A Constitutional Moment in Cross-Border Taxation:
Redefining alternative allocation schemes to reward Global South states to accumulate revenue through alternative economic activities

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Influential players have weaponized the century-old Classification and Assignment Constitution to shield multinationals from taxation. Profound flaws in its mix of written and unwritten rules exposed by the rise of global digital giants have proven surprisingly difficult to address. A law and political economy perspective reveals hidden exercises of power, constitutional hardball, as the cause. That intransigence has created a growing risk of constitutional crisis spurred by the rise of new digital taxes.

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INTRODUCTION

The Classification and Assignment Constitution's mix of written and unwritten rules has shaped the cross-border tax landscape for a century.[i] Two global crises in quick succession have created both an opportunity and an urgent need to remake that material constitution.[ii] But reforms remain stubbornly out of reach.[iii] Constitutional hardball by entrenched actors has made an overhaul impossible.[iv]

This Article makes two distinct contributions to the literature. First, consistent with law and political economy's broader critique of international economic law, it reveals how cross-border taxation's seemingly neutral rules reflect "concentrations of wealth and political power."[v] Second, uses that insight to put the escalating conflict over the taxation of digital giants into context. Constitutional hardball by the Organisation for Economic Cooperation and Development and the United states has frustrated efforts to remake the Classification and Assignment Constitution to reflect the "pre-constitutional understanding" that highly profitable multinationals should not be immune to the urgent revenue needs of states.[vi] The resulting stasis has given rise to a constitutional crisis.

Put simply, a roiling dispute over digital giants that "make massive profits from consumers while contributing relatively few jobs and little tax income to the local economies where those consumers live" has cast a harsh light on the shortcomings of the Classification and Assignment Constitution.[vii] The evident tension between pre-constitutional understandings of how multinationals should be taxed and the reality of the Classification and Assignment Constitution has prompted a variety of states to create an entirely new form of taxation. The yawning revenue demands of the pandemic have spurred the conflict over taxing Facebook and Google.[viii] Seeing states unable to tax them, 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" and demand change.[ix]

The Classification and Assignment Constitution employs on a century-old algorithm to allocate taxing jurisdiction among states.[x] It enumerates a menu of cross-border taxable income items—such as dividends, interest and royalties—(classification) and then allocates each item to either a home or host state (assignment). In a simpler world that algorithm might be no more contentious than the choice of driving on the left or the right side of the street. In fact, the Classification and Assignment Constitution facilitates "coding" that shields market actors from the claims of states and their residents.[xi]

During what the pandemic revealed to be merely the eye of a fiscal storm following the 2008 financial crisis, persistent inequality and austerity attracted an unprecedented level of attention to the flaws of cross-border taxation.[xii] Constitutional hardball has made change difficult. As a result, a moment in time that might have witnessed a restructuring of global tax policy given way to an internecine struggle over whether—not how—the profits of digital giants such as Amazon and Google should be taxed.[xiii] The pandemic has only exacerbated unresolved tensions, casting the continued viability of the Classification and Assignment Constitution into doubt.[xiv]

Part I introduces the concepts of a material constitution and constitutional hardball. It explains how entrenched norms have provided stability in the taxation of cross-border transactions over the past century despite any formal international tax governance structure. It then describes how the resulting constitutional order allows influential actors to engage in constitutional hardball.[xv]

Part II shows that change does sometimes come to the Classification and Assignment Constitution. It also reveals how. It offers examples ranging from the creation of the Controlled

Foreign Corporation a half century ago to the recent European state aid cases to illustrate the process through which constitutional reforms can be initiated and, on rare occasions, completed.

Finally, Part III considers how, at a critical moment, that process has been derailed by constitutional hardball. Exploring the implications of constitutional hardball for the future of the Classification and Assignment Constitution, it describes three potential paths towards urgently needed change.[xvi] It concludes that, in part because of the impact of constitutional hardball, neither greater transparency nor an improved algorithm will suffice.[xvii] It ends by showing how empowering new constitutional actors could facilitate change.[xviii]

I. Material Constitutions and Constitutional Hardball

Tax laws often seem a study in constant motion.[xix] But at the core, change comes only rarely.[xx] 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.[xxi] 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, a written Constitution both impedes and facilitates change. Despite a world changed beyond recognition, cross-border tax rules have changed little over that century.[xxii] Yet no formal constitution exists to entrench its norms.[xxiii] This Part offers evidence that a material constitution—the Classification and Assignment Constitution—has come to shield 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 constitutional hardball can be employed to prevent it.

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.[xxiv] That observation resonates with the behavior of influential actors on the global stage. It also emerges from a synthesis of disparate scholarly visions of cross-border taxation outlined below.[xxv]

Avi-Yonah's broad historical perspective invites speculation on patterns that emerge over time.[xxvi] Rosenbloom injects a note of skepticism informed by his incomparable knowledge of how tax lawyers around the world carry on their trade.[xxvii] 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…."[xxviii] Competing interests and economic change should have left cross-border taxation unrecognizable, with no opportunity for the senescence he decries.[xxix] 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.[xxx]

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 approximates—but does not embody—customary international law.[xxxi] 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.[xxxii]

Constitutions can be amended. Formal constitutions may contain formal amendment procedures. As described in Part II, transformations of material constitutions operate differently.[xxxiii] 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.[xxxiv] 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.[xxxv]

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 failures examined in Part III. The stasis Graetz laments represents only the first. Its cause, constitutional hardball, represents a second, more troubling, problem.

B. Constitutional Hardball

A fidelity to century old norms forms a barrier to change that at times can seem absolute.[xxxvi] Lacking a formal amendment process, the Classification and Assignment Constitution seems to create 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, embedding a formal constitution within a material one. The Constitutional principle of judicial review grants the U.S. Supreme Court the power to strike down an income, consumption or wealth tax, forming part of a material constitution more comprehensive than its written counterpart. Such features of the U.S. material constitution have become central to the U.S. Constitutional separation of powers although the text of the Constitution itself includes no mention of them.[xxxvii]

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.[xxxviii] Marshall famously achieved that enduring result by declaring the Court powerless to grant the relief sought in a particular case.[xxxix] 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.[xl]

As it does for the U.S. Supreme Court, that gatekeeping role grants the United States great power. In the escalating U.S.-E.U. conflict over digital taxes, for example, the U.S. recently opined that the French Digital Service Tax appeared "inconsistent with prevailing tax principles" in several respects.[xli] Incredibly, it remains unclear whether the U.S. Treasury or the countless countries that have embraced digital taxes will carry the day. 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.[xlii] 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…."[xliii] A Treasury White Paper captured the spirit of Marshall as it laid out the U.S. position on Apple's treatment.[xliv] 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."[xlv]

In a 1998 episode, as in the Apple controversy, a taxpayer produced technology while consuming tax subsidies.[xlvi] 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.[xlvii] 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."[xlviii]

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.[xlix] 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.[l] Embracing its self-appointed role as guardian of the Classification and Assignment Constitution, Treasury opposed tax sparing as inconsistent with its core algorithm.[li] The Classification and Assignment Constitution, as interpreted by the U.S. Treasury, permits only some subsidies.[lii]

C. A Serious Business

Constitutional hardball represents a serious business. To "its practitioners… the stakes of the political controversy their actions provoke are quite high" with the losses posing a risk of , and that their defeat and their opponents' victory would be a serious, perhaps permanent setback to the political positions they hold."[liii] Marshall once deployed it to secure a central role for the Supreme Court, and the United States has done the same, making itself a critical arbiter of change in cross-border taxation.[liv]

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.[lv] 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.[lvi] The textual intersection at which taxation and the U.S. constitution meet rests in a single sentence.[lvii] And worlds of controversy hang on one word: direct.[lviii]

Simply put, the constitution imposes Kafka-esque limits on the federal government's capacity to impose direct taxes.[lix] And only the Supreme Court has the power to determine whether a tax is direct and subject to the dreaded fate of "apportionment."[lx] Even the status of the income tax can be debated.[lxi] The once-ascendant consumption tax? It may or may not be a direct tax.[lxii]

The U.S. Treasury's repeated efforts to distinguish good cross-border tax subsidies from those found to be Inconsistent with International Norms earning its disapproval, laid the ground for its current exercise of power. Given that no formal cross-border tax constitution exists, the United States can enjoy no formal constitutional role and its views and preferences should not be determinative. But in practice, the United States has long exercised a power to impose plausible interpretations of Classification and Assignment Constitutional doctrine even when they violate pre-constitutional understandings. 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.

II. The Classification and Assignment Constitution

This Part does not offer an account of why the Classification and Assignment Constitution changes so rarely. To accentuate its key features, this Part focuses on those moments when it has changed (or could).[lxiii] Put differently, it begins to elaborate the substantive and procedural content of the Classification and Assignment Constitution by studying three moments of actual or potential change.

Double tax treaties, the hard law of cross-border taxation, offer critical clues.[lxiv] 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.[lxv] The Classification and Assignment Constitution provides a solution to a complex coordination problem reflected in those treaties that time has revealed to be both elegant and flawed.[lxvi] 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.[lxvii]

A. Stability and Change

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."[lxviii] Double tax treaties may be the most visible feature of the legal order governing cross-border taxation, but they tell only part of the story. And they reveal nothing about how the Classification and Assignment Constitution evolves.

1. The Classification and Assignment Algorithm

Today, the ubiquity of treaties makes them a defining feature of the cross-border tax landscape. But a century ago, cross-border taxation looked quite different. Over the course of the 1920s, the risk of conflict rose and so too did classification and assignment, ultimately informing the design of tax treaties.[lxix] While only a handful of such treaties existed at the end of the Second World War, by the end of the Cold War several thousand had been adopted by pairs of states.[lxx]

The double tax treaty hints at the constraints states face in cross-border tax rulemaking.[lxxi] As in other areas of "international economic law, a neoliberal conception of cross-border activity gradually became dominant, institutionalized in… treaties that served to limit the possibility of political interference with cross-border economic activity."[lxxii] Indeed, if pressed to identify a written cross-border tax constitution, experts would likely suggest double tax treaties.[lxxiii] 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.[lxxiv]

A bill of rights for cross-border investors, treaties shield taxpayers from substantive and procedural burdens.[lxxv] Yet, 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.[lxxvi] And 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.[lxxvii]

Initially, anxiety fueled by global conflict justified the embrace of generous, formalized protections for cross-border transactions.[lxxviii] 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."[lxxix] As Jogarajan observes, double tax treaties existed well before the First World War. By that conflict's close they seemed destined to serve as a reminder of the League's failure, an historical footnote in the taxation of cross-border transactions rather than a dominant feature.[lxxx]

The Classification and Assignment Constitution's core algorithm represented a rejection of what has been called the "original intent" of U.S. international taxation.[lxxxi] Its predecessor, 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.[lxxxii] 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.[lxxxiii] In practice, the Classification and Assignment Constitution's protections favor taxpayers rather than wealthy states by limiting opportunities for political interference.[lxxxiv]

Little used for decades after the League designed them, a decade after the Second World War, double tax treaties found a new advocate in the OECD.[lxxxv] 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.[lxxxvi] Ensuring that only one state can impose substantive and procedural tax burdens on each cross-border transaction dovetailed first with the League's focus on building cross-border ties and ultimately with the OECD's neoliberal agenda.[lxxxvii] For a century, classifying income into categories then allocating the result between pairs of treaty partners has formed the core of cross-border taxation.

2. An Evolving Algorithm

That century-old algorithm has endured while little else has.[lxxxviii] The League of Nations failed to survive long after the Second World War yet its tax treaties would become a significant posthumous victory.[lxxxix] 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.[xc] 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.[xci] 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.[xcii] This anarchic vision sees states taking whatever they can to benefit their constituents and fill their coffers consistent with their long-term interests.[xciii] 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.[xciv]

Dagan's trenchant critique suggests an alternative narrative.[xcv] She dispatches the natural law hypothesis by demonstrating that double taxation should not be expected to occur even in the absence of tax treaties.[xcvi] 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.[xcvii]

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.[xcviii] 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."[xcix]

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.[c]

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.[ci] 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.[cii] 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."[ciii] 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.[civ]

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.[cv] 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.[cvi]

FATCA "focus[ed] the rhetoric" of concern over the evasion made possible by the extraterritorial tax information gap.[cvii] 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.[cviii] Banks and other financial institutions challenged the harsh sanctions FATCA threatened for failures to supply the United States with extraterritorial tax information.[cix] More surprisingly, other states seemed just as skeptical.[cx] Less than two years after 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."[cxi] 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. It identifies distinct income categories—business income and royalties, for example—and assigns 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.[cxii] 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 produces arbitrary results does not make it ineffective as a safeguard against the substantive and procedural burdens of double taxation.[cxiii] Precisely the opposite may be true.[cxiv] 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.[cxv] But that algorithm also permits coding, creating a systemic bias in favor of taxpayers.[cxvi] 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.[cxvii]

Unfortunately, time has not been kind to the classification and assignment algorithm. Today, even a doctor treating a patient can challenge the boundaries of classification and assignment.[cxviii] More broadly, technological innovation has strained the classification mechanism.[cxix] More troubling, taxpayers have become adept at a type of coding, passing one type of income off for another.[cxx] Financial innovation can allow taxpayers to "convert" a transaction in order to reclassify—and reassign—the income it generates.[cxxi] 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.[cxxii] Such reclassifications lie at the heart of transactions such as Google's double Irish sandwich.[cxxiii]

The European Commission's state aid cases directly challenge the Classification and Assignment Constitution.[cxxiv] 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.[cxxv] 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 classification and assignment status quo.[cxxvi] The Commission's state aid cases continue to make their way through the European legal system.[cxxvii]

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).[cxxviii] 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.[cxxix]

C. Codification

These two proposals capture the lurching progress of the taxation of cross-border transactions over the last century.[cxxx] 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 a decade or more. 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.[cxxxi] In the cross-border tax context, those changes observe a particular—and for U.S. observers, familiar—constitutional rhythm.[cxxxii]

If a material constitution of cross-border taxation exists at all, the classification and assignment algorithm represents its central feature.[cxxxiii] 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.[cxxxiv] 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…."[cxxxv] 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 arguably inconsistent with pre-constitutional understandings at the heart of the Classification and Assignment Constitution.[cxxxvi]

This U.S. controlled foreign corporation proposal would soon achieve codification in the enactment of similar statutes around the world.[cxxxvii] As a result, current U.S. tax can be imposed on income in apparent violation of another state's tax sovereignty.[cxxxviii] 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.[cxxxix]

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.[cxl] Pursuing an incremental approach, the United States chose amendment over termination.[cxli] 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."[cxlii]

III. A Constitutional Moment for Cross-Border Taxation

This Part considers a very different possibility, revealing how constitutional hardball can forestall change. 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.[cxliii] That success demonstrates that the Classification and Assignment Constitution can change even though it lacks a formal higher lawmaking structure.[cxliv] Collectively, the three proposals reveal the 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.[cxlv]

Part I introduces the notion of constitutional hardball, taking a constitutionally plausible position that clashes with a pre-constitutional understanding. This Part highlights on ongoing U.S. effort to stifle new taxes designed to capture highly profitable—but lightly taxed—digital giants.[cxlvi] It also considers possible responses to that intransigence. It concludes that—compared to the traditional focus of tax policy reform efforts, improved transparency and building better mousetraps—the most effective remedy to its constitutional hardball lies in empowering new constitutional actors. Those states at the margins enjoy few opportunities to influence evolution of the Classification and Assignment Constitution.[cxlvii]

After the financial crisis, for the first time in decades, the taxation of cross-border transactions entered the fluid phase in which higher lawmaking becomes possible. The classification and assignment 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 amendments or alternatives to the Classification and Assignment Constitution.[cxlviii]

Presented as an inevitability given the complexity of cross-border tax rules, that silencing of marginal states ignores the simple truth that the Classification and Assignment Constitution can be easily understood.[cxlix] Unfortunately, it can be exploited just as easily. And when it is, small and poor states suffer the most. 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.[cl]

Opportunities to not merely maintain but upgrade the basic infrastructure of the taxation of cross-border transactions may only come once in a generation.[cli] History suggests that whatever change occurs will tend to 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.[clii]

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.[cliii] Granting a privileged few the ability to set the agenda in the absence of meaningful accountability leads to precisely the senescence that plagues the taxation of cross-border transactions.

This Part considers three possible tools to combat constitutional hardball. The first is transparency. The second is a new or altered algorithm. 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 2008 Financial Crisis largely intact.[cliv] But change has come at the margins. Prominent among them have been enhancements in fiscal transparency norms. Ideally, such developments can "enable distributive justice and democratic participation in budget decision making" by both insiders and outsiders.[clv] In simple terms, creating metrics to measure departures from an ideal could guide future reforms towards it.[clvi]

Transparency has become a watchword in the cross-border tax context of late, but in the sense of surveillance rather than accountability.[clvii] FATCA has triggered greatly 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.

Indeed, 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.[clviii] Measuring 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.[clix] 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.[clx] And the results can be surprising.[clxi]

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.[clxii] It provides a rough measure of the revenue cost of a variety of tax breaks.[clxiii] 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."[clxiv] 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.[clxv]

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.[clxvi]

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.[clxvii] The few points at which accountability measures intersect with cross-border taxation hints at enormous subsidies.[clxviii] The failures of the tax expenditure budget highlight the power and the limitations of such accountability.[clxix]

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.[clxx] Even among sophisticated practitioners, its rules enjoy a fearsome reputation.[clxxi] Despite new layers of complexity presented as part of a "transformation" of cross-border taxation, the classification and assignment algorithm continues to shield cross-border transactions from both procedural and substantive tax burdens, just as its creators intended.[clxxii]

The primary recent effort by the world's most sophisticated team of tax experts, the OECD, has been its Base Erosion and Profit Shifting effort.[clxxiii] BEPS sought to strengthen classification and assignment by limiting taxpayer ability to favorably code their transactions.[clxxiv] The 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 to achieve improbable assignments.[clxxv] Over time, first-generation earnings-stripping transactions yielded to more sophisticated variations in a cat-and-mouse game BEPS continues.[clxxvi] 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.[clxxvii]

A half century of such incremental efforts to plug gaps in the Classification and Assignment Constitution has produced disappointing results.[clxxviii] The ongoing struggle over digital taxes represents a different approach. The French digital services tax adds a new classification, adhering to a traditional classification and assignment approach but applying to the digital activities of companies such as Facebook and Google. 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.[clxxix]

A leading alternative algorithm rejects classification entirely.[clxxx] Formula or Formulary apportionment has long been a favorite of academics.[clxxxi] Unsurprisingly, they have proven unequal to the higher lawmaking task of replacing classification and assignment with this undifferentiated alternative.[clxxxii]

The U.S. Global Intangible Low-Taxed Income (GILTI) regime likewise does not classify income.[clxxxiii] Although its name suggests otherwise, GILTI does not target any particular type or source of income.[clxxxiv] 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.

Cross-border taxation without classification and assignment might mirror the approach long employed to allocate taxing jurisdiction among the 50 states.[clxxxv] 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 might operate in practice.[clxxxvi] Such a shift could boost global tax revenues by making coding more difficult.

A formulary alternative algorithm could help bridge a growing fiscal gap.[clxxxvii] A destination-based cash flow consumption tax would likewise reject classification and assignment.[clxxxviii] 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 in the wake of the Financial Crisis could supplement existing taxes.[clxxxix] With no shortage of "better mousetraps" to replace classification and assignment, the question becomes why change has been so difficult to achieve.

C. The Political Economy of Cross-Border Taxation

Roughly half a dozen experts from a handful of countries drafted the Classification and Assignment Constitution.[cxc] Half a century later, a similar group of states incorporated a bill of rights for cross-border taxpayers. Another half a century, and the more things have changed the more they have stayed the same. Despite obvious flaws and sustained criticism, states remain powerless to impose tax on even the most profitable of multinationals.

Indeed, the last decade has seen a deeper entrenchment of constitutional actors and norms.[cxci] 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 exclusive membership.[cxcii] 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.[cxciii] More recently, it has done the same in its work on digital taxation.[cxciv]

As Part III.B shows, replacing the classification and assignment algorithm would be quite easy. But the United States and the OECD choose instead to defend a status quo that serves their short-term interests.[cxcv] Circumscribing reform efforts, entrenching the Classification and Assignment Constitution and squandering rare opportunities for genuine change in cross-border taxation represent a high-stakes gamble on constitutional hardball.[cxcvi]

Closing the gaps that digital giants such as Google and Apple exploit would be far easier if a broader range of constitutional actors were empowered.[cxcvii] Although a wide range of states engage with the machinery of cross-border taxation—such as tax treaties—most have little opportunity to influence its design.[cxcviii] Network effects make it difficult for any individual state to chart a different path.[cxcix] Once a critical mass of 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.[cc] In addition, many poor and small states entered the tax treaty network during decolonization.[cci] Reading the spread of tax treaties in light of those constraints and an overlapping wave of independence complicates the notion that the Classification and Assignment Constitution has been embraced broadly.[ccii]

Although modest by comparison with prior efforts such as the 1974 Declaration of a New International Economic Order or even the 2001 proposal for a U.N. International Tax Organization, an ambitious recent proposal sought to expand the role of marginalized states in shaping cross-border tax policy.[cciii] 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."[cciv] That Addis Ababa effort succumbed to constitutional hardball from states and organizations privileged under the Classification and Assignment Constitution.

Expanding the cast of constitutional characters would open the door to long overdue change.[ccv] States on the periphery, marginalized and poorly served by the Classification and Assignment Constitution, would be more likely to embrace a departure from a flawed status quo, particularly one designed without their input or their interests in mind.[ccvi] Recent efforts by the U.N. Tax Committee and groups like the African Tax Administration Forum show how empowering a broader range of actors would produce change.[ccvii]

If given the opportunity to do so, such new constitutional actors might articulate alternative algorithms even more appealing than those described above.[ccviii] 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.[ccix] 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 far from certain.

Conclusion

To an expert eye, the limits of the aging infrastructure of cross-border taxation became obvious decades ago.[ccx] 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.[ccxi] In both cases, powerful actors fought to preserve the status quo and retain their privileged positions.

This article offers both a novel descriptive account and an unflinching normative assessment of entrenched substantive and procedural norms enshrined not in customary international law—as some scholars have argued—but in a material constitution. It also shows how constitutional hardball by a small group of influential states and organizations has thrust the taxation of cross-border transactions to the verge of a constitutional crisis. Ultimately, it reveals that in cross-border taxation, no less than in other areas of the law, power and politics matter.

 This article benefited from feedback from Reuven Avi-Yonah, Allison Christians, Wei Cui, Tsilly Dagan, Mitchell Kane, Rebecca Kysar, Dan Shaviro, Attiya Waris, Eric Zolt, participants in the NYU Tax Policy and Pubic Finance Colloquium, Oregon Law Tax Policy Colloquium, the USD Davis Hastings Tax Law Speakers Series, the Indiana/Leeds Summer Tax Workshop Series, the Oxford Workshops on International Tax Governance and Justice, the Duke Tax Policy Workshop, the Boston College Law School, Regulation and Markets Workshop, the 2018 University of Virginia School of Law Invitational Tax Conference, a Brooklyn Law School Summer Faculty Workshop and the students of Medgar Evers College Preparatory School and Anne Alsott's Federal Income Taxation II class. It also benefited from excellent research from Kalina Georgieva, Jinhua Hu, Dylan Neves-Cox and David Sur and benefited from support from a Brooklyn Law School Dean's Summer Research Grant.

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[i] The existence of that constitution helps to solve the longstanding mystery over the absence of a World Tax Organization. *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). Although Cockfield and others see the OECD as a World Tax Organization in all but name, it is closer to the truth to describe them as an influential actor in a governing framework. *See* Arthur Cockfield, *The Limits of the International Tax Regime as a Commitment Projector*, 33 VA. TAX REV. 59, 70 (2013) (describing the international tax regime "as institutions and institutional arrangements that provide signals to relevant actors, mainly multinational businesses, that international double taxation and other conflicts will be resolved").

[ii] *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 an unwritten 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 in the cross-border context 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").

[iii] *See infra* note vii.

[iv] Tushnet sees constitutional hardball as:

> political claims and practices-legislative and executive initiatives-that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing pre-constitutional understandings. It is hardball because its practitioners see themselves as playing for keeps in a special kind of way; they believe the stakes of the political controversy their actions provoke are quite high, and that their defeat and their opponents' victory would be a serious, perhaps permanent setback to the political positions they hold.

Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004).

[v] Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L. J. 1784, 1789-90 (2020) (observing that "legal discourse has helped consolidate these problems by serving as a powerful authorizing terrain for a set of 'neoliberal' political projects that have fueled these same crises" and critiquing a "twentieth-century synthesis" has produced "some legal subfields….in which law and economics has become dominant" so that "efficiency analysis anchors both the descriptive framing and the normative assessment of law" but offers "no framework for thinking systematically about the interrelationships between political and economic power" and "no means to analyze, let alone counter, contemporary concentrations of wealth and power, except insofar as they interfere with overall efficiency.").

[vi] Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 526 (2004). After a century of stasis, collapse suddenly seems a very real possibility. *See* Ryan Heath, *Divides over global tech tax deepen*, POLITICO, Oct. 30, 2020 ("The risk to governments and companies alike, is that after getting close to a global agreement, their efforts will permanently

splinter."); Will Morris, *The Gathering Storm? The Other Side of the Covid Portal*, BLOOMBERG TAX, Nov. 2, 2020 (arguing that the pandemic has revealed that in cross-border taxation "[a] storm is coming, and trying to ignore it, or hoping that it can be held back, or convincing yourself that you alone will not get hit are not viable strategies").

[vii] Ryan Heath, *Divides over global tech tax deepen*, POLITICO, Oct. 30, 2020. That result resonates with a broader "effort[] 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" the Classification and Assignment Constitution constrains the power of states to tax cross-border transactions. *See* QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM 4, 16 (2018).

[viii] Jack M. Balkin, *Constitutional Hardball and Constitutional Crises*, 26 QLR 579, 581 (2008) ("In constitutional hardball, things that once went without saying are brought to the foreground and made bones of contention, with one side arguing that they were settled in one way and the other denying it heatedly.").

[ix] QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM 16 (2018). In the cross-border tax context, neoliberalism's "overall aim is a tax system interfering as little as possible with the 'natural' working of the market." Lukas Hakelberg & Thomas Rixen, *Is neoliberalism still spreading? The impact of international cooperation on capital taxation*, REV. INT'L POL. ECON. 4 (2020). Since the financial crisis, efforts to combat individual tax evasion (which provides the bulk of revenues in wealthy countries) have gained traction but efforts to combat tax avoidance by multinationals (providing most of the income for poor countries) have not. *See* Rasmus Corlin Christensen & Martin Hearson, *The new politics of global tax governance: taking stock a decade after the financial crisis*, 37 REV. INT'L POL. ECON. 1068 (2020) ("Catalysed by unilateral action by the United States, governments moved quickly after the financial crisis to clamp down on the use of tax havens for tax evasion by wealthy individuals…. In contrast, governments have moved more slowly to address the problems associated with taxing multinational firms, struggling to overcome distributional tensions within the OECD and G20.").

[x] *See* Eric M. Zolt, *Tax Treaties and Developing Countries*, 72 TAX L. REV. 111, 115 (2018) ("A primary task for the original designers of the international tax framework was to design a system to facilitate cross-border transactions by reducing tax barriers by allocating taxing rights to different countries depending on the nature of activity and types of investment.").

[xi] 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). Dagan describes this phenomenon in similar terms. ("It is important to note that this is not merely an enforcement issue, nor is it a matter of states' being unaware of their tax system's vulnerabilities. States commonly knowingly allow for the use of instruments by residents (and, obviously, investors) to lower their tax rates.").

[xii] Piketty lamented 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).

[xiii] 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)

[xiv] *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%).

[xv] *See supra* note vi.

[xvi] The consensus that change is needed is not limited to those at the margins. *See, e.g,* 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 current problems—not only continued vulnerability to avoidance but unaddressed pressures from tax competition—are deep.").

[xvii] 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").

[xviii] In part, that is because a more diverse group of policymakers could increase innovation while decreasing errors. 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).

[xix] 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.").

[xx] 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.

[xxi] *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.

[xxii] 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).

[xxiii] 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").

[xxiv] 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 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.

[xxv] *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.").

[xxvi] 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).

[xxvii] 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.").

[xxviii] Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 BROOK. J. INT'L L. 1357, 1358-59 (2001).

[xxix] 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.").

[xxx] Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 BROOK. J. INT'L L. 1357, 1359 (2001).

[xxxi] 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").

[xxxii] 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 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).

[xxxiii] 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.")

[xxxiv] *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).

[xxxv] 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.

[xxxvi] 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.").

[xxxvii] *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.").

[xxxviii] 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.").

[xxxix] Marbury v. Madison, 5 U.S. 137 (1803) (declining to issue a writ of mandamus).

[xl] 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).

[xli] 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.
[xlii] *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.").
[xliii] U.S. Dep't of the Treasury, White Paper on the European Commission's Recent State Aid Investigations of Transfer Pricing Rulings 25 (2016).
[xliv] 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).
[xlv] 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 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.")
[xlvi] 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").
[xlvii] 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.
[xlviii] 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.").
[xlix] 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.").
[l] *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").
[li] 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.
[lii] 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).
[liii] Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004).
[liv] Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 538-43 (2004) (describing *Marbury* as an iconic—if not entirely typical—example of constitutional hardball).
[lv] 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 Stadnyk Case on False Imprisonment Is a Lemon*, 66 TAX PRAC. 24 (2010).

[lvi] 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.").

[lvii] 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.").

[lviii] 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.").

[lix] 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.").

[lx] 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.

[lxi] 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.").

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

[lxiii] 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").

[lxiv] 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.").

[lxv] 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.”).

[lxvi] 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 cxlvi.

[lxvii] *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.”).

[lxviii] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 124 (1945).

[lxix] 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.”).

[lxx] 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.

[lxxi] 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.”).

[lxxii] Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L. J. 1784, 1805 (2020).

[lxxiii] *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.”).

[lxxiv] *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.”).

[lxxv] 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).

[lxxvi] 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.").

[lxxvii] 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).

[lxxviii] 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").

[lxxix] SUNITA JOGARAJAN, DOUBLE TAXATION AND THE LEAGUE OF NATIONS 254 (2018).

[lxxx] 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).

[lxxxi] 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).

[lxxxii] *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).

[lxxxiii] Dagan emphasizes the second, state-centered explanation for the rise of treaties. *See supra* note lxxvi. 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.

[lxxxiv] 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").

[lxxxv] *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. Michielse & 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.").

[lxxxvi] 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.").

[lxxxvii] 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).

[lxxxviii] 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* DANI 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).

[lxxxix] GEORGE SCOTT, THE RISE AND FALL OF THE LEAGUE OF NATIONS (1973) (dating the League's demise at April 19, 1946).

[xc] 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").

[xci] *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).

[xcii] 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").

[xciii] 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").

[xciv] 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 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).

[xcv] *See generally* Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939 (2000).

[xcvi] 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").

[xcvii] 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").

[xcviii] 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.icrict.com/icrict-documentsthe-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."). ICRIT 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).

[xcix] BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 266 (1991).

[c] 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").

[ci] *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").

[cii] 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).

[ciii] 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).

[civ] 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).

[cv] 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.).

[cvi] 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.").

[cvii] 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).

[cviii] 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 modem tax collection").

[cix] *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.").

[cx] 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).

[cxi] 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).

[cxii] 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).

[cxiii] *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.").

[cxiv] 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").

[cxv] *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….").

[cxvi] *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).

[cxvii] 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").

[cxviii] *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).

[cxix] One can even debate what industry Google is in let alone how to classify its income.

[cxx] *See supra* note xi.

[cxxi] 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).

[cxxii] Omri Marian, *The State Administration of International Tax Avoidance*, 7 HARV. BUS. L. REV. 1, 29 (2017).

[cxxiii] *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.").

[cxxiv] 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.").

[cxxv] 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 ("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.").

[cxxvi] [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).]

[cxxvii] *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).

[cxxviii] 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).

[cxxix] The analogous property interest might be a usufruct, the notion that your rights to property are contingent on you using it.

[cxxx] See, e.g., Reuven S. Avi-Yonah, *All of a Piece Throughout—The Four Ages of US. 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).
[cxxxi] 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).
[cxxxii] 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).
[cxxxiii] State-to-state information exchange, discussed [cross reference], represents another.
[cxxxiv] Checking Ackerman's "signaling" box.
[cxxxv] 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).
[cxxxvi] 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.
[cxxxvii] 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").
[cxxxviii] Taxing a U.S. shareholder on a deemed dividend from a CFC—rather than simply subjecting the CFC to U.S. tax—allowed makes the regime hardball in the sense of both being plausible but in clear tension with pre-constitutional understandings that one jurisdiction not be able to tax income earned in another jurisdiction.
[cxxxix] 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").
[cxl] 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 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)
[cxli] *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).
[cxlii] 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).
[cxliii] New constitutional proposals such as GILTI continue to come from traditional constitutional actors. *See* Susan C. Morse, *GILTI: The Co-operative Potential of a Unilateral Minimum Tax*, 2019 BRIT. TAX REV. 512, 515 (suggesting that GILTI is consistent with, rather than conflicting with, pre-constitutional understandings with "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.

[cxliv] 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.

[cxlv] 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.

[cxlvi] The "plausible" U.S. position with respect to digital taxes seems to be that a numerus clausus principle applies to the Classification and Assignment Constitution, preventing the addition of a new digital classification. 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.

[cxlvii] 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.").

[cxlviii] 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/.

[cxlix] 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 rues but because of character flaws of some sort. Jeffrey Owens & Bernd Schlenther, *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").

[cl] 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.").

[cli] 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.

[clii] *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).").

[cliii] 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 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).

[cliv] Rather than fundamental change, the "transformation" of cross-border taxation more closely resembles entrenchment. *See* Mason *supra* note xiii.

[clv] 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").

[clvi] *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"). Warris'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").

[clvii] *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.").

[clviii] 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 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").

[clix] 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).

[clx] 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").

[clxi] 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).

[clxii] 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").

[clxiii] *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).
[clxiv] STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES 6 (1973).
[clxv] *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").
[clxvi] *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 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).
[clxvii] 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).
[clxviii] 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.
[clxix] 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).
[clxx] 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).
[clxxi] 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").
[clxxii] *See* Mason *supra* note xiii.
[clxxiii] 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.
[clxxiv] BEPS sought to strengthen and preserve the Classification and Assignment Constitution, making it a countermobilization in Ackerman's terms. *See* MICHAEL GRAETZ, FOLLOW THE MONEY 274 (2016) (characterizing BEPS as an attempt to forestall change). Unlike the ongoing U.S. hardball effort with respect to digital taxes, BEPS did not conflict with pre-constitutional understandings.
[clxxv] 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").
[clxxvi] *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.").

[clxxvii] *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.").
[clxxviii] *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).
[clxxix] Allison Christians & Laurens van Apeldoorn, *Taxing Income Where Value Is Created*, 22 FLA. TAX REV. 1 (2018).
[clxxx] 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.").
[clxxxi] *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).
[clxxxii] 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 Koukoulioti, *Sustainable Tax Systems in the Digital Era* (on file with author) (suggesting such an inversion of economic allegiance's benefits principle). Koukoulioti 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.").
[clxxxiii] 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).
[clxxxiv] *See* I.R.C. §951A (requiring U.S. shareholders to include controlled foreign corporation income less their "net deemed tangible income return").
[clxxxv] 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).
[clxxxvi] 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.
[clxxxvii] *See supra* note xcviii.
[clxxxviii] *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).

[clxxxix] 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.

[cxc] 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 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).

[cxci] 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.

[cxcii] 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)

[cxciii] 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. *See, e.g.,* Ryan Heath, *Divides over global tech tax deepen*, POLITICO, Oct. 30, 2020 (quoting a Nigerian official as saying "I don't think there is a lot of confidence in what is going on with the [OECD's] inclusive framework.").

[cxciv] *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").

[cxcv] 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"). Although hardball may not represent the best long-term solution for the states or institutions involved, it may well be a rational solution for individual actors given their shorter time horizons. *See* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 552 (2004) ("They will not care if the worm turns after their politically active lives are over-after they die, retire, or assume the role of elder statesman or -woman. And, if history is a guide, the life span of a constitutional order is longer than the time-horizon of most active political actors.").

[cxcvi] *See* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 544 (2004) ("Political leaders play hardball when they believe that they are in a position to shift from one order to another, or when they believe themselves to be threatened with the possibility of such a shift.").

[cxcvii] No less important, granting agenda-setting power to marginalized actors would ensure that "law's creation of economic order" is "accountable to those who live in that order" as "the ultimate standard of accountability is the democratic will of the people, expressed in procedures that accord equal weight to all members in structuring our shared life." Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L. J. 1784, 1827 (2020) (noting that "the allure of discourses of efficiency and neutrality lies precisely in the claim that these discourses—and the system of market governance itself—can produce optimal outcomes without the messiness of politics and, ultimately, the acknowledgement that political conflict is resolved in an exercise of public power in which some win and some lose"). The resulting accountability could be especially important in tax. *See* 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").
[cxcviii] 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* ATTIYA 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.").
[cxcix] *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.
[cc] 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").
[cci] 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.").
[ccii] 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.
[cciii] 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).

[ccciv] *See* Ivan Ozai, *Institutional and Structural Legitimacy Deficits in the International Tax Regime* WORLD TAX J., February 2020 at 62.

[ccv] 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).

[ccvi] 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).

[ccvii] *See* Will Morris, *The Gathering Storm? The Other Side of the Covid Portal*, BLOOMBERG TAX, Nov. 2, 2020 (comparing proposals by the OECD, the UN and ATAF).

[ccviii] *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.").

[ccix] 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.").

[ccx] *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

[ccxi] *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").