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COMMENT: FOREIGN ACCOUNT TAX COMPLIANCE ACT: WHAT IT COULD MEAN FOR THE FUTURE OF FINANCIAL PRIVACY AND INTERNATIONAL LAW

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Abstract

The Foreign Account Tax Compliance Act (FATCA) is a U.S. regulation enacted in 2010 for the primary purpose of combatting tax evasion and terrorism financing. FATCA attempts to meet this objective by requiring the financial information of all individuals the Act defines as "U.S. persons" to be reported to the U.S. Internal Revenue Service. While FATCA strives to abate financial criminality, it is mired with legal issues affecting U.S. law, the laws of foreign nations, and international law as a whole. The problems with FATCA originate with the predicament of the United States trying to impose a domestic law on foreign nations. Many foreign nations have privacy laws that ordinarily would not permit collecting and reporting individuals' financial information to the U.S. government. These nations therefore cannot comply with FATCA without violating their own laws. If these nations fail to comply, however, FATCA imposes stiff monetary penalties. FATCA purports to overcome this hurdle through the use of intergovernmental agreements. While the intergovernmental agreements theoretically create a lawful way for countries to comply with FATCA, it does not change the fact that in many cases countries are obtaining financial information in a manner that would otherwise be in violation of their privacy laws. Furthermore, they are essentially being forced to do so because of the threat of exorbitant fines for failing to comply. These issues, in conjunction with FATCA's conflicts with U.S. law, demand judicial analysis of the Act's legality. This Comment argues that where a domestic regulation, like FATCA, contains a plethora of legal issues and mandates compliance by financial threat, it needs to be challenged in domestic courts of law and on the international stage. If FATCA does not face legal opposition, or is at least not given further scrutiny, it has the potential to end financial privacy and calls into question the traditional process by which a domestic law can become international law.

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Introduction

Washington D.C. lawyer James Jatras has called it "the worst law most Americans have never heard of." [n1] A U.S. senator has challenged its constitutionality in a U.S. federal court. [n2] The Foreign Account Tax Compliance Act, more commonly known as FATCA, has no shortage of critics. FATCA was signed into law in March 2010 to combat tax evasion by U.S. taxpayers with foreign bank accounts. [n3] The Act purports to accomplish this end by imposing unprecedented reporting requirements on U.S. taxpayers holding foreign financial assets and foreign accounts. [n4]

FATCA targets the financial information of all persons falling within its reach, which can go so far as to include citizens of other countries and individuals who have never set foot in the United States. [n5] This intrusion on financial privacy has been met with support from some foreign governments, [n6] but more commonly the response has been protest, originating from U.S. taxpaying individuals and financial entities with American clients across the globe. [n7]

While the reporting requirements that FATCA imposes on individual U.S. taxpayers are concerning to many, the burden FATCA places on financial institutions is perhaps the most controversial. [n8] The Act requires foreign financial institutions (FFIs) to report the financial information of all their U.S. taxpaying clients directly to the Internal Revenue Service (IRS). [n9] If the FFIs refuse to comply, but still wish to continue providing services for U.S. taxpayers, their options are few and far between. [n10] This imposition on FFIs has [*587] generated widespread criticism from the financial world, both American and foreign alike. [n11]

FATCA has been publicly criticized for its burden on U.S. taxpayers, foreign governments, and financial institutions. [n12] There is a plethora of literature questioning the cost-benefit analysis of implementing FATCA, many of which conclude by calling for its repeal or reform. [n13] Some articles discuss whether it is worth it for FFIs to shoulder the costs of complying with the Act or if it is more sensible to drop American clientele and escape the arm of FATCA altogether. [n14] The far-reaching negative effects of FATCA on the financial world are at the center of numerous debates, but a subject that merits more discussion is the legacy FATCA may leave on U.S. law, international law, and the right to financial privacy worldwide.

This Comment argues that despite claims to the contrary, [n15] financial privacy is a protected right and FATCA is a threat to this right, both in the United States and abroad. If the Act's legality is not challenged for its violation of domestic and foreign privacy laws, FATCA could reshape the right to financial privacy, U.S. law, and international law as a whole for years to come. Part I begins with a discussion of the modern history of U.S. and international financial privacy. Despite the implementation of a variety of regulations limiting its parameters over the past twenty-five years, financial privacy is protected both in the United States and in nations around the world. Part II discusses exactly what FATCA is, whom it affects, and what it means for those affected. Part III addresses how foreign governments and FFIs can comply with FATCA, what options there are for noncompliance, and the consequences of compliance on affected individuals. Part IV analyzes the Constitutional issues associated with FATCA, focusing on the threat that upholding it would have to financial privacy. Part V addresses FATCA's effect on foreign nations' domestic laws, the current international privacy law landscape, and the future [*588] of international law. Part VI suggests that individuals and FFIs alike must continue to posit legal challenges to FATCA to raise awareness concerning the Act's implications as a threat to financial privacy and traditional U.S. and international law.

This analysis as a whole will take a critical look at the limitations FATCA places on financial privacy and how it affects U.S. taxpayers, foreign governments, and financial institutions, and what these effects could mean for the future of domestic and international financial privacy laws. This Comment begins with an explanation of what financial privacy is and how it has evolved over the last twenty-five years leading up to FATCA.

I. Financial Privacy Pre-FATCA

The concept of privacy can be traced back at least as far as 200 A.D. [n16] In Geneva, Switzerland, during the sixteenth century, Protestant Reformation leader John Calvin "embraced individual privacy as a means of self-defense against a predatory state." [n17] Over two hundred years later, the importance of privacy was recognized in the Fourth Amendment to the U.S. Constitution, establishing the "right of people to be secure in their houses, papers, and effects, against unreasonable search and seizures ... ." [n18] There, the framers of the U.S. Constitution codified the right of individuals to be left alone from "every unjustifiable intrusion by the government upon the privacy of the individual." [n19] As society progressed and technology advanced, the constitutional protection of privacy began to take on a new meaning. [n20] The late nineteenth and early twentieth centuries marked the beginning of significant change in the concept of privacy and reform to the common law of privacy. [n21] It was not until the emergence of regulatory reform in the latter half of the twentieth century, however, that the United States saw the emergence of financial privacy. [n22]

[*589] The first recognition of financial privacy in U.S. law came as a response to the Currency and Foreign Transactions Reporting Act of 1970, better known as the Bank Secrecy Act (the BSA). [n23] The BSA was intended to curtail the growing illegal drug trade in the United States by requiring financial institutions to keep records detailed enough to track an individual's transactions and account activity, regardless of whether the individual was a law-abiding citizen. [n24] This encroachment on financial privacy escaped the attention of most Americans until the U.S. Supreme Court addressed the implications of the BSA in United States v. Miller. [n25] In Miller, the Supreme Court acknowledged

that "the lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Security Act ... ." [n26] While the Court held there was no violation of the Fourth Amendment, [n27] this holding was met with staunch criticism [n28] and initiatives by state courts and the federal government to fight back. [n29]

The Right to Financial Privacy Act of 1978 (the RFPA) codified the individual's right to financial privacy at the federal level [n30] and set the foundation for years of regulation to come. [n31] The RFPA established that Congress did in fact believe individuals had a reasonable expectation to financial privacy by mandating that the government follow specific procedures before requesting a financial institution release the financial records of its clients. [n32] If the government violated these procedural safeguards, the RFPA provided individuals standing to challenge the unlawful disclosures of their protected financial information. [n33] Two years after the passing of the Right to Financial Privacy Act, the United States adopted the 1980 Organization for Economic Co-operation and Development (OECD) Guidelines on the [*590] Protection of Privacy and Transborder Flows of Personal Data (Guidelines). [n34] The Guidelines established the first internationally agreed upon standards for individual privacy, striking a balance between the need for privacy protection and the free flow of information. [n35] The Guidelines called for OECD members to adopt a range of privacy protections and the free flow of information among the member countries that explicitly adopted these protections. [n36] While the Guidelines called for specific privacy protections, they also encouraged self-regulation and self-imposed enforcement measures, leading to a litany of individualized privacy protection regulations in countries across the world. [n37] Many of these regulations targeted concerns associated with keeping information private in an era of new technology and the Internet. [n38]

The European Union encouraged its Member States to form their own information protection laws with its adoption of the Data Protection Directive (also known as EU Directive 95-46-EC). [n39] While the Data Protection Directive was not directly binding, it required Member States to adhere to eight broad legal principles that provided for efficient data reporting and additional information privacy protections for the individual. [n40] The Directive also called for the establishment of Data Protection Authorities in each EU Member State to ensure that business entities and individuals had a forum to challenge possible regulatory violations. [n41] The Data Protection Directive took enormous strides in the protection of personal privacy for EU members, but the United States did not take such broad privacy protection measures. The United States responded to general privacy concerns of the Internet era with the Electronic Communications Privacy Act of 1986 and the Computer Matching and Privacy Protection Act of 1988, but these regulations were not targeted as specifically protecting an individual's right to privacy. [n42] Despite these regulations' failure to protect the individual, privacy protection in general was on the rise, both in the United States and internationally. It was not until the modernization of the financial services sector, however, that financial privacy once again came into focus.

[*591] Financial privacy regulation resurfaced in the United States with the passing into law of the Financial Modernization Act of 1999, better known as the Gramm-Leach-Bliley Act (GLBA). [n43] The GLBA created a need to update financial privacy legislation by allowing financial institutions like banks, insurers, and brokerage houses to affiliate with one another [n44] and form financial holding companies. [n45] These changes led to the consolidation of the financial services industry, which then raised concerns that a relatively small group of institutions would have control over the financial information of millions. [n46] As a result of these concerns, legislators ensured that the GLBA required financial institutions to clearly and conspicuously disclose notice of privacy policies and practices to all customers, [n47] including "an annual notice of their privacy policies, and an opportunity for consumers to opt out of disclosing protected financial information to nonaffiliated third parties." [n48] The GLBA's provisions limiting the sharing of personal financial information demonstrate a concrete effort to protect individual financial privacy by the federal government. The protections afforded by the GLBA are particularly noteworthy when compared to the financial privacy commandeered by the Bank Secrecy Act nearly thirty years before. [n49] This trend toward recognizing the importance of financial privacy and the protection of privacy internationally would soon change with the advent of the new millennium. [n50]

By the turn of the twenty-first century, financial privacy regulation had existed for twenty-five years and had adapted to the changing technological landscape, but unexpected catastrophes changed the financial privacy framework once again. [n51] The September 11th terrorist attacks in the United States and the global financial crisis were two such catastrophes. The U.S. Congress responded to the September 11th terrorist attacks with the United and Strengthening America by Providing Appropriate Tools Required to Intercept [*592] and Obstruct Terrorism Act of 2001, better known as the Patriot Act. [n52] Title III of the Patriot Act amended financial privacy law to provide law enforcement with better means of catching money launderers and international terrorists. [n53] It implemented a comprehensive set of new reporting requirements on financial institutions. [n54] Requirements included mandating financial institutions to turn over any and all records if the Treasury Department determined an account or transaction to be "of primary money laundering concern," even if the financial institution was located outside the United States. [n55] These reporting requirements set the precedent for the type of encroachment on financial privacy that individuals and financial institutions would experience just a few years later in the wake of a global financial crisis and the enactment of FATCA.

II. FATCA Defined

The Foreign Account Tax Compliance Act was signed into law March 19, 2010, a date that could one day go down in history as the beginning of the end of financial privacy. [n56] Individuals can seek financial privacy for any number of reasons, and often times they do so through the use of tax havens. [n57] Countries such as the Bahamas, Bermuda, and the Cayman Islands have long been recognized as tax havens. [n58] Some individuals use tax havens to shelter their wealth from the high taxes of their native countries [n59] and others utilize the banking practices of these places simply because they desire a high degree of financial privacy. [n60] Whichever the case, it is important to note that there is nothing illegal about using the different financial rules and regulations of foreign countries for these kinds of reasons; [n61] in fact, this Comment has addressed how regulators have protected the individual's right to financial privacy over the last quarter century. It is not the pursuit of financial privacy [*593] that causes governments to wince, but rather the abuse of financial privacy for unlawful purposes. [n62] Thus, the problem Congress is trying to solve with FATCA does not lie in the concept of financial privacy itself, but rather those who seek financial privacy to support criminal activities.

While there could be limitless reasons an individual may use a tax haven or desire financial privacy, Congress and the IRS are most concerned about tax evasion. Tax evasion by individual persons using FFIs reflects federal revenue losses in the range of $ 40-70 billion per year, to say nothing of the losses caused by corporations and other entities. [n63] U.S. taxpaying individuals using foreign accounts can capitalize on evading taxes because of the limited reach of the IRS. [n64] These individuals often take money earned and taxed in the United States and invest the money through the use of FFIs, which then yield passive income. [n65] This passive income, often in the form of interest or capital gains, although earned outside of the United States, is still income to a U.S. taxpayer and by law should be reported to the IRS and accordingly taxed. [n66] The tax evasion problem arises because FFIs are not under the direct control of the IRS or any other U.S. regulatory agency, and thus have no duty to report. [n67] The American clients of FFIs are not likely to take it upon themselves to do the required IRS reporting because of the low risk of repercussions for not doing so and the high potential for rewards on untaxed income. Therefore, for those U.S. taxpayers who are able to sleep soundly despite their questionable ethics, foreign accounts can be a source of tax-free income as long as FFIs stay outside the control of U.S. law. [n68] After all, how could the U.S. government manage to bring foreign financial institutions under the control of U.S. law? It would seem impossible absent the implementation of some controversial regulation, which for many aptly describes FATCA.

Passed as part of the Hiring Incentives to Restore Employment Act, FATCA was enacted for the purpose of helping the IRS detect tax evasion by [*594] U.S. taxpayers with undeclared assets in foreign institutions. [n69] FATCA uses a two-pronged regulatory attack to accomplish this end: one directed at American taxpayers, defined by the Act as "U.S. Persons," [n70] and one directed at FFIs. [n71]

The FATCA framework directed at "U.S. Persons" implements new reporting requirements on U.S. taxpaying individuals, but does not offer a significant departure from current tax reporting law. FATCA enacted ß 6038D of the Internal Revenue Code, which requires U.S. taxpayers with foreign financial assets to report income earned on these assets to the IRS. [n72] This reporting requirement effectively puts an end to the "honor system" where U.S. taxpayers could choose whether or not to report income made on foreign assets and investments. [n73] Section 6038D applies to all U.S. taxpayers with foreign financial assets with an aggregate value of $ 50,000 or more and which fall into the definition of assets specified by the Act. [n74] This definition of foreign financial assets as set forth in ß 6038D(b) specifically lists: "any stock or security issued by a person other than a United States person; any financial instrument or contract held for investment that has an issuer or counterparty which is other than a United States person; and any interest in a foreign entity" as an asset covered by FATCA. [n75] More broadly, ß 6038D(b) also categorizes an asset as "any financial account maintained by a foreign financial institution." [n76] This second categorization raises what looks like a gaping hole in the FATCA framework: how will the IRS have any idea whether an individual reporting its assets in foreign accounts will be truthful? How would the IRS even know whether a U.S. taxpayer has foreign assets or foreign accounts? Here enters the controversial prong of FATCA's targeting tax evasion: requirements imposed on FFIs that are by definition not under the jurisdiction of U.S. law. [n77]

[*595] FATCA requires FFIs to report personal financial information directly to the IRS regarding any clients that are (or should be) paying U.S. taxes, regardless of the fact that these FFIs are not subject to U.S. law. [n78] The Act

broadly defines FFIs in ß 1471(d)(4) as "any financial institution which is a foreign entity," or any financial institution that is not organized under the laws of the United States. [n79] This definition includes foreign banks, foreign brokerage firms, insurance companies, and a number of different kinds of investment companies, to name only a few of the main institutions affected. [n80] Simply put, FATCA compels nearly all foreign financial entities with U.S. clients to submit private financial information to the U.S. government, an imposition viewed by many foreigners and Americans alike as the IRS overstepping its authority. [n81] From the perspective of the FFI, there seems to be little incentive to comply. For many U.S. taxpayers, the sole appeal of using foreign accounts and other foreign financial services is the fact that they provide financial privacy free from the limitations of United States law. [n82] Now that many FFIs are suddenly subject to U.S. law and can no longer provide financial privacy, their appeal to U.S. taxpayers could plummet and, in turn, so might their business. An obvious choice for FFIs with many U.S. taxpaying clients is to ignore FATCA, ignore the IRS, and carry on with current operations. Unfortunately for these institutions, ignoring FATCA is not an option because compliance penalties leave individuals and FFIs with few options but to comply. [n83]

III. FATCA Compliance

The Foreign Account Tax Compliance Act mandates the attention of the FFIs and individuals it affects, even in foreign jurisdictions, through the use of strict non-compliance penalties. [n84] The severity of these penalties and the nonexistence of compliance alternatives leave U.S. taxpayers with foreign assets little choice but to report as FATCA commands. [n85] Non-compliance [*596] penalties for the FFIs are equally steep, but, unlike the individual taxpayers, FFIs have several compliance options. [n86]

The integral factor in determining how a country's FFIs will comply with FATCA is what type of Intergovernmental Agreement (IGA) the country wishes to adopt. [n87] IGAs provide a means by which FFIs can comply with FATCA without violating their respective local laws. [n88] To comply, countries must choose to adopt one of the two types of IGAs: Model 1 or Model 2. [n89] The significance in choosing a Model 1 or Model 2 IGA will be discussed in Subsection B, but the decision between these Model IGAs does not consider that a third compliance option exists. Under this third option, an FFI could simply choose to drop all its clients that fall under FATCA's definition of "U.S. persons" rather than incurring the costs of compliance. [n90] While this option would be nearly impossible for international financial institutions with thousands of U.S. clients, it could be a reasonable choice for smaller financial institutions where the cost of keeping only a small number of U.S. clients is overly burdensome. [n91] Whether FFIs adopt a Model 1 or Model 2 IGA, or make the decision to discontinue offering services to U.S. taxpayers, each choice is met with significant consequences.

Section A of this Part will address the specific penalties imposed on FFIs and U.S. taxpayers residing abroad and each party's choices in complying with FATCA in the face of these penalties. Section B will address how an FFI can comply through the use of an IGA. Section C will consider the effects of FFIs' compliance decisions and the challenges these decisions create for individuals, FFIs, and foreign governments alike.

A. The Choice to Comply in the Face of Non-Compliance Penalties

Although the U.S. government generally has no jurisdiction to enforce its laws on foreign soil, FATCA compels foreign individuals, financial institutions, and governments to acquiesce to its requirements through the threat of strict non-compliance penalties. [n92] These penalties are distinct for the [*597] U.S. taxpayer with foreign undeclared assets and the FFIs that provide these individuals with services. [n93]

FATCA requires individual U.S. taxpayers to disclose foreign asset information or face a penalty of $ 10,000. [n94] Foreign asset information is defined in ß 6083D(c) of FATCA and includes four categories: 1) the name and the address of the FFI(s) where the individual has assets; 2) the name and address of the issuer for assets in the form of stocks/securities; 3) names, addresses, and information pertaining to contracts and financial instruments; and 4) the maximum value reached by the assets in the taxed year. [n95] If a taxpayer fails to provide this information to the IRS for ninety days it will face the $ 10,000 penalty, and a reoccurring $ 10,000 penalty every thirty days until the taxpayer complies. [n96] In the event a taxpayer wants to take its chances and underreport the value of its foreign assets, if the IRS discovers the violation it will impose a harsh forty percent penalty on the value of the unreported assets. [n97] While Section 6038D(g) offers taxpayers some leeway in case the failure to disclose the foreign asset information was for reasonable cause and not willful neglect, [n98] ultimately anyone holding foreign assets has little choice but to dutifully follow the FATCA reporting requirements. [n99]

These penalties place a stiff price on an individual's financial privacy, but they also adhere to the longstanding principle that all U.S. citizens must pay federal income taxes. [n100] The problem that arises here is that not all those individuals affected by FATCA are U.S. citizens. [n101] FATCA applies to "U.S. persons," comprising residents of the United States, individuals who have a parent that is a U.S. citizen, a person that passes the "substantial presence test," and "any other person that is not a foreign person." [n102] The "substantial presence test" categorizes someone as a U.S. person if they have been [*598] physically present in the United States for 31 days of the present year or 183 days in a three-year period. [n103] Exactly what the catchall phrase "any other person that is not a foreign person" means, or who it could end up including, is not very clear. While there is an argument these non-U.S. citizens have strong enough ties to the United States to compel them to pay federal income taxes, this argument is significantly more tenuous in the case of FFIs, which also face an array of penalties for failing to comply with FATCA.

If a FFI chooses not to report the financial information of its clientele classified as U.S. persons, it faces a thirty percent tax on certain "withholdable payments" specified by the IRS. [n104] These withholdable payments are defined in 26 U.S.C. ß 1473, which includes payments of interest, dividends, and a dozen other forms of income, in addition to any proceeds from the sale or disposition of property, if the source of any of these payments is from within the United States. [n105] Withholdable payments can even include income that would otherwise not be subject to taxation. [n106] The obvious solution to avoiding this withholdable payments tax is FATCA compliance. [n107] Section 1471 contains the comprehensive list of requirements a FFI must follow to avoid incurring this tax on withholdable payments. [n108] Section 1471(b) generally states that a FFI must identify its U.S. taxpaying clients and make annual reports regarding these clients' accounts to the IRS (or a withholding agent) in accordance with certain due diligence and verification procedures. [n109]

Although following the stipulations detailed in ß 1471(b) enables FFIs to avoid the withholding tax, complying has significant costs of its own. [n110] Compliance with FATCA could cost foreign banks on average between $ 30-80 million, by one conservative estimate. [n111] Failure to comply, however, could be just as costly depending on the number of U.S. taxpaying clients of an [*599] institution. [n112] Thus, some FFIs have found that the best way to avoid these costs is to comply with FATCA by dropping all clients that fall within the Act's definition of U.S. persons. [n113] Other FFIs, despite the heavy costs of compliance, cannot afford to incur the penalties and cannot afford to dispense with their U.S. taxpaying clientele. [n114] These FFIs have little choice but to comply, which they have been in growing numbers through the use of the U.S. Treasury-created IGAs. [n115]

B. Compliance Through the Use of Intergovernmental Agreements

The financial reporting measures mandated by FATCA have imposed a variety of challenges on the global financial community and foreign governments struggling to comply. In the financial industry, some FFI managers are unable to pay the steep compliance costs, some are unaware of the compliance requirements altogether, and others are simplifying the matter by choosing to drop American clients and investments. [n116] Even those FFIs that wish to comply and maintain their U.S. clients may be unable to do so because of the imposition it puts on their countries' laws, particularly in those countries regarded as tax havens [n117] and those that have stringent financial privacy laws. [n118] FFIs located in these countries often cannot lawfully report the personal financial information of any of their clients, including people considered "U.S. persons." [n119] To overcome these hurdles the U.S. Treasury Department has established a specialized method of FATCA compliance for foreign governments: IGAs. [n120]

[*600] IGAs provide a unique compliance method to FATCA to ensure FFIs do not violate local laws in complying with FATCA reporting requirements. [n121] The U.S. Treasury Department established two types of FATCA IGAs for communicating financial information to the IRS: Model 1 IGAs and Model 2 IGAs. [n122]

Under Model 1 IGAs, FFIs report the personal financial information required by FATCA to their national governments, rather than directly reporting the information to the IRS. [n123] This avoids the legal issue of having FFIs report their clients' personal information to a foreign government and increases efficiency by use of one IGA versus hundreds or thousands of IGAs with individual FFIs. [n124] Model 1 IGAs can be either reciprocal or nonreciprocal. [n125] Reciprocal Model 1 IGAs require a dual exchange of information between the foreign government and the United States while nonreciprocal Model 1 IGAs do not. [n126] This means that reciprocal Model 1 IGAs require the United States to report the financial information of the foreign countries' citizens with accounts or investments in the U.S. to that country's government. [n127] This mutual exchange of financial information under reciprocal Model 1 IGAs went into effect October 2015, much to the dismay of advocates of financial privacy and critics of FATCA. [n128]

Model 2 IGAs, unlike their counterpart, do require FFIs to report the personal financial information of clients directly to the IRS, with the permission of their respective foreign governments. [n129] Model 2 IGAs maintain financial privacy more effectively because they do not require dual exchange of information like reciprocal Model 1 IGAs and they require personal information to go through the hands of one less organization - foreign governments. [n130] Eliminating foreign governments as financial reporting middlemen should provide comfort for many proponents of financial privacy, but it is not without its drawbacks. While Model 2 IGAs only require direct action from FFIs in theory, if the IRS needs additional information about a [*601] taxpayer, it can request that the foreign government in question take action to enforce the reporting of this information. [n131] Such action not only invalidates the enhanced financial privacy that makes Model 2 IGAs desirable, but it can also lead to the quick rise of administrative costs. [n132] These costs are comparatively high to begin with because unlike Model 1 IGAs, Model 2 IGAs require agreements with each individual FFI. [n133] Thus while Model 2 IGAs offer an individual more financial privacy, the high cost of such privacy may explain why more countries are signing Model 1 IGAs. [n134]

IGAs serve to facilitate compliance with FATCA and lessen its imposition on the laws of foreign countries, but are by no means cost-free. [n135] This cost cannot be measured simply in terms of the dollars needed to negotiate the IGAs and enforce FATCA requirements on foreign governments and financial institutions. While this may be the most important cost to consider in the eyes of the IRS or foreign governments, individuals around the globe with ties to the United States are experiencing an entirely different kind of cost to FATCA compliance.

C. The Cost of Compliance

FATCA is being challenged all over the world by those who feel the economic and personal burdens on U.S. citizens, FFIs, and foreign governments have become excessive. [n136] The American Citizens Abroad, a coalition of expatriates, and lobbyist/lawyer James Jatras, principal of Squire Sanders Public Advocacy, are two examples of American activists publicly campaigning against the harms caused by FATCA. [n137] This outcry raises the question of what exactly is so troublesome about FATCA, a law primarily intended to combat tax evaders from hiding income in offshore and international accounts. [n138] Notwithstanding the legal issues of the Act, which will be discussed in Parts IV and V of this Comment, the criticism surrounding [*602] FATCA can be traced to two main sources: the dollar cost of the Act's implementation/compliance measures and the burden on law-abiding individuals who fall under the definition of a U.S. person. [n139]

Although the exact monetary cost of implementing FATCA and the cost to FFIs is ongoing, it is clear that, to date, the amount is extremely high, particularly in light of the expected benefit. [n140] In 2011, the year after the Act's passage into law, [n141] estimates of the cost of implementing FATCA for the United States alone ranged from eight billion [n142] to thirty billion dollars. [n143] In the same year, estimates of the cost worldwide ranged from five hundred billion to one trillion dollars, [n144] with estimates for some of the larger FFIs reaching one hundred million dollars each. [n145] As time has progressed, these estimates have not decreased. [n146] According to a 2014 survey of three hundred financial institutions conducted by Thomson Reuters, fifty-five percent expected the cost of FATCA to exceed their original budgeting estimates. [n147] While these numbers are staggering in their own right, the Act's widespread critique becomes more justified when these costs are viewed in light of the expected 8.5 billion dollars in tax evasion FATCA was expected to catch. [n148] This means that the IRS is getting less than a one-dollar return on every one hundred dollars spent worldwide to implement and comply with the Act. [n149] As one author aptly puts it, this is like using a sledgehammer to crack a nut. [n150] Despite such a high price for a comparatively low benefit, the dollars spent may not be the most costly part of FATCA.

[*603] FATCA has had a profound impact on all types of U.S. taxpayers the world over, including students studying abroad, missionaries, charity workers, professionals, and U.S. expatriates. [n151] Some of those affected are unwilling to bear the costs and have chosen a variety of different paths to avoid having to comply, ranging from selling their U.S. investments to renouncing their citizenship or green cards. [n152] In fact, from 2012 to 2014, the number of U.S. citizens who renounced their citizenship increased by 266%. [n153] The issues for U.S. taxpayers abroad do not rest only with those unwilling to comply with the Act. Some U.S. taxpayers are willing but simply unable to comply because FATCA has left them with no access to nearby financial services. [n154] FFIs that have responded to FATCA by dropping their U.S. tax-paying clients have left many of the over six million U.S. citizens living abroad and working overseas unable to obtain a foreign bank account. [n155] Thus, access to essentials such as insurance, pensions, Social Security, and more has become much more difficult, [n156] forcing some to relocate to areas where there are banks that accept U.S. taxpayers. While these are only a few examples of the challenges FATCA has created for U.S. taxpayers living abroad, they illustrate significant issues that lead many to ask whether the benefits of the Act truly exceed the costs.

The cost of FATCA implementation/compliance is alarming and the effect on law-abiding individuals globally is a severe unintended consequence, but the problems do not stop there. As more IGAs are signed and FATCA continues to proliferate in the global financial community, small reactions today will be amplified tomorrow. Foreign firms will cease taking on clients the Act defines as U.S. persons, direct investment in U.S. ventures will dramatically suffer, and individuals will continue to renounce their citizenship [*604] and economic ties to the United States. [n157] The high likelihood that these effects will emerge over the course of the upcoming years seems definitive in light of the few alternatives to compliance. There is, however, one means of curtailing the negative effects of FATCA before they spiral out of control: challenging the Act on the basis of whether it is in fact legal.

IV. FATCA's Inconsistency with U.S. Law

Throughout this Comment, it has likely become clear that FATCA has introduced steep costs on entities and persons around the world. While its financial burden has been the primary catalyst for FATCA criticism, the Act's detractors should also take a critical look at allegations of FATCA's illegality. FATCA places a significant strain on international and foreign law, but before analyzing these concerns, this Comment assesses FATCA in juxtaposition with the supreme law of its home country, the U.S. Constitution. There are at least two constitutional issues concerning the implementation of FATCA: the U.S. Treasury Department's authority to negotiate IGAs and the U.S. taxpayer's right to financial privacy. [n158] The implications of these constitutional issues suggest that even if legislators overlook the costs imposed by the Act, FATCA may need to be repealed for its violation of U.S. law.

A. Constitutionality of IGAs

Because IGAs are international agreements, there are few forms that they can take and still be considered lawful; this Comment argues that Model 1 IGAs do not fit any of these established forms. Model 1 IGAs appear to be very similar to treaties, but they cannot be considered as such without creating a serious problem in the eyes of the law. As treaties, IGAs would need to be established either "by and with the Advice and Consent of the Senate" or through an enumerated power of the president. [n159] Where neither method is present, the agreement is unlawful, which is precisely the issue with Model 1 IGAs.

Model 1 IGAs are agreements between the U.S. Treasury Department and a "partner government" that require all FFIs located in the partner government's [*605] jurisdiction to identify accounts of U.S. customers and report information about these accounts back to the United States. [n160] As such, IGAs must be categorized as one of the four types of international agreements under the U.S. Constitution: treaties, congressional-executive agreements, treaty-based agreements, or sole executive agreements. [n161] Of these four types of agreements, the only one that requires no Congressional action and does not build off an existing treaty is the sole executive agreement. [n162]

Sole executive agreements are not technically treaties because they are not established with the advice and consent of the Senate, [n163] so theoretically, they could reflect a legal means by which the Treasury Department uses IGAs to enforce FATCA. Whether sole executive agreements are a viable alternative to treaties, however, is a point of contention outright rejected by many constitutional scholars. [n164] Those scholars that grant sole executive agreements constitutional standing generally do so as a matter of necessity, and advocate their use only when the President conducts administrative or routine matters. [n165] Even if one chooses to accept this view, implementing a new law like FATCA hardly seems like a routine executive matter for which a sole executive agreement could be utilized. [n166] The President's powers, listed in Article II of the U.S. Constitution, are many, but finite. [n167] The power to "lay and collect taxes" is a power of Congress, not the President. [n168] The power to make treaties is a power of the President, but can only be validated by a two-thirds concurrence of the Senate. [n169] FATCA IGAs touch on both of these powers - facilitating the collection of taxes through the use of international agreements. Since such interests are not derived from the President's sole enumerated powers and are not administrative in nature, IGAs cannot be sole executive agreements. Such is the argument of the IRS, which contends that IGAs are not sole executive agreements but rather treaty-based agreements. [n170] However, [*606] some experts explicitly reject this suggestion, maintaining that treaty-based agreements must be built off already existing treaties (and there are no such international agreements already in place pertaining to FATCA). [n171] Even if the IGAs were considered treaty-based agreements, in many cases these agreements would still be invalid because they are not executed by the requisite parties from each nation. [n172]

Thus, the IGAs that are enabling FATCA to succeed appear to have no constitutional standing, which is exactly the argument Senator Rand Paul made in the case of Crawford v. United States. [n173] This case was brought before the U.S. District Court for the Southern District of Ohio to challenge the constitutionality of FATCA (and IGAs) on a number of grounds. [n174] While the constitutionality of FATCA IGAs was a main focus of the proceeding, the larger issue was whether FATCA violates an individual's right to financial privacy. [n175] The case was ultimately dismissed because the Court found that several of the plaintiffs lacked standing and a preliminary injunction would be too harmful to FATCA's fight against tax evasion. [n176] In spite of the ruling, the arguments made, particularly with respect to financial privacy, are worth a closer look. [n177]

B. Right to Financial Privacy

Despite what the U.S. government may contend, [n178] the reaction to the holding in United States v. Miller [n179] and the subsequent legislation discussed in Part I [n180] strongly suggest that individuals do have a right to financial privacy. [*607] This Comment argues that not only is this right protected by legislation and common law, [n181] but it is also constitutionally protected under the Fourth Amendment. This makes FATCA's intrusion into financial privacy without the justification typically required by the Fourth Amendment yet another cause for concern. [n182]

The right to privacy is protected by the Fourth Amendment to the U.S. Constitution [n183] and violated where the government decides in its own capacity to "touch upon intimate areas of an individual's personal affairs." [n184] One such intimate area cited directly in the text of the Fourth Amendment is "papers," which the Supreme Court categorized in United States v. Boyd as an "owner's ... dearest property." [n185] Boyd emphasizes that the compulsory production of a person's papers by the U.S. government to be used against that person is an unreasonable search and seizure, violating the Fourth and Fifth Amendments. [n186] This principle applies directly to the compulsory production of financial information mandated by FATCA.

Although FATCA has not been ruled unconstitutional in court, the compulsory production of financial information has been addressed in U.S. courts before. In Burrows v. Superior Court of San Bernardino, the court held that "police violated [an individual's] rights by obtaining from banks, without legal process, documents in which [the individual] had a reasonable expectation of privacy." [n187] The court in Burrows found that an individual has a reasonable expectation of privacy in their financial information and an expectation that such information would only be used for internal banking purposes. [n188] This recognition of financial privacy was echoed in the Maryland case, Suburban Trust Co v. Waller, where the court held that, "absent a compulsion by law, a bank may not make disclosures concerning a depositor's account ... ." [n189] The courts in each of these cases point out that, through proper legal process, the government can lawfully compel the production of private financial information. [n190] This, too, would apply to FATCA - if its [*608] searches and seizures were reasonable under the Fourth Amendment, the government had a warrant, or some level of individualized suspicion, it could lawfully instill the mandatory reporting requirements. FATCA, however, relies on none of these traditional reasons for conducting a search and seizure. [n191]

When there is no justification for a search and seizure and no basis for believing a particular person is guilty of a crime, a search and seizure is forbidden under the Fourth Amendment - "that prohibition is categorical and without exception." [n192] Herein lies the problem with FATCA: it does not distinguish between the delinquent and the innocent. [n193] FATCA presumes to conduct warrantless searches and seizures of all U.S. persons' financial information with no basis of belief or individualized suspicion that any one specific individual is evading their taxes. Absent very limited exceptions, such searches and seizures without individualized suspicion are unreasonable under the Fourth Amendment. [n194] While there are arguments that an exception to the Fourth Amendment could apply to FATCA searches and seizures, the practical application of these arguments is tenuous. [n195] U.S. citizens have a protected right to financial privacy, and the lack of individualized suspicion coupled with FATCA's departure from the traditional justifications intrude on this right, placing it in prime position to be challenged in court on constitutional grounds.

While the unauthorized establishment of IGAs and failure to justify searching and seizing private financial information pose legitimate concerns under the U.S. Constitution, FATCA is also at odds with foreign constitutions. [*609] In those countries with privacy laws that clash with the requirements of FATCA, governments have to choose between changing domestic law and facing the penalties of noncompliance. In many cases, this forces countries to sign IGAs and give up longstanding traditions of financial privacy. [n196] As more IGAs are negotiated and compliance progresses, FATCA approaches acceptance on a global level. While still a ways off in the case of FATCA, if a regulation is accepted by a cross-section of nations around the word, it can reach the level of customary international law. [n197] If a single piece of U.S. legislation has the potential to reach this level without the input of the International Court of Justice, United Nations, or another international governing body, it calls into question the traditional process by which legislation can become international law.

V. What FATCA Means for International Law

While FATCA has plenty of issues, perhaps the gravest implication of "the worst law nobody has ever heard of" n198 is its potential to alter the landscape of international law. The assorted issues of FATCA already addressed in this Comment are each important in their own right; but perhaps the shortcoming that could have the most potential to make serious, lasting change is the use of IGAs and their effects on the laws of foreign nations. This Part addresses how IGAs are forcing foreign nations to change and what these changes could mean for the future of international law.

A. FATCA and Foreign Financial Privacy Law

FATCA IGAs are construed as legal treaties negotiated by the U.S. Treasury Department with foreign governments "to ensure local laws are not violated by FATCA's reporting requirements," n199 but this label is misleading. n200 IGAs provide foreign countries and FFIs with a FATCA compliance mechanism that does not violate foreign laws only because, in many cases, it requires foreign governments to change their laws. n201 This effect [*610] is perhaps most profound on foreign governments that have longstanding traditions of upholding the privacy of their citizens. These countries are faced with the choice of dispelling their privacy protections or facing the exorbitant costs of non-compliance.

Some of the foreign countries disproportionately affected by FATCA because of their stringent secrecy and financial privacy laws are referred to as "tax havens." n202 Tax havens are countries that have strict bank secrecy laws protecting the relationship between a banker and its client and the revelation of financial and personal information shared in the context of this relationship. n203 A 2015 study conducted by the Congressional Research Service provided a list of countries and territories regarded as tax havens, such as Switzerland, Lebanon, and Singapore, all of which have been historically popular countries for Americans in search of strict financial privacy. n204 The total number of tax haven jurisdictions around the world varies, but there may be as few as a dozen or as many as sixty-five. n205 Despite any negative connotations associated with these places due to assumptions of illegality, the truth is that these countries provide economic benefits to individuals and companies around the world. n206 Now these countries are being forced to forgo their longstanding traditions of maintaining financial privacy in the face of FATCA.

The argument that FATCA does not force foreign countries with strict privacy laws to change their laws carries little weight because of the harsh thirty percent withholding penalty. n207 Switzerland, arguably the country most well known for protecting financial privacy, signed a Model 2 IGA in 2013. n208 Other countries regarded as tax havens n209 such as Singapore, Costa Rica, Lichtenstein, and Luxembourg, have followed suit (with the majority signing Model 1 IGAs). n210 Lebanon is a tax haven that has specific laws against disclosing the bank account information of all depositors and consequently has not signed an IGA. n211 Instead, Lebanon has agreed to lift this banking secrecy [*611] regulation only in the case of persons that are suspected of money laundering or funding terrorists and, of course, U.S. citizens. n212 Lebanon is not the only country that has yet to sign an IGA; in fact, as of September 2016, to ensure complete compliance with FATCA, the total number of IGAs that still need to be negotiated is around fifty. n213 This number does not include those countries that have signed IGAs but have yet to pass the legislation that would actually put the IGA in force. n214 Despite the work ahead, FATCA is well on its way to reaching global compliance and the number of IGAs negotiated and implemented is expected to continue to grow. n215

FATCA revolutionized global financial privacy practices and has taken no prisoners along the way; it required countries to change their laws and forced individuals to accept that financial privacy may just be a right of a bygone era. In the face of strict compliance penalties, there are many who have resigned themselves to this mindset. There are also those who are not so willing to let financial privacy expire as a right of the past, those who challenge the legality of FATCA, and those who question its implications for the future. n216 How is it possible that the United States can impose a domestic regulation on the rest of the world? If such a regulation can be lawfully imposed, does that mean traditional methods of establishing customary international law could become obsolete? The following section analyzes FATCA in light of these questions and analyzes what the answers could mean for the future of international law.

B. FATCA and the Future of International Law

International law can broadly be defined as the law that regulates the relationship between states. n217 It can arise through a rule so universally accepted as binding that it becomes a principle of customary international [*612] law. n218 It can also come into existence through written instruments, such as treaties or conventions like the Vienna Convention on Diplomatic Relations of 1961 or in FATCA's own IGAs. n219 In the case of international law arising from written instruments, the law is binding only on the parties to that specific agreement. n220 Thus, just because South Korea signed a Model 1 IGA (which it did in June of 2014) n221 does not mean that North Korea also agrees to such an exchange of financial information (which it has not). n222 But what would happen if every other country and their respective financial institutions did agree to become parties to FATCA IGAs? The principles embodied in these IGAs would look less like the mandates of a U.S. agency and increasingly more like rules becoming generally accepted on the scale of customary international law.

This concept makes FATCA a law with the potential for repercussions extending far beyond the woes it creates for American expatriates or the burden of its administrative implementation costs. The United States has already negotiated over one hundred IGAs, [n223] and has taken steps to ensure this number only increases. [n224] These IGAs exist on every continent except Antarctica [n225] and have infiltrated countries renowned for having the most stringent financial privacy laws. [n226] Thomas Sutter, a spokesman for the Swiss Bankers Association, a country known for its financial privacy, said, "With FATCA, there is practically no more banking secrecy for customers liable for American tax." [n227] Yet Mr. Sutter, like so many commentators that are critical of the Act, misses the larger point: FATCA does not just affect those persons and FFIs liable to the IRS under the Act. FATCA altered foreign privacy law and the international exchange of private financial information, all by way of a U.S. domestic regulation. The power to have such a profound effect on an [*613] international landscape by way of domestic policy is concerning; what is equally concerning is how it was accomplished.

FATCA changed international financial privacy law and prompted the creation of over one hundred "treaties" within five years of its enactment. [n228] Arguably, FATCA was able to reach this feat only because many foreign nations simply did not have the choice to refuse to comply with FATCA's requirements due to the non-compliance financial penalties. [n229] Instead, they chose to sign the IGAs and concede to the exchange of private financial information, even in cases where it would otherwise violate their domestic law. [n230] While these nations signed these legally binding IGAs by choice, in many ways they are more representative of coercion by an economic bully than an agreement on principles among states. On a small scale, such agreements may not be troubling, but when over one hundred have been negotiated in the course of a few years, [n231] there is cause for concern. What were several agreements signed by a few foreign nations are now becoming a new global standard for financial privacy and the exchange of sensitive financial information. When principles become universally accepted by a cross-section of the world's nations, such principles can become rules of customary international law. [n232] Thus, what was the content of agreements between the United States and a few nations could eventually rise to a level comparable to customary international law.

FATCA's intrusion on financial privacy rising to the level of customary international law is not something that is likely to occur overnight. For FATCA to become customary international law, "it would be necessary to canvass all of the world's great legal systems for evidence of that principle, and also to reference manifestations of that principle in the actual domestic law of as many nations as possible." [n233] However, IGAs have already begun this canvassing process and, as the IGAs are enacted, they represent changes in the domestic laws of many nations. It is well established that international law often emerges from principles originally formed in domestic law. [n234] FATCA may [*614] have not reached this level of international law, but the mass signings of IGAs and the corresponding changes in domestic law demonstrate that it is on its way. Further support for this contention can be found in the reactions of nations who support the transparency and flow of financial information facilitated by FATCA. [n235]

Although many nations had little choice but to comply, there are some nations that appear to agree with what FATCA is trying to accomplish [n236] and perhaps this is why its potential to change the future of international law has been largely overlooked. The OECD, an organization with over thirty member countries, [n237] has announced plans for a global exchange of private information following in the footsteps of FATCA. [n238] While proponents of financial privacy may not be overjoyed, such broad support by OECD member countries and other nations [n239] suggests that FATCA's principles have reached at least a small-scale level of general acceptance. As this acceptance grows, so will FATCA's effect on international law.

VI. Why FATCA Stands Largely Unchallenged and What Should Be Done About It

If the limitations to financial privacy proposed by FATCA became accepted worldwide and there were no other issues with the Act, this would be congruent with the traditional formation of international law. [n240] As this Comment has demonstrated, however, this is not the case. With so many flaws, it seems surprising that FATCA has faced relatively little public opposition. Absent a few examples, such as Crawford v. United States [n241] and a case dismissed by the Federal Court of Canada, [n242] legal challenges to the Act have been few and far between. The final Part of this Comment posits that the main reason FATCA has relatively few challengers is because of the emphasis on [*615] fighting terrorism in twenty-first century politics. Even if combatting terrorism is a main contributor in the global acquiescence to FATCA, the question remains as to whether FATCA's contribution to such a cause is worth the pitfalls of the Act and the cost to financial privacy. [n243]

Political considerations played an instrumental role in FATCA's passage into law in 2010 [n244] and continue to foster the Act's growth and discourage opposition. The stated rationale for creating FATCA was a cause few politicians wishing to be re-elected could argue against: putting an end to tax evasion, money laundering, and financing terrorism. [n245] If this purpose alone was not reason enough to support the Act, FATCA became law as part of the Hiring Incentives to Restore Employment Act, which, as its name implies, was created to spur job growth following the recent recession. [n246] Politicians fighting against the HIRE Act, even for the purpose of taking a stand against FATCA, did so at the risk of being accused of stunting job growth and minimizing the harm of terrorism and tax evasion. Such grave accusations would be damaging to any politician's career and taking such a risk for a still largely unknown Act could hardly be considered worth it. [n247] Thus, in light of its purpose and the potential political costs of opposition, the HIRE Act was passed into law along with FATCA. [n248] While the Act may be costly and legally imposing, the financial information it provides to the government has enticed many nations to advocate for similar legislation to be established on a global scale. [n249]

FATCA's acceptance by many nations and the recent global efforts to promote the international exchange of financial information suggest that the greatest obstacle to challenging FATCA may be foreign governments themselves. In February 2014, the OECD released a global framework for the exchange of financial information based on FATCA, popularly referred to as [*616] the Common Reporting Standard (CRS). [n250] The CRS, which over seventy countries have pledged to adopt by 2017, [n251] makes economic sense because it will build on the information exchange systems established by FATCA IGAs. [n252] This should, in turn, reduce the costs of FATCA implementation and compliance. [n253] While cutting costs is an added benefit, it is only a part of the reason foreign nations are striving for a global version of FATCA. Like FATCA, the political rationale that foreign governments use to justify support for a uniform exchange of financial information is to promote national security by combatting terrorism, tax evasion, and other criminality. [n254]

The reasoning behind support for FATCA and the CRS seems sound: transparency should bring light to criminal schemes in the financial system by providing governments with global access to every individual's financial data. [n255] In light of the September 11th terrorist attacks in the United States, ISIS, and other ongoing threats of terrorism that have marred the early twenty-first century, the demand for national security is high. Yet this argument rests on the assumption that individuals are willing to give up their right to privacy in return for the resulting increase in national security. While there are some willing to make this sacrifice in the name of national security, there are plenty who are not, which is perhaps best evidenced by the 2013 National Security Agency (NSA) leaks. [n256]

The NSA scandal exposed the extent to which the U.S. government was spying on its citizens, irrespective of individualized suspicion or probable cause, [n257] and led many to conclude that the government overstepped its [*617] bounds. [n258] The U.S. government can justify its intrusion on privacy exposed by the NSA leaks in the same way it could justify FATCA's intrusion on financial privacy: "by balancing [the] intrusion on the individual's Fourth Amendment interests against [the] promotion of legitimate government interests." [n259] Courts may ultimately find that this argument is convincing and that the promotion of ensuring national security outweighs FATCA's intrusion on privacy, however such an issue should be addressed in court and not assumed by the government. If the mixed public response to the NSA security leaks is any indication, the appropriate balance between promoting national security and violating individual financial privacy is not black and white. [n260]

Whether foreign governments support the exchange of information accomplished by FATCA, have been bullied into compliance, or are simply unwilling to challenge the Act, it is up to the affected FFIs and individuals themselves to call attention to the Act's affront to privacy. This Comment has discussed how FATCA could be challenged in the United States - by raising challenges in court on constitutional grounds. [n261] In countries that have signed Model 2 IGAs or no IGAs at all, the threat of the IRS enforcing FATCA may seem too remote to warrant a legal challenge to the Act. [n262] However, in the vast majority of countries in which Model 1 IGAs have been signed, [n263] citizens of foreign nations should bring claims for violations of privacy where it violates longstanding law. [n264] If individual claims prove unsuccessful in domestic courts, the next step would be to challenge FATCA on an international stage. The European Court of Human Rights (ECHR), which, unlike the International Court of Justice, hears complaints from individuals, [n265] could be an ideal forum to make the case that FATCA is depriving U.S. [*618] persons worldwide of their right to financial privacy. [n266] Admittedly, in terms of human rights violations, FATCA's imposition on financial privacy may be low in priority compared to some human rights violations facing the ECHR. [n267] But even if the ECHR were to refuse to hear the FATCA cases, the resulting increase in international awareness for FATCA, the impending CRS, and what these regulations could mean for the future of financial privacy would be a success for FATCA critics worldwide.

As regulations like FATCA and the CRS become increasingly commonplace, the claim that there is a right to financial privacy will begin to dissipate and the vast majority of individuals will be unaware before it is too late. In the

United States, allowing FATCA to prosper without any constitutional challenges would set a precedent for violating privacy and give the executive branch the power to create IGAs almost indistinguishable from treaties. [n268] Although unsuccessful to date, [n269] challenging FATCA's legality in court is the best means by which U.S. citizens can demonstrate that legislators cannot assume that changes to the traditional understanding of the right to privacy and the power to make treaties are automatically justified for social and political ends. Similarly, citizens of foreign nations can use their domestic courts or pursue a case in an international court to take a stand against the imposition of U.S. domestic regulations. [n270] If the number of these challenges grow, FATCA and its impending counterparts will gain the widespread recognition necessary for individuals to take a critical look at the Act and how it is changing financial privacy, U.S. law, and international law.

Conclusion

The Foreign Account Tax Compliance Act is capable of eliminating financial privacy, a right protected by the U.S Constitution and the laws of foreign nations, for anyone eligible to pay U.S. taxes regardless of where they [*619] live. [n271] To facilitate international compliance, the U.S. Treasury Department has been negotiating IGAs that they likely do not have the constitutional standing to make. [n272] It is clear that the Act is riddled with issues. If FFIs can be forced to change the reporting of private financial information in spite of the laws of their home countries, what does this mean for the future of financial privacy around the world? If the United States or any other nation can compel global compliance for one of its regulations, does this change our understanding of the process by which legislation can rise to the level of international law? FATCA opens the door to a possible future where international law is established not necessarily because it is universally accepted but because other nations and their citizens are faced with financial threats that force compliance. If other superpower countries implement new regulations that rise to prominence in the same manner as FATCA, the framework of international law could undergo significant change in the years to come. There is a chance for FFIs and individuals to challenge FATCA in domestic courts, and perhaps even bring awareness of the Act's threat to financial privacy to the international stage in a forum such as the ECHR. However, until more significant strides are taken, FATCA will enjoy continued success in reshaping international and domestic law, in addition to pushing financial privacy into a right of the past.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionRight to Financial PrivacyDisclosureCriminal Law & ProcedureSearch & SeizureExpectation of PrivacyTax LawInternational TaxesGeneral Overview

FOOTNOTES:

n1. FATCA: An Introduction for Americans to the "Worst Law Nobody Has Ever Heard Of," Isaac Brock Soc'y (Nov. 4, 2014), http://isaacbrocksociety.ca/wp-content/uploads/2015/07/Introduction-to-FATCA-for- Canadians.pdf [hereinafter Isaac Brock Soc'y].

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n3. Foreign Account Tax Compliance Act, IRS (July 15, 2015), https://www.irs.gov/Businesses/ Corporations/Foreign-Account-Tax-Compliance-Act-FATCA.

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n6. See Joe Harpaz, FATCA Poised To Go Global, Forbes (Aug. 13, 2014 10:36 AM), http://www.forbes.com/sites/joeharpaz/2014/08/13/fatca-poised-to-go-global/.

n7. See Isaac Brock Soc'y, supra note 1.

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n11. See Isaac Brock Soc'y, supra note 1.

n12. See id.; Behrens, supra note 8.

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n16. Samuel H. Hofstadter & George Horowitz, The Right of Privacy 9 (1964). In some cases, the right can be traced back even further. See John T. Soma & Stephen D. Rynerson, Privacy Law in a Nutshell 8 (2008).

n17. Welch, supra note 13.

n18. U.S. Const. amend. IV.

n19. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

n20. Daniel J. Solove & Paul M. Schwartz, Privacy, Information, and Technology 11 (2d ed. 2008).

n21. Id. at 25-26.

n22. Id. at 36 (listing statutes reforming financial privacy, for instance, the Right to Financial Privacy Act of 1978).

n23. Welch, supra note 13.

n24. Virginia Boyd, Financial Privacy in the United States and the European Union: A Path to Translantic Regulatory Harmonization, 24 Berkeley J. Int'l L. 939 n.25 (2006).

n25. United States v. Miller, 425 U.S. 435, 442 (1976).

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n27. Id. at 443-44.

n28. See Joseph R. Jr. Mangan, Reasonable Expectations of Privacy in Bank Records: A Reappraisal of United States v. Miller and Bank Depositor Privacy Rights, 72 Crim. L. & Criminology 243, 243-44 (1981).

n29. See Solove & Schwartz, supra note 20, at 518.

n30. See 12 U.S.C. ß 3403 (2012).

n31. Mangan, supra note 28, at 280.

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n33. The Right to Financial Privacy Act, Elec. Privacy Info. Ctr. (2015), https://epic.org/privacy/rfpa/ (last visited Jan. 28, 2017).

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n36. Id. at 21, 23.

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n39. Boyd, supra note 24, at 957; see generally Council Directive 95/46, 1995 O.J. (L 281) (EC).

n40. Boyd, supra note 24, at 958-59.

n41. Id. at 965-66.

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n44. Solove & Schwartz, supra note 20, at 384.

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n47. Gramm-Leach-Bliley Act, 15 U.S.C. ß 6802 (2012).

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n195. An exception to using individualized suspicion is balancing the privacy interests threatened with government concern for the particular law enforcement issue. See City of Indianapolis, 531 U.S. at 32. Perhaps if a constitutional challenge to FATCA reached the Supreme Court, the Court would argue "the confidentiality of ... financial affairs is outweighed by the advantages to society in disclosure of the information." Burrows v. Superior Court of San Bernardino, 529 P.2d 590 593 (Cal. 1974). This reasoning runs parallel with the principle that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Delaware v. Prouse, 440 U.S. 648, 654 (1979). For a broad discussion of the Fourth Amendment's Balancing Test, see Morgan Cloud, Pragmatism, Positivism, and Principles in Fourth Amendment Theory, UCLA L. Rev. 200, 226-47 (1993). While FATCA does help prevent tax evasion, it also burden millions of law-abiding taxpayers and takes the sensitive financial information of the many U.S. persons affected. See Kim et al., supra note 193. Such an extensive burden on individual privacy probably does not outweigh the governmental interest of catching tax evaders, and at a minimum merits judicial review.

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