib., 522 U.S. 287, 287 (1998).


148. See Hodel, 452 U.S. at 331.


150. See U.S. v. Carlton, 512 U.S. 26, 34 (1994) (noting that pre-1937 cases were decided during an era characterized by exacting review of economic legislation that “has long since been discarded”); Helvering v. City Bank Farmers Trust Co., 296 U.S. 85 (1935) (applying a test of whether the tax was “unreasonably harsh or oppressive” or “arbitrary”).
tax, higher discriminatory taxes on similar goods, services, and products, discriminatory taxes between juridical and natural persons, and certain discriminatory taxes between foreign and domestic corporations and between foreign and domestic products. However, it is important to note that none of these tax laws, although measured against equal protection, required strict scrutiny analysis to satisfy due process.

C. Strict Scrutiny

Notwithstanding the above, tax laws may be judged by strict scrutiny when they interfere with a fundamental right or make a suspect classification. The degree to which a court will scrutinize governmental measures depends on the degree to which the particular interest is protected. As noted above, the general rule is that legislation is presumed to be valid and will be sustained if it has a rational basis; however, if the...
law infringes on a fundamental right or makes a suspect classification then the Court will apply strict scrutiny.

If a measure is held to strict scrutiny, then the government has the burden of showing that the measure is based on a compelling and overriding governmental objective and is narrow tailored to achieve that objective. A measure held to this level of scrutiny will usually, but not always, fail because it does not accord due process of law.

Some tax laws have been stricken due to equal protection concerns. For example, the Supreme Court has stricken higher insurance premiums on non-resident businesses, tax rebates to residents based on length of residence, and unequal tax assessments. All of these provisions were held to violate the Constitution primarily because they required strict scrutiny and could not survive that scrutiny. In particular, the equal protection clause has been held to prohibit taxation discriminating against foreign corporations for ad valorem taxation, property tax exemption for foreign nonprofit organizations, regulatory taxation of insurance

161. See Plyer, 457 U.S. at 217; Shapiro, 394 U.S. at 627.
162. But see U.S. v. Salerno, 481 U.S. 739, 748 (1987) (finding that governmental interest in community safety outweighed individual liberty interest); Roe v. Wade, 410 U.S. 113, 164-5 (1973) (finding that the right was not absolute and must be weighed against the governmental interest in protecting unborn life); Korematsu v. U.S., 323 U.S. 214 (1944) (finding that the measure survived strict scrutiny).
167. See WHYY v. Glassboro, 393 U.S. 117 (1968) (finding that the denial of the exemption merely on the basis that the corporation was foreign was unconstitutional).
companies, and, most importantly in this context, certain aspects of the income tax.

Taxpayers have previously attempted to challenge the expatriate tax provisions on the basis of equal protection and lost. For example, in *Di Portanova v. U.S.*, the Court of Claims judged the provisions using the rational basis standard and found that the “[p]laintiff has not shown why Congress may also not draw reasonable distinctions between various classes of nonresident aliens.” Unfortunately the taxpayer did not specifically allege a fundamental right or protection from national origin discrimination, and thus did not effectively claim a ground that demands strict scrutiny. Failing to invoke strict scrutiny, the Court did not apply it *sua sponte*. Since the claim for strict scrutiny was never seriously pursued, the precedent value of this case is limited only to a finding that the tax satisfies the rational basis test for equal protection.

**D. Fundamental Rights**

Of the two bases for invoking strict scrutiny, we will first address the infringement of a fundamental right to life, liberty, or property. The first, and most significant issue, therefore, is whether there is a fundamental right to expatriate. There are several bases on which a particular right might be considered fundamental: (1) rights explicitly recognized in the Constitutional text; (2) rights not mentioned in the Constitution but closely linked to or arising from other specific Constitutional rights; or (3) extra-Constitutional rights, not mentioned in the Constitution, but deeply rooted in society or necessary for ordered liberty.

1. **Explicit Constitutional Rights**

The Supreme Court has stated that fundamental rights arise where the Constitutional text explicitly guarantees the right. Examples of explicit Constitutional rights abound, but to any casual reader of the Constitution, it is clear that the right to expatriate is not specifically listed. However, the

171. See id.
Court has affirmed that rights closely linked to constitutional rights or extra-Constitutional rights deeply rooted in society, may also be fundamental.

2. Rights Closely Linked to Explicit Constitutional Rights

The court has found fundamental rights not listed in the Constitution but which have a nexus to or impliedly arise from other Constitutional rights. In *Griswold v. Connecticut*, Justice Goldberg argued that the 9th and 10th Amendments clearly contemplated other equally fundamental rights even though not specifically listed so that the definition of fundamental rights should not be limited to the Constitutional text itself.\(^{174}\)

The right to vote “on an equal basis with other citizens in the jurisdiction” is not explicitly guaranteed by the Constitution; however, it has been considered a fundamental right.\(^{175}\) The right is fundamental when it is a “political right, preservative of all rights.”\(^{176}\) The reason that this right is considered fundamental is that it is a device that protects other fundamental rights by granting individuals a degree of control over the government.\(^{177}\)

The right to submit oneself as a candidate for political office has also been considered fundamental, although only in two situations: (a) barring new political parties from the ballot\(^{178}\) and (b) candidate filing fees that cannot be waived.\(^{179}\) One of the reasons cited by the Supreme Court why this right is so closely guarded is that “[o]ften, it is the only means for individuals or private entities to influence the political process in any meaningful way.”\(^{180}\)

The right to renounce citizenship has long been considered the ultimate method to guard and preserve one’s liberty (to “vote with one’s feet”) and as such resembles the above-mentioned political rights. As argued by Alice Abreu, U.S. citizens must have the opportunity to assess the value

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\(^{174}\) See *Griswold v. Conn.*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring) (“The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments”); *Plyler v Doe*, 457 U.S. at 202, n.14.


\(^{176}\) *Plyer*, 457 U.S. at 202, n. 14; *Harper*, 383 U.S. at 667 (finding that the right is the “guardian of all other rights”); *Reynolds*, 377 U.S. at 562.


\(^{178}\) See *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).


of their citizenship and expatriate if the balance is not favorable.\textsuperscript{181} The threat of citizens abandoning the country, perhaps in protest to tax rates or other complaints, may be a way to influence political choices being made and grant individuals control over the government that governs them.\textsuperscript{182} Imposing a continuing taxation relationship disarms the threat to a degree and thus reduces this method of influencing the political process. Accordingly, it satisfies one of the same justifications for protecting the right to vote and submit oneself as a candidate. Since the right to expatriate may function as preservative of all rights in this context, it should have at least the same protection as these other two rights.

3. Extra-Constitutional Rights

In addition to the above, certain rights may also be considered fundamental if they “are, objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”\textsuperscript{183} For example, some courts, that do not find the right to privacy arising from the combined effect of several of the Constitution’s provisions, find the right arising from its historic protection. Perhaps to overcompensate for what it perceives as a too hasty expansion of fundamental rights, the Supreme Court now appears less willing to embrace newly discovered ones,\textsuperscript{184} but it is not foreclosed.

\textsuperscript{181} See Alice G. Abreu, Taxing Exits, 29 U.C. Davis L. Rev. 1087, 1158 (1996).

\textsuperscript{182} See Heath, Symmetries, supra note 45 (noting that “exit is also a political choice”).


\textsuperscript{184} See Rodriguez, 411 U.S. 1 (finding that even very important rights with a clear nexus to Constitutional rights are not sufficient to invoke strict scrutiny unless the right is explicitly or implicitly guaranteed by the Constitution).
The Constitutionality of the Taxation Consequences

i. Rights Deeply Rooted in the Nation’s History

Whether a right is “deeply rooted” requires reading American history and public mores, an inherently delicate task with a variety of perspectives. For example, Justice Scalia argues that fundamental rights are those rights that have been historically protected within the Anglo-American common law tradition.\footnote{185} There is a presumption that “[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the 14th Amendment to affect it.”\footnote{186} There is an even stronger presumption for rights that are “older than the Bill of Rights – older than our political parties.”\footnote{187}

But the test is not purely historical. It is also a matter of how firm the right is in the public conscience. In his concurrence in \textit{Griswold}, Justice Goldberg explained that fundamental rights are not “personal and private notions.”\footnote{188} The rights are not purely historical but are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”\footnote{189}

Privacy in marriage,\footnote{190} procreation,\footnote{191} family planning and relationships,\footnote{192}

\begin{itemize}
\item \textit{Loving v. Va.}, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness").
\item \textit{Bowers v. Okl.}, 478 U.S. at 190-1, 312, 541; Moore, 431 U.S. at 503 ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition"); \textit{Weinberger v. Salvi}, 422 U.S. 749 (1975); \textit{Roe}, 410 U.S. at 152 (noting that the right to privacy is fundamental even though not explicitly mentioned in the Constitution); \textit{Weber v. Aetna Casualty & Surety Co.}, 406 U.S. 164, 169 (1972); \textit{Stanley v. Ill.}, 405 U.S. 645, 651 (1972); \textit{Levy v. La.}, 391 U.S. 68, 71 (1968); \textit{Griswold}, 381 U.S. 479; \textit{May v. Anderson}, 345 U.S. 528, 533 (1953); \textit{Skinner}, 316 U.S. at 536, 541 (finding “[r]ights far more precious . . . than property rights” including the right to produce offspring); \textit{Meyer v. Neb.}, 262 U.S. 390, 399 (1923) (recognizing the “basic civil rights of man”); \textit{Maynard v. Hill}, 125 U.S. 190, 205 (1888) (finding marriage is a fundamental right, “the most important relation in life” and “the foundation of the family and of society, without which there would be neither civilization nor progress”)
\end{itemize}
and child rearing\(^{193}\) are considered fundamental rights partly because they are “fundamental to the very existence and survival of the race”\(^{194}\) and “intimate to the degree of being sacred”\(^{195}\) (in *Baker* the court cited the Bible as supportive of the right as fundamental\(^{196}\), not simply because they have been practiced throughout recorded history. Based on this, the Supreme Court has stricken a statute that prohibits marriage when one party is not currently complying with a child support order\(^{197}\) and another that requires sterilization of habitual criminals.\(^{198}\)

The right to “travel,” or what is usually referred to as the right to change residence from one state to another within the U.S., is also a fundamental right whose “source … has never been ascribed to any particular constitutional provision,”\(^{199}\) but has a long history.\(^{200}\) That said, the decisions finding the right to be fundamental did not necessarily rest on a purely historical test.\(^{201}\) One basis for protecting the right is that it creates two classes of individuals, those with long-term residency in a state and those with short-term residency in a state.\(^{202}\) This right to travel has also been

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193. See Prince v. Mass., 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder”); Pierce v. Soc’y of Sisters, 268 U.S. 510, 534-5 (1925) (finding that raising and directing the education of one’s children is a fundamental right); Meyer, 262 U.S. at 399 (finding that directing a household and raising children are fundamental rights).
194. Skinner, 316 U.S. at 541.
198. See Skinner, 316 U.S. at 541.
201. See Shapiro, 394 U.S. 618; Edwards, 314 U.S. 160.
202. See Shapiro, 394 U.S. at 629–31, 638; Guest, 383 U.S. at 757-8 (1966) (“[t]he constitutional right to travel from one state to another … occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized … [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution).
subsequently expanded to cover the right to travel abroad generally, although not necessarily travel to any particular country.

Even though history alone cannot make a practice a fundamental right, a lack of history may undermine the existence of the right. As examples, the American tradition of rejecting and criminalizing homosexual conduct was cited as a basis for denying sodomy as a fundamental right and the traditional prohibition against suicide was sufficient to support the argument that ending one’s own life was also not a fundamental right.

### ii. Expatriation is Deeply Rooted in the Nation’s History

The right to expatriate has a considerable history of being honored in the U.S. Admittedly, at the beginning of the Republic, many lawmakers adhered to the English common law doctrine that allegiance was permanent, unless the sovereign consented to release a person. Some early U.S. courts decided cases on this basis and these cases have lead many commentators to conclude that there was no debate on the matter in early American history, when in fact this was not true. Even prior to independence, the British Colonies questioned “perpetual allegiance” that was practiced in England as being applicable to the colonies. Although no resolution in the

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204. See Bowers, 478 U.S. at 191-4, 205 (finding that “[o]nly the most willful blindness could obscure the fact that sexual intimacy is ‘a sensitive, key relationship of human existence, central to family life, community welfare, and the development of a human personality’”).
205. See Glucksberg, 521 U.S. 702.
207. See e.g. Williams’ Case, No. 17, 708, 29 Cas. 1330 (C.C.D. Conn. 1799) (finding that citizen could not expatriate without the consent of the country). Also see Perez v. Brownell, 356 U.S. 44, 67 (1958) (finding that “[t]he common-law doctrine of perpetual allegiance [is] evident in the opinions of this court”); Mackenzie v. Hare, 239 U.S. 299, 308 (1915) (recognizing the perpetual allegiance rule in English common law).
208. See Dagrella, Wealthy Americans, supra note 76; Peter Spiro, Dual Nationality and the Meaning of Citizenship, 46 Emory L.J. 1411, 1426 (1997) (stating that early American reluctance to challenge perpetual allegiance was an aspect of its weak international position in the world).
209. See M’Ilvane v. Coxe’s Lessee, 8 U.S. 279, 281, 286-7 (1804) (“[The right of emigration] is positively affirmed by the constitutions of some of the states, viz., Pennsylvania, Kentucky and Vermont, and by an act of assembly in Virginia”). Also see Westin, Expatriation, supra note 2; William Blackstone, Commentaries on the Law 154-5 (1941).
early Congress was ever passed specifically proving for expatriation, there were multiple proposals to do so in the early assemblies, and debate on the matter in Congress as early as 1794. Prominent proponents of the right included Thomas Jefferson and James Madison. In fact, some courts have considered the Declaration of Independence to be a national expatriating act. The Supreme Court has argued that it was the prohibition against expatriation and emigration to the Colonies that contributed to the need for the Declaration of Independence. Some authors have gone so far as to say that “[b]y the outbreak of the Civil War it was widely accepted in the United States that the doctrine of perpetual allegiance was not only an anachronism but also inimical to the interests of the United States.”

Additionally, from its earliest days, the U.S. recognized the expatriation of immigrants to the U.S. from their countries of origin without hesitation. Beginning with the Act of January 29, 1795, the U.S. naturalized new citizens by requiring them to renounce all other


211. See Michelle Leigh Carter, Note, Giving Taxpatriates the Boot—Permanently?: The Reed Amendment Unconstitutionally Infringes on the Fundamental Right to Expatriate, 36 Ga. L. Rev. 835 (Spr. 2002) (citing Tsiang, Question, supra note 193 at 11).

212. See id.; Alan G. James, Expatriation in the United States: Precept and Practice Today and Yesterday, 27 San Diego L. Rev. 853, 861 (1990); M’Ilvane v. Coxe’s Lessee, 8 U.S. at 283 (“The independence of America was a national act. … to throw off the power of a distant country … Rendering [all the inhabitants of America] … citizens of the new states”).

213. See U.S. v. Wong Kim Ark, 169 U.S. 649, 713 (1898) (“Expatriation included not simply the leaving of one’s native country, but the becoming naturalized in the country adopted as a future residence. … it was obstruction to such emigration that made one of the charges against the crown in the Declaration”) (citing The Decl. of Indep., ¶ 9 (charging that the British King “has endeavored to prevent the population of these states; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither”)); Newman, Taxing Issue, supra note 29 (“The right to expatriate is fundamental; the British subjects who claimed their freedom in North America in 1776 cited it as a law of nature in the Declaration of Independence”).

214. James, Expatriation, supra note 199.


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citizenships, clearly recognizing the right of renunciation. Upon enactment of this provision, the British objected, claiming that a British Subject could not renounce allegiance. Admitting these people to U.S. citizenship and recognizing their renunciation, may have thus been one of the contributing causes of the War of 1812.

Some courts of the early Republic were quick to recognize renunciation of U.S. citizenship, but had some reservations about the lack of a specific Constitutional provision on the matter. The Supreme Court observed, “the right of expatriation … is denied by the constitution of no state, nor the United States," the principle of perpetual allegiance did not comply with international law or natural law, and the right was justified as a deeply rooted principle having been exercised in ancient times for several millennia. Although one court found the right of expatriation was fundamental in Murray v. McCarty, another upheld the common law rule in Ainslie v. Martin two years later. This decision was fairly quickly followed by Inglis v. Trustees of the Sailor’s Snug Harbor also upholding the

217. See Wong Kim Ark, 169 U.S. 649.
218. See id. (citing 2 Am. St. Papers 149).
219. See Afroyim, 387 U.S. 253 (citing Talbot v. Janson, 3 Dall. U.S. 162 (1796)).
220. M’Ilvane, 8 U.S. 279.
221. See id. (“den[y]ing that [perpetual allegiance] is founded in, or consonant to, the divine law, the law of nature, the law of nations, or the constitution of the state of New Jersey”).
222. See id. (finding that expatriation “is as ancient as society of man … in] The Bible … we find expatriation practiced, approved, and never restrained … At Athens, after a man examined the laws of the republic, if he did not approve of them, he was at liberty to quit the country with his effects. By the constitution of the Roman commonwealth, no citizen could be forced to leave it, or not to leave it, when made a member of another which he preferred. Even under the emperors, as long as any remains of liberty continued, it was a rule that each one might choose the state of which he wished to be a subject or citizen. Where did the Romans get their laws? From the Grecians. Where did the Grecians get their laws? From the Eastern nations – the aborigines of the earth. The right of expatriation, therefore, as far as we can trace it, has been recognized in the most remote antiquity. Among modern nations the practice is various; the Muscovites forbid it; in Switzerland it is permitted; some princes consider their subjects as riches, as flocks and herds, and their edicts correspond to these false notions … Consult jurists, Grotius, Puffendorf, Burlamaqui, Vattel; they are of opinion, that every man has a natural right, to migrate unless restrained by laws, and that these cannot restrain the right but under special circumstances, and to a limited degree”).
223. 2 Munf. 393 (Va. 1811).
224. 9 Mass. 454, 460 (1813).
English rule, but soon after followed by a contrary decision in *Stoughton v. Taylor*. This latter perspective was then reaffirmed in *Alsberry v. Hawkins*. Chief Justice Marshall weighed in on this debate in *Osborn v. Bank of the United States*, writing that Congress could only prescribe naturalization, not renunciation, suggesting, however, that the individual might still have the right, but that Congress was powerless to regulate the matter one way or the other. In *Afroyim v. Rusk* in 1967, looking back on this period of early American history, the Supreme Court could not find solid agreement on the subject of expatriation, concluding only that the existence of the right was firmly established by 1818 insofar as the judiciary was concerned.

The judiciary was not the only branch wrestling with the question. Although many of the court decisions above were in favor of a general right, the President requested an opinion from the Attorney General in 1856 on the matter. In the opinion, Attorney General Cushing examined federal and state court precedent, as well as international law, to conclude, “[t]he doctrine of absolute and perpetual allegiance, the root of the denial of the right of any emigration, is inadmissible in the United States. It was a matter involved in, and settled for us by, the Revolution, which founded the American Union.” In 1859, the new Attorney General reaffirmed this opinion in a subsequent opinion requested by the President on the same question. The Attorney General stated,

> [t]he natural right of every free person, who owes no debts and is not guilty of any crime, to leave the country of his birth in good faith and for an honest purpose, the privilege of throwing off his natural allegiance, and substituting another

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225. 28 U.S. (3 Pet.) 99, 124 (1830). Also see Talbot, 3 Dall. U.S. 162 (discussing the need for governmental consent to expatriate).

226. 2 Paine U.S. 661 (finding that “expatriation is conceived to be a fundamental right … it is fully recognized. It is constantly exercised, and has never in any way been restrained”).

227. 9 Dana. 177 (1839) (finding the right of expatriation a fundamental right in the U.S.).

228. 22 U.S. (9 Wheat.) 738, 827 (1824) (“The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual”).


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allegiance in its place, – the general right, in one word, of expatriation, – is incontestable. I know that the common law of England denies it; that the judicial decisions of that country are opposed to it; and that some of our own courts, misled by British authority, have expressed, though not very decisively, the same opinion. But all this is very far from settling the question. The municipal code of England is not one of the sources from which we derive our knowledge of international law. We take it from natural reason and justice, from writers of known wisdom, and from the practice of civilized nations. All these are opposed to the doctrine of perpetual allegiance.232

Subsequently in 1868, Congress adopted the first expatriation statute.233 Due to the considerable pedigree preceding the act, it cannot be seen as the first appearance of the right, but it is a clear statement from the third of the three government branches of the right’s fundamental nature. The Act stated,

[w]hereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary, to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: therefore any declaration, restriction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.234

Although not amending the Constitution, clearly Congress intended the statement of policy to be a definitive announcement that such a fundamental right should be understood to exist in the U.S. The Act may

232. Id. at 360.
234. Id.
have been primarily designed to protect newly naturalized U.S. citizens from claims made on them by their nations of origin that refused to release them from citizenship. Many new citizens continued to be held liable for obligations to their former countries and the U.S. wished to adopt a policy of severing the relationships at the person’s request. However, in not holding the U.S. above the laws applied to others, the Attorney General issued an opinion that the statute clearly also recognized the reverse fundamental right of the U.S. citizen to renounce. It took until 1907 for Congress to prescribe specific methods for renouncing, but the right existed by statute as of 1868, if not by common law and executive interpretation before. Modern courts have continued to uphold the policy clearly stated in the 1868 Act, concluding that a right to expatriation is deeply rooted in U.S. law. Even if the Supreme Court’s statement in Afroyim about the right having been established by 1818 was a stroke of historical revisionism, the right was certainly recognized by the judiciary in the post-Civil War era. In Elk v. Wilkins and Jennes v. Landes, the Court found that there is no requirement of consent of the U.S. sovereign for expatriation. In fact, in Wong Kim Ark, the Court more aggressively stated, “[i]t is beyond dispute


237. See Briehl v. Dulles, 248 F. 2d 561, 583, (D.C. Cir. 1957) (finding that “[a]lthough designed to apply especially to the rights of immigrants to shed their foreign nationalities, that Act of Congress is also broad enough to cover, and does cover, the corresponding natural and inherent right of American citizens to expatriate themselves”); Savorgnan v. U.S., 338 U.S. 491, 498, n.11 (1950); Green v. Salas, 31 Fed. Rep. 112. (1887) (finding that “[t]he section comprehends citizens of our own country as well as of other countries”).

238. 112 U.S. 107.


240. 169 U.S. 649 (finding that “from the Declaration of Independence to this day, the United States have rejected the doctrine of indissoluble allegiance, and maintained the general right of expatriation”).
that the most vital constituent of the English common-law rule has always been rejected in respect of citizenship of the United States.\textsuperscript{241}

Although admittedly, the Act “is, like any other act of Congress, subject to alteration by Congress whenever the public welfare requires it,”\textsuperscript{242} it has never been repudiated by Congress. The Nationality Act of 1940 retained the statement of policy from the 1868 Act in favor of the fundamental nature of the right.\textsuperscript{243} The opinion of the courts continued to be that “[i]t is now well settled that anyone may renounce his United States citizenship.”\textsuperscript{244} In \textit{Tomoya Kawakita}, the Court found that “Congress has provided that the right of expatriation is a natural and inherent right of all people.”\textsuperscript{245} Even as late as 1950, the Supreme Court continued to note that interpretation of the right was “to be read in the light of [Congress’ 1868] declaration of policy favoring freedom of expatriation which stands unrepealed … Denial, restriction, impairment or questioning of that right was declared by Congress, in 1868, to be inconsistent with the fundamental principles of this Government.”\textsuperscript{246} Although the Court hinted that even without the Congressional statement, the right would continue to be recognized, just as it had been recognized prior to the declaration of policy, when it said that “[t]raditionally the United States has supported the right of expatriation as a natural and inherent right of all people.”\textsuperscript{247}

The Immigration and Nationality Act of 1952, maintained the essence of the expatriation provisions, but eliminated the verbose statement of public policy regarding the right being fundamental.\textsuperscript{248} Nonetheless, the Supreme Court confirmed its speculation that the right would continue to be upheld as fundamental even without the statement of policy. In Justice Black’s concurrence in \textit{Nishikawa v. Dulles}, he embraced the right with ease, stating, “[o]f course a citizen has the right to abandon or renounce his citizenship.”\textsuperscript{249} Similarly, the Supreme Court found in \textit{Kennedy v. Mendoza-Martinez} that “[t]here is, however, no disagreement that citizenship may be voluntarily relinquished or abandoned either expressly or by conduct.”\textsuperscript{250} In

\begin{itemize}
\item \textsuperscript{241} Id. at 714.
\item \textsuperscript{242} Fong Yue Ting, 149 U.S. 716. Also see In re Rodriguez, 81 Fed. Rep. 354.
\item \textsuperscript{243} See Nationality Act of 1940, 54 Stat. 1137.
\item \textsuperscript{244} Yoo, Expatriation Memo., supra note 16.
\item \textsuperscript{245} Tomoya Kawakita v. U.S., 190 F. 2d 506 (1951).
\item \textsuperscript{247} Id. at 497. Also see Briehl v. Dulles, 248 F. 2d 561, 583 (D.C. Cir. 1957) (finding the right of expatriation to be a “natural and inherent right of all people”).
\item \textsuperscript{248} See INA § 349.
\item \textsuperscript{249} 356 U.S. at 139.
\item \textsuperscript{250} 372 U.S. 144 (1963) (\textit{citing} Perez, 365 U.S. at 48-9, 66-7 (Warren, C.J., dissenting)).
\end{itemize}
Afroyim, as noted above, the Supreme Court revisited the question of expatriation and concluded that the right to expatriate was confirmed as fundamental by U.S. history.\textsuperscript{251} In \textit{Richards v. Secretary of State}, the 9th Circuit addressed the degree of the freedom to expatriate based on motive:

expatriation turns on the ‘will’ of the citizen. We see nothing in [prior decisions] that indicates that renunciation is effective only in the case of citizens whose ‘will’ to renounce is based on a principled, abstract desire to sever ties to the United States. Instead, the cases make it abundantly clear that a person's free choice to renounce United States citizenship is effective whatever the motivation. Whether it is done in order to make more, to advance a career or other relationship, to gain someone's hand in marriage, or to participate in the political process in the country to which he has moved, a United States citizen's free choice to renounce his citizenship results in the loss of that citizenship … United States citizens have right to become aliens.\textsuperscript{252}

Thirteen years later, that precedent was still controlling in \textit{Lozada Colon}, where the District Court of D.C. used the specific words that “an individual has a fundamental right to expatriate.”\textsuperscript{253}

Following the explicit Congressional recognition of the right and the opinions of courts and the executive in the post-Civil War era, the U.S. negotiated a series of treaties under the direction of George Bancroft, the American Minster to Germany, that guaranteed that the expatriation of each other’s citizens would be recognized by both countries with no claim of allegiance to be made by the country of former citizenship, thus confirming expatriation in both domestic and international law. The first of these “Bancroft Treaties” was with the North German Confederation,\textsuperscript{254} followed by similar treaties with Bavaria, Baden, Württemberg, and Hesse.\textsuperscript{255} The

\begin{itemize}
  \item \textsuperscript{251} See 387 U.S. 253.
  \item \textsuperscript{252} Richards v. Sec’y of St., 752 F. 2d 1413 (9th Cir. 1985) (emphasis added). Also see Davis, 481 F. Supp. at 1180 (D.D.C. 1979) (finding that all U.S. citizens have a right to renounce their citizenship and all of its rights and obligations).
  \item \textsuperscript{253} 2 F. Supp. 2d at 45. Also see Yoo, Expatriation Memo., supra note 16.
  \item \textsuperscript{255} See Convention, May 26, 1868, U.S. – Bav., \textit{reported in} Flourney & Hudson, supra note 241 at 661; Convention, Jul. 19, 1868, U.S. – Bad., \textit{reported in} Flourney & Hudson at 663; Convention, Jul. 27, 1868, U.S. – Würt., \textit{reported in}
Bancroft Treaties were followed by treaties of the same subject with Belgium, Norway-Sweden, Great Britain, Austria-Hungary, Ecuador, Haiti, Peru, Portugal, Bulgaria, and Czechoslovakia. The U.S. also negotiated the “Burlingame Treaty” of 1868 with China recognizing “the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of free migration and emigration.”

One hundred years after the Bancroft Treaties, the U.S. Executive reaffirmed that all people of the world enjoy a right to leave their country of citizenship, as expressed in its consent to the Universal Declaration of Human Rights, International Convention on Civil and Political Rights, and a number of other international conventions and resolutions. These agreements were often drafted during the Cold War and motivated partly to criticize the efforts of the Soviet Union and other totalitarian states that prohibited their citizens...

Flournoy & Hudson at 665; Convention, Aug. 1, 1868, U.S. – Hesse, reported in Flournoy & Hudson at 666.


257. See Treaty, Jul. 28, 1868, U.S. – China, art. V, 16 Stat. 739, 740-1 (providing for all emigration to be “entirely voluntary” and stating that all people have an inherent and inalienable right to renounce citizenship). Also see Yoo, Expatriation Memo., supra note 16 (citing the treaty as evidence of the right to expatriation).


from defecting and abandoning their countries, but in agreeing to these documents, the U.S. made a policy statement, and possibly a statement of opinio juris, that a universal fundamental right exists to leave any country, including one’s own, and renounce citizenship. In fact, Congress has even passed resolutions prohibiting the President from granting favorable tariff treatment to states that “[impose] more than a nominal tax, levy, fine, fee or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice.”

On several rare occasions courts have refused to recognize expatriations, but this exception has not diminished the fundamental nature of the right. In Lozada Colon, the Court did not question whether the citizen had a right to expatriate, but simply denied that the citizen had actually effectively done so. In the case, the citizen renounced and yet told the consul that he planned to immediately return to the U.S., specifically Puerto Rico, by right of his continued Puerto Rican citizenship. The consul informed the citizen that if he did renounce U.S. citizenship, then he would be considered an alien as per Puerto Rico as well and would need a visa. The individual took the position that he was concurrently both a citizen of Puerto Rico and the U.S., and merely wanted to renounce his U.S. citizenship, not his Puerto Rican citizenship. As it was impossible to sever the two, the DOS denied that the expatriation was successfully accomplished and the court upheld the denial. This situation was not a case of denying the individual the exercise of a right, since he was free to renounce both citizenships at the same time. The citizen simply did not have the appropriate intent to renounce his U.S. citizenship if he desired to retain Puerto Rican citizenship, an impossible task.

In discussing expatriation, we must consider the related act of leaving the U.S. and changing one’s residence to a foreign country. Courts had denied that there is a fundamental right of the citizen to travel

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Internationally to any specific country;\textsuperscript{263} however, the Court has also confirmed that there is a general right to leave the country\textsuperscript{264} which is in line with an earlier decision by the Court of Appeals for the District of Columbia finding that the right of expatriation,\textsuperscript{265} which requires leaving the U.S. to effectuate, was so compelling to mandate the right to a passport generally. The Court held that

\begin{quote}
[\textit{the right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without the due process of law under the 5th Amendment … Freedom of movement across frontiers in either direction … was a part of our heritage. Travel abroad … may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.}\textsuperscript{266}]
\end{quote}

Therefore, the citizen retains a right, under the general conception of liberty, to leave the U.S. for any reason,\textsuperscript{267} including, this author argues, for tax-motivated expatriation purposes.

Thus, the acts of the judiciary, executive, and legislature, from the early Republic until the present day, affirm, “the right of expatriation … must be considered … a part of the fundamental law of the United States.”\textsuperscript{268} Certainly, no court could find that it does not have a distinguished history and argue that it should be denied status as a fundamental right on that basis.

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\textsuperscript{263} See Noel v. Chapman, 508 F. 2d 1023 (C.A.N.Y. 1975); Zemel v. Rusk, 381 U.S. 1 (1965) (affirming the right of the DOS to deny a U.S. citizen the right to travel to Cuba, specifically, by not validating his passport for that purpose).
\textsuperscript{264} See Kent v. Dulles, 357 U.S. 116 (finding that the Secretary of State does not have the authority to refuse to issue a passport to be used to travel abroad generally and pursue Communist causes).
\textsuperscript{265} See Briehl v. Dulles, 248 F. 2d 561, 583 (D.C. Cir. 1957) (finding that “the … freedom of expatriation … precludes a reading of the passport and travel control statutes which would permit the Secretary of State to prevent citizens from leaving”). Also see Daniel C. Turack, Freedom of Movement and the Travel Document, 4 Calif. W. Int’l L.J. 8 (1973).
\textsuperscript{266} Kent, 357 U.S. at 125-6.
\textsuperscript{267} See id. (finding that “[f]reedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values”) (\textit{citing} Crandall v. Nev., 6 Wall. 35, 44; William v. Fears, 179 U.S. 270, 274; Edwards, 314 U.S. 160).
\textsuperscript{268} Wong Kim Ark, 169 U.S. 649.
\end{flushright}
iii. Ordered Liberty

Lastly, we will consider the degree to which the fundamental right of expatriation may be essential for “ordered liberty” or otherwise foundational for a just society. Admittedly, ordered liberty is a nebulous concept that has not been fully developed in the case law, but we can speculate what it may encompass by considering some principles of law. For example, ordered liberty may require that our society be democratic and that rights are preserved through peaceful means. The courts have alluded to the fact that expatriation may be a peaceful act of assent or disagreement with the policies of the government.\(^{269}\) Ordered liberty may require that U.S. laws comply with international standards, specifically international resolutions affirming the right to leave a country.\(^{270}\) All of these agreements consistently require states to allow expatriation through legal channels as an aspect of human rights, and, through translation, possibly as an aspect of the ordered liberty of international migration. The U.S. may also need to recognize a degree of reciprocity by receiving immigrants from around the world and conversely tolerating emigrants. The U.S. can also consider looking to the practices of other nations as informative of a consensus on ordered liberty. Virtually every country in the world grants the right to expatriate.\(^ {271}\) One must also wonder if ordered liberty tolerates provisions that are extremely difficult to enforce internationally without extraordinary means. Ordered liberty may require some semblance of realistic enforcement power attached to a provision.\(^ {272}\) Congress could, e.g., extend taxing power over all activities that take place on the moon, but such an exercise would be ridiculous. Based on the above-suggested conventions of ordered liberty, we might even contemplate an additional argument in favor of a fundamental right to expatriate.

\(^{269}\) See M’Illvane, 8 U.S. 279 (“[historically] as long as any remains of liberty continued, it was a rule that each one might choose the state of which he wished to be a subject or citizen”).


\(^{271}\) See U.S. O.P.M., Investig. Serv., Citizenship Laws of the World, O.P.M. Doc. No. IS-1 at 57 (2001) (citing Costa Rican Political Constitution, arts. 16-7, as modified June 6, 1995) (Costa Rica is the sole country in the world which has a constitutional provision preventing expatriation). Whether some states actually honor the right is questionable and not particularly relevant for this discussion, since those same states may not honor other fundamental rights as well, but it is significant that expatriation is almost universally recognized in the international community despite “brain drain” and similar international migration issues.

\(^{272}\) See Kirsch, Tax Code, supra note 27; JCT Report, supra note 3 at 83-137 (discussing administrative and enforcement problems of the 1996 legislation).
iv. International Legal Obligations

In addition to concerns about constitutionality, and straying momentarily from the thesis of this article, at this point we might also consider whether the right to leave a country and expatriate is also specifically protected by international law,273 which might inform any presumption that the U.S. would not legislate to contravene international law as well as inform us of a possible interpretation of the substance of certain rights.

The U.S. is party to a number of international law obligations in this area or has otherwise expressed its concurrence with international consensus. The U.S. supported the U.N. General Assembly Resolution giving rise to the Universal Declaration of Human Rights.274 The Declaration states that


274. See Univ. Decl. Hum. Rts., arts. 12-13, supra note 245 (“[e]veryone has the right to freedom of movement and residence within the borders of each State [and] the right to leave any country, including his own”). Also see Hurst Hannum, The Right to Leave and Return in International Law and Practice (1987); Atle Grahl-
“[e]veryone has the right to leave any country, including his own, and to return to his country.”275 There are no limitations on this right regarding taxation and it is phrased in the absolute, as part of the general right to liberty. In addition, the declaration states “[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality,”276 which the U.N. has interpreted to also mean that “[t]he right to change one's nationality presupposes the right to leave one’s country.”277 The U.S. also supported the resolution creating the International Covenant on Civil and Political Rights,278 which prohibits “restrictions [to leave any country, including one’s own] except those which are provided by law and necessary to protect national security, public order, public health or morals or the rights and freedoms of others.”279 To these two declarations must be added the Migrant Worker Convention,280 the Racial Discrimination Convention,281 the}


276. Id. at art. 15(2).
Apartheid Convention,282 the Rights of the Child Convention,283 and the Human Rights Declaration of Individuals Who are Not Nationals of the Country in Which They Live,284 as well as a number of miscellaneous international law reports, conventions and declarations supporting the right to emigrate and/or expatriate.285 Furthermore, contributing to international


customary law, a number of nations have recognized the right either formally or informally, as noted previously.

In 1995, the State Department opined that the expatriation tax did not violate international human rights law stating specifically “that such [expatriation] taxes would not be more burdensome than those [the expatriates] would pay if they were to remain U.S. citizens (or residents),” “that under the proposal U.S. citizens would remain free to change their citizenship,” and “international law would not prohibit reasonable consequences of relinquishment, such as liability for U.S. taxes during the period of citizenship.” Therefore, the DOS concluded “there is no international right to avoid paying taxes by changing one’s citizenship” and “the Administration’s proposal is fully consistent with international human rights law and principles.” At least one author, Detlev Vagts, agreed with this position, arguing that “one observes that the restriction is not on the right of emigration, which is recognized in international law, but on expatriation, which is not so recognized.” Vagts continues, “[a]n American seeking to avoid taxes would first have to go outside the country to renounce citizenship and would not have incurred any

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286. See, e.g., Mubanga-Chipoya Report, supra note 272 at ¶ 512 (finding that “only a few examples could be mentioned of the limitation of this freedom [to leave any country]”); Inglés Report, supra note 264 at ¶¶ 16-7 (finding that, in 1963, twenty-four countries officially recognized the right of a national to leave his country in the constitution or legislation, twelve countries recognized the right in judicial practice, and sixteen countries informally recognized the right).

287. See Sherman Letter, supra note 21. Also see Westin, Expatriation, supra note 2.

288. Id.

289. Id.

290. Id.


292. Id.
tax up to that point.” What this author does not acknowledge, but, as discussed above, courts such as the Supreme Court have acknowledged, is that the right to leave is not narrowly drawn to only contemplate foreign travel but rather encompasses both the physical movement out of country and also the severing of allegiance to a country. Although in more contemporary times, the two processes are considered severable, historically, when dual nationality was comparatively rare, physical movement to a territory outside the state, coupled with the intent to emigrate, establish a new life abroad, and naturalize elsewhere, was the functional, if not legal, equivalent of renunciation.

This DOS analysis is not convincing and some commentators have concluded that, to the contrary, the provision does in fact violate human rights guarantees. Although a U.S. citizen might still be free to expatriate, the consequences of the act are not merely reasonable payment of taxes that accrued during the period of citizenship, but rather an overly broad imposition of future tax liability for ten years, not necessarily directly conditioned on any increase in value that occurred during the time of citizenship. However, if the expatriate holds the appreciated assets more than ten years after expatriation before selling, then the realized appreciation would be free from taxation, so the tax is also overly narrow in that sense, i.e. not truly seeking to tax the increase in value during the time of citizenship. Some of the specific points regarding chilling the exercise of the right raised by the DOS will be addressed in more detail below.

4. Expatriation as a Fundamental Right

The right is certainly not listed specifically in the Constitution, but the purposes and objectives are closely linked to certain specific Constitutional rights, especially the exercise of political freedom and general control over a democratically accountable government. Although there is a tendency to avoid discovering more fundamental rights that do not have a textual basis, the right of expatriation has been reaffirmed as a fundamental right from the very earliest time of the founding of the U.S., and especially

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293. Id.
294. See Mubanga-Chipoya Report, supra note 272; Inglés Report, supra note 264; Boutkevitch Working Paper, supra note 260 (all discussing expatriation in the context of the right to leave any country, including one’s own).
295. See e.g. discussion accompanying the Bancroft treaties, etc., supra notes 242-5.
296. See Westin, Expatriation, supra note 2 (citing Vagts, Proposed, supra note 278); Colón, Changing, supra note 40 at 91 (citing Robert F. Turner, Testimony at Ways & Means Oversight Subcomm., Hearing on Expatriate Tax (Mar. 27, 1995) available in LEXIS, Fedtax Libr., TNT File. 95 TNT 60-22) (stating that the expatriate tax did indeed violate international human rights obligations)).
continuously since 1868 when Congress enacted a very strong statement of policy in favor of the right. We have also briefly touched upon issues of ordered liberty and international law that argue in favor of recognizing the right. Thus, there is a fundamental right that permits expatriation for any purpose whatsoever, even for avoidance of taxation. Since the right goes beyond a merely statutorily created right and is fundamental, any act that interferes with it must be tested against strict scrutiny.

5. Interference with a Fundamental Right

Even if a right is fundamental, there must actually be some degree of interference to trigger strict scrutiny. This is a threshold matter before even applying strict scrutiny. Courts have found that “[i]t is only when there exists a real and appreciable impact on, or a significant interference with the exercise of the fundamental right that the strict scrutiny doctrine will be applied.”297 Certainly a complete prohibition of the exercise of the fundamental right is an infringement,298 but a substantial limitation on the exercise may also be considered an infringement.299 In Burdick v. Takushi, the Supreme Court found that measures that burden the right but do not prevent its exercise may still infringe.300 In these cases, the court will look to the degree of the burden.301 “When the regulation merely has an incidental effect on the exercise of protected rights,” the regulation does not infringe.302 Furthermore, an infringement of a fundamental right does not need to infringe the rights of all persons who choose to exercise the right or all persons within a particular class, provided the infringement is either imposed directly based on the conduct or only affects members of the class.303

In the context of political rights and the right to court access, the bar is set very low, so if the right to expatriate can be shown to be a political right, then it will surely demand strict scrutiny. For the right to vote, strict

298. See Griswold, 381 U.S. at 485 (finding that the prohibition on contraceptives infringes the right not to conceive a child).
299. See Carey v. Pop. Servs. Int’l., 431 U.S. 678, 689 (1977) (finding that the requirement that sale of contraceptives be made by a pharmacist infringes upon the right to privacy); Doe v. Bolton, 410 U.S. 179, 194 (1973) (finding that the requirement that abortions be performed in an accredited hospitals also infringes upon a fundamental right).
301. See id.
303. See Nyquist v. Mauclet 432 U.S. 1, 16 (1977) (although not an absolute prohibition, the statute was directed solely at aliens and only harmed aliens).
scrutiny is required by clear infringements such as a requirement of prior residence, property ownership, or special interest in the outcome of the vote. However, infringements may also take the form of such minor burdens as a poll tax, even a poll tax as low as $1.50. Similarly, rules infringing on candidacy, such as effectively barring new political parties or conditioning ballot access on a filing fee without a waiver for indigent candidates, also gives rise to strict scrutiny. In fact, prohibiting groups from hiring paid signature gatherers for ballot initiatives also demands strict scrutiny. In the area of court access, charging court fees or not providing court appointed counsel in criminal cases would require strict scrutiny. On the other hand, impositions such as banning all write-in votes and otherwise limiting voter’s choices are acceptable provided there is no bar to access and reasonable rules for candidate eligibility such as age or residence restrictions that do not target new parties or discriminate based on wealth generally do not require strict scrutiny.

304. See Dunn, 405 U.S. at 343 (finding that requiring a period of residence was not constitutional).
305. See Kramer v Union Free Sch. Dist., 395 U.S. 621 (finding that the requirement that a voter own property in order to exercise the right to vote was not constitutional). But see Ball v. James, 451 U.S. 355 (1981) (finding that restricting the vote to landowners for a special-purpose district vote like water districts survives strict scrutiny).
306. See Harper, 383 U.S. 663; Breedlove v. Sutlles, 302 U.S. 277 (1937) (finding that a poll tax, as a prerequisite to the right to vote, was unconstitutional).
307. Harper, 383 U.S. 663 (finding that wealth could be a suspect classification when exercising fundamental right to vote). Also see Rodriguez, 411 U.S. 1 (finding that wealth could be a suspect classification in other contexts); Lindsey v. Normet, 405 U.S. 56 (1972) (finding that wealth could also be a suspect classification in the special case of court access to protect against eviction); Bodie v. Conn., 401 U.S. 371 (1971) (finding that wealth could be a suspect classification when related to the fundamental right of court access to secure marriage and divorce); McDonald v. Bd. of Election Comm’rs., 394 U.S. 802, 807 (1969) (also finding that wealth could be a suspect classification when related to voting); but see M.L.B. v. S.L.J., 519 U.S. 102 (1996) (finding that wealth was only a suspect classification in connection with the fundamental right of access to courts in “quasi-criminal” cases such as termination of parental rights).
308. See Williams v. Rhodes, 393 U.S. 23 (1968) (finding that restriction against new political parties violated fundamental political rights).
311. See Griffin v. Ill., 351 U.S. 12 (1956) (finding that wealth restrictions in connection with a civil court case were constitutional).
We must predict whether the degree of the burden is too severe. We are reminded of the language Congress used in the first expatriation statute that “any declaration, restriction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.” The statement of historical policy that stood in the Code for almost one hundred years suggests that the bar is extremely low. The difference between the tax rates paid by non-resident aliens and expatriates does not prevent the exercise of the right to expatriate; however, it does exact a taxing penalty as a direct result of the exercise of a fundamental right. The case decided above regarding the minimum poll tax is also informative in that the fee of $1.50 was almost insignificant and likely would never act as a total prohibition, but nonetheless placed some impediment between the citizen and the exercise of the right. The courts appear to especially criticize fees that are exacted as consequence of the exercise of fundamental rights when those fundamental rights have political significance. The Supreme Court found that conditioning the exercise of the fundamental right on the “capricious or irrelevant factor” of wealth could be an infringement of the right. One could argue that if the legislature may not burden the right to vote, not always considered a fundamental right, with the payment of a minor tax, then the legislature may not burden another fundamental right, the right of expatriation, on the payment of ten years of taxation liability which might reach into the millions of dollars.

Moreover, the question is not necessarily one of amount but of effect, i.e. a chilling effect. On many occasions, the Supreme Court has found violations of fundamental rights when the statute merely created a chilling effect on the exercise of the right or when the statute created unnecessary burdens on the exercise of the right. Once expatriated, the person receives no protection or benefits from the U.S. but remains liable for a much higher tax, but if the person would remain liable for tax regardless of the exercise of the right, then the exercise of the right may be chilled since there is no benefit from it. Admittedly, the fact that the numbers of citizens renouncing has not dropped significantly might be interpreted as evidence that the tax rules have not had a chilling effect, though that data might be

314. See Harper, 383 U.S. at 680 (Black, Harlan, and Stewart, JJ., dissenting); but see Breedlove, 302 U.S. 277; Butler v. Thompson, 341 U.S. 937 (1951) (finding that poll tax was constitutional).
316. See Newman, Taxing Issue, supra note 29 (“In its two years of publication, [the] list of expatriates in the Federal Register has grown no shorter; if the tax law has dissuaded anyone from giving up U.S. citizenship, it doesn’t show”).
misleading. It could be that the numbers have always been lower than they might otherwise be because of the chilling effect. The Supreme Court has found that “[i]f a law has ‘no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.””\(^{317}\) One commentator has observed that the obligation to complete the informational IRS Form 8854 under IRC section 6039G “will intimidate the uninformed, perhaps even chill them from leaving the U.S., especially because on the same page (under penalties for not filing) there is an indecipherable statement that the taxpayer is exposed to a penalty of the greater of $1,000 or five percent of the tax due under section 877 for each of the 10 years of nonfiling.”\(^{318}\) In addition, the threat of a full investigative audit, which is a highly probable consequence of filing the statement, also discourages the exercise of the right to expatriate. It is also interesting to note that the intent to chill the exercise of the right is plainly obvious from the related legislation. In the 2003 Joint Committee on Taxation Report (hereinafter “JCT Report”), the Committee specifically stated that one of the avowed purposes of the expatriate tax was “to express official disapproval of tax-motivated expatriation [and] deter or punish tax-motivated expatriation.”\(^{319}\) Also, for a time during the debates on the Highway Reauthorization Bill, the Bill contained a section imposing tax provisions entitled “Discouraging Expatriation,” a clear statement of intended effect. Although that particular provision did not pass, we must consider that chilling the exercise of the right may be one of the principle motivations of the expatriate tax and compliance requirements.

Based on the above, the expatriation taxation provisions infringe on a fundamental right and must be subjected to strict scrutiny. We will now turn to the alternate basis for invoking strict scrutiny, national origin discrimination, before analyzing whether the provision is narrowly tailored to serve a compelling government interest.

**E. Suspect Classification**

The other basis for subjecting the expatriation tax provisions to strict scrutiny is the creation of a suspect classification, specifically national

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317. Shapiro, 394 U.S. at 631 (citing U.S. v. Jackson, 390 U.S. 570, 581 (1968)).

318. See Westin, Expatriation, supra note 2 (“[c]onditioning an absolute right on jumping through procedural hoops erodes the right; the hoops’ legality is questionable at best”). Also see Cass Sunstein, Why the Unconstitutional Conditions Doctrine is an Anachronism, 70 B.U.L. Rev. 593 (1990).

319 JCT Report, supra note 3 at 75 (emphasis added).
While the substantive due process analysis above focuses on chilling the exercise of a fundamental right by a citizen, this alternate basis for invoking strict scrutiny would apply once the person has become an expatriated alien. There is some suggestion that the acquisition and renunciation of citizenship should be conceptualized as “politically equivalent events” and must therefore be treated in equivalent ways. This suggestion, however, overlooks the fact that a person, having acquired and divesting himself of nationality, immutably retains the status of “former U.S. national.” The distinction that the expatriate tax makes is not between citizens and non-citizens, or between differing classes of citizens as some have suggested, but between non-resident aliens with former U.S. nationality and non-resident aliens without former U.S. nationality. Therefore, distinctions for the treatment of U.S. property are not merely being made between classes of aliens, but rather between aliens on the basis of national origin.

1. Applicability of the Fifth Amendment

Before we can examine the suspect classification, we must be assured that equal protection limits Congress’ power to impose taxation here. Even though tax laws may be held to strict scrutiny under due process when they create a suspect classification, the person classified on suspect criteria in this case is physically outside the U.S. The question is whether the U.S. is held to due process when it extends the taxation power, in a discriminatory fashion, against an alien, not resident in the U.S.

i. Alien Present Within U.S. Territory

The general rule is that the U.S. Constitution does not extend outside the territorial borders of the state. Ever since Yick Wo in 1886, aliens are generally protected by the Constitution, but only when they are physically present in the U.S. The Supreme Court has said that, on the one hand, the

320 This article will not argue for scrutiny of the expatriate classification based on wealth as others have. See e.g. Carter, Giving Taxpatriates, supra note 198.
321 See Heath, Symmetries, supra note 45.
political branches are vested with considerable power and discretion in excluding aliens from the U.S.,
but aliens are entitled to Constitutional protections once admitted. The crucial distinction is whether the person has made an entry to the U.S. For those who have not entered the U.S., “the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law.”

However, this rule against extraterritorial application of the Constitution is not as ironclad as it may appear. The Restatement on Foreign Affairs tells us that the Constitution does in some situations protect aliens outside the territory of the U.S. specifically “[t]he provisions of the United States Constitution safeguarding individual rights … generally limit [United States] governmental authority whether it is exercised in the United States or abroad, and whether such authority is exercised unilaterally or by international agreement.” The courts have found the same in other situations. Although aliens “standing on the threshold of entry” are “not entitled to the constitutional protections provided to those within the territorial jurisdiction of the United States,” aliens apprehended at the border and not formally admitted to the U.S. are nonetheless covered by 5th Amendment protections. These protections include Miranda warnings prior to custodial interrogations, prohibitions against “gross physical abuse”

Moon Sing v. U.S., 158 U.S. 538 (1895) (“While he lawfully remains here he is entitled to the benefit of the guarantees of life, liberty, and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States … But when he has voluntarily gone from the country, and is beyond its jurisdiction, being an alien, he cannot reenter the United States in violation of the will of the government as expressed in enactments of the law-making power”); Richard F. Hahn, Note, Constitutional Limits on the Power to Exclude Aliens, 82 Colum. L. Rev. 957 (Jun. 1982).

324. See Landon v. Plasencia, 459 U.S. 21, 32 (1982); Leng May Ma v. Barber, 357 U.S. 185 (1958); Mezei, 345 U.S. at 212 (1953); Kwong Hai Chew v. Colding, 344 U.S. 590, 600 (1953); Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring); Fong Yue Ting, 149 U.S. at 713-4.


328. See 3d Restatement § 721. Also see Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y., 1997) (citing the same section of the Restatement favorably).

329. Id.

330. Ma v. Ashcroft, 257 F. 3d 1095, 1107 (9th Cir., 2001). Also see Zadvydas, 533 U.S. at 693; Landon, 459 U.S. at 32; Kwong Hai Chew, 344 U.S. at 596, n. 5.

while in detention, and an adjudication of guilt in conformance with due process before any punishment may be imposed.\textsuperscript{332} Moreover, aliens receive these Constitutional protections regardless of whether they are charged with a crime.\textsuperscript{333} A further example of extraterritorial application of Constitutional limitations arose in \textit{Olsen v. Albright}, where the District Court of D.C. found that the plaintiff was wrongly dismissed from his consular position abroad with the DOS because he objected to the institutionalized practice of national origin discrimination in assessing visa applications.\textsuperscript{334} Admittedly, the case was not adjudicating the permissibility of the DOS criteria, but the Court did note in a lengthy analysis that the practice was wrongful under the Constitution, and, thus, the dismissal was also wrongful, even though the practice occurred entirely outside U.S. territory and only affected aliens.\textsuperscript{335} This case has its precedential limitations, but it does suggest limits on the power of the U.S. to act against aliens abroad. In sum, the broad rule that the Constitution does not apply outside the U.S. ignores the fact that the U.S. is not entirely unfettered by Constitutional considerations when it acts extraterritorially.

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\textsuperscript{332} See Kwai Fun Wong, 373 F. 3d 952 (9th Cir., 2004.) (citing U.S. v. Moya, 74 F. 3d 1117, 1119 (11th Cir., 1996); U.S. v. Henry, 604 F. 2d 908, 914 (5th Cir.1979) (regarding Miranda warning); Alvarez-Mendez v. Stock, 941 F. 2d 956, 962, n. 6 (9th Cir., 1991) (considering whether detention of excluded Cuban refugee violated his substantive due process rights, and noting that 5th and 6th Amendments apply to aliens as well as citizens); Lynch v. Cannatella, 810 F. 2d 1363, 1374 (5th Cir. 1987) (“[W]hatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the 5th and 14th amendments to be free of gross physical abuse at the hands of state or federal officials”). Also see Jean, 472 U.S. 846 (citing Wong Wing v. U.S., 163 U.S. 228 (1896)); U.S. v. Casimiro-Benitez, 533 F. 2d 1121 (1976); Henry, 604 F. 2d at 912-3.

\textsuperscript{333} See Jean, 472 U.S. 846 (“Surely it would defy logic to say that a precondition for the applicability of the Constitution is an allegation that an alien committed a crime. There is no basis for conferring constitutional rights only on those unadmitted aliens who violate our society's norms”).


\textsuperscript{335} Id. (“An initial look at the Consulate’s policies suggests that they are suspect. The policies instruct visa officials to rely heavily upon factors such as physical appearance and national origin when adjudicating the applications of visa applicants … Plaintiff was disturbed about these policies, and the administrative record suggests that he attempted to avoid using them as he dispatched the duties of his position. In fact, the Court concludes that the Consulate’s policies are unlawful and that Plaintiff was justified in refusing to follow them”).
ii. Congressional Plenary Powers over Immigration

One important caveat must be mentioned: the exception for plenary powers. In the fields of immigration, foreign relations, and war, the Constitution specifically grants those powers as plenary powers, thus they are much more insulated from Constitutional challenge than other powers, such as the taxing power. However, although the U.S. is free to establish discriminatory laws under the immigration power, the U.S. is not free to discriminate against aliens on a national origin basis without statutory authorization under the immigration power. In addition, the Ninth Circuit has also found that Congress has “plenary power over aliens [which] enables the federal government to unreasonably discriminate against aliens [but] that even Congressional plenary power is subject to Constitutional limits.” It is unclear under what conditions a court would strike a Congressional exercise of a plenary power to discriminate as exceeding Constitutional limits, although a trend against plenary power has been identified.


337. See Demore v Hyung Joon Kim, 123 S. Ct. 1708; Zadvydas, 533 U.S. at 718 (Kennedy, J., dissenting) (stating that “[t]he liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens”); Flores, 507 U.S. at 305-6; Verdugo-Urquidez, 494 U.S. at 273; Fiallo v. Bell, 430 U.S. 787, 792 (1977); Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens”); Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952) (“any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government”).

338. See Jean, 472 U.S. 846 (finding that “[a]s far back as Yick Wo … the Court recognized that even decisions over which the Executive has broad discretion, and which the Executive may make without providing notice or a hearing, cannot be made in an invidiously discriminatory manner”) (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)); U.S. v. Slocum, 464 F. 2d 1180, 1184 (3d Cir. 1972) (finding that profile used to identify possible airplane hijackers may “not discriminate against any group on the basis of religion, origin, political views, or race”); Patel v. I.N.S., 811 F. 2d 377, 382 (7th Cir. 1987); Whitfield v. Bd. of County Comm’rs, 837 F. Supp. 338, 344 (D. Colo. 1993) (finding that “it is wholly inappropriate to define a class as suspects” on the basis of race); Chan v. I.N.S., 631 F. 2d 978, 983-4 (D.C. Cir 1980) (denial of permanent residency to alien who overstayed nonimmigrant visa may not “rest” on an impermissible basis such as an invidious discrimination against a particular race or group”).

339. Mow Sun Wong v. Hampton, 500 F. 2d 1031 (9th Cir., 1974.) (citing U.S. v. Thompson, 452 F. 2d 1333, 1338 (1971)).

has argued that *Nguyen v. INS* and *Zadvydas v. Davis* are significant in that the Supreme Court declined to justify its decision on plenary powers and instead used traditional Constitutional analysis, even though the persons concerned were aliens.\(^{341}\) In *Nguyen*, the Court applied the gender-based equal protection analysis reserved for U.S. citizens, demanding that the law be “substantially related to the achievement of [important governmental] objectives.”\(^{342}\) In *Zadvydas*, the Court prohibited the indefinite detention of un-removable aliens by examining the practice against the standard applied to U.S. citizens and noted that, although aliens may be subject to the plenary power, there are “important constitutional limitations” to that power.\(^{343}\) The above demonstrates that, in terms of the plenary immigration power, there are fewer Constitutional limits, but there may still be some limits.

However, it is highly likely that the plenary power over immigration would not apply to the expatriate tax. Although the tax does distinguish between types of non-resident aliens, this distinction is not specifically one made in connection with the exercise of the immigration power. Rather, the distinction is made under the taxation power and thus does not benefit from the considerable deference demanded by the exercise of a plenary power. Even if the argument were to be made that discrimination, providing it somehow involves aliens, would invoke plenary power, the deference to the exercise of plenary powers is on the decline.

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\(^{341}\) See Spiro, Explaining, supra note 327 (*citing* Nguyen v. INS, 121 S. Ct. 2053 (2001); Zadvydas, 533 U.S. 678, as evidence of a shift away from plenary power). Also see I.N.S. v. Chadha, 462 U.S. 919, 940-1 (1983) (recognizing the plenary power of Congress over immigration but noting that Congress must have also “chosen a constitutionally permissible means of implementing that power”); Japan Whaling Ass’n v. Am. Cetacean Soc’y, 478 U.S. 221, 229-30 (1986) (*quoting* Baker v. Carr, 369 U.S. at 211) (stating that it is “error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance”); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620 (1870); In re Aircrash in Bali, 684 F. 2d 1301, 1309 (9th Cir. 1982), cert. denied, 493 U.S. 917 (1989) (finding that the court may invalidate a treaty that violates the Constitution).

\(^{342}\) Spiro, Explaining, supra note 327.

iii. Due Process Protection for Property Located in the U.S.

In addition, one further factor in the case of the expatriate tax is that, while the expatriate is resident overseas, so the effects of the discrimination may be felt overseas, the income that is being taxed is sourced from the U.S. This fact means that the income should be considered property with a U.S. situs and not extraterritorial property.\(^\text{344}\) The Constitution requires that property located in the U.S. must be treated equally and not subjected to discriminatory treatment on the basis of national origin, regardless of the residence or nationality of the owner.\(^\text{345}\) Aliens that fall within the expatriate regime are taxed on their U.S. property (income) distinctly different from other non-resident aliens, based on U.S. national origin, and thus in a manner that demands strict scrutiny.

A state must have jurisdiction over a person or thing to tax it, or it amounts to the taking of property without due process.\(^\text{346}\) Thus, courts have held that income can only be taxed where it is located and can be reached.\(^\text{347}\)

The Third Restatement notes “[a] state may exercise jurisdiction to tax a person, natural or juridical, on the basis of … nationality, … domicile, or … residence.”\(^\text{348}\) None of these are present in the case of an expatriate who does not have the nationality of the country nor is domiciled or resident therein. The Restatement continues to note that “[a] state may exercise limited jurisdiction to tax a person, natural or juridical, on the basis of … ownership of property located in its territory.”\(^\text{349}\) The jurisdiction to tax in the case of U.S.-source income is therefore based on the jurisdiction over the property or activity occurring within U.S. territory.\(^\text{350}\) In \textit{Di Portanova}, the Claims Court confirmed, “section 877(a) is a source-based tax [not] based on

\(^\text{344}\) See IRC § 2103 (only claiming jurisdiction to tax assets that are “situated” within the U.S.).

\(^\text{345}\) See \textit{WHYY}, 393 U.S. at 218.


\(^\text{348}\) See \textit{3d Restatement} § 411(1).

\(^\text{349}\) Id. § 411(2).

\(^\text{350}\) See \textit{N.Y. ex. rel. Whitney v. Graves}, 299 U.S. 366 (1937); \textit{Barba v. U.S.}, 2 Cl. Ct. 674 (finding that gambling winnings from U.S. sources earned by non-resident alien was taxable by the U.S.).
personal jurisdiction."\(^{351}\) Even if the arguments regarding extraterritorial Constitutional protection and the exceptions to the plenary powers doctrine fail, the income is still U.S.-source and must be considered U.S.-based property within the terms of the IRC, thus falling within Constitutional protection.

\textit{iv. Due Process Protection for U.S. Property Held by Non-Resident Aliens}

As observed above, the Constitutional protections of the 5th Amendment cover property and income generated within the territory of the U.S. The Supreme Court has found on many occasions that a foreign or out-of-state corporation receives the protections of the 5th Amendment for its property within a state.\(^{352}\) In \textit{Russian Volunteer Fleet}, the Supreme Court held that a corporation organized and incorporated in a foreign country could state a claim under the 5th Amendment for just compensation for property taken under eminent domain.\(^{353}\) In addition, in the \textit{Japanese Immigrant Case}, the Supreme Court clearly stated that aliens, not just foreign corporations, might also challenge the treatment of their U.S. property under the 5th Amendment’s Due Process Clause.\(^{354}\) “The Supreme Court has long held that aliens outside the United States are entitled to due process in civil suits in United States courts."\(^{355}\) In addition, the court has found that a property owner may challenge discriminatory property assessment despite that fact that the owner is nonresident and could not be reached by service of process.\(^{356}\) In \textit{Jean v. Nelson}, the Supreme Court concluded that there was no appreciable distinction between a non-resident corporation and a non-resident individual.\(^{357}\) Citing \textit{Russian Volunteer Fleet}, it held that “[t]he corporation in that case certainly had no more claim to being ‘within the United States’ than do the aliens [not admitted to the U.S.].”\(^{358}\) Thus, the Court broadly re-affirmed that “alien friends are embraced within the terms

\(^{351}\) 690 F. 2d 169.
\(^{353}\) Id. (finding that “[t]he petitioner was an alien friend, and as such was entitled to the protection of the 5th Amendment of the Federal Constitution") (\textit{citing} Wong Wing, 163 U.S. at 238). Cf. Yick Wo, 118 U.S. at 369; Santa Clara County v. S. Pacific RR Co., 118 U.S. 394, 396 (1886); Truax, 239 U.S. 39; Terrace v. Thompson, 263 U.S. 197, 216 (1923); Home Ins. Co. v. Dick, 281 U.S. 397, 411 (1930).
\(^{354}\) 189 U.S. 86, 100-101. Also see Hyung Joon Kim, 123 S. Ct. 1708.
\(^{357}\) 472 U.S. 846 (\textit{citing} Russian Volunteer Fleet, 282 U.S. at 491-2).
\(^{358}\) Id.
of the 5th Amendment," suggesting that the only exception for the treatment of aliens outside the U.S. is the exercise of plenary powers, such as war, immigration, etc.

It is important to observe that a state may have the inherent authority to prohibit holding of real property in the state by non-resident and resident aliens. Aside from rules regulating public lands, the federal government has never legislated rules governing alien rights to hold real property.

Although historically, there were state restrictions on the transfer of land by resident aliens, the constitutionality of those restrictions has been undercut since *Graham v. Richardson*. This same protection, however, is not necessarily afforded to non-resident aliens. The distinction between resident and non-resident aliens for purposes of Equal Protection guarantees is usually justified by the fact that non-resident aliens “are not viewed as an isolated minority, since they are granted diplomatic protection by their home country.” However, this statement is misleading. Diplomatic protection is a discretionary act by the state of nationality, not mandatory protection. Furthermore, both non-resident and resident aliens may receive the same diplomatic protection from their country of nationality, without limitation, so

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359. Id.


362. 403 U.S. 365.


it is not uniquely a right held by non-resident aliens.\textsuperscript{365} In fact, in certain circumstances, a state may continue to exercise diplomatic protection over one of its citizens, even after that alien has naturalized to U.S. citizenship.\textsuperscript{366} Thus this distinction between resident and non-resident aliens for purposes of diplomatic protection is not justified. Nonetheless, it is still unclear if it is constitutional to impose real property ownership restrictions against non-resident aliens.\textsuperscript{367}

However, the above does not control the situation entirely. If non-resident aliens are not permitted to hold property, then the kind of protection that property enjoys is moot until the right is granted. If non-resident aliens are permitted to hold property, then, as stated in \textit{Russian Volunteer Fleet}, the kind of protection the property enjoys must accord with due process.\textsuperscript{368} As discussed at the outset, tax laws are subject to equal protection.\textsuperscript{369} Although equal protection does not require identical taxes between domestic and foreign corporations,\textsuperscript{370} “after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind”\textsuperscript{371} and cannot be subjected to discriminatory taxation merely based on its foreign character.\textsuperscript{372} Moreover, if non-resident aliens are permitted to derive

\begin{itemize}
  \item \textsuperscript{365} See id. \textit{(stating in art. 3(1): “The State entitled to exercise diplomatic protection is the State of nationality;” and art. 4: “a State of nationality means a State whose nationality that person has acquired” without any condition that residence in a state shall defeat diplomatic protection).}
  
  \item \textsuperscript{366} See id. \textit{(stating in art. 7: “A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant”).} Also see Esphahanian v. Bank Tejarat, Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251 (1983); Mergé, Italian-U.S. Conciliation Comm., 22 Int’l L. Rep. 443, 455, ¶ V.5 (1955).
  
  
  \item \textsuperscript{368} See Russian Volunteer Fleet, 282 U.S. at 491-2. Also see Oyama v. Calif., 332 U.S. 633 (1948).
  
  
  
  \item \textsuperscript{371} Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 511 (1926).
  
\end{itemize}
income from the U.S., restrictions on investments and businesses based on alienage may still survive scrutiny, but discriminatory taxation rates based on national origin discrimination may not.

Recalling the discussion above regarding the plenary power over aliens, the cited cases on property held by non-resident aliens clearly did not implicate in any way the plenary powers of the national government over immigration, simply because aliens were involved.

When the government seizes the property of foreign nationals within this country, its actions do not fall within a sphere of plenary executive and legislative authority, and it therefore cannot claim that the aliens involved are entitled only to the degree of due process that Congress is prepared to extend them as a matter of grace.

Thus, these acts are not insulated from due process as instances of the exercise of plenary powers so legislation on the matter must be tested against the degree of scrutiny demanded.

2. Classifying on Suspect Grounds

The expatriate taxation provisions make a number of classifications and of those various classifications only one presents itself as a viable basis on which to claim strict scrutiny: national origin. The measure of whether a classification demands strict scrutiny has its origin in Carolene Products in which the Supreme Court found that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” Although the court would generally presume the constitutionality of Acts of Congress, the court will demand a higher level of necessity for the measure and a higher degree of tailoring when a law makes a suspect classification. This presumption is due, in part, to the problem of deeply rooted prejudice rather than rational lawmaking. Also relevant is the fact that some groups have been “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian

374. See Buchanan v. Warley, 245 U.S. 60 (1917) (the Court held that a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law).
377. Id.
378. See Loving, 388 U.S. 1.
political process. This may have been what Justice Harlan meant when identified “discrete and insular minorities.” This problem is especially acute when the basis for the prejudice and legal classification is an immutable characteristic. “Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of ‘class or caste’ treatment that the 14th Amendment was designed to abolish.” The equal protection clause does not prohibit all classifications but it does mean that “all persons similarly circumstanced shall be treated alike.”

The equal protection clause does not demand “abstract symmetry,” nor does it “require things which are different in fact or opinion to be treated in law as though they were the same.” Admittedly, “[a]bsolute equality is impracticable in taxation, and is not required by the equal protection clause.” The circumstances that must be measured for degree of similarity must be “all relevant respects,” so due process equal protection will not require identical tax treatment, just substantially similar treatment. The court will look for “inequalities that result…from hostile discrimination” but will not otherwise re-examine legislative determinations for fairly distributing the taxing burden. However, a court will look to the function the tax plays and not the mere technical classification to judge its constitutionality.

380. Rodriguez, 411 U.S. at 28; Graham, 403 U.S. at 372; Carolene Prods., 304 U.S. at 152, n. 4.
381. Carolene Prods., 304 U.S. at 152, n. 4.
382. See id.
383. Id.
392. See Travis, 252 U.S. 60 (finding that “[t]he characterization of a tax by administrative officers, by the phraseology of the statute, or the opinion of other
classification rises to this level are: (1) whether the “degree of inequality [is minor and merely arising] from the nature of things [or] gross inequality,”\(^{393}\) (2) whether the discrimination is “unusual;”\(^{394}\) and (3) whether the classification is arbitrary and discriminates amongst members of the same class,\(^{395}\) or based on real differences.\(^{396}\) These tax provisions may be assessed against due process because expatriates are subject to “hostile discrimination”\(^{397}\) and the classification is arbitrary. In addition, the discrimination is unusual since the degree of inequality is significant, often to the tune of millions of dollars imposed as a penalty for leaving, and also unusual in that the U.S. receives immigrants from around the world but does not suffer well expatriation.

In addition, historically the rule has been that the law must operate to the disadvantage of the suspect class to support an equal protection claim.\(^{398}\) Recent crystallization in *Adarand Constructors, Inc. v. Pena* has shifted the focus away from the act of disadvantaging a suspect class to the act of making an illegitimate classification.\(^{399}\) In *Brown v. Board of Education*, the Court found “separate but equal” to be invidious discrimination regardless of any disadvantage,\(^{400}\) because the very act of classifying people on suspect criteria was invidious per se. This approach was upheld in *Loving v. Virginia*\(^{401}\) and in *Palmore v. Sidoti*.\(^{402}\) Even though the races were being treated equally, i.e. they could both only marry individuals or have custody of children of the same race, the very notion of a classification based on race was suspect. Accordingly, a disadvantage will not be determinative, although it may be informative that a suspect classification is being made.

courts, is not controlling. This court will look only at the practical effect of the tax as it is enforced”).

393. Colgate, 296 U.S. at 422.
396. See *Quaker City Cab Co. v. Penn.*, 277 U.S. 389, 400 (1928); *S. RR v. Greene Co.*, 216 U.S. 400, 417 (1910).
399. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. at 220-22 (requiring strict scrutiny of race-based classifications made by federal government, even if they are designed to remedy past discrimination); *Breyer v. Meissner*, 214 F. 3d 416 (3d Cir. 2000).
401. 388 U.S. 1.
3. National Origin as the Suspect Classification

The first step is to identify if any suspect classifications are being made. Traditionally, the two suspect classes that almost always demand strict scrutiny are race (or ethnicity) and national origin. Alienage also sometimes demands strict scrutiny, but because of the federal government’s plenary powers over immigration, there are more exceptions for that category than others. Of the various bases on which an expatriate could claim discrimination, race and ethnicity are not viable here since there is no clear connection between the classification and expatriates in general, as expatriates come in all ethnicities. However, from the operation of the law, national origin appears to be implicated as the justification for the measures. Specifically, the individuals who are suffering discrimination are aliens, who are former U.S. nationals, who are not now nationals of the country of their birth, nationals of the country of their parent’s birth, or nationals of the country of which their spouse is a citizen, in addition to other factors.

At the outset, we can note that the distinctions made in the expatriate tax for an individual’s country of birth and country of parent’s birth clearly distinguish based on ancestry and country of birth, and thus make a very strong case for strict scrutiny based on national origin classification. If citizenship distinctions may also serve as a basis for a national origin claim, then spousal citizenship might also qualify, since a national origin discrimination claim may be based on associating or marrying an individual with different national origin. However, those provisions mentioned are linked to saving clauses in the expatriate rules that exempt certain expatriates from the tax. If such a rule was to fail under strict scrutiny, the saving rule might be stricken, but the overall expatriate tax rule might still survive. In order for the expatriate tax as a whole to fail, former U.S. nationality must also state a claim of national origin discrimination and call for strict scrutiny. Therefore, this article will argue below that it does rise to the level of national origin discrimination.


404. See Shaw v. Reno, 509 U.S. 630; Clark, 486 U.S. at 461; Cleburne, 473 U.S. 432; Oyama, 332 U.S. at 644-6; Korematsu, 323 U.S. at 216; Hirabayashi, 320 U.S. at 100; Freeman v. Santa Ana, 68 F. 3d 1180 (9th Cir. 1995).

The Constitutionality of the Taxation Consequences

i. Defining National Origin

Generally speaking, national origin discrimination is a classification based on where a person or his family is “from.” In Hirabayashi, it was announced that “[d]istinctions between citizens solely because of their ancestry” was “odious to a free people whose institutions are founded upon the doctrine of equality.” If the government is discriminating between people based on where they are from, and the factors of former U.S. citizenship, country of birth, country of parent’s birth, and spousal citizenship, are operative factors for determining national origin, then the government may be discriminating based on national origin and the provisions will be subjected to strict scrutiny.

a. Development of the Modern Concept of National Origin

The modern concept of national origin arises from early concepts of race, but has developed in modern jurisprudence into a much more broad category. When the 1866 Expatriation Act was debated, Congress did not draw a fine distinction between the concepts of race, ethnicity, and national origin. The debates focused on “race,” but used a now antiquated definition of that term identifying “the ‘Anglo-Saxon,’ ‘Celtic,’ ‘German,’ ‘Gypsy,’ ‘Hindu,’ ‘Irish,’ ‘Jewish,’ ‘Latin,’ ‘Scandinavian,’ and ‘Spanish’ races,” classifications that today might not be considered racial but instead ethnic, religious, citizenship, or national origin. By defining race very broadly, Congress most likely intended to prohibit discrimination based on a broad understanding of race, including discrimination based on ethnicity, ancestry, color, and national origin.

This inclusive concept of race is supported by many court cases. In White, the Supreme Court used the term “race” as synonymous with “ethnicity” when it declared that “Mexicans [are] of the Spanish race.” In The Slaughter-House Cases, the Supreme Court referred to “the Mexican or Chinese race.” In Strauder v. West Virginia, the Court cited “naturalized Celtic Irishmen” as a protected racial classification. In Hodges, the Court included “the Chinese, … the Italian, … the Anglo–Saxon [and] the African” races. In Panama Railroad Co. v. Rock, the Court opined that Chile and

406. Hirabayashi, 320 U.S. at 100.
410. 83 U.S. (16 Wall.) 36, 72 (1873).
411. 100 U.S. 303, 308 (1880).
412. 203 U.S. 1, 17 (1906).
Panama were populated “predominantly [by the] Spanish ... race [as opposed to the French race].”\textsuperscript{413} In \textit{Morrison v. California}, the Court noted that Mexicans were of a different race than the predominant Anglo-Saxon race of California.\textsuperscript{414} Many of the early cases judging national origin discrimination continued to blur the distinctions between what was then termed race, ancestry,\textsuperscript{415} and ethnicity, without an effort to further define national origin.\textsuperscript{416} In fact, the Court stated that there was no significant distinction between race and national origin\textsuperscript{417} and that the two were “indistinguishable.”\textsuperscript{418} This early interpretation of national origin may have been based on the fact that most nations at the time were largely homogenous and the modern, multiethnic state that is more common today, was largely unknown. Therefore, at that time, there was no need to make a clear distinction between a person with Chinese ethnicity and a person with Chinese nationality, as they were the same.

So it would seem that national origin should be understood as having its initial justification in broad concepts of race; however, the modern definition has migrated far from the racial measure and today stands separated from race and ethnicity. Accordingly, it may be divergent enough to contemplate former nationality as a measure of national origin. What is clear from precedent, is that the U.S. cannot discriminate against a person based on the country from which he came or has ancestry, but what is unclear is whether a person may qualify as being “from” a country, for purposes of national origin, simply by having former nationality or citizenship in that country. There are a number of sources for a more detailed definition of “national origin” that must be examined, including

\begin{itemize}
\item \textsuperscript{413} 266 U.S. 209, 212 (1924).
\item \textsuperscript{414} 291 U.S. 82, 95 n.5 (1934).
\item \textsuperscript{416} See Takahashi v. Fish & Game Comm’n, 334 U.S. 410 (1948) (finding that a state may not discriminate in issuing commercial fishing licenses adversely against Japanese); Oyama, 332 U.S. 633 (discussing “discrimination between citizens on the basis of their racial descent” or a “father’s country of origin”); Korematsu, 323 U.S. at 216 (finding that classifications based upon race and nationality were subject to strict scrutiny); Hirabayashi, 320 U.S. at 100 (finding that “[d]istinctions between citizens solely because of their ancestry” was “odious to a free people”).
\item \textsuperscript{417} See e.g. Graham, 403 U.S. 365; Strauder v. W. Va., 100 U.S. 303 (1880).
\end{itemize}
interpretations of Title VII\(^\text{419}\) the Immigrant Responsibility and Accountability Act (hereinafter “IRCA”)\(^\text{420}\) and the Equal Employment Opportunity Commission (hereinafter “EEOC”\(^\text{421}\)) regulations.

\(b\). Distinguishing National Origin Discrimination from Ethnic Discrimination

The Supreme Court has attempted to clarify national origin on several occasions. In *Espinoza v. Farah Manufacturing Co.*, the Court stated, “national origin means where a person was born, or more broadly, the country from which his or her ancestors came.”\(^\text{422}\) The Court cited the legislative history behind national origin as support, specifically the comments of Congressman Roosevelt, Chairman of the House Subcommittee, who stated that national origin “means the country from which you or your forebears came ... You may come from Poland, Czechoslovakia, England, France, or any other country.”\(^\text{423}\) It is significant to note the use of the term “country” as an alternative to the use of the term “ancestry,”\(^\text{424}\) and as opposed to terms such as “ethnicity,” “nation,” or “national group.” Although clearly a potential ethnic basis exists for a national origin claim, the use of the expression “you may come from ... any other country” generally suggests that former nationality of a country alone might also qualify as a national origin, especially given that today a person from one of those listed countries might very easily have an ethnicity that was not a historic ethnicity of that country’s territory. For example, would an individual of German ethnicity, but who was born in Czechoslovakia, not be considered to have Czech national origin?

An important clarification to the *Espinoza* definition was subsequently made in *Garcia v. Gloor*.\(^\text{425}\) Although upholding the general definition stated in *Espinoza*, the 5th Circuit stated that national origin discrimination was distinct from ethnic discrimination. “National origin must not be confused with ethnic or sociocultural traits or an unrelated status.”\(^\text{426}\) This distinction was re-emphasized by Justice Brennan in his concurrence in

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423. Id. (*citing* 110 Cong. Rec. 2549 (1964)).

424. Id. at 89 (*stating* that “[n]ational origin” means “ancestry”).


426. Id. at 269.
the appeal of *Al-Khazraji v. Saint Francis College* to the Supreme Court.\textsuperscript{427} The Court granted certiorari in the case to address the conflict between, on the one hand, the cases of *Al-Khazraji*\textsuperscript{428} and *Alizadeh v. Safeway Stores*\textsuperscript{429} in which ethnic Arabs were permitted to claim discrimination, and on the other, *Shaare Tefila Congregation v. Cobb*\textsuperscript{430} in which Jews were not. The Court upheld the ethnic Arabs’ claim of discrimination even though the employer claimed that Arabs were of the Caucasian race. Justice Brennan noted the often confused mixing of ethnicity and national origin discrimination. Although a person’s national origin is often the same as the historical ethnicity of that country, this is not always the case. Following the lead of the Supreme Court, the New Jersey District Court stated that it is crucial not to “overly simplify the definition of one’s ‘national origin’ in the context of discrimination.”\textsuperscript{431} Ethnicity is based on racial and physical features; national origin is not. It is based on the country a person or his forebears is from.

c. Distinguishing Citizenship Discrimination from National Origin Discrimination

The full citation of the quote from *Garcia* above reads “[n]ational origin must not be confused with ethnic or sociocultural traits or an unrelated status, such as citizenship or alienage;\textsuperscript{432} however, the use of the term “citizenship” in that context does not defeat the argument that former nationality or citizenship cannot be a test for national origin, because the citizenship discrimination the Supreme Court refers to in this case is discrimination due to lack of U.S. citizenship, not discrimination among foreign citizenships.

In *Espinoza*, the Court made an attempt to distinguish national origin and citizenship discrimination in the context of Title VII discrimination. Initially, the District Court found that, at least under the regulations, “Congress meant to prohibit all invidious employment discrimination on the basis of national origin, including national ancestry, ethnic heritage, nationality and citizenship\textsuperscript{433} so “[w]hile ‘citizenship’ and ‘nationality’ may have different technical meanings, the term ‘national origin’ is broad enough to encompass both.”\textsuperscript{434} The Supreme Court disagreed. The Court highlighted the employer’s practice of “accept[ing] employees of Mexican origin,

\textsuperscript{427} 107 S. Ct. 62 (1986).
\textsuperscript{428} 784 F. 2d 505, 517 (3d Cir. 1986).
\textsuperscript{429} 802 F. 2d 111, 115 (5th Cir. 1986).
\textsuperscript{430} 785 F.2d 523, 527 (4th Cir. 1986).
\textsuperscript{432} Garcia, 618 F. 2d at 269 (5th Cir. 1980) (*emphasis added*).
\textsuperscript{433} 343 F. Supp. 1205 (D.C. Tex., 1971).
\textsuperscript{434} Id.
provided the individual concerned has become an American citizen.\textsuperscript{435} Therefore, the Court only addressed citizenship discrimination in so far as the discrimination was practiced against a person for not having acquired U.S. citizenship. The decision did not address discrimination among aliens based on their foreign citizenships, such as discriminating in favor of people from Colombia but against those from Mexico.

Subsequent decisions have asserted that citizenship is not a basis for a national origin claim; however when discussing citizenship, again the courts are not speaking about citizenship generally, but rather that lacking U.S. citizenship is not alone a valid basis for a national origin discrimination claim.\textsuperscript{436} The reasoning in these decisions is, as noted above in the discussion on plenary powers, the U.S. government has wide ranging discretion to limit privileges to non-U.S. citizens. The courts do not discuss whether citizenship generally could establish nationality, and thus national origin, outside of the non-U.S. citizenship context. While there may be situations where discrimination on the basis of not having U.S. citizenship has the effect of discriminating on the basis of national origin,\textsuperscript{437} discrimination against non-U.S. citizens on citizenship alone is not necessarily determinative of national origin discrimination. It depends on the operative fact that the actor uses for the discrimination.

In fact, in \textit{Schneider v. Rusk}, the Supreme Court specifically recognized a former citizenship as a valid former nationality for purposes of national origin discrimination.\textsuperscript{438} The Court struck a statute providing for the involuntary denaturalization of a naturalized U.S. citizen who returned to his country of former nationality for three years at any time after naturalization to U.S. citizenship. The Court found this provision to be discriminatory on the basis of national origin because it imposed a penalty on certain individuals for being “from” a particular country, measured by former nationality and citizenship. U.S. citizens with a different national origin might live in the same country abroad indefinitely without sacrificing their U.S. naturalization, so a penalty was being imposed only on individuals with that prior citizenship. Although it did not specifically recognize former U.S. citizenship as a national origin claim, it did recognize generally that a former citizenship could serve as a measure of one’s national origin. In line with the reasoning expressed in the Attorney General’s opinion in 1873, there is no

\textsuperscript{435} 414 U.S. 86 (1973).
\textsuperscript{438} Schneider v. Rusk, 377 U.S. 163.
reason to believe that this finding does not also apply in reverse, i.e. establishing U.S. national origin for a person who formerly had U.S. citizenship.

An interesting case to note is that of Chacko v. Texas A&M University in which the plaintiff argued that she was discriminated against based on her national origin, her national origin being Canada. The Southern District of Texas found that “in actuality, Chacko is asserting citizenship discrimination,” not national origin. This finding was based on the fact that

Chacko identifies herself as a ‘Citizen of Canada.’ Nowhere … does Chacko identify or discuss her national origin; nor does Chacko advance any reason other than her citizenship for her alleged termination. Thus, it is apparent that Chacko’s Title VII claim is based upon her citizenship and not her national origin.

It appears that the court may have merely looked for the words “national origin,” and instead, finding “citizen,” converted the claim to citizenship discrimination and dismissed it. The court failed to perceive that she was claiming citizenship as evidence of national origin and did not address whether a person might be discriminated against specifically for being “from” Canada, as opposed to discriminated against for not being a U.S. citizen.

The decision additionally suggests that the court informally looked to ethnicity as a proxy for national origin and, finding Chacko’s ethnicity to be similar to the majority ethnicity at her U.S. employer, dismissed the claim. Also, the Court may have impliedly found that a multi-ethnic country such as Canada might not produce a unified national origin, though no one would deny such a thing as Canadian “nationality” in the sense of international law. We can speculate that the Court may have reached this conclusion because Canada is now a decidedly multi-ethnic state, founded and fed by immigration, and thus there is no Canadian national origin since all Canadians have a “true” national origin from elsewhere, such as England,

440. Id.
441. Id.
442. See De Passalacqua, Voluntary Renunciation, supra note 25 at 275 (“This reality has moved some to define the concept of the ‘nation,’ on the basis of the characteristics of the ‘State.’ In so doing, they often equate the concept of the ‘State’ with that of the ‘nation.’ For these publicists, the State apparatus determines the field of the nation. However, State and nation are different concepts, which should not be confused and should be examined independently of each other”).
France, China, or one of the indigenous tribes. Along the same lines, the Court may have assumed that a person cannot have more than one national origin.

Any of these findings would misread the law and make the crucial mistake of blending ethnic discrimination, or discrimination based on socio-cultural traits, with national origin discrimination. Any of these findings would misread the law and make the crucial mistake of blending ethnic discrimination, or discrimination based on socio-cultural traits, with national origin discrimination. It also disregards the primary directive of national origin discrimination stated by Congressman Roosevelt and recognized in Espi

443. See Garcia, 618 F. 2d at 269 (citing Espinoza, 414 U.S. at 94).
place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.\(^{448}\)

In its compliance manual, the EEOC states that national origin includes one of two areas. The first category is

a ‘national origin group,’ often referred to as an ‘ethnic group,’ [meaning] a group of people sharing a common language, culture, ancestry, and/or other similar social characteristics … including Hispanics … Arabs, … Kurds … Roma (Gypsies) [and] American Indians or members of a particular tribe.\(^{449}\)

This basis for discrimination can encompass “citizenship requirements [that] have the purpose or effect of discriminating against an individual on the basis of national origin,”\(^{450}\) “height or weight requirements [that] tend to exclude individuals on the basis of national origin,”\(^{451}\) “an individual’s foreign accent,”\(^{452}\) “inability to communicate well in English,”\(^{453}\) “foreign training or education,”\(^{454}\) “belonging to a certain ethnic group,” “physical, linguistic, or cultural traits are closely associated with a national origin group,”\(^{455}\) or “an individual's perceived membership in an ethnic or national origin group, even if he or she is not actually a member.”\(^{456}\)

The second alternative basis for a national origin discrimination claim is when

a person (or his or her ancestors) comes from a particular place. The place is usually a country or a former country,\(^{456}\)
for example, Colombia or Serbia. In some cases, the place has never been a country, but is closely associated with a group of people who share a common language, culture, ancestry, and/or other similar social characteristics, for example, Kurdistan.\textsuperscript{458}

In developing its guidelines, the EEOC had the objective to protect against discrimination “whether an individual’s ancestry is Mexican, Ukrainian, Filipino, Arab, American Indian, or any other nationality.”\textsuperscript{459} Interesting to note is the use of the term “nationality” here, as it notes that nationality may be considered to have the same meaning as “national origin.” Also interesting to note is the distinction between, e.g., Mexican and Colombian national origins. Whether they are differing ethnicities is debatable, but they are clearly different countries, nationalities, and citizenships, and qualify on that basis alone.

In addition, comparable statutes also support the above bifurcation of the definition. Although in the U.S., we generally speak of “citizens,” the citizens of the U.S. are also concurrently defined as U.S. “nationals.” According to the INA, a “national” is “a person owning permanent allegiance to a state”\textsuperscript{460} and sharing in the nation’s culture, language, customs, etc. In the U.S., a “national of the United States” is broader than the term “citizen,”\textsuperscript{461} but does encompass it. We can compare this definition to that of other countries where citizen and national are similarly converging.\textsuperscript{462} When a person expatriates, we do not speak of loss of citizenship, but rather “Loss of Nationality”\textsuperscript{463} and the DOS issues a

\textsuperscript{458} Id. at § 13-1.
\textsuperscript{459} Id.
\textsuperscript{462} See e.g. Alfred M. Boll, Multiple Nationality and International Law 70 (2007) (“In many states, as citizenship … rights were extended to all sectors of a state’s community over time, any distinction that may have existed between the concepts of nationality and citizenship began to disappear. In terms of international law however, the two categories are arguably still distinguishable”).
\textsuperscript{463} See INA § 349; Trop v. Dulles, 356 U.S. 86 (1958) (finding that “[i]n form § 401 (g) appears to be a regulation of nationality … Specifically, individuals will lose their U.S. citizenship only by ‘voluntarily performing any of the following acts with the intention of relinquishing United States nationality’ … The statute deals initially with the status of nationality and then specifies the conduct that will result in loss of that status”); Codification of the Nationality Laws of the United States, H. R. Comm. Print, pt. 1, 76th Cong., 1st Sess. 68 (providing that “A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by [performing enumerated acts]”).
Certificate of Loss of “Nationality” in confirmation. Therefore, a person who renounced U.S. citizenship has also renounced U.S. nationality under U.S. legal definitions. Having former U.S. nationality means, under the EEOC and judicial definitions, that the person has a U.S. national origin.

We can also look to dictionaries for confirmation of the common usage of the term “national origin.” Black’s Law Dictionary defines “[n]ational” as “of or relating to a nation.”\(^464\) Black’s further defines “national” as “[a] member of a nation” or “[a] person owing allegiance to and under the protection of a state.”\(^465\) In particular, Black’s defines a “[n]ational of the United States as “[a] citizen of the United States or a noncitizen who owes permanent allegiance to the United States.”\(^466\) Similarly Black’s defines “nationality” as “[t]he relationship between a citizen of a nation and the nation itself, customarily involving allegiance by the citizen and protection by the state; membership in a nation. This term is often used synonymously with citizenship.”\(^467\) Thus, common usage also supports the definition of national as based on political origins.

Lastly, we can look at other nations and international law to determine the definition of national origin and the degree to which it comports with the broad definition we have established here. As has often been observed, “[i]n the absence of a congressional enactment, United States courts are ‘bound by the law of nations, which is a part of the law of the land.’”\(^468\) The Universal Declaration of Human Rights and other U.N. pioneered international agreements can be considered “a settled rule of international law.”\(^469\) The Declaration and a number of international conventions declare that there should not be any discrimination on the basis of race, color, sex, language, religion, political or other opinion, property, birth, or national or social origin, among other statuses. The International Covenant on Economic, Social and Cultural Rights lists race, color, sex, language, religion, or political or other opinion; national or social origin; property; and birth or other status; and so does the International Covenant on Civil and Political Rights.\(^470\) The Racial Discrimination Convention targets laws that make any distinction on the basis of race, color, descendants, national or ethnic origin, moves to prohibit discrimination in civil and human rights on the basis of race, color or ethnic origin, but also adds that countries must not discriminate in limiting civil rights of nationality, education,

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465. Id. (emphasis added) (citing 8 U.S.C. § 1101(a)(21)).
466. Id.
467. Id.
468. Filartiga v. Pena-Irala, 630 F. 2d 876, 887 (2d Cir. 1980) (quoting The Neide, 13 U.S. (9 Cranch) 388, 422 (1815)).
469. Id. at 881 (quoting The Paquete Habana, 175 U.S. 677, 694 (1900)).
religion, employment, profession, residence, public facilities, and political rights. By separately listing race, color, birth, and other statuses, the agreements demonstrate that international law recognizes a distinction between all of these forms of discrimination. Since national origin excludes racial, color-based, social or birth discrimination, its definition may include membership in a nation-state without consideration of ethnicity and other racial factors.

A further international legal source we can examine to assist in narrowing this definition is the international crime of genocide that discusses national origin. In Article II of the Genocide Convention, the crime requires the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” After examining the travaux préparatoires of the Convention and the case law of the International Court of Justice, the Trial Chamber of the International Criminal Tribunal for Rwanda (hereinafter “ICTR”) found that “a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.” The International Criminal Tribunal for the former Yugoslavia has ruled similarly. This definition looks specifically to the country of origin and the nationality relationship of the individual to the country as establishing national origin, without any determinative consideration of ethnicity or race. The reason being that ethnicity is separately defined in the Genocide

473. The Prosec. v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 512 (ICTR, Tr. Ch. I, Sep. 2, 1998) (emphasis added). Cf. The Prosec. v Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 98 (ICTR, Ch. II, May 21, 1999) (distinguishing national group from “[a]n ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others”)). But see The Prosec. v. Rutaganda, Judgment & Sentence, ¶ 56 (ICTR, Tr. Ch. I, Dec. 6, 1999) (finding that “the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context”).
Convention as a set of individuals whose identity is defined by common cultural traditions, language or heritage; and race is also separately defined as a set of individuals whose identity is defined by physical characteristics. Since ethnicity and race are separately provided, then they must not necessarily encompass national origin. If national origin specifically covers “common country of nationality” and classifies something other than ethnicity, race, or color, then the ICTR Trial Chamber in Akayesu\(^{475}\) is correct, it must cover nationality rather than ethnic or racial considerations.

In addition to the fact that expatriates qualify for national origin discrimination based purely on former U.S. citizenship, they might also qualify based on cultural factors. This question raises the issue of whether the U.S. is truly a nation, focusing on the cultural basis for national membership. For a young country, traditionally one of immigration rather than emigration, it seems an odd concept to look to a national culture since many Americans may identify their national, cultural origin as a place other than the U.S. However, if one’s ancestors emigrated from the U.K. to the U.S. five or six generations ago and the person’s family only knew the U.S. and were U.S. nationals, one’s distant ancestors might have been British, but one’s family was “from” the U.S., culturally and historically. Under the criteria established by the Supreme Court, cultural ancestry of the U.S. is possible.

d. Multiple National Origins

The next question is whether an individual may be permitted to claim national origin in more than one nation. This question might arise in the case of a person claiming discrimination on the basis of U.S. national origin, but also clearly having an additional national origin from an earlier country of birth or previous nationality. Courts have on occasion been faced with individuals whose place of birth and citizenship were not identical. The Northern District of New York initially found that “[w]here an individual’s place of birth and country of citizenship differ, national origin refers to place of birth.”\(^{476}\) This finding has, however, been significantly disputed. Based on the case law, national origin must be assessed by the following factors: place

\(^{475}\) Akayesu, ¶ 512 (emphasis added) (“‘national’ referred to ‘a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties’”). Cf. Kayishema & Ruzindana, ¶ 98 (distinguishing national group from “[a]n ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others). A racial group is based on hereditary physical traits often identified with geography”).

of birth, ancestry, objective physical appearance (ethnic features), where the person was raised, national cultural indicia that suggest a foreign origin, such as language(s) spoken, in particular spoken at home; identifiable accent, or the country of current or former citizenship or nationality. Applying these factors in some situations may result in finding a person to have multiple identifiable national origins, for example, the situations in Harel v. Rutgers and Bennun v. Rutgers cited above. These individuals might have variously claimed national origin in several countries, such as Czechoslovakia and/or Israel, based on the traditional criteria above and provided that one of their national origins was discovered and used against them.

We can also look to the Nationality Act of 1940 wherein the U.S. confirmed that Native Americans were U.S. nationals and citizens; however, courts have found that discrimination against members of these tribes is national origin discrimination. Under one measure, the INA, they are U.S. nationals, yet under another measure, tribal membership, they are tribal nationals. One is a state-based designation and the other a primarily ethnic-based designation (with related issues of quasi-sovereignty). These individuals thus have at least two nationalities by operation of U.S. law.

Lastly, we note that the EEOC, and the case law on which its regulations are based, has recognized that individuals may have multiple national origin claims. The EEOC will consider other factors that suggest “national origin considerations, such as … marriage to or association with persons of a national origin group; … and … because an individual’s name or spouse’s name is associated with a national origin group.” Thus, a person could state a claim, not based on his own national origin, but by derivation from his spouse. This person might also have a national origin claim based on his own background, thus resulting in more than one national origin claims. Depending on which of those national origins was identified and used as a basis for discrimination against him, the individual could potentially claim any one of them.

A final anecdotal example of multiple national origins is the unusual story, many times now retold, detailed by an accountant’s letter to the IRS in

478. Id.
480. See INA § 289, 54 Stat. 1137 (affirming the similar provisions in the Citizenship Act of 1924, 43 Stat. 253) (providing that “[t]he following shall be nationals and citizens of the United States at birth: … member of an Indian, Eskimo, Aleutian, or other aboriginal tribe”).
the expatriate tax context. Although of Chinese ethnicity and citizenship, the accountant’s client was born and raised in Calcutta, in British India. Following the Communist revolution in China, he renounced his Chinese citizenship and adopted Pakistani citizenship, as he was resident in the portion of British India that became Pakistan at the time of independence. He later married a woman who was also of Chinese ethnicity, but whose parents were from Malaysia and who had been born in the portion of British India that was now independent India. Thus, she had Indian citizenship, though she resided with her husband in Pakistan. When he relocated to Hong Kong, he adopted British citizenship and renounced his Pakistani citizenship, mostly for business-related discrimination concerns. Upon his later relocation to the U.S., he went through the lengthy process of acquiring U.S. citizenship. In retirement, he relocated once more to Canada to join the remaining members of his family that lived there. Eventually, he adopted Canadian citizenship and renounced his U.S. citizenship. The IRS determined that, based on this fact scenario, he had renounced his U.S. citizenship for tax avoidance reasons since he was wealthy and he did not take up residence in the ancestral birthplace of his parents, now the People’s Republic of China, a place where he had never previously resided. In addition, he was potentially barred from ever returning to the U.S. as a penalty. If national origin is not to be confused with ethnicity, then was is this man’s national origin or origins? In this particularly unique case, he might conceivably have multiple national origins as he can show qualifying links to several countries and can even show some discrimination against him by different countries based on some of those links.

\[i. \text{Criteria Supporting Former Citizenship and National Origin Discrimination}\]

Although we may be satisfied that current national origin jurisprudence already covers former citizenship discrimination as national origin discrimination, we must also consider whether former citizenship discrimination satisfies the traditional criteria for subjecting the classification to strict scrutiny. Beginning with Justice Stone’s holding in \textit{Carolene}., we must ask if there is a discrete and insular minority. Minorities can be more easily identified if their status is defined by an immutable trait. If it is a minority in this sense, then we determine if there is invidious discrimination, i.e. deep-seated prejudice. Oftentimes, these prejudices against discrete

484. See Carolene Prods., 304 U.S. at 152, n. 4.
486. See Carolene Prods., 304 U.S. at 152, n. 4.
and insular minorities are expressed through the prevalence of false and disparaging stereotypes or other consideration that are irrelevant to any proper legislative goal.\textsuperscript{487} The combined effect of the minority status and invidious discrimination against the minority may also result in the identifiable failure of the political processes to protect minorities.\textsuperscript{488}

\textit{a. Discrete and Insular Minority}

A discrete and insular minority is generally defined as a small, well-defined group of individuals with strong commonalities that are politically excluded or isolated and the political system generally will not protect them. The suggestion is that to be discriminatory, the provision must affect a minority, not a broad section of the population.\textsuperscript{489}

This criterion of who is being affected must, however, be carefully drawn due to the jurisprudential move away from disadvantages placed on a class to the illegitimacy of the classification itself.\textsuperscript{490} This means that the focus must not be on the disadvantage of the insularity but rather the existing insularity that is used by the government as a basis for further isolating acts. This type of classification contradicts the tradition of equal protection in that it does not contemplate people as individuals but as members of discrete groups and is “incompatible with the constitutional understanding that each person is to be judged individually.”\textsuperscript{491} If a group is already identified as separate and apart from the mainstream of society, then classifications that track that separateness may be suspect, not because they disadvantage but because they track the pre-existing isolation.

Expatriates certainly form a discrete and insular minority since they are a small, well-defined group of individuals who are politically excluded and unprotected by the political system. The group is a small minority of the population, approximately 300 individuals per year or approximately one millionth of the U.S. population. The group is certainly disadvantaged by the expatriate provisions, as compared to other non-U.S. person aliens residing abroad, so even if a court were to demand a showing of disadvantage that criteria can also be sustained.

\begin{footnotesize}
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\item \textsuperscript{487} See McLaughlin, 379 U.S. at 192.
\item \textsuperscript{488} See Anderson v. Martin, 375 U.S. 399 (1964) (finding that acts intended to prevent minorities from taking art in the political process violate equal protection); U.S. v. Carolene Prods. Co., 304 U.S. at 152, n. 4.
\item \textsuperscript{489} See Leathers v. Medlock, 499 U.S. 439 (1991).
\item \textsuperscript{490} See Adarand Constructors, Inc. v. Pena, 515 U.S. at 220-2 (requiring strict scrutiny of race-based classifications made by federal government, even if they are designed to remedy past discrimination).
\item \textsuperscript{491} Cleburne, 473 U.S. 432; Graham, 403 U.S. 365; McLaughlin, 379 U.S. at 192.
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The fact that non-resident aliens comprise a discrete minority is often excused. As noted previously, the distinction between resident and non-resident aliens for purposes of equal protection guarantees is often justified by the fact that non-resident aliens “are not viewed as an isolated minority, since they are granted diplomatic protection by their home country.” However, as noted above, this statement overlooks the fact that residency, and even citizenship in some cases, is not determinative under international law for diplomatic protection. Thus, this excuse for discrimination against a discrete and insular minority is not justified.

b. Invidious, Deep-Seated Prejudice

The second criterion is deep-seated prejudice against the group. The class must be “saddled with such disabilities, or subjected to … a history of purposeful unequal treatment.” The Supreme Court has recognized that when the Government makes these classifications among people, those “classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective.” Not only can the classification track existing isolation from the mainstream, and be suspect, but the majority may harbor harsh feelings and actions towards the isolated group. Classifications such as these are more likely to be suspect because “laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others.”

The prejudice can be identified by the prevalence of false and disparaging remarks about the class. A court may consider the existence of animus towards the group to be a basis for more searching judicial inquiry, if not strict scrutiny.

Discrimination alone however is not operative, only severe discrimination. The Supreme Court declined to recognize some forms of “discrimination against illegitimates [because the discrimination they face] has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes.”

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492. See Bungert, Equal Protection, supra note 309 at 677.
493. Rodriguez, 411 U.S. at 28; Carolene Prods., 304 U.S. at 152 n. 4.
495. Id.
496. See Newman, Taxing Issue, supra note 29.
497. Romer v. Evans, 517 U.S. 620 (1996) (finding that although sexual orientation did not rise to the level of strict scrutiny, measures passed based on pure animus against the minority demand searching review).
498. Mathews, 427 U.S. at 506.
In order to claim this form of discrimination or prejudice, the individual must be outwardly identifiable as a member of the class.

[Un]lawful discrimination must be based on [the plaintiff’s] objective appearance to others, not his subjective feeling about his own ethnicity. Discrimination stems from a reliance on immaterial outward appearances that stereotype an individual with imagined, usually undesirable, characteristics thought to be common to members of the group that shares these superficial traits.

Former U.S. citizens who renounced their citizenship for tax savings reasons are subjected to invidious, deep-seated prejudice. Statements by members of Congress evidence a hostility held for individuals who renounce citizenship to save on taxes, even though the Supreme Court has consistently found that structuring one’s personal affairs to limit one’s tax liability to the maximum extent of the law is perfectly legal. Although

500. See Dagarella, Wealthy Americans, supra note 76 (“The willingness of our citizens to voluntarily comply with our tax laws is threatened when very wealthy individuals can avoid their responsibility as citizens by turning their backs on this country and walking away with enormous wealth”); Heath, Symmetries, supra note 45 (observing the desire to demand that “the expatriate, having shared in our resources and developed her conception of the good, has decided to leave and thus should square her account with us” and observing that “the debate seemed inspired not by a concern for fiscal coherence but rather outrage that some individuals could think so little of their citizenship that they renounce it for mere pecuniary gain”) (citing Leslie B. Samuels, Asst. Sec’y of Treasury for Tax Pol’y, Testimony, Tax Treatment of Expatriated Citizens: Hearings Before the Sen. Fin. Comm., 104th Cong. 4 (1995) (stating that “U.S. persons should pay their fair share of U.S. tax … [P]ublic confidence in our tax system is eroded by the perception that some wealthy individuals are able to escape paying taxes through devices that are not generally available to all taxpayers”); Colón, Changing, supra note 40 (citing Remarks of Rep. Neil Abercrombie on House Floor (Mar. 30, 1995), available in LEXIS, Fedtax Library, TNT File, 95 TNT 70-27 (stating “[w]hat we have here are Benedict Arnolds, Benedict Arnolds who would sell out their citizenship, sell out their country in order to maintain their wealth”)); Abreu, Taxing Exits, supra note 188 at 1087 (stating that tax-motivated expatriation is like “flag burning: it offends people”) and at 1141 (arguing that the limited HIPAA reforms were a “victory over the … disdain for American citizenship that results in tax-motivated expatriation”).
501. See Gregory v. Helvering, 293 U.S. 465, 469 (1935) (holding that “[t]he legal right of a taxpayer to decrease the amount of what would otherwise be his taxes, or altogether to avoid them, by means which the law permits cannot be doubted”); Murphy Logging Co. v. U.S., 378 F. 2d 222, 223 (1967) (holding that “[t]ax reduction is not evil if you do not do it evilly”); Comm’r v. Newman, 159 F. 2d 848, 850-1 (2d Cir. 1947) (Hand, J., dissenting) (finding that “there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more
most expatriates tend to be extremely wealthy, so the idea of suffering from
discrimination on par with historic racial discrimination is laughable, the
class does face deep-seated prejudice. Often labeled as “un-American,”
traitors, or “Benedict Arnolds,” the group suffers from the belief that they
have abandoned the nation in its hour of need, overlooking the fact that
expatriation is a fundamental right. This animus is often reflected in the
terms of the debate and the legislation passed. The resulting discrimination
is severe in the sense that the differences in tax liability are extreme. Here
we can also mention again that expatriates that incur this tax liability based
on tax-motivated expatriation are also potentially excluded from the U.S., an
enforced exile.

c. Immutable Trait

The fact that membership in the group may be immutable or
unchangeable also makes a finding of “suspect-ness” more likely. As
examples, race and national origin are not personal aspects that can be
changed, but age and wealth are traits that can and do change. Some
immutable characteristics, though, are not in and of themselves sufficient to
invoke strict scrutiny.

[T]he Court has recognized that the legal status of illegitimacy, like race or national origin, is an immutable
characteristic which ‘bears no relation to the individual’s ability to participate in and contribute to society’ … and that
‘the law has long placed the illegitimate child in an inferior position relative to the legitimate in certain circumstances’ … Nonetheless, the Court has said that classifications based
on illegitimacy are not ‘suspect’ or subject to strict scrutiny. 503

This exception may to some degree based on the difficulty of
outward identification of illegitimacy as well as the fact that the status is
increasingly more socially accepted and not subjected to severe
discrimination. Also note that

sex, like race and national origin, is an immutable
characteristic determined solely by the accident of birth, the
imposition of special disabilities upon the members of a

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502. Id.
particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility.\(^{504}\)

and yet the Supreme Court did not find strict scrutiny appropriate. As a final example, in *Cleburne*, the Supreme Court refused to apply strict scrutiny to mental infirmity, even though that status is also an immutable characteristic.\(^{505}\) Based on the above, the degree of immutability cannot be a sole consideration either in favor or against definition as a suspect class, though it is certainly a significant factor.

The status as an expatriate and a former U.S. citizen is immutable. Certainly when the status of U.S. citizen was granted based on birth within the U.S., that fact is truly immutable. “[S]olely [an] accident of birth, the imposition of special disabilities upon the members … because of their [immutable characteristic] would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility.”\(^{506}\) The Supreme Court has found that like race, ancestry is an “immutable characteristic”\(^{507}\) because it is “determined solely by the accident of birth.”\(^{508}\) “The color of a person’s skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government.”\(^{509}\)

However, for those individuals who naturalized as U.S. citizens and then later renounced their citizenship, this national origin is also immutable. In fact, for those individuals who naturalized as minors automatically upon their parents’ naturalization, the acquisition of U.S. nationality was out of their control, but for others the fact that it was based on a choice should not diminish the fact that it is immutable now. One might argue that the individual could never have naturalized and avoided acquiring U.S. nationality. However, once acquired, the former citizenship cannot be erased and the person has former U.S. nationality. Arguing that a person might have avoided acquiring the immutable characteristic is comparable to arguing that an individual could have avoided national origin discrimination in other contexts by simply not marrying a person with a particularly ethnicity. If one has a fundamental right to leave his own country of origin, seek another citizenship, and later divest himself of that citizenship, then the individual is

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505. See *Cleburne*, 473 U.S. at 446-50 (although it is arguable that the court applied the substance of strict scrutiny under the name of rational basis).
509. *Hirabayashi*, 320 U.S. at 100.
free to do these things and not be penalized for the immutable characteristic that results.

**d. Political Powerlessness**

A further factor is political powerlessness of the group and the unlikelihood of protection through the democratic process. “[C]ertain groups, indeed largely the same groups, have historically been ‘relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’”510 The normal working of the democratic representative process will work to prevent different groups from becoming oppressed by the majority, but some minorities are either so statically insignificant that their political voice is weak or, such as the case with aliens, have no political voice at all. “[L]egislation is presumed to be valid ... [because] the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.”511 However, “when a statute classifies by race, alienage, or national origin ... grounded in such considerations are deemed to reflect prejudice and antipathy. ... such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny.”512

Expatriates are aliens and are thus excluded from the political process. Accordingly, they constitute a group with the least political power of any. They cannot effectively protest against their tax treatment by lobbying their representative or exercising a vote. Although they must expect to be taxed to some degree since they earn U.S.-source income, the question is not whether they should be taxed, but whether the taxation scheme may be discriminatory against the class. Individual members of Congress might, in some cases, be open to the taxation complaints of expatriates due to their investment in the U.S., but due to long standing prejudice and the pressures of the democratic process, it is unlikely that Congress as a whole would be sympathetic to the taxation complaints of expatriates. Therefore, not only are the expatriates excluded from the political process, but also they are unlikely to receive protection through the democratic process and may require extraordinary protection.

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510. Rodriguez, 411 U.S. at 28; Graham, 403 U.S. at 372; Carolene Prods., 304 U.S. at 152, n. 4.
512. Id.
e. Provision is Irrelevant to a Proper Legislative Goal

The final factor is that certain classifications “tend to be irrelevant to any proper legislative goal” or “to the achievement of any legitimate state interest” and as such “are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others.” In a way this criterion is a pre-judgment of the likelihood of the classification eventually surviving strict scrutiny and as such will be discussed in more detail in the sections below analyzing the measure against strict scrutiny. The instant classification classifying on national origin and punishing the exercise of a fundamental right is most likely irrelevant to any proper legislative goal or to the achievement of any legitimate state interest and is most likely reflecting prejudice and antipathy. It is also for this reason that the Court should apply strict scrutiny in assessing the provision.

ii. Summary of National Origin Discrimination

The above discussion suggests that national origin can be measured in one of two principle ways, either based on the fact that a person is from an ethnic nation or the fact that a person is from a particular nation-state. This second alternative can be measured by former nationality. The evolution of the law from a racial classification into a broad category contemplating former nationality may be due to the increased international mobility of persons. When national origin theory was first developed, the vast majority of individuals were likely born in their country of citizenship with similar physical features as their ethnic neighbors and remained in their country of citizenship, acquiring cultural and linguistic preferences. Today, this experience is not as universal as before. Although much of the world continues as before, increasing numbers of people do not, especially individuals with the disposition and wherewithal to relocate to the U.S. It may be that, sociologically speaking, individuals who immigrate to the U.S. are more likely than others to have a bifurcation of ethnicity and citizenship. Also, a reminder is necessary that the above discussion argued that former nationality might establish a national origin discrimination claim and thus call for strict scrutiny, but some of the other provisions of the expatriation tax clearly make distinctions based on national origin and thus certainly call for strict scrutiny. Specifically, as mentioned above, the provisions creating exemptions from the tax based on an individual’s country of birth and country of parent’s birth easily satisfy the test of being based on the country

513. McLaughlin, 379 U.S. at 192; Hirabayashi, 320 U.S. at 100.
of ancestry or country a person is “from,” so these provisions demand strict scrutiny regardless of whether the former nationality argument above is accepted. However, if the former nationality argument is accepted, then the provisions making distinctions based on spousal citizenship also demand strict scrutiny.

iii. Intent to Discriminate and Discriminatory Effects

Once we have identified the discriminatory effect, we must also establish purposeful discriminatory intent to sustain an equal protection claim.\(^{515}\) If we find a discriminatory intent but no effect\(^{516}\) or no intent but effect,\(^{517}\) then a court will apply the rational basis standard. Discriminatory purpose “implies that the decision maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effect on an identifiable group.”\(^{518}\) Courts have allowed intent to be inferred from outrageous effects\(^{519}\) and from discriminatory application of laws that do not express a discriminatory intent,\(^{520}\) but for the sake of this argument, we will assume the court will not infer discriminatory intent and will require the taxpayer to prove the intent.

Proponents of the expatriate tax may argue that the U.S. is motivated by a desire to simply recoup expenditures from individuals who have benefited from the U.S.’ protection; however, the debates on the Congressional floor and the titles of many resulting bills suggest an intent to target expatriates purely on the basis of their former nationality. We can look to the recent Highway Reauthorization Bill provision that failed, but was titled “Discouraging Tax Motivated Expatriation.”\(^{521}\) We can also look to Congressional debate and statements mentioned above.

Even if this animus against expatriates does not sustain a showing of intent, we must recall that the intent to target the group on the prohibited basis need not be the sole motivation of the legislation to invoke strict scrutiny. Intent can be found if those who have been discriminated against can show that the legislature would not have enacted the provision but for motivation to discriminate, i.e. the “Feeney” test.\(^{522}\) “[I]t is enough to show that the challenged action was taken ‘at least in part ‘because of’ ... its

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516. See e.g. Palmer v. Thompson, 403 U.S. 217 (1971).
518. Lavernia v. Lynaugh, 845 F. 2d 493, 496 (5th Cir. 1988).
519. See Wash. v Davis, 426 U.S. 229.
520. Yick Wo, 118 U.S. 356.
521. See H.R. 3550, pt. V.
adverse effects upon an identifiable group.” 523 In this case, the legislature passed the law taxing individuals who have renounced U.S. citizenship. Thus, the legislature was motivated to identify those individuals who fell in the class and to pass legislation that treated those individuals in a discriminatory fashion. The Feeney test is satisfied.

Courts have also found that the intent may be shown by its having been merely a predominant factor in passing the law, i.e. the “Miller” test, 524 rather than the sole motivated desire. The Miller test is generally only applied in the context of voting, but if it were to be applied here, it is also satisfied. Congress clearly sought to identify those individuals as set apart from others and the basis for that classification was discriminatory as described above. Therefore, even if Feeney cannot be satisfied, Miller can be.

F. Application of Strict Scrutiny

Regardless of whether we find that the expatriate tax provisions infringe on a fundamental right or if they make a suspect classification, under either measure we must test whether the government can prove that the measure is narrowly tailored to address a compelling government interest. Strict scrutiny may be applied to this tax law because the degree of inequality is gross, 525 the discrimination is unusual, 526 and the classification is arbitrary and discriminatory. 527

Initially, we must observe that, although the Supreme Court has taken pains to emphasize that it is not true, 528 strict scrutiny is nearly always fatal. 529 This is particularly true when the court considers measures that discriminate on race or national origin. Having offered that observation, we will not assume that strict scrutiny will necessary be “fatal in fact.” First, we examine whether there is a compelling state interest, and, only if that first prong satisfied, do we examine whether the measure is narrowly tailored to achieve that end. 530 We must also recall that throughout this inquiry, the

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525. See Colgate, 296 U.S. at 422.
528. See Adarand, 115 S. Ct. 2097 (1995) (stating that “we wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact’”).
530. See Zablocki, 434 U.S. at 388.
burden is now on the government to prove those two prongs.\textsuperscript{531} In fact, the burden has been characterized as “a heavy burden of justification.”\textsuperscript{532}

It has been argued that

[c]omparisons have been made between the new expatriation tax (as well as many of the proposals brought before Congress in 1996) and the exit tax imposed by the former Soviet Union on Jewish citizens in an effort to show that the tax and the exclusion are inhumane … The direct effect of the tax statute does not violate international human rights law because it does not to place a ‘burden on the right to emigrate’ as the Soviet exit tax did.\textsuperscript{533}

What this analysis fails to take into consideration is that the exit tax provision must not merely be humane under international law by not imposing an unreasonable burden; it must also pass strict scrutiny under U.S. law.

1. Compelling State Interest

There have been recent attempts to quantify the degree of “compelling-ness” required to satisfy strict scrutiny, and proposals that the courts are in fact applying more than three differing levels of scrutiny. In order to be compelling, the interest must be constitutionally permissible\textsuperscript{534} and very important. Courts have variously defined the level of importance as any level from “important,”\textsuperscript{535} or “substantial,”\textsuperscript{536} to the extremes of “compelling”\textsuperscript{537} or “overriding.”\textsuperscript{538} In some instances combining two as in “substantial and compelling.”\textsuperscript{539} No significant distinction among these various linguistic choices has ever been satisfactorily made. We can, however, look to actual application to determine what interest may be compelling. Although cases finding an interest compelling enough to

\begin{footnotesize}
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\item \textsuperscript{531} See Rodriguez, 411 U.S. at 16.
\item \textsuperscript{532} McLaughlin, 379 U.S. at 196.
\item \textsuperscript{534} See McLaughlin, 379 U.S. 184; Brown v. Bd. of Edu., 347 U.S. 495.
\item \textsuperscript{535} See Dunn, 405 U.S. 343.
\item \textsuperscript{536} See id.
\item \textsuperscript{537} See Graham, 403 U.S. at 375.
\item \textsuperscript{538} See Loving, 388 U.S. at 11.
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override a racial-based statute are rare, fundamental rights have been limited, such as free speech.

2. Narrowly Tailored Means to Achieve the Permitted End

There is also discussion how narrowly tailored the measure must be. Again, courts fall on a spectrum of phrasings. Some courts merely require the provision to be “drawn with precision to achieve its objectives,” whereas others require the measure to be “necessary … to the accomplishment” of its compelling purpose. One very helpful inquiry is to determine if there are any less restrictive means available to accomplish the same purpose. If the provision does not “advance a compelling state interest by the least restrictive means available,” then the provision cannot be considered narrowly tailored. Secondly, the measure may not be vague or substantially over- or under-inclusive. In Faruki v. Rodgers, the District Court of D.C. explained,

[...] one would think that if government's interest in a given statutory scheme were, in fact, seriously compelling, the regulation would not have obvious holes in its coverage. On the other hand, … [w]here a statute imposes a clear disability, as here, the defect of over-inclusion may be worse than that of under-inclusion, since it would seem more objectionable to impose burdens where they do not belong than to grant what amount to exemptions.

Looking at Brandenburg v. Ohio, we see that even speech in support of breaking the law is acceptable and may only be restricted when the

540. Id.
545. See Schad v. Mt. Ephraim, 452 U.S. 61, 71-4 (1981); Dunn, 405 U.S. at 343; Shapiro, 394 U.S. at 635; McLaughlin, 379 U.S. at 197 (Harlan, J., concurring).
546. 349 F. Supp. 723.
speaker was attempting to and was likely to incite imminent lawless action.\footnote{Brandenburg v. Ohio, 395 U.S. 444 (1969).} Thus, the limit to acceptable restrictions is the least restrictive means to achieve the end of preventing violence.

3. Possible Compelling Interests

In the JCT Report,\footnote{See JCT Report, supra note 3 at 75.} Congress identified six purposes of the expatriate tax that was later enacted: (1) to express official disapproval of tax-motivated expatriation; (2) to deter or punish tax-motivated expatriation; (3) to remove unintended tax incentives from expatriation; (4) to tax appreciation that accrues while a person is a U.S. citizen; (5) to ensure that individuals cannot enjoy any tax benefits that may arise from expatriating while maintaining significant ties to the U.S.; and (6) to achieve a combination of and variations of the other five purposes. We will consider these stated purposes as well as additional hypothetical purposes under strict scrutiny. The purpose of expressing official disapproval of tax-motivated expatriation will not be discussed, as it appears primarily hortatory, notwithstanding that it is questionable whether the government may express official disapproval of any exercise of a fundamental right.

i. Preventing Tax Avoidance

The first potential compelling interest to be discussed is the prevention of tax avoidance, or “to tax appreciation and asset value that accrue while a person is a U.S. citizen or resident.”\footnote{Id.} Although this is certainly an interest of the government, there is no reason to believe necessarily that it is compelling. When a person inherits an asset that has appreciated in value, the person receives a “stepped-up” basis.\footnote{See IRC § 1014.} While this might be dismissed as a mere policy choice, it does evidence that the government does not believe that the need to tax asset appreciation is compelling enough to require taxation of appreciation in all instances. If taxing appreciation were compelling, one would expect it never to be permitted. Thus, it is much more difficult to argue that in the context of the expatriated person that the interest has become more compelling “since an alien as well as a citizen is a ‘person’ for equal protection purposes, a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases than it was in [other cases].”\footnote{Graham, 403 U.S. 365.} In fact, one would imagine just the reverse, if anything, that the interest in
taxing the appreciated asset value might be more compelling in the case of a person who inherits appreciated assets and yet continues to reside in the U.S., enjoying its benefits, as compared to a person who receives no continuing citizenship benefits from the U.S. and is, in fact, barred from returning to the U.S.

It is important to note, once again, that avoiding taxes, i.e. arranging one’s finances in such a manner to minimize liability, is lawful and specifically permitted by numerous court cases cited previously. Specifically, it is lawful to delay realization of gain, group deductibles in one tax year, count days in the country to avoid the threshold of establishing residency, and engage in other planning techniques. Even if this interest in taxing expatriates differently than other non-resident aliens could be characterized as preventing tax evasion, i.e. refusing to pay legitimate liability as opposed to tax avoidance, i.e. minimizing legitimate liability, this interest is irrelevant. The law itself does not operate towards the end of preventing avoidance. The law imposes a tax liability; it does not establish mechanisms to promote taxpayer compliance and reduce evasion. Without the law, the expatriate would have no liability and thus no thing to evade. This situation would be different if the law was a tax enforcement provision, e.g. measures for mandatory withholding, garnishing wages, or establishing liens against property, all of which are aimed at compliance.

Even if this interest could be considered compelling, the provision imposing tax liability on all wealthy expatriates is far more over-inclusive than necessary. Surely not all expatriates are tax evaders and yet the presumption built into the law is that they are. As observed at the outset, the expatriate tax regime will be imposed on wealthy individuals regardless of intent to avoid taxation by expatriating. Furthermore, the over-inclusive character of the measure is based on invidious classification. Although a state may have an interest in “preserving the fiscal integrity of its programs,” it cannot do so by making invidious distinctions.\textsuperscript{552}

\textit{ii. Bona Fide Expatriation}

The second possible interest is to “smoke out” bona fide expatriation. The JCT Report contemplates this purpose when it justified the measures “to ensure that individuals cannot enjoy any tax benefits that may arise from expatriating while maintaining significant ties to the United States.”\textsuperscript{553} This interest is also suggested in the exceptions to the expatriate tax for certain dual citizens and children who have never lived in the U.S. If, in fact, expatriation is a fundamental right, then it begs the question how we could distinguish legitimate from illegitimate expatriation, or even if such a

\footnotesize{\textsuperscript{552} Id. (\textit{citing} Shapiro, 394 U.S. at 627, n.6, 633).  
\textsuperscript{553} JCT Report, supra note 3 at 75.}
thing as illegitimate expatriation could exist or be prohibited. It would be a different matter if the U.S. were to refuse to honor illegitimate expatriations, continue to grant the benefits of citizenship, and impose continuing taxation as a U.S. citizen. However, the U.S. has no intention of denying the renunciations. It honors the expatriation as legitimate and releases the person from citizenship, discontinuing the benefits of citizenship. Since the renunciation is not illegitimate under immigration law, it is hard to understand how it might be illegitimate under tax law. Therefore, this tax treatment cannot be characterized as an attempt to distinguish between legitimate and illegitimate renunciations, and thus, the government interest cannot be compelling.

**iii. Increase or Preserve the Tax Base**

The JCT report also considered these related purposes when it stated that the measures were intended to “remove unintended tax incentives from expatriation.” 554 Another potential interest that the U.S. could cite as justification which was not mentioned in the JCT report 555 is the interest in maximizing the tax base. In fact, it has been reported that the final version of the expatriate tax that passed only did so because it was projected to simply raise more revenue 556 though the IRS has not reported whether the provision has actually succeeded in doing so 557.

The preservation of or increase in the tax base by chilling the exodus of wealthy U.S. citizens cannot be compelling. Courts have found that “fiscal integrity is not a compelling state interest” 558 and that “the state must show more of a constitutionally permissible objective than that the regulation … would save money.” 559 Although “a State has a valid interest in preserving the fiscal integrity of its programs … [it] may not accomplish such a purpose

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554. Id.
555. See id.
556. See Carter, Giving Taxpatriates, supra note 198 (stating, “[t]he compelling state interest underlying the Reed Amendment seems to be to protect revenue”) (citing Renee S. Liu, The Expatriate Exclusion Clause: An Inappropriate Response to Relinquishing Citizenship for Tax Avoidance Purposes, 12 Geo. Immigr. L.J. 689, 693 (Summer 1998) (noting that Congress estimates $3.6 billion dollars will be lost over next decade due to lost tax revenues from taxpatriates)); Colon, Changing, supra note 40 at 91 (citing Barbara Kirchheimer, Ways and Means Committee Approves Archer Expatriate Bill Amid Fight Over Revenue Estimates (June 14, 1995) available in LEXIS, Fedtax Library, TNT File, 95 TNT 115-1).
557. See Newman, Taxing Issue, supra note 29 (“If [the expatriate tax law] has raised any revenue to speak of, the IRS can’t say”).
558. Graham, 403 U.S. at 374-5.
559. Shapiro, 394 U.S. at 633.
by invidious distinctions.”  

Furthermore, the “interest in raising revenue… is not sufficiently compelling to overcome the presumption of unconstitutionality under the non-discrimination principle.”  

As an example, the Eastern District of Texas has found that a desire to collect revenue cannot be a valid basis for removing an elected official from office:

> [T]ax collection is too far remote and attenuated a reason for the … provision to survive constitutional review … if the city needs to collect on liabilities owed to it, let it do so as it would against any other citizen who is in arrears to the city … removing one from office for failure to pay taxes and fees … is irrational.  

Also, the “justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens … There can be no ‘special public interest’ in tax revenues to which aliens have contributed on an equal basis with the residents of the State.”  

The District Court for the Virgin Islands has found

> [t]hat disbursal of funds argument as it relates to treatment of aliens under our laws has been roundly rejected by prior decisions on the theory that maintenance of the fiscal integrity of the program as a governmental objective cannot serve as a justification for the establishment of a scheme which denies aliens equal protection. It is one thing to administer a welfare program, quite another to deny the protection of local law to aliens without showing a compelling interest.  

If the government interest is truly to only increase the revenue base, then it might accomplish the same objective through other non-discriminatory means, such as taxing all non-resident aliens depending on the degree of connection to the U.S., such as having a U.S. visa, time spent in the U.S., or amount of investment holdings in the U.S. The government also has far less restrictive options for preserving the tax base by keeping wealthy taxpayers in the tax net such as providing a better perceived value for the taxes paid. In addition, if purely increasing the tax base is the compelling

560. Graham, 403 U.S. 365. Also see Shapiro, 394 U.S. at 627, n.6, 633.  
concern, why did Congress limit the expatriate tax to only ten years of tax liability? And why are some dual citizens and children exempted, even if they have a tax motivation for expatriating, if the interest is compelling? All of the above options might maximize the tax base on a non-suspect basis and yet the legislature has not elected to pursue them, suggesting that simply increasing the tax base in the most advantageous manner is not the true motivation, and if it was not, imposing a far too under-inclusive regime to do so. Furthermore, even if the interests in collecting more revenue at the expense of non-resident aliens were compelling, the provision is also not narrowly tailored since it is over-inclusive in a different manner, by subjecting all wealthy persons to the tax, regardless of tax motivation.565

Other nations have also similarly concluded that a state’s interest in preserving and increasing tax revenue cannot outweigh a fundamental right to leave one’s country. For example, in 2004 the European Court of Justice (hereinafter “ECJ”) decided the case of de Lasteyrie v. Ministere de l’Economie.566 In de Lasteyrie, the ECJ found that the French exit tax, imposed when a citizen moves tax residence out of France, violated the fundamental right of freedom of movement provided for in the Treaty on European Union.567 France, among the majority of nations of the world, does not practice worldwide taxation in the manner of the U.S. Accordingly, if a citizen wants to avoid that country’s taxation, the citizen merely leaves the country and establishes a tax home elsewhere, regardless of whether the person retains citizenship. Based on this ease of escaping taxation, the French General Tax Code imposes capital gains tax on unrealized gains when an individual leaves France and establishes a tax home elsewhere, in effect, an exit tax similar to the U.S. expatriate tax. The ECJ held that this tax must be sufficiently justified against the fundamental right to relocate within the E.U. Applying an analysis reminiscent of strict scrutiny in favor of a fundamental right, the tax failed since it did not have a compelling justification, was overly broad, and there were realistic and less restrictive alternatives.568 Although this ruling does not apply to moves outside of the

565. See Carter, Giving, supra note 198.
568. See id. (finding that “the principle of freedom of establishment … must be interpreted as precluding a Member State from establishing … a mechanism
E.U. since the E.U. Treaty does not apply, the ruling is significant for affirming that the freedom of movement ranks as a fundamental right and that the state’s interest in tax revenue cannot outweigh the right. Surely an American deeply rooted fundamental right carries at least if not more weight than the rights provided in the E.U. Treaty.

iv. Discourage Acquisition of U.S. Citizenship

One possibility that will be mentioned only in passing, and was not mentioned in the JCT Report,\(^569\) is that the government may wish to discourage individuals from naturalizing to U.S. citizenship in the first place. There is anecdotal evidence that immigration lawyers are advising their clients who consider naturalization that they may need to comply with the expatriation tax regime if they ever seek to renounce later. By making the consequences of naturalization less attractive, perhaps the government is seeking to reduce the numbers of individuals who seek to immigrate to the U.S. and later naturalize. There is, of course, no evidence that this is the purpose, and even if it was, there are certainly far less restrictive means to achieve those ends, especially since Congress wields plenary power regarding the admission of aliens.

v. Benefit U.S. Citizens and Residents

The opposite side of the above potential interest, and also not mentioned in the JCT Report,\(^570\) is the interest in favoring U.S. citizens who remain citizens. This interest would also not be compelling. First, the Supreme Court has found that discriminating against non-residents is never a legitimate purpose.\(^571\) Second, “the government’s ‘right to provide for the economic security of its citizens before its resident aliens … termed the ‘special public interest’ doctrine … has been discredited and rejected by the Supreme Court.”\(^572\) Third, the
disbursal of funds argument as it relates to treatment of aliens under our laws has been roundly rejected by prior

\(^{569}\) See JCT Report, supra note 3 at 75.
\(^{570}\) See id.
\(^{572}\) Mow Sun Wong, 500 F. 2d 1031 (citing Crane v. N.Y., 239 U.S. 195 (1915) (stating that the government satisfied the needs of its citizens by restricting distribution of its resources to them)).
decisions on the theory that maintenance of the fiscal integrity of the program as a governmental objective cannot serve as a justification for the establishment of a scheme which denies aliens equal protection.\(^\text{573}\)

If penalizing aliens or non-residents is never compelling and the government cannot discriminate against aliens in extending benefits, then the government must also be restricted from discriminating in requiring contributions.

**vi. Punish, Prevent, or Discourage Expatriation when Motivated by Tax Avoidance**

The next potential purpose of the provisions is, as stated in the JCT Report, “to deter or punish tax-motivated expatriation.”\(^\text{574}\) Congressional language and comments on the tax provisions support this motive.\(^\text{575}\) The recent Highway Reauthorization Bill included a proposed modification of the expatriate tax scheme entitled, “Prevention of Tax-Motivated Expatriation.”\(^\text{576}\) Courts have also determined that the expatriation provisions were “enacted to forestall tax-motivated expatriation”\(^\text{577}\) and “designed to discourage voluntary expatriation undertaken with a principal purpose of tax avoidance.”\(^\text{578}\) Even in a memorandum opinion on expatriation, the Deputy Assistant Attorney General wrote that “[i]n 1996, Congress passed two laws intended to curtail the use of expatriation as a tax sheltering device.”\(^\text{579}\) If the argument above regarding the fundamental right of expatriation holds, then it is hard to see how the mere desire to limit the exercise of the right, with no more, can be compelling.

Even if the interest could somehow be considered compelling, the measure is certainly not narrowly tailored. There are clearly less restrictive methods to achieve the same result while honoring the fundamental right. The government might offer more or better benefits for the taxes imposed, less tax, better environment, less crime, more equitable allocation, and so on, to induce individuals to remain U.S. citizens. The government could also remove the motivation for expatriation prior to the realization event by imposing a lower tax on U.S. citizens for the event itself. If the tax burden were lower, it would be less attractive to expatriate.

\(^{573}\) Sailer, 356 F. Supp. 72.
\(^{574}\) JCT Report, supra note 3 at 75.
\(^{575}\) See Vagts, Proposed, supra note 278 (“Therefore, the situation lends itself to soak-the-rich populism, including references to the ‘Benedict Arnold tax’”).
\(^{576}\) See H.R. 3550, pt. V.
\(^{578}\) Di Portanova, 690 F. 2d at 179.
\(^{579}\) Yoo, Expatriation Memo., supra note 16.
Furthermore, it is inappropriate, and not narrowly tailored, for Congress to use tax law to exact a penalty for expatriation. We can draw an analogy to the 1st Amendment prohibition on selective taxation that resembles a penalty for the exercise of a lawful right.\textsuperscript{580} Neither structuring one’s affairs to minimize tax liability nor expatriation are a crime, in fact both are lawfully permitted, so it would be odd if Congress could penalize the combination of the two. Along this same reasoning, the U.S. could pass legislation to tax an individual if the person left the U.S. on the 182nd day to avoid paying taxes as a U.S. resident, but that has never been seen to be necessary even when the U.S. could lose a considerable revenue benefit from the individual. Expatriation similarly is an acceptable option to avoiding military service (or perhaps even jury duty). If discouraging expatriation for a particular motivation was compelling, one would think that it would not be regarded as a fundamental right, and that other motivations, that make collection of tax debt more difficult, would give rise to a similar discouragement.

\textit{vii. Prevent Receipt of U.S. Citizenship Benefits Without Tax Contribution}

The final potential interest that the government has in imposing the expatriate taxation scheme, which was not specifically mentioned in the JCT Report, but perhaps implied, is preventing individuals from deriving the benefits of the U.S. protection of the gain in the unrealized value of their assets and yet not contributing to the treasury.

First this argument presupposes that the U.S. philosophically justifies taxation based on a benefits received theory. The Supreme Court has found that the

\begin{quote}
[e]njoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government … A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits.\textsuperscript{581}
\end{quote}

However, shared responsibility does not mean that particular individual benefits are taxed individually. The First Circuit has found that a

\textsuperscript{580} See Leathers, 499 U.S. 439.
\textsuperscript{581} Shaffer v. Carter, 252 U.S. 37, 49-52 (1920). Also see Travis, 252 U.S. 60 (finding that states may tax the income of nonresidents derived from property or activity within the state).
U.S. citizen could not be held liable for taxes during the period when a person may have been temporarily found to not be a citizen, since the person did not receive any benefit from the U.S.  

On the other hand, in *Dane v. Jackson*, the Supreme Court found that a taxpayer may not challenge the tax assessment on the grounds that his town receives less benefit than it pays in tax. Also, a state may not tax the individual within its jurisdiction based on his past contributions to the state or even the length of residence. The acceptance of this state interest is then dependent on the acceptance of the benefits theory, which has never been unanimous or consistent.

In fact, the government might have an interest in arguing against endorsement of the benefits theory, because endorsement of the theory might demand that a court inquire into the precise value of the benefits received, in order to determine if the tax scheme is over-inclusive. Many individuals in the U.S. receive benefits without contributing. One example of benefit without contribution is the stepped basis that property receives when an individual dies and his heirs inherit the property. Another example is that many U.S. citizens pay little to no income tax such as the young and those whose income is lower than the minimum taxing threshold, as well as recent arrivals to the U.S. None of these tax statuses are seen as a sufficiently compelling justification for lower benefits. In addition, many aliens live in the U.S. for many years though carefully limiting their physical presence in the U.S. to avoid worldwide taxation, enjoying benefits of residency and perhaps an increase in the value of their assets but never seeking U.S. citizenship or a green card, yet they are exempt from the higher tax rates imposed on expatriates. The fact that the U.S. subjects different individuals and types of income to different tax rates suggests that the U.S. does not engage in an analysis of the benefits received, thus rejecting the benefits theory. If the U.S. wishes to re-characterize its tax regime, the consequences might not be attractive.

If the government wished to endorse the benefits theory, then there are also problems with the narrow tailoring of the expatriate tax. Having

582. See Benitez Rexach, 558 F. 2d at 40 (stating that “[s]ince the expatriate in fact received benefits of citizenship, the equities favor the imposition of federal income tax liability”). Also see Benitez Rexach, 390 F. 2d 631 (stating that “Lucienne cannot be dunned for taxes to support the United States government during the years in which she was denied its protection”).


586. See IRC § 1014.

exited the U.S., the expatriate is no longer receiving any benefits from the U.S. beyond those accorded to the assets of any alien, so it is debatable what additional benefits the expatriate is receiving, aside from the protection of the U.S.-source income, that justify the continuing tax. Moreover, the wealthy individuals who have expatriated for tax avoidance reasons are also more likely to have paid more in taxes historically than they received in benefits. This is not to say that expatriates did not receive benefits from the U.S., but to question whether the benefits they received are so different as to provide a compelling justification for a tax provision that infringes on a fundamental right and discriminates based on national origin.

Furthermore, there are alternatives that are less restrictive of the fundamental right to expatriate and avoid discrimination based on national origin but would endorse the benefits theory. One option would be to bill individuals for their benefits received. Even a rough approximate for the benefit would be sufficient to recoup expenses. A second alternative would be to tax based on the person’s net wealth rather than income, which would more precisely identify the person’s benefits from the U.S. protective environment as well as asset appreciation. A third alternative would be to simply raise taxes on the wealthiest individuals still in the U.S. who are more likely to expatriate in the future to recoup the expenses provided for the benefits received at the time of receipt. Thus, if they expatriate later, any loss to the treasury would have been covered.

V. CONCLUSION

Based on the fact that expatriation is a fundamental right and that the expatriation tax discriminates on the basis of national origin, the tax provisions demand strict scrutiny analysis. In applying strict scrutiny, we cannot find any compelling government interest to justify the tax provision, and even if a satisfactory justification could be found, the tax provision is not narrowly tailored to achieve the justified end. Accordingly, the expatriate tax provisions as they current stand do not satisfy the requirement of equal protection and due process of law.

If the tax provisions were to be brought into conformity with equal protection and due process, then when a person expatriates, the person simply becomes an alien and falls into the general non-resident alien, non-U.S. person, category and would acquire U.S. residence only through the normal operation of the IRC measuring residence, just as any other alien would. Essentially, the person’s former citizenship would be completely ignored and the person treated as a citizen only of the state in which the person held citizenship at the time. Unrealized gain would still be taxable, only at the rate normally applied to all nonresident aliens.

This method of taxation goes to heart of what it means to be a citizen. Is a citizen simply an individual receiving benefits from the
legitimate monopolizer of violence or is the citizen a member of a common endeavor to create and sustain a government among equals? If the people are the former, existing in a separated and adversarial relationship with the government, then perhaps the government should be empowered to tax all who it can reach for its own enrichment. If, on the other hand, the citizens are engaged in a collective relationship, with the government merely acting as their representative and agent, then when a citizen elects to leave the community and no longer receive the rights of the community, then the individual should not have lingering obligations upon leaving the state.