RUTGERS LAW RECORD

VOLUME 51
ISSUE I: FALL 2023

WHAT A DECISION ON AFFIRMATIVE ACTION TEACHES ABOUT TAXATION

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The U.S. nationality-based tax system discriminates based on nationality (or country of origin). Of all persons living outside the United States, U.S. tax rules classify them based on nationality and subject U.S. nationals to far more onerous federal tax burdens as compared to those who are not U.S. nationals.

Most of those who assume the constitutionality of the current U.S. nationality-based tax system support their assumption by citing the 1924 U.S. Supreme Court decision *Cook v. Tait*. However, much has changed during the past century. Those changes include a dramatic transformation of our understanding of Equal Protection rights with respect to distinctions based on race and nationality.

When *Cook* was decided, *Plessy v. Ferguson* was the law of the land, and the Court's review of legislation was so deferential, it was "incapable of identifying and addressing contemporary prejudices." Today *Plessy* has been thoroughly discredited. Further, a long line of U.S. Supreme Court decisions adopted during the century since *Cook* denounce laws which classify persons based nationality or country of origin, on the grounds that the laws violate Equal Protection. In a recent (2023) decision concerning affirmative action, *Students for Fair Admissions v. Harvard*, the U.S. Supreme Court made clear that race and nationality are inextricably linked, and that distinctions based on either are to be treated with

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"antipathy." Such distinctions are inherently suspect and thus subject to strict scrutiny.

The current U.S. nationality-based tax system cannot be assumed to be constitutional. Citing *Cook v. Tait* to support an assumption of the system's constitutionality at best ignores and at worst denies an entire century of development of Equal Protection rights as well as other constitutional and human rights.

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I. INTRODUCTION

The 2023 U.S. Supreme Court decision *Students for Fair Admissions v. Harvard*[1] has been described as a "landmark"[2] decision with respect to affirmative action. The Court held that race-based admissions policies at two U.S. universities violated the Equal Protection Clause of the Fourteenth Amendment.[3]

At first glance, it may appear that *Students* has nothing to do with taxation. But closer examination reveals that *Students* is directly relevant to the U.S. nationality-based tax system.

[1] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181 (2023).
[2] The Editorial Board, *A Landmark for Racial Equality at the Supreme Court*, WALL ST. J. (June 29, 2023), https://www.wsj.com/articles/harvard-unc-students-for-fair-admissions-supreme-court-affirmative-action-john-roberts-clarence-thomas-racial-preferences-f8c998f6.
[3] Students for Fair Admissions, Inc., 600 U.S. at 220; *see also* U.S. CONST. amend. XIV, § 1.

This article: (II) situates the U.S. nationality-based tax system in the context of Fourteenth Amendment Equal Protection; and then (III) explains the relevance of *Students* for the U.S. nationality-based tax system.

II. SITUATING THE SYSTEM

Decided in 1924, *Cook v. Tait*[4] is considered a seminal case establishing the power of the federal government to tax U.S. nationals living outside the United States based on their worldwide income. Nearly all who comment on this topic appear to perceive *Cook* as the definitive and unquestionable authority on the constitutionality of the current U.S. nationality-based tax system. This is reflected in sweeping statements such as "[under *Cook*], it's Congress's right and sovereign authority to tax U.S. persons on their income, wherever earned,"[5] and "[i]t is settled law that the United States has the power to impose an income tax on the basis of citizenship alone, regardless of residence."[6] These statements – and others like them[7] – seemingly imply that a decision handed down nearly one century ago gives permanent and unquestionable permission to Congress to tax overseas Americans in any manner Congress chooses, without any identified limits.

However, over the past century dramatic changes have occurred. As explained in detail elsewhere, this includes changes with respect to the U.S. tax system,[8] to

[4] Cook v. Tait, 265 U.S. 47 (1924).
[5] Mindy Herzfeld, *Moore, Part 2: How to Tax Foreign Earnings*, 180 TAX NOTES FED. 1975, 1975-76 (Sept. 18, 2023).
[6] Bernard Schneider, *The End of Taxation Without End: A New Tax Regime for U.S. Expatriates*, 32 VA. TAX REV. 1, 5 (2012).
[7] *See, e.g.*, Edward Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 IOWA L. REV. 1289, 1302 (2011) (stating "[i]t has long been established that the U.S. Constitution permits the federal government's worldwide taxation of nonresident U.S. citizens"); *see also* William Thomas Worster, *Renouncing U.S. Citizenship Through Expatriation*, *in* THE CONSULAR PRACTICE HANDBOOK 7 n.55 (Michael H. Davis, et al., eds, 2012); William L. Dentino & Christine Manolakas, *The Exit Tax: A Move in the Right Direction*, 3 WM. & MARY BUS. L. REV. 341, 350 (2012).
[8] Laura Snyder, *The Unacknowledged Realities of Extraterritorial Taxation*, 47 S. ILL. UNIV. L. J. 243, 256-61 (2023).

who is subject to it,[9] and to multiple constitutional[10] and human rights.[11] This article will focus on one constitutional right: Fourteenth Amendment Equal Protection.

A. Plessy v. Ferguson

At the time *Cook* was decided, *Plessy v. Ferguson*[12] was the law of the land.[13] In *Plessy*, the Court held that racial segregation on railroad cars was permissible under the now infamous and thoroughly discredited "separate but equal" doctrine.[14]

In *Plessy*, Louisiana state law required railroad companies to provide "equal but separate accommodations for the white, and colored races,"[15] and required the railroad companies to enforce the segregation. When the law was challenged by a man described as "seven eighths Caucasian and one eighth African blood,"[16] claiming a seat in the car reserved for whites, the Court interpreted the scope of the equal protection clause narrowly; the Court stated that while the object of the Fourteenth Amendment was "undoubtedly" to enforce racial equality "before the law," it "could not have been intended" to abolish distinctions based upon color or

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[9] *Id*. at 256-58, 261-2.
[10] Laura Snyder, *Extraterritorial Taxation #7: Inherently Suspect* 1-4 (Stop Extraterritorial Am. Tax'n, Working Paper No. 7, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4465558 (discussing Fourteenth Amendment Equal Protection); Laura Snyder, *Extraterritorial Taxation #8: More Violations of Equal Protection* (Stop Extraterritorial Am. Tax'n, Working Paper No. 8, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4465589 (discussing additional violations of the Fourteenth Amendment, notably the creation of second class citizenship and animus); *Laura Snyder, Extraterritorial Taxation #9: Forcible Destruction of Citizenship* (Stop Extraterritorial Am. Tax'n, Working Paper No. 9, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4465596 (discussing the forcible destruction of citizenship, in violation of the Fourteenth Amendment); *see also* Laura Snyder, *The Myths and Truths of Extraterritorial Taxation*, 32 CORNELL J. L. PUB. POL'Y 158, 199-232 (2022) (hereinafter "*Myths & Truths*").
[11] Laura Snyder, *Extraterritorial Taxation #10: Violating Human Rights*, (Stop Extraterritorial Am. Tax'n, Working Paper No. 10, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4465610 (discussing the violation of multiple human rights); *see also Myths & Truths, supra* note 10, at 248-63.
[12] Plessy v. Ferguson, 163 U.S. 537 (1896).
[13] *See, e.g*., Jasper L. Cummings, *Moore: Macomber Was Wrongly Decided and Other Considerations*, 180 TAX NOTES FED. 2307, 2309 (Sept. 25, 2023) (explaining that *Plessy* was "part of the general extremely conservative agenda of an extremely activist Court").
[14] *See, e.g*., Oranda González, *Louisiana Governor Pardons Plessy, From "Separate but Equal" Ruling*, AXIOS (Jan. 5, 2022), https://www.axios.com/2022/01/05/louisiana-pardon-plessy-ferguson-racism; *Plessy v. Ferguson*, HISTORY (Jan. 11, 2023), https://www.history.com/topics/black-history/plessy-v-ferguson#plessy-v-ferguson-significance.
[15] *Plessy*, 163 U.S. at 540.
[16] *Id*. at 538.

to enforce social (as opposed to political) equality.[17] For the Court, racial segregation of this kind was within the competency of the legislature in the exercise of its police power. The only limits upon this power were that the laws be enacted "in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class."[18]

Plessy has been roundly condemned as an expression of a "morally bankrupt philosophy."[19] The *Plessy* Court "articulated a vision of judicial deference [in which the Court] will go no further than to ask whether a particular […] law is 'reasonable' […]. *Plessy* clearly demonstrates that such deferential review is incapable of identifying and addressing contemporary prejudices."[20] It should not be permissible "in our democracy for a dominant group to harness the public laws toward the end of controlling the circumstances of a subordinate group."[21] *Plessy* has also been condemned as a failure of the judicial process: the failure to develop a legal test that would require the Court to look beyond what seemed familiar and reasonable in order to engage in a critical analysis of whether the law in question violated the principal tenet of the equal protection clause.[22]

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

The Court's first step on that path came in 1938 – fourteen years after *Cook* – with *United States v. Carolene Products Company*.[23] *Carolene's* now famous Footnote Four introduced the principle of levels of scrutiny, including strict scrutiny, to be applied by a court when considering the constitutionality of a law. Footnote Four established the need for increased scrutiny of laws that affect certain groups, notably groups subject to prejudice as "discreet and insular minorities," rendering them politically powerless.[24]

After *Carolene* and for much of the remainder of the twentieth century, the Court was confronted with a large variety of situations testing the parameters of the Equal Protection Clause. These situations enabled the Court to develop the

[17] *Id.* at 544.
[18] *Id*. at 550.
[19] Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 750 (2014).
[20] *Id*. at 749.
[21] *Id*. at 750.
[22] *Id*.
[23] United States v. Carolene Prods. Co., 304 U.S. 144 (1938).
[24] *Id*. at 152 n.4.

principles it had set out in Footnote Four into a loosely defined doctrine based upon suspect classification analysis and associated tiers of scrutiny.

It is beyond the scope of this article to provide an exhaustive discussion of the Court's doctrine.[25] Hornbook descriptions explain that equal protection challenges to government regulation are subject to one of three tiers of scrutiny: strict, intermediate, or minimal (or "rational basis").[26] The doctrine calls for the application of strict scrutiny to laws that discriminate based on race or nationality/country of origin or that discriminate with regard to a fundamental right.[27] Laws subject to strict scrutiny are valid only if they are necessary to achieve a compelling governmental interest.[28] Laws discriminating based on gender are subject to intermediate scrutiny; they are constitutional only if they are substantially related to an important state interest.[29] Save for certain exceptions, most other laws are considered consistent with the Equal Protection Clause provided they are rationally related to a legitimate governmental interest.[30] This is the rationale adopted by the Court in *Plessy* – it is what has been described as the "prototype" of the traditional deferential rational basis review. It is still used today, but only when neither of the two higher standards of review (strict or intermediate scrutiny) apply.[31]

B. Nationality-Based Discrimination

Since *Carolene* (so, also after *Cook*), and throughout the twentieth century, the U.S. Supreme Court has, on multiple occasions, denounced laws classifying persons based upon country of origin or nationality.[32] The decisions include:

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[25] For more complete reviews as well as critiques, *see, e.g.*, Pollvogt, *supra* note 19; Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135 (2011); Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991).
[26] *See*, *e.g.*, Suzanna Sherry, *Selective Judicial Activism: Defending Carolene Products*, 14 GEO. J. L. & PUB. POL'Y 559, 560 (2016).
[27] *Id*.
[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] Pollvogt, *supra* note 19, at 748.
[32] Interestingly, some members of Congress have vociferously denounced the tax laws of other countries on the grounds that they discriminate against Americans, whether in their practice or by their terms. They have also threatened retaliatory actions. But their denunciations and threats are hypocritical given their silence and inaction in relation to the U.S. nationality-based tax system. Not only does the system also discriminate against Americans but – unlike the laws of other countries – it is within the direct power of Congress to change it. *See generally,* Laura Snyder, *Discriminatory Taxes and Congress: Do as I Say, Not as I Do*, 180 TAX NOTES FED. 1283 (Aug. 21, 2023).

Hirabayashi v. United States (1943):[33] The Court upheld a wartime curfew for people of Japanese ancestry, arguing that it was necessary considering "the danger of espionage and sabotage, in time of war and of threatened invasion."[34] In another period, the Court however explained, such laws would likely have been struck down because distinctions "solely because of […] ancestry are, by their very nature, odious to a free people whose institutions are founded upon the doctrine of equality."[35]

Oyama v. California (1948):[36] The Court struck down a statute presuming that transfers of real property from persons ineligible for citizenship because of their nationality (in this case, Japanese) to their U.S. citizen children were attempts to circumvent the state's Alien Land Law rather than legitimate gifts.[37] The Court stated that a state may not discriminate based on a parent's country of origin absent "compelling justification."[38]

Hernandez v. Texas (1954):[39] The Court held that "the exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment."[40]

Graham v. Richardson (1971):[41] The Court struck down an Arizona requirement that welfare recipients be either U.S. citizens or aliens who have lived in the country for at least 15 years.[42] In doing so, the Court compared classifications based on alienage to those based upon nationality and race, declaring that all such classifications are inherently suspect and subject to close judicial scrutiny.[43]

In re Griffiths (1973):[44] The Court confirmed *Graham v. Richardson* in a case striking down Connecticut's exclusion of aliens from the practice of law. The Court

[33] Hirabayashi v. United States, 320 U.S. 81 (1943).
[34] *Id*. at 100.
[35] *Id*.
[36] Oyama v. California, 332 U.S. 633 (1948).
[37] *Id*.; *See also* Klarman, *supra* note 25, at 233.
[38] *Oyama*, 332 U.S. at 640.
[39] Hernandez v. Texas, 347 U.S. 475 (1954).
[40] *Id*. at 479.
[41] Graham v. Richardson, 403 U.S. 365 (1971).
[42] *Id.*
[43] *Id.* at 371-72.
[44] *In re* Griffiths, 413 U.S. 717 (1973).

repeated that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."[45]

Frontiero v. Richardson (1973):[46] The Court struck down a policy of the U.S. military automatically (without proof) allowing servicemen to claim their spouses as dependents for the purposes of obtaining benefits but requiring servicewomen to demonstrate proof of their spouses' dependence.[47] The Court agreed with the plaintiff that classifications based upon sex, like classifications based upon national origin, are inherently suspect and must be subjected to "close" judicial scrutiny.[48] The Court also stated that national origin is an "immutable characteristic determined solely by the accident of birth."[49]

City of Cleburne v. Cleburne Living Center (1985):[50] The Court declined to hold cognitive disability a quasi-suspect classification calling for a higher standard of judicial review.[51] In doing so, the Court repeated that statutes classifying persons based on national origin (as well as alienage or race) are subject to strict scrutiny. The Court explained:

> These factors [national origin, alienage, or race] are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others. For these reasons, and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny, and will be sustained only if they are suitably tailored to serve a compelling state interest.[52]

These multiple decisions – all handed down after *Cook* – leave no doubt that any law, regulation or other governmental action or policy drawing distinctions based upon nationality or country of origin are subject to strict scrutiny. As such, they will be found to violate the Fourteenth Amendment's Equal Protection Clause

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[45] *Id.* at 721.
[46] Frontiero v. Richardson, 411 U.S. 677 (1973).
[47] *Id.*
[48] *Id.* at 682.
[49] *Id.* at 686.
[50] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).
[51] *Id*.
[52] *Id*. at 440 (citations omitted). The clause typically used in this context is "narrowly tailored." *See* Luiz Antonio Salazar Arroyo, *Tailoring the Narrow Tailoring Requirement in the Supreme Court's Affirmative Action Cases*, 58 CLEV. ST. L. REV. 649, 655-56 (2010).

absent a showing on the part of the government that they are necessary and narrowly tailored to serve a compelling governmental interest.

C. The U.S. Tax System

Section 1 of the Internal Revenue Code imposes U.S. federal taxation upon every "individual," without drawing any distinctions regarding residence, nationality, or other factors.[53] This ambiguous language arguably subjects every person in the world, regardless of residence – or any other connection to the United States – to the U.S. tax system.[54] Thus, it is no surprise that the first thing the first Treasury Regulation does is to draw distinctions. Treasury Regulation § 1.1-1(a)(1) classifies "individuals" into three groups. The first group is based upon U.S. residence; it includes all residents of the United States, regardless of citizenship and even regardless of legal status as a resident.[55] The remaining two groups are based upon non-U.S. residence combined with nationality. More specifically, one group consists of persons who are non-residents of the United States but who are U.S. citizens;[56] the other group consists of persons who, while also non-residents of the United States, are not U.S. citizens (they are referred to as nonresident aliens, or "NRAs").[57]

Based upon a cursory analysis of Treasury Regulation § 1.1-1(a)(1),[58] it might be argued that the classification of "citizen" includes all U.S. citizens, including those who live in the United States. Indeed, that is how the classification is presented in § 1.1-1(b).[59] But the reality is that in the specific context of federal taxation, the reference to "citizen" has consequence only with respect to persons living outside the United States. Given all U.S. residents are subject to U.S. federal taxation without limit, regardless of their citizenship status,[60] the only persons who can be concerned by the reference to "citizens" are persons living outside the United States. Treasury Regulation § 1.1-1 unmistakably classifies those persons based on their country of origin: among all persons living outside the United States, U.S. tax rules subject those whose country of origin is the United States to far more onerous

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[53] 26 U.S.C. § 1.
[54] *See* John Richardson et al., *A Simple Regulatory Fix for Citizenship Taxation*, 169 TAX NOTES FED. 275, 280 (2020); Snyder, *supra* note 8, at 249-50.
[55] 26 CFR § 1.1-1(a)(1).
[56] *Id.*
[57] *Id*.
[58] *Id*.
[59] 26 CFR § 1.1-1(b).
[60] *See* Francine J. Lipman, *The "ILLEGAL" Tax*, 11 CONN. PUB. INT. L. J. 93 (2011) (explaining the punitive manner by which undocumented immigrants are taxed in the United States, including federal income tax). *Id*. at 99-102.

federal tax burdens as compared to those whose country of origin is not the United States.[61] Stated another way, if the reference to "citizens" were removed from Treasury Regulation § 1.1-1, it would have great consequence for U.S. citizens living outside the United States while it would have no consequence for anyone – U.S. citizen or not – residing in the United States, nor for those living outside the United States who are not citizens.[62] Understood in this manner, it is clear that the classification of "citizens" as it is contained in federal tax rules constitutes a suspect classification based upon country of origin (or nationality) and, as such, it is subject to strict scrutiny by a court.

D. Recognition by Others

As noted above, in explaining why classifications based upon national origin are inherently suspect and must be subjected to "close" judicial scrutiny, the Court in *Frontiero v. Richardson* observed that national origin is an "immutable characteristic determined solely by the accident of birth."[63] Imposing special disabilities[64] on a person merely because of an "accident of birth," the Court continued, violates "the basic concept of our system that legal burdens should bear some relationship to individual responsibility."[65]

This author is not the first to recognize that the U.S. nationality-based tax system singles out persons merely because of an accident of birth. Mindy Herzfeld explains "For individuals, status as a U.S. person can follow from the accident of birth."[66] Robert Goulder deplores "[t]he accident of birth might be responsible for determining many aspects of modern life, but must it also preordain where a newborn child will pay tax for the duration of its existence — irrespective of choices made later in life?[67] Alison Christians describes the U.S. nationality-based tax system as applying to persons "by virtue of such things as the circumstances of

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[61] For a summary of the burdens, see, e.g., Snyder, *Do as I Say, supra* note 32, at 1290. For a more detailed discussion, *see, e.g.*, Snyder, *Unacknowledged Realities, supra* note 8, at 263-65. *See generally*, Laura Snyder, *The Criminalization of the American Emigrant*, 167 TAX NOTES FED. 2279 (June 29, 2020). For a discussion of how the burdens reflect prejudice with respect to overseas Americans, *see generally,* Laura Snyder, *Taxing the American Emigrant*, 74 TAX LAW. 299, 313-26 (2021).

[62] Other than enabling them to live freely outside the United States should they seek to do so.

[63] *Frontiero*, 411 U.S. at 686.

[64] *Id*.

[65] *Id*., quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

[66] Herzfeld, *supra* note 5, at 1976.

[67] Robert Goulder, *Is Residence-Based Taxation Compatible with Progressive Idealism?*, TAX NOTES FED. (June 7, 2021), https://www.taxnotes.com/opinions/residence-based-taxation-compatible-progressive-idealism/2021/06/07/76kwc.

their birth or lineage."[68] And William Worster discusses at length national origin – an "accident of birth"[69] – as a suspect classification subject to strict scrutiny (he does so in the context of the constitutionality of the tax consequences of renouncing U.S. citizenship).[70]

Nor is this author the first to recognize that the system is nationality-based. In his defense of the system, Bret Wells states:

> [o]f all the essential bases of U.S. taxation, *nationality* raises the fewest difficulties. U.S. *nationality* (or citizenship – they are the same thing for the present purposes) is a status defined in longtime *nationality* laws. The U.S. tax system, rather than imposing a standard of its own, takes *nationality* as a given[71] [emphasis added].

Wells's assertion that the U.S. nationality-based tax system "raises the fewest difficulties" is demonstrably false.[72] However, his analysis regarding the use of nationality to target persons subject to the system is entirely correct.

Wells continues: "Tax disputes turning on nationality are not particularly common but, when they do arise, require extensive forays outside pure tax law."[73] In making this statement, Wells had in mind disputes over the nationality of the person in question.[74] However, the statement is also true in another context: understanding and challenging the constitutionality of the U.S. nationality-based tax system also requires "extensive forays outside pure tax law." As Part III below illustrates, this includes a foray into 14th Amendment equal protection (among other forays).[75]

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[68] Allison Christians, *A Global Perspective on Citizenship-Based Taxation*, 38 MICH. J. INT'L L. 193, 222 (2017).
[69] William Thomas Worster, *The Constitutionality of the Taxation Consequences for Renouncing U.S. Citizenship*, 9 FLA. TAX REV. 921, 1002-3 (2010).
[70] *Id*. at 971-1019.
[71] Bret Wells, *International Taxation* 29 (5th ed. 2022).
[72] *See, e.g*., Snyder, *Unacknowledged Realities, supra* note 8 (discussing a multitude of problems caused by the U.S. nationality-based tax system).
[73] Wells, *supra* note 71, at 29.
[74] *Id*. (stating "In the vast majority of cases, the *nationality* of individuals is beyond doubt" [emphasis added]).
[75] *See* sources cited *supra* n.10-11, discussing additional violations of the U.S. Constitution and human rights.

III. THE RELEVANCE OF *STUDENTS*

As mentioned above, in *Students* the Court held that race-based admissions policies at two U.S. universities violated the Equal Protection Clause of the Fourteenth Amendment.[76] Echoing *Cleburne*,[77] the majority opinion explained that "antipathy"[78] towards distinctions based on race is "deeply 'rooted in our Nation's constitutional and demographic history.'"[79]

In explaining that the admissions policies in question were inherently suspect[80] and subject to strict scrutiny,[81] the majority as well as two concurring opinions made clear that race and nationality are inextricably linked. This is evidenced in multiple places in the majority and concurring opinions:

The majority opinion recalls that "hostility to […] race and nationality […] in the eye of the law is not justified."[82] The majority opinion reminds us that *Yick Wo v. Hopkins* applied the Clause to "aliens and subjects of the Emperor of China,"[83] while *Truax v. Raich* applied the Clause to "a native of Austria,"[84] and *Strauder v. West Virginia*, in dictum, applied it to "Celtic Irishmen."[85] The concurring opinion of Justice Thomas refers to "the Mexican or Chinese race."[86] Justice Thomas later mentions the internment of Japanese Americans in relocation camps following the bombing of Pearl Harbor, Holocaust survivors, and Irish immigrants.[87] The concurring opinion of Justice Gorsuch breaks down the race of "Asian" into several different nationalities: Chinese, Korean, Japanese, Indian, Pakistani, Bangladeshi, Filipino.[88] Justice Gorsuch also breaks down the race of "White" into a multitude

[76] *See Students for Fair Admissions Inc.*, 143 S. Ct. 2141.
[77] *Cleburne*, 473 U.S. at 440.
[78] *Students for Fair Admissions,* 143 S. Ct. at 216.
[79] *Id.* (quoting *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 291 (1978)). *See also id*. at 2159, 2162 (where the majority opinion equates race and nationality).
[80] *Id.* at 2163.
[81] *Id.* at 2162.
[82] *Students for Fair Admissions*, 143 S. Ct. at 2159, quoting Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (internal quotation marks omitted).
[83] *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2159 (quoting Yick Wo, 118 U.S. at 368).
[84] *Id*. (quoting Truax v. Raich, 239 U.S. 33, 36, 39 (1915)).
[85] *Id*. (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1880)).
[86] *Id*. at 2184 (Thomas, J., concurring) (quoting Slaughter-House Cases, 83 U.S. 36, 72 (1872)).
[87] *Id*. at 2200, 2205 (Thomas, J., concurring).
[88] *Students for Fair Admissions*, 143 S. Ct. at 2210 (Gorsuch, J., concurring).

of different nationalities, including Welsh, Norwegian, Greek, Italian, Moroccan, Lebanese, Turkish, Iranian, Iraqi, Ukrainian, Irish, and Polish.[89]

In sum, *Students* takes a secure place in a long line of U.S. Supreme Court decisions[90] – all decided both after *Cook* and after the discrediting of *Plessy*[91] – denouncing laws classifying persons based upon nationality or country of origin because they violate the Fourteenth Amendment Equal Protection Clause. In addition to confirming the long line of cases, another important contribution that *Students* makes is to further clarify that, for the purposes of Equal Protection, race is nationality and nationality is race. A distinction based on nationality must be treated with the same "antipathy"[92] as a distinction based on race.

Students is further confirmation that, because the U.S. nationality-based tax system makes distinctions based on nationality, it is inherently suspect and thus subject to strict scrutiny.[93] Laws subject to strict scrutiny are valid only if they are necessary to further a compelling governmental interest and are narrowly tailored to achieve that interest.[94] As explained in detail elsewhere, the U.S. nationality-based tax system fails both tests.[95]

IV. CONCLUSION

The U.S. nationality-based tax system discriminates based on nationality (or country of origin).[96] Of all persons living outside the United States, U.S. tax rules classify them based on nationality and subject U.S. nationals to far more onerous federal tax burdens as compared to those who are not U.S. nationals.[97]

Most (all?) of those who assume the constitutionality of the current U.S. nationality-based tax system support their assumption by citing the 1924 U.S. Supreme Court decision *Cook v. Tait*.[98] However, much has changed during the

[89] *Id*. at 2211, 2214 (Gorsuch, J., concurring).
[90] *Supra* notes 32-52 and accompanying text.
[91] *Supra* notes 14-22 and accompanying text.
[92] *Supra* note 78 and accompanying text.
[93] *Supra* note 63 and accompanying text.
[94] *Supra* notes 28, 52 and accompanying text. *See also* Snyder, *Extraterritorial Taxation #7*, *supra* note 10, at 3-12; Snyder, *Myths & Truths, supra* note 10, at 210-18.
[95] *See* Snyder, *Extraterritorial Taxation #7*, *supra* note 10, at 5-12; Snyder, *Myths & Truths, supra* note 10, at 213-18.
[96] *Supra* notes 53-70 and accompanying text.
[97] *Supra* note 61 and accompanying text.
[98] *Supra* notes 5-7 and accompanying text.

past century. Those changes include a dramatic transformation of our understanding of Equal Protection rights with respect to distinctions based on race and nationality.[99]

When *Cook* was decided, *Plessy v. Ferguson* was the law of the land, and the Court's review of legislation was so deferential, it was "incapable of identifying and addressing contemporary prejudices."[100] Today *Plessy* has been thoroughly discredited.[101] Further, a long line of U.S. Supreme Court decisions adopted during the one century since *Cook* denounce laws which classify persons based nationality or country of origin, on the grounds that the laws violate Equal Protection.[102] In a recent (2023) decision concerning affirmative action, *Students for Fair Admissions v. Harvard*, the U.S. Supreme Court made clear that race and nationality are inextricably linked,[103] and that distinctions based on either are to be treated with "antipathy."[104] Such distinctions are inherently suspect and thus subject to strict scrutiny.[105]

The current U.S. nationality-based tax system cannot be assumed to be constitutional. Citing *Cook v. Tait* to support an assumption of the system's constitutionality[106] at best ignores and at worst denies an entire century of development of Equal Protection rights[107] as well as other constitutional[108] and human rights.[109]

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[99] *Supra* notes 12-52 and accompanying text.
[100] *Supra* note 20 and accompanying text. For a discussion of how the burdens of the U.S nationality-based tax system reflect prejudice with respect to overseas Americans, see Snyder, *Taxing the American Emigrant*, *supra* note 61, at 313-26.
[101] *Supra* notes 14-22 and accompanying text.
[102] *Supra* notes 32-52 and accompanying text.
[103] *Supra* notes 82-89 and accompanying text.
[104] *Supra* notes 77-78 and accompanying text.
[105] *Supra* notes 81, 93-94 and accompanying text.
[106] *Supra* notes 5-7 and accompanying text.
[107] *Supra* notes 32-52, 76-94 and accompanying text.
[108] *Supra* note 10 and accompanying text.
[109] *Supra* note 11 and accompanying text.