
December 2023

The Invisibility of the American Emigrant

Laura Snyder

Follow this and additional works at: <https://via.library.depaul.edu/jsj>



Part of the [Civil Rights and Discrimination Commons](#), [Law and Society Commons](#), [Legislation Commons](#), [Public Law and Legal Theory Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

Laura Snyder, *The Invisibility of the American Emigrant*, 17 DePaul J. for Soc. Just. (2024)
Available at: <https://via.library.depaul.edu/jsj/vol17/iss2/6>

This Article is brought to you for free and open access by the College of Law at Digital Commons@DePaul. It has been accepted for inclusion in DePaul Journal for Social Justice by an authorized editor of Digital Commons@DePaul. For more information, please contact digitalservices@depaul.edu.

THE INVISIBILITY OF THE AMERICAN EMIGRANT

LAURA SNYDER*

* University of Westminster Law School (Ph.D., 2018); TRIUM Executive MBA (2006); University of Paris 1–Panthéon-Sorbonne (DEA droit privé, 1996); University of Illinois College of Law (J.D., 1994). Member of the bars of New York, Illinois, and Paris. Co-founder of Stop Extraterritorial American Taxation (“SEAT”) and member of the Board of Directors of the Association of Americans Resident Overseas (“AARO”). Former international member of the Taxpayer Advocacy Panel (“TAP”). The author would like to thank the editorial team of *DePaul Journal for Social Justice* for their invaluable work.

ABSTRACT

Epistemic injustice is the dismissal of people as credible sources of information. It is, because of our presumptions about them, or because what they have to say clashes with how we would like to believe the world works. Epistemic injustice occurs when members of an in-group discredit information received from members of an out-group, despite any expertise the members of the out-group may have. The in-group fails to recognize the contributions to knowledge made by a member of the out-group, as well as the person's status as a "knower." In doing so, members of the in-group consistently fail to track certain truths and fail to investigate claims about the out-group. Further, in-group power figures emphasize stories of crime to make them seem more frequent and heinous. Members of the in-group take an assumption of evil or wrongdoing about a specific person and apply it inferentially to the entire out-group.

In the absence of epistemic justice, one group can be dominated by another. This is why epistemic justice is an essential condition for an equitable and inclusive society, and for the "political ideal of freedom."

Over the course of decades, American nationals living outside the United States (the out-group) have sought to communicate their knowledge of and experiences with the U.S. nationality-based tax system. They have produced a large body of knowledge which teaches that, because of the U.S. nationality-based tax system, persons of American nationality living outside the United States suffer multiple violations of constitutional and human rights.

Unfortunately, academics, industry leaders, and governmental representatives (the in-group) for the most part either belittle this knowledge or, more commonly, do not recognize its existence, let alone contend with its contents or investigate its claims. This is observed in law school course materials, in academic literature, in conferences and think tanks, in the U.S. Congress, and in the IRS.

Until the contributions to knowledge and the experiences of American nationals living outside the United States are more widely recognized, their truths are tracked, and their claims are investigated without pre-conceived judgements and in good faith, there can be no justice, nor any "political ideal of freedom." Today, because of the U.S. nationality-based tax system, no American is truly free to live outside the United States.

TABLE OF CONTENTS

I. INTRODUCTION	5
II. KNOWLEDGE MADE AVAILABLE	8
A. <i>Survey Reports</i>	8
B. <i>Scholarly Articles</i>	9
C. <i>Websites</i>	11
D. <i>Podcasts and Videos</i>	13
E. <i>Governmental Submissions</i>	14
F. <i>In-Person Advocacy</i>	15
G. <i>Litigation</i>	16
H. <i>Renunciations of Citizenship</i>	16
I. <i>Summary of Large Body of Knowledge</i>	18
III. KNOWLEDGE BELITTLED & IGNORED	24
A. <i>Law School Course Materials</i>	25
B. <i>Academic Literature</i>	28
C. <i>Conferences and Think Tanks</i>	32
D. <i>U.S. Congress</i>	34
E. <i>The IRS</i>	41
1. <i>Audits and Penalties</i>	42
2. <i>Taxpayer Services</i>	43
3. <i>Internal Organization</i>	44
4. <i>National Taxpayer Advocate (NTA)</i>	45
F. <i>Case Study</i>	47
IV. MANDATORY REPATRIATION TAX	54
A. <i>Adoption of the MRT</i>	56
B. <i>Moore v. United States</i>	64
V. CONCLUSION	69

*“If knowledge is power, ignorance is also power.”*¹

*“When someone is in a position of power over you, you often need them to have accurate beliefs that only your testimony can reliably supply.”*²

¹ Frances E.W. Harper, *Woman's Political Future*, Address before the World's Congress of Representative Women (May 20, 1893), available at VOICES OF DEMOCRACY, <https://voicesofdemocracy.umd.edu/harper-womens-political-future-speech-text/>.

² Richard Pettigrew, *What is the Characteristic Wrong of Testimonial Injustice?*, 3-4 (Dec. 20, 2023), <https://philarchive.org/archive/PETWIT-8>.

I. INTRODUCTION

In her groundbreaking work *Epistemic Injustice: Power and the Ethics of Knowing*,³ Miranda Fricker explains that there is a distinct form of injustice which can be referred to as “epistemic injustice.”⁴ “Epistemic” means “of or relating to knowledge or knowing.”⁵ “Epistemic injustice” occurs when someone is unfairly undermined or dismissed in their capacity as a knower.⁶

Epistemic injustice can take different forms. Fricker describes two: The first form is “testimonial injustice,” which occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker’s word.⁷ An example that Fricker commonly offers is that of police who do not believe a witness because the witness is black.⁸ The second form, called “hermeneutical injustice,” is more abstract: It occurs when there is a gap in “collective interpretive resources,” putting someone at a disadvantage when making sense of their social experience.⁹ An example that Fricker commonly offers for this form of epistemic injustice is a person who suffers sexual harassment in a culture that has not yet recognized this concept.¹⁰

In her discussion of epistemic “violence,”¹¹ Allie Bunch expands on Fricker’s analysis. Bunch contrasts the “in-group” – generally, a larger portion of a given population – with the “out-group” – those who are marginalized by the in-group.¹² For Bunch, epistemic violence occurs when members of the in-group discredit information received from members of the out-group, despite any expertise they may have. The in-group fails to recognize the contributions

³ MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* (2007). See generally SocialEqualityUCT, *Miranda Fricker - Epistemic Equality?*, YouTube (Sept. 10, 2014), <https://www.youtube.com/watch?v=u8zoN6GghXk&t=2127s>; Mark Jago (Attic Philosophy), *Social Philosophy: Epistemic Injustice*, YouTube (March 22, 2022), https://www.youtube.com/watch?v=dFOxRomd_RQ&list=PL08WIJ7NkJjBp_o-fT0f4CifxbQHGI-C3&index=10.

⁴ FRICKER, *supra* note 3, at 1.

⁵ *Epistemic*, Merriam-Webster (last visited Jan. 25, 2024), <https://www.merriam-webster.com/dictionary/epistemic>.

⁶ *Miranda Fricker's Epistemic Ethics: Shaping the Discourse on Credibility and Inequality*, TOMORROW BIO (Aug. 16, 2023), <https://www.tomorrow.bio/post/miranda-fricker-s-epistemic-ethics-shaping-the-discourse-on-credibility-and-inequality-2023-08-4958459101-philosophy>.

⁷ FRICKER, *supra* note 3, at 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Allie J. Bunch, *Epistemic Violence in the Process of Othering: Real-World Applications and Moving Forward*, 1 SCHOL. UNDERGRAD. RSCH. J. CLARK 11 (2015), <https://commons.clarku.edu/cgi/viewcontent.cgi?article=1022&context=surj>.

¹² *Id.* at 11-13.

to knowledge made by a member of the out-group, as well as the person's status as a "knower."¹³

Epistemic violence also occurs when resources are refused to the out-group.¹⁴ This includes the lack of proper education about the out-group: it is either inaccurate or absent entirely.¹⁵ The resulting state of "reliable ignorance" ensures, Bunch explains, that "members of the in-group will consistently fail to track certain truths and to investigate claims about the out-group."¹⁶ Further, "in-group power figures will emphasize stories of out-group crime to make them seem more frequent and heinous."¹⁷ Bunch continues, "[there is a] cognitive process in which the evidence found in the propagated stories is processed into a belief that a person is inherently evil. The cognitive error occurs when one takes the assumption of evil about a specific person, then applies it inferentially to the entire group."¹⁸

Spiel et al., also using the term "violence," offers this summary:

Epistemic violence is violence against one's status as a *knower*; one's role as a creator and communicator of knowledge. It is the dismissal of people as credible sources of information, because of our presumptions about them, or how their communicative means (or what they have to communicate) clashes with how we would like to believe the world works.¹⁹

Fricker continues:

Testimonial injustice not only blocks the flow of knowledge, it also blocks the flow of evidence, doubts, critical ideas and other epistemic inputs that are conducive to knowledge. [...T]estimonial injustice [is] not only bad for the person whose word is prejudicially downgraded; it is epistemically bad for the hearer, and for the epistemic system quite generally. An epistemic system characterized by testimonial injustice is a system in which ignorance will repeatedly prevail over potentially shared knowledge, despite the speakers' best efforts. When a speaker knows something the hearer doesn't (and where the level of credibility

¹³ *Id.* at 12.

¹⁴ *Id.* at 12-13.

¹⁵ *Id.* at 13.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Katta Spiel et al., "I Am Just Terrified of My Future" – *Epistemic Violence in Disability Related Technology Research*, CHI EA '20: Extended Abstracts of the 2020 CHI Conference on Human Factors in Computing Systems, at 3 (Apr. 2020), https://ironholds.org/resources/papers/epistemic_violence.pdf.

deficit is such that the hearer does not accept what she is told) the hearer's ignorance is conserved.²⁰

The concept of epistemic injustice or violence (also known as epistemic oppression²¹ and epistemic exclusion²²) has profound implications for how we understand and navigate knowledge in society. The concept forces us to confront the ways in which biases and prejudices can corrupt our judgments of credibility and undermine the voices of those who may have important insights to offer.²³ By casting light on these injustices, Fricker and others encourage us to reevaluate our own epistemic practices and strive for a more equitable and inclusive approach to knowledge.²⁴ The result can only be a more equitable and inclusive society.

Ultimately, Fricker explains, in the absence of epistemic justice, one group can be dominated by another.²⁵ This is why epistemic justice is an essential condition for the “political ideal of freedom.”²⁶

The purpose of this article is to expose the epistemic injustice that occurs today with respect to persons of American nationality living outside the United States and the U.S. nationality-based tax system. Applying the framework offered by Bunch:²⁷ (II) persons of American nationality living outside the United States – the “out-group” – have made readily available a large body of knowledge demonstrating the extensive and intractable problems of the system and the harm suffered as a result; however, (III) most academics, industry leaders, and governmental representatives – the “in-group” – consistently belittle and ignore such knowledge while emphasizing stories of wrongdoing. In doing so, the in-group renders American nationals living outside the United States invisible, save for criminalizing them. The in-group's (in)actions serve to further entrench the U.S. nationality-based tax system, its intractable problems, and the harm it causes. The ultimate result is the loss of freedom for *all* Americans, not just those living outside the United States.

²⁰ Miranda Fricker, *Epistemic Injustice and the Preservation of Ignorance*, in THE EPISTEMIC DIMENSIONS OF IGNORANCE 3-4 (Rik Peels & Martijn Blaauw, eds., 2016), <https://eprints.whiterose.ac.uk/110048/3/EI%20%2526%20Ignorance.pdf>.

²¹ See, e.g., Taylor Rogers, *Resisting Epistemic Oppression*, 14 HUMANA MENTE 175 (2021), <https://www.humanamente.eu/index.php/HM/article/view/353/299>; Kristie Dotson, *Conceptualizing Epistemic Oppression*, 28 SOC. EPISTEMOLOGY 115 (2014), <https://doi.org/10.1080/02691728.2013.782585>.

²² See, e.g., Dotson, *supra* note 21, at 1, 2, 5, 9; Roger, *supra* note 21, at 176.

²³ Miranda Fricker's *Epistemic Ethics*, *supra* note 6.

²⁴ *Id.*

²⁵ See generally Miranda Fricker, *Epistemic Justice as a Condition of Political Freedom?*, 190 SYNTHÈSE 1317 (2013).

²⁶ *Id.*

²⁷ See *supra* notes 11-18 and accompanying text.

This article finishes with (IV) an examination of epistemic injustice in the specific context of the Mandatory Repatriation Tax (MRT) and a case currently before the U.S. Supreme Court, *Moore v. United States*.

II. KNOWLEDGE MADE AVAILABLE

Over the course of decades, American nationals living outside the United States have sought to communicate their knowledge of and experiences with the U.S. nationality-based tax system. Their communications have taken a variety of forms, both direct and indirect. Some of the most significant direct communications include: (A) survey reports; (B) scholarly articles; (C) websites; (D) podcasts and videos; (E) submissions to legislative and other governmental bodies; (F) in-person advocacy in Washington, DC; and (G) litigation. An unmistakable indirect communication is: (H) the dramatic increase in the number of Americans renouncing U.S. citizenship.

An exhaustive description of each communicative avenue would be impossible. The discussion below merely touches on them and provides information for further reference. Part II concludes with a highly condensed summary of the most salient aspects of the large body of knowledge and experiences that persons of American nationality living outside the United States have sought to communicate over the course of decades.

A. Survey Reports

Many surveys of American nationals living outside the United States have been conducted, each seeking to better understand their experiences with the U.S. nationality-based tax system. The reports on these surveys include:

- By Democrats Abroad: *Once Uncomfortable, Now Suffocating: A 2022 Update on Tax and Financial Access Issues of Americans Abroad* (2022);²⁸
- By Stop Extraterritorial American Taxation (SEAT): “*Being an American Outside of America is No Longer Safe.*” *Survey Report: Effects of the Extraterritorial Application of U.S. Taxation and Banking Policies* (2021);²⁹

²⁸ Democrats Abroad Taxation Task Force, *Once Uncomfortable, Now Suffocating: A 2022 Update on Tax and Financial Access Issues of Americans Abroad*, DEMOCRATS ABROAD (Nov. 30, 2022),

https://assets.nationbuilder.com/democratsabroad/pages/31033/attachments/original/1669430637/Democrats_Abroad_2022_Update_on_Tax_and_Financial_Access_Issues_of_Americans_Abroad.pdf?1669430637.

²⁹ Laura Snyder, “*Being an American Outside of America is No Longer Safe.*” *Survey Report: Effects of the Extraterritorial Application of U.S. Taxation and Banking Policies* –

- By the Association of Americans Resident Overseas (AARO) (2021);³⁰
- By Amanda Klekowski von Koppenfels: *The Disinterested State: Negative Diasporic Policy as an Expression of State Inclusion and National Exclusion* (2019);³¹
- By Laura Snyder: *I Feel Threatened by My Very Identity: Report on U.S. Taxation and FATCA Survey* (2019);³² and
- Another by Democrats Abroad: *Tax Filing from Abroad: Research on Non-Resident Americans and U.S. Taxation* (2019).³³

A paper summarizing the findings of the first three surveys is available on the SEAT website.³⁴

B. Scholarly Articles

American nationals living outside the United States have published many scholarly articles examining the constitutional, legal, regulatory, human rights, and moral issues raised by the U.S. nationality-based tax system. Examples include articles:

- Describing how the U.S. tax code discriminates against and punitively taxes non-U.S. investments and business structures;³⁵

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

³⁰ AARO 2020 Advocacy Survey, ASS'N AM. RESIDENT OVERSEAS (Feb. 24, 2021), <https://www.aaro.org/issues/2020-advocacy-survey>.

³¹ Amanda Klekowski von Koppenfels, *The Disinterested State: Negative Diasporic Policy as an Expression of State Inclusion and National Exclusion*, 45 J. ETHNIC & MIGRATION STUD. 595 (2019), <https://doi.org/10.1080/1369183X.2017.1409173>.

³² John Richardson, *Survey Dispels Myth of Wealthy Americans Abroad and Why Middle Class Americans Abroad are Forced to Renounce U.S. Citizenship*, TAX CONNECTIONS (Nov. 6, 2019), <https://www.taxconnections.com/taxblog/survey-dispels-myth-of-wealthy-americans-abroad-and-why-middle-class-americans-abroad-are-forced-to-renounce-u-s-citizenship/>.

³³ Carmelan Polce, *Tax Filing from Abroad: Research on Non Resident Americans and U.S. Taxation*, DEMOCRATS ABROAD, (Mar. 1, 2019), https://www.democratsabroad.org/carmelan/tax_filing_from_abroad_2019_research_on_non-resident_americans_and_u_s_taxation.

³⁴ Laura Snyder, *Extraterritorial Taxation #2: How It Is Experienced*, SEAT Working Paper Series #2023/2 (June 5, 2023), <https://papers.ssm.com/sol3/papers.cfm?abstract-id=4465003>.

³⁵ Karen Alpert, *Investing with One Hand Tied Behind Your Back—An Australian Perspective on United States Tax Rules for Non-Resident Citizens*, UNIV. N.S.W. 1, 1 (Jan. 8, 2018), <https://www.business.unsw.edu.au/About-Site/Schools-Site/Taxation-Business-Law-Site/Documents/20-Alpert-ATTA2018.pdf>.

- Explaining the multiple and complex issues that arise when a person has more than one tax residence at a time;³⁶
- Explaining how prejudice towards emigrants from the United States has shaped the country’s nationality-based tax policies since the 1860s;³⁷
- Describing how the U.S. Department of Treasury has both the legal authority and the moral imperative to take regulatory action to alleviate the effects of the U.S. nationality-based tax system;³⁸
- Examining in detail the relationship between U.S. taxation and banking policies and the stigmatization of American nationals living outside the United States;³⁹
- Exposing the IRS’s failure to administer the U.S. nationality-based tax system and, as a result, its additional failure to respect the Taxpayer Bill of Rights;⁴⁰
- Demonstrating that while *Cook v. Tait* may hold that the federal government has the power to tax American nationals living outside the United States based upon their worldwide income, *Cook* does not allow the government to tax them in manners that violate their constitutional and human rights;⁴¹
- Summarizing the current situation with respect to U.S. nationality-based tax system and explain why, so far, efforts to change the policies have failed;⁴² and

³⁶ Karen Alpert et al., *The Implications of Tax Residence for Human Rights*, TAX RESIDENT & HUM. RTS., Feb. 10, 2020, at 2-10 (prepared for the “Accounting & Finance Association of Australia and New Zealand” (AFAANZ) 2020 Annual Conference).

³⁷ Laura Snyder, *The Criminalization of the American Emigrant*, 167 TAX NOTES FED. 2279, 2279-80 (June 29, 2020).

³⁸ Richardson et al., *A Simple Regulatory Fix for Citizenship Taxation*, 169 TAX NOTES FED. 275, 275 (2020).

³⁹ Laura Snyder, *Taxing the American Emigrant*, 74 TAX LAW 299, 313-26 (2021).

⁴⁰ Laura Snyder et al., *Mission Impossible: Extraterritorial Taxation and the IRS*, 170 TAX NOTES FED. 1827, 1843-53 (2021).

⁴¹ Laura Snyder, *The Myths and Truths of Extraterritorial Taxation*, 32 CORNELL J. L. PUB. POL’Y 185 (2022).

⁴² Laura Snyder, *The Unacknowledged Realities of Extraterritorial Taxation*, 47 S. ILL. UNIV. L. J. 243 (2023).

- Challenging the rationales most commonly offered to justify the U.S. nationality-based tax system⁴³ and confronting the theory of the rationales with the reality of the system in place today.⁴⁴

Finally, SEAT has made available a series of working papers.⁴⁵ The first articles in the series draw upon the trilogy of papers: *The Unacknowledged Realities of Extraterritorial Taxation*,⁴⁶ *Can Extraterritorial Taxation Be Rationalized?*,⁴⁷ and *The Myths and Truths of Extraterritorial Taxation*.⁴⁸

C. Websites

Multiple websites exist where American nationals living outside the United States discuss their knowledge of and experiences with the U.S. nationality-based tax system. The websites include:

- *Stop Extraterritorial American Taxation* (SEAT) (<http://seatnow.org/>): The purpose of SEAT is to provide an educational platform for academics, governmental representatives, and others about the effects of the U.S. nationality-based tax system.⁴⁹ To this end, the website is a portal to a wealth of information, via both its blog⁵⁰ and its links to a number of scholarly articles,⁵¹ including those listed above.
- *Citizenship Solutions* (citizenshipsolutions.ca/): Canada-based John Richardson began this website in 2013.⁵² Since then, he has blogged extensively and in considerable detail on a wide range of issues relating to the U.S. nationality-based tax system.⁵³

⁴³ Laura Snyder, *Can Extraterritorial Taxation Be Rationalized?*, 76 TAX LAW. 535, 538-77 (2023).

⁴⁴ *Id.* at 578-601.

⁴⁵ *SEAT Working Paper Series*, STOP EXTRATERR. AM. TAX'N, <https://seatnow.org/seat-working-paper-series/>.

⁴⁶ Snyder, *Unacknowledged Realities*, *supra* note 42.

⁴⁷ Snyder, *Can Extraterritorial Taxation Be Rationalized*, *supra* note 43.

⁴⁸ Snyder, *Myths & Truths*, *supra* note 41.

⁴⁹ *About SEAT: Education to Facilitate Change*, STOP EXTRATERR. AM. TAX'N, <https://seatnow.org/about-seat/>.

⁵⁰ *What's New*, STOP EXTRATERR. AM. TAX'N, <https://seatnow.org/whats-new/>.

⁵¹ *SEAT's Publications*, STOP EXTRATERR. AM. TAX'N, <https://seatnow.org/>.

⁵² The first post on the website is John Richardson, *What You Should Consider Before Contacting a Lawyer*, CITIZENSHIP SOLS. (July 10, 2013), <https://citizenshipsolutions.ca/2013/07/10/what-you-should-consider-before-contacting-a-lawyer/#more-84589>.

⁵³ See, e.g., John Richardson, *TCJA and Expanding the Definition of and Number of 'Controlled Foreign Corporations' Subject to Subpart F*, CITIZENSHIP SOLS. (Feb. 25, 2018), <http://citizenshipsolutions.ca/2018/02/25/tcja-and-expanding-the-definition-of-and-number-of-controlled-foreign-corporations-subject-to-subpart-f/>; John Richardson, *The S. 911 Foreign Earned Income Exclusion: Its Origins, Journey, Opportunities and Limitations*, CITIZENSHIP

- *Association of Americans Resident Overseas* (AARO) (www.aaro.org/): A principal purpose of AARO's website is to keep the association's members informed regarding issues that are relevant to them as American nationals living outside the United States. Examples include discussions of the significance of the U.S. Supreme Court decision *Bittner v. United States*,⁵⁴ and the difficulties American nationals living outside the United States face in saving for retirement.⁵⁵ The website provides links to a variety of information about nationality-based taxation,⁵⁶ FATCA,⁵⁷ and FBAR.⁵⁸
- *Democrats Abroad Taxation Task Force* (<https://www.democratsabroad.org/taxation>): This website includes a wiki⁵⁹ and a blog⁶⁰ offering information about the problems American nationals living outside the United States experience because of the U.S. nationality-based tax system and the Task Force's policy recommendations to address the problems.⁶¹
- *Let's Fix the Australia/US Tax Treaty!* (<http://fixthetaxtreaty.org/>): This website was created in 2016 by Dr. Karen Alpert.⁶² Its purpose is to educate about the inadequacies of the tax treaty between Australia and

SOLS. (May 12, 2020), <http://citizenshipsolutions.ca/2020/05/12/the-s-911-foreign-earned-income-exclusion-its-origins-journey-opportunities-and-limitations/>; John Richardson, *Post 36 – The Little Red @USTRansitionTax Book – About the 965 Mandatory Repatriation Tax*, CITIZENSHIP SOLS. (June 26, 2023), <https://citizenshipsolutions.ca/2023/06/26/post-36-the-little-red-ustransitiontax-book-about-the-965-mandatory-repatriation-tax/>.

⁵⁴ Fred Einbinder, *The Supreme Court's Favorable Decision in the Bittner FBAR Case*, ASS'N OF AM. RESIDENT OVERSEAS (Mar. 21, 2023), <https://www.aaro.org/issues/fbar/supreme-courts-favorable-decision-in-bittner-fbar-case>.

⁵⁵ Letter from Doris L. Speer, President, AARO, to Richard Phillips, Pensions and Tax Policy Director, United States Senate Committee on Health, Education, Labor and Pensions (Sept. 6, 2023), <https://www.aaro.org/images/Banking/Letter-to-Retirement-Legislation-HELP-Committee-06SEPT23.pdf>.

⁵⁶ *Taxation*, ASS'N OF AM. RESIDENT OVERSEAS, <https://www.aaro.org/issues/taxation-issues>.

⁵⁷ *FATCA*, ASS'N OF AM. RESIDENT OVERSEAS, <https://www.aaro.org/issues/fatca>.

⁵⁸ *FBAR and Other Financial Reporting Cases*, ASS'N OF AM. RESIDENT OVERSEAS, <https://www.aaro.org/issues/fbar/fbar-and-other-financial-reporting-cases>.

⁵⁹ *Taxation Advocacy and Activism*, DEMOCRATS ABROAD, <https://democratsabroad.atlassian.net/wiki/spaces/TTF/overview>.

⁶⁰ *News*, DEMOCRATS ABROAD, https://www.democratsabroad.org/taxation_news.

⁶¹ Democrats Abroad, *How to Fix 23 Tax Problems for Americans Abroad with Three Solutions* (2020), https://assets.nationbuilder.com/democratsabroad/pages/28939/attachments/original/1669431900/00/23_Problems_3_Solutions_2020.pdf?1669431900.

⁶² Karen Alpert, *Welcome, LET'S FIX THE AUSTRALIA/US TAX TREATY!* (Aug. 26, 2016), <https://fixthetaxtreaty.org/2016/08/26/welcome/>.

the United States and the inequities experienced by individuals simultaneously subject to both U.S. and Australian tax rules.⁶³

D. Podcasts and Videos

There are several sources of information about the U.S. nationality-based tax system offered in audio and/or video format. These sources include:

- *PREP Podcaster* – “*Success Favours The PREPared Mind:*” Via the Podbean hosting platform, John Richardson⁶⁴ offers more than 200 podcasts in which he discusses with a variety of persons the multitude of issues raised by the U.S. nationality-based tax system.⁶⁵
- *IRSMedic*: Hosted by Anthony Parent, this YouTube channel is not focused exclusively on nationality-based taxation. Nevertheless, it offers many videos on the topic. They include: a discussion of the results of one of the surveys mentioned above,⁶⁶ explaining the difference between U.S. taxation and FATCA,⁶⁷ the significance of the U.S. tax code taxing individuals without defining the term;⁶⁸ why it is difficult for American nationals living outside the United States to invest in mutual funds;⁶⁹ and an interview with an African American living outside the United States who is contemplating renouncing U.S. citizenship.⁷⁰
- *Other creators*: At least two popular online content creators who are American nationals living outside the United States have posted videos

⁶³ *Id.*

⁶⁴ See *supra* notes 52-53 and accompanying text.

⁶⁵ Prep Podcaster, PODBEAN, <https://prep.podbean.com/>.

⁶⁶ IRS Medic, *Share This US Expat Tax Survey Far and Wide!* YOUTUBE (Mar. 24, 2020), <https://www.youtube.com/watch?v=v0RIPUCihEA> (discussing the survey mentioned *supra*, note 32 and accompanying text).

⁶⁷ IRS Medic, *What is the Difference Between FATCA and Citizenship Based Taxation (CBT)?*, YOUTUBE (Feb. 7, 2023), <https://www.youtube.com/watch?v=qGIE1MUxEqw>.

⁶⁸ IRS Medic, *The US Individual Income Tax Does Not Define "Individual,"* YOUTUBE (July 26, 2022), <https://www.youtube.com/watch?v=wY3OQzuqvVI>

⁶⁹ IRS Medic, *Demystifying PFICs: A Beginner's Guide to US Taxation of Passive Foreign Investment Companies*, YOUTUBE (Dec. 19, 2023), <https://www.youtube.com/watch?v=V2d0IJGs4Nw>.

⁷⁰ IRS Medic, *Will This Black American Woman Be Forced To Renounce US Citizenship?*, YOUTUBE (Dec. 22, 2020), <https://www.youtube.com/watch?v=UaTILxfPs0M>.

discussing their experiences with the U.S. nationality-based tax system. They include Evan Edinger⁷¹ and Amanda Rollins.⁷²

E. Governmental Submissions

American nationals living outside the United States have made submissions to legislative and other governmental bodies as early as 1979. In that year, the association American Citizens Abroad (ACA) submitted to President Jimmy Carter a detailed report on the U.S. laws and regulations that discriminate against American nationals living outside the United States.⁷³ The report, which was contained in a 1980 Presidential Report to the Committee on Foreign Relations, described many problems created by the U.S. nationality-based tax system, including IRS service failures, that remain a problem today.⁷⁴

A plethora of submissions have followed. Their authors include individuals⁷⁵ as well as organizations. Those submitted by organizations are

⁷¹ Evan Edinger, *What It's Like as an American Abroad with Taxes: Double Taxation*, YOUTUBE (Aug. 2, 2020), <https://www.youtube.com/watch?v=4l2RDCx2YnA>; Evan Edinger, *Would I Ever Renounce My US Citizenship?*, YOUTUBE (Oct. 15, 2020), <https://www.youtube.com/watch?v=Hjo7quY0NZk>.

⁷² Amanda Rollins (American Fille), *The Financial Limitations of Being an American [sic] Abroad*, TIKTOK (Sept. 29, 2023), https://www.tiktok.com/@americanfille/video/7284181638030855457?_r=1&_t=8gMMSeDuNyi. See also Ron Placone (interviewing Artsy Marxist), *Leaving the US on a Budget - Yes It Is Possible*, YOUTUBE, at 14:00-15:05 (Nov. 15, 2023), <https://www.youtube.com/watch?v=MOfr-NaesIM>.

⁷³ *Report Submitted by American Citizens Abroad: "Laws and Regulations of the United States That Discriminate Against American Citizens Living Abroad, or That Make Overseas American Noncompetitive in the Markets of the World,"* contained as Appendix B to STAFF OF S. COMM. ON FOREIGN RELATIONS, 96TH CONG., U.S. LAW AFFECTING AMERICANS LIVING AND WORKING ABROAD 89-93 (Comm. Print 1980).

⁷⁴ See *id.* The continuing IRS service failures are described in detail in Snyder et al., *Mission Impossible*, *supra* note 40.

⁷⁵ See, e.g. *Tax Reform*: Hearing Before Comm. On Ways & Means, 109th Cong. 175, 180 (2005), <https://www.govinfo.gov/content/pkg/CHRG-109hrg24645/html/CHRG-109hrg24645.htm>; *The Need for Comprehensive Tax Reform to Help American Companies Compete in the Global Market and Create Jobs for American Workers*: Hearing Before Comm. On Ways & Means, 112th Cong. 133-141 (2011), <https://waysandmeans.house.gov/wp-content/uploads/2017/07/20110512FC.pdf>; *Perspectives on the Need for Tax Reform*: Hearing Before Subcomm. on Tax Policy, 114th Cong. 114-7 (2016), <https://www.govinfo.gov/content/pkg/CHRG-114hrg22371/pdf/CHRG-114hrg22371.pdf>; *International Tax Reform*: Hearing Before Sen. Comm. Fin., 115th Cong. 98-99 (2017), <https://www.finance.senate.gov/imo/media/doc/32785.pdf>; *Creating Opportunity Through a Fairer Tax System*: Hearing Before Subcomm. on Fiscal Resp. and Econ. Growth, 117th Cong. 97-102, 103-8, 114-20, 128-41, 146-7, 152-54 (2021), <https://www.finance.senate.gov/imo/media/doc/486681.pdf>; *Closing the Tax Gap*: Hearing Before Subcomm. on Taxation and IRS Oversight, 117th Cong. 122-29, 132-35, 141-45, 147-56 (2021), <https://www.finance.senate.gov/imo/media/doc/49445.pdf>.

listed on their respective websites – submissions by AARO,⁷⁶ by SEAT,⁷⁷ and by Democrats Abroad,⁷⁸ to name just three organizations. The submissions describe problems experienced by overseas Americans because of U.S. taxation and make policy proposals intended to address the problems.

In spring 2023, AARO, together with SEAT, sent to each member of Congress a letter explaining the problems with the U.S. nationality-based tax system and containing first-hand accounts by that member’s constituents of how they experience the system.⁷⁹

The submissions are consistently ignored. The recipients of the submissions (usually but not always a congressional committee) do not follow-up on the submissions or take any other action in connection with them. With one exception (discussed immediately below), the submissions are not even acknowledged, beyond being included as annexes to the relevant congressional report.⁸⁰

The exception was a 2015 report by the Senate Committee on Finance’s International Tax Reform Working Group. It observed that of the 347 submissions it received, nearly three-quarters dealt with the international taxation of individuals, mainly focusing on citizenship-based taxation, FATCA, and FBAR.⁸¹ The report explained that while the Working Group did not have the time to “produce a comprehensive plan to overhaul the taxation of individual Americans living overseas,” the Working Group urges “the Chairman and Ranking Member to carefully consider the concerns articulated in the submissions moving forward.”⁸² There is no record of any follow-up to that recommendation.

F. In-Person Advocacy

Two organizations representing American nationals living outside the United States, AARO and Democrats Abroad, make regular trips to Washington D.C. to speak directly with members of Congress, congressional

⁷⁶ *Advocacy Submissions*, ASS’N OF AM. RESIDENT OVERSEAS, <https://www.aaro.org/advocacy/aaro-advocacy-submissions>.

⁷⁷ *SEAT Submissions*, STOP EXTRATERR. AM. TAX’N, <https://seatnow.org/seat-home/seat-submissions/>.

⁷⁸ *Library*, DEMOCRATS ABROAD, <https://www.democratsabroad.org/taxlibrary>.

⁷⁹ *AARO’s Dear 535 Campaign*, ASS’N OF AM. RESIDENT OVERSEAS (Apr. 24, 2023), <https://aaro.org/advocacy/dear-535-campaign>; *Launch with AARO of Dear 535 Campaign*, STOP EXTRATERR. AM. TAX’N (Apr. 27, 2023), <https://seatnow.org/2023/04/27/launch-with-aaro-of-dear-535-campaign/>.

⁸⁰ *See, e.g.*, sources cited *supra* note 75.

⁸¹ STAFF OF S. FIN. COMM., INT’L TAX REFORM WORKING GRP., FINAL REPORT 80-81 (Comm. Print July 7, 2015), <https://www.finance.senate.gov/imo/media/doc/The%20International%20Tax%20Bipartisan%20Tax%20Working%20Group%20Report.pdf>.

⁸² *Id.*

staffers, and representatives of other governmental agencies, such as the IRS, the Taxpayer Advocate, and the Department of State. Their respective trips take place at least once a year, if not more frequently. Accounts of their trips are available online.⁸³

G. Litigation

The Association of Accidental Americans (AAA) has instigated numerous lawsuits and complaints both in the United States and in Europe attacking various aspects of the U.S. nationality-based tax system. They include: (i) in U.S. District Court, against the United States Department of State, alleging that the fee to renounce U.S. citizenship violates both the U.S. Constitution and international law,⁸⁴ and (ii) before the European Commission, against France, alleging that the enforcement of FATCA violates the European Union's (EU) General Data Protection Regulation (GDPR).⁸⁵ AAA has also brought actions in individual member states of the EU alleging that the member state's enforcement of FATCA violates the GDPR.⁸⁶ In June 2023, the litigation chamber of Belgium's Data Protection Authority issued a decision agreeing with AAA.⁸⁷

H. Renunciations of Citizenship

The forms of communication described above are all what can be described as direct, in that the information imparted is expressed with words, be they written or oral. American nationals living outside the United States

⁸³ See, e.g., Rebecca Lammers, *June 2023 Congressional Tax Door Knock Update*, DEMOCRATS ABROAD (July 5, 2023), https://www.democratsabroad.org/june_2023_congressional_tax_door_knock_update; *Overseas Americans Week, May 2023*, ASS'N OF AM. RESIDENT OVERSEAS, <https://www.aaro.org/events/event-reports/overseas-americans-week-2023>. AARO often conducts its "Overseas Americans Week" jointly with a representative of the Federation of American Women's Clubs Overseas (FAWCO). See *Overseas Americans Week*, FAWCO (June 11, 2019), <https://www.fawco.org/us-issues/us-issues-news/overseas-americans-week>.

⁸⁴ See *Accidental Americans Take the U.S. State Department to Court*, ASSOCIATION DES AMÉRICAINS ACCIDENTELS (last visited Jan. 25, 2024), <https://www.americains-accidentels.fr/page/1503405-lawsuit-against-state-department>.

⁸⁵ The complaint was filed before the Regulation (EU) 2016/679. See *Plainte Contre la France Déposée Auprès de la Commission Européenne*, ASSOCIATION DES AMERICAINS ACCIDENTELS (last visited Jan. 25, 2024), <https://www.americains-accidentels.fr/page/2238232-plainte-contre-la-france>.

⁸⁶ See *Accidental Americans File European FATCA Complaints*, THE AMERICAN (May 29, 2023), <https://www.theamerican.co.uk/pr/ne-Accidental-Americans-File-FATCA-Complaints>.

⁸⁷ See, e.g., Robert Goulder, *Ooh-Là-Là: Did Belgium Just Cancel FATCA?*, 110 TAX NOTES INT'L 1419 (June 5, 2023), <https://www.taxnotes.com/featured-analysis/ooh-la-la-did-belgium-just-cancel-fatca/2023/06/02/7gtlb>. But see Elodie Lamer, *Appeals Court Sends FATCA Case Back to Belgian Authority*, 182 TAX NOTES FED. 199 (Jan. 1, 2024), <https://www.taxnotes.com/fatca-expert/fatca/appeals-court-sends-fatca-case-back-belgian-authority/2023/12/21/7hpxq>.

also communicate their knowledge and experiences indirectly, through actions. One important form that this takes is the dramatic increase in the number of Americans renouncing U.S. citizenship.⁸⁸

There exists a multitude of worthwhile commentary on the reasons for the increase in renunciations,⁸⁹ but it is not necessary to read it to receive this communication loud and clear: *Something is wrong*. Americans are taught from childhood that the United States is the greatest country in the world⁹⁰ and that they are privileged to be Americans.⁹¹ They grew up reciting the pledge of allegiance⁹² and singing the national anthem.⁹³ By renouncing U.S. citizenship in relatively large numbers,⁹⁴ American nationals living outside the United States are communicating that something has happened to radically change how they feel about the United States,⁹⁵ causing them to give up on what they

⁸⁸ See, e.g., Snyder, *Myths & Truths*, *supra* note 41, at 199-203; Andreas Kluth, *U.S. Expats Can't Renounce Their Citizenship Fast Enough*, WASH. POST (Sept. 1, 2020), https://www.washingtonpost.com/business/us-expats-cant-renounce-their-citizenship-fast-enough/2020/08/31/19185870-eb60-11ea-bd08-1b10132b458f_story.html; Robert W. Wood, *Renouncing American Citizenship Hits All-Time Record*, FORBES (Feb. 7, 2021), <https://www.forbes.com/sites/robertwood/2021/02/07/renouncing-american-citizenship-hits-all-time-record/?sh=51ffb9045127>.

⁸⁹ See, e.g., John Richardson, *Americans Abroad Aren't Denouncing Because They Want To. They Are Renouncing Because They Feel They Have To*, CITIZENSHIP SOLS. (Nov. 14, 2023), <https://citizenshipsolutions.ca/2023/11/14/americans-abroad-arent-denouncing-because-they-want-to-they-are-renouncing-because-they-feel-they-have-to/>; Kluth, *supra* note 88.

⁹⁰ See, e.g., Mark Ashwill, *US Nationalism – The Elephant in the Room*, UNIVERSITY WORLD NEWS (Mar. 18, 2016), <https://www.universityworldnews.com/post.php?story=20160317005217625>; Minxin Pei, *The Paradoxes of American Nationalism*, FOREIGN POL'Y (May-June 2003), https://carnegieendowment.org/pdf/files/pei_paradoxes_of_american_nationalism.pdf.

⁹¹ Cordell Shull, *Freedom in the Eyes of Troops*, HERITAGE ACADEMY'S INDEPENDENCE (Fall, 2017) at 13, <https://hamesa.com/wp-content/uploads/sites/17/2016/12/Independence-Fall-2017.pdf>; Elise Westhoff, *Liberty, Equality, and Opportunity: Why America is Still Worth Fighting For*, PHILANTHROPY ROUNDTABLE (June 25, 2021), <https://www.philanthropyroundtable.org/liberty-equality-and-opportunity-why-america-is-still-worth-fighting-for/>.

⁹² Simone Cazares, *A History of the Pledge of Allegiance*, MPR NEWS (July 9, 2019), <https://www.mprnews.org/story/2019/07/09/pledge-of-allegiance-history>.

⁹³ Jane Hampton Cook, *5 Reasons We Stand for the Flag*, THE HILL (Sept. 29, 2017), <https://thehill.com/opinion/white-house/353087-5-reasons-we-stand-for-the-flag/>.

⁹⁴ Contrast, for example, renunciation of citizenship of a European country. Absent special cases, it is exceptionally rare. A special case would be, for example, a dual citizen seeking a public office for which dual citizenship is forbidden. See, e.g., *Zurabishvili States Her French Citizenship Terminated*, CIVIL GEORGIA (Aug. 31, 2018), <https://civil.ge/archives/250743>. (explaining that Salome Zurabishvili, then a candidate for the presidency of Georgia, renounced her French citizenship because under Georgian law the presidency may not be held by a dual citizen).

⁹⁵ See, e.g., Laura Snyder, “*Being an American Outside of America is No Longer Safe.*” *Survey Report: Effects of the Extraterritorial Application of U.S. Taxation and Banking*

once thought was among the most precious things they had – their U.S. citizenship.⁹⁶

I. Summary of Large Body of Knowledge

By this point, it should be apparent that American nationals living outside the United States have made available an extensive body of knowledge about the true nature of the U.S. nationality-based tax system. It is so extensive that any attempt to summarize its contents would fail to do it justice. Nevertheless, this article will attempt to delineate the most salient aspects. There are an estimated 4.8 to 9 million Americans living outside the United States.⁹⁷ This is comparable to the number of people living in a mid-sized U.S. state.⁹⁸

Americans live outside the United States for a variety of reasons. The most common are to join a romantic partner, for family reasons, to pursue professional opportunities, for study, or simply for adventure.⁹⁹ Some were born outside the United States and have never lived in the United States.¹⁰⁰ Few Americans live outside the United States for the purpose of avoiding U.S. taxation.¹⁰¹

Over the course of more than one century, U.S. policymakers have repeatedly made clear from their statements that the purpose of the U.S. nationality-based tax system is not to raise revenue but to discourage

Policies – Participant Comments – Version 1 of 3, STOP EXTRATERR. AM. TAX’N 3, 56, 66, 73, 74, 78, 79, 283, 305, 363, 368, 375, 376, 385, 398, 402, 407, 413, 418-9, 421, 498, 503, 513, 543, 552, 673 (May 4, 2021), <http://seatnow.org/wp-content/uploads/2021/05/Comments-by-topic.pdf> (hereinafter “SEAT Survey Comments”).

⁹⁶ *Id.* at 524-5, 543-4.

⁹⁷ See Snyder, *Unacknowledged Realities*, *supra* note 42, at 272. See also Doris L. Speer, *How Many Americans Live Abroad?*, ASS’N OF AM. RESIDENT OVERSEAS (Nov. 2023), <https://www.aaro.org/about-aaro/how-many-americans-live-abroad>, (explaining the difficulties in estimating the number of Americans living outside the United States).

⁹⁸ *Population Estimate for 2022*, STATSAMERICA, https://www.statsamerica.org/sip/rank_list.aspx?rank_label=pop1 (the state ranked 25th in size, Louisiana, is listed with a population of 4.5 million; nine states have a population between 4 and 6 million).

⁹⁹ Snyder, *Extraterritorial Taxation #2*, *supra* note 34, at 5. See also Laura Snyder, “*Being an American Outside of America Is No Longer Safe*” *Survey Report: Data Part 1 of 2*, STOP EXTRATERR. AM. TAX’N 10 (May 4, 2021), <https://seatnow.org/wp-content/uploads/2021/05/SEAT-Survey-May-2021-Data-Part-1-of-2.pdf> (hereinafter “SEAT survey data part 1”).

¹⁰⁰ Snyder, *Extraterritorial Taxation #2*, *supra* note 34, at 4.

¹⁰¹ Laura Snyder, “*I Feel Threatened by My Very Identity*”: *Report on US Taxation and FATCA Survey—Part 1 Data*, CITIZENSHIP SOLS. 7 (Oct. 25, 2019), <http://www.citizenshipsolutions.ca/wp-content/uploads/2019/10/Part-1-Data.pdf> (hereinafter, “I Feel Threatened Survey part 1”); SEAT survey data part 1, *supra* note 99, at 10.

Americans from living outside the United States and to punish them when they do so.¹⁰²

The U.S. nationality-based tax system severely penalizes nearly every aspect of the financial lives of Americans who live outside the United States.¹⁰³ This includes retirement planning and other investments, home and business ownership, entrepreneurship, bank and other financial accounts, employment, and community service.¹⁰⁴

The problem is rarely the payment of U.S. taxes; most American nationals living outside the United States owe no U.S. tax.¹⁰⁵ The United States collects little revenue from overseas taxpayers, as compared to income tax revenue from all sources and to total federal expenditures.¹⁰⁶

The IRS does not have the resources or the expertise needed to administer the U.S. nationality-based tax system in many countries where American nationals live.¹⁰⁷ Further, many of the services the IRS provides to U.S. resident taxpayers are unavailable to those residing outside the United States.¹⁰⁸ The result is that American nationals living outside the United States are left on their own to navigate highly complex rules, subject to draconian penalties in the event of error.¹⁰⁹

American nationals living outside the United States experience different problems at different times. What each person experiences at any point in time depends upon a variety of factors. These factors include: the country where

¹⁰² See Snyder, *Taxing the American Emigrant*, *supra* note 39, at 318-20; Snyder, *Unacknowledged Realities*, *supra* note 42, at 247-8, 297-9; Snyder, *Myths & Truths*, *supra* note 41, at 223-231; Snyder, *Does the Federal Budget Trump Constitutional Rights?*, 52 HOFSTRA L. REV. (forthcoming).

¹⁰³ See, e.g., Snyder, *Unacknowledged Realities*, *supra* note 42, at 251-68; Snyder, *Criminalization of the American Emigrant*, *supra* note 37, at 2280-87 (June 29, 2020).

¹⁰⁴ See sources cited *supra* note 103. See also Snyder, *Can Extraterritorial Taxation Be Rationalized?*, *supra* note 43, at 599-610.

¹⁰⁵ Snyder, *Criminalization of the Emigrant*, *supra* note 37, at 2282; Snyder, *Taxing the American Emigrant*, *supra* note 39, at 305 n.20; Snyder, *Unacknowledged Realities*, *supra* note 42, at 302.

¹⁰⁶ Snyder, *The Unacknowledged Realities*, *supra* note 42, at 274; Snyder, *Can Extraterritorial Taxation Be Rationalized?*, *supra* note 43, at 589-90.

¹⁰⁷ See generally Snyder et al., *Mission Impossible*, *supra* note 40.

¹⁰⁸ *Id.* at 1829-30.

¹⁰⁹ See *infra* notes 293-319 and accompanying text.

they live,¹¹⁰ their source(s)¹¹¹ and type(s)¹¹² of income, their business activities,¹¹³ their assets,¹¹⁴ and their stage in life.¹¹⁵

The policies cause many American nationals living outside the United States to experience considerable psychological and even physical consequences.¹¹⁶ For many, the difficulties they experience are so severe, it causes them to renounce U.S. citizenship as the only means to escape the penalizing policies.¹¹⁷

¹¹⁰ SEAT survey data part 1, *supra* note 99 at 15-29; Snyder, “*Being an American Outside of America Is No Longer Safe*” *Survey Report: Data Part 2 of 2*, STOP EXTRATERR. AM. TAX’N 33-47 (May 4, 2021), <https://seatnow.org/wp-content/uploads/2021/05/SEAT-Survey-May-2021-Data-Part-2-of-2.pdf> (hereinafter “SEAT survey data part 2”). *See also, e.g.*, John Richardson, *Bonjour: Different US Tax Treaties Provide Different US Taxation for Different Groups of Americans Abroad*, CITIZENSHIP SOLS. (Feb. 6, 2023), <https://citizenshipsolutions.ca/2023/02/06/bonjour-different-us-tax-treaties-provide-different-us-taxation-for-different-groups-of-americans-abroad/>; Snyder, *Taxing the American Emigrant*, *supra* note 39, at 334-41.

¹¹¹ Punitive taxation applies to income sourced outside – not inside – the United States. *See* John Richardson, *The United States Imposes a Separate and Much More Punitive Tax on U.S. Citizens Who Are Residents of Other Countries*, TAX CONNECTIONS (Mar. 13, 2019), <https://www.taxconnections.com/taxblog/the-united-states-imposes-a-separate-and-more-punitive-tax-system-on-us-dual-citizens-who-live-in-their-country-of-second-citizenship/>. *See also* Snyder, *Taxing the American Emigrant*, *supra* note 39, at 304-6.

¹¹² For example, investments in mutual funds and many non-U.S. retirement plans are taxed especially punitively. *See, e.g.*, IRS Medic, *Demystifying PFICs*, *supra* note 69; Alpert, *supra* note 35, at 4-6; Snyder, *Unacknowledged Realities*, *supra* note 42, at 260, 304-5, 305 n.433; Snyder, *Taxing the American Emigrant*, *supra* note 39, at 304.

¹¹³ Owners of small businesses that qualify as a “controlled foreign corporation” (CFC) are taxed more punitively as compared, for example, to those who are salaried employees outside the United States. *See, e.g.*, Snyder, *Unacknowledged Realities*, *supra* note 42, at 260, 306; Snyder, *Taxing the American Emigrant*, *supra* note 39, at 305, 337-8.

¹¹⁴ For example, those who rent their principal home outside the United States, or whose name is kept off the title to their family home outside the United States, will not be subject to U.S. capital gains taxation upon the sale of the home. *See, e.g.*, SEAT Survey Comments, *supra* note 95, at 5, 7, 8, 42, 129, 132, 274, 280.

¹¹⁵ The longer an American lives outside the United States, the more likely they are to experience unemployment, grow their families, grow ill, and grow old. These stages of life typically result in moving from earned to unearned income (unemployment, maternity/family leave, disability benefits, pension). These forms of unearned income sourced outside the United States are often taxed more punitively than earned income. *See* Snyder, *Taxing the American Emigrant*, *supra* note 39, at 342; Snyder, *Unacknowledged Realities*, *supra* note 42, at 303-4.

¹¹⁶ *See* Snyder, *Unacknowledged Realities*, *supra* note 42, at 266-67; SEAT Survey Comments, *supra* note 95, at 3-55.

¹¹⁷ *Supra* notes 88-96 and accompanying text. *See also* Snyder, *Unacknowledged Realities*, *supra* note 42, at 267-8; Snyder, *Myths & Truths*, *supra* note 41, at 199-203, 258-61.

IRS data demonstrates that most overseas Americans who renounce U.S. citizenship owed little to no U.S. tax in the years prior to renunciation.¹¹⁸ They renounce not to avoid paying U.S. tax but because compliance with the U.S. nationality-based tax system has become too difficult.¹¹⁹

Upon renunciation, many middle-class Americans living outside the United States are subject to a penalizing exit tax. This is because the U.S. exit tax encompasses the value of their home and pension.¹²⁰ This is in stark contrast to the departure taxes of other countries, which are focused principally on corporate shares and exclude the value of ordinary assets – such as a home, pension, and small business – that are needed to sustain ordinary life.¹²¹

The persons subject to these penalizing policies are targeted based on nationality. More specifically, the only persons subject to the policies are American nationals living outside the United States. Persons living in the United States – regardless of nationality – are not subject to them.¹²² Nor are non-American nationals living outside the United States.¹²³

The 1924 U.S. Supreme Court decision *Cook v. Tait*¹²⁴ is considered a seminal case establishing the power of the federal government to tax American nationals living outside the United States based on their worldwide income.¹²⁵ However, *Cook* was decided when the now thoroughly discredited *Plessy v. Ferguson* was the law of the land.¹²⁶ The Second World War – with all its abuses of citizenship and human rights – had not yet occurred, thus, our

¹¹⁸ Snyder, *Unacknowledged Realities*, *supra* note 42, at 254-5; Snyder, *Can Extraterritorial Taxation Be Rationalized*, *supra* note 43, at 577 n.218.

¹¹⁹ See sources cited *supra* note 118. See also SEAT survey data part 2, *supra* note 110, at 60-61, 63-66.

¹²⁰ Snyder, *Myths & Truths*, *supra* note 41, at 238-40; Snyder, *Can Extraterritorial Taxation Be Rationalized*, *supra* note 43, at 574-5.

¹²¹ Snyder, *Extraterritorial Taxation #15: Taxing in Respect of Rights*, SEAT Working Paper Series #2023/15, at 7-11 (June 5, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4466241; Snyder, *Myths & Truths*, *supra* note 41, at 268-9.

¹²² Exceptions would include immigrants to the United States, to the extent they retain assets located in their countries of origin and/or they inherit assets located in their country of origin. See Snyder, *Myths & Truths*, *supra* note 41, at 264 n.495.

¹²³ Snyder, *Myths & Truths*, *supra* note 41, at 218-23; Snyder, *Discriminatory Taxes and Congress: Do as I Say, Not as I Do*, 180 TAX NOTES FED. 1283, 1288-91 (Aug. 2, 2023).

¹²⁴ *Cook v. Tait*, 265 U.S. 47 (1924); Snyder, *What a Decision on Affirmative Action Teaches About Taxation*, 51 RUTGERS L. REC. 102, 111-12 (2023).

¹²⁵ See Snyder, *Myths & Truths*, *supra* note 41, at 188; Snyder, *Unacknowledged Realities*, *supra* note 42, at 256-7; Snyder, *Can Extraterritorial Taxation Be Rationalized*, *supra* note 43, at 538; Snyder, *Affirmative Action*, *supra* note 124, at 104.

¹²⁶ Snyder, *Myths & Truths*, *supra* note 41, at 203-4; Snyder, *Affirmative Action*, *supra* note 124, at 105-6.

modern concepts of citizenship¹²⁷ and human rights¹²⁸ were not yet developed. Dramatic changes have taken place over the course of an entire century since *Cook* was decided: changes regarding equal protection and our concept of citizenship, human rights, and the nature of the U.S. tax system.¹²⁹ Given these changes, *Cook* cannot be understood to permit Congress to tax American nationals living outside the United States in any manner it chooses without any limitations and regardless of the effects. On the contrary, Congress must respect our modern understandings of equal protection, of citizenship, and of other constitutional rights, not to mention human rights.

Today, the U.S. nationality-based tax system violates the Fourteenth Amendment in several manners: (i) it discriminates based on nationality (a suspect class that is subject to strict scrutiny);¹³⁰ (ii) it causes the forcible destruction of citizenship;¹³¹ (iii) it creates a second class of citizenship;¹³² (iv) it was conceived and is maintained in animus;¹³³ and (v) it cannot pass the “rational basis” level of review.¹³⁴

The system also violates multiple provisions of multiple international human rights instruments that the United States has either signed or signed and ratified. The rights include: (i) the right to leave one’s country; (ii) the right to work, to free choice of work, and freedom from discrimination in work; (iii) equality in dignity and rights; (iv) freedom from the deprivation of one’s nationality and the right to return to one’s country; and (iv) the right of self-determination.¹³⁵

The U.S. nationality-based tax system violates multiple provisions of the Taxpayer Bill of Rights.¹³⁶

Ultimately, the U.S. nationality-based tax system deprives not only Americans living outside the United States but *all* Americans of individual self-determination.¹³⁷ Because of the system, American nationals living

¹²⁷ See Snyder, *Can Extraterritorial Taxation Be Rationalized*, *supra* note 43, at 543-6 (explaining that prior to the Second World War, citizenship was understood to be a nexus of obligations rather than a nexus of rights); see also Snyder, *Myths & Truths*, *supra* note 41, at 199-203, 270-304.

¹²⁸ Snyder, *Myths & Truths*, *supra* note 41, at 248-63.

¹²⁹ See generally Snyder, *Myths & Truths*, *supra* note 41. For a detailed timeline of the changes, see *id.* at Appendix A.

¹³⁰ Snyder, *Myths & Truths*, *supra* note 41, at 205-18; See also, generally, Snyder, *Affirmative Action*, *supra* note 124. See also Snyder, *Trump Constitutional Rights*, *supra* note 102.

¹³¹ Snyder, *Myths & Truths*, *supra* note 41, at 199-203.

¹³² *Id.* at 218-23.

¹³³ *Id.* at 223-31.

¹³⁴ *Id.* at 232-46.

¹³⁵ *Id.* at 248-63.

¹³⁶ *Id.* at 263-67.

¹³⁷ *Id.* at 246-48.

outside the United States are forced into more precarious financial situations and prevented from full participation in society in the places where they live. They struggle to save for retirement,¹³⁸ hold certain jobs,¹³⁹ keep financial accounts,¹⁴⁰ hold title to family assets,¹⁴¹ and operate small businesses.¹⁴² For some, this results in strained family relationships,¹⁴³ postponing marriage,¹⁴⁴ becoming financially dependent on their non-U.S. citizen spouse and other family members,¹⁴⁵ avoiding trips to the United States to visit family,¹⁴⁶ lying about their status as a U.S. citizen,¹⁴⁷ and, as discussed above, giving up U.S. citizenship.¹⁴⁸ In sum, persons of American nationality who live outside the United States have lost the ability to control their lives.¹⁴⁹ Instead, their lives are controlled by U.S. government policies that are accomplishing their intended purpose: to punish persons of American nationality for living outside the United States.¹⁵⁰

Regarding Americans living in the United States, their values, hopes, and ambitions for the kind of lives they would like to live have led some to

¹³⁸ See, e.g., SEAT survey data part 1, *supra* note 99 at 14, 16-17; SEAT Survey Comments, *supra* note 95, at 92-129.

¹³⁹ See, e.g., SEAT survey data part 1, *supra* note 99 at 14, 28; SEAT survey data part 2, *supra* note 110, at 45; SEAT Survey Comments, *supra* note 95, at 342-51.

¹⁴⁰ See, e.g., SEAT survey data part 2, *supra* note 110, at 31-35, 38-44; SEAT Survey Comments, *supra* note 95, at 237-66.

¹⁴¹ See, e.g., SEAT survey data part 1, *supra* note 99 at 14, 23; SEAT survey data part 2, *supra* note 110, at 32, 39; SEAT Survey Comments, *supra* note 95, at 270-87.

¹⁴² See, e.g., SEAT survey data part 2, *supra* note 110, at 48-52; SEAT Survey Comments, *supra* note 95, at 316-40.

¹⁴³ See, e.g., SEAT survey data part 2, *supra* note 110, at 67-8; SEAT Survey Comments, *supra* note 95, at 83-92.

¹⁴⁴ See, e.g., SEAT Survey Comments, *supra* note 95, at 16, 39, 84, 85, 87, 89, 91, 92, 98, 102, 208, 230, 235, 336, 409, 410, 510, 572, 573-4.

¹⁴⁵ See, e.g., *id.* at 272, 274, 283, 301, 340, 398, 512.

¹⁴⁶ See, e.g., *id.* at 61, 87, 227, 236, 278, 392, 416, 422.

¹⁴⁷ See, e.g., SEAT survey data part 2, *supra* note 110, at 32, 37; SEAT Survey Comments, *supra* note 95, at 369-79.

¹⁴⁸ See *supra* notes 88-96, 117-119 and accompanying text.

¹⁴⁹ Snyder, *Myths & Truths*, *supra* note 41, at 246-48. See also Snyder, *Trump Constitutional Rights*, *supra* note 102.

¹⁵⁰ See *supra* note 102 and accompanying text.

consider living overseas.¹⁵¹ Leaving one's country is a human right.¹⁵² However, if Americans living in the United States seek to exercise that human right, they too will be confronted with the panoply of restrictions on their lives that comes with the U.S. nationality-based tax system.¹⁵³ Some – not immediately upon leaving the United States, but eventually – will take the drastic, irreversible, and, for most, unwanted step of renouncing U.S. citizenship.¹⁵⁴ Whether, to avoid the system, they decide to remain in the United States, or, regardless of the system, they nevertheless emigrate to another country – in either case their destinies will be shaped not by themselves but by the U.S. nationality-based tax system.

Again, the above is a highly condensed and necessarily incomplete summary of the extensive body of knowledge about the U.S. nationality-based tax system that American nationals living outside the United States have made available. For more detail, the reader is invited to consult the reference material described in Part II¹⁵⁵ and the sources cited in the summary's footnotes.¹⁵⁶

III. KNOWLEDGE BELITTLED & IGNORED

Part II of this article described the extensive body of knowledge about the U.S. nationality-based tax system that American nationals living outside the United States (the out-group) have made available. Unfortunately, academics, industry leaders, and governmental representatives (the in-group) for the most part either belittle this knowledge or, more commonly, do not acknowledge its existence, let alone contend with its substantive contents. That is, as Bunch

¹⁵¹ A survey conducted in 2022 indicated that 38% of Americans living in the United States had contemplated moving overseas “permanently.” Among those under 45, the amount was 45%. See Zoha Qamar, *Many Americans Say They Want to Relocate for Political Reasons Few Actually Do*, FIVE THIRTY EIGHT (Oct. 11, 2022), <https://fivethirtyeight.com/features/many-americans-say-they-want-to-relocate-for-political-reasons-few-actually-do/>. See also David Brady & Brett Parker, *Would You Leave the United States?*, HOOVER INSTITUTION (Mar. 4, 2022), <https://www.hoover.org/research/would-you-leave-united-states>; Placone, *supra* note 72, at 14:45-17:00; Bethan Moorcraft, *'The New American Dream Is to Leave': Most in the US Don't Believe Hard Work Will Get You Ahead. Here's What Some Are Striving for Instead*, YAHOO FIN. (Jan. 3, 2024), https://finance.yahoo.com/news/american-dream-leave-most-us-123000387.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&g_uce_referrer_sig=AQAAANKPIJ33_6C0GWzuQR2u7vMTt-R-qxckNaV8T9PBARVwX_77aV0ZKf3FUr1xG8txUHJko-37Px6ATfs45zfMVrjCVOhkgSGvk9L29aIYhPoPV-IhabAWOU4TD9m3lo_YgcaRbEtRTM6yIM3MAY851OKa1ieZ7-uqcmrqplFNbDtb.

¹⁵² Snyder, *Myths & Truths*, *supra* note 41, at 249-52.

¹⁵³ See *supra* notes 103-104 and accompanying text.

¹⁵⁴ See *supra* notes 88-96 and accompanying text. See also SEAT Survey Comments, *supra* note 95, at 499-561.

¹⁵⁵ See *supra* notes 28-96 and accompanying text.

¹⁵⁶ See *supra* notes 97-154.

predicted, the truths and claims that are brought forward by the out-group are neither tracked nor investigated by the in-group.¹⁵⁷ As Bunch further predicted,¹⁵⁸ to the extent members of the in-group (academics, industry leaders, and governmental representatives) do comment on the out-group (American nationals living outside the United States), it is to emphasize stories of the perceived wrongdoings of the out-group to make them seem more frequent and heinous.

It would be impossible to identify, much less examine in detail, every instance in which this epistemic injustice occurs. Instead, Part III will touch on selected examples. The examples are drawn from: (A) law school syllabi and assigned texts, (B) academic literature, (C) conferences and think tanks, (D) Congress, and (E) the IRS. Part III will conclude by (F) selecting one example for a detailed examination, as a case study.

A. Law School Course Materials

Most U.S. law schools offer at least an introductory and perhaps also one or more advanced courses on federal income taxation. However, in most such courses, the topic of the taxation of Americans residing outside the United States is typically not addressed.¹⁵⁹ Instead, the topic is considered more appropriate for a course on international taxation. The fact that the U.S. nationality-based tax system is excluded from general courses on federal income taxation is an implicit acknowledgement that the system is not merely a simple extension of the domestic system. Instead, it is something quite different and complex that requires entirely separate and more advanced analysis.

Not all law schools offer a course on international taxation,¹⁶⁰ but those that do include the University of Houston (Houston) and the University of Florida (Florida). This article comments on the syllabi for the course,

¹⁵⁷ See *supra* note 16 and accompanying text.

¹⁵⁸ See *supra* note 17 and accompanying text.

¹⁵⁹ See, e.g., the syllabi for courses taught at the University of Houston and Southern Illinois University: John Marshall Wilson, *Federal Income Tax* (Fall, 2023), <https://law.uh.edu/assignments/fall2023/10740.pdf>; William Drennan, *Federal Income Taxation* (Fall, 2023), <https://law.siu.edu/common/documents/syllabi/fall-23-syllabi/FIT-F-2023-Syllabus-Income-Tax-Aug-2023.pdf>.

¹⁶⁰ For example, the University of Illinois used to offer a course in international taxation but no longer does. Its current tax course offerings are “Income Taxation,” “Corporate Taxation,” and “Federal Tax Policy.” *Courses*, ILL. COLL. L. (accessed Jan. 26, 2024), <https://law.illinois.edu/academics/courses/>.

“International Tax” taught at Houston in Fall 2023¹⁶¹, and the course, “Introduction to U.S. International Taxation” taught at Florida in Fall 2021.¹⁶²

Each syllabus contains a listing of each class to be held during the relevant semester, indicating the topic to be covered in that class and the corresponding preparatory reading material. The topics include “residency,” “source rules,” “foreign tax credit,” and “treaties.”¹⁶³ For each syllabus, neither the class/topic listing nor any of the reading materials assigned indicated that any element of the body of knowledge made available by American nationals living outside the United States was included in either course.¹⁶⁴

The principal reading material for the Houston course included *U.S. International Taxation: Cases and Materials*¹⁶⁵ and *International Taxation*.¹⁶⁶ The principal reading material for the Florida course included *International Taxation in a Nutshell*.¹⁶⁷

U.S. International Taxation contains the text of *Cook v. Tait*, followed by a series of questions.¹⁶⁸ The first question is notable: it asks that, even if *Cook* held that Congress can tax overseas Americans, whether Congress actually did so, given the only citation offered is to Treasury regulation rather than to the Code.¹⁶⁹ A later question asks the students what they think about the Court’s contention that overseas Americans “benefit from the U.S. government” and therefore, should pay taxes to support it.¹⁷⁰ These questions have the potential to be thought-provoking. They do not acknowledge or incorporate in any evident manner the knowledge made available by American nationals living outside the United States, but the questions could nevertheless facilitate worthwhile discussion.

The same cannot be said for the other two course materials: *International Taxation* does not just ignore the knowledge made available by American nationals living outside the United States, it expressly denies that there are any

¹⁶¹ Bret Wells, *International Tax* (Fall, 2023), <https://law.uh.edu/assignments/fall2023/18539.pdf>.

¹⁶² Mindy Herzfeld, *Introduction to U.S. International Taxation* (Fall, 2021), <https://www.law.ufl.edu/law/wp-content/uploads/Herzfeld-Fall-2021-International-tax-syllabus-July-22-2021.docx>.

¹⁶³ See sources cited *supra* notes 161-162.

¹⁶⁴ *Id.*

¹⁶⁵ REUVEN S. AVI-YONAH, DIANE M. RING, & YARIV BRAUNER, *U.S. INTERNATIONAL TAXATION: CASES AND MATERIALS* (5th ed. 2022).

¹⁶⁶ BRET WELLS, *INTERNATIONAL TAXATION* (5th ed. 2022).

¹⁶⁷ MINDY HERZFELD, *INTERNATIONAL TAXATION IN A NUTSHELL* (12th ed. 2019). This article will discuss the thirteenth edition, published in 2023: MINDY HERZFELD, *INTERNATIONAL TAXATION IN A NUTSHELL* (13th ed. 2023).

¹⁶⁸ Avi-Yonah et al., *supra* note 165, at 28-30.

¹⁶⁹ *Id.* at 29.

¹⁷⁰ *Id.*

difficulties in connection with taxing them.¹⁷¹ Of all the “essential bases” of U.S. taxation, the book asserts that the use of nationality “rais[es] the fewest difficulties.”¹⁷² The book cites *Cook* unquestioningly as upholding “the validity of worldwide taxation”¹⁷³ of American nationals living outside the United States: “[A]long with whatever protections and benefits it confers, U.S. citizenship brings worldwide taxation as its price, a quid pro quo [that justifies] worldwide taxation” of American nationals.¹⁷⁴ “Any problems that do arise in connection with nationality are typically *at the fringes*”¹⁷⁵ (emphasis added). These assertions are similar to those examined in the case study below and thus, are critiqued there.¹⁷⁶

A passage close to the end of the book reads “For 50 years, Americans living and working abroad have experienced a somewhat different income tax environment from the rest of us.”¹⁷⁷ This statement, considered in isolation, could be considered promising. Perhaps at least some of the problems of the U.S. nationality-based tax system will be acknowledged? Unfortunately, the opposite is the case. Instead of acknowledging the problems, the book enters into a discussion of the Foreign Earned Income Exclusion (FEIE), implying that because of it, American nationals living outside the United States have an unfair advantage over U.S. residents.¹⁷⁸ The book lists several explanations that have been offered for the “apparent windfall”¹⁷⁹ of the FEIE, but is clearly skeptical given the observation “some [of the explanations] may even have merit.”¹⁸⁰ The clear implication is that American nationals living outside the United States are not subject to *any* taxes on the amounts subject to the FEIE – that the amounts are earned tax-free. The passage fails to acknowledge that American nationals living outside the United States are also subject to income taxation by the countries where they live and in the same manner as all other residents of those countries.¹⁸¹ The passage also fails to adequately address the fact that the FEIE applies only to earned income – that other kinds of income,

¹⁷¹ Wells, *supra* note 166, at 29-30.

¹⁷² *Id.* at 29.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 29-30.

¹⁷⁶ See *infra* notes 328-393 and accompanying text.

¹⁷⁷ Wells, *supra* note 166, at 463.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 463-4.

¹⁸⁰ *Id.* at 463.

¹⁸¹ See, e.g., Snyder, *Unacknowledged Realities*, *supra* note 42, at 263-5; Snyder, *Taxing the American Emigrant*, *supra* note 39, at 304-6.

such as pensions and welfare benefits paid by other countries, do not qualify for the exclusion.¹⁸²

As mentioned above,¹⁸³ *International Taxation in a Nutshell* contains passages comparable to *U.S. International Taxation*'s discussion of *Cook*. They are discussed in detail in the case study in subpart F below.¹⁸⁴

B. Academic Literature

The academic literature discussing the U.S. nationality-based tax system is voluminous. Any attempt to address it in a comprehensive manner would be foolhardy. This article will touch on just a few examples.

Kirsch's article, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*¹⁸⁵, is one of the few pieces of academic literature acknowledging that American nationals living outside the United States have made available their knowledge of and experiences with the U.S. nationality-based tax system. Kirsch describes the contributions of one organization in an entire paragraph.¹⁸⁶ However, he sandwiches the paragraph between derogatory remarks about the organization: it is derided as a "lobbying group,"¹⁸⁷ and is contrasted to another source of knowledge, the National Taxpayer Advocate, who is praised as "more neutral."¹⁸⁸ These derisions belittle and discredit both the source and the substance of the knowledge offered by those American nationals.

Outside of Kirsch,¹⁸⁹ most of the academic literature discussing the U.S. nationality-based tax system either fails entirely to acknowledge the contributions made by American nationals living outside the United States or does so only in a highly limited manner. This is as much true of the literature

¹⁸² Wells, *supra* note 166, at 463-8. For a discussion of this problem, see, e.g., Snyder, *Unacknowledged Realities*, *supra* note 42, at 303-5; Snyder, *Taxing the American Emigrant*, *supra* note 39, at 342-3. See also *supra* note 115 and accompanying text.

¹⁸³ *Supra* note 176 and accompanying text.

¹⁸⁴ See *infra* notes 328-393 and accompanying text.

¹⁸⁵ Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117 (2014).

¹⁸⁶ *Id.* at 129-30.

¹⁸⁷ *Id.* at 129. "Lobbying group" carries a negative connotation because of its association with corporate funding and "legalized bribery." See, e.g., Jimmy Williams, *I Was a Lobbyist for More than 6 Years. I Quit. My Conscience Couldn't Take It Anymore*, VOX (Jan. 5, 2018), <https://www.vox.com/first-person/2017/6/29/15886936/political-lobbying-lobbyist-big-money-politics>; see also Leeja Miller, *How Lobbying is Ruining Democracy*, YOUTUBE (Oct. 25, 2023), <https://www.youtube.com/watch?v=tKTWzHqS2p0&t=1010s>. Nearly all who advocate for overseas Americans are unpaid volunteers with limited to no funding. They are best described as "advocates." See, e.g., *About SEAT*, *supra* note 49.

¹⁸⁸ *Id.* at 130.

¹⁸⁹ There is another notable exception. See discussion *infra* notes 195-197 and accompanying text.

defending the system as it is of the literature critiquing it. Examples include: *Citizenship Taxation, Globalization and Inequality* by Robert T. Kudrle,¹⁹⁰ *Resolving the Conflicts of Citizenship Taxation: Two Proposals*, by Grace Nielsen,¹⁹¹ *Fixing Five Flaws of the Tax Cuts and Jobs Act*, by Kimberly A. Clausing,¹⁹² *The Offshore Tax Enforcement Dragnet*, by Shu-Yi Oei,¹⁹³ and *A Global Perspective on Citizenship-Based Taxation*, by Allison Christians.¹⁹⁴

A rare example of academic literature that can be described as fully recognizing American nationals living outside the United States as “knowers”¹⁹⁵ is *Size Matters (Even If the Treasury Insists It Doesn't): Why Small Taxpayers Should Receive a De Minimis Exemption from the GILTI Regime*, by Patrick Riley Murray.¹⁹⁶ This “note” (authored by a law student) repeatedly quotes American nationals living outside the United States. The article tells stories about their experiences with the Mandatory Repatriation Tax (MRT) and GILTI from their perspective, and it investigates their claims, notably in relation to GILTI.¹⁹⁷

Two recent articles merit special attention. The first is *Reforming the Exit Tax*, by Reuven S. Avi-Yonah.¹⁹⁸ This article opines on the reasons for the dramatic increase in the number of Americans renouncing U.S. citizenship¹⁹⁹

¹⁹⁰ Robert T. Kudrle, *Citizenship Taxation, Globalization and Inequality*, 25 FLA. TAX REV. 797 (2022) (limited references at 811 n.51-52, 812 n.53, 816 n.70, 826 n.126).

¹⁹¹ Grace Nielsen, *Resolving the Conflicts of Citizenship Taxation: Two Proposals*, 25 FLA. TAX REV. 436, (2021) (the knowledge made available by overseas Americans is not mentioned at all).

¹⁹² Kimberly A. Clausing, *Fixing Five Flaws of the Tax Cuts and Jobs Act*, 11 COLUM. J. TAX L. 31 (2020). The article does not acknowledge overseas Americans or the devastating effects of the Act for them because of the Mandatory Repatriation Tax. *See infra* notes 394-465 and accompanying text.

¹⁹³ Shu-Yi Oei, *The Offshore Tax Enforcement Dragnet*, 67 EMORY L. J. 655 (2018). Limited references at 693 (discounting the sources of the information as “lobbying groups”), 699 n.212, 724 n.322.

¹⁹⁴ Allison Christians, *A Global Perspective on Citizenship-Based Taxation*, 38 MICH. J. INT'L L. 193, 234 (2017). Limited reference at 194 n.2.

¹⁹⁵ *See supra* notes 6, 13, 19 and accompanying text.

¹⁹⁶ Patrick Riley Murray, *Size Matters (Even If the Treasury Insists It Doesn't): Why Small Taxpayers Should Receive a De Minimis Exemption from the GILTI Regime*, 106 MINN. L. REV. 1625 (2022).

¹⁹⁷ *See, e.g. id.* at 1625-26, 1629-30, 1633, 1640-41, 1642. The MRT is further discussed *infra* notes 394-504 and accompanying text.

¹⁹⁸ Reuven S. Avi-Yonah, *Reforming the Exit Tax*, 49 INT'L TAX J. 41 (2023).

¹⁹⁹ *Id.* at 41 (stating that “Most expatriations are tax motivated,” and indicating that renunciants are seeking to avoid high U.S. tax rates). *But see supra* notes 118-119 and accompanying text (explaining that IRS data demonstrates that most overseas Americans who renounce U.S. citizenship owed little to no U.S. tax in the years prior to renunciation. They renounce not to avoid paying U.S. tax but because compliance with the U.S. nationality-based tax system became too difficult). *See also infra* notes 279-280 (U.S. Representative Don

and recommends that the exit tax be increased.²⁰⁰ The problem is not just that the article ignores the contributions to knowledge made by American nationals living outside the United States.²⁰¹ The problem is also that – as Bunch explained would happen (“the in-group power figures will emphasize stories of out-group crime to make them seem more frequent and heinous”)²⁰², the article implies that many if not most overseas Americans are wealthy persons who live outside the United States to avoid U.S. taxation²⁰³ and thus deserve an even more penalizing exit tax.²⁰⁴ This is in curious contrast to Kudrle who cites data offered by overseas Americans “only” demonstrating that many of them are not rich, but scoffs at the need for the data because “that was not in doubt”.²⁰⁵

The second recent article meriting special attention is *Race-Based Tax Weapons*, by Jeremy Bearer-Friend.²⁰⁶ This article describes a study purporting to examine how tax policy can be used as a weapon to target and harm a specific group based on their race, ethnicity, or ancestry.²⁰⁷ The study specifically focused on taxes “imposed by Anglophone governments in the

Beyer explaining that renunciations are “completely driven by the way the U.S. government treats our citizens that live overseas. [...The system] places a uniquely heavy burden on [overseas Americans]).

²⁰⁰ *Id.* at 43.

²⁰¹ See, e.g., Snyder, *Myths & Truths*, *supra* note 41, at 236-41; Snyder, *Can Extraterritorial Taxation Be Rationalized*, *supra* note 43, at 595-601; John Richardson, *How Wealthy Are Those Who Renounce US Citizenship?*, STOP EXTRATERR. AM. TAX’N (Jan. 3, 2022), <https://seatnow.org/2022/01/03/how-wealthy-are-those-who-renounce-us-citizenship/>; Laura Snyder, *Renunciations of US Citizenship: Correcting the Myths Perpetuated in Recent Media Coverage*, STOP EXTRATERR. AM. TAX’N (Nov. 9, 2020), <https://seatnow.org/2020/11/09/renunciations-media-coverage/>.

²⁰² *Supra* note 17 and accompanying text.

²⁰³ Avi-Yonah, *supra* note 198, at 41-42 (stating, for example, “it is quite easy for rich Americans earning more than the earned income exclusion (about \$120,000) to live abroad, and many of them do not pay any tax on their new residence jurisdiction because of various incentive programs offered by many developed countries”). *But see* sources cited *supra* note 201. See also Snyder, *Extraterritorial Taxation #2*, *supra* note 34, at 5 (synthesizing surveys demonstrating that few American nationals living outside the United States are wealthy). See also Laura Snyder, *Overseas Americans Are Ordinary People, Not FATCats*, 179 TAX NOTES FED. 1345 (May 22, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4466418 (examining an IRS working paper on the wealth of U.S. persons held outside the United States; the paper confirms that overseas Americans are not “fat cats” but ordinary people with ordinary income and wealth).

²⁰⁴ *Id.* at 42-43 (arguing, for example, that the current exit tax is not sufficiently shaming).

²⁰⁵ Kudrle, *supra* note 190, at 812 n.53.

²⁰⁶ Jeremy Bearer-Friend, *Race-Based Tax Weapons*, 14 U.C. IRVINE L. REV. (forthcoming 2023) (last visited Jan. 24, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4504119.

²⁰⁷ See Tax Notes Staff, *Race-Based Poll Taxes and 20th-Century Discrimination*, FORBES (Oct. 11, 2023), <https://www.forbes.com/sites/taxnotes/2023/10/11/race-based-poll-taxes-and-20th-century-discrimination/?sh=4b286bec2143>.

20th century.”²⁰⁸ For the purposes of the study, a tax weapon was a policy that “imposes a targeted harm on the member of a targeted class that exceeds what otherwise similarly situated individuals of other groups endure.”²⁰⁹ The U.S. nationality-based tax system was imposed by an Anglophone government (the United States) in the twentieth century²¹⁰ (and, obviously, continues to the present day). The system treats similarly situated persons in dramatically different ways,²¹¹ and, in doing so, causes considerable harm.²¹² The system targets persons based on nationality, which is inextricably linked to race, ethnicity, and ancestry,²¹³ and is a protected class subject to strict scrutiny under the Fourteenth Amendment.²¹⁴ Nevertheless, nothing about the system or about the knowledge made available by American nationals in relation to the system is mentioned in the article, much less, as Bunch predicted,²¹⁵ investigated in any manner.

This Section B paints a bleak picture of the epistemic injustice with respect to American nationals living outside the United States that proliferates in academic literature. One final example, however, demonstrates that change – however incremental – is possible. In 2017, Professor Edward Zelinsky took a hard line, writing “I am . . . unimpressed by the alleged horror stories of U.S. citizens renouncing their citizenships because of U.S. income tax burdens.”²¹⁶ By 2022, however, his position had begun to soften – he wrote an article arguing in favor of simplifying tax reporting for American nationals living outside the United States.²¹⁷ He explained, “A particularly telling argument advanced by critics of citizenship-based taxation is that for many expatriates, compliance with U.S. income tax law is too complex and expensive. This critique carries particular force for expatriates of modest means.”²¹⁸ While, in the same article, Zelinsky makes clear that he still supports taxing persons living overseas based upon nationality,²¹⁹ his support for simplified reporting demonstrates greater understanding of and empathy for the plight of American

²⁰⁸ Bearer-Friend, *supra* note 206, at 5.

²⁰⁹ *Id.* at 24.

²¹⁰ *See, e.g.*, Snyder, *Myths & Truths*, *supra* note 41, at Appendix A (containing a detailed timeline of evolution of the U.S. nationality-based tax system throughout the twentieth century).

²¹¹ *See, e.g.*, Snyder, *Myths & Truths*, *supra* note 41, at 218-23.

²¹² *Supra* notes 116-117, 138-150 and accompanying text.

²¹³ *Supra* notes 122-123 and accompanying text; Snyder, *Affirmative Action*, *supra* note 124, at 110-15.

²¹⁴ *Supra* note 130 and accompanying text

²¹⁵ *Supra* note 16 and accompanying text.

²¹⁶ Edward A. Zelinsky, *Defining Residence for Income Tax Purposes: Domicile as Gap-Filler, Citizenship as Proxy and Gap-Filler*, 38 MICH. J. INT’L L. 271, 272 (2017).

²¹⁷ Edward A. Zelinsky, *Simplifying Income Tax Reporting for Americans Abroad*, 174 TAX NOTES FED. 513 (Jan. 24, 2022).

²¹⁸ *Id.* at 514.

²¹⁹ *Id.*

nationals than he demonstrated in 2017. What caused this change of heart? Zelinsky is clear. It was his direct engagement with American nationals living outside the United States. In his case, the engagement took the form of a “spirited”²²⁰ debate with John Richardson. “These discussions sensitized me to the need to simplify tax compliance for expatriates,”²²¹ Zelinsky explained.

C. Conferences and Think Tanks

Many U.S.-based organizations hold conferences and issue analyses and position papers addressing tax policy. This author was unable to find evidence of a conference presentation (past or planned), analysis, or position paper by a U.S.-based organization addressing the situation of American nationals living outside the United States.

For example, the American Bar Association Section of Taxation organizes several tax-focused in-person and virtual conferences each year. At the time this article was written, the Section’s website listed several past and upcoming events addressing topics such as: “the latest federal, state, and international legal developments and planning trends,”²²² Advanced Tax Seminars,²²³ and “U.S. and Europe Tax Practice Trends.”²²⁴ The twenty-two page program for the Section’s week-long virtual meeting held in October 2023 did not mention any topics addressing the situation of American nationals living outside the United States,²²⁵ nor did its seventy-three page program for its January, 2024 Midyear Tax Meeting.²²⁶

Likewise, The Center for Taxpayer Rights describes its mission as “furthering taxpayers’ awareness of and access to taxpayer rights.”²²⁷ Each year since 2015, the Center has participated in the organization of an “International Conference on Taxpayer Rights.” None of the conference agendas indicate that the situation of American nationals living outside the

²²⁰ *Id.* at 513 n.4.

²²¹ *Id.*

²²² ABA Tax Section, *34th Annual Philadelphia Tax Conference November 14, 2023 – November 15, 2023* (last visited Jan. 25, 2024), <https://web.event.com/event/82511b45-371c-488d-9d0e-7eae8b885b3f/summary>.

²²³ ABA Tax Section, *2024 ABA/IPT Advanced Tax Seminars March 11, 2024 – March 15, 2024*, <https://events.americanbar.org/event/9d16d1f3-9fdc-495e-acd3-fb49ec300142/summary>.

²²⁴ ABA Tax Section, *24th Annual U.S. and Europe Tax Practice Trends April 10, 2024 – April 12, 2024*, <https://events.americanbar.org/event/bd891f70-9d06-4047-a545-6ab55d5ef88f/summary>.

²²⁵ ABA Tax Section, *Virtual 2023 Fall Tax Meeting October 16 - 20, 2023*, <https://www.americanbar.org/content/dam/aba/events/taxation/23fall/23fall-program.pdf>

²²⁶ ABA Tax Section, *2024 Midyear Tax Meeting January 18-20 San Francisco, CA: Preliminary Program*, <https://www.americanbar.org/content/dam/aba/events/taxation/24mid/24mid-program.pdf>.

²²⁷ *Home*, CTR. FOR TAXPAYER RIGHTS (last visited Jan. 25, 2024), <https://taxpayer-rights.org/>.

United States was addressed.²²⁸ The Center’s website contains discussions of various tax-related issues and advocacy activities of the Center. None address the situation of American nationals outside the United States.²²⁹

Similarly, the website of the Tax Policy Center contains a multitude of discussions, research, statistics, and commentary on multiple issues relating to “Individual Taxes,” “Business Taxes,” “Federal Budget and Economy,” “State and Local Issues,” and “Campaigns, Proposals, and Reform.”²³⁰ Upon review of the material, this author found just a few brief mentions of Americans living outside the United States, without substantive analysis or policy positions.²³¹

The website of the Tax Foundation also contains a multitude of discussions, research, data, and commentary on multiple tax-related issues. Research areas are listed as “State Tax,” “Federal Tax,” “Global Tax,” and “EU Tax.”²³² “Featured Projects” include: “International Tax Competitiveness Index 2023” and “Tax Reforms for Growth & Opportunity,” “Details and Analysis of a Tax Reform Plan for Growth and Opportunity,” and “State and Local Tax Burdens, Calendar Year 2022.”²³³ The section “Education” offers “Explainer Videos” on topics such as: “It Pays to Keep It Simple,” and “Tariffs Are Taxes Too.”²³⁴ In all the material on the Tax Foundation’s website, this

²²⁸ The agendas are available at: Center for Taxpayer Rights, *International Conference on Taxpayer Rights* (last visited Jan. 25, 2024), <https://taxpayer-rights.org/international-conference/>.

²²⁹ See, e.g., Center for Taxpayer Rights, *Taxpayer Rights Digest* (last visited Jan. 25, 2024), <https://taxpayer-rights.org/taxpayer-rights-digest/>; Center for Taxpayer Rights, *Amicus Curiae Briefs* (last visited Dec. 30, 2023), <https://taxpayer-rights.org/amicus-briefs/>. The Center submitted an amicus brief in connection with *Silver v. IRS*. While the context of this litigation was the taxation of an American national living outside the United States, the brief was exclusively focused on the application of the Regulatory Flexibility Act (RFA) without addressing the taxation of American nationals. See Brief for Center for Taxpayer Rights as Amicus Curiae supporting Plaintiffs, *Silver v. IRS*, No. 1:19-cv-00247 (D.D.C. 2020), <https://taxpayer-rights.org/wp-content/uploads/2020/08/Silver-Amicus-Memorandum-filed-May-18-2020.pdf>.

²³⁰ See *Topics*, TAX POLICY CENTER (last visited Jan. 25, 2024), <https://www.taxpolicycenter.org/topics>.

²³¹ Examples include: Howard Gleckman, *TaxVox: Individual Taxes*, TAX POLICY CENTER (March 28, 2023), <https://www.taxpolicycenter.org/taxvox/4-trillion-us-wealth-stashed-overseas-much-it-tax-havens>; Renu Zaretsky, *Pizza, Expats and Drugs*, TAX POLICY CENTER (May 13, 2014), <https://www.taxpolicycenter.org/daily-deduction/pizza-expats-and-drugs>; Renu Zaretsky, *Budget Woes, Taxing Times*, TAX POLICY CENTER (May 8, 2015), <https://www.taxpolicycenter.org/taxvox/budget-woes-taxing-times>.

²³² *Latest Work*, TAX FOUNDATION (last visited Jan. 25, 2024), <https://taxfoundation.org/> (dropdown menu under “Research”).

²³³ *All Research and Data*, TAX FOUNDATION (last visited Jan. 25, 2024), https://taxfoundation.org/all-research-data/?post_types=all-research#results.

²³⁴ *TaxEDU*, TAX FOUNDATION (last visited Jan. 5, 2024), <https://taxfoundation.org/taxedu/>.

author did not find any substantive discussion of American nationals living outside the United States or their situation.

Finally, The Center on Budget and Policy Priorities describes itself as promoting federal policies “that will build a stronger, more equitable nation and fair tax policies. [... We show] the harmful impacts of policies [and we] bring the lessons learned on the ground back to the policymaking process in Washington, D.C.”²³⁵ Despite this description, this author did not find any substantive discussion of American nationals living outside the United States or their situation on the Center’s website.

Based on the activities and websites of these organizations, one could be forgiven for thinking that American nationals living outside the United States do not exist or that, if they do, their knowledge and experiences are not worthy of consideration or investigation.

D. U.S. Congress

As discussed above, in as early as 1979, ACA submitted to then President Jimmy Carter a detailed report on the U.S. laws and regulations that discriminate against American nationals living outside the United States. The report was included in a 1980 Presidential Report to the Committee on Foreign Relations.²³⁶

In the decades since, a multitude of Congressional hearings have been organized. Their titles include “Perspectives on the Need for Tax Reform,”²³⁷ “Comprehensive Tax Reform: Prospects and Challenges,”²³⁸ “International Tax Reform,”²³⁹ “Creating Opportunity Through a Fairer Tax System,”²⁴⁰ and “How Tax Reform Will Simplify Our Broken Tax Code and Help Individuals and Families.”²⁴¹ These subject matters – and others like them²⁴² – beg the question of American nationals living outside the United States and the U.S. nationality-based tax system. However, in the decades since 1980, Congress

²³⁵ *About the Center*, CTR. ON BUDGET AND POL’Y PRIORITIES (last visited Jan. 25, 2024), <https://www.cbpp.org/about>.

²³⁶ *Supra* notes 73-74 and accompanying text.

²³⁷ *Perspectives on the Need for Tax Reform*, *supra* note 75.

²³⁸ *Comprehensive Tax Reform: Prospects and Challenges*: Hearing Before Sen. Comm. Fin., 115th Cong. S. Hrg. 115–286 (2017), <https://www.finance.senate.gov/imo/media/doc/30827.pdf>.

²³⁹ *International Tax Reform*: Hearing Before Sen. Comm. Fin., 115th Cong. S. Hrg. 115–384 (2017), <https://www.finance.senate.gov/imo/media/doc/32785.pdf>.

²⁴⁰ *Creating Opportunity Through a Fairer Tax System*: Hearing Before Subcomm. on Fiscal Responsibility and Economic Growth, 117th Cong. S. Hrg. 117-373 (2021), <https://www.finance.senate.gov/imo/media/doc/486681.pdf>.

²⁴¹ *How Tax Reform Will Simplify Our Broken Tax Code and Help Individuals and Families*: Hearing Before Comm. On Ways & Means, 115th Cong., Serial No. 115-TP02 (2017), <https://waysandmeans.house.gov/wp-content/uploads/2018/05/20170719TP-Transcript.pdf>.

²⁴² *See, e.g., infra* notes 243, 250, 254.

has barely touched on the situation. American nationals living outside the United States are not asked to testify. On the exceptionally small number of occasions when the topic of American nationals outside the United States or the U.S. nationality-based tax system are introduced into the discussion at a Congressional hearing, be it by a member of Congress or a testifying witness, the purpose is either to affirm the virtues of the system²⁴³ or to denigrate those who are subject to it and exaggerate their perceived crimes.²⁴⁴

Some members of Congress do not wait for a Congressional hearing to exemplify Bunch’s prediction of “cognitive error” when “one takes the assumption of evil about a specific person, then applies it inferentially to the entire group.”²⁴⁵ A March 2023 report by the Senate Finance Committee, entitled “Credit Suisse’s Role in U.S. Tax Evasion Schemes,” discussed tax evasion committed by one man (Dan Horsky) and one “family of dual U.S.–Latin American citizens.”²⁴⁶ The report declared no fewer than three times that “[d]ual citizenship affords unique opportunities for cross-border tax evasion.”²⁴⁷ For the Committee, because one man and one family of dual citizens engaged in criminal tax evasion, all dual citizens are to be suspected of criminal tax evasion.²⁴⁸ The majority of American nationals living outside the United States are also citizens of at least one other country.²⁴⁹

American nationals living outside the United States have noticed and commented on the repeated Congressional failures to acknowledge their perspectives and contributions to knowledge. For example, after the March 2021 Senate Finance Committee hearing entitled “How U.S. International Tax

²⁴³ See, e.g., *Creating Opportunity Through a Fairer Tax System*, *supra* note 240, at 20 (Witness David Gamage stating that the U.S. nationality-based tax system “works quite well”).

²⁴⁴ See, e.g., *Closing the Tax Gap*, *supra* note 75, at 33 (Senator Sheldon Whitehouse making a joke that the persons subject to FATCA are “FATCAT[S]”). “Fat cats” is a derogatory expression referring to persons who have become wealthy through questionable means. See Snyder, *Taxing the American Emigrant*, *supra* note 39, at 308.

²⁴⁵ *Supra* note 18 and accompanying text.

²⁴⁶ Sen. Comm. Fin., *Credit Suisse’s Role in U.S. Tax Evasion Schemes* (March 29, 2023), at 2, <https://www.finance.senate.gov/imo/media/doc/SFC%20CREDIT%20SUISSE%20REPORT%20FINAL%20Mar%202028.pdf>.

²⁴⁷ *Id.* at 1, 4, 33.

²⁴⁸ See *Finance Committee Report – Unfair Characterization of Dual Citizens*, ASS’N OF AM. RESIDENT OVERSEAS (April 7, 2023), <https://aaro.org/issues/taxation-issues/finance-committee-report-unfair-characterization-of-dual-citizens>.

²⁴⁹ See Snyder, *How Quickly Can Overseas Americans Be Vilified, Marginalized, and Abandoned? In Just Two Months!*, STOP EXTRATERR. AM. TAX’N (April 30, 2023), <https://seatnow.org/2023/04/30/how-quickly-can-overseas-americans-be-vilified-marginalized-and-abandoned-in-just-two-months/>.

Policy Impacts American Workers, Jobs, and Investment,”²⁵⁰ an American national living outside the United States submitted a statement containing this rebuke:

The hearing focused on U.S. multinational corporations. But here is the reality: U.S. tax rules treat individuals living outside the United States, the same way they treat U.S. multinationals doing business outside the United States. Although, I am a flesh and blood individual person, not a single participant recognized how individuals are affected by these rules. Yet, the focus of the hearing was supposed to be about individuals. How did this happen?

I was shocked that there was no witness who had personal experience with a company or individual running a business with interests outside the U.S.A. Not a single one! This is crazy. I respectfully suggest that subsequent hearings include witnesses who have experienced running businesses outside the United States and/or actually living outside the United States. To put it another way: Subsequent hearings should deal with the reality on the ground and not the theory in the cloud.²⁵¹

Unfortunately, the Senate Finance Committee paid no heed. In the immediately following months (April,²⁵² May,²⁵³ and July 2021²⁵⁴), it held three additional hearings. Again, issues directly affecting American nationals living outside the United States were on the agenda. However, no American national living outside the United States was asked to testify, and their situation was not discussed.

The discussion above demonstrates that, generally, Congress ignores American nationals living outside the United States and fails to investigate their claims about the U.S. nationality-based tax system. There are, however, a small number of exceptions to this general rule, discussed immediately below.

In April 2017, a hearing entitled “Reviewing the Unintended Consequences of the Foreign Account Tax Compliance Act” was organized by the House Subcommittee on Government Operations (Committee on

²⁵⁰ *How U.S. International Tax Policy Impacts American Workers, Jobs, and Investment: Hearing Before Sen. Comm. Fin.*, 117th Cong. S. Hrg. 117-304 (2021), <https://www.finance.senate.gov/imo/media/doc/47971.pdf>.

²⁵¹ *Id.* at 128 (letter submitted by Alissa Andrews).

²⁵² *Creating Opportunity Through a Fairer Tax System*, *supra* note 240.

²⁵³ *Closing the Tax Gap*, *supra* note 75.

²⁵⁴ *Building on Bipartisan Retirement Legislation: How Can Congress Help? : Hearing Before Sen. Comm. Fin.*, 117th Cong. S. Hrg. 117-678 (2021), <https://www.finance.senate.gov/imo/media/doc/52448.pdf>.

Oversight and Government Reform).²⁵⁵ True to its title, the hearing focused on FATCA. The hearing began with statements by Senators Rand Paul²⁵⁶ and Mark Meadows,²⁵⁷ each of whom critiqued FATCA. Senator Paul explained, “[t]his is a big, big deal to the 9 million Americans who live overseas.”²⁵⁸ He argued that FATCA violates the Fourth Amendment right to privacy and that its compliance costs are larger than the revenue it generates.²⁵⁹ Senator Meadows discussed the difficulties American nationals living outside the United States have in opening and keeping financial accounts.²⁶⁰ He lamented that, as a result of those difficulties, overseas Americans must “make the tragic choice between keeping their citizenship and preserving their financial stability.”²⁶¹ The hearing included testimony from several American nationals living outside the United States who, either in-person or on video, explained their own experiences with the policy as well as the experiences of others.²⁶²

After these statements, the hearing devolved into the rhetoric Bunch predicted, an assumption of evil about certain persons was applied inferentially to the entire group.²⁶³ Senator Gerald Connolly defended FATCA on the grounds that “[e]xtremely wealthy tax cheats . . . hired expensive lawyers who knew how to evade the system.”²⁶⁴ The only overseas American that Connolly was willing to admit might not fit this description was the person who testified right before he spoke – “the woman we just saw on that video.”²⁶⁵ The hearing witness Elise Bean reiterated Connolly’s inference of evil upon an entire group. She discussed, in detail, the results of her investigation demonstrating that certain persons were using “offshore” bank accounts for tax evasion.²⁶⁶ “That’s the backdrop for FATCA,”²⁶⁷ she explained. What she failed to note was that none of the subjects of her investigation were Americans living outside the United States – they were all U.S. residents. She also failed to note that she had no evidence of American nationals living outside the United States using “offshore” accounts to engage

²⁵⁵ *Reviewing the Unintended Consequences of the Foreign Account Tax Compliance Act*: Hearing Before Subcomm. on Govt. Operations, 117th Cong. Serial No. 115-45 (2017), <https://www.govinfo.gov/content/pkg/CHRG-115hhrg28503/pdf/CHRG-115hhrg28503.pdf>.

²⁵⁶ *Id.* at 1-4.

²⁵⁷ *Id.* at 4-5.

²⁵⁸ *Id.* at 3.

²⁵⁹ *Id.* at 1-3.

²⁶⁰ *Id.* at 5.

²⁶¹ *Id.*

²⁶² *Id.* at 5, 7-56.

²⁶³ *Supra* note 18 and accompanying text.

²⁶⁴ *Reviewing the Unintended Consequences*, *supra* note 255, at 5.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 57-67.

²⁶⁷ *Id.* at 58.

in tax evasion. Nevertheless, for both Connelly and Bean, because some were guilty, all must be treated as if they, too, were guilty.

Another exception occurred when, while serving as a member of Congress, Representative George Holding took several opportunities to try to draw attention to the situation of American nationals living outside the United States. For example, during a hearing held on May 18, 2017,²⁶⁸ he questioned two witnesses, business executives, on how moving to a purely residence-based system of taxation would impact their businesses' ability to hire and retain Americans outside the United States.²⁶⁹ In two other hearings held that same year, Holding made statements about the U.S. nationality-based tax system, deploring how it both makes it more expensive for American companies to employ Americans outside the United States and leads many Americans living outside the United States to renounce U.S. citizenship.²⁷⁰ Further, in 2018, Holding introduced H.R. 7358, the "Tax Fairness for Americans Abroad Act."²⁷¹ If it had been adopted, it would have allowed "nonresident citizens" to exclude non-U.S. income from their gross income taxable by the United States.²⁷² To underscore how exceptional Holding's attention to overseas Americans was, the bill never gained a single cosponsor.

As a final exception, in recent years Representatives Dina Titus and Don Beyer have become champions for Americans living outside the United States. Among other actions, they introduced/cosponsored two bills in the current 118th Congress: (1) H.R.2729, "Commission on Americans Living Abroad Act of 2023,"²⁷³ seeking the appointment of a commission to study how federal laws and policies affect United States citizens living in foreign countries; and (2) H.R.5432, "Tax Simplification for Americans Abroad Act,"²⁷⁴ seeking to simplify U.S. tax filings for overseas Americans who meet certain conditions.

²⁶⁸ *How Tax Reform Will Grow Our Economy and Create Jobs*: Hearing Before Comm. On Ways & Means, 115th Cong. Serial No. 115-FC01 (2017), <https://www.govinfo.gov/content/pkg/CHRG-115hhrg33393/pdf/CHRG-115hhrg33393.pdf>.

²⁶⁹ *Id.* at 171-73.

²⁷⁰ *Increasing U.S. Competitiveness and Preventing American Jobs from Moving Overseas*: Hearing Before Comm. On Ways & Means, 115th Cong. 143-46 (2017), <https://www.congress.gov/111/chrhg/CHRG-111hhrg33426/CHRG-111hhrg33426.pdf>; *How Tax Reform Will Simplify Our Broken Tax Code*, *supra* note 241, at 50-51.

²⁷¹ Tax Fairness for Americans Abroad Act of 2018, H.R. 7358, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/7358?s=2&r=1>

²⁷² *Id.*

²⁷³ Commission on Americans Living Abroad Act of 2023, H.R.2729, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-bill/2729?q=%7B%22search%22%3A%22Commission+on+Americans+Living+Abroad+Act%22%7D&s=5&r=2>.

²⁷⁴ Tax Simplification for Americans Abroad Act, H.R.5432, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-bill/5432?q=%7B%22search%22%3A%22H.R.+5432%22%7D&s=4&r=1>.

Of particular note is a virtual event that Democrats Abroad organized in October 2023 with Representative Beyer.²⁷⁵ He began with a statement recognizing the invisibility of American nationals living outside the United States and their experiences with the U.S. nationality-based tax system: “This [is] a really important issue that [gets] tragically little attention in Washington D.C. and in Congress,”²⁷⁶ he said.

He explained that he became aware of the issue in 2009, when he arrived in Switzerland to serve as Ambassador. He understood that his most important job was to overcome the anti-American sentiment present in Switzerland. He initially thought that the source of the sentiment was from events such as the United States’s participation in recent wars and the prisoner abuse that occurred at Abu Ghraib. However, after participating in a town hall meeting in Geneva for Americans living in Switzerland, he learned that the source of anti-American sentiment was elsewhere.²⁷⁷

Representative Beyer explained:

I’ve been in and out of politics . . . for 40 years. That [town hall meeting] was the most brutal session I ever had. I’ve never had a town hall meeting, heard debate, or anything, that was as difficult as that was. [The other person who did the meeting with me] fled halfway through. We discovered that the source of the anti-American hostility in Switzerland was among the American expats who lived in Switzerland. It all had to do with [the U.S. nationality-based tax system].²⁷⁸

Beyer then commented at length on the situation of Americans living outside the United States and the failures of Congress in their regard. His comments evidence a remarkable understanding. Given his status as a member of Congress, they merit extensive quotation here:

[Renunciations of U.S. citizenship are] completely driven by the way the U.S. government treats our citizens that live overseas.²⁷⁹ [. . . The system] places a uniquely heavy burden on [overseas Americans].²⁸⁰

. . .

²⁷⁵ Democrats Abroad, *Congressman Don Beyer & The Tax Simplification for Americans Abroad Act*, YOUTUBE (Oct. 28, 2023), https://www.youtube.com/watch?v=xX7PvNJqU_Y (Representative Beyer interviewed by Rebecca Lammers).

²⁷⁶ *Id.* at 19:55.

²⁷⁷ *Id.* at 21:05-21:30.

²⁷⁸ *Id.* at 21:10-22:00.

²⁷⁹ *Id.* at 22:55.

²⁸⁰ *Id.* at 23:14.

Anecdotally, we found that FATCA was one of the primary causes of divorce in Switzerland, as American[s] . . . didn't want the U.S. government getting involved in their spouse's business.²⁸¹

. . .

In our justifiable attempt to curb tax evasion by [hiding income overseas], we have swept up millions of ordinary Americans in a tax system that is unresponsive at best and actively harmful at worst.²⁸²

. . .

I do understand the great dilemma that [overseas Americans] live under.²⁸³

. . .

[Of the 435 members of the House of Representatives], I would be astonished if more than eight to twelve people knew that we had [nationality-based] taxation. Most are just clueless about it. Those that do know either have been exposed to it from me [or the other members of the House who do know about it] or they are actually CPAs.²⁸⁴

. . .

Only by living overseas did I understand that this is a really important public policy issue to address.²⁸⁵

. . .

[There is an] unfair and incorrect assumption that Americans living abroad are (a) either all tax cheats or (b) they're wealthy people living in Monaco or the French Riviera. The reality is that most Americans living overseas are middle-income, just normal Americans working and raising their kids. They live overseas for a variety of reasons. One of the most damning statistics: Of all the countries in the OECD, we are dead last in the percentage [of our citizens] who live and work overseas. A little of that may be because it's wonderful to live in America,

²⁸¹ *Id.* at 25:50.

²⁸² *Id.* at 26:13.

²⁸³ *Id.* at 33:07.

²⁸⁴ *Id.* at 37:40.

²⁸⁵ *Id.* at 39:00.

but . . . a lot of it is how we treat our Americans living overseas.²⁸⁶

In sum, Congress barely acknowledges the existence of Americans living outside the United States. Except for one hearing held in 2017,²⁸⁷ overseas Americans are not invited to testify during hearings held on topics that directly affect them. Instead, persons who do not have actual knowledge of the U.S. nationality-based tax system are invited to comment on it.²⁸⁸ Given American nationals living outside the United States are excluded from the conversation, the effect of proposed and adopted legislation on them is not considered. As further discussed below, this has devastating consequences.²⁸⁹

Representative Beyer demonstrates that when a member of Congress accepts to genuinely engage with overseas Americans in good faith and without pre-conceived judgements about who they are and why they live outside the United States, it is possible for that member of Congress to finally *see* them.²⁹⁰ With genuine and open-minded engagement, a member of Congress can achieve a true understanding of the situation of American nationals living outside the United States and become motivated to take action to address it.²⁹¹

E. The IRS

The IRS has a two-faced approach towards American nationals living outside the United States and the knowledge they offer about the U.S. nationality-based tax system. It has one approach for (1) penalties and audits, but another approach for (2) taxpayer services. Further, (3) the internal organization of the IRS demonstrates ignorance of American nationals living outside the United States. In stark contrast, (4) the National Taxpayer Advocate's 2023 Annual Report to Congress offers an example of what can happen when a member of the "in-group,"²⁹² acting in good faith and with an open mind, recognizes the contributions to knowledge made by American nationals living outside the United States and investigates their claims.

²⁸⁶ *Id.* at 39:33.

²⁸⁷ *Supra* notes 255-267 and accompanying text.

²⁸⁸ *See, e.g., supra* notes 243-244, 266-267 and accompanying text.

²⁸⁹ *Infra* notes 405-465 and accompanying text.

²⁹⁰ *Supra* notes 275-286 and accompanying text.

²⁹¹ On the importance of open mindedness, *see* Jack M.C. Kwong, *Epistemic Injustice and Open-Mindedness*, 30 *HYPATIA* 337 (2015) (explaining that epistemic injustice occurs because its perpetrators are not sufficiently open-minded); Jago, *supra* note 3, at 5:01 (explaining the importance of the audience having an open mind and being genuinely willing to hear).

²⁹² *Supra* note 12 and accompanying text.

1. Audits and Penalties

The IRS does not hold back when it comes to penalizing American nationals living outside the United States. The IRS imposes harsh penalties even in situations when the Americans are faced with complex rules that confuse professional return preparers and the taxpayers acted in good faith.²⁹³ The IRS's approach to international reporting penalties have been described as “especially harsh.”²⁹⁴ The Internal Revenue Manual explaining how IRS employees should apply such penalties show that for “anyone who’s swimming in the international waters — if you have a foreign account, if you have a foreign entity, if you are engaged in foreign activities — you are presumed to know everything that you should know about this area. [A] lack of knowledge, even if it’s a negligent mistake or inadvertence, doesn’t matter.”²⁹⁵

A 2023 audit by the Treasury Inspector General for Tax Administration criticized the IRS for focusing its auditing resources on low-income (under \$200,000 annually) international taxpayers, because such audits are “less productive when measured by dollars returned per hour.”²⁹⁶ The IRS defended its approach by stating: “the Dollars per Hour metric does not include the assessment of penalties, and . . . penalties are a significant focus of [the IRS’s] compliance effort.”²⁹⁷

A study conducted by the National Taxpayer Advocate (NTA) demonstrated that the IRS penalty regime for international information returns (returns that do not state a tax liability) disproportionately affects individuals

²⁹³ See, e.g., Jeanne Sahadi, *You've Never Seen IRS Penalties Like These*, CNN MONEY (June 4, 2015), <https://money.cnn.com/2015/04/01/pf/taxes/irs-penalties/index.html>; William Baldwin, *The IRS Versus the Clumsy Taxpayer*, FORBES (Dec. 11, 2022), <https://www.forbes.com/sites/baldwin/2022/12/11/the-irs-versus-the-clumsy-taxpayer/?sh=1bd67a263d7a>; Lauren Vella, *Foreign Account Reports a 'Financial Trap' for Americans Overseas*, BLOOMBERG TAX (Jan. 11, 2023), <https://news.bloombergtax.com/daily-tax-report/foreign-account-reports-a-financial-trap-for-americans-overseas>. See also Paul Atkinson & Doris Speer, *FBAR And Other Financial Reporting Cases: Selected Cases Show Wide Range of Violations and Penalties*, ASS'N OF AM. RESIDENT OVERSEAS (May 3, 2023), <https://aaro.org/images/Financial-Reporting-Chart-03MAY23.pdf>.

²⁹⁴ Kristen A. Parillo, *IRS Penalty Practice May Be Due for Reset*, 180 TAX NOTES FED. 1338 (Aug. 21, 2023), <https://www.taxnotes.com/tax-notes-today-federal/penalties/irs-penalty-practice-may-be-due-reset/2023/08/16/7h2y1> (quoting Caroline D. Ciruolo).

²⁹⁵ *Id.*

²⁹⁶ Treasury Inspector General for Tax Administration, *The IRS Large Business and International Division Should Consider Shifting Individual Examination Resources to More Productive Examinations*, Reference No. 2023-30-019, at 5 (May 25, 2023), <https://www.tigta.gov/sites/default/files/reports/2023-05/202330019fr.pdf>.

²⁹⁷ *Id.* at 6.

with “moderate” resources.²⁹⁸ It is, the NTA explains, “by no means just a rich person’s problem.”²⁹⁹ Specifically regarding informational penalties under Internal Revenue Code (IRC) Sections 6038³⁰⁰ and 6038A,³⁰¹ the NTA found that 71% are assessed against taxpayers with income of \$400,000 or less.³⁰² The average penalty amount for these individuals is over \$40,000.³⁰³

When it comes to conducting audits and assessing penalties, American nationals living outside the United States are not invisible to the IRS. On the contrary, they are highly visible and those who are low-income are especially seen and targeted.

2. Taxpayer Services

The IRS provides considerably reduced services to American nationals living outside the United States as compared to what is offered to domestic taxpayers.³⁰⁴ The IRS systematically rejects requests to improve services for American nationals living outside the United States to bring them on par with those provided to those living in the United States.³⁰⁵ In doing so, it offers vague excuses like “it would be nice” to provide such services, but that it would “be unfeasible,” “not be technically viable,” “increase the overall cost,” or “require modification to a contract.”³⁰⁶

When the Taxpayer First Act was signed into law in July 2019,³⁰⁷ the IRS had the opportunity to request additional resources for the purpose of improving services for overseas taxpayers, but it did not do so.³⁰⁸ Since that time it still has not made any such request.³⁰⁹

²⁹⁸ Erin Collins, *NTA Blog: International Information Return Penalties Impact a Broad Range of Taxpayers*, TAXPAYER ADVOCATE SERVICE (last updated Nov. 1, 2023), <https://www.taxpayeradvocate.irs.gov/news/nta-blog-international-information-return-penalties/>.

²⁹⁹ *Id.*

³⁰⁰ Pertaining to “Information reporting with respect to certain foreign corporations and partnerships.” I.R.C. § 6038.

³⁰¹ Pertaining to “Information with respect to certain foreign-owned corporations.” I.R.C. § 6038A.

³⁰² Collins, *supra* note 298.

³⁰³ *Id.*

³⁰⁴ For a detailed comparison of the respective service levels, *see generally* Snyder et al., *Mission Impossible*, *supra* note 40. For a summary comparison, *see id.* at 1829-30.

³⁰⁵ *See generally, id.*

³⁰⁶ *Id.* at 1839.

³⁰⁷ Taxpayer First Act, Pub. L. No. 116-25, 133 Stat. 981 (2019).

³⁰⁸ INTERNAL REVENUE SERV., TAXPAYER FIRST ACT REPORT TO CONGRESS (Jan. 2021), <https://www.irs.gov/pub/irs-pdf/p5426.pdf>; Snyder et al., *Mission Impossible*, *supra* note 40, at 1843-53.

³⁰⁹ *See, e.g.* IRS, *News Release and Fact Sheet Archive* (last updated Jan. 10, 2024), <https://www.irs.gov/newsroom/news-release-and-fact-sheet-archive> (news release archive)

The considerable additional funding (approximately \$80 billion) the IRS received under the 2022 Inflation Reduction Act (IRA)³¹⁰ arguably offered the IRS the opportunity to improve services for international taxpayers. However, the IRS's eight year, 150-page "Strategic Operating Plan"³¹¹ (the Plan), describing how it intends to spend the additional funding, scarcely acknowledges the existence of international taxpayers.³¹² In relation to improving services, the Plan mentions international taxpayers only twice, with respect to enabling payments³¹³ and expanding credentialing access.³¹⁴ Further, the detailed "report card" the IRS issued one year after the adoption of the IRA failed to even mention international taxpayers, let alone describe any efforts to improve services for them.³¹⁵

In sum, while American nationals living outside the United States are highly visible to the IRS for auditing and the assessment of penalties, they disappear when it comes to requesting funding and improving services for them.

3. Internal Organization

The IRS's internal organization consists of four primary operating divisions: Wage and Investment, Large Business & International (LB&I), Small Business/Self-Employed, and Tax-Exempt and Government Entities.³¹⁶

The grouping of international individuals with large businesses in the same division is either potentially logical or absurd, depending on whether American nationals living outside the United States are seen as stereotypes or as who they really are. If they are seen as the stereotypical "expats" who work for large American multinationals and are sent overseas by their employer on a

dating back to 2002 shows few news releases have been concerned with international taxpayers; none describe any request for adequate resources to serve international taxpayers).

³¹⁰ See, e.g., Brendan McDermott, *IRS-Related Funding in the Inflation Reduction Act*, CONG. RSCH. SERVS. (Oct. 20, 2022), <https://crsreports.congress.gov/product/pdf/IN/IN11977>.

³¹¹ INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE INFLATION REDUCTION ACT STRATEGIC OPERATING PLAN FY2023-2031 (April 5, 2023), <https://www.irs.gov/pub/irs-pdf/p3744.pdf> (hereinafter "IRS PLAN").

³¹² In 150 pages, they are mentioned just three times. *Id.* at 40, 44, 132.

³¹³ *Id.* at 40.

³¹⁴ *Id.* at 44.

³¹⁵ See IRS, *Inflation Reduction Act 1-Year Report Card: IRS Delivers Dramatically Improved 2023 Filing Season Service, Modernizes Technology, Pursues High-Income Individuals Evading Taxes* (Aug. 16, 2023), <https://www.irs.gov/newsroom/inflation-reduction-act-1-year-report-card-irs-delivers-dramatically-improved-2023-filing-season-service-modernizes-technology-pursues-high-income-individuals-evading-taxes>.

³¹⁶ *At-a-Glance: IRS Divisions and Principal Offices*, IRS (last updated March 3, 2023), <https://www.irs.gov/about-irs/at-a-glance-irs-divisions-and-principal-offices>.

temporary mission,³¹⁷ then the grouping is not entirely inexplicable. However, if they are seen for who they really are – people from all walks of life and all levels of income, with many kinds of employers, some self-employed, some unemployed and retired, and many living outside the United States for decades if not most or all their lives³¹⁸ – then this grouping is manifestly absurd.

Large, multinational businesses and ordinary American nationals living outside the United States are two distinct categories of taxpayers. They require two very different approaches for tax administration. Since large businesses and ordinary overseas Americans are grouped together, it is easy to understand that these large entities dominate over individuals. This results in the IRS both misunderstanding overseas Americans – by failing to see them for who they really are – and allocating only minimal resources to them. In some cases, such individuals are even subsumed within large businesses, to the immense detriment of the individuals. One example of this is the IRS’s application of the global intangible low-taxed income regime in the same manner, be it to a large multinational company or to a one-person doctor’s office, which has resulted in financial devastation for many American nationals living outside the United States. This is discussed further in Part IV below.³¹⁹

4. National Taxpayer Advocate (NTA)

In stark contrast to the IRS, the NTA’s 2023 Annual Report (the Report) to Congress offers a recent example of what can happen when a member of the “in-group,” acting in good faith and with an open mind, recognizes the contributions to knowledge made by American nationals living outside the United States and investigates their claims. More specifically, two of the Report’s ten “Most Serious Problems” are focused principally, if not exclusively, on the experiences of American nationals living outside the United States.³²⁰ The contents of these two parts of the Report are evidence the NTA

³¹⁷ This stereotype is reinforced by articles like these: Andrea Ella Palmer, *11 Best US Companies to Work for Abroad*, GO OVERSEAS (Dec. 20, 2022), <https://www.gooverseas.com/blog/best-us-companies-work-abroad>; Tiffany Grant, *Want To Work Abroad? These 5 International Companies Are Hiring*, MONEY TALK WITH TIFF (Nov. 9, 2022), <https://moneytalkwitht.com/blog/work-abroad/#:~:text=Taboola%2C%20Audible%2C%20Asana%2C%20Google.and%20experience%20a%20new%20culture>.

³¹⁸ See, e.g., Snyder, *Extraterritorial Taxation* #2, *supra* note 34, at 4-5.

³¹⁹ *Infra* notes 394-504 and accompanying text.

³²⁰ NAT’L TAXPAYER ADVOC., *Most Serious Problem #8 – International: The IRS’s Approach to International Information Return Penalties Is Draconian and Inefficient*, 2023 ANNUAL REPORT TO CONGRESS (Jan. 2024), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/01/ARC23_MSP_08_International.pdf (hereinafter “MSP #8”); NAT’L TAXPAYER ADVOC., *Most Serious Problem #9 – Compliance Challenges For Taxpayers Abroad: Taxpayers Abroad Continue to Be Underserved and Face Significant Challenges in Meeting Their U.S. Tax Obligations*, 2023 ANNUAL REPORT TO CONGRESS (Jan. 2024),

tracked many of the claims made by American nationals living outside the United States. The NTA independently investigated those claims, and, importantly, did so using IRS data that was not publicly available (i.e., data that was unavailable to the American nationals whose claims the NTA was investigating). Examples of the claims the NTA investigated – and subsequently confirmed – include:

- The IRS imposes draconian penalties for the failure to make a purely informational filing (no tax was owed). This occurs even when the requirement and/or the deadline to file was unclear, even to tax professionals, and the taxpayer acted in good faith;³²¹
- The returns that international taxpayers are required to file are considerably more voluminous and complex as compared to those that domestic taxpayers are required to file;³²²
- Because of the complexity of the forms, more international taxpayers (as compared to domestic taxpayers) use a paid return preparer. At the same time, the majority of the returns filed from outside the United States (and three times the number of international returns as compared to domestic returns) show no tax is owed;³²³
- International taxpayers have considerably more limited access to IRS assistance as compared to domestic taxpayers;³²⁴
- There are lengthy delays in the delivery of postal mail from the IRS to international taxpayers; because of this, the recipient does not have sufficient time to respond. They often incur damage of some kind as a result (a penalty, loss of rights, . . .);³²⁵ and
- Non-English-speaking, international taxpayers have special difficulties in understanding their obligations because few – if any – IRS

https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/01/ARC23_MSP_09_Compliance-Abroad.pdf (hereinafter “MSP #9”).

³²¹ MSP #8, *supra* note 320, at 103-4, 107-8. This tracks and confirms the claim made, e.g., in Snyder et al., *Mission Impossible*, *supra* note 40, at 1839.

³²² MSP #9, *supra* note 320, at 119-22, 107-8. This tracks and confirms the claim made, e.g., in Snyder et al., *Mission Impossible*, *supra* note 40, at 1831.

³²³ MSP #9, *supra* note 320, at 121-23. This tracks and confirms the claim made, e.g., in Snyder et al., *Mission Impossible*, *supra* note 40, at 1832.

³²⁴ MSP #9, *supra* note 320, at 123-25. This tracks and confirms the claim made, e.g., in Snyder et al., *Mission Impossible*, *supra* note 40, at 1832.

³²⁵ MSP #9, *supra* note 320, at 128-9. This tracks and confirms the claim made, e.g., in Snyder et al., *Mission Impossible*, *supra* note 40, at 1834.

publications and other services are offered in a language they can understand.³²⁶

The NTA's 2023 Annual Report to Congress offers another example of what can happen when a member of the "in-group," acting in good faith and with an open mind,³²⁷ recognizes the contributions to knowledge made by American nationals living outside the United States and investigates their claims.

F. Case Study

As this Part III demonstrates, epistemic injustice towards persons of American nationality living outside the United States is pervasive. So much so that it would be impossible to examine every instance, let alone examine every instance in-depth. Instead, set forth below is a case study focused on two passages from an academic work. The work is the 13th edition of *International Taxation in a Nutshell*,³²⁸ published in 2023. The two passages were selected because they are especially emblematic of the widespread problem.

The first passage:

In *Cook v. Tait* . . . the Court justified U.S. assertion of taxing jurisdiction on the theory that the benefits of citizenship extend beyond territorial boundaries. For example, the United States seeks to protect its citizens anywhere in the world. Also, citizens have the right to return to the United States whenever they want and participate in the economic system. In effect, a citizen of the United States has an insurance policy, and taxes are the cost of maintaining that policy.³²⁹

The second passage:

Suppose a citizen of the United States, fearing a high U.S. tax liability, renounces citizenship. [If] the individual is a resident of the United States, the renunciation has no tax effect because U.S. residents are taxed in the same manner as U.S. citizens.³³⁰

The purpose of this case study is to identify the knowledge and experiences offered by American nationals living outside the United States that the author of these passages failed to acknowledge, and their claims that the author failed to investigate. To be clear, the problem with these passages is *not* the failure of the author to agree with the opinions of the American

³²⁶ MSP #9, *supra* note 320, at 121. This tracks and confirms the claim made, e.g., in Snyder et al., *Mission Impossible*, *supra* note 40, at 1834-35.

³²⁷ See *supra* note 291 (explaining the importance of the audience having an open mind and being genuinely willing to hear).

³²⁸ HERZFELD (13th ed.), *supra* note 167.

³²⁹ *Id.* at 30.

³³⁰ *Id.* at 34.

nationals. The problem – the source of the epistemic injustice – is the author’s failure to recognize their important contributions to knowledge, to track their truths, and to investigate their claims. Had the author done each with genuine good faith and openness,³³¹ these passages would likely read quite differently.

In the first passage,³³² the author assumes the constitutionality of today’s U.S. nationality-based tax system by citing the 1924 U.S. Supreme Court decision *Cook v. Tait*.³³³ The limitations of *Cook* for this purpose have been examined at length.³³⁴ The examination reveals that citing *Cook* – a century-old decision – to support an assumption of the current 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.³³⁵ This assumption also ignores dramatic evolutions in our understanding of citizenship and in the U.S. tax system.³³⁶

The author assumes that the Court in *Cook* was right to justify taxing American nationals living outside the United States on the grounds that they benefit from their citizenship when they are outside the United States.³³⁷ This assumption ignores: (i) that the benefits rationale for taxation was discredited both before and after *Cook* was decided;³³⁸ (ii) that, despite the reflexive appeal of the benefits rationale, there is no benefit to which one could legitimately point that would justify the current penalizing system³³⁹ (some of these purported benefits are discussed further below);³⁴⁰ and (iii) in the aftermath of World War II (i.e., after *Cook*), both the U.S. Supreme Court and international human rights bodies took steps to protect citizenship as a constitutional and a human right.³⁴¹ Imposing taxation as a counterpart to citizenship is antithetical to our modern understanding of constitutional and human rights and it negates the rights.³⁴²

³³¹ See Jago, *supra* note 3, at 5:01 (explaining the importance of the audience having an open mind and being genuinely willing to hear).

³³² *Supra* note 329 and accompanying text.

³³³ 265 U.S. 47 (1924).

³³⁴ Snyder, *Myths & Truths*, *supra* note 41, at 203-63.

³³⁵ *Id.*

³³⁶ *Id.* at 194-203, 270-304. See also Snyder, *Unacknowledged Realities*, *supra* note 42, at 256-62.

³³⁷ *Supra* note 329 and accompanying text.

³³⁸ Snyder, *Can Extraterritorial Taxation Be Rationalized*, *supra* note 43, at 546-8.

³³⁹ *Id.* at 548-64.

³⁴⁰ *Infra* notes 343-367 and accompanying text.

³⁴¹ Snyder, *Can Extraterritorial Taxation Be Rationalized*, *supra* note 43, at 543-6; Snyder, *Myths & Truths*, *supra* note 41, at 199-203, 257-61.

³⁴² See, e.g., Snyder, *Can Extraterritorial Taxation Be Rationalized*, *supra* note 43, at 592; Snyder, *Myths & Truths*, *supra* note 41, at 233.

The author asserts that “the United States seeks to protect its citizens anywhere in the world.”³⁴³ The reality is that the United States does little to protect Americans living outside the United States.³⁴⁴ When *Cook* was decided in 1924, the United States lacked a credible record with respect to the evacuation of U.S. citizens.³⁴⁵ Today, overseas Americans have no guarantee that the United States will evacuate them from any given emergency situation.³⁴⁶ On those occasions when Americans are evacuated, the State Department is required by law to seek reimbursement.³⁴⁷

Further, depending upon the circumstances, the United States may refuse protection to dual citizens.³⁴⁸ Bilateral Investment Treaties, purported by some to protect the property of overseas Americans, in effect serve no purpose for them.³⁴⁹ When the United States was recently called upon to take specific actions to protect overseas Americans – actions that another country that does not tax its overseas nationals successfully implemented – the United States refused, offering the excuse that it has “historically” not offered such protection.³⁵⁰

The author seeks to justify the U.S. nationality-based tax system on the grounds that American nationals have the right to return to the United States.³⁵¹ The right to return to one’s country is a human right protected by multiple international human rights instruments that the United States has signed and ratified.³⁵² Further, the right to enter and to remain in a country is a fundamental component of citizenship of that country.³⁵³ As explained above,³⁵⁴ citizenship is both a constitutional and a human right. Again, imposing taxation as a counterpart to citizenship or to the ability to return to one’s country is antithetical to our modern understandings of constitutional

³⁴³ *Supra* note 329 and accompanying text.

³⁴⁴ Snyder, *Can Extraterritorial Taxation Be Rationalized*, *supra* note 43, at 553-61.

³⁴⁵ *Id.* at 553.

³⁴⁶ *Id.* at 553-6.

³⁴⁷ *Id.* at 554-6.

³⁴⁸ *Id.* at 557.

³⁴⁹ *Id.* at 557-8.

³⁵⁰ *Id.* at 558-61.

³⁵¹ *Supra* note 329 and accompanying text.

³⁵² Snyder, *Myths & Truths*, *supra* note 41, at 257-61.

³⁵³ See, e.g., Rosalyn Higgins, *The Right in International Law of an Individual to Enter, Stay in and Leave a Country*, 49 INT’L AFF. 341 (1973); Tjasa Leskovic Vendramin, *The Right to Return of Refugees in International Law: The Case Study of Bosnia and Herzegovina* (2007/2008) (Master’s Thesis, International University Institute for European Studies), at 16-20,

https://web.archive.org/web/20200725002914/http://www.unaslovenia.org/sites/default/files/file/leskovic_vendramin-the_right.pdf; Robert Jay Dilger, *Home Is Where They Have to Take You In: Right to Entry for U.S. Citizens* (Cong. Rsch. Serv.) (Oct. 16, 2014), <https://sgp.fas.org/crs/misc/home.pdf>.

³⁵⁴ *Supra* note 341 and accompanying text.

and human rights, and it negates the right.³⁵⁵ Taxation (let alone penalizing taxation) is not imposed as a counterpart, for example, to the fundamental rights of freedom of speech or freedom of religion. Further, as American nationals living outside the United States and others have explained, it is not uncommon for a U.S. citizen to be denied entry to the United States or, once in the country, to be deported.³⁵⁶

The author seeks to justify the U.S. nationality-based tax system on the grounds that American nationals have the “right to participate in the economic system” of the United States.³⁵⁷ This phrasing is ambiguous and raises several questions. Does the author mean the right to work (to be employed) in the United States? If so, the right to work is a human right enshrined in several human rights instruments.³⁵⁸ Further, the right to work is another fundamental component of citizenship³⁵⁹ which, again, is a constitutional and a human right.³⁶⁰ Or does the author mean the right to carry out business activities and/or to invest in the United States? If so, nearly all persons in the world can do this,³⁶¹ independent of residence and citizenship status. Indeed, the United States actively encourages nonresident non-citizens to do both, by offering both tax advantages³⁶² and financial secrecy.³⁶³

In the last sentence of the first passage, the author also seeks, yet again, to justify the U.S. nationality-based tax system - this time by asserting that “a citizen of the United States has an insurance policy, and taxes are the cost of

³⁵⁵ *Supra* note 342 and accompanying text.

³⁵⁶ Snyder, *Can Extraterritorial Taxation Be Rationalized*, *supra* note 43, at 561-4.

³⁵⁷ *Supra* note 329 and accompanying text.

³⁵⁸ Snyder, *Myths & Truths*, *supra* note 41, at 252-4.

³⁵⁹ See generally Linda Bosniak, *Citizenship and Work*, 27 N.C. J. INT'L L. 497 (2002), <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1727&context=ncilj>; Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMMIGR. L.J. 243 (2017), https://digitalcommons.law.uidaho.edu/cgi/viewcontent.cgi?article=1397&context=faculty_scholarship. Both articles are predicated on the right to work as a fundamental component of citizenship. See generally Pir Ali Kaya and Isin Ulas Ertugrul Yilmazer, *The Right to Work as a Fundamental [sic] Human Right*, 15 EUR. SCI. J. 151 (2019), <http://dx.doi.org/10.19044/esj.2019.v15n14p151>.

³⁶⁰ *Supra* notes 341, 354 and accompanying text.

³⁶¹ Exceptions would include individuals subject to U.S. sanctions. See Office of Foreign Assets Control, *Basic Information on OFAC and Sanctions*, U.S. DEPT. TREAS. (updated June 14, 2023), <https://ofac.treasury.gov/faqs/topic/1501>.

³⁶² Vladimir Menkov, Chris Lott, & Enzo Michelangeli, *U.S. Taxes for Foreign Investors*, INVEST FAQ (accessed Jan. 5, 2024), <https://invest-faq.com/us-taxes-for-foreign-investors/>; Vincenzo Villamena, *Foreign Investment in the U.S. – Great Opportunities but with U.S. Tax Implications*, ONLINE TAXMAN (March 1, 2021), <https://onlinetaxman.com/foreign-investment-in-us-tax/>. See also Snyder, *Myths & Truths*, *supra* note 41, at 227-28; 236-37.

³⁶³ Snyder, *Myths & Truths*, *supra* note 41, at 235 n.325; Snyder, *Can Extraterritorial Taxation Be Rationalized*, *supra* note 43, at 594 n.285.

maintaining that policy.”³⁶⁴ First, recall that the paragraph in question is about how the U.S. Supreme Court’s justifications for taxing American nationals living outside the United States are contained in its decision *Cook v. Tait*.³⁶⁵ *Cook* does not depict U.S. citizenship as an “insurance policy,” nor does it make any such implication. Likewise, the Court does not state or imply that U.S. taxation is a “cost” of citizenship. On the contrary, and as discussed above,³⁶⁶ the Court asserted the (already then discredited) benefits rationale, stating that there is a “presumption that government by its very nature benefits the citizen and his property wherever found [and] therefore has the power to make the benefit complete.”³⁶⁷ In short, there is no legal or judicial authority to support the last sentence of the first passage.

Instead, the last sentence of the first passage recalls the “worth the tax cost” rationale that others have offered to justify the U.S. nationality-based tax system.³⁶⁸ While that rationale has been debunked elsewhere,³⁶⁹ the following merits mention here: since citizenship is “the right to have rights,”³⁷⁰ describing it as “insurance”, has some accuracy. The constitutional and human right of citizenship is a means of assuring other constitutional and human rights.³⁷¹ As discussed above,³⁷² however, asserting the right has a “cost” is antithetical to our modern understandings of constitutional and human rights. Further, in negating the right, the assertion degrades it to the status of something that is merely transactional.

Further, in degrading the constitutional and human right of citizenship to a mere transaction, the last sentence of the first passage makes two assumptions: (i) that most, if not all, American nationals living outside the United States *pay* U.S. tax, and (ii) that whatever form the “cost” of U.S. citizenship takes, it is at least roughly the same for what is, presumably, the same “policy.” The reality is that neither of these assumptions is true. Most U.S. federal returns filed from outside the United States show no U.S. tax is owed.³⁷³ Further, the experiences that American nationals living outside the United States have with the U.S. nationality-based tax system vary widely. These experiences vary not

³⁶⁴ *Supra* note 329 and accompanying text.

³⁶⁵ *Supra* note 333 and accompanying text.

³⁶⁶ *Supra* note 338 and accompanying text.

³⁶⁷ *Cook v. Tait*, 265 U.S. 47, 56 (1924).

³⁶⁸ Snyder, *Can Extraterritorial Taxation Be Rationalized*, *supra* note 43, at 541-2, 572.

³⁶⁹ *Id.* at 572-5.

³⁷⁰ Snyder, *Myths & Truths*, *supra* note 41, at 197, 257, 281; Snyder, *Can Extraterritorial Taxation Be Rationalized*, *supra* note 43, at 544-6, 573.

³⁷¹ See sources cited *supra* note 370.

³⁷² *Supra* notes 342, 355 and accompanying text.

³⁷³ *Supra* note 105 and accompanying text. See also MSP #9, *supra* note 320, at 117 n.3, 122 (explaining that approximately 62% of individual international taxpayers reported zero tax liability between 2016 and 2021).

only from person to person, but they also vary for the same person depending on the evolution of the person's life circumstances.³⁷⁴ For what is, presumably, the same "insurance" coverage, does it make sense that an American national living in Switzerland should incur greater "cost" than one living in Mexico?³⁷⁵ For an American small business owner in Canada to incur greater "cost" than an American employee in the same country?³⁷⁶ What is the correct "cost" for the constitutional and human right of citizenship and is it fair that the "cost" differs depending on the person, the country where they live, and a large variety of other life circumstances?

In the second passage, the author paints the narrative of a person renouncing U.S. citizenship because they "fear . . . a high U.S. tax liability."³⁷⁷ The implication is that this is the most common – if not the only – reason an American would renounce U.S. citizenship. While this scenario is the one that attracts the most attention of academics and the media alike,³⁷⁸ it is rare. IRS data demonstrates that, of persons renouncing U.S. citizenship, most had "no or little tax liability in the years prior to expatriation."³⁷⁹ Instead, surveys of renunciants indicate that most renounced not because of the amount of their U.S. taxes but because of the difficulties they experienced as a result of the system.³⁸⁰ Surveys of current U.S. citizens living outside the United States demonstrate that more than 50% "often" or "sometimes" contemplate renouncing U.S. citizenship.³⁸¹ If they did so, the reason would not be because

³⁷⁴ *Supra* notes 110-115 and accompanying text.

³⁷⁵ *See, e.g.*, SEAT survey data part 1, *supra* note 99 at 15-29; SEAT survey data part 2, *supra* note 110, at 32-47. This data demonstrates that, generally speaking, American nationals residing in Switzerland experience the most problems in connection with the U.S. nationality-based tax system as compared to other countries. This includes Mexico; residents there reported comparatively fewer problems.

³⁷⁶ For example, American national small business owners residing in Canada experienced considerable difficulties in connection with the Mandatory Repatriation Tax (MRT) that American nationals who were not small business owners (employees, unemployed) residing in Canada did not experience. *See Snyder, Taxing the American Emigrant, supra* note 39, at 337-8. The MRT is discussed further below, *infra* notes 394-504 and accompanying text.

³⁷⁷ *Supra* note 330 and accompanying text.

³⁷⁸ *See, e.g.*, Juliana Kaplan, *Ultrawealthy Americans are Ditching Their US Citizenship in Droves*, BUS. INSIDER (Aug. 5, 2021), <https://www.businessinsider.com/ultrawealthy-us-citizens-are-denouncing-citizenship-in-droves-2021-8#:~:text=More%20of%20America's%20wealthiest%20citizens,increase%20from%20the%20prior%20year>; Reuven S. Avi-Yonah, *What Is the Best Candidate for a Post-Moore Constitutional Challenge?*, 182 TAX NOTES FED. 105, 106 (Jan. 1, 2024) (defending the exit tax because "it only applies to relatively rich taxpayers" and Elon Musk could renounce U.S. citizenship). *But see, supra* notes 120-121 and accompanying text, explaining that because the exit tax encompasses assets such as the taxpayer's residence and pension, it ensnares many middle-class Americans.

³⁷⁹ *Supra* note 118 and accompanying text.

³⁸⁰ SEAT survey data part 2, *supra* note 110, at 65.

³⁸¹ *Id.* at 59.

they “fear a high U.S. tax liability,” but, for 70% of them, because of the problems they experience as a result of the U.S. nationality-based tax system.³⁸² These same survey reports also contain the commentary of those who have renounced U.S. citizenship. Their comments include:

It was an immeasurably emotional decision. But I had to be realistic. [I needed] to have a bank [and p]reparation fees represented 1/3 of my gross annual income. . . . I cried for a long time. I used to think that the worst day of my life was when my son died. But . . . my renunciation . . . was the day that I died.³⁸³

The officer at consulate was flat and businesslike, process quick and easy. I however was vacillating between homicidal rage and indescribable sorrow.³⁸⁴

[I]t was a choice between the lesser of two evils: living with the anxiety [that] my U.S. citizenship entailed, or living with the depression, the sadness, of having given up my U.S. citizenship. In the end, I decided I could probably live with the sadness.³⁸⁵

These words have nothing to do with a narrative of “fearing a high U.S. tax liability.”

The author states, “if the individual is a resident of the United States, the renunciation has no tax effect because U.S. residents are taxed in the same manner as U.S. citizens.”³⁸⁶ This statement is true in theory, but *only* in theory. The reality is that renunciation of U.S. citizenship can take place only at a U.S. consulate or embassy located outside the United States.³⁸⁷ This is a fact, among others, with which American nationals living outside the United States are well-acquainted, as demonstrated by the recent consular backlog of

³⁸² *Id.* at 60.

³⁸³ Snyder, *Unacknowledged Realities*, *supra* note 42, at 267-8, quoting SEAT Survey Comments, *supra* note 154, at 523-24.

³⁸⁴ Snyder, *Unacknowledged Realities*, *supra* note 42, at 268, quoting SEAT Survey Comments, *supra* note 154, at 531.

³⁸⁵ Snyder, *Unacknowledged Realities*, *supra* note 42, at 268, quoting SEAT Survey Comments, *supra* note 154, at 535.

³⁸⁶ *Supra* note 330 and accompanying text.

³⁸⁷ U.S. Dept. State Bur. Consular Aff., *Renunciation of U.S. Citizenship by Persons Claiming Right of Residence in the United States*, TRAVEL.STATE.GOV (accessed Jan. 26, 2024), <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Renunciaton-USCitizenship-persons-claiming-right-residence.html#:~:text=In%20other%20words%2C%20an%20individual,a%20U.S.%20embassy%20or%20consulate.>

requests for renunciation appointments.³⁸⁸ Such American nationals also know that a necessary consequence of renunciation is the loss of the right to live in the United States³⁸⁹ (that is, the loss of their human right to return to their country).³⁹⁰ Persons who renounce U.S. citizenship already live outside the United States, in most cases for years if not decades.³⁹¹ They renounce only when they feel sufficiently confident they will never need to reside in the United States (again). The author’s purely theoretical statement – oblivious to multiple realities of renunciation of U.S. citizenship – is especially emblematic of the failure to recognize the contributions to knowledge of American nationals living outside the United States, to track their truths, and to investigate their claims. They have a wealth of knowledge demonstrating that the U.S. nationality-based tax system violates the right to citizenship and, with it, the right to return to the United States.³⁹²

Again, the problem with the passages that were selected for this case study is not the failure of the author to agree with the opinions of American nationals living outside the United States. The problem – the source of the epistemic injustice – is the author’s failures to recognize the important contributions to knowledge made by the American nationals, to track their truths, and to investigate their claims.³⁹³ To reiterate, had she done all three in good faith, the passages would likely read quite differently.

IV. MANDATORY REPATRIATION TAX

The last part of this article will examine the invisibility of the American emigrant in the specific context of a case currently before the U.S. Supreme Court, *Moore v. United States*. At issue in the case is the “Mandatory Repatriation Tax” (MRT, also referred to as the “Transition Tax”), adopted under the 2017 Tax Cuts & Jobs Act (TCJA or Act).³⁹⁴ The MRT had devastating effects for overseas Americans with small businesses in the

³⁸⁸ See, e.g., Snyder, *Myths & Truths*, *supra* note 41, at 303-4.

³⁸⁹ See, e.g., SEAT Survey Comments, *supra* note 95, at 73, 369, 619, 626 (survey participants explaining that they while they contemplate renouncing U.S. citizenship, they do not do so because they may need to return to the United States to care for aging family members).

³⁹⁰ See *supra* notes 351-356 and accompanying text.

³⁹¹ See Paul R. Organ, *Citizenship and Taxes: Evaluating the Effects of the U.S. Tax System on Individuals’ Citizenship Decisions* (draft Aug. 23, 2021), <https://www.irs.gov/pub/irs-soi/21rpicitizenshipandtaxes.pdf> (the author uses IRS data to show that “the recent increase in renunciations is mainly driven by those who have for many years lived abroad, rather than by individuals leaving the U.S., and that these renunciations are primarily a response to increased compliance costs, not tax liabilities”); see also e.g., SEAT survey data part 2, *supra* note 110, at 62-66; SEAT Survey Comments, *supra* note 95, at 516-61; Kluth, *supra* note 88.

³⁹² See, e.g., *supra* notes 130-135 and accompanying text.

³⁹³ *Supra* notes 13-17 and accompanying text.

³⁹⁴ I.R.C. § 965; Tax Cuts and Jobs Act, Pub. L. No. 115–97, §§ 14103-14202, 131 Stat. 2054, 2195-2216 (2017).

countries where they live.³⁹⁵ *Moore* theoretically offers the opportunity for the damages they suffered to be repaired, if not in whole, then at least in part.³⁹⁶ However, because overseas Americans have been invisible to policymakers and others from the inception of the TCJA until the present day, it would be overly optimistic to hope that, at this late stage, the U.S. Supreme Court might finally see them and accord them some relief when it renders a decision in *Moore*.

This Part IV describes the invisibility of American nationals living outside the United States with respect to both: (A) the adoption of the MRT, and (B) *Moore v. United States*, a case currently before the U.S. Supreme Court.

The discussion below needs to be understood in the following context: as discussed in further detail *infra*, the IRS provided data indicating that for tax year 2017, a total of 3,231 domestic corporations filed a tax return demonstrating net liability for the MRT.³⁹⁷ Unfortunately, the IRS has not provided comparable data regarding the number of individuals who were subject to the MRT. In its absence, it is nevertheless possible to extrapolate from the data that is available to arrive at a rough estimate of how many American nationals living outside the United States were affected. To begin, this can be done by looking at the rate of business formation in the United States and applying this to the returns filed from outside of the United States. IRS data shows that there were 151.67 million 2017 tax returns filed with US addresses,³⁹⁸ of which 25.96 million filed Schedule C.³⁹⁹ The U.S. Small Business Association estimates that there were 29.6 million small businesses

³⁹⁵ See Brief for Stop Extraterritorial Americans Taxation (SEAT) and the Association of Americans Resident Overseas (AARO) as Amici Curiae Supporting Petitioners, at 8-10, *Moore v. United States* (2023) (No. 22-800). https://www.supremecourt.gov/DocketPDF/22/22-800/278394/20230905122218259_Moore%20AC%20Brief%20filed%20by%20SEAT%20and%20AARO%205%20Sept%202023.pdf; Brief of Individual Taxpayers as Amicus Curiae Supporting Petitioners, at 13-22, *Moore v. United States* (2023) (No. 22-800). https://www.supremecourt.gov/DocketPDF/22/22-800/278943/20230906131442418_Moore%20v.%20United%20States%20No.%2022-800%20Brief%20of%20Individual%20Taxpayers%20as%20Amici%20Curiae%20in%20Support%20of%20Petitioners.pdf.

³⁹⁶ Depending on the Court's decision in *Moore*, some taxpayers may be eligible for at least a partial refund. See, e.g., Edward L. Froelich and Caroline H. Ngo, *Filing a Protective Refund Claim (With a Moore Angle)*, MCDERMOTT, WILL & EMERY (Sept. 25, 2023), <https://www.mwe.com/insights/filing-a-protective-refund-claim-with-a-moore-angle/>.

³⁹⁷ Melissa Costa & Caitlin McGovern, *Effect of IRC Section 965 Transition Tax on Domestic Corporations, Tax Year 2017*, IRS STAT. INCOME SPECIAL RELEASE 2-3 (undated), <https://www.irs.gov/pub/irs-soi/soi-a-co965-id2002.pdf.pdf>.

³⁹⁸ See "SOI Tax Stats – Historic Table 2" on the IRS website at <https://www.irs.gov/statistics/soi-tax-stats-historic-table-2>. Numbers quoted are from tax year 2017: Other Areas for overseas filers and Total less Other Areas for domestic filers.

³⁹⁹ *Id.*

in the United States in 2017.⁴⁰⁰ If we assume that all small businesses are owned by someone who files a tax return, then 19.5% of filers would own small businesses and 17.1% filed Schedule C, leaving 2.4% of filers with non-Schedule C small businesses. IRS data indicates that for tax year 2017, a total of 785,930 returns were filed from outside the United States.⁴⁰¹ For American nationals living outside the United States, a corporate business form is often preferred over Schedule C, so the rate of ownership of non-Schedule C small businesses is likely to be higher than on domestic returns.⁴⁰² But, if we nevertheless assume that 2.4% of tax return filers own a non-Schedule C small business, then we estimate that approximately 18,900 American nationals living outside the United States were subject to the MRT. This is *six times* the number of U.S. domestic corporations that were affected.⁴⁰³

It is apparent then, that by number of taxpayers, considerably more individuals of American nationality living outside the United States were affected by the MRT than were domestic U.S. corporations. This fact is discussed further below.⁴⁰⁴

A. Adoption of the MRT

As mentioned above, the MRT was included in the TCJA.⁴⁰⁵ The TCJA has been described as changing U.S. corporate taxation from a worldwide system, where corporations were generally taxed regardless of where their profits were derived, toward a territorial system, where corporations are generally taxed only on their domestic source profits.⁴⁰⁶ The TCJA provided that when “controlled foreign corporations” (CFCs) distribute their earnings as dividends to U.S. corporate shareholders, those earnings were generally no longer to be taxed. Thus, the Act eliminated, on an ongoing basis, the prior taxes that would have applied to dividends distributed by a CFC to a U.S. corporate shareholder. The one-time MRT was described as necessary “to avoid a potential windfall for CFCs that deferred income”⁴⁰⁷ and could then distribute

⁴⁰⁰ U.S. Small Business Administration Office of Advocacy, *Small Business Profile*, at 1 (2017), <https://advocacy.sba.gov/wp-content/uploads/2017/01/United-States-2017.pdf>.

⁴⁰¹ “SOI Tax Stats,” *supra* note 398.

⁴⁰² Likewise, the rate of ownership of Schedule C businesses is 17.1% for domestic returns and 10.7% for Other Areas returns according to the IRS. *See* “SOI Tax Stats,” *supra* note 398.

⁴⁰³ *See* Alpert et al., *Don’t Blame the Victims: Individuals and the MRT*, 182 TAX NOTES FED. 1617, 1621 (Feb. 26, 2024).

⁴⁰⁴ *Infra* notes 489-495 and accompanying text.

⁴⁰⁵ *Supra* note 394 and accompanying text.

⁴⁰⁶ *See* Brief for the United States in Opposition, on Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, *Moore v. United States* (No. 22-800) (May, 2023), at 3, https://www.supremecourt.gov/DocketPDF/22/22-800/267027/20230516164014148_22-800%20Moore%20v.%20USA.pdf (citing H.R. Rep. No. 409, 115th Cong., 1st Sess., at 370 (2017)).

⁴⁰⁷ Brief for the United States on Petition, *supra* note 406, at 4 (citing H.R. Rep. No. 409, *supra* note 406, at 375).

that income tax-free to “U.S. corporate shareholders” upon the repatriation of earnings accumulated prior to the TCJA.⁴⁰⁸

Even though the MRT was clearly intended to address a problem perceived to lie with *U.S. corporate* shareholders,⁴⁰⁹ it was applied to all “U.S. person” shareholders of non-U.S. companies, regardless of whether the shareholder was based in the United States or was a corporation. As a result, individuals – American nationals living outside the United States as well as individuals living in the United States – found themselves subject to the MRT.⁴¹⁰

More specifically, with the adoption of the TCJA, American nationals operating a small business in the countries where they live found themselves subject to a 17.54% retroactive tax on the retained earnings of their company for tax years 1986 to 2017.⁴¹¹ The tax was not imposed on the companies themselves, but rather on their American-national owners, as individuals. The tax was not triggered by any event such as a distribution by the company, so the individual owners had to figure out some means of obtaining the funds necessary to pay the tax.⁴¹²

Examples of small businesses affected by the MRT include: (i) a film production company; (ii) a doctor’s office; (iii) a family winery; (iv) IT services; (v) real estate investment; and (vi) consulting.⁴¹³

Even though all individual shareholders of a CFC, U.S. and non-U.S. residents alike, were subject to the MRT, the consequences of the MRT were not the same. For a U.S. resident, shareholding in a company incorporated and doing business outside the United States is, likely, only one (small) part of that individual’s investment portfolio. That individual likely has other significant investments as well as one or more other sources of income, notably sourced from the United States.⁴¹⁴ In stark contrast, for an American national living outside the United States, the company is likely in their country of residence.

⁴⁰⁸ *Id.*

⁴⁰⁹ Brief for the United States on Petition, *supra* note 406, at 4.

⁴¹⁰ See, e.g., Raymond M. Polantz, *Passthrough-Entity Treatment of Foreign Subsidiary Income*, TAX ADVISER (Aug. 1, 2023), <https://www.thetaxadviser.com/issues/2023/aug/passthrough-entity-treatment-of-foreign-subsidiary-income.html>.

⁴¹¹ Snyder, *Taxing the American Emigrant*, *supra* note 39, at 337; See also Brief for SEAT and AARO, *supra* note 395, at 3, 15, 31.

⁴¹² See, e.g., Snyder, *Taxing the American Emigrant*, *supra* note 39, at 337-8. See also SEAT Survey Comments, *supra* note 95, at 327-8, 333, 335.

⁴¹³ See Brief for SEAT and AARO, *supra* note 395, at 8-9.

⁴¹⁴ For example, prior to his retirement, Charles Moore, one of the two petitioners in *Moore v. United States*, was a software engineer with Microsoft in Washington State. Stephanie Kirchgaessner & Dominic Rushe, *Billionaire-Linked US Thinktank Behind Supreme Court Wealth Tax Case Lobbying*, THE GUARDIAN (Aug. 25, 2023), <https://www.theguardian.com/us-news/2023/aug/25/us-thinktank-billionaires-supreme-court-wealth-tax-lobbying>.

The company is likely the American national's livelihood; it is the nexus of their professional activities and the principal source of their income (a doctor's office, a consulting firm...).⁴¹⁵ They are small business owners, and the company is their business.⁴¹⁶ In other words, while individual shareholders both inside and outside the United States were subject to the MRT, the consequences were considerably more amplified for those living outside the United States. Besides terminating the operation of their small businesses – that is, give up their livelihoods – there was little American national small business owners living outside the United States could have done to plan for and thereby avoid the MRT.⁴¹⁷

While the MRT was devastating for American nationals around the world,⁴¹⁸ it was especially so for those living in Canada. Prior to 2018, Canadian tax rules incentivized small business owners to retain earnings in their companies as a way to fund retirement.⁴¹⁹ More specifically, because of differences in the applicable tax rates, business owners were encouraged during their active years to limit what they drew from the company in salary and dividends to only what was necessary to fund current needs. They were encouraged to accumulate the remaining income in the company as retained earnings as a form of savings. These savings could either be invested passively to accumulate additional income or held as cash. Either way, upon retirement, the owner could wind down the company's activities except for the savings, which could be drawn down, through the payment of dividends, as a form of income during retirement.⁴²⁰ Upon the adoption of the TCJA, small business owners living in Canada of U.S. nationality found themselves required to liquidate large portions of their retirement savings—in amounts ranging from \$200,000 to \$4 million – to pay the MRT.⁴²¹ This liquidation, in turn, triggered its own Canadian tax and, in many cases, resulted in double taxation.⁴²²

As mentioned above, the MRT was meant to be a counterpart to prospective tax relief that was offered to U.S. multinationals.⁴²³ To add insult to injury, however, overseas Americans (as well as individual shareholders living in the United States) were not eligible to benefit from that prospective relief:

⁴¹⁵ *Supra* note 413.

⁴¹⁶ *See* SEAT Survey Comments, *supra* note 95, at 316-40.

⁴¹⁷ Alpert et al., *supra* note 403, at 1622-25.

⁴¹⁸ *Supra* notes 395, 416.

⁴¹⁹ Snyder, *Taxing the American Emigrant*, *supra* note 39, at 337-8.

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Supra* notes 406-409 and accompanying text.

- After having been subjected to the MRT, distributions based on post-TCJA earnings from CFCs continued to be included in the gross income of those individual shareholders. Therefore, the justification for subjecting corporations to the Repatriation Tax – that they would no longer be taxable on distributions from CFCs – has no application to individual shareholders of CFCs, whether they live inside or outside the United States. Individuals continued to be taxed, be it directly, on actual distributions from CFCs, or indirectly (via Subpart F), on the undistributed income earned or received by CFCs;⁴²⁴
- The TCJA legislated a reduction in the corporate tax rate of C corporations from 35% to 21% – another way that the TCJA benefited C corporations. The individual shareholders of CFCs received no corresponding benefit;⁴²⁵
- While “income” subject to the MRT was taxed to C corporations at a maximum rate of 15.5%, it was taxed to individual shareholders of CFCs at a maximum rate of 17.54%;⁴²⁶ and
- The TCJA allows corporate – but not individual – shareholders to claim a 100% deduction for dividends received.⁴²⁷

The differences in tax treatment between corporations, individuals living in the United States (regardless of nationality), and American nationals living outside the United States are summarized in the Table ahead.

⁴²⁴ See Brief for SEAT and AARO, *supra* note 395, at 15.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.* at 17-18.

Table: Consequences of the Mandatory Repatriation Tax for Differently Situated Taxpayers⁴²⁸

Consequence	Corporation	Individual: U.S. Resident (Regardless of Nationality)	Individual: American National Living Outside United States
Tax rate on mandatory deemed repatriation	8% or 15.5%, depending on whether “repatriated” Earnings and Profits (E&P) was held in cash. ⁴²⁹	<i>Without §962 election:</i> Up to 17.54% or 9.05%, depending on marginal individual tax rate and how “repatriated” E&P is held ⁴³⁰	<i>Without §962 election:</i> Up to 17.54% or 9.05%, depending on marginal individual tax rate and how “repatriated” E&P is held ⁴³¹
		<i>With §962 election:</i> Corporate rates apply ⁴³²	<i>With §962 election:</i> Corporate rates apply ⁴³³
Foreign Tax Credit for taxes paid by CFC	Automatic under §960 ⁴³⁴	Only if §962 election is made ⁴³⁵	Only if §962 election is made ⁴³⁶

⁴²⁸ See Alpert et al., *supra* note 403, at 1620.

⁴²⁹ Under I.R.C. § 965 the percentage of post-1986 accumulated E&P that was taxable was defined by I.R.C. § 965 (c)(2) as the percentage that, when taxed at the applicable corporate tax rate would generate a net 15.5% tax on E&P held in cash, and 8% on the remaining balance. See also *Tax Cuts and Jobs Act: A Comparison for Large Businesses And International Taxpayers*, IRS (Dec. 11, 2023), <https://www.irs.gov/newsroom/tax-cuts-and-jobs-act-a-comparision-for-large-businesses-and-international-taxpayers>.

⁴³⁰ When the taxpayer’s marginal tax rate differed from the corporate tax rate, the effective rate of the MRT changed. The rates quoted are computed using the maximum 2017 individual tax rate of 39.6%.

⁴³¹ See *supra* note 430.

⁴³² I.R.C. § 962. See also *How to Calculate Section 965 Amounts and Elections Available to Taxpayers*, IRS Pub. 5292 (April 6, 2018), at 3, <https://www.irs.gov/pub/irs-prior/p5292--2017.pdf> (hereinafter “*IRS Pub. 5292*”).

⁴³³ See *supra* note 432.

⁴³⁴ I.R.C. § 960; See also IRS Pub. 5292, *supra* note 432, at 9.

⁴³⁵ I.R.C. § 962; See also IRS Pub. 5292, *supra* note 432, at 9.

⁴³⁶ See *supra* note 435.

Consequence	Corporation	Individual: U.S. Resident (Regardless of Nationality)	Individual: American National Living Outside United States
U.S. tax when E&P from deemed repatriation is actually distributed	None ⁴³⁷	None unless §962 election is made to compute MRT ⁴³⁸ If §962 election is made, then any distribution in excess of actual tax paid on deemed repatriation is taxable ⁴³⁹	None unless §962 election is made to compute MRT ⁴⁴⁰ If §962 election is made, then any distribution in excess of actual tax paid on deemed repatriation is taxable ⁴⁴¹
Distribution taxed by host country when actually distributed	Depends on tax treaty, often 5% for dividend to parent ⁴⁴²	Depends on tax treaty; often 15% ⁴⁴³	Fully taxed as a dividend; Treaty benefits not available ⁴⁴⁴

⁴³⁷ I.R.C. § 245A. *See also Tax Cuts and Jobs Act: A Comparison, supra* note 429.

⁴³⁸ I.R.C. § 959. In the absence of a §962 election, the full amount of the Post-1986 E&P included in income under I.R.C. § 965(a) is considered previously taxed E&P (subject to allocation of deficits under §965(b)).

⁴³⁹ I.R.C. § 962(d); Regulations Regarding the Transition Tax Under Section 965 and Related Provisions, T.D. 9846, 84 Fed. Reg. 1838, 1849 (Feb. 5, 2019).

⁴⁴⁰ *See supra* note 438.

⁴⁴¹ *See supra* note 439.

⁴⁴² *See, e.g.*, UNITED STATES MODEL INCOME TAX CONVENTION (2016), at Art. 10, https://home.treasury.gov/system/files/131/Treaty-US-Model-2016_1.pdf (providing for 5% tax on dividends paid to a company owning at least 10% of the company paying dividends, and 15% otherwise). *See also* tax treaties available at *United States Income Tax Treaties - A to Z*, IRS (last updated Oct. 27, 2023), <https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z>.

⁴⁴³ *See sources cited supra* note 442.

⁴⁴⁴ The tax treaty would not apply as both the company targeted by the MRT and the American-national shareholder are residents of the same country (the country in which the company has been organized). *See, e.g.*, UNITED STATES MODEL INCOME TAX CONVENTION, *supra* note 442, at Art. 1(4).

Consequence	Corporation	Individual: U.S. Resident (Regardless of Nationality)	Individual: American National Living Outside United States
Future U.S. tax rates	21% ⁴⁴⁵ reduced from 35%. ⁴⁴⁶	Top rate 37% reduced from 39.6% through 2025 ⁴⁴⁷	Top rate 37% reduced from 39.6% through 2025 ⁴⁴⁸
U.S. tax on future distributions/dividends	Zero ⁴⁴⁹	Taxed as a dividend with credit for host country tax (likely reduced by treaty) ⁴⁵⁰	Taxed as a dividend with credit for host country tax (no treaty benefits) ⁴⁵¹

Many appealed to Congress to consider the MRT's impact for individual shareholders and especially for those with American nationality living and operating small businesses outside the United States. Beyond annexing their appeals to multiple hearing reports, no Congressional action was taken.⁴⁵²

Appeals were also made to the Treasury Department, asking that its regulations consider the impact of the MRT in relation to small businesses, and especially in relation to those owned by American nationals in the countries where they live.⁴⁵³ However, Treasury did not just reject the appeals. It also categorically denied the very existence of such small businesses:

“As an initial matter, foreign corporations are not considered small entities. Nor are U.S. taxpayers considered small entities

⁴⁴⁵ I.R.C. § 11.

⁴⁴⁶ *Corporate Income Tax: Effective Rates Before and After 2017 Law Change*, U.S. GOV'T ACCT. OFF. (Dec. 14, 2022), <https://www.gao.gov/products/gao-23-105384>.

⁴⁴⁷ I.R.C. § 1(j). See, e.g., *Tax Cuts and Jobs Act (TCJA)*, TAX FOUNDATION (accessed Jan. 5, 2024), <https://taxfoundation.org/taxedu/glossary/tax-cuts-and-jobs-act/>.

⁴⁴⁸ See *supra* note 447.

⁴⁴⁹ See *supra* note 437.

⁴⁵⁰ See, e.g., Polantz, *supra* note 410. See also UNITED STATES MODEL INCOME TAX CONVENTION, *supra* note 442.

⁴⁵¹ See, e.g., Polantz, *supra* note 410. Treaty benefits would not be available because of the saving clause. UNITED STATES MODEL INCOME TAX CONVENTION, *supra* note 442, at Art 1(4). See also Snyder, *Unacknowledged Realities*, *supra* note 42, at 299-301.

⁴⁵² *Id.* at 19-20.

⁴⁵³ *Id.* at 20, citing Murray, *supra* note 196, at 1660-63; Jacqueline Bugnion, *A Double Taxation Nightmare Disguised as Tax Reform*, 163 TAX NOTES FED. 723, 727-9 (Apr. 29, 2019).

to the extent the taxpayers are natural persons Although the Treasury Department and the IRS received a number of comments asserting that a substantial number of small entities would be affected by the proposed regulations, those comments were principally concerned with U.S. citizens living abroad that owned foreign corporations*No small entity is affected in this scenario*⁴⁵⁴ (emphasis added).

For Treasury, any business outside the United States that is operated by a “U.S. taxpayer” is a large business, regardless of its actual size. Further, for Treasury, all such businesses should be subject to the MRT, regardless of the actual identity and residence of its shareholders and regardless of the devastating effects that Congress (presumably) did not intend. The epistemic injustice (violence) in this instance is profound. It’s not just the knowledge and experiences of overseas Americans operating small businesses that are expressly denied, but also their very existence.

The IRS barely acknowledges that the MRT applies to individuals.⁴⁵⁵ Its literature about the tax generally uses the generic term “taxpayer.”⁴⁵⁶ Most telling is the information about the effects of the MRT that the IRS has made publicly available. As mentioned above, the IRS has posted on its website a three-page document entitled “Effect of IRC Section 965 Transition Tax on Domestic Corporations, Tax Year 2017.”⁴⁵⁷ This document describes, in considerable detail, the effects of the MRT for domestic corporations, without any mention of the effects on individuals. The document contains statistics revealing, among other data, that for Tax Year 2017, a total of 3,231 corporations filed a tax return demonstrating net liability for the MRT.⁴⁵⁸ Nothing on the IRS website offers a comparable description pertaining to individuals – residing inside or outside the United States – or any comparable data in their regard. This is the case even though, as the calculations above demonstrate, six times more American nationals living outside the United

⁴⁵⁴ 84 Fed. Reg., *supra* note 439, at 1, 873. See Murray, *supra* note 196, at 1662.

⁴⁵⁵ See, e.g., LB&I Concept Unit, *IRC 965 Transition Tax Overview*, DCN INT-C-127 (Jan. 24, 2020), <https://www.irs.gov/pub/irs-utl/irc965-transition-tax-overview.pdf>. In this document’s “detailed explanation of the concept” of the MRT, individuals are not specifically mentioned or addressed. Instead, they are subsumed in the term “U.S. shareholder,” which encompasses corporations. The examples provided are of U.S. domestic corporations that hold shares of more than one foreign corporation. *Id.* at 19-20.

⁴⁵⁶ See, e.g., *Section 965 Transition Tax*, IRS (Dec. 1, 2023), <https://www.irs.gov/businesses/section-965-transition-tax>

⁴⁵⁷ *Supra* note 397 and accompanying text (emphasis added).

⁴⁵⁸ Costa & McGovern, *supra* note 397, at 3.

States were affected by the MRT, as compared to U.S. domestic corporations.⁴⁵⁹

In sum, in devising the MRT, Congress was exclusively focused on corporate rather than individual shareholders; no thought was given to individual shareholders of CFCs.⁴⁶⁰ Their very existence was not acknowledged, let alone the fact that the MRT would apply to them.⁴⁶¹ After the adoption of the TCJA, Congress continued to refuse to acknowledge the existence of individual shareholders,⁴⁶² and both Congress and Treasury refused to acknowledge, much less contend with, the devastating effects of the MRT for American nationals living outside the United States.⁴⁶³ The IRS conducted a study on the effects of the MRT for domestic corporations, but it has done nothing comparable regarding the effects on individuals.⁴⁶⁴ This is the case even though available data indicates that the number of American nationals living outside the United States affected by the MRT is six times greater than the number of domestic corporations affected by it.⁴⁶⁵

In the context of the MRT, for Congress, Treasury, and the IRS, American nationals living outside the United States were and continue to be invisible.

B. Moore v. United States

The plaintiffs in *Moore* were a married couple living in Washington State. In 2005, they invested in 11% of an Indian corporation, KisanKraft, created to import, manufacture, and distribute affordable farming equipment in India. The Moores never realized earnings from the investment.⁴⁶⁶

In 2018, the Moores discovered they owed nearly \$15,000 in U.S. income tax, applied retroactively by the MRT, based on the unrealized earnings of KisanKraft dating back to 2006. Believing the MRT to be unconstitutional, the Moores took their case to a U.S. District Court in Washington State arguing that because the tax was imposed on accumulated foreign earnings, it was not a tax on income and was therefore, unconstitutional under the Sixteenth

⁴⁵⁹ *Supra* notes 398-402 and accompanying text. *See also* Alpert et al., *supra* note 403, at 1621.

⁴⁶⁰ *Supra* notes 405-408 and accompanying text.

⁴⁶¹ *Id.*

⁴⁶² *Supra* note 452 and accompanying text.

⁴⁶³ *Supra* notes 452-454 and accompanying text.

⁴⁶⁴ *Supra* notes 457-458 and accompanying text.

⁴⁶⁵ *Supra* notes 397-402, 459 and accompanying text.

⁴⁶⁶ *Moore v. United States*, No. C19-1539-JCC (W.D. Wash. Nov. 19, 2020), at 2-3. *See also* Marie Sapirie, *Persons of the Year: The Moores: The Constitution, Realization, and Two Tax Everymen*, 181 TAX NOTES FED. 2091 (Dec. 18, 2023).

Amendment.⁴⁶⁷ In June 2022, the Ninth Circuit Court of Appeals affirmed the district court’s decision rejecting the challenge.⁴⁶⁸

In June of 2023, the U.S. Supreme Court granted the Moores’ petition for a writ of certiorari, meaning the Court agreed to hear the Moores’ appeal.⁴⁶⁹ The question posed in granting certiorari is “Whether the Sixteenth Amendment authorizes Congress to tax unrealized sums without apportionment among the states.”⁴⁷⁰ The Court held oral arguments in the case in early December 2023.⁴⁷¹

Moore has been described as possibly the “most important tax case in a century.”⁴⁷² It has been the subject of considerable commentary.⁴⁷³ No fewer than twenty-two amicus briefs have been filed in favor of the Petitioners (the Moores) and no fewer than eighteen in favor of the Respondents (the United States). Three were filed in favor of neither party.⁴⁷⁴

In the reams of commentary, amicus briefs, and filings by the parties themselves,⁴⁷⁵ as well as the oral arguments held in December,⁴⁷⁶ little has

⁴⁶⁷ Sapirie, *supra* note 466, at 2092.

⁴⁶⁸ *Moore v. US*, 36 F.4th 930 (9th Cir. 2022).

⁴⁶⁹ Sapirie, *supra* note 466, at 2092.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² Jon Whiten, *As SCOTUS Considers ‘Moore’ Case, Hundreds of Billions of Dollars Hang in the Balance*, INST. ON TAX’N AND ECON. POL’Y (Sept. 27, 2023), <https://itep.org/as-scotus-considers-moore-case-billions-of-dollars-hang-in-the-balance/#:~:text=Later%20this%20year%2C%20the%20Supreme, far%20beyond%20the%20plaintiffs%20themselves>. See also Dan Greenberg & Devin Watkins, *Ninth Circuit Refuses to Reconsider Allowing Wealth Taxes*, COMPETITIVE ENTER. INST. (Nov. 23, 2022), <https://cei.org/blog/ninth-circuit-refuses-to-reconsider-allowing-wealth-taxes/>.

⁴⁷³ For a listing of just some of the commentary, see Paul Caron, *Clarke: What Issues Are Fair Game In Moore v. United States?*, TAXPROF BLOG (Dec. 28, 2023), https://taxprof.typepad.com/taxprof_blog/2023/12/clarke-what-issues-are-fair-game-in-moore-v-united-states.html.

⁴⁷⁴ See, e.g., Sapirie, *supra* note 466, at 2092-3.

⁴⁷⁵ See, e.g., Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, *Moore v. United States* (No. 22-800) (Feb. 2023), https://www.supremecourt.gov/DocketPDF/22/22-800/255137/20230221100735190_USSC%20Petition%20for%20Writ%20of%20Certiorari.pdf; Brief for the Petitioners, on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, *Moore v. United States* (No. 22-800) (Aug. 2023), https://www.supremecourt.gov/DocketPDF/22/22-800/278464/20230830102536217_22-800%20Brief%20for%20Petitioners.pdf; Brief for the United States in Opposition, *supra* note 406; Brief for the United States, on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, *Moore v. United States* (No. 22-800) (Oct. 2023), https://www.supremecourt.gov/DocketPDF/22/22-800/285200/20231016195041390_22-800bsUnited%20States.pdf.

⁴⁷⁶ Transcript of Oral Argument, *Moore v. United States* (No. 22-800), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-800_097c.pdf.

been said about the status of the Moores as individuals rather than corporations. Even less has been said about how the MRT has affected individuals living outside the United States. The entire conversation has been focused on the 3,231 corporations subject to the MRT, compared to the near total exclusion of any consideration of the estimated upwards of 18,900 American nationals living outside the United States subject to the MRT (number of corporations),⁴⁷⁷ let alone the unknown number of individuals living in the United States.

A joint report issued by the Roosevelt Institute and the Institute on Taxation and Economic Policy (ITEP) is one of the few commentaries acknowledging that individuals were affected. However, the report minimizes this fact. It does not describe how the individuals were affected while, at the same time, assuming, without evidence, that they were among “the minority” of those affected (as compared to the number of corporations).⁴⁷⁸ A summary of the report posted on the ITEP website more firmly minimizes the existence of individuals and negates their experiences. It does this by subsuming individuals into the category of “multinational corporations” such as “Big Pharma” and “Big Tech,” and then declaring that if the Supreme Court strikes down the MRT, “it would be hard to identify a less deserving set of tax cut beneficiaries.”⁴⁷⁹

Of all the amicus briefs submitted in relation to *Moore*, just two acknowledge that individuals were affected by the MRT and addressed their situations.⁴⁸⁰ The two briefs have been all but ignored by both parties to *Moore*, by commentators, and by the Court itself during the oral arguments held in December 2023.⁴⁸¹ One brief was mentioned in one *Tax Notes* article.⁴⁸² Both briefs were included in a listing by the Tax Law Center,⁴⁸³ but they were incorrectly classified as “Briefs Providing Business Perspectives”⁴⁸⁴

⁴⁷⁷ *Supra* notes 397-402 and accompanying text.

⁴⁷⁸ Niko Lusiani et al., *Supreme Corporate Tax Giveaway: Who Would Benefit from the Roberts Court Striking Down the Mandatory Repatriation Tax?*, INST. ON TAX’N AND ECON. POL’Y (Sept. 2023), at 11, <https://sfo2.digitaloceanspaces.com/itep/Supreme-Corporate-Tax-Giveaway-Mandatory-Repatriation-Tax-ITEP-Roosevelt-report-v2.pdf>.

⁴⁷⁹ Whiten, *supra* note 472.

⁴⁸⁰ See Briefs cited *supra* note 395.

⁴⁸¹ One of the two briefs was referenced without commentary or examination at Paul Caron, *Zelenak: Reading The Taxpayers’ Brief in Moore*, TAXPROF BLOG (Oct. 18, 2023), https://taxprof.typepad.com/taxprof_blog/2023/10/zelenak-reading-the-taxpayers-brief-in-moore.html.

⁴⁸² Andrew Velarde, *Moore Amici Assert Transition Tax Damages Treaty Principles*, 180 TAX NOTES FED. 1937 (Sept. 11, 2023).

⁴⁸³ Tax Law Center, *Guide to Amicus Briefs Filed in Moore v. United States*, N.Y. UNIV. SCH. OF L. (accessed Jan. 24, 2024), <https://www.law.nyu.edu/centers/tax-law-center/work/Moore-v-US-Compendium>.

⁴⁸⁴ *Id.*

when, on the contrary, the fundamental purpose of each was to expose the situation of *individuals*. To the extent the individuals have been mentioned in the myriad of commentary on *Moore*, it has been to blame them for not having the foresight to have known for years, if not decades before the adoption of the TCJA, that they needed to structure their businesses in a manner that would have permitted them to avoid the MRT – assuming that such a structure was, indeed, possible.⁴⁸⁵

Remarkably, even a *Tax Notes* article declaring the Moores to be “*persons of the year*”⁴⁸⁶ (emphasis added) and describing them as “*Everyman taxpayers*”⁴⁸⁷ (hardly a description one would apply to a corporation) failed to distinguish the Moores from multinational corporations. The same article took care to describe many of the issues raised in the amicus briefs submitted in relation to *Moore* but excluded any mention of the two briefs addressing the Moores’ status as individuals or the issues pertaining to individuals raised in either brief.⁴⁸⁸

Underscoring the erasure of individuals, and especially of American nationals living outside the United States, are two comments made by the Solicitor General – counsel for the Respondent (the U.S. government) – during oral arguments for *Moore*. In response to a question by Justice Alito, she stated:

The overwhelming majority of taxpayers subject to [the MRT] are domestic corporations.⁴⁸⁹

Of course, as the estimate above demonstrates,⁴⁹⁰ this is not the case. The Solicitor General evidently recognized her error because later in the session she corrected herself, stating:

[A]s I had mentioned in an earlier response, one of the important things for the Court to keep in mind is that 99 percent of the tax owed under the MRT is owed by domestic

⁴⁸⁵ See Mindy Herzfeld, *Moore, Part 3: Should the Supreme Court Help Taxpayers Who Don't Help Themselves?*, 180 TAX NOTES FED. 2220, 2221, 2223 (Sept. 25, 2023); Reuven Avi-Yonah, *Moores Needed Clear Tax Advice, Not Crystal Ball*, 181 TAX NOTES FED. 311, 311-12 (Oct. 9, 2023); Michael J. Graetz, *To Avoid the Moore Morass, the Court Should DIG It — But It Probably Won't*, 181 TAX NOTES FED. 1253, 1260 (Nov. 13, 2023); Robert Goulder, *Oral Arguments In Moore: Do The Taxpayers Have A Problem?* FORBES (Jan. 8, 2024), <https://www.forbes.com/sites/taxnotes/2024/01/08/oral-arguments-in-moore-do-the-taxpayers-have-a-problem/?sh=77f2329d3b91>. But see Alpert et al., *supra* note 417 (explaining why it would have been difficult if not impossible for American nationals living outside the United States to structure their businesses in a manner enabling them to avoid the MRT).

⁴⁸⁶ Sapirie, *supra* note 466, at 2091.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.* at 2092-3.

⁴⁸⁹ Transcript of Oral Argument, *supra* note 476, at 98.

⁴⁹⁰ *Supra* notes 398-402 and accompanying text.

corporation shareholders, large U.S. companies, for example, that have these foreign subsidiaries where they have been holding money overseas for a number of years. And this would be a tax on the privilege of doing business with those corporate relationships and in that corporate form [emphasis added].⁴⁹¹

These statements by the Solicitor General are emblematic of the epistemic injustice found in the U.S. government's entire approach to *Moore*. The above-cited correction is an admission by the Solicitor General that the number of individuals affected by the MRT *is* greater than the number of domestic corporations affected.⁴⁹² Yet, despite this evident awareness, the obvious fact the Moores themselves are individuals, as well as the two amicus briefs that were filed explaining the problems individuals experienced with the MRT,⁴⁹³ at no point in its filings or oral arguments did the U.S. government acknowledge the considerable differences between corporations and individuals in relation to the MRT,⁴⁹⁴ let alone acknowledge the MRT's particularly penalizing effects for individuals of American nationality living outside the United States.⁴⁹⁵ It is as if, for the U.S. government, individuals – including American nationals living outside the United States – do not exist, or, if they do, their knowledge of and experiences with the MRT do not matter and there is no need to investigate their claims.

Yet somehow, as Bunch predicted,⁴⁹⁶ in erasing American nationals living outside the United States, the U.S. government also managed to criminalize them. In her oral arguments before the Supreme Court, the Solicitor General insinuated no fewer than four times⁴⁹⁷ that the principal, if not only, reason to create a company outside the United States is to keep money “offshore, . . . out of the reach of U.S. taxing authorities.”⁴⁹⁸ She made no allowance for the legitimate, if not unavoidable, needs of small business owners living outside the United States to operate with a local entity,⁴⁹⁹ nor did she accord any legitimacy to such small businesses retaining their earnings in the countries not only where the businesses are established and operated, but also where

⁴⁹¹ Transcript of Oral Argument, *supra* note 476, at 135-6.

⁴⁹² Unfortunately, the Solicitor General's correction of her error was not perceived by all. *See, e.g.,* Donald B. Susswein et al., *Moore: Now Can We Talk About Attribution?*, 182 TAX NOTES FED. 297, 304 (Jan. 8, 2024) (quoting the Solicitor General's statement that “[t]he overwhelming majority of taxpayers subject to this are domestic corporations” but not identifying the Solicitor General's later correction).

⁴⁹³ *Supra* note 480 and accompanying text.

⁴⁹⁴ Discussed *supra* notes 481-485 and accompanying text.

⁴⁹⁵ *See* Brief for the United States on Petition, *supra* note 406; Brief for the United States, on Writ, *supra* note 475; Transcript of Oral Argument, *supra* note 476.

⁴⁹⁶ *Supra* notes 11-18 and accompanying text.

⁴⁹⁷ Transcript of Oral Argument, *supra* note 476, at 98, 110, 121.

⁴⁹⁸ *Id.* at 98.

⁴⁹⁹ *See* Alpert et al., *supra* note 417.

their owners live (thus, earnings never destined to be “repatriated” to the United States). Her clear implication to the U.S. Supreme Court was that the only reason *anyone* would operate a business outside the United States would be to “shelter funds offshore”⁵⁰⁰ and evade U.S. taxation.

From the inception of the MRT to the U.S. Supreme Court’s current consideration of *Moore*, American nationals living outside the United States have suffered epistemic injustice by Congress, Treasury, the IRS, both parties to *Moore*, and those commenting on *Moore*. All either fail to recognize the knowledge and experiences of individuals – including American nationals outside the United States⁵⁰¹ – and, in the case of Treasury, they expressly deny their very existence.⁵⁰² Additionally, all fail to investigate their claims. These failures further entrench the harm caused to individuals – especially to American nationals outside the United States – by the MRT.

The U.S. Supreme Court has not yet rendered a decision in *Moore*, so theoretically it is still possible for the injustice to be rectified, at least in part.⁵⁰³ However, during oral arguments the Justices themselves barely mentioned individuals, let alone American nationals living outside the United States,⁵⁰⁴ so the chances of that are unfortunately slim.

V. CONCLUSION

Epistemic injustice (violence) is the dismissal of people as credible sources of information, because of our presumptions about them, or because what they have to say clashes with how we would like to believe the world works.⁵⁰⁵ Epistemic injustice (violence) occurs when members of an in-group discredit information received from members of an out-group, despite any expertise the members of the out-group may have.⁵⁰⁶ The in-group fails to recognize the contributions to knowledge made by a member of the out-group, as well as the person’s status as a “knower.”⁵⁰⁷ In doing so, members of the in-group consistently fail to track certain truths and investigate claims about the out-group.⁵⁰⁸ Further, in-group power figures emphasize stories of crime to make them seem more frequent and heinous.⁵⁰⁹ Members of the in-group take an

⁵⁰⁰ Transcript of Oral Argument, *supra* note 476, at 98.

⁵⁰¹ *Supra* notes 452, 455-465, 475-495 and accompanying text.

⁵⁰² *Supra* notes 453-454 and accompanying text.

⁵⁰³ *Supra* note 396 and accompanying text.

⁵⁰⁴ See generally Transcript of Oral Argument, *supra* note 476.

⁵⁰⁵ *Supra* notes 4-7, 13, 19 and accompanying text.

⁵⁰⁶ *Supra* notes 12-13 and accompanying text.

⁵⁰⁷ See *supra* notes 6, 13, 19 and accompanying text.

⁵⁰⁸ *Supra* note 13 and accompanying text.

⁵⁰⁹ *Supra* note 17 and accompanying text.

assumption of evil or wrongdoing about a specific person and apply it inferentially to the entire out-group.⁵¹⁰

In an epistemic (knowledge) system characterized by “testimonial injustice,”⁵¹¹ ignorance prevails over potentially shared knowledge, despite the speakers’ best efforts. When a speaker knows something the hearer doesn’t – and where the level of credibility deficit is such that the hearer does not accept what they are told – the hearer’s ignorance is maintained.⁵¹²

In the absence of epistemic justice, one group can be dominated by another. This is why epistemic justice is an essential condition for an equitable and inclusive society, and for the “political ideal of freedom.”⁵¹³

Over the course of decades American nationals living outside the United States (the out-group) have sought to communicate their knowledge of and experiences with the U.S. nationality-based tax system. Their direct communications have taken a variety of forms. They include survey reports,⁵¹⁴ scholarly articles,⁵¹⁵ websites,⁵¹⁶ podcasts and videos,⁵¹⁷ submissions to legislative and other governmental bodies,⁵¹⁸ in-person advocacy in Washington, D.C.,⁵¹⁹ and litigation.⁵²⁰ There is also an unmistakable form of indirect communication: the dramatic increase in the number of Americans renouncing U.S. citizenship.⁵²¹ Considered as a whole, this large body of knowledge teaches, in a nutshell, that because of the U.S. nationality-based tax system, persons of American nationality living outside the United States suffer multiple violations of multiple constitutional and human rights.⁵²²

Unfortunately, academics, industry leaders, and governmental representatives (the in-group) either belittle this knowledge or, more commonly, do not recognize its existence, let alone contend with its contents or investigate its claims. This is observed in law school course materials,⁵²³ in

⁵¹⁰ *Supra* note 18 and accompanying text.

⁵¹¹ *Supra* note 7 and accompanying text

⁵¹² *Supra* note 20 and accompanying text.

⁵¹³ *Supra* note 26 and accompanying text.

⁵¹⁴ *Supra* notes 28-34 and accompanying text.

⁵¹⁵ *Supra* notes 35-48 and accompanying text.

⁵¹⁶ *Supra* notes 49-63 and accompanying text.

⁵¹⁷ *Supra* notes 64-72 and accompanying text.

⁵¹⁸ *Supra* notes 73-82 and accompanying text.

⁵¹⁹ *Supra* note 83 and accompanying text.

⁵²⁰ *Supra* notes 84-87 and accompanying text.

⁵²¹ *Supra* notes 88-96 and accompanying text.

⁵²² *Supra* notes 97-156 and accompanying text.

⁵²³ *Supra* notes 159-184, 328-393 and accompanying text.

academic literature,⁵²⁴ in conferences and think tanks,⁵²⁵ in the U.S. Congress⁵²⁶ and in the IRS.⁵²⁷

An especially current example is the Mandatory Repatriation Tax (MRT) and litigation currently before the U.S. Supreme Court – *Moore v. United States*. The MRT had a devastating effect for American nationals living outside the United States and operating small businesses in the countries where they live.⁵²⁸ *Moore* theoretically offers to the U.S. Supreme Court the opportunity to repair the damages, if not in whole, then at least in part.⁵²⁹ However, because American nationals living outside the United States have been invisible to policymakers and others from the inception of the MRT to the present day,⁵³⁰ it would be overly optimistic to hope that someone – in this case, the U.S. Supreme Court – might finally see them and accord them some relief when rendering its decision in *Moore*.

Ultimately, and as Spiel et al. predicted,⁵³¹ the knowledge and experiences offered by the community of American nationals living outside the United States (the out-group) clashes with how most members of the academy and industry, and governmental representatives (the in-group) would like to believe the world works, and, especially, with how the world of nationality-based taxation works. In rendering such American nationals invisible, the body of knowledge that they offer is ignored and the in-group's vision of how U.S. nationality-based taxation works can continue to remain unchallenged.

There is evidence that when a member of the in-group – acting in good faith and with an open mind⁵³² – does recognize the contributions to knowledge made by American nationals living outside the United States and investigates their claims, there can be hope for change. This has been demonstrated by Representatives Don Beyer and Dina Titus,⁵³³ Professor Edward Zelinsky,⁵³⁴ and the National Taxpayer Advocate.⁵³⁵

Beyer, Titus, Zelinsky, and the NTA are small in number and, as a very small minority of the in-group, they are not enough to effect meaningful change. Until the extensive contributions to knowledge and the experiences of

⁵²⁴ *Supra* notes 185-215 and accompanying text.

⁵²⁵ *Supra* notes 222-235 and accompanying text.

⁵²⁶ *Supra* notes 236-272, 287-289 and accompanying text.

⁵²⁷ *Supra* notes 293-319 and accompanying text.

⁵²⁸ *Supra* notes 395, 416-422 and accompanying text.

⁵²⁹ *Supra* note 396 and accompanying text.

⁵³⁰ *Supra* notes 452-465, 475-495, 501-502 and accompanying text.

⁵³¹ *Supra* note 19 and accompanying text.

⁵³² *See supra* note 331 (explaining the importance of the audience having an open mind and being genuinely willing to hear).

⁵³³ *Supra* notes 273-286, 290 and accompanying text.

⁵³⁴ *Supra* notes 216-221 and accompanying text.

⁵³⁵ *Supra* notes 320-327 and accompanying text.

American nationals living outside the United States are considerably more widely recognized, their truths are tracked, and their claims are investigated without pre-conceived judgements and in good faith, there can be no justice, nor any “political ideal of freedom.”⁵³⁶ Today, no American is truly free to live outside the United States.⁵³⁷

⁵³⁶ *Supra* note 26 and accompanying text.

⁵³⁷ *Supra* notes 151-154 and accompanying text.