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# CONDITIONING CITIZENSHIP BENEFITS ON SATISFYING CITIZENSHIP OBLIGATIONS

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*Citizenship status is often discussed in terms of both its benefits and its obligations. A recently enacted federal statute (“the FAST Act”), which denies U.S. passports to certain citizens who owe significant unpaid taxes, provides an opportunity to examine the linkage between citizenship benefits and obligations. In particular, it raises the question under what circumstances, if any, should the benefits of citizenship be conditioned on compliance with the obligations of citizenship.*

*This Article identifies a typology for situating unpaid taxes within other circumstances under which passports may be denied to U.S. citizens. It then focuses on the instrumental, constitutional, and expressive impacts of the FAST Act, illustrating that the benefit-obligation linkage can have unintended consequences, not only from an instrumental perspective, but perhaps more importantly from its expressive impact on social norms. The Article then applies these lessons to a broader range of situations where federal benefits are conditioned on compliance with citizenship obligations, most notably the denial of student loan benefits for those young men who do not register with the Selective Service.*

*The Article concludes by acknowledging that, for certain types of benefit-obligation linkages and under certain circumstances, conditioning citizenship benefits on compliance with citizenship obligations might provide useful instrumental results. It cautions, however, against the wider expansion of this conditional approach to citizenship benefits, due to the unintended instrumental and expressive effects that might result.*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1702
II.	OVERVIEW OF PASSPORT LIMITATION PROVISIONS OF FAST ACT.....	1704
	A. Summary of FAST Act Passport Provisions .....	1704

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1. <i>Mechanism of Passport Limitations</i> .....	1704
2. <i>Purposes of FAST Act Passport Limitations</i> .....	1707
B. <i>Other Passport Denial/Revocation Circumstances</i> .....	1708
III. INSTRUMENTAL IMPACT—DOMESTIC CITIZENS VS. NONRESIDENT CITIZENS.....	1712
A. <i>Impact on Tax Compliance Among Citizens Living     Domestically</i> .....	1713
B. <i>Impact on Tax Compliance Among Citizens Living Abroad</i> .....	1715
IV. POTENTIAL CONSTITUTIONAL CONCERNS .....	1721
A. <i>Procedural Due Process</i> .....	1722
B. <i>Substantive Due Process—International Travel as a Liberty Interest</i> 1727	
V. BROADER TAX POLICY IMPACTS OF FAST ACT PASSPORT LIMITATIONS 1730	
A. <i>Impact on Tax Compliance by Others</i> .....	1730
B. <i>Impact of FAST Act on Citizenship-Based Taxation</i> .....	1733
VI. LIMITS ON THE USE OF CITIZENSHIP BENEFIT DENIAL AS A MEANS OF ENFORCING CITIZENSHIP OBLIGATIONS.....	1734
VII. CONCLUSION .....	1739

## I. INTRODUCTION

Citizenship status carries with it both obligations, such as the duty to pay taxes, and benefits, such as the right to a passport. The benefits of citizenship generally are not tied to compliance with the obligations. Yet, the recently enacted Fixing America’s Surface Transportation Act (“FAST Act”)<sup>1</sup> explicitly links benefits and obligations by conditioning the availability of a U.S. passport on compliance with federal tax law. Subject to certain exceptions, the FAST Act prohibits the State Department from issuing a passport to any individual who has a “seriously delinquent tax debt” (generally defined as an assessed federal tax liability greater than \$50,000 with respect to which a notice of lien has been filed or a levy has been made),<sup>2</sup> and also permits the State Department to revoke an existing passport for such an individual.<sup>3</sup> In addition, the FAST Act permits the

1. Fixing America’s Surface Transportation Act (“FAST Act”), Pub. L. No. 114-94, 129 Stat. 1312 (2015). Earlier versions of the passport restrictions for delinquent taxpayers had been introduced in 2012 and 2013. These proposals were based on a 2011 report by the Government Accountability Office suggesting that passport restrictions could be used to close the tax gap. *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-272, FEDERAL TAX COLLECTION: POTENTIAL FOR USING PASSPORT ISSUANCE TO INCREASE COLLECTION OF UNPAID TAXES (2011), <http://www.gao.gov/assets/320/316478.pdf> [hereinafter GAO REPORT]; *see also* SEN. REP. NO. 112-152, at 18 (2012) (discussing earlier version of passport limitation provision and citing GAO REPORT).

2. I.R.C. § 7345(b)(1) (2018) (as added by FAST Act § 32101).

3. *See* FAST Act § 32101. This section of the FAST Act added new I.R.C. § 7345, 129 Stat. at 1732. Subsequent legislation made minor technical corrections to this new provision. *See* Pub. L. 115-97, title I, § 11002(d)(1)(RR), Dec. 22, 2017, 131 Stat. 2061 (2017); Pub. L. 115-141, div. U, title I, § 103(a), Mar. 23, 2018, 132 Stat. 1169.

State Department to deny issuance of a passport if a citizen's passport application fails to include a social security number (regardless of whether or not there is delinquent tax debt).<sup>4</sup>

The FAST Act adds “seriously delinquent tax debt” and “failure to provide a social security number” to a growing list of circumstances under which the State Department is either required or permitted to deny (or possibly revoke) a citizen's passport.<sup>5</sup> Other such circumstances include child support arrears in excess of \$2,500, certain limited types of unpaid federal debts, covered sex offenders, outstanding federal, state, or local felony warrants, and circumstances that may cause serious damage to U.S. national security or foreign policy.<sup>6</sup> Moreover, from a tax enforcement perspective it reflects the increased use of collateral sanctions—*i.e.*, the denial of government benefits or privileges, on top of monetary penalties—in order to increase tax compliance.<sup>7</sup>

This Article addresses a number of practical and conceptual concerns raised by the FAST Act, not only with respect to its own implementation, but more broadly with respect to its wider implications for other situations where Congress might condition significant benefits of citizenship upon compliance with important obligations of citizenship. Part II summarizes the passport limitation provisions of the FAST Act, and identifies a typology for situating the FAST Act within the other circumstances under which the State Department may deny passports, distinguishing between “nexus” passport limitation provisions (such as felony arrest warrants) and “secondary enforcement” passport limitations (such as the FAST Act and child support arrearage passport limitations). Part III analyzes the potential instrumental effectiveness of the law, identifying the factors that are most relevant in determining whether the FAST Act will be effective in encouraging compliance. In doing so, it highlights an important distinction between the FAST Act's impact on U.S. citizens living within the United States (“domestic citizens”) and U.S. citizens living abroad (“nonresident citizens”).

Part IV briefly addresses potential constitutional issues, concluding that the provision generally does not violate the due process guarantees of the Fifth Amendment, but that there may be isolated constitutional and related concerns during the transitional implementation period that the I.R.S. should address in administrative guidance. Part V addresses the FAST Act's expressive effects on social norms, including its potential impact on both general tax compliance and the underlying policy justification for taxing U.S. citizens living outside the United States. In addition, it highlights the possibility that the FAST Act, which explicitly conditions an important benefit of citizenship on tax compliance,

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4. FAST Act § 32101(f)(1)(A). A passport can also be denied if the application “includes an incorrect or invalid social security number willfully, intentionally, negligently, or recklessly provided by such individual.” *Id.* Prior to the FAST Act, individuals were required to provide a social security number with their passport application, but the only consequence of not doing so was a potential \$500 penalty. *See* I.R.C. § 6309E (2018).

5. FAST Act § 7345(b).

6. *See* 22 C.F.R. § 51.60 (2019).

7. *See generally* Joshua D. Blank, *Collateral Compliance*, 162 U. PA. L. REV. 719, 776–77 (2014). Professor Blank, writing before the enactment of the FAST Act, supports passport limitations as a useful tool to increase tax compliance. *See id.* His arguments are critiqued *infra* notes 208–26 and accompanying text.

might be perceived as shifting the income tax toward a “user fee” perspective, undermining the “ability to pay” rationale that traditionally underlies the progressive income tax. Finally, Part VI discusses the broader implications of this analysis beyond passports and taxes, including its impact on the federal law that denies student loans and other federal benefits to those citizens who fail to register with the Selective Service when required, and proposes limitations (based in part on the above-mentioned taxonomy) on the use of benefit denial as a means to enforce compliance with citizenship obligations.

## II. OVERVIEW OF PASSPORT LIMITATION PROVISIONS OF FAST ACT

This Part provides an overview of the passport limitation provisions of the FAST Act, and a summary of the potential goals of the legislation. In addition, it situates unpaid taxes (the relevant focus of the FAST Act) within the broader group of circumstances under which the State Department may deny or revoke a citizen’s passport, differentiating between those circumstances where there is a direct nexus between the wrongdoing and the passport denial, and those circumstances (including tax delinquencies under the FAST Act) where, rather than being based on a direct nexus, the denial is primarily intended to further some other policy goal.

### A. *Summary of FAST Act Passport Provisions*

#### 1. *Mechanism of Passport Limitations*

The FAST Act contains a detailed set of both intra- and inter-departmental coordination requirements that must be followed before a U.S. citizen’s passport can be denied or revoked. For example, it includes procedures the I.R.S. must follow to certify a “seriously delinquent tax debt” to the Secretary of the Treasury, requirements for contemporaneous notification that the I.R.S. must give the delinquent taxpayer, procedures the Secretary of the Treasury must follow to forward that certification to the Secretary of State, and opportunities for post-certification judicial review.<sup>8</sup> Once this certification has been forwarded by the Secretary of the Treasury, the FAST Act contains requirements the Secretary of State must follow in either denying or revoking a passport with respect to the delinquent individual.<sup>9</sup> The following discussion briefly outlines the relevant statutory structure.<sup>10</sup>

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8. See I.R.C. § 7345 (2018) (added by FAST Act § 32101(a)).

9. See FAST Act § 32101(e) (2018).

10. The Internal Revenue Service announced that it intends to promulgate regulations under I.R.C. § 7345 as part of its priority guidance plan. See DEP’T OF TREASURY, 2016-2017 PRIORITY GUIDANCE PLAN 22 ¶ 24, [https://www.irs.gov/pub/irs-utl/2016-2017\\_pgp\\_initial.pdf](https://www.irs.gov/pub/irs-utl/2016-2017_pgp_initial.pdf).

Under Internal Revenue Code section 7345, as added by the FAST Act, the Commissioner of Internal Revenue,<sup>11</sup> upon identifying an individual with a seriously delinquent tax debt, provides a certification to the Secretary of the Treasury, who then transmits that certification to the Secretary of State.<sup>12</sup> A “seriously delinquent tax debt” is

an unpaid, legally enforceable Federal tax liability of an individual—

(A) which has been assessed,

(B) which is greater than \$50,000 [adjusted for inflation after 2016],<sup>13</sup>

and

(C) with respect to which—

(i) a notice of lien has been filed pursuant to section 6323 and the administrative rights under section 6320 with respect to such filing have been exhausted or have lapsed, or

(ii) a levy is made pursuant to section 6331.<sup>14</sup>

A debt is excluded from this definition (and therefore not subject to certification and potential passport denial) if it is (i) being paid in a timely manner pursuant to an installment agreement or offer-in-compromise, or (ii) a debt with respect to which collection is suspended because a collection due process hearing is requested or pending, or because of innocent spouse relief under Code section 6015.<sup>15</sup> In addition, if the Commissioner discovers that a previous certification was erroneous, or if the debt underlying the certification is fully satisfied or ceases to be a seriously delinquent tax debt by reason of the circumstances mentioned in the preceding sentence, the Commissioner must notify the Secretary of the Treasury, who then notifies the Secretary of State to remove the certification.<sup>16</sup> Given that these certification reversals are limited to either a full satisfaction of the underlying debt or other specified circumstances, it appears that an individual is not entitled to a reversal merely by paying down enough of the tax debt to bring the outstanding liability below \$50,000 (in the absence of an installment agreement, offer-in-compromise, or other specified circumstance).<sup>17</sup>

Section 7345 provides several procedural protections for taxpayers when the Commissioner certifies a seriously delinquent tax debt. The Commissioner is

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11. The certification may only be delegated by the Commissioner “to the Deputy Commissioner for Services and Enforcement, or the Commissioner of an operating division, of the Internal Revenue Service.” I.R.C. § 7345(g) (2018).

12. *Id.* § 7345(a). The FAST Act also provides exceptions to I.R.C. § 6103 to allow this information sharing with respect to the taxpayer’s identity information and the amount of the seriously delinquent tax debt. FAST Act § 32101(c).

13. The inflation adjustment is contained in I.R.C. § 7345(f) (the adjustments to the \$50,000 amount are rounded to the nearest multiple of \$1,000). For 2019, the inflation-adjusted threshold is \$52,000. *See* Rev. Proc. 2018-57 § 3.59.

14. I.R.C. § 7345(b)(1) (2018).

15. *See id.* § 7345(b)(2). The Commissioner’s ability to certify a seriously delinquent tax debt is also postponed with respect to a taxpayer’s service in a combat zone. *See* FAST Act, § 32101(d) (amending I.R.C. § 7508(a)).

16. I.R.C. § 7345(c)(1). The Code contains detailed rules regarding the timing of the Commissioner’s certification reversals. *See id.* § 7345(c)(2).

17. *Id.* § 7345(c).

required to provide contemporaneous notice to the taxpayer of any certification (or reversal of a certification) that is made to the Secretary of the Treasury.<sup>18</sup> That notification must include a description, in simple and nontechnical terms, of the taxpayer's right to bring a civil action against the United States (in a federal district court or the Tax Court) "to determine whether the certification was erroneous or whether the Commissioner has failed to reverse the certification."<sup>19</sup> Apparently, by focusing on whether the certification was erroneous (or should have been reversed), the judicial review will focus only on whether the definitional and procedural requirements of Code Section 7345 have been satisfied (*e.g.*, at least \$50,000 of assessed tax liability with respect to which the notice of lien or levy requirements are satisfied, and no exception discussed above applies).<sup>20</sup> This procedure does not appear to authorize a judicial review of the correctness of the underlying assessed tax liability.<sup>21</sup>

The FAST Act, in order to ensure that taxpayers have notice of the potential passport-related consequences of tax debt before it reaches the certification stage, also modifies the statutorily required information that must be included in a notice of lien or a notice of levy sent to a taxpayer.<sup>22</sup> Specifically, a notice of lien or a notice of levy must include, in simple and nontechnical terms, a description of Code Section 7345 and the potential denial, revocation, or limitation of passports for individuals with seriously delinquent tax debts.<sup>23</sup>

Once the Secretary of State receives a certification of seriously delinquent tax debt from the Secretary of the Treasury, the FAST Act contains detailed provisions regarding both the issuance of new (or renewed) passports and the revocation of existing passports.<sup>24</sup> The Secretary of State is prohibited from issuing a new (or renewed) passport to a person with a seriously delinquent tax debt,<sup>25</sup> although an exception permits the issuance "in emergency circumstances or for humanitarian reasons."<sup>26</sup> With respect to existing passports held by a person with a seriously delinquent tax debt, the Secretary of State is permitted (although not required) to revoke the passport.<sup>27</sup> If the passport is revoked while the holder is

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18. *Id.* § 7345(d).

19. *See id.* § 7345(d)–(e).

20. *Id.* § 7345(b).

21. This conclusion is supported by the one-sentence explanation of the judicial review provision in the FAST Act Conference Report, which notes that "the amendments to the provision permit *limited judicial review* of the certification or a failure to reverse a certification." H.R. REP. NO. 114-357, at 532 (2015) (Conf. Rep.) (emphasis added); *see also* Andrew Velarde, *IRS Expects Limited Judicial Review of Passport Revocations*, 58 TAX NOTES 1129 (Feb. 19, 2018) (citing IRS official's statement at ABA Tax Section meeting that judicial review of certifications will not involve questions about the underlying tax liability).

22. H.R. REP. NO. 114-357, at 531.

23. *See* Fixing America's Surface Transportation Act ("FAST Act"), Pub. L. No. 114-94, § 32101(b), 129 Stat. 1312, 1729 (2015) (amending I.R.C. § 6320(a)(3) (regarding notice of lien) and § 6331(d)(4) (regarding notice of levy)).

24. H.R. REP. NO. 114-357, at 531–32.

25. FAST Act § 32101(e)(1)(A) (stating that "the Secretary of State *shall not issue* a passport" under such circumstances) (emphasis added).

26. *Id.* § 32101(e)(1)(B).

27. *Id.* § 32101(e)(2)(A) (stating that "the Secretary of State *may revoke* a passport previously issued" to such a person) (emphasis added).

abroad, the Secretary of State is permitted to limit the passport to enable only return travel to the United States.<sup>28</sup>

In addition to these consequences to individuals with seriously delinquent tax debt, the FAST Act “authorize[s]” (but does not explicitly require) the Secretary of State to deny a passport application if an individual does not include her social security number on the application, or includes “an incorrect or invalid social security number willfully, intentionally, negligently, or recklessly”<sup>29</sup> (regardless of whether or not the individual owes any outstanding federal tax debt). Under such circumstances, the Secretary of State may issue the individual a passport “in emergency circumstances or for humanitarian reasons.”<sup>30</sup> The Secretary of State is also authorized to revoke a previously issued passport if the individual submits an application that does not include the social security number or willfully, intentionally, negligently, or recklessly includes an incorrect or invalid one.<sup>31</sup> If the passport is revoked under such circumstances, the Secretary of State is permitted to limit the passport to enable only return travel to the United States.<sup>32</sup>

The IRS began implementing the FAST Act’s certification process in early 2018.<sup>33</sup> As of April 2018, the IRS estimated that approximately 436 thousand taxpayers met the certification criteria and did not meet a statutory or discretionary exclusion.<sup>34</sup> As of May 4, 2018, the IRS had only completed the certifications on 9,356 taxpayers but anticipated that it would “increase certification by five to ten percent each week until it certifies all taxpayers meeting the criteria.”<sup>35</sup>

## 2. *Purposes of FAST Act Passport Limitations*

The FAST Act passport limitations were included as a revenue offset for an infrastructure funding bill and were estimated to raise \$395 million over ten years.<sup>36</sup> The potential denial (or revocation) of a passport would act as an incentive, at least for those who desired to acquire (or retain) a U.S. passport, to pay

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28. *Id.* § 32101(e)(2)(B).

29. *Id.* § 32101(f)(1)(A).

30. *Id.* § 32101(f)(1)(B).

31. *Id.* § 32101(f)(2)(A).

32. *Id.* § 32101(f)(2)(B).

33. *See* NAT’L TAXPAYER ADVOCATE, OBJECTIVES REPORT TO CONGRESS, FY 2019, vol. 1, at 80 [hereinafter NAT’L TAXPAYER ADVOCATE 2019 REPORT]. The IRS published several items of administrative guidance relating to the initial implementation of the FAST Act certification process. *See* Notice 2018-01, I.R.B. 2018-3, 299 (Jan. 16, 2018) (information for taxpayers regarding the implementation of the provision); Notice CC-2018,005 (Apr. 5, 2018) (guidance to Chief Counsel attorneys); IRS Internal Revenue Manual § 5.1.12.27 (Dec. 20, 2017) (detailed internal procedures for passport certification and decertification); *cf.* REG-129260-16, 83 Fed. Reg. 10811 (Mar. 13, 2018) (notice of proposed rulemaking to authorize the Department of State to disclose tax return information to contractors who assist the Department in the enforcement of the passport denial and revocation provisions of the FAST Act).

34. *See* NAT’L TAXPAYER ADVOCATE 2019 REPORT, *supra* note 33, at 83.

35. *See id.*

36. *See* JOINT COMM. ON TAXATION, 114<sup>TH</sup> CONG., ESTIMATED REVENUE EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN THE CONFERENCE AGREEMENT FOR H.R. 22, THE “FIXING AMERICA’S SURFACE TRANSPORTATION (“FAST”) ACT”, JCX-140-15 (Dec. 3, 2015).

their “seriously delinquent tax debt.”<sup>37</sup> Moreover, the threat of passport denial or revocation might create an incentive for individuals to comply with their tax obligations before they become delinquent.<sup>38</sup> Initial reports suggest that the FAST Act is having at least some impact on taxpayers who have “seriously delinquent tax debt” and are potentially subject to passport denial.<sup>39</sup> As of June 2018 (less than six months into the IRS rollout of the process), an IRS official stated that 220 people had paid a total of \$11.5 million to pay their tax debt in full (including one taxpayer who paid \$1 million), and 1,400 others had signed installment agreements in order to avoid certification.<sup>40</sup>

In addition to this principal incentivizing purpose, the passport limitations may also serve some secondary purposes (although, given the limited legislative history of the provision, it is doubtful that these other purposes were significant in the enactment of the legislation). For example, the denial of a passport might prevent a delinquent taxpayer from physically fleeing the country in order to escape payment.<sup>41</sup> The provision could also be viewed as having broader impacts, including inducing compliance by the broader public,<sup>42</sup> as considered in more detail *infra* Part V.

### *B. Other Passport Denial/Revocation Circumstances*

As noted above, the FAST Act adds “seriously delinquent tax debt” and “failure to provide a social security number” to a growing list of circumstances under which the State Department is either required or permitted to deny (or possibly revoke) a citizen’s passport. The full list of relevant circumstances is summarized in federal regulations issued by the State Department.<sup>43</sup>

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37. See GAO REPORT, *supra* note 1, at 16; see also Memorandum from Nina E. Olson, National Taxpayer Advocate, to Mary Beth Murphy, Commissioner, SB/SE Division, April 6, 2018, at 3, reprinted in NAT’L TAXPAYER ADVOCATE 2019 REPORT, *supra* note 33, vol. 2, at 58, 60 (“The reasoning behind the passport certification program is not to penalize taxpayers for their unpaid debts, but to ‘serve as an incentive to individuals wishing to obtain passports to comply with their tax obligations, thus reducing the level of tax delinquencies and promoting compliance.’”).

38. A Senate Finance Committee report for the Senate bill containing the provision that (with some amendments) became I.R.C. § 7345, stated that “[t]he Committee believes that tax compliance will increase if issuance of a passport is linked to payment of one’s tax debts.” S. REP. NO. 114-45, 57 (2015).

39. *Id.*

40. See Laura Saunders, *Thousands of Americans Will be Denied a Passport Because of Unpaid Taxes*, WALL ST. J. (Jul. 6, 2018 5:50 AM), <https://www.wsj.com/articles/thousands-of-americans-will-be-denied-a-passport-because-of-unpaid-taxes-1530869401>.

41. The GAO Report does not explicitly mention this concern. This concern would be of less relevance to U.S. citizens already residing overseas, as they are already physically outside of the United States (although the eventual need to renew the passport could limit the amount of time they could remain outside the United States, particularly if they did not hold a second passport). GAO REPORT, *supra* note 1.

42. The GAO Report notes the role that the provision could play in providing confidence to other taxpayers. See GAO REPORT, *supra* note 1, at 16.

43. See 22 C.F.R. §§ 51.60–51.64 (2019). Sections 51.60 and 51.61 list circumstances where the State Department is either prohibited from issuing, or authorized to refuse to issue, a passport. Section 51.62 lists circumstances where the State Department is authorized to revoke a previously issued passport. Sections 51.63 and 51.64 allow the State Department to restrict the use of a passport in certain dangerous areas.



In order to analyze their instrumental, expressive, and other impacts, this Article groups these passport-denial circumstances into two broad categories: (i) those where the passport has a direct nexus to the individual's wrongdoing and the passport limitation is a primary mechanism for preventing further wrongdoing with the passport (or perhaps punishing the past passport-related wrongdoing); and (ii) those where there is not necessarily a direct nexus between the passport and the wrongdoing, but the passport limitation is a secondary mechanism for enforcing compliance with some other wrongdoing.

Perhaps the best example of the primary type is the State Department's ability to refuse (or revoke) a passport if the individual's "activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States."<sup>44</sup> Given that travel outside the country is expected to directly facilitate the anticipated wrongdoing,<sup>45</sup> there is a direct nexus between denying the passport and preventing the harm. Other circumstances where the State Department is allowed to deny or revoke a passport due to a direct link between the foreign travel and the harm include situations where the individual has an outstanding federal<sup>46</sup> or state<sup>47</sup> felony arrest warrant or is subject to certain court orders or conditions of probation or parole that prohibit him from leaving the United States.<sup>48</sup> Under these circumstances, a passport would directly enable the individual to escape from the enforcement of the arrest warrant or the court order. Similarly, the State Department is permitted to deny or revoke an individual's passport if that individual previously crossed an international border to commit certain drug trafficking crimes or "sex tourism" crimes of which he was subsequently convicted, but only during the period that the individual is imprisoned or on parole or supervised release.<sup>49</sup> While passport denials in these latter situations could be viewed, at least in part, as punishment for a past wrongdoing that directly involved the use of a passport, the fact that it is limited to situations when the individual is still under court supervision for the international-related offense suggests at least some concern that a new passport might be used for repeat international-related wrongdoing.

An important example of the second category of limitations—where there is not necessarily a direct nexus between the passport limitation and the wrongdoing, but the passport limitation is a secondary mechanism for enforcing compliance with some other wrongdoing—involves child support arrearages. The State Department is prohibited from issuing a passport to (and is permitted to

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44. 22 C.F.R. § 51.60(c)(4) (2019) (authority to refuse to issue passport); *see also id.* § 51.62(a)(1) (authority to revoke passport); *Haig v. Agee*, 453 U.S. 280 (1981) (upholding State Department's authority to revoke passport based on national security concerns). This authority was invoked recently to revoke the U.S. passport of Edward Snowden, making him only eligible for a "limited validity passport good for direct return to the United States." Patrick Weil, *Citizenship, Passports, and the Legal Identity of Americans: Edward Snowden and Others Have a Case in the Courts*, 123 *YALE L.J.F.* 565, 565–66 (2014).

45. *See, e.g., Agee*, 453 U.S. at 284.

46. *See* 22 C.F.R. § 51.60(b)(1) (2019).

47. *Id.* § 51.60(b)(9).

48. *Id.* § 51.60(b)(2).

49. 22 U.S.C. § 212a (2018) (sex tourism); 22 C.F.R. § 51.61 (2019) (drug trafficking).

revoke a passport of) an individual who owes more than \$2,500 in past due child support.<sup>50</sup> A federal statute establishes a mechanism whereby the state agency responsible for administering child support provides a certification to the Department of Health and Human Services (“DHHS”) whenever an individual is determined to owe more than \$2,500 in child support arrearages,<sup>51</sup> and DHHS then forwards that certification to the Secretary of State.<sup>52</sup>

In these circumstances, there is no direct connection between the wrongdoing (failure to pay child support) and international travel.<sup>53</sup> Rather, the denial of the passport is used to incentivize compliance with respect to the underlying transgression.<sup>54</sup> By tying the availability of a passport to compliance with child support obligations, the statute has “the effect of focusing that person’s mind on . . . the need to support one’s children first. It doubtless encourages parents to do their duty to family,”<sup>55</sup> acting as an incentivizing mechanism to rectify past non-compliance. Although the Supreme Court has not addressed challenges to the child support-based denial of a passports, two federal circuit courts have upheld its validity in the face of constitutional and other challenges.<sup>56</sup> Another example of the second category of limitations involves passport denials for individuals who are in default on certain emergency loans the United States made to the individual while in a foreign country.<sup>57</sup>

An important aspect of the second category of limitations is the ability to obtain a passport once the underlying wrongdoing is cured. For example, once the individual has satisfied his outstanding child support obligations, or has repaid his relevant federal debt, the need to use passport limitations as an incentive is gone and the passport restrictions are lifted.

The FAST Act falls into the second category, where the passport limitation is used as a secondary mechanism for enforcing compliance with some other wrongdoing—in this case, the limitation is intended to provide an incentive to

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50. 42 U.S.C. § 652(k)(1) (2018); 22 C.F.R. §§ 51.60(a)(2) (2019) (denial of passport application), 51.62(a)(1) (revocation of existing passport). Prior to 2006, the triggering threshold was \$5,000, rather than \$2,500. See Pub. L. 109-171, § 7303 (substituting \$2,500 for \$5,000, effective as of Oct. 1, 2006).

51. 42 U.S.C. § 654(31) (2018).

52. 42 U.S.C. § 652(k) (2018).

53. It is, of course, possible that in some cases the passport denial might directly prevent a person with unpaid child support from fleeing the country. Such a direct linkage, however, does not appear to be the principal focus of the provision.

54. See *Eunique v. Powell*, 302 F.3d 971, 975 (9th Cir. 2002).

55. *Id.* (upholding constitutionality of passport denial based on child support arrearages); see also *Risenhoover v. Washington Cty. Cmty. Servs.*, 545 F. Supp. 2d 885, 890 (D. Minn. 2008) (citing *Eunique* “focusing the mind” rationale).

56. See *Eunique*, 302 F.3d at 975; *Weinstein v. Albright*, 261 F.3d 127 (2d Cir. 2001); see also *Risenhoover*, 545 F. Supp. 2d at 890 (upholding revocation due to past due child support).

57. See 22 C.F.R. § 51.60(a)(1) (2019) (prohibition on issuing passport if individual is in default on emergency loan to enable destitute citizen to return to United States); *id.* § 51.60(c)(1) (allowing denial of passport if individual has not repaid loan for emergency medical and other assistance while in a foreign country); *id.* § 51.60(c)(2) (allowing denial of passport if individual has not repaid loan received for repatriation or evacuation from war zone or other hazardous foreign area); cf. Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117, 218–21 (2014) (criticizing U.S. policy of seeking reimbursement for emergency evacuation as being inconsistent with policy justifications for citizenship-based taxation).

comply with past-due tax obligations (or to avoid incurring large tax debts in the first place).<sup>58</sup> As with the passport limitation based on past-due child support, the FAST Act places responsibility for certifying noncompliance with the underlying law in the hands of the agency with primary subject-matter responsibility for that law (the I.R.S. in the case of FAST Act tax delinquency, and the appropriate state agency in the case of child support arrearages).<sup>59</sup> The agency then informs the relevant federal department with subject matter authority over the underlying law (Department of Treasury in the case of delinquent taxes and DHHS in the case of delinquent child support), which then transmits the certification to the Department of State. With both the tax delinquency and child support delinquency, the Department of State is prohibited from issuing a passport (other than a limited passport for direct return to the United States) if a certification is in effect.<sup>60</sup> Similarly, with both types of delinquency the State Department is authorized (but not required) to revoke an existing passport if a certification is in effect for the individual.<sup>61</sup> With respect to this authority to revoke passports, in order to conserve resources and limit the need for discretionary determinations, the State Department has adopted a policy that it will not proactively seek out individuals with child support arrearages in order to revoke their existing passports.<sup>62</sup> Instead, it will undertake a revocation only when the individual comes to the attention of the State Department—*e.g.*, when the individual applies for a passport renewal (or for a new or renewed passport for his child), or when the individual seeks certain other consular services.<sup>63</sup> The State Department has not

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58. See *supra* notes 33–35 and accompanying text.

59. Cf. U.S. DEP'T OF STATE, 7 FOREIGN AFFAIRS MANUAL ("FAM") 1387.1(i)(2) (instructing State Department personnel that if a passport applicant claims that no child support is owed, "[y]ou must inform the applicant . . . that only the relevant state child support enforcement agencies have the authority to authorize the Department to release the passport . . . hold"). This approach is partially consistent with Joshua Blank's argument that collateral sanctions for tax noncompliance should be triggered by findings of the tax agency, rather than the nontax agency that imposes the sanction. See Blank, *supra* note 7, at 776–77; see also Michael S. Kirsch, *Alternative Sanctions and the Federal Tax Law: Symbols, Shaming, and Social Norm Management as a Substitute for Effective Tax Policy*, 89 IOWA L. REV. 863, 897–900 (2004) (describing the near impossibility of the State Department implementing the Reed Amendment, which prohibits the entry of former citizens who renounced citizenship for tax avoidance purposes, in the absence of statutorily authorized coordination with the I.R.S.). The FAST Act is consistent with Blank's analysis to the extent that the FAST Act prohibits the State Department from issuing a new (or renewed) passport to a person for whom an I.R.S. certification is in force, but it is partially inconsistent with respect to passport revocations, given that the State Department (the nontax agency) has discretion as to whether to revoke a passport of a person from whom an I.R.S. certification is in force. This discretion might be of less concern to Blank's analysis to the extent it is exercised based only on nontax considerations. See *infra* notes 59–60 and accompanying text (noting that in the context of child support arrearages, the State Department exercises its revocation discretion using objective criteria developed based on resource considerations, rather than inquiries on the substantive merits).

60. See 22 C.F.R. § 51.60(a)(2)–(3) (2019). Note that the State Department has already updated these regulations to incorporate the "seriously delinquent tax debt" provisions of the FAST Act.

61. See *Weinstein v. Albright*, 261 F.3d 137, 137 (2d Cir. 2001) (distinguishing, in the child support arrearage context, between State Department's mandatory obligation to deny a passport application and its permissive ability to revoke an existing passport).

62. *Id.* at 138.

63. See U.S. DEP'T OF STATE, 7 FOREIGN AFFAIRS MANUAL ("FAM") 1387.1(e); see also *Weinstein*, 261 F.3d at 137–39 (holding that this policy, whereby the State Department only revokes the passport of a person

yet updated the Foreign Affairs Manual to address circumstances when it will revoke a passport for seriously delinquent tax debt under the FAST Act, but presumably it would adopt a similar wait-for-them-to-come-to-us policy that it applies to child support arrearages. Although the State Department regulations allow affected individuals to request a review hearing for certain types of passport denials or revocations, such a hearing is not permitted for denials or revocations based on either a child support arrearage or a seriously delinquent tax debt certification.<sup>64</sup>

Of course, as with any generalization, the lines between the two categories of passport limitations (*i.e.*, those where there is a direct nexus between the passport and the potential harm, and those where the passport limitation is used as an incentive or leverage to enforce an unrelated substantive law) are not always clear. For example, to the extent that denying a passport prevents an individual with a tax delinquency (or child support arrearages) from fleeing the country, the act of fleeing could be viewed as a separate harm to be prevented, thereby creating a more direct nexus between the passport denial and preventing the harm. As noted above, however, the GAO Report, upon which the FAST Act passport limitations are based, did not explicitly mention this purpose,<sup>65</sup> focusing instead on the tax compliance incentives associated with the passport limitations. Moreover, to the extent the FAST Act passport limitations are applied to citizens already living overseas, the anti-fleeing rationale would have little relevance (at least until the individual needs to renew his passport or comes to the attention of the State Department and has his passport revoked, at which time a passport limitation might effectively cause him to return to the United States).<sup>66</sup> Accordingly, the FAST Act's passport limitations are best viewed as falling within the second category of limitations, primarily aimed at ensuring compliance with a substantive law that itself has no direct connection to international travel.

### III. INSTRUMENTAL IMPACT—DOMESTIC CITIZENS VS. NONRESIDENT

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with a child support arrearage when the person applies for a new passport or otherwise seeks consular services, does not violate due process).

64. See 22 C.F.R. § 51.70(a)–(b) (2019). This denial of a hearing presumably is based on the fact that passport limitations are triggered by a certification from another subject-matter agency, and notice and hearing opportunities exist in the context of that agency's certification process. See *infra* notes 144–45 and accompanying text (discussing this issue in the context of due process analysis).

65. See generally GAO REPORT, *supra* note 1. The federal circuit courts upholding the validity of passport limitations based on child support arrearages noted that the child support-based limitations not only “encourage[] people to pay such arrearages, [but also] prevent[] them from fleeing the country to avoid paying such arrearages.” *Weinstein v. Albright*, 2000 U.S. Dist. LEXIS 11604, at \*17 (S.D.N.Y. Aug. 10, 2000), *aff'd*, 261 F.3d 137 (2d Cir. 2001).

66. Even in these circumstances the nonrenewal or revocation would have little impact on returning the individual to the United States if he was a dual citizen holding a passport from another country. Additional issues involving dual citizens are discussed *infra* Section III.B.

## CITIZENS

As discussed in the prior Part, the principal purpose of Code section 7345, as added by the FAST Act, is to increase tax compliance, particularly with respect to those individuals with relatively large federal tax delinquencies. This Part discusses the instrumental impact section 7345 can be expected to have in incentivizing tax compliance. In doing so, it emphasizes the significant instrumental difference it might have on U.S. citizens residing abroad (referred to as overseas or nonresident citizens) compared to those residing domestically (referred to as domestic citizens).

Because the FAST Act uses possession of a passport as the principal leverage to encourage tax compliance, the statute's effectiveness will be directly proportional to the importance the tax delinquent places on having a passport. For those with a high demand for a U.S. passport, the passport limitations might provide a strong incentive to comply with their tax obligations. In contrast, for those with a relatively low demand for a U.S. passport, the provision will have little impact. While the demand for passports among domestic citizens may vary widely, the demand for passports among overseas citizens is likely to be very high (particularly if the individual does not hold dual citizenship, and therefore is unable to obtain and use a passport from another country).

*A. Impact on Tax Compliance Among Citizens Living Domestically*

In the case of domestic citizens, an individual's demand for a passport will depend on a range of factors. At one extreme, a domestic citizen with a strong desire to physically leave the U.S. (perhaps, to take the most egregious case, to flee from significant tax liabilities) would have a strong need for a passport. Of course, it is just such an individual that the FAST Act would hope to snare by denying the passport. Other, less extreme factors that would suggest a relatively higher demand for a passport include having significant business activities abroad, having close family members abroad,<sup>67</sup> and having a strong interest in foreign pleasure travel. It is not unreasonable to assume that individuals with higher incomes and income from nonemployee settings, who might have a greater propensity or opportunity to evade taxes, might also have a higher demand for passports under these factors (*e.g.*, business or pleasure travel abroad). For those individuals, the incentives created by the FAST Act passport limitations might have some instrumental impact. Yet, for many of these individuals (particularly those with very large tax delinquencies), at the margin the cost of paying the past-due taxes might exceed the subjective value of foreign travel, thereby diminishing the instrumental effect of the statute.

Despite this demand for U.S. passports by some domestic citizens, a majority of domestic citizens do not travel outside the United States and, accordingly, exhibit little demand for a passport. For example, in 2015 the State Department issued approximately 15 million passports and a total of approximately

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67. This situation might be more likely for first-generation naturalized citizens.

125 million valid U.S. passports were in circulation.<sup>68</sup> Considering that many valid passports in circulation might have been issued for a one-time foreign trip, and several million passports might be held by overseas citizens,<sup>69</sup> the number of domestic citizens who evidence a current demand for passports may be slightly over 100 million. More specifically, the State Department's Bureau of Consular Affairs estimates that 65 million U.S. citizens travel abroad each year.<sup>70</sup> By comparison, there are approximately 294 million citizens living in the United States.<sup>71</sup> Accordingly, in any given year fewer than one-quarter of domestic citizens utilize a passport to travel outside the United States, and even over a period of several years perhaps one-third of domestic citizens do so.<sup>72</sup> As a result, for a large percentage of domestic citizens, the FAST Act will have little direct impact on their tax compliance.<sup>73</sup> As noted in the prior paragraph, however, it is possible that the minority of domestic citizens who travel abroad might have higher incomes or a greater opportunity to evade tax payments than a non-passport-holding individual earning income from employment (or not earning any income).

The experience with passport denials for child support arrearages provides some useful guidance regarding the instrumental impact of passport limitations conditioned upon noncompliance with financial obligations. Somewhat outdated data suggests that the child support program has been reasonably effective in flagging noncompliant individuals, with approximately 1,000 passports denied per week under the program.<sup>74</sup> The largest annual direct collection resulting from

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68. See U.S. DEP'T OF STATE, *Passports Statistics*, <https://travel.state.gov/content/passports/en/passports/statistics.html> (last visited Aug. 24, 2019).

69. The State Department estimates that there are approximately 6.8 million U.S. citizens living abroad, however, it does not specifically state that all of these citizens hold U.S. passports. See U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Who We Are and What We Do: Consular Affairs by the Numbers* (Jan. 2013), [https://travel.state.gov/content/dam/ca\\_fact\\_sheet.pdf](https://travel.state.gov/content/dam/ca_fact_sheet.pdf); see also Letter from Carolyn Maloney et al., Congressional Representative, to John Kerry, Secretary of State (Apr. 12, 2016), <https://www.americansabroad.org/media/files/a2504669/letter-to-state--passport-revocation.pdf> [hereinafter Congressional Letter to Sec. Kerry] (asserting that "there are roughly eight million Americans living overseas who may be impacted by" the FAST Act passport limitations).

70. See U.S. DEP'T. OF STATE, BUREAU OF CONSULAR AFFAIRS, *supra* note 69.

71. According to the U.S. Census Bureau's 2012 American Community Survey, there are approximately 273.2 million native-born citizens and 18.7 million naturalized citizens living in the United States. See U.S. CENSUS BUREAU, SELECTED SOCIAL CHARACTERISTICS IN THE UNITED STATES, 2015 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES, tbl. DP02, [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_12\\_1YR\\_DP02&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_1YR_DP02&prodType=table).

72. William D. Chalmers, *The Great American Passport Myth: Why Just 3.5% of Us Travel Overseas!*, LIFE (Sept. 29, 2019, 9:55 AM), [https://www.huffpost.com/entry/the-great-american-passpo\\_n\\_1920287](https://www.huffpost.com/entry/the-great-american-passpo_n_1920287).

73. For possible indirect impacts, see *infra* Part V.

74. See NATIONAL CHILD SUPPORT ENFORCEMENT ASSOCIATION, QUICK FACTS: PASSPORT DENIAL, <http://www.ncea.org/documents/Quick-Facts-Passport-Denial.pdf> (data from 2009). Much of the data in that summary reflected pre-2006 years when the triggering threshold for child support arrearages was \$5,000, rather than the current \$2,500. The recent DHHS annual report to Congress suggests that in FY2014 \$182 million was collected, although that figure includes not only "data matches with Department of State to deny passport renewals for those past due in child support . . . [but also] with financial institutions and insurance companies." OFFICE OF CHILD SUPPORT ENFORCEMENT, ANNUAL REPORT TO CONGRESS FY 2014 7, [https://www.acf.hhs.gov/sites/default/files/programs/css/fy2014\\_part\\_01\\_narrative\\_and\\_national\\_performance.pdf](https://www.acf.hhs.gov/sites/default/files/programs/css/fy2014_part_01_narrative_and_national_performance.pdf).

this program was 40 million, with an average lump-sum payment of approximately \$5,600.<sup>75</sup>

While the child support enforcement program faces the same problem identified above for tax enforcement—*i.e.*, a majority of citizens have little demand for a passport, and thus will not be induced to comply—the data suggests that a significant number of citizens do have a demand for passports sufficient to incentivize compliance with their underlying financial obligations.<sup>76</sup> The absolute number of individuals affected by the FAST Act limitations, however, could be expected to be lower than the number impacted by the child support provision, given that the number of individuals owing child support is higher than the anticipated number who might have seriously delinquent tax debt.<sup>77</sup>

### *B. Impact on Tax Compliance Among Citizens Living Abroad*

In comparison to domestic citizens, a significant majority of whom might have little or no demand for a passport (and thus might not be susceptible to the incentivizing purpose of the FAST Act), citizens abroad have a very high need for their passport. Citizens abroad not only need a U.S. passport to travel between their residence country and the United States, but also to travel between foreign countries and to serve as a form of official identification to conduct financial and other transactions within their country of residence.<sup>78</sup> Indeed, if the individual is not a dual citizen of another country (and therefore only has access to a U.S. passport), she might find it difficult to function even within her residence country without a U.S. passport. Because of an overseas citizen's very high demand for her U.S. passport, she might be impacted significantly by the FAST Tax passport limitations.<sup>79</sup>

Because of this heightened importance of a U.S. passport for overseas citizens, it is reasonable to expect that the FAST Act passport limitations might have the greatest instrumental impact on that group in incentivizing tax compliance (even though the FAST Act was not enacted with a particular focus on that group

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75. See NATIONAL CHILD SUPPORT ENFORCEMENT ASSOCIATION, *supra* note 74.

76. See *id.*

77. In 2013, of the approximately 6.5 million custodial parents who were entitled to receive child support, only 48.7% of them received the full payment due. See U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT 2013, tbl. 1, <https://www.census.gov/content/dam/Census/library/publications/2016/demo/P60-255.pdf>. The average child support due was \$5,774, while the average child support received was \$3,953, suggestion that a significant number of payers would exceed the \$2,500 arrearage threshold triggering the passport limitation. In contrast, in 2014 an aggregate of approximately 2.5 million notices of federal tax liens and levy requests were filed (the actual number of individuals affected is lower, given that some individuals might have been subject to both a notice of lien and levy). I.R.S., SOI TAX STATE-DELINQUENT COLLECTION ACTIVITIES-IRS DATA BOOK TABLE 16 (2014), <https://www.irs.gov/uac/soi-tax-stats-delinquent-collection-activities-irs-data-book-table-16>. Of these notices of lien and levy, some relate to amounts less than \$50,000, thereby further decreasing the potential number of individuals with seriously delinquent tax debt.

78. See Congressional Letter to Sec. Kerry, *supra* note 69 (describing ways in which “[t]he possession of a valid U.S. passport is essential to normal daily function for an American citizen living abroad”); see also Weil, *supra* note 44 (highlighting the legal identification aspect of a passport).

79. See Congressional Letter to Sec. Kerry, *supra* note 69.

of citizens).<sup>80</sup> A number of other factors must be considered, however, in order to determine the actual, practical impact of the FAST Act on overseas citizens' tax compliance.<sup>81</sup>

While the United States generally exercises taxing jurisdiction based on citizenship status (so-called "citizenship-based taxation"), regardless of the citizen's residence, the enforcement of citizenship-based taxation with respect to nonresident citizens' foreign-source income has always been problematic.<sup>82</sup> Congress previously attempted, with little apparent success, to leverage the passport application process to assist with tax enforcement. In particular, Code section 6039E (enacted in 1986 and still in force) requires a passport application to include the applicant's taxpayer identification number (typically the social security number) as well as the name of the foreign country in which the individual resides.<sup>83</sup> The penalty for failing to do so, however, is relatively modest (\$500) under this provision,<sup>84</sup> particularly from the perspective of someone who might be evading significant taxes. More importantly, under section 6039E failing to provide the social security number did not prevent the State Department from issuing the passport.<sup>85</sup>

More recent developments, combining both sticks and carrots, have had a greater potential impact on tax compliance by overseas citizens. In particular, Congress enacted the controversial and highly publicized Foreign Account Tax Compliance Act ("FATCA")<sup>86</sup> in 2010, which, when fully implemented, raises the potential that foreign financial institutions will (either directly or indirectly) report information to the I.R.S. on foreign financial accounts held by U.S. citizens.<sup>87</sup> FATCA also imposes reporting obligations on U.S. citizens, whether living domestically or abroad, with respect to foreign financial accounts and, along with the previously existing obligation to file a Report of Foreign Bank and Financial Accounts ("FBAR"), creates the possibility of extremely high penalties for U.S. citizens who fail to report foreign accounts.<sup>88</sup> In the context of these heightened reporting obligations and potential penalties, the I.R.S. has offered a number of offshore voluntary disclosure programs to enable previously noncompliant taxpayers to become compliant without the risk of criminal prosecution (but at the cost of paying potentially high monetary penalties).<sup>89</sup> In response to complaints that these voluntary disclosure programs imposed overly burdensome

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80. See H.R. REP. NO. 114-357 (2015).

81. See discussion *infra* Part V.

82. See generally Michael S. Kirsch, *Citizens Abroad and Social Cohesion at Home: Refocusing a Cross-Border Tax Policy Debate*, 36 VA. TAX REV. 205 (2017); Kirsch, *supra* note 57.

83. I.R.C. § 6039E(b) (2018).

84. See *id.* § 6039E(c).

85. Accordingly, prior to the FAST Act, a passport could be denied with respect to the nonpayment of taxes only if the individual's case had escalated to one of the other (nontax-specific) scenarios that justified the denial of a passport under 22 C.F.R. § 51.60, such as an outstanding felony arrest warrant.

86. FATCA is codified in I.R.C. §§ 1471–1474 (2018).

87. See *id.*

88. I.R.C. § 1471 (2018).

89. See *How to Make an Offshore Voluntary Disclosure*, IRS, <https://www.irs.gov/compliance/criminal-investigation/how-to-make-an-offshore-voluntary-disclosure> (last updated Nov. 30, 2018).



penalties on taxpayers whose failure to file had been nonwillful, the I.R.S. more recently created streamlined filing compliance procedures that enable the individual to avoid penalties by filing delinquent or amended tax returns for the past three years, and delinquent FBARs for the past six years.<sup>90</sup> In addition to these I.R.S. compliance initiatives, the Justice Department has attempted to increase compliance by pursuing a number of high-profile criminal cases involving foreign bank accounts, particularly those held in Swiss banks.<sup>91</sup>

In order to focus on the impact that the FAST Act passport limitations will have on overseas citizens in the context of these other developments, it is useful to identify the specific hurdles that the I.R.S. faces in securing tax compliance from overseas citizens. In order to collect taxes from citizens living abroad, the I.R.S. must meet at least three potential challenges: (i) the threshold step of being aware of and identifying the citizens living abroad; (ii) obtaining information regarding the financial accounts and income of the citizen abroad in order to determine tax liability; and (iii) once the first two hurdles are cleared, actually collecting any taxes owed. While these same requirements exist in a domestic context, the challenges the I.R.S. faces in meeting them are often much lower, particularly because of the information reporting and withholding requirements often imposed domestically on third parties (*e.g.*, domestic financial institutions and employers).<sup>92</sup>

The I.R.S.'s task in addressing these three challenges is made more complicated by the fact that it also faces a broad range of overseas citizens. At one extreme are those who try (with varying degrees of success) in good faith to meet their tax filing and payment obligations. Next, there are some overseas citizens who might not be making current efforts to comply, but at least the I.R.S. is aware of their existence (because, for example, they previously had filed returns), although the identifying information (*e.g.*, their address) may be out of date. Finally, there are some (perhaps many) overseas citizens the I.R.S. has no awareness of. Among this group, some might have little or no tax liability (beyond possible penalties for failure to file information returns) due to the foreign tax credit or otherwise and might not even be aware of their obligation to comply with U.S. tax laws, while others might knowingly be evading U.S. tax liability.

In this context, prior to the developments in the past decade, the I.R.S. faced significant problems in identifying overseas citizens who did not voluntarily file their tax returns.<sup>93</sup> As noted previously, Code section 6039E was of little practical help, given the relatively small penalty for failing to provide a social security number with the passport application, and the ability to receive a passport even

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90. *Streamlined Filing Compliance Procedures*, IRS, <https://www.irs.gov/individuals/international-taxpayers/streamlined-filing-compliance-procedures> (last updated June 27, 2019).

91. *See, e.g.*, Kirsch, *supra* note 57, at 141–46.

92. *Third Party Reporting Information Center—Information Documents*, IRS, <https://www.irs.gov/tax-professionals/third-party-reporting-information-center-information-documents> (last updated Dec. 7, 2018).

93. *See* Kirsch, *supra* note 57, at 129.

when the social security number was omitted.<sup>94</sup> The more recent I.R.S. initiatives, including the specter of FATCA and FBAR penalties along with voluntary disclosure programs and the streamlined filing compliance procedures, have the potential for helping the I.R.S. with the threshold identification of citizens abroad in step (i). Particularly with respect to those noncompliant individuals who were concerned that the I.R.S. (either through FATCA or otherwise) might become aware of them, these initiatives might have incentivized them to enter the system through one of the available programs.

The threat of these penalties, however, might not have been sufficient to incentivize compliance by recalcitrant overseas citizens, particularly if a significant amount of unpaid tax liability (or undisclosed foreign accounts) was at stake, and the individual assumed that there was little likelihood of I.R.S. detection. It is with respect to this group of overseas citizens that the FAST Act—in particular, the requirement that a valid social security number be provided with the passport application<sup>95</sup>—might aid the I.R.S. in the threshold identification of overseas citizens. If the overseas citizen needs to renew his passport, he will now need to provide a social security number under the FAST Act, which the State Department will then forward (along with the individual's identifying information) to the I.R.S. under Code section 6039E.<sup>96</sup> If, however, the individual has a second nationality and passport, he might have a lesser need to obtain (or renew) a U.S. passport, particularly if he does not plan to travel to the United States.<sup>97</sup> Accordingly, the FAST Act will not necessarily help to identify such dual citizens, who have the potential to be the most blatant offenders.

Even if the FAST Act's social security number requirement helps with the threshold identification step, the I.R.S. must then address step (ii), obtaining information on the individual's income in order to determine tax liability. The recent initiatives, particularly FATCA reporting by foreign financial institutions,<sup>98</sup> along with the compliance initiatives, might help to some extent. The FAST Act itself, however, will not provide useful information in this step. In order for the State Department to deny or revoke a passport under this statute, the I.R.S. must already have had sufficient information to certify a seriously delinquent tax debt, which requires not only an assessment of at least \$50,000, but also a properly executed notice of lien or levy.<sup>99</sup> Thus, the FAST Act is only relevant after the I.R.S. has obtained the relevant information; the FAST Act's passport limitation provisions (beyond the social security number requirement) do not assist in obtaining the underlying income information.

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94. I.R.C. § 6039E(b) (2018).

95. Fixing America's Surface Transportation Act ("FAST Act"), Pub. L. No. 114-94, § 32102(e)(1)(B)(i), 129 Stat. 1312, 1734-35 (2015).

96. *Id.*

97. A U.S. citizen entering the United States is required to do so using a U.S. (rather than a second country's) passport. See 8 U.S.C. § 1185(b) (2018) ("[I]t shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid United States passport.").

98. 26 U.S.C. § 1471(a) (2018).

99. 22 C.F.R. § 51.60 (2019).

If the I.R.S. is able to both (i) identify overseas citizens, and (ii) obtain information on the individual's income in order to determine tax liability, the FAST Act might help in step (iii), the collection of the tax. Prior to the FAST Act, the I.R.S. faced significant hurdles in collecting unpaid taxes from an overseas citizen whose assets are overseas.<sup>100</sup> If the overseas citizen depends on his U.S. passport (as most overseas citizens without dual citizenship do), the FAST Act now provides an important point of leverage, denying the passport renewal until the overseas citizen pays (or otherwise properly addresses through an installment agreement or otherwise) a seriously delinquent tax debt. Again, however, this aspect of the FAST Act will have much less instrumental impact with respect to a dual citizen who has a second passport and therefore has less of a need for his U.S. passport.

In summary, the social security number requirement of the FAST Act might be useful in identifying some overseas citizens that might not otherwise come to the I.R.S.'s attention and, to the extent the I.R.S. can utilize other recent compliance initiatives to obtain information on an individual's overseas income, the passport limitations of the FAST Act might provide added leverage in collecting the taxes. Both of these instrumental aspects of the FAST Act may be significantly undermined, however, in the case of the subset of overseas citizens who hold dual (or multiple) citizenship, and therefore do not rely as heavily on a U.S. passport as do overseas citizens who hold only U.S. citizenship.

It is important to recognize that, like any compliance measure, the FAST Act may impose additional costs (both direct and indirect) on citizens and, given the heightened importance of passports to overseas citizens relative to domestic citizens, these costs are likely to be borne more heavily by overseas citizens. For example, a recent letter to Secretary of State John Kerry by several Congressional representatives highlights a number of practical concerns that might arise for overseas citizens in the context of the FAST Act, such as potential problems in receiving notice abroad and the opportunity for appeal, as well as significant interference with work and personal life abroad if a passport is incorrectly revoked or denied.<sup>101</sup> While these are important concerns, they appear to be less immediate than the more significant obstacles potentially imposed on overseas citizens by FATCA.<sup>102</sup> More importantly, the FAST Act places a passport in jeopardy only to the extent there has already been an assessment of tax and a notice of lien or levy. Accordingly, the citizen is likely to have already been aware of the underlying tax problem and have had the opportunity to address it and, at least with respect to notices of lien or levy sent after the FAST Act was enacted, the citizen should have received specific warning that one of the consequences of the tax

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100. See Kirsch, *supra* note 57, at 129.

101. See Congressional Letter to Sec. Kerry, *supra* note 69; see also American Citizens Abroad, *American Citizens Abroad Position Paper on Passport Revocation*, <https://www.americansabroad.org/media/files/files/c8188518/final-aca-position-paper-on-passport-revocation.pdf> (discussing concerns that a passport revocation "holds the potential for wreaking irreversible harm" to a citizen living abroad by putting him into a "virtual debtor's prison, in which he is physically unable to generate the income alleged to be due on account of his inability to travel," and describing consequences if a mistake is made with respect to a lien or levy).

102. See generally Kirsch, *supra* note 57, at 166–70.

delinquency could be the loss of the passport.<sup>103</sup> Moreover, the FAST Act requires the I.R.S. to send an additional notice at the time that the seriously delinquent tax debt is certified<sup>104</sup> and allows the individual to seek judicial review to determine whether the certification was erroneous.<sup>105</sup>

Critics of the FAST Act also express concern that passport limitations for tax debts “put[] us on a slippery slope, opening a Pandora’s box to application of this tool in scenarios in which allegations of increasingly trivial offenses trigger government recourse to this most dramatic of sanctions.”<sup>106</sup> Of course, the mere fact that Congress might enact even tougher sanctions in the future (or could have implemented less stringent sanctions currently) is not, of itself, a reason to reject an enforcement effort that might, at least with respect to some individuals, be effective. Nonetheless, it is important to consider whether there are any limiting principles on the FAST Act’s precedent of subjecting citizenship benefits to compliance with citizenship obligations. Such considerations are addressed in Part VI, *infra*.

Despite this general defense of the application of the FAST Act to overseas citizens, there are, potentially, some areas of particular concern to overseas citizens that the I.R.S. could address. Congress has a recent tendency (most evident in enacting FATCA, and to a lesser extent with the FAST Act) to focus on non-compliance by U.S.-resident citizens, but to address that noncompliance in a way that disproportionately impacts nonresident citizens.<sup>107</sup> As with FATCA, Congress did not focus particularly on the way in which the FAST Act might uniquely burden overseas citizens.<sup>108</sup> I previously have argued that Congress,

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103. See Fixing America’s Surface Transportation Act (“FAST Act”), Pub. L. No. 114-94, § 32101(b), 129 Stat. 1312, 1729 (2015) (requiring that a notice of lien or a notice of levy must include, in simple and nontechnical terms, a description of Code Section 7345 and the potential denial, revocation, or limitation of passports for individuals with seriously delinquent tax debts). For a discussion of potential due process issues that might arise with respect to FAST Act certifications that are based on pre-FAST Act notices of lien or levy, see *infra* paragraph preceding note 165.

104. See I.R.C. § 7345(d) (2018).

105. See *id.* § 7435(e); see also *supra* notes 18–21 and accompanying text (discussing FAST Act procedural protections).

106. American Citizens Abroad, *supra* note 101. That position paper also complains that FBAR penalties might easily push an individual above the \$50,000 threshold. See *id.* It is unlikely, however, that an FBAR penalty will be included in the \$50,000 threshold for certifying seriously delinquent tax debt. Although the I.R.S. was delegated enforcement authority for the FBAR in 2003, the FBAR penalty is not a tax under the Internal Revenue Code. See Internal Revenue Manual [“I.R.M.”] § 4.26.16.1 (2018). Rather, it is authorized by the Bank Secrecy Act, 31 U.S.C. § 5321(a)(5) & (6) (2018). See I.R.M. § 4.26.16.2.1.3. More importantly, the FBAR penalty is not collected using the regular Internal Revenue Code procedures, but instead is subject to collection procedures specified in Title 31 of the U.S. Code. See I.R.M. § 8.11.6.1.1.

107. FATCA was principally driven by concerns that U.S.-resident citizens were holding significant amounts in offshore, undeclared financial accounts. See Kirsch, *supra* note 57, at 166. While only a relatively modest number of U.S.-resident citizens are likely to hold foreign financial accounts, and thus be impacted by FATCA’s enforcement provisions, a significant percentage of citizens living abroad are likely to be impacted by FATCA (given that the latter group is likely to hold foreign financial accounts as part of their routine day-to-day financial transactions). See *id.* at 161.

108. The GAO REPORT, *supra* note 1, which served as the impetus for the FAST Act passport limitations, did not explicitly differentiate between noncompliance by domestic citizens and noncompliance by overseas citizens, nor did it acknowledge the differing importance of passports to the two groups. In reviewing twenty-five

when enacting tax legislation primarily intended to address domestic citizens, and the IRS when enforcing that legislation, needs to more seriously consider how that legislation might impact citizens abroad and whether specific provisions can be included to address their concerns without undermining the effectiveness of the law.<sup>109</sup> A number of such accommodations might warrant consideration, particularly as Treasury and the I.R.S. draft administrative guidance for the FAST Act.<sup>110</sup> For example, overseas citizens advocates argue that citizens abroad face a higher risk of not actually receiving notices sent by the I.R.S.<sup>111</sup> To the extent such risks exist, the I.R.S. should undertake efforts to address those concerns, particularly given the added consequences of passport loss. Other possible procedural concerns that the I.R.S. might address are discussed *infra* Section IV.A, in the context of due process analysis.

In addition, these advocates note that the significant FATCA-related penalties for failing to disclose foreign accounts could cause an individual's tax liability to exceed \$50,000.<sup>112</sup> Of course, the penalty itself, even if owed, would not trigger a passport denial or revocation—only the nonpayment after assessment and notice of lien or levy could cause certification would do so.<sup>113</sup> The IRS should nonetheless consider whether special treatment might be warranted for such penalties incurred by an overseas citizen, given that they might have a disproportionate impact on citizens overseas who are much more likely to hold “foreign” accounts as part of their routine banking and other financial activities.<sup>114</sup> For example, guidance could clarify that an individual who is unable to make full payment of amounts due under the Offshore Voluntary Disclosure Program, but has made arrangements to make deferred payments (and is in compliance with such arrangements), will not be subject to a FAST Act certification.<sup>115</sup>

#### IV. POTENTIAL CONSTITUTIONAL CONCERNS

The FAST Act, by allowing the State Department (in coordination with the I.R.S.) to deny or revoke a passport and thereby interfere with an individual's ability to travel abroad, impacts an important aspect of citizenship and, accordingly, raises important Fifth Amendment constitutional issues.<sup>116</sup> In particular, it raises both procedural due process questions (related to the procedures by which the passport is denied or revoked) and substantive due process questions (relating to the ability of Congress to interfere with a possible liberty interest in international travel). Given the relatively recent enactment of the FAST Act, no court

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cases of individuals involved in abusive or potentially criminal federal tax activity, the report noted that four of the individuals resided outside the United States. *See id.* at 10.

109. *See* Kirsch, *supra* note 57, at 210–12.

110. *See supra* note 10 (noting that guidance under I.R.C. § 7345 has been included on the I.R.S.'s priority guidance plan).

111. *See* Congressional Letter to Sec. Kerry, *supra* note 69.

112. *See* American Citizens Abroad, *supra* note 101.

113. *Id.*

114. *Cf.* Kirsch, *supra* note 57, at 161.

115. *See supra* note 89 and accompanying text.

116. *See* discussion *infra* Part IV.

has yet decided these issues with respect to that statute.<sup>117</sup> This Part, relying on Supreme Court decisions addressing passport limitations in other contexts, and on appeals court decisions specifically addressing the passport limitations that arise when there are child support arrearages, analyzes how these issues are likely to be decided with respect to the FAST Act passport limitations.

#### A. *Procedural Due Process*

The Fifth Amendment to the U.S. Constitution provides, *inter alia*, that no person shall “be deprived of life, liberty, or property, without due process of law.”<sup>118</sup> At a minimum, this provision requires that when the government seeks to deprive a person of one of these interests, the person must be given notice and an opportunity to be heard. The Supreme Court has stated:

The constitutional right to *interstate* travel is virtually unqualified. By contrast, the “right” of *international* travel has been considered to be no more than an aspect of the “liberty” protected by the Due Process Clause of the Fifth Amendment. As such, this “right” [to international travel], the Court has held, can be regulated within the bounds of due process.<sup>119</sup>

Accordingly, the question is whether the passport-limitation procedures provided in the FAST Act (and related regulations) provide sufficient notice and opportunity to be heard. In resolving this question, “[t]he Due Process Clause does not demand that the government provide the same kind of procedural protections for every deprivation of a property or liberty interest,”<sup>120</sup> but at a minimum it requires that the government provide “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>121</sup> In so doing, they must be “provided with an opportunity to contest the relevant determination ‘at a meaningful time and in a meaningful manner.’”<sup>122</sup>

Before applying these principles to the FAST Act, it is useful to consider the federal circuit court cases addressing passport limitations for child support arrearages. These cases are particularly relevant given the many similarities between the two provisions<sup>123</sup>—*e.g.*, both the child support-based limitations and the FAST Act are “secondary” type passport limitations intended to induce compliance with respect to some other wrongdoing,<sup>124</sup> and both provisions are triggered by a certification from an agency with subject-matter jurisdiction over the underlying wrongdoing.<sup>125</sup>

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117. See discussion *infra* Part IV.

118. U.S. CONST. amend. V.

119. *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) (emphasis added) (citations omitted).

120. *Weinstein v. Albright*, 261 F.3d 127, 134 (9th Cir. 2001) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)).

121. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

122. *Weinstein*, 261 F.3d at 135 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

123. See *supra* notes 48–60 and accompanying text.

124. See *supra* notes 48–55 and accompanying text.

125. See *supra* notes 57–58 and accompanying text.

In *Weinstein v. Albright*,<sup>126</sup> the Second Circuit Court of Appeals rejected a procedural due process challenge to the statute and regulations that authorize the denial and revocation of a passport for child support arrearages.<sup>127</sup> That federal statute provides that the state agency supervising child support provide the individual “notice of [the child support arrearages] determination and the consequences thereof, and an opportunity to contest the determination.”<sup>128</sup> Pursuant to this provision, the New York state agency mailed Mr. Weinstein a notice at his last known address explaining the potential passport consequences and informing him of his right to an administrative review, including an in-person conference, to contest the amount of the child support arrearages.<sup>129</sup> In addition, under the New York state rules applicable in *Weinstein*, the individual had the right to seek state court review of an adverse administrative decision.<sup>130</sup>

Mr. Weinstein did not utilize the administrative review process and the State Department, based on the arrearages certification, denied his application for passport renewal (and also revoked his existing passport).<sup>131</sup> Mr. Weinstein brought an action in federal district court claiming that the denial of his passport renewal violated his due process rights because the statute failed to provide him review of the passport denial before a federal agency—*i.e.*, the Department of State.<sup>132</sup> The Second Circuit ultimately held that the arm of the government offering the hearing (*i.e.*, a state agency vs. the Federal Department of State) was irrelevant.<sup>133</sup> The court held that the due process standards were satisfied because the state agency responsible for determining and certifying the amount of the arrearage had provided meaningful notice of the consequences and an opportunity to be heard at a meaningful time and in a meaningful manner, which would have allowed Mr. Weinstein to challenge the underlying arrearages determination before any action on the passport was taken.<sup>134</sup>

Mr. Weinstein also challenged the revocation of his existing passport on due process grounds because, unlike the denial of a passport application (which is mandatory once a certification has been issued), the statute gives the State Department discretion in deciding whether to revoke an existing passport if a certification has been issued.<sup>135</sup> Mr. Weinstein argued that the failure to provide

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126. *See generally Weinstein*, 261 F.3d 127.

127. *Id.* at 139.

128. 42 U.S.C. § 654(31) (2018).

129. *Weinstein*, 261 F.3d at 132.

130. *See id.*

131. *Id.* at 133.

132. *Id.*

133. *Id.* at 135.

134. *See id.*; *see also Risenhoover v. Washington Cty. Cmty. Servs.*, 545 F. Supp. 2d 885, 890 (D. Minn. 2008) (holding as well that the child support arrearages provisions for denying a passport satisfy procedural due process requirements).

135. *Weinstein v. Albright*, 261 F.3d 127, 138–39 (2d Cir. 2001); *see also supra* notes 59–60 and accompanying text (noting that the statutory language authorizes, but does not require, the revocation of an existing passport).

a hearing before the State Department raised the possibility that the State Department might exercise this discretion arbitrarily.<sup>136</sup> The court rejected this argument, noting that there was no evidence that the State Department arbitrarily exercised its discretion.<sup>137</sup> Rather, the court noted that the State Department had adopted a narrow, objective policy for revoking existing passports of those who have been certified with child support arrearages, doing so only when the individual comes to the attention of the State Department by applying for a new passport or otherwise seeking consular services.<sup>138</sup>

This analysis suggests that the FAST Act, at least as a general matter, is likely to survive a procedural due process challenge. As with child support arrearages, an individual subject to the FAST Act passport limitations is not entitled to a hearing at the State Department level.<sup>139</sup> Based on the reasoning in *Weinstein*, however, the arm of the government providing the notice and the opportunity for a hearing is not controlling, as long as the individual is afforded the opportunity for a timely and meaningful hearing at some level.<sup>140</sup> Accordingly, the key consideration is whether the individual potentially subject to the FAST Act is provided sufficient opportunity for a hearing at the I.R.S. certification level (or before).<sup>141</sup>

The statute envisions that an individual will receive two levels of notification (and potential opportunities for a hearing) in the context of a seriously delinquent tax debt certification.<sup>142</sup> First, the FAST Act amends Code sections 6320(a)(3) and 6331(d)(4), which specify the information that must be included in a notice of lien and a notice of levy, respectively.<sup>143</sup> Under these amendments, those notices must now include language in “simple and nontechnical terms” describing the “provisions of section 7345 relating to the certification of seriously delinquent tax debts and the denial, revocation, or limitation of passports of individuals with such debts.”<sup>144</sup> As a result of these respective notifications, the individual should be made aware of the consequences of failing to address the underlying tax liability and, as importantly, the opportunity for a timely hearing before an impartial I.R.S. employee who had no prior involvement with respect to the unpaid tax.<sup>145</sup> At the hearing the individual may raise any relevant issue, including spousal defenses, challenges to appropriateness of collection actions, and offers of collection alternatives (*e.g.*, installment agreements or offers-in-compromise), and may also raise challenges to the underlying tax liability if the

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136. *Weinstein*, 261 F.3d at 138–39.

137. *Id.*

138. *Id.* at 138; *see also supra* notes 59–60 and accompanying text (describing this policy as currently reflected in the regulations).

139. *See supra* note 61 and accompanying text.

140. *Weinstein*, 261 F.3d at 139.

141. *Id.* at 133.

142. Fixing America’s Surface Transportation Act (“FAST Act”), Pub. L. No. 114-94, § 7345(b), 129 Stat. 1312, 1729 (2015).

143. *Id.*

144. *Id.* § 32101(b).

145. *See* I.R.C. § 6320(a)–(b) (2018) (notice of lien); § 6330(a)–(b) (notice of levy).



individual did not receive a statutory notice of deficiency for the liability or did not otherwise have a previous opportunity to dispute the tax liability.<sup>146</sup>

Because a debt can be considered a “seriously delinquent tax debt” only after a notice of lien has been filed and the administrative rights have been exhausted or have lapsed,<sup>147</sup> or after a levy has been made (which required a notice and opportunity for hearing), the foregoing procedures ensure that an individual will generally have had an opportunity for notice and meaningful opportunity to be heard with respect to the underlying components of a “seriously delinquent tax debt” before a certification is made.<sup>148</sup>

In addition, the statute provides a second level of notice and review in connection with the I.R.S.’s actual certification of a seriously delinquent tax debt.<sup>149</sup> This notification, which must be issued contemporaneously with the certification, explains the individual’s opportunity to “bring a civil action against the United States in a district court of the United States, or against the Commissioner in the Tax Court, to determine whether the certification was erroneous.”<sup>150</sup> This judicial review, which the Conference Report refers to as a “limited judicial review of the certification,”<sup>151</sup> presumably will focus on whether the technical requirements for certification have been satisfied (*e.g.*, at least \$50,000 of assessed tax liability with respect to which the notice of lien or levy requirements are satisfied, and no statutory exception applies).<sup>152</sup> Accordingly, this judicial review is not as useful to the taxpayer as is the first-level review, which also can consider installment or other payment options, as well as the validity of the underlying assessment in some circumstances.<sup>153</sup>

Even so, this judicial review is likely to satisfy the baseline due process requirement that the individual receive notice and an opportunity to be heard. Congress has chosen to permit certification (and passport denial) once the basic requirements of the “seriously delinquent tax debt” definition are satisfied, by which time the taxpayer has had an opportunity to address more substantive aspects of the tax debt through the first-level notice regarding the underlying lien or levy.<sup>154</sup> The judicial review apparently is merely assuring that no mistake has been made in the certification process mandated by Congress.

Despite these statutory protections which, on their face, appear to satisfy due process, several practical considerations might raise due process concerns. First, the *Weinstein* case highlights the importance of ensuring that the individual is made aware of the passport-limiting consequences that are at stake.<sup>155</sup> While

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146. *See id.* § 6330(c); § 6320(c) (cross-referencing § 6330(c)).

147. *See supra* notes 104–05 and accompanying text.

148. *See supra* notes 104–05 and accompanying text.

149. *See supra* notes 18–21 and accompanying text.

150. I.R.C. § 7345(d)–(e) (2018).

151. *See supra* note 21.

152. Fixing America’s Surface Transportation Act (“FAST Act”), Pub. L. No. 114-94, § 7345(b), 129 Stat. 1312, 1729 (2015).

153. *See supra* notes 15–17 and accompanying text.

154. *See supra* notes 15–17 and accompanying text.

155. *Weinstein v. Albright*, 261 F.3d 127, 134 (2d Cir. 2001).

Congress implicitly acknowledged this by statutorily requiring notices of lien and levy to describe the potential passport-limiting consequences of tax debt under the FAST Act, during at least some transition period the I.R.S. might be certifying seriously delinquent tax debt that relates to pre-FAST Act liens and levies.<sup>156</sup> For this “transitional” tax debt, the taxpayer would not have received notice of the passport-limiting consequences of the tax debt at the time of the underlying notice of lien or levy (because the FAST Act had not yet been enacted when the notice was sent), and therefore might not have taken the notice as seriously as he otherwise would have now that the FAST Act is on the books.<sup>157</sup> The judicial review of a certification presumably will not remedy this problem to the extent the review is limited to whether the certified debt meets the statutory definition of “seriously delinquent tax debt.”<sup>158</sup> In order to address this transitional tax debt, the I.R.S. might want to consider some type of precertification administrative relief to allow an administrative hearing to taxpayers potentially subject to certification with respect to pre-FAST Act levies and lien notices.

Another concern relates to the practical usefulness of post-certification judicial review of certifications. Bringing a civil action in federal court might be very expensive.<sup>159</sup> Moreover, it might take a relatively long time for the court to hear the civil action and render a decision, during which time the Treasury Department will have already transmitted the certification to the State Department and the State Department may have already acted on the certification by denying a passport application or, if the individual attempted to use any passport or consular services, revoked the individual’s existing passport.<sup>160</sup> Under such circumstances, the taxpayer might be viewed as not having been entitled to a meaningful, timely review of the certification before being subjected to the adverse consequences of passport loss.

These potential problems might cause particular hardships to citizens abroad. First, the expense and logistics of pursuing a federal court civil action from abroad might be daunting.<sup>161</sup> More importantly, the possibility of a passport denial or revocation before a timely judicial review is completed might raise additional hardships for citizens abroad, not only because they are more dependent on passports than are domestic citizens, but also because of the collateral harm that might occur.<sup>162</sup>

The I.R.S. National Taxpayer Advocate has identified a number of specific, practical issues raised by the FAST Act (primarily focused on domestic citizens)

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156. FAST Act § 7345(b).

157. *Id.*

158. *Id.*

159. See Letter from Texas Society of Certified Public Accountants, to Comm’r John Koskinen 2 (Mar. 9, 2017).

160. See *id.*

161. *Id.*

162. See American Citizens Abroad, *supra* note 101, at 1–2 (noting that an individual attempting to travel without a valid passport may be subject to detention or arrest, may be unable to seek medical care, and may have difficulty accessing financial accounts).

and has made several recommendations aimed at ensuring that passport certifications occur “only after a taxpayer’s administrative rights have been exhausted or lapsed.”<sup>163</sup> While the I.R.S. has accepted some of these recommendations, it has denied others.<sup>164</sup>

*B. Substantive Due Process—International Travel as a Liberty Interest*

In addition to questioning the adjudicative and procedural aspects of the FAST Act, a taxpayer might argue that the FAST Act’s passport limitations reflect an impermissible interference with his right to international travel. Under this so-called substantive due process argument, certain liberties are so important that they are beyond the reach of governmental interference except under narrow circumstances. To the extent that a law restricts a “fundamental” right, it is subject to strict scrutiny—*i.e.*, it must be justified by a compelling state interest and must be narrowly tailored to serve that interest.<sup>165</sup> Otherwise, the law is subject to the more relaxed “rational basis” standard, which only requires that the law be rationally related to a legitimate government interest.<sup>166</sup>

As noted above, the Supreme Court has observed that “[t]he constitutional right of *interstate* travel is virtually unqualified.”<sup>167</sup> In contrast, “the ‘right’ of international travel has been considered to be no more than an aspect of the ‘liberty’ protected by the Due Process Clause of the Fifth Amendment . . . [and] can be regulated within the bounds of due process.”<sup>168</sup> The Supreme Court has addressed the right to international travel in several contexts.<sup>169</sup> It has been most skeptical of international travel restrictions when the restriction potentially infringed upon some additional constitutional right, most typically First Amendment rights to freedom of association.<sup>170</sup> For example, in *Kent v. Dulles*, the State Department denied a petitioner’s passport application because of allegations that the petitioner was a member of the Communist Party.<sup>171</sup> The Court observed that “[t]he right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment,” and that

163. NAT’L TAXPAYER ADVOCATE 2019 REPORT, *supra* note 33, vol. 2, at 53; *see generally id.* vol. 2, at 80–113.

164. *See generally id.* vol. 2, at 80–113 (detailing the National Taxpayer Advocates’ recommendations and the IRS’ response).

165. *See generally* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 427 (2010) (summarizing Supreme Court’s currently prevailing substantive due process framework).

166. *See id.*

167. *Califano v. Gautier Torres*, 435 U.S. 1, 4 n.6 (1978) (citing *United States v. Guest*, 383 U.S. 745, 757–58 (1966)). The right to interstate travel, which is “firmly embedded in our jurisprudence,” often arises in the context of the Fourteenth Amendment’s Privileges and Immunities clause in the context of state laws that either directly or indirectly burden interstate travel. *See Saenz v. Roe*, 526 U.S. 489, 498–500 (1999).

168. *Gautier Torres*, 435 U.S. at 4 n.6; *cf. Weil, supra* note 44 (asserting that a citizen might have a substantive due process right against passport revocation based on the “legal identity” function of a passport, rather than the “international travel” function).

169. *See Kent v. Dulles*, 357 U.S. 116, 120 (1958).

170. *See id.* at 130.

171. *Id.* at 117–18.

“[f]reedom of movement is basic in our scheme of values.”<sup>172</sup> Ultimately, however, the Court demurred on “decid[ing] the extent to which it can be curtailed” under the Constitution,<sup>173</sup> holding instead for the petitioner on the statutory ground that Congress had not delegated to the State Department the right to deny a passport based on an individual’s beliefs or associations.<sup>174</sup>

Less than a decade later, after the Subversive Activities Control Act, which explicitly authorized the denial of a passport based on Communist affiliation, entered into force, the Supreme Court was required to confront the constitutional issue it had avoided in *Kent*.<sup>175</sup> In *Aptheker v. Secretary of State*, the State Department invoked that act to revoke the passport of a member of the Communist Party of the United States.<sup>176</sup> The Court acknowledged that the right to international travel might be restricted based on national security concerns, but concluded that an individual’s threat to national security cannot be inferred from mere membership or association with an organization.<sup>177</sup> Therefore, the Court concluded that the statute on its face “too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment.”<sup>178</sup>

In cases where the passport restriction did not implicate First Amendment freedom of association concerns, however, the Court has applied a more lenient approach.<sup>179</sup> For example, in *Zemel v. Rusk*, the Supreme Court upheld restrictions on the use of a U.S. passport to travel to Cuba.<sup>180</sup> After citing *Kent*’s reference to a liberty interest in international travel, the Court observed, “[h]owever, the fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited.”<sup>181</sup> While it did not set forth an explicit review standard, the Court, in upholding the restriction, noted a number of foreign relations-based concerns that might justify the restriction.<sup>182</sup> Similarly, in *Haig v. Agee*, the Court upheld the State Department’s revocation of a passport belonging to a former CIA agent who used his passport to travel to foreign countries and disclose intelligence information.<sup>183</sup> The Court stated that the freedom to travel abroad “is subject to *reasonable* government regulation,” although it suggested that the restrictions at issue in that case, based on national

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172. *Id.* at 125–26.

173. *See id.* at 127.

174. *Id.* at 130.

175. *Aptheker v. Sec’y of State*, 378 U.S. 500, 501 (1964).

176. *Id.*

177. *See id.* at 510–11.

178. *Id.* at 505.

179. *See Eunique v. Powell*, 302 F.3d 971, 973–74 (9th Cir. 2002) (“The [Supreme] Court has not been as troubled in cases which do not directly involve those [First Amendment] concerns.”).

180. 381 U.S. 1, 3 (1965).

181. *Id.* at 14.

182. *See id.* at 14–16.

183. 435 U.S. 280, 308 (1981).

security and foreign policy, might have satisfied an even higher standard of review.<sup>184</sup> Dicta in the recent *Zivotofsky v. Kerry* case, citing *Zemel* and *Agee*, reinforces Congress' authority to regulate international travel, observing that "Congress has substantial authority over passports."<sup>185</sup> The Court does not question the power of Congress to enact passport legislation of wide scope."<sup>186</sup>

As suggested by the foregoing analysis, the Supreme Court has not articulated a clear standard that should apply in reviewing statutes that directly interfere with international travel, such as passport revocations.<sup>187</sup> Yet, the cases suggest that, unless a separate right is at stake (*e.g.*, freedom of association under the First Amendment), courts generally do not apply a heightened standard of review, particularly when the passport limitation is explicitly authorized by statute.<sup>188</sup> For this reason, both federal circuit courts that have reviewed the passport limitations for child support arrearages have applied a "rational basis" review to uphold that statute.<sup>189</sup> For example, in *Eunique*,<sup>190</sup> the Ninth Circuit observed that the child support-related limitation "easily passes that test," citing a number of government interests that were advanced, including the maintenance of social order by encouraging parents to support their children, avoiding economic problems caused by parents who fail to support their children, and protecting the public by preventing the public from needing to provide financial support to children whose parents do not do so.<sup>191</sup> It then noted that the passport restriction rationally furthers these interests by both ensuring that the individual remains within the United States and does not flee, and also that he is incentivized to pay by "focusing the person's mind" on the child support obligation.<sup>192</sup>

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184. See *id.* at 306–07 (emphasis added). The Court mentioned that the government has a compelling interest in protecting national security secrets, and also that protecting foreign policy is a "governmental interest of great importance." *Id.* at 307. Given these references to "important" and "compelling" reasons, it is difficult to conclude whether the Court based its holding on a lower "reasonable government regulation" standard or some heightened standard. *Id.* at 306–07.

185. 135 S. Ct. 2076, 2096 (2015).

186. *Id.* at 2096 (focusing on separation of powers between Congress and the Executive, rather than on travel restrictions).

187. A final set of relevant Supreme Court cases deal with statutory restrictions that do not directly prevent international travel, but nonetheless infringe on it. For example, in *Califano v. Aznavorian*, the Court upheld a statute that denied Supplemental Security Income benefits to people who were outside the country. 439 U.S. 170, 178 (1978). The Court held that a statutory limitation that had only an incidental effect on international travel need only have a rational basis, and the restriction on Supplemental Security Income benefits met that standard. *Id.* at 177–78.

188. See *supra* notes 171–87 and accompanying text.

189. See *Eunique v. Powell*, 302 F.3d 971, 974 (9th Cir. 2002) ("As I see it, the Court has suggested that rational basis review should be applied"). Although the Second Circuit opinion did not explicitly address the standard, it adopted the district court's substantive due process reasoning, which had applied a rational basis standard in *Weinstein v. Albright*, 2000 U.S. Dist. LEXIS 11604, \*17. *Weinstein v. Albright*, 261 F.3d 127, 133 (2d Cir. 2001). A more recent District Court decision cites *Eunique* and *Weinstein* for the proposition that rational basis review applies, but concluded that even if a higher intermediate level of review applied the child support-based passport limitations would be satisfied.

190. *Eunique*, 302 F.3d at 974–75.

191. *Id.*

192. *Id.* at 975.

For similar reasons, the FAST Act's passport limitations satisfy a rational basis test.<sup>193</sup> The restriction furthers the government interest in collecting significant tax delinquencies and closing the tax gap. Indeed, the government interests furthered by the FAST Act may be even more important than those furthered by the child support limitations, given that the collection of tax revenue is one of the hallmark functions of a government.<sup>194</sup> Moreover, the FAST Act's passport limitations are rationally related to furthering those interests. As with the child support limitations, denying a passport to a person with seriously delinquent tax debt might have an incentivizing effect on their compliance behavior (at least for certain categories of citizens discussed above),<sup>195</sup> and also will prevent those tax delinquents currently in the country from potentially fleeing. Moreover, as discussed above, conditioning the passport on the provision of a social security number provides a reasonable likelihood that the government will be able to identify U.S. citizen-taxpayers who previously may have been very difficult to identify.<sup>196</sup>

## V. BROADER TAX POLICY IMPACTS OF FAST ACT PASSPORT LIMITATIONS

Having concluded that the FAST Act's passport limitations may have some instrumental impact in incentivizing tax compliance (at least with respect to certain domestic citizens and certain nonresident citizens), and that the legislation is likely to satisfy constitutional requirements (at least to the extent certain transitional and other limited concerns are addressed), this Part considers some broader tax policy implications—both positive and negative—of the FAST Act's passport limitations. These implications primarily arise from the expressive, social norm-related effects of the legislation.

### A. *Impact on Tax Compliance by Others*

Extensive literature suggests that the law can have important impacts on behavior beyond its direct instrumental effects on the targeted taxpayer.<sup>197</sup> For example, tax compliance among the public depends, at least in part, on perceptions that others are also complying.<sup>198</sup> To the extent that the public perceives a significant tax gap, and a lack of punishment or other adverse consequences for

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193. In one other important way, the FAST Act limitation presents a stronger case than did the limitations in *Zemel* and *Agee*. In both of those cases, before upholding the limitations from constitutional challenge, the Court had to infer that Congress authorized the restrictions despite the lack of clear statutory guidance. In contrast, the FAST Act limitations (like the circuit court cases upholding child support-based limitations) are based on explicit statutory authorization (indeed, a statutory requirement in the case of passport denials). See *Zemel v. Rusk*, 381 U.S. 1 (1965); see also *Haig v. Agee*, 453 U.S. 280 (1981); Fixing America's Surface Transportation Act ("FAST Act"), Pub. L. No. 114-94, 129 Stat. 1312 (2015).

194. Indeed, one of the government interests at stake with the child support limitations—the concern about the public needing to provide financial support to a child whose parent does not provide support—is only possible if the government first collects tax revenue.

195. See *supra* Part III.

196. See *supra* notes 97–101 and accompanying text.

197. See generally Kirsch, *supra* note 59, at 913–21.

198. See generally Blank, *supra* note 7, at 758–65 (summarizing literature).

those who do not comply with their tax obligations, otherwise-compliant taxpayers might begin to believe they are being taken advantage of, and may be discouraged from complying themselves.<sup>199</sup> Indeed, the 2011 GAO Report observes that “IRS enforcement of federal tax laws is vital—not only to identify tax offenders—but also to promote broader compliance by giving taxpayers confidence that others are paying their fair share.”<sup>200</sup>

Professor Joshua Blank relies, in part, on these reciprocity concerns to justify the increased use of “collateral tax sanctions”—*i.e.*, the denial of government benefits or privileges, on top of monetary penalties—to increase tax compliance.<sup>201</sup> In particular, writing after earlier versions of the FAST Act passport limitations had been introduced, but before the FAST Act was enacted, Professor Blank suggests that the revocation of passports for delinquent taxpayers might improve reciprocity-based compliance in the broader population.<sup>202</sup>

This impact envisioned by Professor Blank, however, might be severely limited. As Professor Blank acknowledges, reciprocity-based compliance is most effective when the public can “observe specific examples of the government’s success in detecting and punishing tax-noncompliant individuals.”<sup>203</sup> Professor Blank lists several examples of collateral tax sanctions where the public would be able to observe an individual’s collateral punishment.<sup>204</sup> Passports, however, are not public records.<sup>205</sup> Accordingly, it is unlikely that the public will become aware that a particular individual had his passport revoked (or application denied) due to seriously delinquent tax debt.<sup>206</sup> At best, now that the FAST Act has been enacted, some members of the public might have become aware that this new law is on the books and that some delinquent taxpayers will be caught by it.<sup>207</sup> The reciprocity-based impact on general public tax compliance may be improved if, once the FAST Act has been in force for a while, the I.R.S. publicizes the aggregate amount of taxes collected pursuant to the provision, just as child

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199. GAO REPORT, *supra* note 1, at 16.

200. *Id.*

201. These collateral tax sanctions differ from “alternative sanctions” about which I have previously written. *See* Kirsch, *supra* note 59. Whereas collateral tax sanctions apply in addition to more traditional monetary penalties to deter or penalize noncompliance with the tax laws, alternative sanctions often involve the imposition of some type of non-monetary penalty to address a perceived abuse of the tax code *in lieu of* modifying the underlying tax code to eliminate the perceived abuse. *See id.*

202. Blank, *supra* note 7, at 763.

203. *Id.*

204. *Id.* at 764.

205. *See* Privacy Act of 1974, 5 U.S.C. § 552a (2018); *Get Copies of Passport Records*, U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/passports/en/passports/services/obtain-copies-of-passport-records.html> (last visited Aug. 4, 2019).

206. *See* Blank, *supra* note 7, at 763–64.

207. Legislation that is enacted merely to give the public the impression that Congress has “d[one] something” has its own potential adverse consequences, as such “symbolic legislation” raises its own potential problems. *See generally* Kirsch, *supra* note 59, at 921–30. Given that the FAST Act’s passport limitations are expected to have an actual impact on at least certain groups of citizens, however, it does not appear to be merely symbolic legislation. *See supra* Part III.

support organizations have publicized the success of the child support-related passport limitation program.<sup>208</sup>

Professor Blank also argues that (then-proposed) legislation to revoke passports of tax delinquents would enhance feelings of citizenship and the important duty of paying taxes.<sup>209</sup> In particular, he argues that it would reinforce the “expenditure-revenue link,” noting that “[n]umerous studies have confirmed that, as taxpayers increasingly perceive that the government is using their tax dollars to provide public goods, their willingness to cooperate with the state and to pay their taxes out of a duty of citizenship . . . rises as well.”<sup>210</sup> Based on this rationale, he concludes that

if the federal government enacts legislation that would revoke passports from tax delinquents, it can remind individuals that their tax dollars pay for protections that the U.S. government and its embassies provide when Americans travel abroad. Collateral tax sanctions thus essentially encourage individuals to view their taxes as “user fees” that they pay in exchange for commonly used benefits and services.<sup>211</sup>

It is debatable whether the FAST Act sanctions illustrate this “expenditure-revenue link” rationale. As Professor Blank notes, that rationale primarily focuses on the government trumpeting the positive public benefits of government expenditures—*e.g.*, schools, hospitals, jet fighters, etc.—relying on people’s feelings of patriotism and pride to make them feel good about continuing to pay taxes that fund such benefits.<sup>212</sup> The FAST Act’s passport limitations, however, do not take this approach, but instead operate by threatening to withhold the particular taxpayer’s own individualized (passport) benefit if taxes are not paid.<sup>213</sup> Given the relatively large delinquencies involved, and the fact that individuals subject to the FAST Act have already been subject to either a notice of lien or levy, it is unlikely that those individuals would be swayed by appeals to citizenship (even if the public goods highlighted, such as overseas citizenship services and protection, might benefit them directly). To the extent that this argument is focusing on the impact on the broader public of denying particular benefits to a particular taxpayer who might otherwise receive those benefits, it appears to be moving toward the “reciprocity” argument discussed above.<sup>214</sup>

Perhaps more importantly, Professor Blank’s argument praising collateral tax sanctions as “essentially encourag[ing] individuals to view their taxes as ‘user fees’ that they pay in exchange for commonly used benefits and services” raises deeper concerns.<sup>215</sup> While it is useful for individuals to view their taxes as providing worthwhile public goods (as posited by the “expenditure-revenue link”

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208. See *supra* notes 73–74 and accompanying text.

209. Blank, *supra* note 7, at 766.

210. *Id.* at 766.

211. *Id.* at 767–68.

212. See *id.* at 766.

213. Fixing America’s Surface Transportation Act (“FAST Act”), Pub. L. No. 114-94, § 32101(a), 129 Stat. 1312, 1729 (2015).

214. See discussion *supra* Section V.A (discussing reciprocity-based compliance).

215. Blank, *supra* note 7, at 768.



rationale), a movement toward viewing taxes as “user fees” would shift individuals’ attention away from beneficial public goods supported by their taxes and toward a focus on the benefits that that particular individual receives.<sup>216</sup> A shift too far in that direction might undermine the federal income tax, which generally is based on an “ability to pay” rationale (under which an individual’s tax liability, and thus his or her financial support of society, is not tied directly to the benefits the individual receives), rather than an individualized “benefits” rationale.<sup>217</sup> Ultimately, the slight move toward fee-for-service that might be associated with the FAST Act may be justified by the instrumental impact it might have on tax compliance by otherwise recalcitrant taxpayers with relatively large tax delinquencies, as well as the potentially positive impact it might have on the public’s reciprocity feelings toward tax compliance. Yet, before Congress (or state legislatures) consider moving too far down this road with additional collateral sanctions conditioning individualized benefits to tax payments, they should keep in mind the potential risk of focusing individuals excessively on “what benefits do I individually get out of it” rather than “what public benefits (from which I, admittedly, may partially benefit) are facilitated by my tax payments.”

#### B. *Impact of FAST Act on Citizenship-Based Taxation*

A final consideration involves the impact that the FAST Act passport limitations may have on the underlying justifications for the United States using citizenship as a jurisdictional basis for taxing the foreign income of citizens living abroad (so-called “citizenship-based taxation”).<sup>218</sup> I have previously argued that one of the principle justifications for citizenship-based taxation involves the impact of taxes on social cohesion in the United States.<sup>219</sup> In the absence of citizenship-based taxation, there might be a strong tax-driven incentive for a not insignificant number of high-income and high-net-worth individuals to establish tax residence abroad in order to avoid U.S. income and/or estate taxes.<sup>220</sup> The creation of a separate classes of citizens (and the media’s undoubted publicizing of wealthy citizens living abroad and legally avoiding the payment of income tax) could have corrosive effects on broader U.S. society, just as it has in other countries that rely only on residence-based taxation.<sup>221</sup>

These adverse effects on social cohesion can also apply to the extent the public becomes aware of high-income citizens living abroad and failing to pay income tax that is owed under the current citizenship-based taxation regime. While the problems created by this noncompliance-driven scenario might be less than those that would arise with the repeal of citizenship-based taxation (because the public might be less aware of noncompliance with citizenship-based taxation than they would be of the repeal of citizenship-based taxation), in some ways the

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216. *Id.* at 767–68.

217. *Id.* at 771–72.

218. *See generally* Kirsch, *supra* note 59.

219. *See generally* Kirsch, *supra* note 82, at 210–15.

220. *Id.* at 236–37.

221. *See id.* at 249–50.

problems might be greater (because noncompliance raises the additional concern that the I.R.S. is impotent in enforcing the law).<sup>222</sup> In this regard, the FAST Act's passport limitations (in conjunction with the other compliance initiatives introduced in the past several years),<sup>223</sup> to the extent they increase nonresident citizens' compliance with the law and the I.R.S.'s ability to enforce the law, will help to avoid "social cohesion" problems, thereby reinforcing the justification for citizenship-based taxation.

As I have suggested elsewhere (focusing on FATCA and related initiatives), it is important that compliance regimes be enforced in a way that does not impose unduly adverse consequences on overseas citizens, particularly those who are attempting to comply.<sup>224</sup> This may be less of a concern in the FAST Act context than with FATCA (because, at least when the certification system operates correctly—*e.g.*, with proper notice—overseas citizens acting in good faith are unlikely to be subject to the FAST Act consequences).<sup>225</sup> Yet, the system will not always operate properly and mistakes undoubtedly will sometimes occur. For that reason, it is imperative (for policy reasons, even apart from potential constitutional due process considerations discussed above) that the I.R.S. (in cooperation with the Treasury Department and State Department) implement the FAST Act in a way that ensures that overseas citizens are not caught by surprise with a passport revocation or other FAST Act consequences without having received notice and having had a meaningful opportunity to address the issue in a timely way.<sup>226</sup>

#### VI. LIMITS ON THE USE OF CITIZENSHIP BENEFIT DENIAL AS A MEANS OF ENFORCING CITIZENSHIP OBLIGATIONS

This final Part considers general principles that can be derived from the foregoing discussion. In particular, it asks what limitations (beyond constitutional) should apply to the denial of citizenship benefits as a means of enforcing citizenship obligations. This analysis does not focus on the use of these sanctions to punish past wrongdoing.<sup>227</sup> Rather, it focuses on the denial of benefits in order to bring a citizen back into compliance with respect to an ongoing failure to comply with citizenship-related obligations.<sup>228</sup>

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222. *Id.* at 257.

223. Fixing America's Surface Transportation Act ("FAST Act"), Pub. L. No. 114-94, § 32101(a), 129 Stat. 1312, 1729 (2015).

224. See Kirsch, *supra* note 57, at 210–21; see also Kirsch, *supra* note 82, at 233–34.

225. See Kirsch, *supra* note 57, at 210–21.

226. See *supra* notes 165–68 and accompanying text (discussing possible transitional relief for pre-FAST Act notice of lien and levy, possible solutions for notice-delivery problems nonresident citizens might face, consideration of administrative review of certifications to avoid the expense and delay of judicial review, and ensuring that the State Department does not revoke a passport while a certification review is pending).

227. *Cf.* Blank, *supra* note 7, at 789.

228. Admittedly, the existence of the benefit denial might prevent the citizen from failing to fulfil her obligations in the first place. See *id.* Such ex ante effects, however, while important, are not the focus of this Article.

This inquiry has relevance outside of the specific benefit of holding a passport or the specific obligation to pay taxes. For example, Congress has conditioned federal benefits on compliance with the other important obligation (apart from paying taxes) commonly associated with citizenship—the performance of military service when required by law.<sup>229</sup> While the United States does not currently have a military draft, it does generally require all male citizens (whether living in the United States or abroad)<sup>230</sup> to register with the Selective Service upon reaching age eighteen.<sup>231</sup> Failure to comply with this obligation can result in the loss of a wide range of benefits, including those provided by a broad range of federal student loan, grant, and job training programs, the ability to get jobs in the executive branch and the U.S. Postal Service, and the ability to receive a federal security clearance (required for positions with certain federal contractors).<sup>232</sup>

The merits of linking citizenship benefits to citizenship obligation compliance can be judged, in part, on the instrumental impact the benefit denial has on encouraging obligation compliance. Legal enforcement is most typically effectuated through two broad types of sanctions: monetary penalties or imprisonment.<sup>233</sup> In some circumstances, however, monetary penalties might not be effective in ensuring compliance. For example, the denial of a passport under the FAST Act only occurs in circumstances where monetary consequences have not been effective (indeed, the triggering event itself is the nonpayment of money owed to the government).<sup>234</sup> Under such circumstances, the benefit denial might provide a useful tool to incentivize compliance. In particular, it might be effective when imprisonment is viewed as too harsh a penalty for the transgression.<sup>235</sup> By comparison, the failure to register with the Selective Service might be remedied, to some extent, by a monetary penalty. Although the law provides for both felony imprisonment and a potential \$250,000 fine for a willful failure to register,

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229. 50 U.S.C. § 3811 (2018).

230. See Kirsch, *supra* note 82, at 214–15 n.29 (discussing the registration obligation imposed on nonresident citizens).

231. See 50 U.S.C. § 3802(a). The requirement remains in force until the individual either registers or attains age twenty-six. In addition, non-citizen male residents of the United States generally must register upon reaching age eighteen, and a failure to register can have adverse impact on his eligibility for naturalization. See 8 U.S.C. § 1426(a). This Article focuses only on the denial of benefits to citizens.

232. See 50 U.S.C. § 3811(a)–(f). See *generally Benefits and Penalties*, SELECTIVE SERV. SYS., <https://www.sss.gov/Registration/Why-Register/Benefits-and-Penalties> (last visited Aug. 28, 2019). These benefit denials are inapplicable after the registration requirement is inapplicable to the person if the person can show (by a preponderance of the evidence) that the failure to register was not knowing and willful. *Id.* § 3811(g). A majority of U.S. states also deny certain benefits for a failure to register with Selective Service. See *State/Commonwealth and Territory Legislation*, SELECTIVE SERV. SYS., <https://www.sss.gov/Registration/State-Commonwealth-Legislation> (last visited Aug. 28, 2019).

233. Cf. Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J.L. & ECON. 255, 258 (1993).

234. The FAST Act applies only after the individual has incurred at least \$50,000 of legally enforceable federal tax liability. Fixing America's Surface Transportation Act ("FAST Act"), Pub. L. No. 114-94, § 32101(b), 129 Stat. 1312, 1729–30 (2015).

235. Many significantly delinquent tax debts might not be the result of criminal behavior. As a general matter, a failure to pay taxes is a misdemeanor if it is shown to be willful. See 26 U.S.C. § 7203 (2018). The failure can be a felony in certain circumstances, such as fraud or the failure to pay withheld payroll taxes. See *id.* §§ 7201–7202.

these potential penalties have not played a significant part in compliance with Selective Service registration,<sup>236</sup> perhaps because of the difficulty and cost of pursuing those remedies on an individual-by-individual basis, and the lack of an active draft. Nonetheless, the compliance rate for selective service registration remains relatively high, with 92% of men ages eighteen through twenty-five having registered.<sup>237</sup> While this result might be, at least in part, due to the prospect of federal benefit denial, it also may be strongly influenced by social norms related to patriotism and serving one's country.

The taxonomy of passport denial provisions described above<sup>238</sup> provides a useful frame through which to consider the instrumental effect of citizenship benefit denials. "Nexus" or "primary" provisions involve situations where the passport has a direct nexus to the individual's wrongdoing and the passport limitation is a primary mechanism for preventing further wrongdoing with the passport, such as a passport denial or revocation when the individual's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States.<sup>239</sup> This nexus approach is also reflected in certain nonindividualized restrictions on the use of a U.S. passport to travel to foreign countries when such travel could have significant adverse foreign policy implications, such as the recent announcement that the Department of State plans to "impose a travel restriction on all U.S. nationals' use of a [U.S.] passport to travel in, through or to North Korea."<sup>240</sup> Other examples of nexus-based restrictions include passport limitations on individuals with outstanding federal, state, or local felony arrest warrants, whereby the passport denial directly prevents the individual from potentially fleeing the country,<sup>241</sup> and passport restrictions on those who have previously crossed an international border to commit certain drug trafficking crimes or "sex tourism" crimes for which he was previously convicted, but only during the period that the individual is imprisoned or on parole or supervised release.<sup>242</sup> While the restrictions on this latter group may have an element of punishment,<sup>243</sup> the denial of the passport benefit has a direct link to possibly preventing a crime that would require the crossing of an

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236. See Tina Griego, *America May Never Have a Draft Again. But We're Still Punishing Low-Income Men for Not Registering*, WASH. POST (Oct. 16, 2014), <https://www.washingtonpost.com/news/storyline/wp/2014/10/16/america-may-never-have-a-draft-again-but-were-still-punishing-low-income-men-for-not-registering> (observing that it has been more than 30 years since anyone has been prosecuted).

237. See *Quick Facts and Figures*, SELECTIVE SERV. SYS., <https://www.sss.gov/About/Quick-Facts-and-Figures> (last visited Aug. 28, 2019).

238. See *supra* notes 41–64 and accompanying text.

239. See *supra* notes 42–46 and accompanying text.

240. Stephanie Rosenbloom, *That North Korea Vacation? It'll Soon Be Out of the Question for Americans*, N.Y. TIMES (July 31, 2017), <https://www.nytimes.com/2017/07/31/travel/north-korea-travel-ban-americans-state-department.html>.

241. See 22 C.F.R. § 51.60 (2019).

242. See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-643, *PASSPORT ISSUANCE: CURRENT SITUATION RESULTS IN THOUSANDS OF PASSPORTS ISSUED TO REGISTERED SEX OFFENDERS* (2010).

243. See *supra* notes 46–49 and accompanying text.

international border, at least to the extent that the individual is likely to commit a similar crime (or flee the country) while on parole or supervised release.<sup>244</sup>

For these reasons, nexus-based benefit denials have the strongest instrumental justification for their use. In contrast, those benefit denials that reflect “secondary” enforcement mechanisms<sup>245</sup> may have only limited instrumental effect (or a more significant instrumental effect, but only on a limited group of individuals). For example, as discussed above,<sup>246</sup> the FAST Act is best classified as a secondary mechanism, given that there is not necessarily a direct connection between having a tax delinquency and traveling abroad (unless, for example, a U.S. citizen currently living in the United States plans to flee the jurisdiction in order to avoid paying the tax, which might only reflect a very small number of individuals with tax delinquencies greater than \$50,000).<sup>247</sup> Moreover, the denial of federal benefits for failing to register with the Selective Service is a secondary mechanism, as the passport denial does not directly prevent nonregistration.

Classifying a provision as a secondary mechanism does not necessarily mean that it has no instrumental effects. Rather, it suggests that any instrumental effects might be more attenuated. For example, as discussed above, the FAST Act might induce tax compliance among those individuals who place high value on traveling abroad.<sup>248</sup> Similarly, the sanctions for failing to register with Selective Service might have important instrumental effects on the many individuals who apply for student loans. Yet, some effects of these secondary sanctions might also be unintended and might fall more heavily on some classes of individuals than others. For example, as discussed above,<sup>249</sup> the FAST Act’s passport denial provisions are likely to have a much greater impact on citizens living abroad (particularly if they do not have a passport from a second country).<sup>250</sup> While some (particularly those who generally support the taxation of citizens living abroad) might view this aspect as a positive development to the extent it helps enforce U.S. tax laws against overseas citizens, it must also be acknowledged that it might create unintended hardships for such individuals.<sup>251</sup> Accordingly, as discussed above,<sup>252</sup> the I.R.S. and Department of State, in implementing the FAST Act, must take these previously discussed practical concerns seriously when issuing guidance and implementing the provision.<sup>253</sup> Similarly, the benefit denials for failure to register with Selective Service also impact overseas citizens differently than domestic citizens. In that case, however, there might be less of an instrumental effect on overseas citizens, at least to the extent that

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244. *See supra* notes 46–49 and accompanying text.

245. *See supra* notes 48–61 and accompanying text.

246. *See supra* notes 56–61 and accompanying text.

247. *See supra* notes 58, 99 and accompanying text.

248. *See supra* notes 50–66 and accompanying text.

249. *See supra* notes 77–121 and accompanying text.

250. Fixing America’s Surface Transportation Act (“FAST Act”), Pub. L. No. 114-94, § 32101(e), 129 Stat. 1312, 1732 (2015).

251. *See supra* notes 105–21 and accompanying text.

252. *See supra* notes 165–68 and accompanying text.

253. *See* FAST Act § 32101(e) (2015).

citizens overseas might pursue federal student loans, grants, and executive branch jobs at a lower rate than do domestic citizens. These examples suggest that caution is appropriate when enacting “secondary”-type provisions that deny federal benefits in an attempt to instrumentally induce better compliance with the obligations of citizenship.

Of course, provisions limiting benefits in response to a failure to comply with citizenship obligations are not only enacted for instrumental reasons. These provisions might also be judged by their expressive effects on social norms.<sup>254</sup> Unlike the instrumental impact, which generally targets the transgressing individual, the expressive effects focus on society as a whole. For example, both the denial of passports to those with seriously delinquent tax debt and the denial of government benefits to those who do not register with Selective Service might be viewed as reinforcing the public’s view that those who benefit from citizenship must support the country (both financially via taxes and defensively via potential military service). Conditioning benefits on compliance with citizenship obligations, however, can have unintended effects on social norms. As discussed above,<sup>255</sup> to the extent the FAST Act’s explicit linking of passport benefits to the payment of taxes causes a shift in public perception toward viewing taxes as “user fees,” the traditional “ability to pay” rationale of the progressive income tax might be undermined. In a broader context, to the extent that the right to travel is viewed as an important (even if not fundamental) right, its use as a bargaining chip for incentivizing monetary (tax) payments might be viewed as debasing the meaning of citizenship.

Similarly, the direct linkage between federal benefits and Selective Service registration might unintentionally undermine the social norms of patriotism and supporting the country that it was intended to reinforce. For example, in the (perhaps unlikely) event that a significant number of individuals fail to register on the grounds that the potential cost of losing eligibility for federal benefits did not outweigh the subjective cost to them of registering, their actions might reflect a shift toward viewing the relationship between citizenship obligations and benefits as a fee-for-service transaction.<sup>256</sup>

Finally, the denial of benefits to individuals under these provisions might impose additional costs on society that, while they might not outweigh the benefits to society of increased compliance with citizenship obligations, may nonetheless be relevant. For example, to the extent federal student loan and grant programs were enacted at least in part to create a more educated populace, such

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254. See generally Kirsch, *supra* note 59, at 913.

255. See *supra* note 226 and accompanying text.

256. Such a cost-benefit driven trend is particularly unlikely as long as the United States continues to have no draft. After all, except for those with moral opposition, there is little subjective cost to registering with Selective Service when there is a very low chance that the United States will reinstate a draft. Moreover, this tradeoff ignores the possibility of significant monetary or criminal penalties. While the Department of Justice apparently has not enforced such sanctions in many decades, see *supra* note 243 and accompanying text, if the cost-benefit driven trend posited in the text were to occur, it is likely that the Department of Justice would become more active in enforcing these sanctions. This possibility itself would likely deter those potential registrants who were considering a cost-benefit approach to the registration decision.

benefits to society will be lost to the extent individuals are made ineligible for the programs.<sup>257</sup>

Ultimately, the interaction of these instrumental, social norm, and other effects, and the resulting policy implications regarding the merits of provisions that condition the benefits of citizenship on fulfilling the obligations of citizenship, are complicated by problems of incommensurability. There is no readily available measure to compare, for example, the importance of the right to travel with the potential societal benefit of increased tax compliance. Such comparisons are further complicated by the difficulty of placing a relative value on the expressive impact the provision might have on social norms. In some circumstances, the appropriate resolution, after taking all these factors into account, might be clear. For example, most (although perhaps not all) people would oppose a benefit-obligation linkage provision that gives 911 operators access to a real-time database of seriously delinquent taxpayers and then denies a 911 police or ambulance response when a tax delinquent calls with an emergency. In most other situations, however, the resolution and balance of tradeoffs will not be as clear.

## VII. CONCLUSION

Citizenship status is often discussed in terms of both its benefits and its obligations. The FAST Act, by denying passports to certain citizens who owe significant unpaid taxes, provides a rare opportunity to examine the linkage between those benefits and obligations. To the extent a statute conditions citizenship benefits on compliance with citizenship obligations for instrumental purposes (*e.g.*, trying to induce tax compliance by denying the citizen's passport), this Article demonstrates that the instrumental effects are often more complex than cursory analysis would suggest. This complexity is particularly evident when, as with the FAST Act, there is no direct nexus between the benefit denial and the noncompliance, but the provision is instead used as a secondary enforcement mechanism to induce compliance. The denial of benefits may achieve some instrumental goals, such as tax compliance with respect to citizens who have a particularly high subjective demand for a passport. This impact might be particularly useful when there are no feasible alternative ways to induce compliance. These instrumental effects, however, are often highly context dependent. Moreover, this context dependency can sometimes cause the statute to have a greater impact on an unintended group (in the case of the FAST Act, it has a particularly focused impact on U.S. citizens living abroad, although there is no indication in the legislative history that this group was the focus of the legislation). These provisions, particularly when they involve a denial of important rights, might also raise constitutional concerns (as illustrated by some transitional implementation aspects of the FAST Act).

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257. *Subsidized and Unsubsidized Loans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/loans/subsidized-unsubsidized> (last visited Aug. 28, 2019).

In addition, such provisions can have unintended expressive consequences. For example, the FAST Act, by linking passport eligibility to financial (tax) payments, might imply that the federal income tax is nothing more than a “user fee” tied to the taxpayer’s subjective benefits, thereby undermining the ability-to-pay rationale traditionally offered for the progressive income tax. These concerns also arise in the context of other citizenship obligations, such as the federal statute denying student loans and other benefits to individuals who do not comply with their Selective Service registration obligations.

As the foregoing demonstrates, provisions that link citizenship benefits to compliance with citizenship obligations might serve a useful role in some contexts (including the FAST Act, provided certain concerns identified above are addressed in administrative guidance). This Article suggests, however, a more lukewarm embrace of these provisions than has been advocated by others, and cautions against their use as a tool of social norm management. Such provisions raise significant concerns beyond the perceived instrumental benefit of increased compliance. Accordingly, this citizenship benefit-obligations linkage should be expanded to other areas only with caution and only after a thorough consideration of its instrumental compliance impacts (both intended and unintended), expressive effects on social norms, and other societal costs.