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NEW YORK UNIVERSITY  
SCHOOL OF LAW

“A Constitutional Moment in Cross-Border Taxation.”

**Steven Dean**  
NYU Law School

**August 25, 2020**

Via Zoom

Time: 2:00 – 3:50 p.m. EST

Week 1

## **SCHEDULE FOR FALL 2020 NYU TAX POLICY COLLOQUIUM**

(All sessions meet online on Tuesdays, from 2:00 to 3:50 pm EST)

1. Tuesday, August 25 – Steven Dean, NYU Law School. “A Constitutional Moment in Cross-Border Taxation.”
2. Tuesday, September 1 – Clinton Wallace, University of South Carolina School of Law. “Democratic Justice in Tax Policymaking.”
3. Tuesday, September 8 – Natasha Sarin, University of Pennsylvania Law School. “Understanding the Revenue Potential of Tax Compliance Investments.”
4. Tuesday, September 15 – Adam Kern, Princeton Politics Department and NYU Law School. “Illusions of Justice in International Taxation.”
5. Tuesday, September 22 – Henrik Kleven, Princeton Economics Department. “The EITC and the Extensive Margin: A Reappraisal.”
6. Tuesday, September 29 – Leandra Lederman, Indiana University Maurer School of Law. “Of Risks and Remedies: Best Practices in Tax Rulings Transparency.”
7. Tuesday, October 6 – Daniel Shaviro, NYU Law School. “What Are Minimum Taxes, and Why Might One Favor or Disfavor Them?”
8. Tuesday, October 13 – Steve Rosenthal, Urban-Brookings Tax Policy Center. “Tax Implications of the Shifting Ownership of U.S. Stock.”
9. Tuesday, October 20 – Michelle Layser, University of Illinois College of Law. “How Place-Based Tax Incentives Can Reduce Economic Inequality.”
10. Tuesday, October 27 – Michelle Hanlon, MIT Sloan School of Management. [Paper on taxpayer responses to the 2017 tax act, using survey data.]
11. Tuesday, November 10 – Owen Zidar, Princeton Economics Department. “The Tax Elasticity of Capital Gains and Revenue-Maximizing Rates.”
12. Tuesday, November 17 – Abdoulaye Ndiaye, NYU Stern Business School. “Redistribution With Performance Pay.”
13. Tuesday, November 24 – Lilian Faulhaber, Georgetown Law School. “Searching for Coherence: The Overuse of Excess Returns and Excess Profits.”
14. Tuesday, December 1 – Erin Scharff, Arizona State Sandra Day O’Connor College of Law. “Revisiting Local Income Taxes.”

## A Constitutional Moment in Cross-Border Taxation

*Steven A. Dean*<sup>†</sup>

*Influential states and organizations have shaped a material constitution—identified here as the Classification and Assignment Constitution—establishing ground rules for cross-border taxation that constrain the taxation of multinationals. The rise of global digital giants against a backdrop of crisis has cast a harsh light on the limits of its core algorithm. This article shows why and how rewriting that constitution will help provide both developing and developed states with badly needed revenues.*

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## INTRODUCTION

The Classification and Assignment Constitution has shaped cross-border policymaking for a century.<sup>1</sup> Two global crises in quick succession have created both an opportunity and an urgent need to remake that material constitution, altering its substantive rules by transforming the processes that shape them.<sup>2</sup> In tax, just as in trade and investment law, critics find “not a borderless market without states but a doubled world kept safe from mass demands for social justice and redistributive equality by the guardians of the economic constitution.”<sup>3</sup>

Enumerating a fixed menu of forms of cross-border income—such as dividends, interest and royalties—susceptible to tax (classification) and articulating tailored tie breakers to determine which state has a legitimate claim to each category (assignment) shields market actors from the claims of states. Its elegant *numerus clausus* logic protects market actors not only from duplicative assertions of tax jurisdiction but also from novel forms of taxation.<sup>4</sup> This Article describes how to rewrite the protective algorithm at the core of the Classification and Assignment Constitution to provide all states—and developing states in particular—with access to the revenues they desperately need.

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<sup>1</sup> Critics of neoliberalism have “have identified efforts to insulate market actors from democratic pressures in a series of institutions from the IMF and the World Bank... trade treaties like the North American Free Trade Agreement (NAFTA), and the WTO” and “in the expansion of international investment law designed to protect foreign investors from diverse forms of expropriation and to provide a parallel global legal system known as the transnational law merchant.” See, e.g., QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* 4, 16 (2018). But when the subject of tax arises even careful observers tend to retreat to the use of contested metaphors like “tax haven” rather than acknowledging the existence of institutions designed to insulate market actors from the procedural and substantive tax burdens those democratic pressures would otherwise impose. That result is in part a function of the absence of a World Tax Organization to protest. See Vito Tanzi, *Is There a Need for a World Tax Organization?*, in *THE ECONOMICS OF GLOBALIZATION: POLICY PERSPECTIVES FROM PUBLIC ECONOMICS* (Asaaf Razin & Efraim Sadka eds., 1999); Arthur J. Cockfield, *The Rise of the OECD as Informal World Tax Organization through National Responses to E-Commerce Tax Challenges*, 8 *YALE J.L. & TECH.* 136 (2006).

<sup>2</sup> See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 124 (1945) (distinguishing between a formal constitution “a certain solemn document, a set of legal norms that may be changed only under the observation of special prescriptions, the purpose of which is to render the change of these norms more difficult” and a material constitution that “consists of those rules which regulate the creation of the general legal norms, and in particular the creation of statutes”). Such material constitutions play a vital role in preserving the rule of law but can raise important questions of political legitimacy. See Julian Arato, *Constitutionality and Constitutionalism Beyond the State: Two Perspectives on the Material Constitution of the United Nations*, 10 *INT’L J. CONST. L.* 627, 651 (2012) (noting a key Kantian “problem of governance on the global scale is to constrain the governors by law and thus preempt slippage from constitutionalism and the rule of law to the autocratic rule of one or a few human beings”).

<sup>3</sup> QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* 16 (2018).

<sup>4</sup> In property law, the *numerus clausus* principle limits permissible types of property interests to facilitate the allocation and identification of ownership rights to enhance the operation of markets. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L.J.* 1, 4(2000) (“In the common law, the principle that property rights must conform to certain standardized forms has no name. In the civil law, which recognizes the doctrine explicitly, it is called the *numerus clausus*—the number is closed.”). In this cross-border tax context, what we call classification and assignment enhances the operation of markets by “reduc[ing] the costs to [taxpayers] of identifying the legal dimensions of [taxing] rights.” *Id.* at 61. While *numerus clausus* benefits private parties here as elsewhere, it also imposes costs on states. By circumscribing permitted categories of tax claims, *numerus clausus* not only reduces procedural burdens placed on taxpayers but also reduces substantive tax burdens. It does that in part by curtailing new taxes such as digital services taxes. At the same time, the existence of multiple classifications assigned according to different rules allows taxpayer “coding”—shifting income from one classification/location to another. See KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 48 (2019) (observing that lawyers use legal rules to change the classification of property, favorably coding assets to protect market participants).

Over the last decade, during what the ongoing pandemic has revealed to be merely the eye of a fiscal storm, persistent inequality and austerity attracted an unprecedented level of attention to the way states collect revenues to meet their growing needs.<sup>5</sup> A window of time that might have witnessed a restructuring of global tax policy instead culminated in an internecine struggle over how—and whether—the profits of digital giants such as Amazon and Google fit within its rigid *numerus clausus* algorithm.<sup>6</sup> The arrival of COVID has only exacerbated those unresolved tensions.<sup>7</sup>

This article offers a glimpse of what might have been, and perhaps still could be. It does so by imagining a world in which marginalized countries willing to reject *numerus clausus* to gamble on a new approach to taxing cross-border transactions gain a voice in setting the global tax policy agenda.<sup>8</sup> Empowering additional constitutional actors would bring fresh perspectives to bear on perennial challenges dating to the Kennedy era, inviting increased innovation while decreasing errors.<sup>9</sup>

Echoes of this cross-border constitutional moment—implicating similar questions of power and inequality—can be perceived in the unsettled nature of U.S. domestic law.<sup>10</sup> In 2017, the United States enacted once-in-a-generation changes to its income tax laws, and for a tantalizing moment seemed close to a far more profound remaking.<sup>11</sup> For much of 2019, it appeared that the 2020 U.S.

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<sup>5</sup> Calls for higher tax lawmaking anchored some of the most compelling economic critiques of the intercrisis period. Thomas Piketty laments that “tax competition is allowing entire categories of income to gain exemption from the common rules” in his influential 2013 book. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 636 (2017). As he considers the future of globalization, Dani Rodrik singles out “corporate tax competition” as key example of “[t]he clash between globalization and domestic social arrangements” at the heart of his trilemma. DANI RODRIK, *THE GLOBALIZATION PARADOX* 190, 193-94 (2012).

<sup>6</sup> William Horobin & Aoife White, *Why ‘Digital Taxes’ Are the New Trade War Flashpoint*, WASH. POST, Jan. 22, 2020 (describing geopolitical fallout of Europe’s adoption of digital services taxes targeted at U.S. digital giants). Mason describes the digital tax war as an example of “cleavages that have emerged in the interests of European countries and the United States that may affect their ability to display a united front to developing countries seeking a larger share of tax revenue from international commerce”). Ruth Mason, *The Transformation of International Tax*, Am. J. Int’l L., forthcoming July 2020. The state aid controversies are often seen as an aspect of that same transatlantic tension. See Lilian V. Faulhaber, *Beyond Apple: State Aid as a Model of a Robust Anti-Subsidy Rule*, 48 Geo. J. Int’l L. 381 (2017).

<sup>7</sup> See Nana Ama Sarfo, *Developing Countries’ Search for a Post-Pandemic Tax Path*, 98 TAX NOTES INT’L 1104, 1105 (2020) (relating an African Tax Administration Forum official’s observation that “the COVID-19 pandemic has shined a spotlight on the absence of fair taxing rights in developing countries”); African Union, *Impact of the Coronavirus (COVID 19) on the African Economy 19* (noting that the pandemic could reduce Africa’s tax revenues by 20-30%).

<sup>8</sup> A more inclusive higher tax lawmaking process would pave the way for the sort of changes that might otherwise never find their way onto the global tax policy agenda. See J.C. SHARMAN, *HAVENS IN A STORM* 64-65 ( ) (observing that in cross-border taxation as elsewhere “[c]orporate lobbies or dominant classes may best protect their interests through agenda control, ensuring that unwanted proposals and projects never see the light of day” which “might even extend to the point where decision makers are captured by class interests to such an extent that they cannot even conceive of policies disfavored by elites”).

<sup>9</sup> Steven Dean, *Inclusive International Tax Policymaking: FATCA, The U.S. Congressional Black Caucus and the OECD Blacklist* (forthcoming in the *Revue européenne et internationale de droit fiscal*) (showing how diversity in international tax policymaking can spur innovation).

<sup>10</sup> Among other dramatic changes to the tax law, in 2017, the United States reduced the rate of tax on corporate income almost, but not quite, in half. David Kamin et al., *The Games They Will Play: Tax Games, Roadblocks, and Glitches under the 2017 Tax Legislation*, 103 MINN. L. REV. 1439, 1445 (2019) (“Perhaps the most significant change brought by the 2017 tax legislation was the reduction of the highest statutory corporate income tax rate from 35% to 21% percent.”).

<sup>11</sup> That more radical departure from current cross-border tax policies proved controversial in part because of a perceived incompatibility with global norms. See Rebecca M. Kysar, *Unraveling the Tax Treaty*, 104 MINN. L. REV. 1756, 1808 (2020) (noting that the 2016 Republican plan to adopt a destination-based cash flow tax “was critiqued, in part, for its incompatibility with the tax treaty regime”).

election would serve as a referendum on a wealth tax.<sup>12</sup> Although a wealth tax might survive a constitutional challenge, it would inevitably invite one by fundamentally rewriting U.S. tax law.<sup>13</sup>

The intercrisis pressures driving change within the United States affected nations across the globe, making tax law salient in an unprecedented fashion, everywhere and all at once.<sup>14</sup> To an expert eye, the limits of the aging infrastructure of cross-border taxation became obvious decades ago.<sup>15</sup> In 2010 and 2015, extraordinary actions by powerful states made it possible to observe the machinery of the Classification and Assignment Constitution in motion. The U.S. Foreign Account Tax Compliance Act (FATCA) targeted banks worldwide to prevent tax evasion by individuals and E.U. “state aid” challenges threatened hidden tax subsidies to multinationals, each disrupting longstanding cross-border tax norms.<sup>16</sup> In both cases, powerful actors fought to preserve the status quo and retain their privileged positions.

Although COVID-19 banished tax from the headlines, the profound fiscal burdens the pandemic has placed on jurisdictions around the world only increases the pressure on the Classification and Assignment Constitution. This article offers both a novel descriptive account and normative assessment of entrenched substantive and procedural norms enshrined not in customary international law, but in a material constitution. To make change possible, new constitutional actors must be enlisted to offset the power wielded by a small group of influential states and organizations.<sup>17</sup> Inverting a conventional wisdom skeptical of involving a broader group in setting the global tax policy agenda, fundamental reform to close a growing global fiscal gap would be made easier by empowering marginalized states.

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<sup>12</sup> See Lily Batchelder & David Kamin, *Taxing the Rich: Issues and Options* (Aspen Economic Strategy Group).

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3452274](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452274) (providing an overview of recent proposals for taxing the wealthy).

<sup>13</sup> See Daniel Hemel & Rebecca Kysar, *The Big Problem With Wealth Taxes*, N.Y. TIMES, Nov. 7, 2019 (concluding that the Warren proposal would be constitutionally problematic). Successfully implementing a wealth tax could require an amendment to the U.S. Constitution but constitutional change does not always require a formal amendment. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 267-68 (1999) (distinguishing between “the *classical* system” that begins with a “deliberative assembly meeting on the national level” and concludes with “a formal constitutional amendment” on the one hand and “a *modern* system” in which “transformative statutes that challenge the fundamentals of the preexisting regime” serve as proposals to be embraced by the courts).

<sup>14</sup> Michael Devereux and Judith Freedman were two of the first voices making the case for higher tax lawmaking. See, e.g., Michael Devereux & Judith Freedman *The system must change*, GUARDIAN, Feb. 8, 2009 at <https://www.theguardian.com/commentisfree/2009/feb/09/taxation-system-change> (calling it “a dream come true that a national newspaper should take an interest in” the taxation of cross-border transactions).

<sup>15</sup> See Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 BROOK. J. INT’L L. 1357, 1471 (2001). (“These fundamental rules for accomplishing and enforcing international tax policy were put in place during the formative period—1918 through 1928—for international income taxation, a time when the world economy was very different.”). Before its sinking in World War I, the passenger ship *Lusitania* “broke all records for speed” yet took “four days, eleven hours, and forty-two minutes, at an average speed of 25.85 knots” to cross the Atlantic. ERIC LARSON, *DEAD WAKE: THE LAST CROSSING OF THE LUSITANIA* 16. When the wealthy businessman Alfred Vanderbilt—lost when the *Lusitania* was struck by a torpedo—traveled to Europe on business he could travel in style, but each leg of the trip would consume almost an entire work week. See N.Y. TIMES, *The Day at Queenstown.; HOW VANDERBILT AND OTHERS DIED*, MAY 10, 1915

<sup>16</sup> See Ruth Mason, *Identifying Illegal Subsidies*, 69 AM. U. L. REV. 479, 481 (2019) (describing the European Commission’s state aid effort as a “bombshell”); Shu-Yi Oei, *The Offshore Tax Enforcement Dragnet*, 67 EMORY L.J. 655, 682 (2018) (describing FATCA as “[t]he statutory capstone of the United States’ battle against offshore tax evasion”).

<sup>17</sup> The norms and rules governing cross-border taxation do not fit comfortably within a rigid customary international law framework. See, e.g., Irma Johanna Mosquera Valderrama, *BEPS principal purpose test and customary international law*, 2020 LEIDEN J INT’L L. 1, 21 (2020) (questioning whether “the widespread practice of including a principal purpose test in tax treaties enough to create a customary international tax law rule”).

## I. ORDINARY TAX POLITICS AND HIGHER TAX LAWMAKING

Tax laws often seem a study in constant motion.<sup>18</sup> But at the core, change comes only rarely.<sup>19</sup> The U.S. income tax illustrates both truths. It emerged a century ago out of an extraordinary national debate that pitted an entrenched minority against an energized majority pursuing change that would culminate in a constitutional amendment.<sup>20</sup> Today, keeping track of the ever-changing details of the U.S. income tax verges on impossible yet its core concepts remain essentially unaltered.

In the United States, the Constitution both impedes and facilitates change. Despite a world changed beyond recognition, cross-border tax rules have changed little over that century.<sup>21</sup> Yet no formal constitution exists to entrench its norms.<sup>22</sup> This Part offers evidence that a material constitution—the Classification and Assignment Constitution—shields cross-border capital from demands for social justice and redistributive equality. Core concepts articulated after World War I and enshrined in bilateral treaties after World War II favor influential states by protecting powerful economic actors. As illustrated in Parts II and III, this basic law of cross-border taxation can change—even though no formal mechanism exists to achieve it—but states eager for reform lack access to the levers of power.

A. *A Material Constitution*

An inchoate cross-border tax constitution mediates between a day-to-day experience that verges on anarchy and a reality that the broad outlines of cross-border taxation have remained unchanged over a century.<sup>23</sup> That observation resonates with the behavior of influential actors on the

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<sup>18</sup> Ever-changing rates offer the easiest evidence of that fluidity. See Tracey M. Roberts, *Brackets: A Historical Perspective*, 108 NW. U. L. REV. 925 (2014) (examining and comparing the income tax rate structures in the past one hundred years); William E. Foster, *Partisan Politics and Income Tax Rates*, 2013 MICH. ST. L. REV. 703 (2013) (discussing the relationship between the historic income tax rates and political partisanship); Deborah H. Schenk, *The Income Tax at 100*, 66 TAX L. REV. 357, 368 (2013) (“Individual rates or brackets have changed almost every year since 1913. Five years after the passage of the 1913 Act, the top rate jumped to 77% but seven years later it was down to 25%. But 77% was not the highest rate. In 1944-1945 the top rate was 94% on income exceeding \$200,000, which adjusted for inflation, is roughly \$2.5 million. The last time the top rate was so high was 1963 when it was 91% and the last really high rate was 70% in 1981. The number of rate brackets has varied widely. Today there are six; in 1964 there were thirty-six.”).

<sup>19</sup> Principles such as the realization requirement preventing the taxation of simple appreciation operate today much as they have since the early days of the income tax. See *Eisner v. Macomber*, 252 U.S. 189, 189 (1920) (“Capital gains (being mere increases in valuation) are not income until realized.”). Some scholars have suggested that eliminating the realization requirement could be an alternative to creating a wealth tax.

<sup>20</sup> See AJAY MEHROTRA, *MAKING THE MODERN FISCAL STATE* 245 (2013) (noting the tax policy inertia keeping solidified by the defeat of the pro-income tax Williams Jennings Bryan yielded to the Sixteenth Amendment fueled not only by “formal political battles” but also by the emergence of “wealthy shareholders and managers of the new, large-scale industrial firms as the type of individual taxpayers that had the faculty and ability to bear a growing share of the burdens of underwriting increased governmental expenditures”). Without the majoritarian mechanism provided by Article V, the income tax might never have been born.

<sup>21</sup> Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 BROOK. J. INT’L L. 1357 (2001) (criticizing that lack of change).

<sup>22</sup> Double tax treaties—discussed in Part II—tend not to be “reform friendly” but do not adequately explain the dearth of higher tax lawmaking. See Fadi Shaheen, *How Reform-Friendly Are U.S. Tax Treaties?*, 41 BROOK. J. INT’L L. 1243, 1292 (2016). (noting that “most recent proposals for reforming the U.S. international tax system are, or can be expressed as, perfect fixed or floating combinations of exemption and credit, and therefore are treaty compatible”).

<sup>23</sup> Ackerman describes this phenomenon occurring in the U.S. domestic context. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 293 (1999) (describing this “constitutional dualism” as the mechanism through which “the American Constitution succeeds in constituting something more than a government in Washington, D.C.”). The constitutional amendment that paved the way for the income tax demanded not only overwhelming congressional support but also

global stage. It also emerges from a synthesis of disparate scholarly visions of cross-border taxation outlined below.<sup>24</sup>

Avi-Yonah's broad historical perspective invites speculation on patterns that emerge over time.<sup>25</sup> Rosenbloom injects a note of skepticism informed by his incomparable knowledge of how tax lawyers around the world carry on their trade.<sup>26</sup> Their work and that of others collectively describe a material constitution that establishes the basic political economy ground rules determining what states may and must do in taxing cross-border transactions. But it elides the reality that some actors wield disproportionate power in shaping that constitution.

The enduring power of the Classification and Assignment Constitution comes into focus when Graetz notes the "remarkable" fact "that not only the fundamental structure of the system for taxing international income today, but also many of the core concepts used to implement that structure... date from a time when airplanes were first becoming a regular means of travel..."<sup>27</sup> Competing interests and economic change should have left cross-border taxation unrecognizable, with no opportunity for the senescence he decries.<sup>28</sup> Embedded within it, "concepts such as permanent establishment, corporate residence, and arm's length pricing" have long been rendered incoherent by change yet stubbornly persist.<sup>29</sup>

The Classification and Assignment Constitution lies at the core of today's cross-border taxation much as envisioned a century ago by the League of Nations, entrenching norms in a manner that evokes customary international law. The existence of a material constitution suggests two underappreciated features of the cross-border tax landscape. The possibility of constitutional transformation represents the first. The second reveals powerful constitutional actors able to control both the pace and the direction of that change.<sup>30</sup>

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required ratification by three-quarters of the states. That such a distinction—with everyday rulemaking on one side and higher tax lawmaking on the other—exists at the domestic level cannot be disputed.

<sup>24</sup> Compare H. David Rosenbloom, *International Tax Arbitrage and the "International Tax System"*, 53 TAX L. REV. 137, 137 (2000) ("The existence of overarching principles of international taxation into which U.S. law somehow fits, with which the U.S. Senate might be called upon to 'agree,' qualifies as news.") with Reuven S. Avi-Yonah, *International Tax as International Law*, 57 TAX L. REV. 483, 498 (2004) ("I briefly survey some examples that in my opinion strengthen the view that an international tax regime does exist and that it rises to the level of customary international law.").

<sup>25</sup> Reuven S. Avi-Yonah, *All of a Piece throughout: The Four Ages of U.S. International Taxation*, 25 VA. TAX REV. 313 (2005) (offering a periodization of a century U.S. international tax policy priorities).

<sup>26</sup> H. David Rosenbloom, *International Tax Arbitrage and the "International Tax System"*, 53 TAX L. REV. 137, 138 (2000) ("International tax arbitrage, the deliberate exploitation of differences in national tax systems, is the planning focus of the future. This is not a passing fad, not a minor phenomenon. Thanks in large part to the tutelage of U.S. professionals, taxpayers throughout the world have become conscious of the many benefits of threading a course among domestic tax laws.").

<sup>27</sup> Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 BROOK. J. INT'L L. 1357, 1358-59 (2001).

<sup>28</sup> Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 BROOK. J. INT'L L. 1357, 1362 (2001) ("But we—and here by we, I mean the professional international tax community—lawyers, accountants, and economists, in the universities, private practice, and the government—are not well-positioned to conduct such a comprehensive review. We have been blinded by adherence to inadequate principles and remain wedded to outdated concepts.").

<sup>29</sup> Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 BROOK. J. INT'L L. 1357, 1359 (2001).

<sup>30</sup> Avi-Yonah's influential framing of the material constitution as customary international law obscures the important role of key constitutional actors and the role they play as gatekeepers of change. He describes the U.S. role in rewriting the Classification and Assignment Constitution with its introduction controlled foreign corporation rules but does not adequately acknowledge the significance of that power. See Reuven Avi-Yonah, *International Tax as International Law*, 57 TAX L. REV. 483, 498 (2004) ("The spread of CFC legislation is a good example of how rapidly customary international law, in fact, can change."). The spread of CFC legislation is a good example of the unique and powerful role the United States plays in the evolution of a material constitution, but not a good example of the formation of customary

Constitutions can be amended. Formal constitutions may contain formal amendment procedures. Necessarily, transformations of material constitutions operate differently.<sup>31</sup> Constitutional actors, whether courts, legislators or international organizations shape material constitutions through their actions. Ring and Christians highlight the intergovernmental dynamics and cross-border politics that generate change. Ring's application of international relations theory to cross-border taxation documents the channels through which states and non-state actors exert influence.<sup>32</sup> Christians identifies the key role played by organizations such as the OECD and the G20 in shaping the global tax policy agenda through soft power.<sup>33</sup>

The juxtaposition of unfettered freedom for policymakers and enduring norms constraining fundamental change revealed by a material constitution resonates with the work of a range of scholars. Interrogating the substantive and procedural content of the Classification and Assignment Constitution reveals critical normative failures examined in Part III. The stasis Graetz laments represents only the first. The second—more troubling—flaw lies in a countermajoritarian higher lawmaking process that empowers a strong few and silences a weak multitude.

### B. *Constitutional Actors*

A fidelity to century old norms forms a barrier to change that at times can seem absolute.<sup>34</sup> Lacking a formal amendment process, the Classification and Assignment Constitution creates an even more formidable barrier to change than a formal constitution. The Classification and Assignment Constitution not only describes a set of substantive rules, like any basic law it also allocates power.

Even written constitutions possess important unwritten features. The constitutional principle of judicial review grants the U.S. Supreme Court the power to strike down an income, consumption or wealth tax it deems constitutionally flawed, forming part of a material constitution more comprehensive than its formal counterpart. Such features of the U.S. material constitution have

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international law. See Irma Johanna Mosquera Valderrama, *BEPS principal purpose test and customary international law*, 2020 LEIDEN J INT'L L. 1, 9 (2020) (concluding that for at least 50 years after *Avi-Yonah* concludes the CFC became customary international CFC rules did not meet the “state practice” requirement of customary international law).

<sup>31</sup> This is equally true in the domestic context and with respect to the formal constitutions of intergovernmental organizations like the United Nations. See Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 YALE J. INT'L L. 289, 290 (2013) (“Unlike formal amendment, which occurs through the express decision of the member states according to a certain procedure, informal transformation occurs more subtly, through the practice of the organization. Although the latter mode of change may attract less attention than the former, the degree of change involved can be just as dramatic.”)

<sup>32</sup> See Diane Ring, *International Tax Relations: Theory and Implications*, 60 TAX L. REV. 83, 97-104 (2007) (describing neorealist theories of state action and regime formation).

<sup>33</sup> Christians observes that not all of what appears to bind states in the cross-border tax context rises to the level of formal—“hard”—law. Allison Christians, *Hard Law, Soft Law, and International Taxation*, 25 WIS. INT'L L.J. 325 (2007). (“Soft law is sometimes praised for its flexible, bottom-up approach, which may allow states to adapt to their diverse circumstances and lower the cost of contracting between states. On the other hand, it may serve as a mechanism for key actors to achieve agendas with particularized benefits.”) The “soft law” that Christians hypothesizes—dark matter distinct from the “hard law” of double tax treaties—evokes unwritten constraints on the taxation of cross-border transactions.

<sup>34</sup> The power of the material constitution can represent a sort of “originalism without text,” hinging on “legal propositions, as opposed to the meanings of words....” See Stephen E. Sachs, 127 *Originalism Without Text*, YALE L. J. 156, 168 (2018) (“Originalism is not about the text. On a conventional but mistaken view, to be an originalist is to read words in a particular way... but meaning itself is always the goal. The question the theory addresses is ‘what does the text of the Constitution mean?’; the answer originalism offers is ‘whatever it originally meant.’”). Graetz and O’Hear articulate, but expressly disclaim any support for, a similar brand of originalism. See Michael J. Graetz & Michael M. O’Hear, *The “Original Intent” of U.S. International Taxation*, 46 DUKE L.J. 1021, 1028 (1997) (“We make no claim here, however, that the original intent of international taxation should necessarily constrain today’s policies.”).

become central to the U.S. Constitutional separation of powers although the text of the constitution itself includes no mention of them.<sup>35</sup>

Chief Justice John Marshall fashioned the concept of judicial review, snatching a central role for the Supreme Court out of the jaws of an impossible situation.<sup>36</sup> Marshall famously achieved that enduring result by declaring the Court powerless to grant the relief sought in a particular case.<sup>37</sup> Replicating Marshall's feat on a global scale, the U.S. Treasury has positioned the United States as a key actor in the Classification and Assignment Constitution, serving as an arbiter of change.<sup>38</sup>

That gatekeeping role grants the United States great power. In the escalating U.S.-E.U. conflict over digital taxes, the U.S. recently opined that the French Digital Service Tax appeared "inconsistent with prevailing tax principles" in several respects.<sup>39</sup> Over decades, the United States has consistently framed its judgements of innovations in cross-border taxation as objective assessments against the norms enshrined in a material constitution.

In 2016, when presented with a pointed challenge to the Classification and Assignment Constitution, the U.S. Treasury rose to its defense.<sup>40</sup> Specifically, in response to an unorthodox challenge to Apple's cross-border tax planning, the United States called for "a return to the system and practice of international tax cooperation that has long fostered cross-border investment...."<sup>41</sup> A Treasury White Paper captured the spirit of Marshall as it laid out the U.S. position on Apple's treatment.<sup>42</sup> Rather than openly exerting control, Treasury modestly observed that "[t]he Commission's New Approach Is Inconsistent with International Norms and Undermines the International Tax System."<sup>43</sup>

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<sup>35</sup> See WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 1 (2018) ("Marbury v. Madison will long remain a foundational case for understanding the work and jurisprudence of the Supreme Court of the United States. In an 1803 opinion by Chief Justice Marshall, the Court explicitly rules for the first time that is possessed what we now call the power of judicial review, or jurisdiction to examine whether legislation enacted by Congress is consistent with the Constitution.").

<sup>36</sup> The U.S. Treasury has positioned itself as the de facto constitution court for cross-border taxation. See WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 1 (2018) ("Marbury v. Madison was a truly seminal case, which ultimately conferred vast power on the Supreme Court of the United States and on other constitutional courts throughout the world. What makes the case even more important is the absence of any clear plan on the part of the Constitution's framers to provide the Court with this power.").

<sup>37</sup> *Marbury v. Madison*, 5 U.S. 137 (1803) (declining to issue a writ of mandamus).

<sup>38</sup> A rule of recognition can steer change even without need for a gatekeeper. See Steven A. Dean, *Neither Rules Nor Standards*, 87 NOTRE DAME L. REV. 537 (2013) (concluding that the absence of what H.L.A. Hart termed a rule of recognition caused cross-border taxation to stagnate as the world grew more complex).

<sup>39</sup> U.S. Trade Rep., Report on France's Digital Services Tax Prepared in the Investigation under Section 301 of the Trade Act of 1974 3, Dec. 2 2019.

<sup>40</sup> See Lilian V. Faulhaber, *Beyond Apple: State Aid as a Model of a Robust Anti-Subsidy Rule*, 48 GEO. J. INT'L L. 381, 383 (2017) ("U.S. Treasury Secretary Lew sent a sternly worded letter to the President of the European Commission, the Obama administration expressed concern about the investigations that led to the decisions, and U.S. politicians on both sides of the aisle claimed that the decisions were illegal and inconsistent with international tax law.").

<sup>41</sup> U.S. Dep't of the Treasury, White Paper on the European Commission's Recent State Aid Investigations of Transfer Pricing Rulings 25 (2016).

<sup>42</sup> Ackerman might identify the White Paper as part of a countermobilization intended to preserve the status quo. Bruce Ackerman, *WE THE PEOPLE: FOUNDATIONS* 266-67 (1991).

<sup>43</sup> U.S. Dep't of the Treasury, White Paper on the European Commission's Recent State Aid Investigations of Transfer Pricing Rulings 1 (2016). Its intervention could easily be dismissed as little more than bureaucratic "pandering to private interests in order to get the resources they will require for normal political victories" rather than an argument grounded in higher lawmaking. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 245 (1991); Lilian V. Faulhaber, *The Trouble with Tax Competition: From Practice to Theory*, 71 TAX L. REV. 311 (2018) ("This impact of multinationals on tax competition was manifest in the U.S. Treasury Department's White Paper that defends U.S. companies targeted by Commission state aid investigations. The influence of multinational corporations was also evident as governments were unwilling to eliminate patent boxes entirely, despite economic studies demonstrating that they are not economically

In a 1998 episode, as in the Apple controversy, a taxpayer produced technology while consuming tax subsidies.<sup>44</sup> While it supported the implicit subsidy at issue in Apple, in Compaq, the U.S. Treasury opposed this subsidy, concluding that the taxpayer had used foreign tax credits improperly.<sup>45</sup> Yet to explain its opposition, the U.S. Treasury pointed to the same higher law of cross-border taxation, noting that “Congress and the Treasury have consistently opposed” similar subsidies “in the tax treaty context because such benefits are inconsistent with U.S. tax principles and sound tax policy.”<sup>46</sup>

A third invocation came much earlier. In explaining its position in Compaq, Treasury relied on a long-ago dispute over tax sparing as a precedent of sorts.<sup>47</sup> Tax sparing occurs when one state creates a tax subsidy with respect to income generated by cross-border investment. The prototypical tax sparing scenario involves a developing state that offers foreign investors a tax holiday that is preserved thanks to an exercise of restraint by an accommodating developed state.<sup>48</sup> Embracing its self-appointed role as guardian of the Classification and Assignment Constitution, Treasury opposed tax sparing as inconsistent with its core algorithm.<sup>49</sup> The Classification and Assignment Constitution, as interpreted by the U.S. Treasury, permits only some subsidies.<sup>50</sup>

### C. Higher Lawmaking

Just as Marshall once secured a central role for the Supreme Court by proclaiming its powerlessness, the United States has made itself a critical arbiter of change in cross-border taxation. Particularly without a formal amendment process for amending the Classification and Assignment

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efficient. Thus, government were acting on behalf of taxpayers benefiting from tax competition, either in other jurisdictions, as was the case with the White Paper, or in the jurisdictions that assisted the taxpayers, as was the case with the patent boxes.”)

<sup>44</sup> Charlene D. Luke, *Risk, Return, and Objective Economic Substance*, 27 VA. TAX REV. 783, 822 (2008) (concluding that “Compaq presents a case in which quantifying the implicit subsidy was fairly straightforward”).

<sup>45</sup> That juxtaposition raises the question of why one cross-border tax subsidy falls afoul of the cross-border tax constitution while the other does not.

<sup>46</sup> I.R.S. Notice 98-5 at 4-5 (“The foreign tax credit benefits derived from such transactions represent subsidies from the U.S. Treasury to taxpayers that operate and earn income in low-tax or zero-tax jurisdictions. The effect is economically equivalent to the tax sparing benefits for U.S. taxpayers that Congress and the Treasury have consistently opposed in the tax treaty context because such benefits are inconsistent with U.S. tax principles and sound tax policy.”).

<sup>47</sup> The invocation of tax sparing in document typically directed at facilitating taxpayer compliance was striking. See David P. Hariton, *The Compaq Case, Notice 98-5, and Tax Shelters: the Theory is All Wrong*, 94 TAX NOTES 501, ¶ (2002) (“In any case, the first interesting thing about this notice is that it talks about the worldwide tax system, the role of foreign tax crediting, ‘tax sparing,’ and other things that one would normally find in an internal policy memorandum, or in a white paper, rather than in a notice offering guidance to taxpayers on how to file their returns and pay their taxes.”).

<sup>48</sup> See Kim Brooks, *Tax Sparing: A Needed Incentive for Foreign Investment in Low-Income Countries or an Unnecessary Revenue Sacrifice?*, 34 QUEEN’S L.J. 505, 511 (2009) (“tax sparing provisions preserve the tax incentives granted by one jurisdiction (normally a low-income jurisdiction) by requiring the other jurisdiction (normally a high-income jurisdiction) to give a tax credit for the taxes that would have been paid to the low-income country if the incentive had not been granted”).

<sup>49</sup> It is not difficult to imagine hypothetical dissenting opinions reaching different conclusions. Treasury implicitly concludes that the developing state may choose to impose a tax (or no tax) on income assigned to it, but may not deem a tax paid. Ireland may likewise impose a tax or no tax on income assigned to it, and other states may not alter Ireland’s sovereign choice. Compaq’s arrangement allowed tax sleight-of-hand in the Netherlands—a third way between taxing and not taxing—to limit the power of the United States to tax. It is possible to see a common thread of classification and assignment in each case, but one could, in good faith, interpret classification and assignment differently.

<sup>50</sup> The logic runs that tax sparing “inappropriately allows the reduction of U.S. taxation of U.S. persons...” while Ireland’s subsidy affected an Irish company. See Allison D. Christians, *Tax Treaties for Investment and Aid to Sub-Saharan Africa: A Case Study*, 71 BROOKLYN L. REV. 639, 694 (2005) (laying out the U.S. argument against tax sparing). U.S. skepticism regarding tax sparing was far from universal. See Kim Brooks, *Tax Sparing: A Needed Incentive for Foreign Investment in Low-Income Countries or an Unnecessary Revenue Sacrifice?*, 34 QUEEN’S L.J. 505, 509-10 (2009).

Constitution, that gatekeeping role grants it immense countermajoritarian power. A brief history of the income tax and the U.S. Constitution shows why.

The source of the limitations that have kept the domestic U.S. tax laws constant for more than a century presents no mystery. The same cannot be said of the precise contours of those Constitutional constraints.<sup>51</sup> The U.S. Constitution does not say much about tax, but the few words it does offer have had a profound impact on the course of U.S. tax policy.<sup>52</sup> The textual intersection at which taxation and the U.S. constitution meet rests in a single sentence.<sup>53</sup> And worlds of controversy hang on one word: direct.<sup>54</sup>

Simply put, the constitution imposes Kafka-esque limits on the federal government's capacity to impose direct taxes.<sup>55</sup> And only the Supreme Court has the power to determine whether a tax is direct and subject to the dreaded fate of "apportionment."<sup>56</sup> Even the status of the income tax can be debated.<sup>57</sup> The once-ascendant consumption tax? It may or may not be a direct tax.<sup>58</sup>

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<sup>51</sup> The relevance of the Constitution as a constraint on Congressional power to tax loomed large a little more than a decade ago. See *Murphy v. Internal Revenue Service*, 493 F.3d 170 (D.C. Cir., 2007), cert. denied, 553 U.S. 1004 (2008) (grappling with the question of what constituted "income" for purposes of the Sixteenth Amendment). A case turning on whether a recovery related to the purchase of a used offer an unsettling glimpse into a world in which such Constitutional uncertainty became commonplace in tax. See Robert W. Wood, *Why the Stodnyk Case on False Imprisonment Is a Lemon*, 66 TAX PRAC. 24 (2010).

<sup>52</sup> W. ELLIOT BROWNLEE, *FEDERAL TAXATION IN AMERICA: A HISTORY* 31 (2016) ("The ratification of the U.S. Constitution in 1788 created the basic structure of federal taxation. . . . [T]he Constitution restricted the ability to levy 'direct' taxes – taxes levied directly on individuals. This restriction had a major impact on the form of all federal tax regimes and on the division of tax effort between the federal government and the governments of state and localities.").

<sup>53</sup> U.S. Const. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.").

<sup>54</sup> Joseph M. Dodge, *What Federal Taxes are Subject to the Rule of Apportionment under the Constitution*, 11 U. PA. J. CONST. L. 839, 842 (2009) ("At one end of the spectrum, Erik Jensen argues that "direct tax" means any tax not capable of being shifted, which is deemed to encompass any tax on the economic attributes of persons (including a tax on a person's aggregate consumption). At the other end of the spectrum, Bruce Ackerman argues that the Thirteenth Amendment (abolishing slavery) effectively repealed the apportionment requirement, because the clauses containing the apportionment requirement were invented to effectuate a compromise over slavery. Calvin Johnson goes almost as far in arguing that 'direct tax' means only a tax capable (without effort) of fair apportionment among the states in accordance with population, thereby limiting that term to requisitions and universal head taxes.").

<sup>55</sup> The Sixteenth Amendment requires the direct taxes to be apportioned and the wealth tax would be virtually impossible to apportion. See Daniel Hemel & Rebecca Kysar, *The Big Problem With Wealth Taxes*, N.Y. TIMES, Nov. 7, 2019 (noting that Warren and Sanders's "proposed wealth taxes would apply to real property, which would seem to make them 'direct taxes'" subject to absurd constitutional math meaning that "the wealth tax rate in West Virginia — the poorest state per capita — would need to be roughly 10 times the rate in more affluent California and more than 20 times the rate in prosperous Connecticut.").

<sup>56</sup> The constitutional arguments surrounding the meaning of direct center on a case in which the Supreme Court struck down a tax on real estate. *Pollock v. Farmers' Loan & Trust Company*, 158 U.S. 601 (1895). That holding and the Sixteenth Amendment have been interpreted to pose a mortal threat to a broad range of taxes.

<sup>57</sup> In this famous Cross of Gold speech, William Jennings Bryant emphasized the uncertainty the Sixteenth Amendment would later render irrelevant. See GLENN R. CAPP, *FAMOUS SPEECHES IN AMERICAN HISTORY* (1963). ("They say that we passed an unconstitutional law; we deny it. The income tax was not unconstitutional when it was passed; it was not unconstitutional when it went before the Supreme Court for the first time; it did not become unconstitutional until one of the judges changed his mind, and we cannot be expected to know when a judge will change his mind.").

<sup>58</sup> The answer depends on how you view the early Supreme Court cases holding the income tax was a direct tax. See Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334 (1997). Some see Pollack as an aberration surgically removed by the Sixteenth Amendment posing no constitutional threat to consumption taxes or wealth taxes. See Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1 (1999) (treating Pollack's broad reading of direct as judicial error); Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up*

The U.S. Treasury's repeated efforts to distinguish good subsidies from bad, with subsidies found to be Inconsistent with International Norms earning its disapproval, call to mind the Supreme Court's problematic direct tax jurisprudence. Since the United States enjoys no formal constitutional role in the cross-border tax context, U.S. views and preferences should not be determinative. But in practice, the United States has long exercised the same power under the Classification and Assignment Constitution that the Supreme Court has pursuant to the U.S. material constitution.

Had the United States not stood firm in opposition to tax sparing, arguably no greater a departure than others it supported, the cross-border tax landscape might look quite different today. But for the Sixteenth Amendment, the Supreme Court's opposition to the income tax might have had a similar impact. The U.S. Supreme Court's countermajoritarian stance on the income tax proved not to be the last word.

The Sixteenth Amendment paved the way for the income tax—a reform that had enjoyed broad popular support but faced skepticism from elites—to replace tariffs. The same concerns over inequality and power that fueled the Sixteenth Amendment now focus on deficiencies evident in the income tax both domestically and in the cross-border context.<sup>59</sup> But part III highlights a crucial difference. The Classification and Assignment Constitution contains no counterbalancing majoritarian mechanism to offset the power of wealthy states.<sup>60</sup> As Part II demonstrates, the United States has long wielded great influence in the cross-border tax context. FATCA and Subpart F—like tax sparing—testify to an extraordinary power to both spur and prevent change.

The U.S. Supreme Court may soon decide the fate of a wealth tax. Bruce Ackerman, a constitutional law scholar, predicts one outcome of such a contest.<sup>61</sup> Tax experts tend to be more skeptical.<sup>62</sup> Handicapping the fate of any change to the Classification and Assignment Constitution that the United States declines to support poses less of a challenge.

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*in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1 (1998) (treating the error as enshrined in the constitution itself).

<sup>59</sup> Piketty urges an “appropriate updating of the last century’s social democratic and fiscal-liberal program” to address inequality, replacing the tool populists hoped would accomplish just that. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 663 (2017). Piketty specifically invokes cross-border taxation to justify that intervention. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 636-37 (2017) (noting that “progressive taxation is today under serious threat both intellectually (because its various functions have never been fully debated) and politically (because tax competition is allowing entire categories of income to gain exemption from the common rules)”). He invites constitutional change when he concludes that the “ideal tool” to “regain control over the globalized financial capitalism of this century.... would be a progressive global tax on capital....” THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 663 (2017).

<sup>60</sup> Beyond the central role played by the United States, as described below, the OECD has increasingly become a de facto World Tax Organization although its members represent less than a fifth of the world’s population. Organisation for Economic Cooperation and Development, *Population and Migration* [http://www.oecd.org/sdd/01\\_Population\\_and\\_migration.pdf](http://www.oecd.org/sdd/01_Population_and_migration.pdf) (“In 2010, OECD countries accounted for 18% of the world’s population of 6.9 billion. China accounted for 19% and India for 18%. Within the OECD, in 2010, the United States accounted for 25% of the OECD total, followed by Japan (10%), Mexico (9%), Germany (7%) and Turkey (6%).”).

<sup>61</sup> Ackerman et al., Letter to Senator Elizabeth Warren, <https://www.warren.senate.gov/imo/media/doc/Constitutionality%20Letters.pdf> (concluding that Warren’s “wealth tax proposal is plainly constitutional”).

<sup>62</sup> See Daniel Hemel & Rebecca Kysar, *The Big Problem With Wealth Taxes*, N.Y. TIMES, Nov. 7, 2019.

## II. THE CLASSIFICATION AND ASSIGNMENT CONSTITUTION

Rather than offering an account of why the Classification and Assignment Constitution changes so rarely, this Part relies on those few moments when it does to identify its key features.<sup>63</sup> Put differently, it begins to elaborate the substantive and procedural content of the Classification and Assignment Constitution by studying three moments of change. Double tax treaties, the hard law of cross-border taxation, offer critical clues.<sup>64</sup>

Thousands of agreements trace their origins back to the birth of the cross-border tax constitution, a coincidence that makes it easy to mistake them for a formal constitution.<sup>65</sup> The Classification and Assignment Constitution provides a solution to a complex coordination problem—a numerus clausus classification and assignment algorithm—that time has revealed to be both elegant and flawed.<sup>66</sup> For better or worse, treaties translate that algorithm into hard law. Designed to serve as a shield against substantive and procedural tax burdens, today taxpayers wield both that algorithm and treaties as a sword.<sup>67</sup>

### A. A Material Constitution

No formal cross-border tax constitution exists, but such “a constitutional form, or a constitution in the formal sense of the word, is not indispensable, whereas the material constitution, that is to say, norms regulating the creation of general norms and—in modern law—norms determining the organs and procedure of legislation, is an essential element of every legal order.”<sup>68</sup> Double tax treaties may be the most visible feature of the legal order governing cross-border taxation,

<sup>63</sup> Michael J. Graetz & Michael M. O’Hear, *The “Original Intent” of U.S. International Taxation*, 46 DUKE L.J. 1021, 1074 (1997) (identifying “[t]he classification and assignment of specific categories of income to source or residence... determined by an objective test, ‘economic allegiance,’ whose purpose was to weigh the various contributions made by different states to the production and enjoyment of income” as one “three great principles” articulated by the “four economists” in 1923). The classification and assignment approach algorithm emerged from a standard-setting impulse originating in the late 19th that century left many indelible marks on modern life, not least time zones and the postage stamp. See JÜRGEN OSTERHAMMEL, *THE TRANSFORMATION OF THE WORLD: A GLOBAL HISTORY OF THE NINETEENTH CENTURY* 510 (Patrick Camiller, trans., Princeton University Press 2015) (noting “historically unparalleled norm setting in countless areas of technology, communication and cross-border trade” touching on “weights and measures, international mail (Universal Postal Union of 1874, Universal Postal Convention of 1879), railroad gauges, train timetables, coinage, and much else besides were simplified and standardized for large areas of the world”).

<sup>64</sup> The importance of treaties tends to be overstated. Often mistaken for the DNA of cross-border taxation, its primary importance is often delivering subsidies to multinationals and reducing withholding taxes. See Patrick Driessen, *Is There a Tax Treaty Insularity Complex?*, 135 TAX NOTES 745, 748 (2012) (“Modern treaties seem to be more about reducing tax withholding on some cross-border flows, and less about whether someone is being unfairly doubly taxed.”).

<sup>65</sup> Treaties and classification and assignment have become so intertwined that it becomes difficult to say whether classification and assignment gives rise to treaties or the reverse. See Rebecca M. Kysar, *Unraveling the Tax Treaty*, 104 MINN. L. REV. 1756, 1807 (2020) (“[I]nstead of easing double taxation, treaties have contributed to double non-taxation. This is a direct result of the architecture set up by the treaty system, relying on the malleable concepts of source and residence, which are the foundations of the domestic international tax systems around the world.”).

<sup>66</sup> Successes like classification and assignment and the postage stamp obscure the reality that not every one of those standard-setting efforts flourished. Esperanto may have been “a masterpiece of logic and simplicity” that “quickly attracted the support of linguists, scientists and writers in many countries” yet it failed to take root. See Ralph L. Harry, *Esperanto: An International Language for International Law*, 10 CASE W. RES. J. INT’L L. 817, 818 (1978) (describing the 1887 introduction history of Esperanto and its subsequent history). The numerus clausus principle employed by the classification and assignment algorithm is discussed below. See *infra* note 4.

<sup>67</sup> See Thomas Rixen, *From double tax avoidance to tax competition: Explaining the institutional trajectory of international tax governance* 18 REV. INT’L POL. ECON. 197, 220 (2011) (“As an unintended consequence of its institutional setup, the tax regime, which originally only dealt with double tax avoidance, endogenously creates under-taxation.”).

<sup>68</sup> HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 124 (1945).

but they tell only part of the story. Incorporating the algorithm at the heart of the Classification and Assignment Constitution, they entrench the enduring norms of cross-border taxation.

### 1. The Classification and Assignment Algorithm

The double tax treaty hints at the constraints states face in cross-border tax rulemaking.<sup>69</sup> If pressed to identify a formal cross-border tax constitution, experts would likely suggest double tax treaties.<sup>70</sup> And if compelled to explain why so little has changed in cross-border taxation over a century, they might explain that the years have intensified rather than altered the economic pressures that shaped treaties.

Today, the ubiquity of treaties makes them a defining feature of the cross-border tax landscape. Even fifty years ago, cross-border taxation looked quite different. From only a handful of such treaties at the end of the Second World War, by the end of the Cold War several thousand had been adopted by pairs of states.<sup>71</sup> Treaties, like other aspects of the Classification and Assignment Constitution, reflect the priorities of the two post-war moments in which it took shape.<sup>72</sup>

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<sup>69</sup> When significant law changes take place the question of whether those changes conflict with treaty obligations often becomes an issue. See, e.g., Fadi Shaheen, *How Reform-Friendly Are U.S. Tax Treaties?*, 41 BROOK. J. INT'L L. (2016) (“Recent proposals for reforming the U.S. international tax system, however, deviate from the classic worldwide or credit features of the system and raise the question of whether and to what extent such proposals are treaty compatible.”); Stephen E. Shay & Victoria P. Summers, *Selected International Aspects of Fundamental Tax Reform Proposals*, 51 U. MIAMI L. REV. 1029, 1078 (1997) (concluding that replacing the U.S. income tax with a consumption tax “would likely place substantial pressure on U.S. income tax treaty partners to terminate such treaties with the United States. Although this would be detrimental to existing foreign direct investment by U.S. investors, it is but one of many ‘costs’ of tax reform that must be weighed against the potential benefits.”).

<sup>70</sup> See Reuven S. Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 TEX. L. REV. 1301, 1303 (1996) (“[A] coherent international tax regime exists that enjoys nearly universal support and that underlies the complexities of the international aspects of individual countries’ tax systems. This regime was first developed in the 1920s, when the League of Nations first undertook to study ways to avoid international double taxation, and has been embodied both in the model tax treaties developed by the Organization for Economic Co-operation and Development (OECD) and the United Nations and in the multitude of bilateral treaties that are based on those models.”); Rebecca M. Kysar, *Unraveling the Tax Treaty*, 104 MINN. L. REV. 1756, 1756 (2020) (“Coordination among nations over the taxation of international transactions rests on a network of some 2000 bilateral double tax treaties. The double tax treaties are, in many ways, the roots of the international system.”); Lee A. Sheppard, *How Can Vulnerable Countries Cope with Tax Avoidance?*, 69 TAX NOTES INT’L 410, 410 (2013) (“By signing an OECD model treaty, a signatory accepts separate company accounting (which enables shell corporations), arm’s-length transfer pricing (a battle of the experts), and permanent establishment (a limitation on tax jurisdiction over companies doing business). The OECD model treaty—the accepted international standard—is the ultimate source of the problems.”).

<sup>71</sup> Marian and Ash chart the spread of double tax treaties over time, situating their dramatic rise in popularity in the 1960s and 70s. Elliott Ash & Omri Y. Marian, *The Making of International Tax Law: Empirical Evidence from Natural Language Processing* (UC Irvine School of Law Research Paper No. 2019-02) available at SSRN: <https://ssrn.com/abstract=3314310>.

<sup>72</sup> Compare Thomas Rixen, *From double tax avoidance to tax competition: Explaining the institutional trajectory of international tax governance* 18 REV. INT’L POL. ECON. 197, 205 (2011) (“The original and initially sole purpose of the global tax regime was to mitigate international double taxation in order to liberalize international trade and investment.”) with Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 BROOK. J. INT’L L. 1357, 1391 (2001). (“In addition to the economic benefits that our international tax policy has produced, it also has served important U.S. political interests as the United States became a world power, both politically and economically after the First World War. After the Second World War, international tax policy helped facilitate U.S. private investments abroad in furtherance of our nation’s desires for the economic rebuilding of Europe and Japan. By looking only at private rates of return and U.S. tax collections to measure national welfare, economists fail to count any political benefits.”).

A bill of rights for cross-border investors, treaties shield taxpayers from excessive substantive and procedural burdens.<sup>73</sup> As Dagan demonstrates at a theoretical level—and a review of the record supports as an empirical matter—the risk to cross-border transactions posed by competing claims of taxing jurisdiction actually seems quite modest.<sup>74</sup> Far less costly technologies to avoid double taxation—both in terms of tax revenues and public outlays—existed before the League of Nations settled on its classification and assignment algorithm and treaties.<sup>75</sup>

Anxiety fueled by global conflict justified the embrace of generous, formalized protections for cross-border transactions.<sup>76</sup> Jogarajan’s comprehensive study of the origins of the modern cross-border tax legal order notes that “[t]he 1920s history... shows that the development of the [double tax treaty] was less about establishing a set of rules for the avoidance of double taxation and more about political relationships.”<sup>77</sup> As Jogarajan observes, double tax treaties existed well before the First World War. Yet by that conflict’s close they seemed destined to serve as a historical footnote in the taxation of cross-border transactions rather than a dominant feature.<sup>78</sup>

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<sup>73</sup> Slobodian notes that after 1945 neoliberal advocates “pined for the League” and sought to “constrain national sovereignty and make investor rights stronger than civil rights” through bilateral investment treaties and other formal protections for cross-border investors. QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* 144 (2018). The Classification and Assignment Constitution comes close to realizing their “Hayekian demand for xenos rights [that] came close to the nineteenth-century principle of extraterritoriality—the immunity of foreign actors from domestic laws” through its core algorithm and its double tax treaty bill of rights. *Id.* at 148. The tradition of placing such formal limits on sovereign tax power dates as far back as the Magna Carta in 1215. See Wolfgang Schon, *Taxation and Democracy*, *TAX L. REV.* (forthcoming) (citing constraints that “successfully limited the taxing power of the Kings of England” over centuries).

<sup>74</sup> Tsilly Dagan, *The Tax Treaties Myth*, 32 *N.Y.U. J. Int’l L. & Pol.* 939, [] (2000) (concluding that treaties “serve less heroic goals, such as easing bureaucratic hassles and coordinating tax terms.”). Dagan concludes that their key role is a transfer of revenue from the global south to wealthy capital exporting states but from an interwar perspective it seems equally likely that it was intended as a hedge against conflict. Kysar reaches a similar conclusion through a careful examination of today’s tax rules. See Rebecca M. Kysar, *Unraveling the Tax Treaty*, 104 *MINN. L. REV.* 1755, 1780 (2020) (“Thus, it seems that this purported goal for tax treaties—to constrain the top rate residence countries can impose on foreign source income—would likely be achieved in the absence of the treaties.”).

<sup>75</sup> The foreign tax credit would have been costly to the United States in terms of tax revenue, but in order to claim a credit taxpayers would be required to pay tax elsewhere, so it is less susceptible to abuse. Treaties also represent an enormous investment of public resources in solving the private problem of double taxation. That investment might not always seem justified, but during the interwar years it the League of Nations and the double tax treaties they created epitomize an eagerness to “conduct their foreign policies through certain machinery, in certain conferences, and on the basis of certain obligations providing for international co-operation and peaceful settlement of disputes.” C. HOWARD-ELLIS, *THE ORIGIN, STRUCTURE & WORKING OF THE LEAGUE OF NATIONS* 58 (The Lawbook Exchange 2003) (1929).

<sup>76</sup> Rixen’s rationalist perspective treats the choice of classification and assignment and treaties as driven exclusively by reason rather than fear. As economic instability grew over the 1920s, it seems at least as likely that the League’s tax experts favored a generous classification and assignment approach over more frugal alternatives such as the (isolationist) foreign tax credit at least in part out of worry. See Emily Rosenberg, *Transnational Currents in a Shrinking World*, in *A WORLD CONNECTING: 1870-1945*, 842 (Rosenberg ed., Harvard University Press 2012) (noting that despite an early reluctance to focus on “policies related to tariffs, trade, monetary systems” the League ultimately answered “leading nations and bankers” who “urged active interventions to help stabilize postwar economies in crisis”).

<sup>77</sup> SUNITA JOGARAJAN, *DOUBLE TAXATION AND THE LEAGUE OF NATIONS* 254 (2018).

<sup>78</sup> Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 *BROOK. J. INT’L L.* 1357, 1357 (2001). At a sufficient level of abstraction, the foreign tax credit and classification and assignment represent substitutes. Each can help ensure that taxpayers will pay tax on a cross-border transaction to one state rather than two. On closer examination, classification and assignment seems the VHS to the foreign tax credit’s Betamax. Reflecting the palpable anxieties of the interwar period, the League of Nations effort sacrificed technical superiority to support its political agenda of preserving peace by nurturing cross-border ties. Double tax treaties supercharge that approach by precisely articulating the contours of classification and assignment (and by allowing states to establish formal diplomatic relationships even when they can agree on very little).

The Classification and Assignment Constitution's core algorithm represented a rejection of what has been called the "original intent" of U.S. international taxation.<sup>79</sup> The foreign tax credit allowed taxpayers to offset a U.S. tax burden by demonstrating the payment of tax overseas, reflecting U.S. interwar skepticism of foreign entanglements while providing an explicit subsidy for cross-border transactions viewed as essential to post-World War I reconstruction.<sup>80</sup> The foreign tax credit ensured that taxpayers would not be taxed twice on income generated by cross-border transactions but did nothing to shield taxpayers from procedural burdens. The Classification and Assignment Constitution—through both its core algorithm and its double tax treaty bill of rights—does both.

As Dagan suggests, power helps to explain the embrace of the Classification and Assignment Constitution over the foreign tax credit. In particular, Dagan sees a potential shift of revenue towards influential states and away from countries reliant on foreign capital.<sup>81</sup> In practice, the Classification and Assignment Constitution's protections favor taxpayers rather than wealthy states.<sup>82</sup>

As the risk of conflict rose over the course of the 1920s, so too did the Classification and Assignment Constitution's algorithm and bill of rights.<sup>83</sup> The double tax treaty entrenches the Classification and Assignment Constitution. Once treaties achieve a critical mass, they become "self-perpetuating" for reasons that have nothing to do with their importance in preventing double taxation.<sup>84</sup> Little used for decades after the League designed them, a decade after the Second World

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<sup>79</sup> Graetz and O'Hear note that the foreign tax credit preceded the creation of the classification and assignment algorithm. See Michael J. Graetz & Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 DUKE L.J. 1021, 1028 (1997) ("Today's common attribution to the U.S. international tax regime, by both economists and lawyers, of a deliberate policy of 'worldwide efficiency' or 'capital export neutrality'—a policy of taxing U.S. residents identically whether they invest here or in a foreign country—overlooks the original primacy given by T.S. Adams and the U.S. international tax regime to source-based taxation."). The foreign tax credit reflects an inward-looking American post-war approach that hoped "foreign entanglements could remain minimal as long as businessmen were expansionist and public-spirited." EMILY ROSENBERG, *SPREADING THE AMERICAN DREAM: AMERICAN ECONOMIC AND CULTURAL EXPANSION, 1890-1945*, 139 (1982) (American Dream).

<sup>80</sup> See EMILY ROSENBERG, *SPREADING THE AMERICAN DREAM: AMERICAN ECONOMIC AND CULTURAL EXPANSION, 1890-1945* 139 (1982) (American Dream) (noting that United States remained wary of direct involvement overseas after World War I).

<sup>81</sup> Dagan emphasizes the second, state-centered explanation for the rise of treaties. See *supra* note 74. But after both the first and the second world war, when tax treaties were embraced by experts and states respectively, it is not obvious that the key supplier of capital, the United States, would have sought to maximize its revenues at the expense of European treaty partners. During the interwar period, the United States hoped an open checkbook would take the place of direct overseas involvement. After the second, the United States abandoned that reticence and spent heavily to finance Europe's reconstruction. That could help to explain why treaties were not embraced until decade after World War II ended.

<sup>82</sup> In practice, the classification and assignment algorithm provides benefits not to wealthy states but to taxpayers. See Eric M. Zolt, *Tax Treaties and Developing Countries*, 72 TAX L. REV. 111, 112 (2018) "tax revenue yielded by developing countries likely results in relatively little revenue gains by developed countries. In the current economic environment, tax treaties are less about distributive rules between countries and more about developed countries assisting their multinational entities (MNEs) in reducing their foreign tax liabilities and developing countries using treaties to attract foreign investment").

<sup>83</sup> Even the explicitly business-focused International Chamber of Commerce, which would play an influential role in the interwar embrace of tax treaties, emphasized "peace" and "harmony of action" as core parts of its mission. See International Chamber of Commerce, Proceedings, organization meeting, Paris, France, June 23 to 30, 1920 p. 6 ("The purpose of the organization is to promote international commerce, to facilitate the commercial intercourse of nations, to secure harmony of action on all international questions involving commerce and industry, and to promote peace, progress and cordial relations between the countries and their citizens by the cooperation of business men and their associations devoted to the development of commerce and industry.").

<sup>84</sup> John F. Avery Jones, *Are Tax Treaties Necessary*, 53 TAX L. REV. 1, 3 (1999). The reason tax treaties are sticky turns out to be a function of domestic law changes designed to make treaties irresistible. *Id.* ("Treaties are a one-way street; they lead only to more treaties.... One state will introduce a crazy tax system with the knowledge that other countries will come running to its door asking for a treaty in familiar form, which it will willingly give the other state, subject, of

War, double tax treaties found a new advocate in the OECD.<sup>85</sup> As the OECD pursued economic growth, treaties gained a foothold.

The stark post-war realities faced first by the League of Nations and then by the OECD amply justified the Classification and Assignment Constitution's generous algorithm and formal protections.<sup>86</sup> Ensuring that only one state can impose substantive and procedural tax burdens on each cross-border transaction dovetailed both with the League's focus on building cross-border ties and the OECD's neoliberal agenda.<sup>87</sup> For a century, classifying income into categories then allocating the result between pairs of treaty partners pursuant to a numerus clausus algorithm has formed the core of cross-border taxation.

## 2. Constitutional Actors

That century-old algorithm has endured while little else has.<sup>88</sup> The League of Nations failed to survive long after the Second World War yet its tax treaties would become a significant posthumous

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course, to some concessions on the part of the other state, which it does not mind giving because its system was designed to allow for this.”).

<sup>85</sup> See Kim Brooks & Richard Krever, *The Troubling Role of Tax Treaties*, in 51 SERIES ON INTERNATIONAL TAXATION: TAX DESIGN ISSUES WORLDWIDE 159, 163–64 (Geerten M.M. Michiels & Victor Thuronyi eds., 2015) (noting that the final League model was produced in 1943—with an additional model created “without organizational endorsement”—and then in 1956 “the Organisation for European Economic Cooperation, the post-war organization that emerged in 1948 from the Marshall Plan, started work on a model treaty for its members” ultimately releasing a model in 1963 as the Organisation for Economic Cooperation and Development); Nana Ama Sarfo, *How the OECD Became the World's Tax Leader*, 98 TAX NOTES INT'L 624, 625 (2020) (“When the OECD sat down to discuss double taxation in the wake of World War II... [t]he organization was more concerned with facilitating economic relationships between its member states and boosting those states economically.”).

<sup>86</sup> The fallout from World War I and the flu pandemic of 1918 made the need for such protections a matter of political and diplomatic as well as economic necessity. See Nana Ama Sarfo, *How the OECD Became the World's Tax Leader*, 98 TAX NOTES INT'L 624, 624 (2020) (“the league quickly realized that it could not properly address political cooperation and stability without addressing the specter of double taxation, which threatened to undermine diplomatic cooperation and stability.”).

<sup>87</sup> Classifying income into categories and assigning active items to host states and passive to residence states—per the benefits principle—reflects an allocation consistent with minimizing private procedural burdens on cross-border transactions. A foreign tax credit creates complexity, layering an additional compliance burden atop the burden of filing returns in both host and residence jurisdictions. See Reuven S. Avi-Yonah, *Structure of International Taxation: A Proposal for Simplification*, 74 TEX. L. REV. 1301, 1307 (1996) (noting that in the absence of classification and assignment mechanisms such as the permanent establishment concept “international business would be subject to burdensome administrative requirements of filing returns and paying tax in every country in which it has a minimal presence”). Classification and assignment's procedural benefits would have loomed much larger a century ago, when it would emphatically not have been true that “while there may be good reason to care about high versus low taxes on cross-border activity, or even about even versus uneven taxes at a given margin, this does not imply that here is any direct normative reason to care about the number of taxes that are being levied on a given taxpayer or transaction.” DANIEL SHAVIRO, *FIXING U.S. INTERNATIONAL TAXATION* (Oxford 2014).

<sup>88</sup> A sweeping wave of post-World War II multilateral institution-building spared tax. The bilateral nature of tax treaties sets them apart from the multilateral Bretton Woods system that “would govern the world economy for the first three decades following World War II.” See DAN RODRIK, *THE GLOBALIZATION PARADOX* 69 (2012). It is treated as unremarkable that treaties embracing the classification and assignment algorithm blossomed after remaining largely dormant through the 1950s. But Graetz and O'Hear take pains to point out that the simple story often told of the origins of cross-border taxation and its classification and assignment algorithm conveniently ignores alternatives such as the foreign tax credit targeted more narrowly at minimizing double taxation. They make this observation in demonstrating that the “original intent” of international taxation was to favor source (foreign tax credit) rather than residence (classification and assignment). Michael J. Graetz & Michael M. O'Hear, *The “Original Intent” of U.S. International Taxation*, 46 DUKE L.J. 1021 (1997).

victory.<sup>89</sup> Still, the Classification and Assignment Constitution can change, and it has. As detailed below, a very short list of constitutional actors has shaped its evolution.

The material constitution of cross-border taxation would obviously have developed quite differently had its original intent been realized. Largely irrelevant for almost half a century then ubiquitous for the next, the double tax treaty's rags-to-riches story underscores the tension between dynamism and stability at the heart of the taxation of cross-border transactions.<sup>90</sup> A cycle of rigidity and remaking weaves disparate visions of the material constitution of cross-border taxation scholars have offered into a familiar story of entrenched power.

A range of explanations as to why states have remained committed to ideas and mechanisms a century or more old has been offered over the years. Each depicts an enduring status quo, but their impossible task of painting a static picture of the complexities of a century of cross-border taxation makes each portrait they conjure incomplete. In still images, the dynamics of motion remain merely a subject of speculation. Watching how the taxation of cross-border transactions behaves in a moment of change reveals that missing movement and the actors animating it.

Observing the Classification and Assignment Constitution in motion reveals the presence of powerful constitutional actors with the capacity to instigate change and to prevent it. Most accounts of the rules governing the taxation of cross-border transactions do not allow for such agency. Instead, cross-border tax rules become a sort of natural law tax experts discover, a form of customary law they identify or not law at all.

Although some see inevitability in the rules governing cross-border taxation others see obligation. The strength of the customary international law view of cross-border taxation lies in its power to reconcile parallel state behavior with diverging state interests.<sup>91</sup> Heterogeneity among states ensures the existence of both winners and losers in any bargain. The power of the Classification and Assignment Constitution when national interests urge otherwise offers evidence that a customary international law of cross-border taxation binds states.

Another view perceives pure politics at work.<sup>92</sup> This anarchic vision sees states taking whatever they can to benefit their constituents and fill their coffers consistent with their long-term interests.<sup>93</sup> None of these perspectives allows a role for constitutional actors, despite the League's early intervention and the OECD's successful efforts to breathe life into the double tax treaty.<sup>94</sup>

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<sup>89</sup> GEORGE SCOTT, *THE RISE AND FALL OF THE LEAGUE OF NATIONS* (1973) (dating the League's demise at April 19, 1946).

<sup>90</sup> Thomas Rixen, *From double tax avoidance to tax competition: Explaining the institutional trajectory of international tax governance*, 18 *REV. INT'L POL. ECON.* 197, 207 (2011) (noting that even in "the 1950s the [tax treaty-based] regime was still of limited practical significance").

<sup>91</sup> See Reuven Avi-Yonah, *International Tax as International Law*, 57 *TAX L. REV.* 483 (2004) (describing features of the taxation of cross-border transactions that could be described as customary international law).

<sup>92</sup> H. David Rosenbloom, *International Tax Arbitrage and the "International Tax System"*, 53 *TAX L. REV.* 137, 166 (2000) ("the international tax system ... system appears to be imaginary").

<sup>93</sup> Apparently altruistic behavior can appear selfish when states take the long view by considering the benefits of participating in a regime over time. See Claire R. Kelly, *Realist Theory and Real Constraints*, 44 *VA. J. INT'L L.* 545, 547 (2004) (concluding that states may sometimes prioritize their long-term interests over short term costs because "compliance with regime rules in a hard case initially may result in a power loss (either relative or absolute) to a nation, these constraining regimes may also withhold benefits from states which refuse to comply with them").

<sup>94</sup> Treaties took a very long time to gain the momentum needed to achieve their current levels of saturation. See John F. Avery Jones, *Are Tax Treaties Necessary*, 53 *TAX L. REV.* 1, 3 (1999) (noting that "[i]n 1939, there were 20 treaties between OECD members, 85 at the time of the 1963 Draft, 179 at the time of the 1977 Model Treaty and 475 (out of a possible 552) in 1995"). Rixen notes the long delay between the creation of the double tax treaty and its rise to prominence but does not explain why the decades between their "initial setup" and their rise to prominence—and the availability of alternative approaches including the foreign tax credit—did not create an opportunity for the emergence of a superior

Dagan's trenchant critique suggests an alternative narrative.<sup>95</sup> She dispatches the natural law explanation for the Classification and Assignment Constitution by demonstrating that double taxation should not be expected to occur even in the absence of tax treaties.<sup>96</sup> The familiar patterns she observes call both the anarchic view and its customary international law antithesis into question. Dagan sees the hand of powerful states at work shaping and preserving the Classification and Assignment Constitution, uncovering traces of the enduring struggle between wealthy states and the global south.<sup>97</sup>

The OECD represents neither today's only nor—one could argue—most influential constitutional actor. The following examples illustrate how such actors continue to shape the material constitution of cross-border taxation. Whatever these illustrations reveal about the origins of the Classification and Assignment Constitution, they tell us more about its future. Created to suit an interwar hunger for standards and formal interstate links and seized upon after World War II to nurture economic growth, the apparent stability of the Classification and Assignment Constitution obscures considerable volatility in cross-border taxation. The change depicted below reveals both rigidity and the potential for sudden pivots.

### *B. Deliberation*

Change, when it comes to cross-border taxation can come quickly. No formal process announces its arrival or invites participants to a constitutional convention. A higher lawmaking function that could be mediated through a World Tax Organization instead unfolds in obscurity pursuant to the terms of a material constitution.

During the intercrisis years, the air became thick with unease over the favorable tax results Google, Apple and others enjoyed thanks to the classification and assignment algorithm, a heightened salience that is a necessary but not sufficient condition for change.<sup>98</sup> Capitalizing on such a constitutional moment requires more. The necessary catalyst takes the form of a "proposal" that allows "the movement to focus its rhetoric into a series of more or less operational proposals for constitutional reform."<sup>99</sup>

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alternative. Thomas Rixen, *From double tax avoidance to tax competition: Explaining the institutional trajectory of international tax governance*, 18 REV. INT'L POL. ECON. 197, 207 (2011).

<sup>95</sup> See generally Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939 (2000).

<sup>96</sup> Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939, 939 (2000) ("these ubiquitous treaties are not necessary for preventing double taxation").

<sup>97</sup> Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939, 939 (2000) (expressing concern that treaties may be "redistributing tax revenues from the poorer to the richer signatory countries").

<sup>98</sup> The Independent Commission for the Reform of International Corporate Taxation's 2015 declaration brought together a broad range of high-profile individuals and organizations, from Piketty to Christian Aid, to focus on the flaws of the Classification and Assignment Constitution and to advocate for an alternative known as formulary apportionment. See Declaration of the Independent Commission for the Reform of International Corporate Taxation at <https://www.icrit.com/icrit-documents/the-declaration> ("We are a group of leaders from government, academia, and civil society, including the faith community. Our backgrounds, experience, and expertise span the globe. With the conviction that our system of taxing the global profits of multinational corporations is broken and that the rules and institutions governing the international corporate tax system must change, we have formed an Independent Commission for the Reform of International Corporate Taxation."). ICRICT was one of a number of organizations—such as the Financial Transparency Coalition (2009), the Global Alliance for Tax Justice (2013) and the Addis Tax Initiative (2015)—that emerged in the intercrisis period focused on global tax reform joining other institutions already engaged in that effort. Some of those institutions were quite new (Tax Justice Network—Africa created in 2007) while others were older but with a new focus on tax (Christian Aid founded in 1945).

<sup>99</sup> BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 266 (1991).

Two recent proposed changes to the Classification and Assignment Constitution mark possible paths to alternate futures. Authored by constitutional actors too potent to be ignored yet too radical to gain easy acceptance even in extraordinary times, the U.S. Foreign Account Tax Compliance Act and the European Commission's state aid cases each seized on the fluidity of the intercrisis moment.<sup>100</sup>

## 1. FATCA

Nothing illustrates the allure of the Classification and Assignment Constitution like its treatment of cross-border investment. Whatever the economic realities might be, passive income such as interest belongs to the country in which the investor resides.<sup>101</sup> As a result, an investor having no active presence in a host country need do no more than confirm their residence elsewhere to secure an exemption from host country taxes. Having no claim to a nonresident's income, a host state generally has only nominal obligations to buttress the claims of any residence jurisdiction.

By design, qualifying for an exemption from U.S. tax on interest paid by a U.S. business to a foreign investor requires nothing more than evidence of non-U.S. ownership. Claims for exemption from tax withholding filed by foreign investors with host states—certifications of foreign beneficial ownership such as the U.S. I.R.S. W-8 BEN—long provided residence states with their only supply of extraterritorial tax information. Compared to the tailored and timely information received from banks and employers domestically, relying on second-hand forms filed by its residents with foreign governments left a growing disconnect between the information collected from within the United States and from abroad.<sup>102</sup> In the words of then-I.R.S. Commissioner Mark Everson, by the mid-1990s “[t]he use of documents that report foreign source income ha[d] been a concern for us for many years.”<sup>103</sup> By the time of the financial crisis, that states bore sole responsibility for supplying extraterritorial tax information to counterparts with respect to such exempt income had long become part of the Classification and Assignment Constitution.<sup>104</sup>

<sup>100</sup> The demise of the League of Nations left a void in the taxation of cross-border transactions that the OECD has only partly filled. Viewed in higher lawmaking terms, what tends to be seen as U.S. unilateralism instead looks more like advocacy for a modern amendment to the cross-border tax constitution. See Susan C. Morse, *GILTI: The Co-operative Potential of a Unilateral Minimum Tax*, 2019 BRIT. TAX REV. 512, 514 (envisioning a radical new minimum tax known as GILTI as a proposal that might produce “a robust global corporate income tax... it encourages corporate income tax laws to converge globally”).

<sup>101</sup> See Reuven S. Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 TEX. L. REV. 1301, 1303 (1996) 1305 (“Specifically, the international consensus allocates active business income to the jurisdiction from which it derives (the source jurisdiction) and passive income to the jurisdiction in which the investor resides (the residence jurisdiction”).

<sup>102</sup> It had also become increasingly clear that information exchange had devolved into a de facto honor system for cross-border investors, with unscrupulous taxpayers able to hide cross-border investment income from host countries. As the financial crisis struck, there could be no doubt that “[f]or national governments, the choice is not whether to address the growing extraterritorial tax information deficit, but how.” Steven A. Dean, *The Incomplete Global Market for Tax Information*, 49 B.C.L. REV. 605, 610 (2008) (suggesting a number of alternatives more likely to generate extraterritorial tax information than the foreign beneficial ownership certificate swaps states had long relied on). Wei Cui offers a novel critique of our reliance on third-party information reporting. See Wei Cui, *Taxation without Information: The Institutional Foundations of Modern Tax Collection*, 20 U. PA. J. BUS. L. 93 (2018).

<sup>103</sup> Letter from Mark W. Everson, Dep’t of the Treasury, to the Honorable Max Baucus, Ranking Member, U.S. Senate Comm. on Fin. 2 (June 12, 2006) [hereinafter Everson Letter], reprinted in Everson Explains U.S. IRS’s Use of Foreign-Source Income Data, *WORLDWIDE TAX DAILY*, June 16, 2006 (explaining how nations traded more or less useless information with one another gleaned from certifications received from taxpayers in exchange for exemptions).

<sup>104</sup> The flaws in that barter system had become obvious. See Joseph Guttentag & Reuven Avi-Yonah, *Closing the International Tax Gap*, in *BRIDGING THE TAX GAP: ADDRESSING THE CRISIS IN FEDERAL TAX ADMINISTRATION* 99-100 (Max B. Sawicky ed., 2005) (illustrating the ease with which U.S. taxpayers “spoofed” the barter system to claim an exemption).

In 2010, FATCA proposed a radical reform, bridging the qualitative and quantitative gap in U.S. access to extraterritorial tax information by extending its domestic third-party information reporting framework overseas.<sup>105</sup> Challenging the notion that cross-border passive investment should trigger only modest public—and no private—reporting obligations for host states, FATCA’s “more or less operational” proposal challenged a longstanding feature of the Classification and Assignment Constitution. In essence, wherever in the world they might operate, all banks and other entities with information on U.S. residents became required to send that information to directly to the U.S. government or risk potentially devastating retaliation.<sup>106</sup>

FATCA “focus[ed] the rhetoric” of concern over the evasion made possible by the extraterritorial tax information gap.<sup>107</sup> That effort to replicate domestic tax information acquisition extraterritorially by enlisting private actors to provide tax information directly to U.S. authorities met swift resistance from nearly every quarter.<sup>108</sup> Banks and other financial institutions challenged the harsh sanctions FATCA threatened for failures to supply the United States with extraterritorial tax information.<sup>109</sup> More surprisingly, other states seemed just as skeptical.<sup>110</sup> Less than two years after

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<sup>105</sup> Hiring Incentives to Restore Employment Act §§ 501-531, Pub. L. No. 111-147, 124 Stat. 71 (2010) (codified in scattered sections of I.R.C.).

<sup>106</sup> The United States used threats of substantial penalties on financial flows to address a key enforcement problem that had made reliance on state-to-state exchanges critical.

The challenges a government faces in securing access to domestic tax information are even more formidable when the information it needs to enforce its tax laws rests outside its borders. Governments must contend with both legal and practical limits on their power to compel foreign actors to provide them with that extraterritorial tax information. Domestically, a government may impose *ex ante* regulatory requirements that certain information and transactions be reported by commercial intermediaries and may then compel the production of supplemental information that becomes relevant with the benefit of hindsight. Beyond its borders, those government powers are not reliable.

Steven A. Dean, *The Incomplete Global Market for Tax Information*, 49 B.C.L. REV. 605, 607 (2008). The key to FATCA’s power was the threat of imposing enormous costs on financial institutions unwilling to comply. Year’s after FATCA’s enactment, the technical and political challenges of actually imposing those costs—particularly on what were known as passthru payments—proved too high. *See* NYSBA Tax Section, Letter to Mark Mazur et al., January 19, 2017 at <https://nysba.org/NYSBA/Sections/Tax/Tax%20Section%20Reports/Tax%20Reports%202017/1362%20Letter.pdf> (“Given the extent of international cooperation in this area, passthru payment withholding may not be the best method to encourage a jurisdiction’s participation in a system for the automatic exchange of account information. With passthru payment withholding, compliance costs are imposed on compliant institutions in order to isolate the noncompliant.”).

<sup>107</sup> It is no small irony that some of the most dramatic examples of the evasion that paved the way for FATCA resulted from a U.S. qualified intermediary regime that, by design, undermined the state-to-state information barter system by ensuring that the United States be able to grant an exemption without collecting information on foreign investors. The qualified intermediary regime deputized banks such as U.B.S.—soon to be famous for smuggling diamonds in toothpaste tubes for its clients—to certify the exempt foreign status of its clients without passing along the underlying information to the United States. The United States could not supply information to other states that it did not possess. Steven A. Dean, *Neither Rules Nor Standards*, 87 NOTRE DAME L. REV. 537, 567-571 (2013) (describing the implications of the qualified intermediary regime).

<sup>108</sup> The priority on extending the U.S. information acquisition machinery extraterritorially reflects a consensus that access to third party information reporting is central to modern tax enforcement. *But see*, Wei Cui, *Taxation without Information: The Institutional Foundations of Modern Tax Collection*, 20 U. Pa. J. Bus. L. 93, 99 (2018) (arguing that contemporary scholarship has “mischaracterized the role of information reporting, which has also led to increasing confusions about the institutional basis of modern tax collection”).

<sup>109</sup> *See* Shu-Yi Oei, *The Offshore Tax Enforcement Dragnet*, 67 EMORY L.J. 655, 710 (2018) (“FFIs have borne significant FATCA compliance costs. Many have had to build technology platforms and upgrade computer and compliance systems to identify U.S. taxpayers. Costs of FFIs also include manpower, training, legal, and other administrative costs.”).

<sup>110</sup> Perhaps because they lacked the leverage the United States wielded—by threatening financial penalties on foreign entities declining to participate in the FATCA information reporting regime—other states quickly countermobilized. Ackerman describes the forces striving to preserve the status quo—rejecting the proposed amendment—as a countermobilization. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 266-67 (1991).

the enactment of FATCA, the United States, France, Germany, Italy, Spain and the United Kingdom issued a joint statement supporting “an intergovernmental approach to FATCA implementation.”<sup>111</sup> That stance ensured that the state-to-state reporting long enshrined in the Classification and Assignment Constitution would be preserved.

## 2. State Aid

For close to a century, the classification and assignment algorithm has offered taxpayers an escape from the complex game of musical chairs that the taxation of cross-border transactions might have been. Its *numerus clausus* approach offers a fixed menu income categories—business income and royalties, for example—with ownership of each assigned to a particular state. Depending on the type of income, possession might be granted to the state where the income arises (source) or ultimately settles (residence), but not both.<sup>112</sup> Once title vests in a state, that state may tax the income or choose not to tax it. Other states may not tax that income even if its owner fails to do so.

That classification and assignment’s *numerus clausus* algorithm produces arbitrary results does not make it ineffective as a safeguard against the substantive and procedural burdens of double taxation.<sup>113</sup> Precisely the opposite may be true.<sup>114</sup> Sharply limiting the universe of permissible classifications of income reduces taxpayer information costs and tie-breaking rules assigning ownership provide assurance that tax claims will be asserted by at most one state.

The algorithm works exceedingly well to reduce burdens on taxpayers engaged in cross-border transactions, eliminating “juridical” double taxation by ensuring that each type of income can only be taxed by a single jurisdiction.<sup>115</sup> But that algorithm creates a systematic bias in favor of taxpayers.<sup>116</sup>

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<sup>111</sup> U.S. Treasury Department, Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance And Implementing FATCA (at <https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Joint-Statement-US-Fr-Ger-It-Sp-UK-02-07-2012.pdf>). The potent withholding tax that fueled FATCA proved to be an empty threat. *See* Treas. Reg. §1.1471-5(h)(2) (leaving the puzzle of how to solve the thorny problem of “blockers” noted in I.R.S. Notice 2011-34).

<sup>112</sup> To a surprising extent, those “cuts” of income are arbitrary. *See* Reuven Avi-Yonah, *International Tax as International Law*, 57 TAX L. REV. 483, 490-91 (2004) (noting that the potential conflict over competing claims to income “has been solved by arbitrary rules embodied in tax treaties that define the source of various categories of income”). For all the reasons that a United Nations entity created a “multilingual index of products” to provide uniformity in cuts of meat, the absence of an “abstract theoretical framework” may be advantageous). David Weisbach, *Line Drawing, Doctrine, and Efficiency in Tax Law*, 84 CORNELL L. REV. 1627, 1627-28 (1999). (arguing “that line drawing in the tax law can and should be based on the efficiency of competing rules rather than on... whether various reified constructs can be fit together” or “whether something is ‘income’” according to an abstract theoretical framework).

<sup>113</sup> *See* Reuven Avi-Yonah, *International Tax as International Law*, 57 TAX L. REV. 483, 491 (2004). (“For example, income from services is sourced where the services are provided (and not where they are consumed); dividend and interest income are sourced by the residence of the payor; capital gains are sourced by the residence of the seller; and so on.”).

<sup>114</sup> David Weisbach, *Line Drawing, Doctrine, and Efficiency in Tax Law*, 84 CORNELL L. REV. 1627, 1644 (1999). (noting that in the tax context “the platonic approach fails as a general method of drawing lines”). Critics describe such countermajoritarian neoliberal structures as an exercise of power. *See* Globalists at 16 (“encasement of the market in a spirit of militant globalism is a better way of describing the international dimensions of the neoliberal project than the Polanyian terms of disembedding the economy according to a doctrine of market fundamentalism”).

<sup>115</sup> *See* Yariv Brauner, *Treaties in the Aftermath of BEPS*, 41 BROOK. J. INT’L L. 973, 986 (2016) (double tax treaties produce this flawed result because they “eliminate juridical rather than economic double taxation...”).

<sup>116</sup> *See* Rebecca M. Kysar, *Unraveling the Tax Treaty*, 104 MINN. L. REV. 1756, 1756 (2020) (“tax treaties allocate taxing jurisdiction to the country of the taxpayer’s residence, which often fails to impose a tax.”). As Shaviro notes, double tax treaties’ “focus on double taxation can potentially be misleading” by implying that treaties embrace a “single tax principle” that equally targets double taxation and non-taxation. *See* Daniel Shaviro, *The Two Faces of the Single Tax Principle*, 41 BROOK. J. INT’L L. 1293, 1295 (2016).

If the state assigned ownership of an item of income does not claim it, the Classification and Assignment Constitution prevents other states from asserting a claim.<sup>117</sup>

Unfortunately, time has not been kind to the classification and assignment algorithm. Today, even services increasingly challenge the boundaries of classification and assignment.<sup>118</sup> Technological innovation has strained the classification mechanism.<sup>119</sup> More troubling, taxpayers have become adept at passing one type of income off for another. Financial innovation can allow taxpayers to “convert” a transaction in order to reclassify—and reassign—the income it generates.<sup>120</sup> Substituting “intermediary financing arrangements in which debt-to-equity arbitrage is the primary component” to shift a transaction to a different cubbyhole than that occupied by “taxpayers who invest directly in their jurisdiction of choice” is all in a day’s work for an international tax lawyer.<sup>121</sup> Such reclassifications lie at the heart of transactions such as Google’s double Irish sandwich.<sup>122</sup>

The European Commission’s state aid cases directly challenge the Classification and Assignment Constitution.<sup>123</sup> Drawing on a body of E.U. state aid law distinct from the traditional tools of cross-border taxation, the Commission rejected the notion that once assigned ownership of income pursuant to the algorithm a state could exercise its dominion by either imposing a tax on it or declining to do so.<sup>124</sup> The Commission concluded that in certain circumstances the owner of income could be forced to tax it. In reaction—as described in Part I—the United States urged a return to the

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<sup>117</sup> The state assigned the income effectively taxes it at a zero percent rate. See Daniel Shaviro, *The Two Faces of the Single Tax Principle*, 41 BROOK. J. INT’L L. 1293, 1294 (2016) (“[s]ince zero multiplied by anything is zero, being taxed zero times cannot help but result in a lower tax liability than being taxed some positive amount once”).

<sup>118</sup> See, e.g., Michael S. Kirsch, *Tax Treaties and the Taxation of Services in the Absence of Physical Presence*, 41 BROOK. J. INT’L L. 1143, 1146 (2016). (noting uncertainty with respect to the source of income earned by “a physician resident and located in State R... perform[ing] telesurgery on a patient located in State S through a synchronous robotic surgery system”); [Nciko Wa Nciko Arnold, Who gets to Tax global-north Citizens who have been evacuated from Africa but who still derive Income from Africa through Telework? Forthcoming (discussing tax implications of the evacuation of and telework by foreign workers).

<sup>119</sup> One can even debate what industry Google is in let alone how to classify its income.

<sup>120</sup> Kleinbard critiques the same result that occurs with the “cubbyhole” approach embraced by the taxation of financial products under U.S. law. See Edward D. Kleinbard, *Equity Derivative Products: Financial Innovation’s Newest Challenge to the Tax System*, 69 TEX. L. REV. 1319, 1356 (1991) (noting that by bringing together “a simple combination of the ownership of stocks and a forward contract to produce a synthetic money market instrument” tax lawyers can produce a different set of results than those resulting from a simple purchase of a money market fund). Such conversions are the “coding” of capital Pistor describes as having profoundly deleterious consequences for equality. KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 48 (2019).

<sup>121</sup> Omri Marian, *The State Administration of International Tax Avoidance*, 7 HARV. BUS. L. REV. 1, 29 (2017).

<sup>122</sup> See Edward D. Kleinbard, *Stateless Income*, 11 FLA. TAX REV. 699, 714 (2011) (Kleinbard describes the result as “debt-financed tax arbitrage”). Such arrangements may fall into the broader category of “hybrid mismatches.” OECD, *Neutralizing the Effects of Hybrid Mismatch Arrangements* 29 (2015) (“A hybrid mismatch arrangement is an arrangement that exploits a difference in the tax treatment of an entity or instrument under the laws of two or more tax jurisdictions to produce a mismatch in tax outcomes where that mismatch has the effect of lowering the aggregate tax burden of the parties to the arrangement.”).

<sup>123</sup> The Classification and Assignment Constitution does allow for the possibility of tax subsidies, which is one reason that the challenge had to come from a different body of law. Lilian V. Faulhaber, *Beyond Apple: State Aid as a Model of a Robust Anti-Subsidy Rule*, 48 GEO. J. INT’L L. 381, 404 (2017) (“[O]ne reason that the EU brought those investigations is that state aid is the only tool that the EU had to challenge tax benefits that it believed to be undercutting fair trade and competition within the single market. Not only is this the only tool that the EU has, but the EU is also the only entity to have such a tool.”).

<sup>124</sup> European Commission Press Release IP/16/2923, *State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth up to [euros] 13 Billion* (Aug. 30, 2016), [http://europa.eu/rapid/press-release\\_IP-16-2923\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2923_en.htm) (“The European Commission has concluded that Ireland granted undue tax benefits of up to €13 billion to Apple. This is illegal under EU state aid rules, because it allowed Apple to pay substantially less tax than other businesses. Ireland must now recover the illegal aid.”).

classification and assignment status quo.<sup>125</sup> The Commission’s state aid cases continue to make their way through the European legal system.<sup>126</sup>

Given the scope and scale of its challenge—even for giants like these, €13 billion matters—the direct impact of the E.U. Commission’s effort drew attention. The fundamental nature of the Commission’s state aid challenge to the classification and assignment algorithm suggest that it could also be a harbinger of higher lawmaking. A post-state aid world might impose affirmative obligations on states rather than simply offering an unencumbered grant of ownership (tax sovereignty).<sup>127</sup> Such an approach, transforming the Classification and Assignment Constitution’s “may” to a “must” would represent an even greater departure than FATCA’s proposed shift away from intergovernmental cooperation.<sup>128</sup>

### C. Codification

These two proposals capture the lurching progress of the taxation of cross-border transactions over the last century.<sup>129</sup> Driven by cycles of higher lawmaking and ordinary politics, a pattern emerges in episodes such as these. The ultimate impact of FATCA and the European Commission’s state aid cases may not be evident for decades. To understand what they might one day mean, it helps to look back a half century to the rise of the controlled foreign corporation.

As Justice Marshall demonstrated, a basic law can be rewritten without deploying formal mechanisms of change. The Classification and Assignment Constitution can be—and in fact has been—amended in much the same way.<sup>130</sup> In the cross-border tax context, those changes observe a particular—and for U.S. observers, familiar—constitutional rhythm.<sup>131</sup>

<sup>125</sup> [cross reference to this quote: “a return to the system and practice of international tax cooperation that has long fostered cross-border investment....” U.S. Dep’t of the Treasury, White Paper on the European Commission’s Recent State Aid Investigations of Transfer Pricing Rulings 25 (2016).]

<sup>126</sup> See Ruth Mason, *Implications of the Rulings in Starbucks And Fiat for the Apple State Aid Case*, 165 TAX NOTES 193 (2019) (describing recent developments in the state aid cases). COVID may fundamentally alter the state aid landscape. See William Hoke, 98 TAX NOTES INT’L 237 (2020) (Before the pandemic, the European Commission vigorously enforced state aid rules prohibiting member states from conferring selective advantages on businesses that distort trade and competition within the EU. Once the magnitude of the crisis became clear, the commission quickly relaxed its policy).

<sup>127</sup> Ring provides a comprehensive discussion of the meaning and significance of tax sovereignty. See Diane M. Ring, *What’s at Stake in the Sovereignty Debate: International Tax and the Nation-State*, 49 VA. J. INT’L L. 155 (2008).

<sup>128</sup> The analogous property interest might be a usufruct, the notion that your rights to property are contingent on you using it.

<sup>129</sup> See, e.g., Reuven S. Avi-Yonah, *All of a Piece Throughout—The Four Ages of U.S. International Taxation*, 25 VA. TAX REV. 313 (2005) (Avi-Yonah sees four distinct eras framed by the benefits principle, capital export neutrality, competitiveness and cooperation).

<sup>130</sup> Ring situates that phenomenon within international relations theory as an aspect of cognitivism, observing that “[c]hanges in knowledge and belief systems” can produce substantive changes in rules such as those governing cross-border taxation. Diane Ring, *International Tax Relations: Theory and Implications*, 60 TAX L. REV. 83, 92 (2007).

<sup>131</sup> A hypothetical U.S. Supreme Court opinion upholding the constitutionality of a wealth tax would rewrite the U.S. Constitution much as the 16th amendment once did. Supplementing the classical system of amendment contained within the Constitution, Ackerman envisions a modern counterpart complete with signs of heightened public engagement (signaling), the articulation of alterations (proposals), efforts to achieve a consensus (deliberation) and, finally, incorporating the amendment (codification). BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, 270 (1991 [1999]) (describing “the four critical functions that must be discharged by a credible higher lawmaking system”). Even though the context is different, these elements can be observed in the higher lawmaking of cross-border taxation. As in the U.S. domestic context, a classical—formal—system of higher lawmaking, this informal counterpart makes constitutional amendment possible even when Article 5 becomes unavailable. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1741-42 (2007) (explaining that today “changing our constitution” need not rely on Article V but can take the form of “landmark” statutes and judicial opinions).

If a material constitution of cross-border taxation exists at all, the classification and assignment algorithm represents its central feature.<sup>132</sup> Altering it, for example, to include a new classification for digital services would necessarily implicate the higher lawmaking Ackerman describes. But it would not be the first successful amendment. A half-century ago, along with the rise of double tax treaties—and a dawning recognition of the limits of classification and assignment—came the controlled foreign corporation.

Then as now, the phenomenon that would eventually be labeled “stateless income” made the taxation of cross-border transactions salient.<sup>133</sup> A proposal emerged to modify the classification and assignment algorithm. Rather than countermobilize—as they did in response to FATCA and State Aid—other states deliberated and codified this departure from “the system and practice of international tax cooperation that has long fostered cross-border investment...”<sup>134</sup> The U.S. Subpart F regime, when implicated by specific hallmarks of tax planning, constructs an artificial dividend from the controlled foreign corporation to its U.S. shareholder to produce a different result than the classification and assignment algorithm would otherwise provide.<sup>135</sup>

This U.S. controlled foreign corporation proposal would soon achieve codification in the enactment of similar statutes around the world.<sup>136</sup> As a result, current U.S. tax can be imposed on income in apparent violation of another state’s tax sovereignty. That complex process of recharacterization represents a stark departure from numerus clausus simplicity. In a sense, the controlled foreign corporation rules represented an acknowledgment that—even as the OECD seized on the double tax treaty to entrench it—the classification and assignment algorithm envisioned decades earlier had proven no match for the ingenuity of lawyers and bankers armed with increasingly sophisticated telecommunications technology.<sup>137</sup>

This cross-border constitutional moment unfolded much as Ackerman imagined. Signaling focused on the salient threat of “tax havens” rather than the more esoteric questions of source, residence or neutrality an expert might have emphasized.<sup>138</sup> Pursuing an incremental approach, the

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<sup>132</sup> State-to-state information exchange, discussed [cross reference], represents another.

<sup>133</sup> Checking Ackerman’s “signaling” box.

<sup>134</sup> U.S. Dep’t of the Treasury, White Paper on the European Commission’s Recent State Aid Investigations of Transfer Pricing Rulings 25 (2016). Avi-Yonah describes the embrace of the controlled foreign corporation by developed states. See Reuven S. Avi-Yonah, *International Tax as International Law*, 57 *Tax L. Rev.* 483, 489 (2004) (describing the embrace of the controlled foreign corporation concept).

<sup>135</sup> • Subpart F is comprised of §951 through §965 of the Internal Revenue Code. §951(a) provides that some U.S. shareholders of a controlled foreign corporation must include in their gross income certain types of income and investments of the controlled foreign corporation that otherwise would not be included in their gross income under the general rules. §951(b) provides that the U.S. shareholders that are subject to this anti-deferral rule are U.S. persons who own 10% or more of the stock of a controlled foreign corporation by vote or value. §957(a) defines a controlled foreign corporation as any foreign corporation of which U.S. shareholders own more than 50% of the stock by vote or value. The mechanics of the controlled foreign corporations regime are determined by the numerous special rules of Subpart F as well as by other provisions of the Internal Revenue Code that apply generally to foreign corporations.

<sup>136</sup> Avi-Yonah describes the rise of the controlled foreign corporation in similar terms but labels it a change in customary international law. See Reuven S. Avi-Yonah, *International Tax as International Law*, 57 *Tax L. Rev.* 483, 489 (2004). (treating the rise of the controlled foreign corporation “a good illustration of the growth of customary international law in the tax area”).

<sup>137</sup> In practice, classification and assignment’s theoretically simple approach proved much more complex when applied to the operations of multinationals. See Stanley S. Surrey, *Reflections on the Allocation of Income and Expenses among National Tax Jurisdictions*, 10 *Law & Pol’y Int’l Bus.* 409, 453 (1978) (“there is a growing, if not already strong, awareness that descriptive conclusions are not adequate to meet the day-today problems tax administrators face in the application of the arm’s length standard and the factors involved under that standard”).

<sup>138</sup> President Kennedy addressed a special message to Congress on tax in 1961 that highlighted the threat of tax havens. President John F. Kennedy’s Special Message to the Congress on Taxation, April 20th, 1961 (“I recommend elimination of the ‘tax haven’ device anywhere in the world”). Boise and Morriss provide a thoughtful study of the rise and fall of

United States chose amendment over termination.<sup>139</sup> And it succeeded in spurring a sudden and lasting change in the basic law of cross-border taxation. The widespread embrace of the controlled foreign corporation concept by legislatures in much of the world would embed the controlled foreign corporation in the Classification and Assignment Constitution. Wielding unsurpassed power in higher lawmaking, “the United States takes the lead, the OECD and its members reach a compromise, and the rest of the world follows the OECD.”<sup>140</sup>

### III. A CONSTITUTIONAL MOMENT FOR CROSS-BORDER TAXATION

Set alongside the indeterminate impact of two recent proposals, the U.S. effort that produced the controlled foreign corporation stands as a higher lawmaking triumph. That success demonstrates that the Classification and Assignment Constitution can change even though it lacks a formal higher lawmaking structure.<sup>141</sup> Collectively, the three proposals reveal the countermajoritarian power wielded by the United States, the European Union and the OECD as constitutional actors, allowing them to elevate their narrow interests over those of the states and individuals that form the base of the global economic pyramid.<sup>142</sup>

Such an approach does have advantages.<sup>143</sup> But for states at the margins, the Classification and Assignment Constitution offers little opportunity for control and few benefits.<sup>144</sup> During the intercrisis period, for the first time in decades, the taxation of cross-border transactions entered the fluid phase in which higher lawmaking becomes possible.<sup>145</sup> The classification and assignment

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one tax haven, detailing the role of classification and assignment and the tax treaty in permitting—“[w]ith strong initial encouragement from the U.S. Treasury”—the avoidance U.S. corporate withholding taxes. See Craig M. Boise & Andrew P. Morriss, *Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles*, 45 TEX. INT’L L. J. 377, 379-381 (2009)

<sup>139</sup> See Nir Fishbien, *From Switzerland with Love: Surrey’s Papers and the Original Intent(s) of Subpart-F*, 38 VA. TAX REV. 1, 27 (2018) (noting that statutory language for formulary apportionment had at one point been drafted).

<sup>140</sup> Jinyan Li, *Global Profit Split: An Evolutionary Approach to International Income Allocation*, 50 CAN. TAX J. 823, 867 (2002) (describing a similar pattern in the transfer pricing context).

<sup>141</sup> In the absence of a World Tax Organization—or even one of Hart’s rules of recognition—the informal process Li describes fills the resulting higher lawmaking gap.

<sup>142</sup> Williams Jennings Bryant’s famous Cross of Gold speech focused on the countermajoritarian power of the Supreme Court in challenging the Court’s opposition to the income tax. [cross reference] Of course in the case of the income tax, Article V provided a way for the majority to overturn the Supreme Court’s countermajoritarian holding.

<sup>143</sup> From a U.S. perspective, such an arrangement seems ideal. And it is certainly possible that what is good for the United States happens to be good for the world. See, e.g., Susan C. Morse, *GILTI: The Co-operative Potential of a Unilateral Minimum Tax*, 2019 BRIT. TAX REV. 512, 515 (concluding that the recent U.S. minimum tax known as “GILTI has a fundamentally co-operative structure [that] does not match the core “America First” message of current US foreign policy.”). But such happy accidents hardly seem inevitable.

<sup>144</sup> Nations that did not exist when the basic law of cross-border taxation took shape remain bound to its dictates and lack the power to influence its evolution. Slobodian argues that institutions such as the double tax treaties were deployed specifically to tame a threat to the market posed by decolonization. QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* 146 (2018) (“Empires could end, neoliberals argued after 1945, but only if capital rights were secured and nation-states were kept from impeding the free flow of money and goods. But how to ensure this outcome in an era of decolonization when liberation, self-determination, and sovereignty were touted as the defining traits of statehood?”). One reason so few states embraced the controlled foreign corporation concept before the OECD encouraged them to do so as part of its BEPS effort is the extraordinary its extraordinary complexity. Peter Mullins, *International Taxation and Developing Countries*, Center for Global Development (January 2020) (“Many of the international tax initiatives are designed by, and for, developed economies, and so may be too complex and/or not practical in a developing country.”).

<sup>145</sup> See IMF, *Corporate Taxation In The Global Economy*, Policy Paper, at 7 (Mar. 2019) (“With the international tax system in a state of flux, ideas for far-reaching reform are receiving serious attention, reflecting wide recognition that the roots of

algorithm's failures that made the taxation of global digital giants salient differed in extent more than in kind from those Kennedy grappled with half a century before. And, as before, most states remained powerless to articulate alternatives to the Classification and Assignment Constitution.<sup>146</sup>

Presented—without irony—as an inevitability given the complexity of cross-border tax rules, that silencing of marginal states ignores the simple truth that most of the Classification and Assignment Constitution can be easily understood.<sup>147</sup> Its numerus clausus algorithm can be grasped by anyone who has ever found a book in a library. And the frustration it engenders can be appreciated by anyone who has ever watched perfectly good food go to waste. The facility classification and assignment grants private actors to “code” cross-border transactions to exploit vulnerabilities in that algorithm mirrors the power corporate law grants businesses “to partition assets and shield them behind a chain of corporate veils” to achieve similarly favorable results.<sup>148</sup>

Opportunities to not merely maintain but upgrade the basic infrastructure of the taxation of cross-border transactions may only come once in a generation.<sup>149</sup> Recent experience suggests that whatever change occurs will disproportionately benefit wealthy states. FATCA failed to replace state-to-state information flows with a true cross-border counterpart of its domestic information reporting regime. Still, FATCA reflects an agenda-setting power that provides an enormous advantage to those actors able to wield it. In the years since FATCA, vast amounts of resources have been devoted to strengthening a personal income tax vital to wealthy states but largely irrelevant to the poorest.<sup>150</sup>

Despite differences among the three proposals described in Part II, a common thread runs through each. Articulated by the United States and the European Union, they reflect their priorities rather than those of states on the periphery. The absence of a formal higher lawmaking structure for cross-border taxation tilts the playing field in favor of wealthy states while obscuring their power.<sup>151</sup>

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current problems—not only continued vulnerability to avoidance but unaddressed pressures from tax competition—are deep.”).

<sup>146</sup> Advocates for a New Deal for developing countries have offered visions for a more inclusive higher lawmaking structure. See, e.g., The International Centre for Tax and Development (ICTD), What should a ‘new deal’ on international tax look like for developing countries? at <https://www.ictd.ac/blog/what-should-new-deal-international-tax-look-like-developing-countries/>.

<sup>147</sup> In recent years criticisms of developing states have been increasingly veiled but continue to convey the conviction that poor states remain unable to collect revenues not because of systemic flaws in cross-border tax rules but because of character flaws of some sort. Jeffrey Owens & Bernd Schlenker, *What Is the Link Between COVID-19 and Illicit Financial Flows?*, 98 TAX NOTES INT’L 691, 693 (2020) (noting that despite efforts by international organizations “many African countries have been slow to heed the recommendations made... largely because of a lack of political will at the national level).

<sup>148</sup> KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 48 (2019) (articulates a comprehensive theory of a dualist structure of private law that favors capital in areas ranging from real and intellectual property to corporate and tax law). But even critics of neoliberalism resort to the cliché of tax havens to explain that coding rather than focusing on the systemic failures that permit it. Globalists 267 (“Others have written the history of the neoliberal fix in different ways. One scholar writes of the ‘nonmajoritarian’ models of governance in port authorities and the idea of central bank independence.... Other scholars have described the creation of an ‘offshore world’ of tax havens through which nations compete to offer the least possible corporate tax, the greatest possible secrecy, and the best incentives for individuals and corporations to flee the clutches of their own redistributive states.”).

<sup>149</sup> The degree of precision possible in identifying the temporal or substantive edges of a constitutional moment is necessarily limited. One might, for example, decide that rather than two constitutional moments—one domestic and one global—there is only one. Or one could reasonably wonder whether FATCA’s personal income tax enforcement constitutional moment is entirely distinct from the corporate-oriented moment implicated by the E.U. state aid cases.

<sup>150</sup> See Richard M. Bird & Eric M. Zolt, *Redistribution via Taxation: The Limited Role of the Personal Income Tax in Developing Countries*, 52 UCLA L. REV. 1627, 1694 (2005) (“As it has operated in most developing countries, the global progressive personal income tax long advocated by tax experts is in fact neither global nor progressive, nor personal, nor often even on income (but rather on some presumptive basis).”).

<sup>151</sup> Other reforms fail to find a place on the agenda or succumb to a countermobilizations. Tax sparing provisions designed to put a thumb on the classification and assignment scale in favor of developing countries arguably fall into the

Granting a privileged few the ability to set the agenda in the absence of meaningful accountability stacks the deck against change, leading to precisely the senescence that plagues the taxation of cross-border transactions.

This part highlights structural obstacles to rewriting the Classification and Assignment Constitution to permit all states—and states on the periphery in particular—to collect the revenue they increasingly need by describing three paths towards innovation. The first focuses on transparency. The second considers how to alter the classification and assignment algorithm to help states meet growing demands for revenue. The third focuses on creating a more diverse set of constitutional actors able to exert meaningful agenda-setting power.

### A. Transparency

The Classification and Assignment Constitution weathered the intercrisis period intact. One significant change has been an increase in transparency. Enhancing “fiscal transparency norms” can “enable distributive justice and democratic participation in budget decision making by legislative and civil society actors” (whether or not they exercise direct control over the policymaking process).<sup>152</sup> In simple terms, creating metrics to measure departures from an ideal could guide future reforms towards it.<sup>153</sup>

Transparency has become a watchword in the cross-border tax context of late, but in the sense of surveillance rather than accountability.<sup>154</sup> FATCA increased flows of information about taxpayers across borders, but little effort has been made to systematically quantify the shortcomings of the classification and assignment algorithm. One of the most surprising aspects of the story of the taxation of cross-border transactions has been how little of it has been told in numbers.<sup>155</sup> Measuring

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second category. See Kim Brooks, *Tax Sparing: A Needed Incentive for Foreign Investment in Low-Income Countries or an Unnecessary Revenue Sacrifice*, 34 QUEEN'S L.J. 505, 530 (2009) (noting a growing consensus on the part of wealthy states against tax sparing).

<sup>152</sup> Lisa Philipps & Miranda Stewart, *Fiscal Transparency: Global Norms, Domestic Laws, and the Politics of Budgets*, 34 BROOK. J. INT'L L. 797, 799, 801 (2009) (“emphasiz[ing] the need to design transnational fiscal norms that foster inclusive, democratic institutions at the country level” and “identify[ing] the beginnings of an architecture that could provide an inclusionary framework for taxing and spending in the global context”).

<sup>153</sup> See ATTIYA WARIS, FINANCING AFRICA 151 (2019) (urging states to “[c]ross reference countries’ losses in taxes, human rights indicators, and progress towards [U.N. Sustainable Development Goals] to understand and demonstrate interrelations between taxation, human rights and development to compare to international benchmarks and exemplary countries”). Waris’s admonition regarding underinvesting in constitutions where tax is concerned applies no less in the cross-border context than it does at the state level. See Attiya Waris, *Delineating a Rights-Based Constitutional Fiscal Social Contract through African Fiscal Constitutions*, 2015 E. AFR. L.J. 24, 43 (2015) (lamenting that “no real analysis goes into analysing and tying down the right or power of government to tax, the amount collectible and the use to which it is put” the result can be “a culture of tax evasion, avoidance, impunity, corruption, lack of responsibility, and accountability as well as outright theft across the continent”).

<sup>154</sup> See, e.g., Leandra Lederman & Joseph Dugan, *Information Matters in Tax Enforcement 2020* B.Y.U. L. REV. \_\_\_\_ (forthcoming 2020) (using the term transparency to refer to state access to information about taxpayers rather than the reverse). Particularly in the wake of FATCA and the rise of the OECD Common Reporting Standard, transparency has become synonymous with surveillance in the cross-border tax context. See, e.g., Arthur J. Cockfield, *How Countries Should Share Tax Information*, 50 VAND. J. TRANSNAT'L L. 1091, 1094 (2017). (“The main policy response thus far... is to encourage countries to exchange tax and financial information so that home countries can better enforce their tax laws to inhibit undesired activities.”).

<sup>155</sup> Until just a few years ago, the most rigorous scholars evaluated cross-border tax rules in terms that now seem as dated the humors physicians of old relied on to understand the workings of the human body. Equally difficult to bring into balance, rather than four humors, the standard account held that the health of the rules governing the taxation of cross-border transactions could be measured in terms of two neutralities. See Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 BROOK. J. INT'L L. 1357, 1362 (2001). (“Frequently, the normative and policy discussions of international income taxation in the literature, including not only

the subsidies implicit in the Classification and Assignment Constitution—as the European Commission did in its state aid cases—can have a profound impact in terms of agenda-setting.<sup>156</sup>

In part as the result of long-ago decisions, even the limited information provided domestically tends to end at the water's edge. Over the past decade, efforts to quantify flaws in the taxation of cross-border transactions have gained momentum.<sup>157</sup> And the results can be surprising.<sup>158</sup>

The tax expenditure budget represents one of the most important tools in the tax policy toolbox, not for what it does but for what it reveals.<sup>159</sup> It provides a rough measure of the revenue cost of a variety of tax breaks.<sup>160</sup> That tax expenditure budget was developed in response to concerns that “less critical analysis is paid to” such loopholes “than to almost any direct expenditure program one can mention.”<sup>161</sup> Although its chief U.S. advocate advocated extending the tax expenditure budget's reach to the cross-border context, its analysis still does not reach tax treaties or the limits of the classification and assignment algorithm more broadly.<sup>162</sup>

The persistent appeal of delivering subsidies through tax laws highlights the practical limits of tax expenditure analysis. But even the most potent transparency tool would have no impact if it willfully ignored the costs of classification and assignment. Surprisingly, the U.S. tax expenditure budget does not capture benefits supplied to taxpayers through treaties even though delivering subsidies may be the primary function of tax treaties today.<sup>163</sup>

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the academic publications of both economists and lawyers, but also—and perhaps most importantly—most of the key serious government analyses containing any normative discussion, begin and end with an assumption—not an argument—that the proper goal for U.S. international tax policy is advancing worldwide economic efficiency. Achieving such efficiency typically is said to involve two kinds of neutralities.”). Despite its technical sophistication, the OECD has yet to offer any meaningful information on the revenue implications of its BEPS effort. *See, e.g.*, Ruth Mason, *The Transformation of International Tax*, Am. J. Int'l L., forthcoming July 2020 (concluding that although it has transformed international taxation “[i]t is too early to know the revenue effects of BEPS”).

<sup>156</sup> In addition to calling for substantive higher lawmaking, Piketty echoes calls for “democratic and financial transparency” and uncovering the complex truth behind the competing narratives of cross-border taxation requires data. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 667 (2017).

<sup>157</sup> The IMF has made continued efforts to track “spillovers” in cross-border taxation. *See* IMF, *Spillovers in International Corporate Taxation*, IMF Policy Paper (May 2014) (defining spillover as “the impact that one jurisdiction's tax rules or practices has on others” with an eye towards “the core concern with the level and cross-country allocation of corporate tax payments”).

<sup>158</sup> Elisa Casi et al., *Cross-Border Tax Evasion after the Common Reporting Standard: Game Over?* at 31 (ZEW - Centre for European Economic Research Discussion Paper No. 18-036) available at SSRN: <https://ssrn.com/abstract=3245144> or <http://dx.doi.org/10.2139/ssrn.3245144> (finding statistically significant “evidence that an unexpected country seems to attract wealth and related income for the purpose of tax evasion, i.e., the United States increase in cross-border bank deposits in the United States in cross-border deposits” over the past decade).

<sup>159</sup> Just as important as what it reveals is what the tax expenditure budget fails to capture. It is far from comprehensive in cataloguing tax benefits. Of course, transparency alone may not be enough. *See, e.g.*, Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407, 410 (1999) (noting that current U.S. practice fails to subject “tax expenditures to the full panoply of constitutional and statutory restrictions on government spending”).

<sup>160</sup> *See* Steven A. Dean, *The Tax Expenditure Budget Is a Zombie Accountant* 46 U.C. DAVIS L. REV. 265 (2012) (describing the operation of the tax expenditure budget).

<sup>161</sup> STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 6 (1973).

<sup>162</sup> *See* Steven A. Dean, *The Tax Expenditure Budget Is a Zombie Accountant* 46 U.C. DAVIS L. REV. 265, 289 (2012) (“Surrey himself concluded that preferences provided through the tax treaty process should be considered tax expenditures, but they continue to be excluded from the tax expenditure budget”). The resulting absence of data on the effects of tax treaties has attracted relatively little attention. *See* Patrick Driessen, *Is There a Tax Treaty Insularity Complex?*, 135 TAX NOTES 746 (2012). (noting the “absence of specific budgetary and broader economic analyses of tax treaties prevails despite a growing literature on the general economic effects of tax treaties”).

<sup>163</sup> *See* Eric M. Zolt, *Tax Treaties and Developing Countries*, 72 TAX L. REV. 111, 112 (2018) (“Specifically, in the current economic environment, tax treaties can be used by developed countries to assist their multinational enterprises (MNEs) in reducing their foreign tax liabilities and can be used by developing countries to attract foreign investment. Thus viewed, tax treaties are more tools to influence economic decisions regarding cross-border investments and less formal

Existing transparency measures also fail to capture other potentially costly features of cross-border taxation. For example, “highly favorable” advance pricing agreements deliver benefits to taxpayers that go uncounted.<sup>164</sup> The few points at which accountability measures intersect with cross-border taxation hints at enormous subsidies.<sup>165</sup> The failures of the tax expenditure budget highlight the power and the limitations of such accountability.<sup>166</sup>

### B. *Altered and Alternative Algorithms*

Today’s tax experts swim in a sea of technical detail, but the Classification and Assignment Constitution and its core algorithm are simple. The codification of Subpart F produced rules that few truly understand.<sup>167</sup> Even among sophisticated practitioners, its rules enjoy a fearsome reputation.<sup>168</sup> Despite new layers of complexity introduced in the wake of the OECD Base Erosion and Profit Shifting effort, the classification and assignment algorithm continues to shield cross-border transactions from both procedural and substantive tax burdens, just as its creators intended.

The primary intercrisis effort by the world’s most sophisticated team of tax experts, the OECD, has been BEPS.<sup>169</sup> BEPS—a countermobilization in higher lawmaking terms—sought to strengthen classification and assignment by limiting taxpayer ability to favorably code their transactions.<sup>170</sup> That resulting algorithm—altered first by Subpart F and more recently by BEPS—provides wealthy states with new power to override unrealistic classifications that permitted taxpayers

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rules for allocating taxing rights.”). In describing the implications of Google’s Double Irish Dutch Sandwich Kleinbard notes that “Ireland has a good tax treaty network whose treaties often reduce the tax rate on royalties paid between firms in the two treaty countries to zero.” Edward D. Kleinbard, *Stateless Income*, 11 FLA. TAX REV. 699, 712 n.19 (2011).

<sup>164</sup> Daniel Shaviro, *Friends Without Benefits? Treasury and EU State Aid*, 83 TAX NOTES 1067, 1068 (2016) (concluding that APAs lie at the heart of the E.U. state aid controversy by delivering “illegal state aid... effectively... akin to illegally giving money to” multinationals).

<sup>165</sup> The U.S. Treasury’s Office of Tax Analysis estimated that the “[d]eferral of income from controlled foreign corporations” would confer a tax benefit worth \$1,415,810,000,000 for the period between the period 2017 through 2027.

<sup>166</sup> Applying the principles of the tax expenditure budget to systematically measure the tax subsidies Zolt describes or those at the heart of the state aid controversies, for example, would be difficult, but not excessively so from a technical standpoint. See Ruth Mason, *Identifying Illegal Subsidies*, 69 AM. U. L. REV. 479 (2019) (surveying the landscape of subsidy measurement in cross-border taxation).

<sup>167</sup> The imputed payments raise questions once considered to be significant in U.S. constitutional terms as the economic income reflected in those deemed payments becomes subject to U.S. income tax before being “realized” for tax purposes. See Richard J. Horwich, *The Constitutionality of Subpart F of the Internal Revenue Code*, 19 U. MIAMI L. REV. 400 (1965).

<sup>168</sup> Over time, the resulting complexity caused cross-border taxation’s accessibility to shrink while its importance grew. Proving the adage that war is too important to be left to the generals, cross-border tax policy in the hands of those steeped in its tools and traditions has become a morass of complexity with little to show for it in terms of revenues. The limits of Subpart F echo the downside of the broader trend in cross-border taxation away from standards and towards rules. See Steven A. Dean, *Neither Rules Nor Standards*, 87 NOTRE DAME L. REV. 537 (2013) (describing a broad trend in cross-border taxation towards rules and away from standards and its cost in terms of legitimacy). Subpart F was a victim of a Clinton-era change to the entity classification rules referred to as the check-the-box rules. See Steven A. Dean, *Attractive Complexity: Tax Deregulation, the Check-the-Box Election, and the Future of Tax Simplification*, 34 HOFSTRA L. REV. 405, 456 (2005) (noting that “[w]ith the creation of check-the-box elections, entity classification became an additional, and critical, variable in the Subpart F equation”).

<sup>169</sup> BEPS highlights the dangers of incrementalism. Aiming to preserve the classification and assignment algorithm and its numerus clausus approach, BEPS failed to address underlying flaws in classification and assignment, resulting in an entirely new classification that has only underscored the divide between the United States and Europe over the treatment of Google, Amazon and the other U.S. digital giants. The result appears to be a compromise that pleases no one.

<sup>170</sup> See MICHAEL GRAETZ, FOLLOW THE MONEY 274 (2016) (dismissing BEPS as an inadequate incrementalist response to a systemic failure of the taxation of cross-border transactions).

to achieve improbable assignments.<sup>171</sup> Over time, first-generation earnings-stripping transactions yielded to more sophisticated variations in a cat-and-mouse game BEPS continues.<sup>172</sup> Google's infamous double-Irish sandwich and the Apple structures that provoked the EU's state aid challenge represent distant descendants of the "tax haven devices" Kennedy targeted, designed to reclassify and divert business income to achieve a more favorable assignments.<sup>173</sup>

A half century of such incremental efforts to plug gaps in the Classification and Assignment Constitution has produced disappointing results. The ongoing struggle over digital taxes represents a test of the continued relevance of the *numerus clausus* framework.<sup>174</sup> The French digital services tax adheres to a traditional classification and assignment approach, applying to revenues, rather than profits, generated by the digital activities of companies such as Facebook and Google.<sup>175</sup> Predictably, it poses twin challenges in determining what should be classified as digital and how to assign those revenues to a state. Traditional methods of assigning business income, focusing on determining the jurisdiction where the relevant assets exist and activities take place, face obvious challenges in an industry with few employees and fewer smokestacks. A controversial new assignment methodology, based on the notion that users of digital platforms such as Facebook and Google effectively serve as unwitting smokestacks underscores that classification and assignment struggles to keep pace with technological change.<sup>176</sup>

A leading alternative algorithm rejects *numerus clausus* by eliminating classification.<sup>177</sup> Formula or Formulary apportionment, the technical term for this algorithm, has long been a favorite of academics.<sup>178</sup> Unsurprisingly, they have proven unequal to the higher lawmaking task of replacing

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<sup>171</sup> Allison Christians & Laurens van Apeldoorn, *Taxing Income Where Value Is Created*, 22 FLA. TAX REV. 1, 2 (2018) ("the foundational allocation rules embraced and enforced by BEPS ensure that highly productive, higher income countries are systematically assigned a larger share of revenue than less productive, lower-income countries").

<sup>172</sup> See Edward D. Kleinbard, *Stateless Income*, 11 FLA. TAX REV. 699, 720 (2011) ("Over the last several years, however, the scope of the subpart F system has been cut back, so that increasing amounts of U.S. firms' foreign earnings can qualify as active business income, and therefore are eligible for "deferral." This scaling back of the subpart F system in turn has greatly enhanced the ability of U.S. firms both to operate in a quasi-territorial environment and to generate stateless income.").

<sup>173</sup> See Edward D. Kleinbard, *Stateless Income*, 11 FLA. TAX REV. 699, 713 (2011) (noting that Google's "structure is easily replicable by others (and in fact has been reported to be in widespread use among U.S. technology firms); there is nothing in the structure that relies on any unique business model or asset of Google's. From the point of view of sophisticated U.S. multinational firms, this arrangement is simply one tool among many in the stateless income planning toolkit.").

<sup>174</sup> Creating a new classification—digital services—offers the possibility of upgrading the operating system of cross-border taxation to embrace the digital economy. In practice, it is not obvious such a classification and assignment 2.0 would prove stable. In other areas of substantive law that embrace *numerus clausus*, such a leap has proven difficult. Christina Mulligan, *A Numerus Clausus Principle for Intellectual Property*, 80 TENN. L. REV. 235 (2013) (noting that although U.S. real property law relies on a rigid *numerus clausus* framework there is no *numerus clausus* for intellectual property).

<sup>175</sup> In place of allowing taxpayers to offset their income with expenses, the French digital services tax simply imposes a very low 3% rate. See Lilian V. Faulhaber, *Taxing Tech: The Future of Digital Taxation*, 39 VA. TAX REV. 145 (2019) (describing digital services taxes and related OECD initiatives).

<sup>176</sup> Allison Christians & Laurens van Apeldoorn, *Taxing Income Where Value Is Created*, 22 FLA. TAX REV. 1 (2018).

<sup>177</sup> The 2001 United Nations Zedillo Report viewed "unitary taxation" as the ultimate goal of the International Tax Organization it advocated. The Independent Commission for the Reform of International Corporate Taxation urges the same approach. See Declaration of the Independent Commission for the Reform of International Corporate Taxation 2 ([here](#)) ("States must reject the artifice that a corporation's subsidiaries and branches are separate entities entitled to separate treatment under tax law, and instead recognize that multinational corporations act as single firms conducting business activities across international borders.").

<sup>178</sup> See, e.g., Reuven S. Avi-Yonah et. al., *Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split*, 9 Fla. Tax. Rev. 497 (2009); Susan C. Morse, *Revisiting Global Formulary Apportionment*, 29 VA. TAX REV. 593 (2010).

classification and assignment with this undifferentiated alternative.<sup>179</sup> A notable exception to the failure of academics to displace the classification and assignment algorithm came in late 2017.<sup>180</sup> The U.S. Global Intangible Low-Taxed Income (GILTI) regime does not classify income.<sup>181</sup> Although its name suggests otherwise, GILTI does not target any particular type or source of income.<sup>182</sup> Rather than applying to a specific category of intangible-derived income such as royalties, it revisits the controlled foreign corporation rules by imposing a tax on U.S. shareholders on that corporation's income after applying a negative screen for returns linked to "tangible" overseas assets. Not quite what Altshuler and others envisioned, but even so, GILTI's negative screen algorithm makes it an outlier.

Replacing the classification and assignment algorithm by eliminating its classification prong would mean the end of the Classification and Assignment Constitution. The result might mirror the approach long employed to allocate taxing jurisdiction among the 50 states.<sup>183</sup> A BEPS transparency measure—Country by Country Reporting (CbCR)—offers states a "high level" assessment of the income earned by each multinational within its borders and suggests how a formulary algorithm would differ from classification and assignment.<sup>184</sup>

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<sup>179</sup> Taking a "whole animal" approach, this algorithm does not distinguish among different types of income. Revenues from business activities, capital income and profits derived from intellectual property earned by multinationals receive identical treatment. All thrown into the conceptual equivalent of a meatgrinder, the resulting undifferentiated income is measured—allocated—to states by a predetermined formula. Precisely what an acceptable formula would look like is the all-important question. Typically, proposals echo the four economists "economic allegiance" concept and allocate based on the physical location of plant, property and employees or some blend of similar elements. See Henry Ordower, *Utopian Visions toward a Grand Unified Global Income Tax*, 14 FLA. TAX REV. 361, 384-390 (2013) (describing the traditional formulary elements). But for all the reasons that one might prefer a welfarist-inflected alternative to economic allegiance—the allocation step of the classification and assignment algorithm—a formula that would affirmatively favor states with a higher marginal utility would be appealing. See Vasiliki Koukouloti, *Sustainable Tax Systems in the Digital Era* (on file with author) (suggesting such an inversion of economic allegiance's benefits principle). Koukouloti effectively raises the same baseline question Murphy and Nagel did, with everyday nationalism and sovereignty replacing everyday libertarianism and property rights, respectively. LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 15 (2002) ("The assumption that pretax market outcomes are presumptively just, and that tax justice is a question of what justifies departures from that baseline, appears to flow from an unreflective or 'everyday' libertarianism about property rights.").

<sup>180</sup> Shaviro expresses skepticism of GILTI as a minimum tax. See Daniel Shaviro *What are Minimum Taxes, and Why Might One Favor or Disfavor Them?* z Shaviro, Daniel, What Are Minimum Taxes available at SSRN: <https://ssrn.com/abstract=3604328>

<sup>181</sup> Rosanne Altshuler, *Keynote Address*, 24 FORDHAM J. CORP. & FIN. L. 225 (2019) (describing the origins of the 2017 tax law changes in her prior work and that of others).

<sup>182</sup> See I.R.C. §951A (requiring U.S. shareholders to include controlled foreign corporation income less their "net deemed tangible income return").

<sup>183</sup> The Multistate Tax Commission oversees the Uniform Division of Income for Tax Purposes Act regulate the allocation. See s Model Compact Article IV. Division of Income (As revised by the Multistate Tax Commission July 29, 2015) at <http://www.mtc.gov/getattachment/Uniformity/Article-IV/Model-Compact-Article-IV-UDITPA-2015.pdf.aspx>. Proposals for similar multijurisdictional taxes highlight the potent appeal of eschewing a numerus clausus approach. See Afton L. Titus *The design of a corporate income tax system and how to protect it for the East African Federation* (2020) (suggesting a formulary apportionment approach to taxation).

<sup>184</sup> The formulary algorithm's greatest strength—the elimination of classification and the planning opportunities it presents—seems to also be its key weakness. Without that dubious feature, formulary apportionment presents such a tempting alternative for states that the OECD warned them not tether a formulary algorithm to CbCR information to collect tax and only to use CbCR for risk assessment purposes. OECD guidance specifically steers states away from making the leap from CbCR to taxing based on a formula. BEPS Action 13 on Country-by-Country Reporting: Guidance on the Appropriate Use of Information Contained in Country-by-Country Reports 5 at <https://www.oecd.org/tax/beps/beps-action-13-on-country-by-country-reporting-appropriate-use-of-information-in-CbC-reports.pdf>.

Such a change could boost global tax revenues by making coding more difficult, but the countermajoritarian power wielded by wealthy states and influential intergovernmental organizations favors the status quo. The digital tax “war” that made the headlines just as the world turned its attention to COVID amounts to a fight over a new classification that would leave the classification and assignment’s numerus clausus algorithm intact.<sup>185</sup> That conflict—amplified by COVID’s pressures—could tip the balance in the contest between preservationists and revolutionaries by making cross-border taxation salient to the broader public. Without a cross-border tax equivalent of Article V, the demise of the Classification and Assignment Constitution could result in complete collapse rather than orderly change.

A formulary alternative algorithm could help bridge a growing fiscal gap.<sup>186</sup> A destination-based cash flow consumption tax would likewise reject classification and assignment.<sup>187</sup> Other—even more radical—alternatives such as a global “upstream” carbon tax modeled on the proposal a group of influential Republicans urged the United States to adopt during the intercrisis period could supplement existing taxes.<sup>188</sup> With no shortage of “better mousetraps” to replace classification and assignment, the question becomes why change has been so difficult to achieve.

### C. Constitutional Actors

Roughly half a dozen experts from a handful of countries drafted the Classification and Assignment Constitution.<sup>189</sup> Half a century later, a similar group of states incorporated a bill of rights

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<sup>185</sup> See Joseph Bankman et al., *Collecting the Rent: The Battle to Capture MNE Profits*, 72 TAX L. REV. (forthcoming) (describing the tools states have used to “strike back” against the success of multinationals in exploiting classification and assignment by changing business income into “IP-generated profits” assigned to a jurisdiction that is neither the multinational’s residence jurisdiction nor the location of its customers).

<sup>186</sup> See *supra* note 98.

<sup>187</sup> See Alan Auerbach et al., *Destination-Based Cash-Flow Taxation* Working Paper no. 17/01, Oxford University, Centre for Business Taxation (describing the sort of tax that became the focus of U.S. policymakers in the months leading up to the significant, but far less radical, tax changes enacted in late 2017).

<sup>188</sup> The “carbon dividend” plan would dramatically increase the price of carbon while refunding 100% of taxes collected to individuals. *Climate change: Put a price on carbon pollution, then refund the money to consumers*, USA TODAY, Feb. 19, 2020 (endorsing a plan that “would tax carbon at the source—such as refineries, mines and wells — at \$43 a ton. It would immediately double the price of a ton of coal, tax natural gas at \$2.28 per thousand cubic feet and increase gas prices by 38 cents a gallon. A family of four would get a \$2,000 rebate to help offset increases in energy costs.”). Clausing embraces the notion of a domestic carbon dividend. KIMBERLY CLAUSING, *OPEN: THE PROGRESSIVE CASE FOR FREE TRADE, IMMIGRATION, AND GLOBAL CAPITAL* (2019). A global carbon dividend could help solve a market failure fueling a growing environmental crisis while providing a truly universal basic income.

<sup>189</sup> Despite working in the 20th rather than the 18th century, the framers of the cross-border tax constitution—a handful of experts from the United States and Europe—could easily be mistaken for the U.S. founding fathers. None may have been more influential than “the ‘four economists’: Professor Edwin R.A. Seligman of the United States, Sir Josiah Stamp of Great Britain, Professor G.W.J. Bruins of the Netherlands, and Professor Luigi Einaudi of Italy” that collectively authored a 1923 report on cross-border tax issues for the League of Nations. Michael J. Graetz & Michael M. O’Hear, *The “Original Intent” of U.S. International Taxation*, 46 DUKE L.J. 1021, 1074 (1997). Early resolutions prepared by the International Chamber of Commerce that in turn shaped the League’s subsequent work “were drafted by a committee comprised of representatives from the national chambers of commerce of Belgium, France, Great Britain, Italy, the Netherlands, and the United States.” Michael J. Graetz & Michael M. O’Hear, *The “Original Intent” of U.S. International Taxation*, 46 DUKE L.J. 1021, 1067 n.185 (1997). The launch of the International Chamber of Commerce occurred shortly after the end of World War I. “On October 20 to 24, 1919, there was held in Atlantic City, New Jersey, under the auspices of the Chamber of Commerce of the United States of America, ‘The International Trade Conference.’ Industrial, business and financial leaders of Belgium, France, Great Britain, Italy and the United States participated in the conference, and careful consideration was given to important questions affecting commerce and industry, not only in the respective countries, but nationally and internationally.” International Chamber of Commerce. (1920). Proceedings, organization meeting, Paris, France, p. 5, June 23-30, 1920. More recent research concludes that “the influential Experts

for cross-border taxpayers. Another half a century more and little has changed, leaving classification and assignment's numerus clausus algorithm intact long after its flaws have become obvious to experts and non-experts alike.<sup>190</sup>

Despite that, the last decade has seen a deeper entrenchment of constitutional actors and norms.<sup>191</sup> After a brief moment during which the G20 appeared poised to lead, the OECD has reasserted control and has since deployed its considerable resources towards charting a path consistent with the interests of its narrow membership.<sup>192</sup> Having been subject to significant criticism for failing to take the interests of non-member countries at the agenda-setting stage of its BEPS initiative, the OECD invited non-members to become part of what has become known as the inclusive framework, serving as a focus group to help guide implementation of OECD policies.<sup>193</sup> More recently, it has done the same in its work on digital taxation.<sup>194</sup>

That approach has served to circumscribe reform efforts, entrenching the Classification and Assignment Constitution and squandering valuable opportunities for a true transformation of cross-border taxation. As Part III.B demonstrates, identifying potential solutions to the growing global fiscal deficit poses less of a challenge than implementing them.<sup>195</sup> Replacing the algorithm at its core without rewriting the Classification and Assignment Constitution to introduce new constitutional actors may be impossible. Empowering new constitutional actors to help set the global tax policy agenda may help close the global fiscal deficit.

Expanding the cast of cross-border tax constitutional characters beyond Europe, the United States and the OECD would increase the potential for fundamental change.<sup>196</sup> States on the periphery, marginalized and poorly served by the Classification and Assignment Constitution, would be more

were d'Aroma (Italy), Clavier (Belgium), and Thompson (Britain)" after scrutinizing their individual contributions to the interwar effort. SUNITA JOGARAJAN, *DOUBLE TAXATION AND THE LEAGUE OF NATIONS* 252 (2018).

<sup>190</sup> Allison Christians & Laurens van Apeldoorn, *Taxing Income Where Value Is Created*, 22 FLA. TAX REV. 1, 6-7 (2018) (observing that "tax policy leaders of the past century, namely the member countries of the OECD, have worked resolutely to settle their own most pressing concerns" with the "unsurprising result of this imbalance of policy attention is that the income tax allocation standards embodied in OECD models and guidance systematically under-assign profits to low-income countries").

<sup>191</sup> The OECD's BEPS effort has been described as a transformation even though it leaves both the core algorithm and the distribution of power unaltered.

<sup>192</sup> Allison Christians, *Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20*, 5 NW. J. L. & SOC. POL'Y 19, 19-20 (2010) (noting that although "[i]n the fall of 2009, global economic crisis appeared to bring about a major shift in policymaking power by bringing to prominence the G20, an international network of finance ministers and central bankers from eleven developed countries and eight less-developed countries...the United States and Europe continue to dominate a virtually impervious institutional architecture of tax policymaking in the form of the Organisation for Economic Cooperation and Development"); Nana Ama Sarfo, *How the OECD Became the World's Tax Leader*, 98 TAX NOTES INT'L 624 (2020)

<sup>193</sup> See Ivan Ozai, *Institutional and Structural Legitimacy Deficits in the International Tax Regime* (on file with author). To critics, Inclusive Framework's claim that non-OECD states participate on "equal footing" has the unintentionally Orwellian feel of separate but equal, with the global south asked to sit in the back of the bus.

<sup>194</sup> See Allison Christians, *A Unified Approach to International Tax Consensus*, TAX NOTES INT'L, Nov. 11, 2019, at 497 (criticizing the OECD's recent "Unified Approach" to digital taxation as "a surprising throwback to a historic moment in international taxation, when four expert economists charted a path for the century to follow...by setting out terms that continue to control the discourse today, including by limiting countries' exercise of the jurisdiction to tax on mutually agreeable terms").

<sup>195</sup> The Independent Commission for the Reform of International Corporate Taxation embraced the concept of formulary apportionment. See *supra* note 98. But its very independence ensures that it can do little to implement changes to the classification and assignment algorithm.

<sup>196</sup> Increasing input legitimacy by providing more states with an opportunity to participate in cross-border higher tax lawmaking would be an important incidental benefit of a more inclusive process. See Steven A. Dean, *Neither Rules Nor Standards*, 87 NOTRE DAME L. REV. 537 (2011) (describing the distinction between the output legitimacy generated by a regime's efficacy and the input legitimacy created by broad participation in a regime's creation).

likely to embrace a departure from a status quo designed without their interests in mind.<sup>197</sup> If given the opportunity to do so, new constitutional actors might articulate alternative algorithms even more appealing than those described above.<sup>198</sup> A more diverse group of decisionmakers, bringing different experiences and perspectives to bear on challenges faced by the classification and assignment algorithm since the Kennedy era might have more success in finding a lasting solution.<sup>199</sup> Unfortunately, the emergence of a constitutional actor from beyond North America and Europe—able to serve the distinct concerns of relatively small and poor states—seems little closer than a century ago.<sup>200</sup>

Empowering new constitutional actors would have other benefits. The post-World War II embrace of the double tax treaty bill of rights provided a measure of the legitimacy crucial to all tax rules—and to international tax rules in particular—but falls short in two respects.<sup>201</sup> First, network effects make it difficult for any individual state to chart a different path.<sup>202</sup> Once a critical mass of

<sup>197</sup> In 2001, the United Nations proposed just such an arrangement with its International Tax Organization. Although “the G-7 might point to the tax expertise and agenda of the OECD, and claim that no more help is needed, that an ITO would be redundant” from the perspective of the global south “a new global institution in taxation policy will make a significant, nonredundant contribution to global governance if—and only if—it gives a full and true voice to the fiscal concerns and needs of developing countries.” Frances Horner, *Do We Need an International Tax Organization?*, 24 TAX NOTES INT’L 179, 179 (2001) (Horner notes that the proposed ITO agenda included the elimination of classification through the introduction of unitary taxation).

<sup>198</sup> See An Intergovernmental UN Tax Commission—Why We Need It and How We Can Get It, Eurodad (2019) (“If the world’s poorest countries were able to participate effectively in the development of global tax rules and standards, they would be able to ensure that the global system also works for their countries.”).

<sup>199</sup> Heterogeneity fuels innovative problem solving not only by harnessing different perspectives, but also by driving members of a team to work harder. See Katherine W. Phillips et al., *How Diversity Makes Us Smarter*, 311 SCIENTIFIC AMERICAN 42, 46 (2014) (“Members of a homogeneous group rest somewhat assured that they will agree with one another; that they will understand one another’s perspectives and beliefs; that they will be able to easily come to a consensus.... This logic helps to explain both the upside and the downside of social diversity: people work harder in diverse environments both cognitively and socially. They might not like it, but the hard work can lead to better outcomes.”).

<sup>200</sup> Multilateral efforts such as the OECD Multilateral Convention on Mutual Administrative Assistance in tax matters often allow states on the periphery to sign on once they are created, but without control over their design they tend to have little relevance for such states. See ATTIIYA WARIS, *FINANCING AFRICA* 36 (2019) (“There seems to be little hesitation to sign onto international platforms and simultaneously little attention to intentionality about how participation in the platforms could advance matters at domestic levels.”).

<sup>201</sup> The legitimacy deficit that results from the dominance of core states and the marginalization of others makes cooperation reduces compliance both at the state and individual levels. See Steven A. Dean, *Neither Rules Nor Standards*, 87 NOTRE DAME L. REV. 537, 541 (2011) (describing the important role of legitimacy in cross-border taxation); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705, 713 (1988) (describing the role of legitimacy in generating compliance pull crucial to international law); Diane M. Ring, *What at Stake in the Sovereignty Debate?: International Tax and the Nation-State*, 49 VA. J. INT’L L. 155, 175 (2008) (noting that “a strong democratic process with a close link between the citizen-taxpayer and the government may also improve participation in the tax system”).

<sup>202</sup> See John F. Avery Jones, *Are Tax Treaties Necessary*, 53 TAX L. REV. 1, 3 (1999) (“The disadvantage of the tax treaty route is that it is self-perpetuating. Treaties are a one-way street; they lead only to more treaties.... The more outrageous the provisions of internal law, the better the starting position for negotiating treaties. One state will introduce a crazy tax system with the knowledge that other countries will come running to its door asking for a treaty in familiar form....”); Tsilly Dagan, *Tax Treaties as a Network Product*, 41 BROOK. J. INT’L L. 1081, 1081 (2016) (“treaties became an effective mechanism for bolstering developed countries’ market dominance, thereby impeding global justice”). Others offer a less cynical take on treaties’ stickiness. See, e.g., Thomas Rixen, *From double tax avoidance to tax competition: Explaining the institutional trajectory of international tax governance?* 18 REV. INT’L POL. ECON. 197, 198 (2011) (“Therefore the process becomes self-reinforcing: actors do not wish to endanger the coordinating function of the regime that they had established long before under-taxation became virulent.”). It is, of course, misleading to suggest that treaties were “established” long before undertaxation became virulent. Although introduced during the interwar years, they remained largely dormant until the OECD adopted them in the 1950s. Treaties began to play a central role in cross-border taxation at essentially the same time that the United States created Supbart F and Controlled Foreign Corporations.

states embraced the classification and assignment algorithm and treaties, signing a double tax treaty can no longer be viewed as a vote to ratify the Classification and Assignment Constitution.<sup>203</sup> Second, many poor and small states entered the tax treaty network during decolonization.<sup>204</sup> Reading the spread of tax treaties in light those constraints and an overlapping wave of independence complicates the notion that the Classification and Assignment Constitution has been embraced by the global south.<sup>205</sup>

The intercrisis period offered a rare opportunity to close a legitimacy gap and open the door to innovative alternatives to the classification and assignment algorithm by expanding the circle of states able to exercise higher lawmaking power. Although modest by comparison with prior efforts such as the 1974 Declaration of a New International Economic Order and the 2001 proposal for a U.N. International Tax Organization, the most ambitious intercrisis proposal might have done just that.<sup>206</sup> In 2015, advocates pushed hard to elevate the United Nations tax committee from “an expert body” to an “intergovernmental body” so that it would be able to “make political decisions on behalf of governments.... similar to the existing UN Climate Convention, the UN Convention on Biological Diversity, or the UN’s Forum on Forests, all with universal or near-universal membership.”<sup>207</sup> That the Addis Ababa effort fell short amid opposition from influential states and organizations uninterested in a more inclusive process suggests dim prospects not only for a more open agenda-setting process in the near future but for fundamental reform of the taxation of cross-border transactions.

In the long term, that victory by insiders may prove pyrrhic. By choosing to preserve their privilege under the Classification and Assignment Constitution, states long at the core of cross-border taxation may have missed their last best opportunity to forge a lasting new consensus not bound by

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<sup>203</sup> TSILLY DAGAN, INTERNATIONAL TAX POLICY 166 (2017) (noting “the asymmetrical power of developed and developing countries, the network effects of the treaty system, and the agenda-setting influence of developed countries”).

<sup>204</sup> Boise and Morriss describe the rise of the Netherlands Antilles as an offshore financial center, detailing how the U.S.-Netherlands tax treaty came into existence. See Craig M. Boise & Andrew P. Morriss, *Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles*, 45 TEX. INT’L L. J. 377, 409 (2009). (“Although no one at the time fully anticipated its implications, the most crucial development in the creation of the Netherlands Antilles’ offshore financial sector was the extension of the U.S.-Netherlands tax treaty (and its withholding tax exemption) to the Antilles in 1955. The extension was almost an afterthought, accomplished in an atmosphere of postwar goodwill pursuant to a provision of the treaty that permitted its terms to be replicated in new treaties with the overseas territories of either country.”).

<sup>205</sup> To address concerns regarding the lack of participation by developing countries in the creation of the modern tax treaty, Stanley Surrey and others participated in a U.N.-sponsored effort to create more tailored treaties. See Stanley S. Surrey, *United Nations Group of Experts and the Guidelines for Tax Treaties between Developed and Developing Countries*, 19 HARV. INT’L L. J. 1, 6-7 (1978). (noting that “developing countries, coming new to [tax treaty] negotiations and without having participated in the formulation of the OECD draft, were suspicious”). Such efforts gained limited traction in part because of a perception that such an “indefensible core of decay in the rules-based global economy” would jeopardize the system taxation of cross-border transactions. Globalists at 243, 249 (“By proposing new rules for the game rather than adhering to the liberal precepts of an earlier era, Global South actors threatened to cripple the entire system.”). Slobodian notes a broader neoliberal skepticism regarding “demands for economic redistribution and stabilization... enshrined in the Declaration of a New International Economic Order championed by the world’s poorer nations and passed by the UN General Assembly in 1974” and a more specific fear of demands for colonial reparations imposing international redistributive tax burdens on wealthy states. Globalists 18, 247.

<sup>206</sup> The Declaration of a New International Economic Order is discussed in note 205. In 2001, a proposal by then U.N. Secretary General Zedillo to create an International Tax Organization was dismissed as duplicative of the OECD. [Zedillo report] Incremental change came would ultimately come in the form of the Multilateral Instrument, designed “to either supplement or address specified omissions in existing bilateral treaties without overriding the remaining provisions.” See Allison Christians, *BEPS and the New International Tax Order*, 2016 BYU L. REV. 1603, 1642 (2016).

<sup>207</sup> See Ivan Ozai, *Institutional and Structural Legitimacy Deficits in the International Tax Regime* (on file with author).

the century-old *numerus clausus* algorithm. Over time, their grip on cross-border taxation will inevitably weaken. The rise of China and other states could soon strip away the agenda-setting power the United States has been unwilling to share. Recognizing that its interests may not always be served by serving the interests of the largest global businesses—an insight that could explain Europe’s growing misgivings over the Classification and Assignment Constitution—the United States could choose to lean into that future. One could imagine a former President Obama serving as a U.S. Special Envoy on cross-border taxation, rewriting the Classification and Assignment Constitution at an ad hoc constitutional convention at which a diverse group of states gains a voice.

## CONCLUSION

Over the past quarter century, the taxation of cross-border transactions has been the site of a clash between progressives and neoliberals.<sup>208</sup> Today, the fate of the Classification and Assignment Constitution hangs in the balance along with that of the World Trade Organization and the Paris Climate Agreement. But—by comparison with trade and the environment—few take notice and even fewer understand the stakes of the contest. Its century old *numerus clausus* algorithm and the double tax treaty bill of rights that entrenches it shield cross-border transactions from taxation largely free of the scrutiny lavished on its counterparts.

Over the past decade, higher lawmaking activity has revealed much about the nature of Classification and Assignment Constitution and the actors that shape it. In the wake of COVID, that newfound knowledge creates an opportunity. Long-needed reform could enhance the legitimacy and the substance of cross-border taxation. A century ago, the United States would not have adopted the income tax without the (counter-countermajoritarian) Sixteenth Amendment. Lacking an equivalent balance against the influence of powerful elites, the material constitution that shapes cross-border taxation must be rewritten to provide one.

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<sup>208</sup> Twenty years later, the protesters in Seattle look more right than wrong. The WTO never solved its democracy problem. The inequality produced by ignoring the demands of labor fed the rise of disruptive social movements and insurgent political parties. Ecological issues are at the center of every serious agenda. A less obvious leitmotif is taxation. Attac, an organization founded in France in the wake of the 1995 protests, originally stood for “Action for a Tobin Tax to Assist the Citizen,” and agitated for a small tax (as proposed by economist James Tobin) on the financial transactions that surged after the mid-1990s. These demands resonate today in the work of progressive economists like Thomas Piketty, Emmanuel Saez, and Gabriel Zucman, as well as the party manifestos of Jeremy Corbyn’s Labour Party and the stump speeches of Democratic candidates Elizabeth Warren and Bernie Sanders. Looked at this way, the protesters didn’t lose. They prefigured political demands that have become ever more mainstream.

Quinn Slobodian, *20 Years After Seattle, the Clash of Globalizations Rages On: Alter-globalization is back— but this time, it’s coming from both the left and the right*, *THE NATION*, Nov. 29, 2019).