A Constitutional Moment in Cross-Border Taxation

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To show why the taxation of cross-border transactions has remained largely unaltered across a century of upheaval, this article reveals a steady hand in control. To explain how those complex rules have changed—and could change in more profound ways—it does the same. Demonstrating how cross-border taxation has been shaped by the preferences and the intellectual habits of the United States, it highlights an unexpected opportunity for marginalized states to seize control of its future.

1. INTRODUCTION

The complex pattern of formal and informal rules that governs the taxation of cross-border transactions tends to be thought of as rigidly path dependent. (Rixen, 2011) In truth, the Classification and Assignment Constitution has repeatedly undergone sudden changes initiated by influential actors. A failure to acknowledge the power wielded by a handful of states and organizations nurtures an evolutionary myth of cross-border taxation, but a close examination reveals traces of intelligent design, with repeated interventions altering the course of its development.

A century ago a material constitution coalesced around an elegant but flawed algorithm providing for the "classification and assignment of specific categories of income to source or residence" to allocate taxing rights among states. (Graetz & O'Hear, 1997, p. 1074) To determine which state can impose tax on a cross-border transaction, this approach enumerates a menu of taxable income items—such as dividends, interest and royalties—(classification) and then allocates each item to either a home or host state (assignment).[1] Decades later, after World War II, thousands of bilateral double tax treaties emerged to form an intricate bill of rights to that constitution. The startling rise of the treaties widely perceived as hallmarks of stability reveals a surprisingly dynamic material constitution.

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[1] 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. (Osterhammel, 2015).

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Despite the absence of any formal amendment mechanism, the Classification and Assignment Constitution has been remade more than once. Employing constitutional concepts deeply engrained in its legal culture, the United States has mastered the art of both initiating change and preventing it. U.S. policymakers have alternately transformed the Classification and Assignment Constitution and preserved it much as they do with the U.S. Constitution. Understanding the U.S. perspective on wielding constitutional power reveals an important opportunity for long-marginalized states. Simply put, it shows how constitutional power can be seized with nothing more than an idea.

Section 2 introduces the concept of a material constitution. It explains how U.S. policymakers have entrenched norms that have provided stability in the taxation of cross-border transactions over the past century despite the absence of any formal international tax governance structure. It then describes how the resulting constitutional order allows it and others to exercise power to alter that constitutional order.

Section 3 shows that at constitutional moments change can be initiated, revealing how the Classification and Assignment Constitution has been amended. Offering examples ranging from the creation of the Controlled Foreign Corporation a half century ago to the recent European state aid cases, it illustrates the process through which constitutional amendments can be proposed and, on rare occasions, completed.

Finally, section 4 highlights implications of this constitutional order for marginalized states. It urges bold action of the type that Justice Marshall once took to transform the role of the U.S. Supreme Court, granting it primacy in a suddenly remade constitutional order. Reshaping a material constitution, as every U.S. lawyer learns in their earliest days of legal training, requires no formal control at all.

2. MATERIAL CONSTITUTIONS

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." (Kelsen, 1945, p. 124) A 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. 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.

2.1. A material constitution

Avi-Yonah's broad historical perspective invites speculation on patterns that emerge over time. (Avi-Yonah, 2005). Rosenbloom injects a note of skepticism informed by his unsurpassed knowledge of how tax lawyers around the world carry on

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their trade. (Rosenbloom 2000, p. 138). 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…." (Graetz, 2001, pp. 1358-59). Competing interests and economic change should have left cross-border taxation unrecognizable, with no opportunity for the senescence he decries. Graetz laments that "concepts such as permanent establishment, corporate residence, and arm's length pricing" have long been rendered incoherent by change yet stubbornly persist.

Classification and assignment lies at the core of today's cross-border taxation much as envisioned a century ago by the League of Nations, entrenched in a manner that—like other features of the cross-border landscape—approximate customary international law. The existence of a material constitution suggests two underappreciated features of the cross-border tax landscape. The possibility of constitutional transformation represents the first. The second reveals constitutional actors able to control both the pace and the direction of that change.

Constitutions can be amended. Formal constitutions may contain formal amendment procedures. As described in Part II, transformations of material constitutions operate differently. 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. (Ring, 2007, pp. 97-104). 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. (Christians 2007).

2.2. The power of ideas

A fidelity to century old norms forms a barrier to change that at times can seem absolute. Lacking a formal amendment process, the Classification and Assignment Constitution seems to create an even more formidable barrier to change than a formal constitution. Still, even written constitutions possess important unwritten features, embedding a formal constitution within a broader material counterpart.

The principle of judicial review, for example, has become central to U.S. Constitutional law even though the text of the Constitution itself includes no mention of the idea. (Nelson, 2018, p. 1). Chief Justice John Marshall fashioned the concept of

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judicial review, famously snatching a central role for the Supreme Court. 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.

In 2016, when presented with a pointed challenge to the Classification and Assignment Constitution, an array of influential U.S. policymakers rose to its defense. As Faulhaber describes it, "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." (2017, p. 383) The United States called for "a return to the system and practice of international tax cooperation that has long fostered cross-border investment…." (U.S. Treasury, 2016). The Treasury's White Paper captured the spirit of Marshall as it laid out the U.S. position on Apple's treatment. 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."

In a 1998 episode, as in the Apple controversy, a taxpayer produced technology while consuming tax subsidies. While it supported the implicit subsidy at issue in Apple, in Compaq, the U.S. Treasury opposed this subsidy, concluding in I.R.S. Notice 98-5 that the taxpayer had used foreign tax credits improperly. The Notice discussed "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". (Hariton, 2002, p. 504). To explain its opposition, the U.S. Treasury pointed to the 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."

A third invocation came much earlier. 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. (Brooks, 2009). Embracing its self-appointed role as guardian of the Classification and Assignment Constitution, Treasury opposed tax sparing, asserting the plausible—but contested—idea that tax sparing violated constitutional requirements even if consistent with the pre-constitutional understandings regarding the need to protect poor countries. (Christians, 2005). The Classification and Assignment Constitution, as interpreted by the U.S. Treasury, permits only some subsidies.

The U.S. Treasury's repeated efforts to distinguish good cross-border tax subsidies from those found to be Inconsistent with International Norms and earning its disapproval, laid the groundwork 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

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practice, the United States has repeatedly succeeded in imposing plausible interpretations of Classification and Assignment Constitutional doctrine on the world. 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.

2.3. A portrait of change

Today, the ubiquity of treaties makes them a defining feature of the cross-border tax landscape. But just a few decades ago, cross-border taxation looked quite different. Over the course of the 1920s, the risk of conflict rose and so too did the urgency of classification and assignment, ultimately informing the design of tax treaties.[2] At the end of the Second World War, only a handful of such treaties existed. But by the end of the Cold War several thousand had been adopted by pairs of states.

The double tax treaty hints at the constraints states face in cross-border tax rulemaking. 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." (Britton-Purdy et al., 2020, p. 1805) Indeed, if pressed to identify a written cross-border tax constitution, experts would likely suggest double tax treaties, widely considered to be "the roots of the international system." (Kysar, 2020, p. 1756) And if compelled to explain why so little has changed in cross-border taxation over a century, they might point to the network effects they generate. (Dagan, 2016, p. 1081)

But, of course, network effects do not explain the tax treaty's meteoric Cold War rise. "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." (Graetz, 2001, p. 1391) Treaties, a bill of rights for cross-border investors, helped shield taxpayers from substantive and procedural burdens, including from newly independent states. (Slobodian, 2018, p. 144)

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 in the absence of treaties actually seems quite modest. (Dagan, 2000) Less costly technologies—both in terms of tax revenues and public outlays—to avoid double taxation such as the foreign tax credit existed before the League of Nations settled on its classification and assignment algorithm (and the

[2] 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:

> "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."

(International Chamber of Commerce, Proceedings, organization meeting, Paris, France, June 23 to 30, 1920, p. 6).

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treaties that would transform that algorithm into taxpayer rights). With "leading nations and bankers" advocating "active interventions to help stabilize postwar economies in crisis" the embrace of such generous, formalized protections for cross-border transactions addressed deep anxieties. (Rosenberg, 2012, p. 842) 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." (2018, p. 254)

The Classification and Assignment Constitution's core algorithm represented a rejection of what has been called the "original intent" of U.S. international taxation. (Graetz & O'Hear, 1997) 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. (Rosenberg, 1982, p. 139) 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.

Dagan suggests the ways power helps to explain both the embrace of the Classification and Assignment Constitution over the foreign tax credit and the later rise of treaties. In particular, Dagan sees a potential shift of revenue towards influential states and away from countries reliant on foreign capital. (2000) The Classification and Assignment Constitution's protections actually favor taxpayers rather than wealthy states—limiting opportunities for the taxation of cross-border transactions—but that distinction does not conflict with Dagan's intuition that power matters.

Double tax treaties remained little used through the 1950s, decades after the League embraced them. (Rixen, 2011, p. 207) Even the OECD was slow to adopt the double tax treaty, publishing its first model in 1963. "In 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." (Avery Jones, 1999, p. 3)

First the League of Nations and later the OECD adopted the Classification and Assignment Constitution's generous algorithm and formal protections. That only one state could 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. As a result, a century-old algorithm has endured while little else has. A sweeping wave of post-World War II multilateral institution-building spared tax, which followed a very different path as the multilateral Bretton Woods system that "would govern the world economy for the first three decades following World War II" took shape. (Rodrik, 2012, p. 69) The remainder of this Part considers the dynamics that have shaped its evolution.

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2.4. Evolution vs. Intelligent Design

The material constitution of cross-border taxation could have developed quite differently. Largely irrelevant for almost half a century then ubiquitous for the next, the double tax treaty underscores the tension between dynamism and stability at the heart of the taxation of cross-border transactions. A cycle of change 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 (Avi-Yonah, 2004). 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 dismisses "the international tax system" as "imaginary" and perceives pure politics at work in shaping the taxation of cross-border transactions (Rosenbloom, 2000, p. 166). This anarchic vision sees states taking whatever they can to benefit their constituents and fill their coffers consistent with their long-term interests. None of these perspectives allows a role for constitutional actors, despite the heavy hands of first the League and then the OECD evident in the eventual rise of the double tax treaty.

Dagan's trenchant critique suggests an alternative narrative. She dispatches the evolutionary hypothesis by demonstrating that double taxation should not be expected to occur even in the absence of double tax treaties, concluding that "these ubiquitous treaties are not necessary for preventing double taxation." (Dagan, 2000, p. 939) 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.

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3. THE CLASSIFICATION AND ASSIGNMENT CONSTITUTION

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. Dagan's skeptical view of treaties suggests that their sharp rise in the wake of World War II reflects an exercise of power. Finding patterns that double taxation does not explain, Dagan sees the hand of powerful states at work shaping the Classification and Assignment Constitution to their own ends. The following illustrations reveal how powerful actors shape the material constitution of cross-border taxation to suit their needs.

3.1. Deliberation

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. "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)." (Avi-Yonah, 1996, p. 1303) 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.

Compared to the tailored and timely information received from banks and employers domestically, the sparse data shared by foreign governments left a growing disconnect between the information collected from within the United States and from abroad. 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." (Everson, 2006) 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, a deeply entrenched norm of cross-border taxation.

In 2010, the U.S. Foreign Account Tax Compliance Act (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. Rejecting 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 with information on U.S. residents became required to send that information to directly to the U.S. government or risk potentially devastating retaliation.

FATCA "focus[ed] the rhetoric" of concern over the evasion made possible by the extraterritorial tax information gap. That effort to replicate domestic tax information acquisition extraterritorially by enlisting private actors to provide tax information

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directly to U.S. authorities met swift resistance from nearly every quarter. Banks and other financial institutions challenged the heavy compliance burdens FATCA imposed and the harsh sanctions it threatened for failures to supply the United States with extraterritorial tax information. (Oei, 2018) More surprisingly, other states seemed just as skeptical. Yet in 2012, 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."

FATCA shows how change can be initiated. State Aid shows how it can be blocked. In both cases, the control the U.S. wields over the development of cross-border taxation clashes with the conventional account of its evolution. The resulting arrangements remain effective as a safeguard against the substantive and procedural burdens of double taxation. They also permit "coding." (Pistor, 2019)

Classification and assignment creates a systemic bias in favor of taxpayers. (Kysar, 2020, p. 1756) 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. Exploiting such vulnerabilities mirrors the power corporate law grants businesses "to partition assets and shield them behind a chain of corporate veils" to achieve similarly favorable results. (Pistor, 2019, p. 48)

Taxpayers have become adept at this type of coding, passing one type of income off for another. Financial innovation can allow taxpayers to "convert" a transaction in order to reclassify—and reassign—the income it generates. (Kleinbard, 1991) 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. (Marian, 2017, p. 29) Such reclassifications lie at the heart of infamous transactions such as Google's double Irish sandwich.

The European Commission's state aid cases challenged the rigid logic of classification and assignment. 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. The Commission concluded that in certain circumstances the owner of income could be forced to tax it. As described in Part I, in reaction and with increasing success, the United States urged a return to the coding of the road classification and assignment status quo.

3.2. Codification

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. Justice Marshall demonstrated how a basic law can be rewritten without deploying formal mechanisms of change. The Classification and Assignment Constitution has been "amended" in much the same way. In the cross-border tax

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context, those changes observe a particular—and for U.S. observers, familiar—constitutional rhythm.[3]

Following 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, coding made the taxation of cross-border transactions salient. A proposal emerged to modify the classification and assignment algorithm.

Rather than countermobilize—as the United States did with State Aid, invoking a "system and practice of international tax cooperation that has long fostered cross-border investment"—other states deliberated and codified this change. (Avi-Yonah, 2004, p. 489) 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. That approach produces a different result arguably inconsistent with pre-constitutional understandings at the heart of the Classification and Assignment Constitution.

This U.S. controlled foreign corporation proposal achieved codification in the enactment of similar statutes around the world. As a result, current U.S. tax can be imposed on income in apparent violation of another state's tax sovereignty. In a sense, the controlled foreign corporation rules represented an acknowledgment that—even as the OECD seized on the double tax treaty to bolster 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.

This cross-border constitutional moment unfolded much as Ackerman imagined. President Kennedy signaled broadly—"I recommend elimination of the 'tax haven' device anywhere in the world"—rather than dwelling on the technical details of classification and assignment that made coding possible. The widespread embrace of the controlled foreign corporation concept by legislatures in much of the world would embed it 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." (Li, 2002, p. 867)

4. A CONSTITUTIONAL MOMENT FOR CROSS-BORDER TAXATION

States at the margins have enjoyed few opportunities to influence the evolution of the Classification and Assignment Constitution. Part II shows why that has long been

[3] Supplementing the formal 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). (Ackerman, 1991). 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.

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true. This part reveals why it need not be. True power in cross-border taxation lies not in managing its details but in rewriting its basic law.

Proposals such as those described in Part II made by the United States and the European Union reflect their priorities rather than those of states on the periphery. The absence of a formal higher lawmaking structure for cross-border taxation has tilted the playing field in favor of wealthy states while obscuring their power. But that same absence of formal rules creates an opportunity for outsider states to remake the constitutional landscape, much as Justice Marshall once did.

4.1. 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 remain simple. New layers of complexity—a "transformation" when viewed from a U.S. perspective (Mason, 2020)—serve to preserve its core classification and assignment algorithm. The primary recent efforts by the world's most sophisticated team of tax experts, the OECD—its Base Erosion and Profit Shifting effort and its controversial Pillars—maintain a status quo that serves the interests of its exclusive membership.

BEPS sought to strengthen classification and assignment by limiting the power of taxpayers to favorably code their transactions. Pillars One and Two aim to preserve classification and assignment concepts such as source and residence. The result—altered first by Subpart F and more recently by BEPS and perhaps soon by the Pillars—no longer represents a coherent response to today's challenges. (Bunn, 2020)

Over time, first-generation earnings-stripping transactions yielded to more sophisticated variations in a cat-and-mouse game that BEPS and the Pillars perpetuate. Reflecting the priorities and influence of the United States, the Classification and Assignment Constitution continues to shield cross-border transactions from both procedural and substantive tax burdens while allowing "highly productive, higher income countries [to be] systematically assigned a larger share of revenue than less productive, lower-income countries." (Christians & van Apeldoorn, 2018) The result may not be precisely what its creators envisioned, but accomplishes just what they intended.

4.2. The political economy of cross-border taxation

A handful of experts from a homogenous group of countries shaped the Classification and Assignment Constitution. (Jogarajan, 2018). The framers of the cross-border tax constitution—a handful of experts from the United States and Europe—might 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. (Graetz & O'Hear, 1997, p. 1074). The International Chamber of Commerce's influential work was "drafted by a committee comprised of representatives from the national chambers of commerce

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of Belgium, France, Great Britain, Italy, the Netherlands, and the United States." (Graetz & O'Hear, 1997, p. 1067).

Half a century later through the OECD, a similar group of states incorporated a bill of rights for cross-border taxpayers in the form of bilateral tax treaties. Another half a century, and the more the taxation of cross-border transactions has changed the more it has stayed the same. The OECD's recent "Unified Approach" to digital taxation has been described 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." (Christians, 2019, p. 497)

A small group of states continue to deploy their considerable resources towards charting a path consistent with its interests. Even the Inclusive Framework, the OECD's response to questions of its insularity, has done little to win over critics.[4] The 1974 Declaration of a New International Economic Order and the proposal for a U.N. International Tax Organization show one way the Global South could exercise power. In 2001, the United Nations proposed the creation of an International Tax Organization, concluding that while "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." (Horner, 2001, p. 179)

An inclusive formal cross-border rulemaking body such as that unrealized International Tax Organization would provide an opportunity for states to exercise the agenda-setting authority long wielded by the United States. 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." (Ozai, 2020, p. 62)

Fortunately, the world need not wait to see whether a formal inclusive global tax governance structure takes shape. The same levers of informal control that have allowed the United States to be the deus ex machina of global tax policy could allow others to do the same. In a world in which more than half of the countries in Africa collect less than 15% of their GDP in taxes, less than the 20% the United Nations deemed necessary for sustainable development, (Waris, 2019, p. 27) rewriting the Classification and Assignment Constitution as Marshall once did the U.S. Constitution would be more than justified.

[4] A Nigerian official discussing the OECD's digital tax efforts concluded that "I don't think there is a lot of confidence in what is going on with the [OECD's] inclusive framework." (Heath, 2020)

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The growing influence of organizations like the African Tax Administration Forum suggests how traditionally marginalized states could follow Justice Marshall's—and President Kennedy's—example, transforming ideas into power. A constitutional moment in which the taxation of cross-border transactions has drawn the attention of organizations ranging from the Tax Justice Network, the Global Alliance on Tax Justice, the West African Tax Administration Forum, the Inter-American Center of Tax Administrations, the International Consortium of Investigative Journalists to the Pan African Lawyers Union offers an opportunity for the realization of a radical new vision that prioritizes those at the base of the global economic pyramid.

Offering a "more or less operational" alternative to the Classification and Assignment Constitution that "focuses the rhetoric" that has thrust cross-border taxation into the spotlight would not require formal approval from anyone but could trigger a flow of revenues to those states most in need. All it would need to do would be to capture the imagination of a public newly awakened to the urgency and power of cross-border taxation. Constitutional actors such as Attiya Waris, a Kenyan scholar named by the United Nations in 2021 as its Independent Expert on foreign debt and human rights, could transform the current constitutional order as effortlessly as Marshall once did, unapologetically winning hearts and changing minds across the globe with the power of her ideas.

5. CONCLUSION

Long-marginalized states must seize the opportunity afforded by the current moment to remake the basic law that shapes global taxation. An amendment to the Classification and Assignment Constitution authored by actors from the Global South could remake the basic law of cross-border taxation not by persuading experts but by capturing the imagination of the public. Those in control of the taxation of cross-border transactions have all but ceased attempting to articulate "a clear and consistent vision." (Bunn, 2020, p. 1)

That failure, at a time when the world has focused on cross-border taxation as never before, provides an extraordinary opportunity for anyone able to offer a compelling alternative to that incoherence. In tax, as everywhere else, power matters. As Marshall showed long ago, ideas have power to spare.

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