

# Article

## On the Constitutionality of Tax Treaties

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## I. INTRODUCTION

Taxes, as we learned in grade school, kindled the American Revolution. Revolt against collecting revenues without representation caused a tea party, propelling the colonies towards convening the First Continental Congress. Forgotten, though, is the role of taxes in shaping our fledgling nation immediately after the Revolution. Debates over which governmental body could impose taxes inflamed the delegates to the Constitutional Convention. So important was the issue that the decision to originate revenue bills in the lower house of Congress constituted a cornerstone of the Great Compromise, thus birthing the representational structure of our country. This principle became embodied in the Constitution as the Origination Clause,<sup>1</sup> ensuring that the power to tax would begin with the house that was directly elected and proportionate to the population.

Tax treaties (generally, bilateral instruments that mitigate or eliminate double taxation of income across jurisdictions) have become an important and frequently used coordination device between countries, with the United States entering into nearly seventy such instruments,<sup>2</sup> yet they upset this intra-congressional balance. Tax treaties are considered to be self-executing, meaning that they need no implementing legislation to take legal effect. As a result, the ratification of a tax treaty cuts the House of Representatives wholly out of the process of promulgating policy in the area of international taxation, in apparent derogation of the Origination Clause. Yet the Treaty Clause also bestows upon the Senate sole authority to assent to treaties generally,<sup>3</sup> thus creating a constitutional puzzle, in the case of tax treaties, that has yet to receive any analysis or sustained treatment in the academic literature.<sup>4</sup> In this

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1. U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”).

2. Allison Christians, *How Nations Share*, 87 IND. L.J. 1407, 1419 (2012) (“Currently, the United States has income tax treaties with sixty-eight countries . . .”).

3. U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

4. I have uncovered only a few, brief references to the issue in works addressing other subject matters. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 592 n.38 (2005) (briefly positing that implementing legislation may be required for treaties in areas of “special sensitivity,” such

Article, I canvass the historical foundations and doctrinal developments of the Origination Clause and the Treaty Clause. After so doing, I conclude that tax treaties indeed create constitutional infirmities.

The text, history, and structure of the Clause, together with judicial precedent and normative concerns, mandate House participation as an exclusive means of enacting tax laws.<sup>5</sup> Specifically, tax treaties fall within the scope of the Origination Clause because they directly impact government revenues. Moreover, a widely accepted proposition among practitioners and the Internal Revenue Service—that tax treaties do not violate the Origination Clause because they do not increase tax liability—is mistaken.<sup>6</sup> Constitutional analysis, including existing case law, and important practical concerns overturn this view. The “raising Revenue” language of the Clause encompasses laws that predominantly involve revenue, *either* through tax increases *or* decreases. The

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as taxing and spending); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 923 (1995) (noting in passing that the Origination Clause may strengthen the argument that NAFTA is constitutional); Chandler P. Anderson, *The Extent and Limitations of the Treaty-making Power Under the Constitution*, 1 AM. J. INT'L L. 636, 653 (1907) (“The views expressed in Congress, as above outlined, and by authoritative writers on the subject, show a consensus of opinion that with respect, at least, to the appropriation of money and the regulation of tariff duties treaty stipulations cannot be regarded as self-executing, and require legislative action to carry them into effect.”); Edwin D. Dickinson, *Are the Liquor Treaties Self-Executing?*, 20 AM. J. INT'L L. 444, 449 (1926) (“Legislative practice would indicate that treaties involving a modification of the revenue laws are also in the same category [as those treaties requiring implementing legislation], though in principle the case is not so clear.”); Leslie Henry, *When Is a Treaty Self-Executing?*, 27 MICH. L. REV. 775, 780 (1929) (“[T]ariff provisions are usually said to need action by Congress.”); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, 677 (1986) (“It is also not clear whether treaties affecting revenue laws can be self-executing.”); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1261 n.133 (1995) (noting that the Origination Clause may place limits on treaties involving revenues but disagreeing with Ackerman and Golove that House participation justifies the use of congressional-executive agreements); Quincy Wright, *Treaties and the Constitutional Separation of Powers in the United States*, 12 AM. J. INT'L L. 64, 68-69 (1918) (“Although the competence of the treaty power has been clearly established by practice, the necessity of congressional action to carry out treaties affecting the revenue has usually been recognized, the negotiated instrument itself sometimes providing that it shall not become valid until the necessary legislation has been passed.”); William C. Gordon, Comment, *Self-Executing Treaties—The Genocide Convention*, 48 MICH. L. REV. 852, 854 n.12 (1949) (“A treaty may even affect revenue matters and be self-executing, so long as money need not be appropriated.”); cf. Anthony C. Infanti, *Curtailing Tax Treaty Overrides: A Call to Action*, 62 U. PITT. L. REV. 677, 709 (2001) (arguing that the House’s involvement in passing tax treaty overrides is in tension with the Treaty Clause).

5. In light of the strong constitutional and normative reasons for enacting international tax agreements through implementing legislation or congressional-executive agreements, it is perhaps surprising that current practice pursues neither. The House frequently defended its right to implement tax treaties during the early part of the country’s history yet no longer does so. The House’s ostensible failure to defend its turf in the tax treaty area might suggest that little harm is done from its omission in the tax treaty process. As I discuss below, however, the House’s current silence arises from historical happenstance and should not be dismissed as acquiescence. See *infra* notes 285-294 and accompanying text.

6. This practice is thought to avoid the Clause’s mandate that “[a]ll Bills for raising Revenue originate in the House of Representatives.” U.S. CONST. art. I, § 7, cl. 1 (emphasis added); see, e.g., U.S. DEP’T OF TREAS., TECHNICAL EXPLANATION OF THE U.S.-U.K. TAX CONVENTION 2 (2002) (“[The] Convention may not increase the tax burden on a resident of a Contracting State beyond the burden determined under domestic law.”); Jeffrey A. Schoenblum, *Bilateral Transfer Tax Treaties*, Tax Mgmt. Portfolios (BNA) No. 851 (2012) (noting that it is routinely accepted among tax professionals that, in order to comply with the Origination Clause, tax treaties cannot increase tax liability).

precaution of limiting treaties to the tax-decreasing context is thus ineffectual protection against the constitutional violation.

Additionally, close reading of the case law interpreting the treaty power supports the view that such power is bound by certain constitutional limits, which, I argue, include the origination privilege. The Origination Clause thus functions as a constitutional constraint upon the Senate's treaty power. To avoid the enactment of constitutionally suspect tax treaties and to preserve the salient principles embodied in the Origination Clause, I argue that tax treaties must not be self-executing but instead must be implemented through legislation passed by both houses or else be approved as congressional-executive agreements. By enhancing the deliberative process of tax treaties, the remedies suggested herein support democratic principles. Although this is an important normative consideration in and of itself, it is especially convincing given the goal at the Founding to bring tax law closer to the people.

Because tax treaties currently benefit very few taxpayers at the cost of the general public, they implicate the democratic concerns motivating the Origination Clause. Adding to this problematic dynamic, unlike in the domestic context, these tax expenditures wholly escape the budgetary process. The remedies suggested herein would properly enlist budgetary rules such that Congress could weigh a tax treaty's costs and benefits. The increased deliberation and vetogates provided by House involvement would subject tax treaties to a more robust, democratic process, improving their quality. The creation of bicameralism in the process where it was previously absent increases coordination costs between the House and Senate, thereby possibly reducing special interest deals. Moreover, the remedies would give Congress opportunities to clarify the purposes of tax treaties, perhaps supplanting the traditional double taxation justification with more relevant concerns such as the increase in investment flows between countries and the protection of the United States revenue base. The failure of tax treaties to address such economic goals in a coherent fashion directly reflects the paucity of the process to which they are subject. In these respects, features of today's legislative and treaty environments have made the democratic concerns motivating the Clause even more acute, in sharp contrast to those principles underlying the Treaty Clause, such as secrecy concerns and the protection of regional interests, which have fallen away in modern times.

Requiring implementing legislation or approval through congressional-executive agreements would allow the nation not only to honor our Constitution but also to better uphold the nation's obligations under international law, creating certainty for public and private actors alike. It may decrease statutory overrides of tax treaties, a phenomenon partially resulting from the House's jealous, albeit well-founded, guardianship over tax matters. Additionally, these prescribed remedies would brace tax treaties against challenges to their binding effect. This benefit is especially important in light of

increasing willingness by courts to uphold such challenges.<sup>7</sup> Although implementing legislation or congressional-executive agreements would be a dramatic deviation from tax treaty-making in the United States, it is nothing new for numerous other nations.<sup>8</sup> Treaty partners would likely view this additional requirement to the American treaty-making process as rather unremarkable. Considering the benefits from stabilizing the international tax landscape, they may even welcome it.

Although the constitutionality of self-executing tax treaties has not received significant scholarly attention, the constitutionality of self-executing treaties, in general, has been the subject of much debate.<sup>9</sup> Scholars on both sides of the debate admit that there is a likely exception for those treaties that are within Congress's exclusive province because they raise separation-of-powers concerns, although they do not attempt to enumerate or justify those exceptions.<sup>10</sup> With respect to tax treaties, this Article fills that gap in the literature by arguing that the Origination Clause's unique set of exclusive procedures and its rich ties to democratic concerns justify the long-held intuition that tax treaties are, indeed, non-self-executing.<sup>11</sup> This analysis thus has implications beyond the context of tax treaties by shedding light on the vexing question of whether and when the Constitution limits the reach of treaties in general.

In Part II of this Article, I canvass the history, scope, and justiciability of the Origination Clause. I then trace the history and meaning of the Treaty Clause, with particular attention to the domestic legal status of treaties. Having

7. See *Medellin v. Texas*, 552 U.S. 491 (2008); see also Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 71-76 (2012) (finding that, post-*Medellin*, the lower courts have applied a presumption against self-execution for categories of treaties that prior to *Medellin* were presumed self-executing).

8. In the United Kingdom, Ireland, Malta, and Australia, the legislative branch must pass legislation in order for treaties to become part of domestic law. In most other democratic states, the legislative branch also participates in the treaty-making process by passing a resolution or legislation providing prior consent to the treaty's subsequent enactment. Klaus Vogel, *The Domestic Law Perspective*, in TAX TREATIES AND DOMESTIC LAW 3, 4-5 (Guglielmo Maisto ed., 2006). Indeed, the United States "is in the distinct minority in excluding a part of the legislature that is usually involved in domestic lawmaking from international lawmaking, and it is among a small handful of countries that combine the latter feature with a rule that makes treaties automatically a part of the domestic law." Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1274, 1309 (2008) (remarking that the United States, Mexico, and Tajikistan comprise that latter category).

9. See, e.g., Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties As "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999) (defending the view that treaties are self-executing); Vasav Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479 (2006) (arguing that, in addition to treaties within Congress's exclusive powers, treaties that conflict with existing statutory law are non-self-executing); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) (arguing that treaties are self-executing); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) (contending that treaties on the subject of one of Congress's enumerated powers are not self-executing) [hereinafter Yoo, *Globalism*]; John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) (same) [hereinafter Yoo, *Treaties and Public Lawmaking*].

10. Kesavan, *supra* note 9, at 1505-06 (reviewing internationalist literature).

11. See *id.* at 1505 (citing, among others, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. i & reporters' n.6 (1987)).

laid out the constitutional first principles underlying the Origination Clause and the Treaty Clause, I provide in Part III a general overview of tax treaties. In Part IV, I set forth the position that self-executing tax treaties impermissibly circumvent the Origination Clause, examining textual, historical, precedential, and normative considerations. I then defend my thesis against possible counter-arguments by arguing, for instance, that the last-in-time rule, in which a latter enacted statute can trump a previously ratified treaty, provides insufficient protection against the House's constitutional right to originate legislation. Finally, in Part V, I detail the implementation of my solutions.

## II. THE TENSION BETWEEN THE ORIGINATION AND TREATY CLAUSES

This Part first examines the historical foundations of the relevant clauses of the Constitution, the Origination Clause and the Treaty Clause, including the latter's interplay with the Supremacy Clause.<sup>12</sup> These clauses relate in complex manners, many of which were unforeseen by the Framers. Hence, this Part also analyzes the doctrinal developments and congressional precedents that help to explain such interactions. The conclusions drawn from these inquiries lay the groundwork for the central thesis of the Article.

In particular, I show that (1) the Framers intended the Origination Clause to protect the interests of the populace and to counterbalance the power of the small states; (2) the Origination Clause—justiciable by the courts and enforced by the House—continues to play an important role in the tax legislative process; (3) the Treaty Clause also served a central, although purely historical, purpose of giving the power over foreign affairs to the house with the then greater international expertise and ensuring the interests of the states were protected; and (4) neither originalist sources nor the Constitution suggest that the Treaty Clause overrides the Origination Clause. As to the latter point, in Part IV, I draw upon subsequent case law, congressional practice, and normative considerations to show that the Treaty Clause must give way to the Origination Clause in the context of tax treaties.

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12. In conducting a historical examination of these clauses, I consult "the canonical originalist sources," such as "the records of the constitutional convention, the ratification debates, *The Federalist*, and early governmental practice." Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1733 (2002). In so doing, however, I do not attempt to reconstruct the Framers' singular intent on the issue of tax treaties as self-executing devices. Such an intent did not exist at the Founding, which predated tax treaties by a hundred years. Instead, I use these materials, along with constitutional text and structure, to construct the most convincing constitutional interpretation. In so doing, I do not reject the idea of a "living constitution," one that, while focusing on constitutional text and structure, as well as the originalist sources, understands the Constitution as being applied in new situations, necessitating evolving meaning. See, e.g., Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009) (arguing that originalism and living constitutionalism are compatible rather than opposed). Indeed, much of my argumentation focuses on normative justifications for protecting the House's prerogative in the tax treaty context.

## A. History and Interpretations of the Origination Clause

### 1. The Role of the Origination Clause in the Great Compromise

Article I, Section 7 of the Constitution—perhaps most well-known for setting forth the bicameralism and presentment requirements that form the constitutional bedrock of the legislative process<sup>13</sup>—contains an opening clause, referred to as the Origination Clause, which commands that revenue-raising bills begin in the House of Representatives. The Origination Clause served as a central element of the Great Compromise of 1787, which, in turn, saved the constitutional enterprise by defining the legislative structure and representation in a manner that appeased both large and small states.<sup>14</sup> The Great Compromise, as the Supreme Court has stated, “was considered so important by the Framers that they inserted a special provision to ensure that it could not be altered, even by constitutional amendment, except with the consent of the states affected.”<sup>15</sup>

The Constitutional Convention itself was called primarily to bestow upon Congress the power to raise revenue in response to huge debts incurred by the new government. Although there was a consensus view in favor of the need for a federal taxing power, the process by which Congress would tax proved highly controversial and was the subject of many debates, votes, and revisions.<sup>16</sup> The final version of the Origination Clause reads as follows: “All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”<sup>17</sup> The practice of originating revenue bills in the lower house traces its history to fourteenth-century England. Since that time, the elected House of Commons originated revenue bills with the subsequent agreement by the House of Lords, which was appointed by the crown.<sup>18</sup> The rationale for the rule was that the lower house was in closer communication with the citizens, and thus its members were in a better position to judge the optimal level of taxation—that is, one that would produce sufficient revenue while avoiding a perception of being onerous.<sup>19</sup> Additionally, due to its direct accountability to the people, a lower house was presumably reluctant to levy arbitrary taxes.<sup>20</sup>

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13. U.S. CONST. art. I, § 7, cl. 2; *INS v. Chadha*, 462 U.S. 919 (1983) (holding that a one-house legislative veto violates the bicameralism and presentment clauses of Article I, Section 7, Clause 2).

14. 2 GEORGE TUCKER CURTIS, *HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES* 216-17 (1863); Forrest McDonald & Michael Mendle, *The Historical Roots of the Originating Clause of the U.S. Constitution: Article I, Section 7*, 27 *MOD. AGE* 274 (1983) (analyzing the role of Origination Clause in Constitutional Convention).

15. *Chadha*, 462 U.S. at 950 n.15.

16. See Jonathan Rosenberg, Comment, *The Origination Clause, the Tax Equity and Fiscal Responsibility Act of 1982, and the Role of the Judiciary*, 78 *NW. U. L. REV.* 419, 422-23 (1983).

17. U.S. CONST. art. I, § 7, cl. 1.

18. DAVID K. WATSON, 1 *THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY, APPLICATION, AND CONSTRUCTION* 342 (1910); JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* §§ 874-75 (Edmund H. Bennet ed., Little Brown 1858) (1833).

19. See STORY, *supra* note 18, § 875.

20. See *id.*

Out of adherence to the principles underlying the English rule, the American colonies adopted a custom whereby revenue bills originated in the lower house.<sup>21</sup> Of the eleven states adopting new constitutions after the revolution, seven had some version of the origination privilege.<sup>22</sup> Given this history, one could conclude that the framers were reflexively adopting the English rule in adding the Origination Clause to the Constitution. Subsequent debates during the Convention, however, suggest otherwise.<sup>23</sup> Indeed, the evolution of the clause indicates it was adopted not only to bestow power over revenue matters to the directly elected house, thereby increasing government accountability of a populist sort, but also, according to contemporaneous sources, to serve as a counterweight to the special powers granted to the Senate.<sup>24</sup> James Madison, in a speech to the newly formed House of Representatives on May 15, 1789, highlighted the democratic reasons for the Clause but also recounted that the structure of the House *itself* was due to its power to originate revenue bills:

The constitution . . . places the power in the House of originating money bills. The principal reason . . . was [] because [its members] were chosen by the People, and supposed to be best acquainted with their interests, and ability. In order to make them more particularly acquainted with these objects, the democratic branch of the Legislature consisted of a greater number, and were chosen for a shorter period, so that they might revert more frequently to the mass of the People.<sup>25</sup>

Early in the Convention, the Clause was readily rejected, with only delegates from Delaware, New York, and Virginia voting in its favor.<sup>26</sup> These few proponents argued that the direct and more proportional representatives of the people should be the ones to “hold the purse strings” of the nascent country.<sup>27</sup> Its opposition successfully argued that enforceability would be a problem and would create conflict between the houses.<sup>28</sup> Even after several subsequent defeats of the clause, proposals continuously arose in the context of the division of power between the Senate and the House. On July 5, 1787, the

21. WATSON, *supra* note 18, at 343.

22. Two of the eleven states had no bicameral legislature. Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 765 n.118 (1993). The states with origination privileges were divided over whether to allow the upper house to amend revenue legislation. *Id.*; see also Rebecca M. Kysar, *The “Shell Bill” Game* (unpublished manuscript) (on file with author) (discussing history of the Senate’s power to amend revenue legislation).

23. During the constitutional debates, some contended that the Origination Clause’s inclusion in the Constitution simply reflected a matter of custom. See WILLIAM M. MEIGS, *THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787*, at 108 (1987).

24. THE FEDERALIST NO. 66, at 370-72 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (defending the Senate’s powers on a quid pro quo basis with those of the House, including the origination power); see also Rosenberg, *supra* note 16, at 429 (“If not for the origination clause, the delegates from the large states likely would never have agreed to vest the Senate with such critical powers as the treaty-making power and the appointment power.”).

25. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 356 (Max Farrand ed., rev. ed. in four vol. 1966).

26. CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 275-77, 277 n.1 (1928).

27. *Id.* at 275 (statement of Mr. Gerry).

28. JAMES MADISON, *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1789*, at 188-89 (Jonathan Elliot ed., J.B. Lippincott Co. 1891) (1845) (statement of General Pinckney).



Convention's Compromise Committee recommended the Great Compromise, which would trade equal representation of the States in the Senate for the exclusive right of the House to originate money bills.<sup>29</sup> The version of this resolution gave no amendment powers to the Senate.<sup>30</sup>

Initially, the Framers were divided as to which body benefitted the most from this quid pro quo. The clause's persistence throughout the negotiations indicates that the Framers believed the ability to initiate the legislative agenda to be extremely valuable.<sup>31</sup> And by refusing to give this power to the house further removed from the people, the Framers intended to protect the country from being perceived as an aristocracy.<sup>32</sup>

Nevertheless, concerns over the practicalities of the Origination Clause remained, including the interpretation of its scope.<sup>33</sup> To cure these shortcomings, a proposal was drafted such that the clause only applied to bills whose *purpose* was to raise revenue, in response to the objection that all bills that had incidental effects on the Treasury would be subject to the clause.<sup>34</sup> Additionally, the proposal gave the Senate the power to amend the bills, perhaps to quell concerns that the upper house needed to correct errors and to protect its purview over foreign matters.<sup>35</sup>

The final form of the Origination Clause, with the Senate's ability to amend and a general aim at "bills for raising revenue," was incorporated two months after the Great Compromise.<sup>36</sup> Although the small states had already bargained for the crucially important benefit of equal representation in the Senate, the House's power under the Origination Clause was perceived as so important that bestowal of the rest of the Senate's powers relating to executive appointment, treaty-making, impeachment, and presidential elections was necessary to reach a final agreement.<sup>37</sup> The governmental structure of the fledgling nation was in this way formed. So understood, the Origination Clause served two purposes. First, the Origination Clause acted as a counterbalance to the powers secured to the small states in the Senate. Second, the Origination Clause served the interests of the people by securing a prominent role for the

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29. Although some members contended that the Origination Clause had not been part of the compromise, those who advocated for its conclusion considered it to be essential to the deal. *Id.* at 394, 396, 414-20.

30. See generally Kysar, *supra* note 22 (providing a general overview of the Senate's power to amend revenue legislation and the separation of powers concerns that mandate a broad judicial interpretation of such power).

31. Rosenberg, *supra* note 16, at 426-27. Political scientists have explored the importance of agenda setting, most often in the executive branch context. See, e.g., STEPHEN J. WAYNE, THE LEGISLATIVE PRESIDENCY 16 (1978) (arguing that the President enjoys agenda-setting power in promulgating the annual budget); Lars Willnat, *Agenda-Setting and Priming: Conceptual Links and Differences*, in COMMUNICATION AND DEMOCRACY: EXPLORING THE INTELLECTUAL FRONTIERS IN AGENDA-SETTING THEORY 58 (Maxwell E. McCombs, Donald L. Shaw & David Weaver eds., 1997).

32. MADISON, *supra* note 28, at 418 (statement of Mr. Dickinson).

33. Rosenberg, *supra* note 16, at 426.

34. MEIGS, *supra* note 23, at 112.

35. MADISON, *supra* note 28, at 415 (statement of George Mason).

36. *Id.* at 510; MEIGS, *supra* note 23, at 108.

37. MADISON, *supra* note 28, at 510-11.

directly elected house, which was also subject to proportional representation and more frequent elections, in setting revenue policy.

## 2. *Judicial Interpretations of the Origination Clause*

The history of the Origination Clause illuminates its importance and meaning. Yet the Framers spoke little of how the clause was to be interpreted. The discussion below of the relevant case law and congressional precedents will help somewhat to fill the gaps, although much has been left open by the courts and Congress.

### a. *The Scope of the Clause and Justiciability*

The Supreme Court has had occasion to speak to the meaning of the Origination Clause only a handful of times but it has developed two rules that tend to narrow its application: (1) raising revenue must be the primary purpose, rather than an incidental consequence, of the legislation; and (2) such revenues must be for the general government coffers.<sup>38</sup> The Supreme Court has also broadly construed the Senate's amendment power, holding that the Senate's substitution of a corporate tax for an inheritance tax in a House-originated bill was germane to the subject matter of that bill and hence constituted an amendment within the Senate's powers under the Origination Clause.<sup>39</sup>

The most recent Supreme Court ruling to address the Origination Clause, *United States v. Munoz-Flores*,<sup>40</sup> involved a law requiring federal courts to impose a monetary "special assessment" on those convicted of a misdemeanor, which would be used, in part, to compensate victims of a crime. The Court held that the program represented a transfer between criminals and victims rather than a tax, although it did admittedly generate revenues.<sup>41</sup> An interesting aspect of *Munoz-Flores* was the Court's determination that the House was not the sole enforcer of the Origination Clause. In the majority opinion, Justice Marshall opined that:

Although the House certainly can refuse to pass a bill because it violates the Origination Clause, that ability does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments . . . . Nor do the House's incentives to safeguard its origination prerogative obviate the need for judicial review.<sup>42</sup>

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38. For a summary of these cases, see *infra* notes 151-166 and accompanying text. I have discussed in detail elsewhere how the Court uses the second condition as a proxy for the first. See Kysar, *supra* note 22.

39. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911); see also *Rainey v. United States*, 232 U.S. 310, 317 (1914) (broadly construing the amendment power). As will be discussed *infra* Subsection IV.B.4, in spite of the Court's broad reading of the amendment power, the House's power to originate revenue bills still sets the starting point for negotiations over tax legislation; it is mistaken to read this case law as rendering the Clause irrelevant.

40. 495 U.S. 385, 398 (1990).

41. *Id.* at 400-01 n.7.

42. *Id.* at 392 (citation omitted).

Thus, unlike the House's other internal rules, the Origination Clause is unwaivable and enforceable by the Court.<sup>43</sup> That is to say that the Court can strike down a bill in violation of the Origination Clause even though the House has chosen to waive its origination privilege or has improperly found a bill to be outside of the clause's reach. Under *Munoz-Flores*, the failure of the House to assert its right to implement legislation for tax treaties in the modern era does not cure constitutional violations.<sup>44</sup>

b. *The Meaning of "Raising Revenue"*

The Supreme Court is not the only judicial body to have struggled with the proper interpretation of the Origination Clause. In the lower courts, a large controversy concerning the Origination Clause began after passage of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).<sup>45</sup> These cases collectively have been understood to stand for the proposition that "raising revenue" for the purposes of the Origination Clause does not mean "increasing revenue."<sup>46</sup> In accordance with congressional practice, courts treat tax increases *as well as* tax cuts as within the scope of the Origination Clause.

TEFRA originated in the House of Representatives as a tax cut, and hence as a revenue-reducing act.<sup>47</sup> The Senate, however, struck out the entirety of the bill and substituted it with a tax increase, or revenue-raising act.<sup>48</sup> One influential TEFRA case, *Armstrong v. United States*,<sup>49</sup> involved a taxpayer seeking a refund of a portion of the tax assessed by TEFRA. The taxpayer asserted that the Origination Clause applied only to bills that increase taxes. For that reason, the taxpayer argued, TEFRA did not become such a bill until it originated in the Senate, in violation of the Origination Clause.<sup>50</sup>

The Ninth Circuit rejected that construction of the Origination Clause, holding that the House properly originated the bill.<sup>51</sup> Specifically, the court of appeals concluded that the Origination Clause applied to "all laws *relating to* taxes" for several reasons.<sup>52</sup> Its interpretation has been affirmed by four other

43. See Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1021-25 (2011) (discussing the endogeneity, i.e., the necessity of self-interpretation and self-enforcement by the adopting body, of legislative rules); Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 553-62 (2009) (providing an overview of legislative rules in the context of special interest disclosure rules).

44. See *infra* notes 283-284 and accompanying text.

45. Pub. L. No. 97-248, 96 Stat. 324 (1982).

46. JAMES V. SATURNO, CONG. RESEARCH SERV., RL 31399, THE ORIGINATION CLAUSE OF THE U.S. CONSTITUTION: INTERPRETATION AND ENFORCEMENT 8 (2011).

47. *Moore v. U.S. House of Representatives*, 553 F. Supp. 267, 269-70 (D.D.C. 1982) (recounting legislative history). The appellate court in *Moore* exercised remedial discretion to refuse to grant relief to House members raising an Origination Clause issue. The court left open the possibility that private taxpayers could bring Origination Clause challenges. *Moore v. U.S. House of Representatives*, 733 F.2d 946, 956 (D.C. Cir. 1984).

48. *Moore*, 733 F.2d at 956.

49. 759 F.2d 1378 (9th Cir. 1985).

50. *Id.* at 1381.

51. *Id.* at 1381-82.

52. *Id.* at 1381.

circuits<sup>53</sup> and, as discussed below, supports the conclusion that tax treaties improperly circumvent the Origination Clause even though they do not uniformly increase taxes.<sup>54</sup>

### 3. *Congressional Interpretations of the Origination Clause*

Congressional practice, perhaps no less than judicial interpretation, is crucial to understanding the Origination Clause. The primary method by which the Origination Clause is enforced is by a House resolution to return a bill to the Senate (referred to as “blue-slipping” because the resolution was historically printed on blue paper).<sup>55</sup> Although any member may deliver such a resolution, typically the Chair of the Ways and Means Committee does so. The consideration of the resolution by the House takes “precedence [over] all other questions except motions to adjourn.”<sup>56</sup> The House also informally enforces the clause through several different methods, including: (1) by ignoring a Senate passed revenue bill, instead taking action on a House bill;<sup>57</sup> (2) by using a conference committee to decide questions under the clause;<sup>58</sup> or (3) by taking up the bill yet excising the offending language.<sup>59</sup>

The House’s precedents have become important in defining whether a bill is for raising revenue.<sup>60</sup> In tension with case law holding otherwise, the House at times assumes that all legislation that may affect revenue, and not just legislation that does so directly, falls within the scope of the Origination Clause.<sup>61</sup> It also interprets the clause to include, as the case law above also concludes, tax cuts.<sup>62</sup> Historically, the House has issued blue-slips on a wide

53. *Texas Association of Concerned Taxpayers, Inc. v. United States*, 772 F.2d 163, 168 (5th Cir. 1985); *Wardell v. United States*, 757 F.2d 203, 205 (8th Cir. 1985) (per curiam); *Rowe v. United States*, 583 F. Supp. 1516, 1519 (D. Del. 1984), *aff’d mem.*, 749 F.2d 27 (3d Cir. 1984); *Heitman v. United States*, 753 F.2d 33, 35 (6th Cir. 1984) (per curiam).

54. See *infra* notes 151-173 and accompanying text.

55. See H.R. Res. 6 104th Cong. Para. 106 (1995) (enacted as House Rule XXI cl. (5)(c)).

56. House Rule IX, cl. 2(a)(1).

57. 3 LEWIS DESCHLER, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES ch. 13, § 18.1-18.5 [hereinafter DESCHLER’S PRECEDENTS].

58. 2 ASHER C. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ch. XLVII, § 1487 [hereinafter HINDS’ PRECEDENTS].

59. SATURNO, *supra* note 46, at 9-10.

60. House precedents concerning the Origination Clause include the following: 6 CLARENCE CANNON, CANNON’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ch. CLXXX (1935); DESCHLER’S PRECEDENTS, *supra* note 57, at ch. 13, pt. C; and 2 HINDS’ PRECEDENTS, *supra* note 58, at ch. XLVII. In addition, House actions to return Senate bills containing revenue provisions for the 97th-106th Congresses may be found in H.R. Rep. No. 106-1036, at 100-05 (2000).

61. For instance, the House has blue-slipped a bill to require the President to impose import restrictions on certain countries. See *Privileges of the House—Returning to the Senate the Bill S. 254, Violent and Repeat Juvenile Offender Accountability and Rehabilitation Act of 1999*, 138 CONG. REC. 3332, 3377 (1992).

62. See *Privileges of the House—Returning to the Senate the Bill S. 104, Nuclear Waste Policy Act of 1982*, 144 CONG. REC. H878-79 (daily ed. Mar. 5, 1999) (returning to the Senate a bill repealing a fee that was determined by the House to have a direct, negative impact on revenues). Language from an 1872 Senate Committee Report, reprinted in the *Precedents of the House of Representatives*, comports with this understanding:

Suppose the existing law lays a duty of 50 per cent upon iron. A bill repealing such law, and providing that after a certain day the duty upon iron shall be only 40 per cent, is still a bill for raising revenue, because that is the end in contemplation. Less revenue will be

variety of legislative measures, including a concurrent resolution reinterpreting portions of the Tariff Act of 1922; bills providing for an issuance of bonds; and a bill exempting the Olympic Games from taxation.<sup>63</sup>

The Senate also participates in determining the scope of the Origination Clause, although to a much lesser extent than the House. Mostly, its precedents serve to “underscore the House’s interpretation of what constitutes revenue in a constitutional sense.”<sup>64</sup> When the question whether a bill or amendment violates the Origination Clause arises in the Senate, a point of order typically is submitted by the Presiding Officer to the Senate Floor where the issue is debated and decided by a simple majority.<sup>65</sup> Most disagreement between the two houses has concerned the Senate’s authority to amend revenue bills. In the nineteenth century, for instance, the House took the position that Senate amendments had to be germane to the original bill.<sup>66</sup> Current precedent, however, recognizes that the Senate generally has the power to amend a House-originated revenue bill without regard to germaneness, but that it may not propose a revenue-related amendment to a non-revenue bill.<sup>67</sup>

## B. *History and Interpretations of the Treaty Clause*

### 1. *The Role of the Treaty Clause at the Founding*

In order to understand why self-executing tax treaties violate the Constitution, it is necessary to also explore the meaning of the Treaty Clause. The Treaty Clause, which is located in Article II, Section 2 of the Constitution, declares that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>68</sup>

Our task of ascertaining the meaning of this power and its relationship to the Origination Clause begins, again, at the Founding. The records of the debates at the Federal Convention indicate that Hamilton first proposed that the treaty power be vested in the President and Senate as part of his plan for a federal government.<sup>69</sup> The crisis over representation, however, foreclosed consideration of presidential powers until after the Great Compromise was

raised than under the former law, still it is intended to raise revenue, and such a bill could not constitutionally originate in the Senate, nor could such provisions be ingrafted, by way of amendment, upon any House bill which did not provide for raising—that is, collecting—revenue.

2 HINDS’ PRECEDENTS, *supra* note 58, ch. XLVII, § 1489 (emphasis added) (quoting S. REP. NO. 146 (1872)).

63. SATURNO, *supra* note 46, at 6.

64. *Id.* For instance, the Senate has sustained a point of order against a bill that paid revenues into the general Treasury fund and has refused to consider a bill whose import limitations would have directly affected tariffs. *Id.*

65. FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE, S. Doc. 101-28, at 685, 1215 (1992).

66. 2 HINDS’ PRECEDENTS, *supra* note 58, §§ 1481, 1489.

67. SATURNO, *supra* note 46, at 1.

68. U.S. CONST. art. II, § 2, cl. 2.

69. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 25, at 292.

reached.<sup>70</sup> Since the Great Compromise was understood as allocating power reasonably among the large and small states, giving more power to the Senate through the Treaty Clause after the agreement was struck proved controversial.<sup>71</sup> Eventually, delegates from the large states became persuaded by the view of the small states that the gravity of the origination privilege justified granting additional powers to the Senate, including the treaty power.<sup>72</sup>

Initial drafts of the Treaty Clause gave the treaty power to the Senate alone, without participation by the Executive.<sup>73</sup> Yet the exclusion of the President was overshadowed by the more controversial omission of the House.<sup>74</sup> Numerous proposals were made by the larger states to include the House.<sup>75</sup> For instance, George Mason, in seconding a motion in favor of the Origination Clause, did so in response to the possibility that the Senate could "sell the whole Country by means of Treaties."<sup>76</sup> Others agreed with Mason, going so far as to propose that the treaty power should be vested solely in the Executive and asserting that, if the House is removed from the treaty-making process, treaties should "not be final so as to alter the laws of the land, till ratified by legislative authority."<sup>77</sup>

During formal debates over the Treaty Clause, however, the Framers defeated a proposal that would have foreclosed treaties from being binding until "ratified by a law."<sup>78</sup> The opponents, including Madison, argued that implementation would be inconvenient in matters of negotiating alliances and peace treaties. Practice abroad became the subject of debate as some argued an act of Parliament was necessary in order to effectuate Great Britain's treaty obligations, while others disputed this characterization.<sup>79</sup>

Madison would hint that perhaps the House should participate only in non-peace treaties, but the drafting committee did not take up this suggestion.<sup>80</sup> One other relevant proposal was made and defeated, which would have required both House and Senate involvement in the consent of treaties.<sup>81</sup> The primary objection to the latter proposal was the "necessity of secrecy in the case of treaties" that forbade consideration of them by the whole Congress.<sup>82</sup> After further debate over the supermajority requirement in the Treaty Clause, the clause was approved in its current form.<sup>83</sup> Although the Treaty Clause was

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70. Arthur Bestor, "Advice" from the Very Beginning, "Consent" When the End Is Achieved, 83 AM. J. INT'L L. 718, 722 (1989).

71. *Id.* at 723.

72. Rosenberg, *supra* note 16, at 428.

73. Bestor, *supra* note 70, at 722.

74. *Id.* at 723.

75. *Id.* at 724.

76. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 25, at 297.

77. *Id.*

78. *Id.* at 392.

79. *Id.* at 393.

80. *Id.* at 394.

81. *Id.* at 538.

82. *Id.*

83. *Id.* at 550.

a topic of consternation among the states during their ratifying conventions, no amendments to the clause were adopted.<sup>84</sup>

In Federalist No. 64, John Jay justified the treaty power as one that must be delegated to those who are “best qualified” and who will “afford the highest security,” particularly in the case of treaties relating to “war, peace, and commerce.”<sup>85</sup> Jay further reasoned that, because Senators, at the time, were to be chosen by select electors rather than directly elected, and because their terms were longer and staggered, they would be best situated to represent national interests.<sup>86</sup> Like the Framers during the debates of the Constitutional Convention, Jay also explained that the treaty-making process, by confining it to the smaller house, assured secrecy and immediacy.<sup>87</sup> The House of Representatives, Jay argued, was elected too frequently to understand national concerns and, as a discontinuous body, should not be trusted with “great affairs” given that there was no mechanism to ensure transmission of information between successive Houses.<sup>88</sup> Hamilton would, by and large, reiterate Jay’s rationales in Federalist No. 75, arguing that, because of their composition and admission procedures, the Representatives would lack knowledge of foreign politics, a national interest, and an ability to maintain secrecy.<sup>89</sup> Additionally, convening the representatives for the task of approving treaties, Hamilton argued, would prove impracticable.<sup>90</sup>

Regional interests also provided another dimension to the history of the Treaty Clause. The supermajority requirement and involvement of the Senate was regarded as a mechanism that would disable the federal government from negotiating treaties against a particular region.<sup>91</sup> In the Continental Congress, a potential treaty with Spain would have given trade concessions that benefitted northern commercial interests in exchange for navigation rights to the Mississippi River that harmed the Western territories.<sup>92</sup> The Western minority of states successfully blocked the deal because of a supermajority requirement in the Articles of Confederation, and the fresh memory of the incident would mandate a similar protection of states’ interests in the Constitution. The carryover of the supermajority requirement from the Articles of Confederation, as well as the states’ equal representation in the Senate, prevented the Senate from straying from the responsibility of representing the States.<sup>93</sup> At the same time, the Treaty Clause strengthened the ability of the national government to overcome collective action problems and propagate international policy.<sup>94</sup>

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84. 3 STORY, *supra* note 18, § 1508.

85. THE FEDERALIST NO. 64, at 312 (John Jay) (Terence Ball ed., 2003).

86. *Id.*

87. *Id.*

88. *Id.*

89. THE FEDERALIST NO. 75 (Alexander Hamilton).

90. *Id.*

91. Hathaway, *supra* note 8, at 1281-86; Henry P. Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 748 (2010).

92. Hathaway, *supra* note 8, at 1281-82; Monaghan, *supra* note 91, at 748.

93. Hathaway, *supra* note 8, at 1283-85.

94. *Id.*

What precisely does it mean for the Senate to provide "advice and consent"? It has been suggested that the phrase was a technical term at the time of the founding, which required "close and continuous consultation . . . between a ruler and a council of state or privy council."<sup>95</sup> Initially, President Washington sought the advice of the Senate prior to treaty negotiations, but this approach rapidly broke down by the end of his second term due to his frustration with its inconvenience and impracticality.<sup>96</sup> Instead, Washington began to ask for Senate approval subsequent to treaty negotiations.<sup>97</sup> Today, the Senate's power to provide consent essentially gives it veto power over treaties,<sup>98</sup> and primary negotiating responsibility continues to fall to the President.<sup>99</sup> The Senate's modern role involves the approval or rejection of fully negotiated treaties by a two-thirds vote, at times conditioning its assent upon acceptance of expressed reservations.<sup>100</sup>

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As we have seen, the history of the Treaty Clause might be marshaled to conclude that implementing legislation is not constitutionally required. After all, proposals to do just that were resoundingly rejected at the Convention. Does this mean that the Treaty Clause does not require implementing legislation in any context? In my view, the answer is almost certainly no. It is difficult to read definitive meaning into the Framers' actions. First, the United States would not enter into a treaty predominantly involving taxes for another hundred years after the Founding,<sup>101</sup> and the modern bilateral income tax treaty, the subject of this Article, would not exist until 1932.<sup>102</sup> Thus, it may have been nearly impossible for the Framers to have conceived of a treaty predominantly involving revenue matters in the same manner as domestic legislation. The evolution of the case law, normative considerations, and congressional practice, however, cast self-executing tax treaties into constitutional doubt.<sup>103</sup>

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95. Bestor, *supra* note 70, at 725.

96. Hathaway, *supra* note 8, at 1280.

97. *Id.*

98. *See id.* at 726-27.

99. Kevin C. Kennedy, *Conditional Approval of Treaties by the U.S. Senate*, 19 LOY. L.A. INT'L & COMP. L.J. 89, 93-94 (1996); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 579 (1991).

100. Kennedy, *supra* note 99, at 95.

101. H. David Rosenbloom & Stanley I. Langbein, *United States Tax Treaty Policy, An Overview*, 19 COLUM. J. TRANSNAT'L L. 359, 361 (1981).

102. Tax Convention, U.S.-Fr., Apr. 27, 1932, 49 Stat. 3145.

103. *See infra* Part IV.



## 2. *The Relationship of Treaties to Domestic Law*

### a. *When Do Treaties Require Implementing Legislation?*

The Supremacy Clause is direct in its command: “This Constitution, Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby . . . .”<sup>104</sup> As set forth briefly above, the Supreme Court has interpreted this language to mean that treaties have the power and effect of domestic laws when, by their own terms, they operate without legislation or are, in other words, self-executing.<sup>105</sup> Specifically, the Court has reasoned that because treaties are the law of the land, they are equivalent to legislative acts in terms of judicial enforceability when they are self-executing.<sup>106</sup> Other treaties, known as non-self-executing treaties, have domestic legal effect only after Congress implements them through legislation.

The intent of the treaty-making nations generally determines whether the treaty is self-executing.<sup>107</sup> This judicial understanding of self-executing treaties has been widely debated by scholars, with some arguing that the Supremacy Clause expressly makes all treaties enforceable by courts, even when they are silent on the issue,<sup>108</sup> and others contending that the constitutional history prohibits self-executing treaties when the treaty abrogates Congress’ Article I powers.<sup>109</sup>

104. U.S. CONST. art. VI, cl. 2.

105. Although the precise meaning of “non-self-execution” is somewhat in dispute among scholars, courts generally treat non-self-executing treaties as not enforceable by the judiciary. Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self Execution*, 55 STAN. L. REV. 1557, 1588 (2003). Some scholars have argued that non-self-execution means only that the treaty fails to provide for a private right of action, thereby empowering courts to enforce treaties in situations not requiring a private right of action. See, e.g., David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 45 (2002). Professor Vázquez has helpfully explained that courts may refuse to enforce a treaty for various reasons. A treaty may require appropriations of money or the creation of a crime, for instance, which lies within the exclusive province of Congress. Others may be nonjusticiable due to standing requirements, a lack of a private right of action, or because the treaty-makers’ intent requires implementing legislation. See generally Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L. L. 695 (1995) [hereinafter Vázquez, *The Four Doctrines*]; Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 602 (2008) [hereinafter Vázquez, *Treaties as Law of the Land*]. In this Article, I generally refer to non-self-execution as the first type—taxes are within Congress’s exclusive province and therefore tax treaties cannot be judicially enforced as a constitutional matter.

106. *Foster v. Neilson*, 27 U.S. 253, 254 (1829) (holding that a treaty governing Spanish land grants in Florida was not self-executing).

107. CHRISTOPHER R. DRAHOZAL, *THE SUPREMACY CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 160 (2004) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114(a) (1987) (stating that treaties are “‘non-self-executing’ . . . if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation.”)).

108. See Flaherty, *supra* note 9; Vázquez, *The Four Doctrines*, *supra* note 105, at 698-700; Vázquez, *supra* note 9.

109. See Yoo, *Globalism*, *supra* note 9; Yoo, *Treaties and Public Lawmaking*, *supra* note 9, at 2255 (1999).

A recent Supreme Court case, *Medellin v. Texas*, does little to settle the academic debate, although it provides the most extended discussion of the self-execution doctrine. In *Medellin*, the Court held that a treaty obligation to comply with a decision of the International Court of Justice (ICJ) was not enforceable by the Court because the treaty was not self-executing, judging predominantly by its text and structure.<sup>110</sup>

One might read the *Medellin* opinion to create a presumption against self-execution, requiring clear language to the contrary before a treaty will be enforceable without implementing legislation, and lower courts have indeed done so.<sup>111</sup> Other scholars, however, have rejected such a reading, reasoning instead that *Medellin* is consistent with a presumption in favor of self-execution<sup>112</sup> or requires that self-execution “be resolved on a treaty-by-treaty basis.”<sup>113</sup> Regardless of how the Court ultimately settles this debate, it seems to have renewed its commitment to examine the text and surrounding circumstances of the treaty in order to ascertain the intent of the United States in determining judicial enforceability of a treaty.<sup>114</sup> Because the Court has now refused to enforce a treaty due to a lack of implementing legislation, it has also incentivized the Senate and Executive branch to provide clearer statements with regard to the self-execution of treaties,<sup>115</sup> including in the tax treaty context.<sup>116</sup> The subject of this Article, however—whether tax treaties can be self-executing as a constitutional matter—is a separate question.

#### b. *The Constitution and Conflicting Treaties*

Case law does not definitively resolve the important question of whether the Treaty Clause is absolute or instead limited by other parts of the Constitution. In *Missouri v. Holland*, the Supreme Court upheld the implementation of a treaty against a Tenth Amendment challenge.<sup>117</sup> Prior to

110. 552 U.S. 491 (2008). The Court also held that the President could not unilaterally force state courts to comply with the ICJ decision since the treaty first needed to be implemented by a law meeting the requirements of Article I, Section 7. *Id.* at 526.

111. See Hathaway et al., *supra* note 7, at 71-76 (finding that, post-*Medellin*, the lower courts have applied a presumption against self-execution for categories of treaties that, prior to *Medellin*, were presumed self-executing). Prior to *Medellin*, scholars extensively debated whether and if a presumption in favor of self-execution exists. See, e.g., LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 201 (2d ed. 1996); Flaherty, *supra* note 9, at 2128-29; Vázquez, *supra* note 9, at 2158; Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 633-37 (2007) (finding a presumption of self-execution in cases involving enforcement against states); Yoo, *Globalism*, *supra* note 9 (making a constitutional case against a presumption of self-execution).

112. Vázquez, *Treaties as Law of the Land*, *supra* note 105, at 660.

113. Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 540-41 (2008) (reading the decision “as requiring self-execution to be resolved on a treaty-by-treaty basis without resort to any general presumption”).

114. *Id.* at 540.

115. Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131, 182.

116. Although in the past, the Senate Finance Committee has included statements in its report that tax treaties are self-executing, recently and in response to *Medellin*, the advice and consent resolution of the Senate has formally recognized such treaties to be self-executing. See, e.g., S. Rep. No. 110-17, at 7 (2008) (consenting to the Tax Convention with Iceland subject to the declaration that the Convention is self-executing).

117. 252 U.S. 416 (1920).

the negotiation of the treaty, Congress passed a statute regulating the hunting of migratory birds, which was struck down by two lower federal courts because it was not within an enumerated power of Congress. The Justice Department tried a different tactic by pushing a treaty between the United States and Canada that would protect migratory birds, arguing that Congress could then reenact the unconstitutional statute under its power to do what is “necessary and proper” to carry the treaty power into execution.<sup>118</sup>

Justice Holmes wrote that, in part because the treaty did not “contravene any prohibitory words to be found in the Constitution,” the Tenth Amendment did not limit it. The Court went on to say that it did not “mean to imply that there are no qualifications to the treaty-making power,”<sup>119</sup> although it gave no indication what such limitations were. In dismissing the constitutional challenge to the statute implementing the treaty, the Court effectively held that the treaty power was one of the powers delegated to the federal government and that the Tenth Amendment only reserved to the states non-delegated powers.<sup>120</sup> In so holding, the Court implicitly concluded that Congress could implement a non-self-executing treaty through legislation, even though Congress lacked the power to enact the legislation in the non-treaty context.<sup>121</sup>

In a later case, *Reid v. Covert*, a plurality of the Court moved away from *Holland* by rejecting the argument that a treaty could override individual rights guaranteed by the Sixth Amendment in the Constitution, distinguishing *Holland* as specific to the Tenth Amendment context.<sup>122</sup> To hold otherwise, the plurality reasoned, “would be manifestly contrary to the objectives of those who created the Constitution, as well as to those who were responsible for the Bill of Rights—let alone to our entire constitutional history and tradition.”<sup>123</sup> According to the plurality, the Framers’ failure to limit the treaty power to those treaties made “in ‘pursuance’ of the Constitution” was only to leave in place agreements made under the Articles of Confederation following the Revolutionary War.<sup>124</sup> Since *Covert*, the Court has implied that obligations under international law are subject to constitutional restraints such as the First

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118. HENKIN, *supra* note 111, at 190.

119. *Holland*, 252 U.S. at 433.

120. A recent Supreme Court case, *Golan v. Holder*, 132 S. Ct. 873 (2012), involved a constitutional challenge that the Copyright Clause functions as an impediment to enacting a law implementing a treaty. The *Golan* Court held that there was no constitutional violation of the Copyright Clause and hence did not reach the issue. In another case recently remanded to the Third Circuit, the Court held that an individual had standing to argue that a federal law enforcing a treaty violated the Tenth Amendment. *Bond v. United States*, 131 S. Ct. 2355 (2011). The *Bond* Court expressed no view on the merits of the argument. Upon remand, the Third Circuit held that the subjects of implementing legislation were not confined to those enumerated in Article I, Section 8. *United States v. Bond*, 681 F.3d 149 (3d Cir. 2012). A petition for certiorari from that appeal is currently pending before the Court.

121. See Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1880 (2005).

122. *Reid v. Covert*, 354 U.S. 1, 17 (1957) (holding that spouses of military workers are not subject to unconstitutional trials despite a treaty between the United States and Great Britain that granted military jurisdiction over such individuals to the United States).

123. *Id.* at 17.

124. *Id.* at 16-17.

Amendment.<sup>125</sup> As I explain below in Section IV.B., this precedent supports the conclusion that the treaty power cannot be used to circumvent the Origination Clause.

c. *Statutes and Conflicting Treaties: The Last In Time Rule*

Also relevant to our inquiry is the so-called last in time rule. Because the Supremacy Clause ranks both treaties and statutes as the “supreme” laws of the land, the Supreme Court has interpreted them to have equal standing. In the case of a conflict between the two, the Court in *Whitney v. Robertson* adopted the last in time rule, which famously holds that, as between treaties and statutes, whichever was enacted most recently controls.<sup>126</sup> Accordingly, a later-enacted statute overrides an earlier, conflicting treaty<sup>127</sup> and, conversely, a later-ratified treaty supersedes an earlier, contrary statute.<sup>128</sup> Because the last in time rule has only domestic effect, when the former occurs, the United States violates its international commitments.<sup>129</sup> Scholars have attacked the last in time rule both for policy reasons and as contrary to the Framers’ intent;<sup>130</sup> however, others have answered these critiques<sup>131</sup> and the Court has repeatedly embraced it.<sup>132</sup>

### III. UNDERSTANDING TAX TREATIES

The prior discussion of the evolution and interpretation of the Origination, Treaty, and Supremacy Clauses is necessary to appreciate these clauses’ effects in the realm of tax treaties. The below discussion provides a brief overview of tax treaties and describes their status vis-à-vis domestic law.

125. In *Boos v. Barry*, 485 U.S. 312 (1988), the Court held that a local law protecting foreign diplomats by forbidding signs near embassies in accordance with treaty obligations is contrary to the First Amendment. In dicta, the court stated that an interest under international law did not necessarily render the interest compelling for purposes of First Amendment analysis. It, however, did not resolve the issue since the local law was not narrowly tailored to serve any such interest, whether compelling or not. See also *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 416 (2003) (citing *Boos*, 485 U.S. at 324; *Reid*, 354 U.S. at 15-19) (stating in dicta that both treaties and executive agreements must comport with individual rights as provided by the Constitution).

126. *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888).

127. *Breard v. Greene*, 523 U.S. 371, 376 (1998) (denying relief to a defendant for a habeas challenge under the Vienna Convention due to a later enacted law that procedurally barred such a claim).

128. *Cook v. United States*, 288 U.S. 102, 118-19 (1933) (holding that a treaty between the United States and Great Britain amended an extant statute authorizing inspections of foreign vessels).

129. For critiques of the last in time doctrine, see Kesavan, *supra* note 9; and Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 254 (2000).

130. See Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT’L L. 406, 425-26 (1989); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1099 (1985).

131. Peter Westen, *The Place of Foreign Treaties in the Courts of the United States: A Reply to Louis Henkin*, 101 HARV. L. REV. 511, 512, 516 (1987) (justifying the last in time rule as a type of political question doctrine).

132. Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT’L L. 393 (1988). Louis Henkin argued that the equality between treaties and domestic laws was not an inevitable reading of the Supremacy Clause by the Court. To illustrate, Henkin states that “3 and 2 are both ‘supreme’ to 1 but they are not equal.” HENKIN, *supra* note 111, 210 n.\*.

### A. Key Functions of Tax Treaties

The United States has entered into bilateral tax treaties for over three-quarters of a century,<sup>133</sup> with its first adopted in 1932.<sup>134</sup> Tax treaties overlay the domestic international tax rules of the United States, which consist of two regimes: one governing the international activities of United States persons abroad and one governing the activities of foreign persons in the United States. Tax treaties are generally bilateral agreements whose stated purpose is to alleviate the phenomenon of double taxation and to avoid fiscal evasion.<sup>135</sup> Double taxation occurs because taxation of international transactions differs among nations. For instance, in the United States, Congress taxes the nation's residents based on income they earn around the globe. This is called a worldwide, or residence-based, system of taxation.<sup>136</sup> Other countries will tax any income that is sourced to that country through some nexus, such as taxing interest income where funds are borrowed. For that reason, if a United States resident earns interest on bonds from a Canadian corporation, both the United States and Canada will tax that income—hence the term “double” taxation. Tax treaties are a device nations use to resolve such conflicts.

Why is double taxation thought to be a problem? The treaty network is intended to lower taxes in order to increase international trade and investment. To this end, income-tax treaties typically limit taxing jurisdiction and cannot, by their own terms, be used to increase a taxpayer's United States tax liability. It would seem then that tax treaties generally serve to reduce United States revenues, but this is not always the case. If the foreign tax of United States taxpayers is reciprocally reduced or exempted by the tax treaty, the income is still subject to United States tax but with a reduced or eliminated foreign tax credit offset, reflecting the lower foreign tax paid as a result of the treaty. This amounts to a larger United States tax liability. Thus, to the extent this effect outweighs revenue lost by lower withholding rates on foreign persons, the overall United States revenue might actually be *increased* as a result of the entrance of the United States into a treaty. The net revenue effect is dependent upon overall capital flows between the countries.<sup>137</sup>

133. See, e.g., Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts and Unsatisfactory Policies*, 26 BROOK. J. INT'L L. 1357, 1357-62 (2001) (detailing the history of tax treaties); Michael J. Graetz & Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 DUKE L.J. 1021, 1066-89 (1997) (same).

134. Tax Convention, *supra* note 102.

135. United States Model Income Tax Convention, Nov. 15, 2006, <http://www.treasury.gov/press-center/press-releases/Documents/hp16801.pdf> (describing in the title and preamble the convention's aims to avoid double taxation and prevent fiscal evasion). Although tax treaties have a stated purpose to eliminate double taxation, modern welfare theory would deem the increase in investment flows between countries as the relevant economic concern. I argue below that improvement of the tax treaty process might clarify the purpose of tax treaties to reflect this and other important policy goals. See *infra* notes 211-212 and accompanying text.

136. PAUL MCDANIEL ET AL., INTRODUCTION TO UNITED STATES INTERNATIONAL TAXATION 87 (5th ed. 2005).

137. See REUVEN S. AVI-YONAH, INTERNATIONAL TAX AS INTERNATIONAL LAW 170 (2007). See generally MICHAEL J. GRAETZ, FOUNDATIONS OF INTERNATIONAL INCOME TAXATION (2003) (discussing the international legal system for taxation).

### B. *The Tax-Treaty-Making Process*

The tax treaty-making process began in 1928 when the League of Nations issued a draft model double-income tax treaty.<sup>138</sup> Today, the more than three thousand tax treaties around the world,<sup>139</sup> including the nearly seventy into which the United States has entered,<sup>140</sup> are based on the League of Nations model, which in turn is the predecessor of both the United States model treaty and the Organisation for Economic Cooperation and Development (OECD) model treaty.<sup>141</sup> The basic structure of the United States' tax treaties remains heavily influenced by these model treaties but important details do vary widely across the various individual treaties and across time. They are indeed the product of extensive negotiations among representatives of the United States, generally officials from the Treasury Department's Office of International Tax Counsel and the Office of Tax Analysis (Business and International Taxation), and officials from the other country. Once a treaty has been negotiated, the text is approved by the State Department and signed by executive officials, typically the Secretary of State or the United States Ambassador in the United States.<sup>142</sup>

The treaty is then submitted to the Senate for advice and consent to ratification. The Senate Foreign Relations Committee reviews the treaty and its accompanying explanations prepared by the Treasury Department and the Joint Committee on Taxation. After its review, the Committee sends the treaty to the Senate floor. The full Senate debates the treaty, possibly with changes recommended by the Committee, with consent rendered by a vote of two thirds of the Senators present. After the Senate approves a resolution ratifying the treaty, the President typically brings the treaty into force by exchanging signed ratification instruments with the treaty partner.<sup>143</sup>

### C. *Tax Treaties as Self-Executing*

Although a treaty may be ratified and in force, it may not necessarily have legal effect. As discussed above,<sup>144</sup> some treaties, by their own terms, require implementing legislation. Previous commentators agree that tax treaties do not require such legislation and are enforceable as soon as the treaties are ratified,<sup>145</sup> although they have not provided any in-depth analysis of the issue.

138. *Report Presented by the General Meeting of Government Experts on Double Taxation and Tax Evasion*, League of Nations Doc. C.562M.178 1928 II (1928).

139. Press Release, Organisation for Economic Co-operation and Development (OECD), OECD Model Tax Convention: 50 Years of Promoting a Business-Friendly Tax Environment. (Apr. 9, 2008), <http://www.oecd.org/newsroom/oecdmodeltaxconvention50yearsofpromotingabusiness-friendlytaxenvironment.htm>.

140. Christians, *supra* note 2, at 1419.

141. Graetz & O'Hear, *supra* note 133, at 1066; Victor Thuronyi, *Tax Cooperation and a Multilateral Tax Treaty*, 26 BROOK. J. INT'L L. 1641, 1641 (2001).

142. ALLISON CHRISTIANS ET AL., UNITED STATES INTERNATIONAL TAXATION 184 (2d ed. 2011).

143. *Id.* at 184.

144. *See supra* notes 106-109.

145. *Columbia Marine Servs., Inc. v. Reffet Ltd.*, 861 F.2d 18 (2d Cir. 1988) (assuming that a tax treaty is self-executing); BORIS BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME,

The text of bilateral tax treaties may render them self-executing even in light of *Medellín*.<sup>146</sup> This result would comport with current practice whereby taxpayers claim the benefits provided by such treaties, with the blessing of both Congress and the Treasury Department.<sup>147</sup> We need not, however, decide the issue with finality here since our inquiry is whether such legislation is constitutionally mandated, regardless of treaty language.

Related to the question of whether tax treaties are self-executing is the question of whether they have actually been implemented by legislation. Although Congress does not implement individual income tax treaties through legislation post-ratification, it could be argued that Section 894(a) of the Code, which requires that “[t]he provisions of this title shall be applied to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer,”<sup>148</sup> effectively achieves implementation of *all* tax treaties.<sup>149</sup> The extensive legislative history of this provision, however, contains no reference that this was indeed its meaning; instead the history, indicates that it was simply enacted as a codification of the last in time rule, and it has been interpreted by commentators accordingly.<sup>150</sup>

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ESTATES AND GIFTS ¶ 65.4.1 (2012) (“Tax treaties are ratified by the Senate alone and are regarded as self-executing, which means that they have the force of law even though not enacted as a statute.”); Michael P. Van Alstine, *Federal Common Law in the Age of Treaties*, 89 CORNELL L. REV. 892, 923 (2004); Wu, *supra* note 111, at 591 n.62 (detailing tax cases across four decades where the courts “directly enforce[d] treaties without even discussing whether they [were] ‘self-executing’”).

146. See, e.g., UNITED STATES MODEL INCOME TAX CONVENTION art. 28 (2006) (“This Convention shall enter into force on the date of the exchange of instruments of ratification, and its provisions shall have effect.”). To clarify the issue in light of *Medellín*, the Senate has recently begun to attach declarations to its advice and consent that the tax treaty at issue is self-executing. See, e.g., S. TREATY DOC. NO. 110-17 (2008) (consenting to the Tax Convention with Iceland subject to the declaration that the Convention is self-executing).

147. Michael S. Kirsch, *The Limits of Administrative Guidance in the Interpretation of Tax Treaties*, 87 TEX. L. REV. 1065, 1073-74 (2009).

148. 26 U.S.C. § 894(a) (2006).

149. For instance, John Yoo contests the “long pedigree of complete interchangeability” of congressional-executive agreements and Article II treaties. John Yoo, *Laws as Treaties? The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 812 (2001). Instead, he argues that the former addresses subjects traditionally within Congress’s purview, such as international trade, and that the latter are reserved to areas traditionally within Executive authority, such as “national security, arms control, human rights, and the environment.” *Id.* at 811. The observation that tax treaties are uniformly enacted through the Article II process challenges this bifurcation since tax is quintessentially within Congress’s domain. Yoo recognizes tax treaties as a possible exception to his thesis but attempts to argue that they have been implemented through Sections 894 and 7852(d) of the Internal Revenue Code. *Id.* at 811 n.218.

150. CONFERENCE REPORT ON H.R. 4333 TECHNICAL AND MISCELLANEOUS REVIEW ACT OF 1988, H.R. REP. NO. 100-1104, at 12 (1988) (Conf. Rep.). According to the legislative history, the “due regard” language in Section 894(a) “simply provides for giving the treaty that regard which is due under the ordinary rules of interpreting the interactions of statutes and treaties.” Thus, “where a treaty obligation has been superseded for internal U.S. law purposes, no effect need be given to the treaty under the agreement provision.” *Id.*; see BITTKER & LOKKEN, *supra* note 145, ¶ 65.4.1. This reading is consistent with Section 894’s cross-reference to Section 7852, which essentially codifies the last in time rule. BITTKER & LOKKEN, *supra* note 145, ¶ 65.4.1. The final versions of Sections 894(a) and 7852 were drafted as a compromise between the House’s position that later enacted statutes would always trump treaties, regardless of intent, and the IRS’s position that a statute must explicitly override a treaty in order for it to take precedence. See Irwin Halpern, *United States Treaty Obligations, Revenue Laws, and New Section 7852(d) of the Internal Revenue Code*, 5 FLA. INT’L L.J. 1 (1989); see also Kathleen Matthews, *Treasury Encouraged by Finance Treaty Override Substitute*, 40 TAX NOTES 662 (1988). Relatedly, although the House could implement all treaties in existence, blanket implementation of all

## IV. SELF-EXECUTING TAX TREATIES AS CONSTITUTIONALLY SUSPECT

The above discussion makes evident the historical and practical importance of both the Origination Clause and the Treaty Clause. This Section argues that the interaction of those two clauses renders self-executing tax treaties constitutionally suspect.

A. *Tax Treaties Fall Within the Scope of the Origination Clause*1. *Tax Treaties "Raise Revenue"*

In order to assess the constitutional issues raised by self-executing tax treaties, we must examine the scope of the Origination Clause to determine whether tax treaties fall within its ambit. The Origination Clause has been construed to encompass those classes of laws whose primary purpose (rather than an incidental effect) is to raise money.<sup>151</sup> Although tax treaties have a stated purpose of mitigating double taxation and increasingly seem to also be employed to increase investment flows between countries,<sup>152</sup> these purposes do not nullify their impact upon revenues.<sup>153</sup>

In other contexts, such as whether legislation is a tax within the meaning of the Anti-Injunction Act, the Court has explicitly abandoned "distinctions between regulatory and revenue-raising taxes."<sup>154</sup> The Court's decision reflects the reality that "[e]very tax is in some measure regulatory."<sup>155</sup> An opposite conclusion would require the Court to examine hidden motivations for a tax.<sup>156</sup> The recent health care decision reaffirms the Court's unwillingness to resurrect

future treaties may not absolve subsequent treaties from the constitutional requirement of implementation. This would be akin to a waiver by the House of its origination power, in violation of the case law thereunder. *See* *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990).

151. *See infra* notes 154-162 and accompanying text.

152. *See infra* notes 208-209 and accompanying text.

153. Although my conclusion has implications for all treaties containing revenue-raising provisions, the primary focus of this Article is upon modern bilateral income tax treaties. Generally, the Supreme Court has held that legislation must have a primary purpose of raising revenue to fall within the ambit of the Origination Clause. *See infra* notes 154-162 and accompanying text. Modern bilateral income tax treaties fit squarely within this range of cases since their primary subject matter involves revenue. It could be argued that some provisions therein, such as information exchange provisions, are severable from the revenue portions of the treaty, although I think such a conclusion is overly formalistic. *See infra* notes 309-314 and accompanying text. In the context of domestic legislation, the line between revenue and non-revenue legislation can be blurry and this definitional difficulty would continue in the treaty context. For instance, tax cuts bear a resemblance to spending provisions in that both can deliver benefits to a favored group. Fees covering the cost of a government benefit may also resemble taxes, although the House, in asserting its privilege under the Origination Clause, has concerned itself primarily with fees deposited into the general fund rather than fees tied to the cost of government services. *SATURNO*, *supra* note 46, at 5. Finally, it is important to note that trade treaties, a conspicuous category of treaties potentially containing revenue-raising provisions, are generally enacted as congressional-executive agreements rather than Article II treaties and thus do not violate the Origination Clause.

154. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974).

155. *Sozinsky v. United States*, 300 U.S. 506, 513 (1937).

156. *Id.* at 513-14.



the distinction between taxes and regulatory measures in establishing the parameters of the taxing power.<sup>157</sup>

An attempt to maintain a distinction between taxes that regulate conduct and those that do not, applying the protection of the Origination Clause only to the latter, would render the Clause a nullity. Perhaps for this reason, the Court instead appears to focus on whether fees collected by the government are for the general coffers of the government, in which case they are taxes subject to the Clause, or whether they are to fund a single purpose, in which case they are not.<sup>158</sup> For instance, the Court has held that a bill taxing property in the District of Columbia in order to provide the District with railroad terminals, was not a bill to raise revenue within the meaning of the Clause.<sup>159</sup> Similarly, the Court rejected characterization of bank fees that would help establish a bond-backed currency as taxes.<sup>160</sup>

Revenues affected by tax treaties do not fund a specific program or purpose and instead fund the general “expenses or obligations of the government.”<sup>161</sup> Neither do they constitute quid pro quo arrangements of the type identified by the lower courts as falling outside of the scope of the Clause. In *United States ex rel. Michels v. James*, a New York district court held that a bill to increase postage rates did not constitute a revenue bill because citizens received postal service in exchange.<sup>162</sup> The court reasoned that revenue bills must either directly or indirectly impose taxes, or their equivalent, for the government’s use with no quid pro quo exchange.<sup>163</sup> The Origination Clause, it argued, placed the power to originate taxes within the house most accountable to the people out of concern that the government could exploit its citizens; a voluntary payment for postal services does not fall within the category of the Framers’ concern.<sup>164</sup> The encouragement of investment flows and tax incentives provided by a treaty, although beneficial to certain taxpayers, does not resemble a bargained-for transaction between the government and the taxpayers. If pure economic benefits constituted a quid pro quo exchange, then virtually all tax benefits would fall outside the scope of the Clause.

Tax treaties do “rais[e] revenue”<sup>165</sup> in accordance with the language of the Clause. Although one could read such words to encompass only legislation that *increases* government revenue, as discussed above, appellate courts have consistently rejected such an interpretation and instead have held that legislation that *relates* to taxes falls within the scope of the Clause.<sup>166</sup> Such a

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157. See *Nat’l Fed. of Indep. Bus. v. Sebelius*, No. 11393, slip op. at 36-37, 42-43 (June 28, 2012).

158. See Kysar, *supra* note 22 (discussing this general pattern in the case law under the Origination Clause).

159. *Millard v. Roberts*, 202 U.S. 429 (1906).

160. *Twin City Bank v. Nebeker*, 167 U.S. 196 (1897).

161. *Id.* at 203.

162. 26 F. Cas. 577, 578 (S.D.N.Y. 1875).

163. *Id.*

164. *Id.*

165. U.S. CONST. art. I, § 7, cl. 1.

166. See *supra* notes 45-53 and accompanying text.

reading also comports with the reality that, “[at] the time the Constitution was written, a tax bill in a generic sense and a tax bill that raised revenues above the previous year’s revenue were tautologous.”<sup>167</sup> If we are to conclude that the original meaning of the Clause was to protect all tax bills, then the existence of only revenue-increasing bills at the founding should not limit the Clause’s scope to such bills. The democratic concerns motivating the Clause, after all, apply equally to revenue-decreasing bills since our revenue system is essentially a zero sum game; accordingly, even certain tax cuts may harm the public.

It could, however, be argued that the Court has expressed a willingness to examine whether revenues were increased. In *Munoz-Flores*, the Court held that a law imposing a monetary assessment on criminals to compensate victims of crime did not constitute a tax.<sup>168</sup> The Court reasoned that although the legislation at issue specified that assessments exceeding a certain amount would be deposited into the general Treasury, in fact no excess revenues occurred.<sup>169</sup> The Court’s inquiry into the *amount* of revenues collected, however, was relevant only tangentially to the question of whether they funded a specific program or the general Treasury. Where that concern does not exist, the amount of revenues collected should be irrelevant, in accordance with the Clause’s meaning.

The appellate courts correctly reasoned that interpreting the clause to require only a relation to revenues, regardless of direction, comports with dictionary definitions and Congressional precedent.<sup>170</sup> A contrary interpretation would drastically reduce the Senate’s amendment power since the Senate would be forbidden from proposing amendments that would turn tax cuts into tax increases.<sup>171</sup> It would also be practically impossible to adopt due to the inability to predict the precise revenue impact of the law. This is the case for tax treaties as well, which have the potential to increase or decrease revenues depending on the directional flows of investment.<sup>172</sup> This constitutional analysis admittedly overturns a widespread view among practitioners and the Internal Revenue Service that tax treaties must not increase tax liability in order to avoid violation of the Origination Clause.<sup>173</sup> Nevertheless, it comports with the case law and is necessary in light of the difficulties implementing an opposite approach.

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167. John L. Hoffer, *The Origination Clause and Tax Legislation*, 2 B.U. J. TAX L. 1, 5 (1984).

168. *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990).

169. *Id.* at 399.

170. *Armstrong v. United States*, 759 F.2d 1378, 1381 (9th Cir. 1985) (citing BLACK’S LAW DICTIONARY 1133 (rev. 5th ed. 1979)).

171. *Id.*

172. *See supra* Section III.A; *see also* *Wardell v. United States*, 757 F.2d 203, 205 (8th Cir. 1985); *Armstrong*, 759 F.2d at 1381 (“The term ‘Bills for raising Revenue’ does not refer only to laws *increasing* taxes, but instead refers in general to all laws *relating* to taxes.”); 2 HINDS’ PRECEDENTS, *supra* note 58, at 949-53.

173. U.S. CONST. art. I, § 7, cl. 1; *see supra* note 6 and accompanying text.

## 2. Tax Treaties as “Bill” Substitutes

A more difficult textual question arises in considering whether a treaty is a “bill[] for raising Revenue.”<sup>174</sup> There is no discussion in the historical records indicating a definition of this term.<sup>175</sup> Today, we think of a bill as a draft statute, before it becomes law. This definition could fairly encompass a treaty since such an instrument is given legal status under the Supremacy Clause and under international law. Although not a draft statute, it is a draft law. Indeed, one court has stated that “all laws relating to taxes” fall within the scope of the Origination Clause and that tax treaties constitute such laws.<sup>176</sup>

The Founders did, however, distinguish between laws and bills in the text of the Constitution. For instance, Article I, Section 9 provides that “no money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” Thus, one could argue that the appropriations power necessarily limits the treaty power since treaties are laws; the same cannot be said for the origination power, which only applies to bills. Yet such an interpretation misses the context of the origination power, which, by definition, only applies to laws in draft form. A “bill” is, after all, shorthand for a draft law. Thus, we cannot read much into the choice of phrasing the Origination Clause as applying to bills, as opposed to the Appropriations Clause’s reference to laws. Rather than indicating intent that the Appropriations Clause limits the treaty power in a way that the Origination Clause did not, it is more likely that the Framers only wished to conveniently convey that the origination power necessarily applied to laws in draft form.

Such a reading comports with the sensible view that enacting law through other means should not be an end-run around the exclusive requirements for creating revenue-raising legislation. This interpretation roots itself in case law striking down actions that avoid the precise constitutional procedures for enacting law. For instance, in *INS v. Chadha*, the Court struck down Congress’s ability to effectively amend legislation outside of the Article I, Section 7 procedures.<sup>177</sup> The *Chadha* Court held that a one-house legislative veto violated the requirements of bicameralism and presentment. The case involved an immigration statute authorizing the INS to suspend deportation in cases of extreme hardship, a finding that could be vetoed by either house of Congress. In effect, the Court held that, although Congress’s action did not constitute a bill, per se, its intention was to enact law outside of the “‘finely wrought’ procedure that the Framers designed” through which bills became laws.<sup>178</sup>

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174. U.S. CONST. art. I, § 7, cl. 1 (emphasis added).

175. J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 469 (1990) (“Neither the Constitution, the debates from the Constitutional Convention, nor *The Federalist* define ‘bill’ . . .”).

176. *Armstrong*, 759 F.2d at 138.

177. *INS v. Chadha*, 462 U.S. 919 (1983).

178. *Id.* at 951. To be sure, the *Chadha* Court listed the treaty power as one of four provisions “by which one House may act alone with the unreviewable force of law.” *Id.* at 955. *Chadha*’s usefulness is hence limited to the inquiry of whether or not self-executing tax treaties should be considered impermissible substitutes for bills, for purposes of the Origination Clause; not whether all treaties are subject to Article I, Section 7 procedures. Because there is little historical evidence as to

Similarly, the Origination Clause designates the exclusive procedures through which an instrument, even if not a "bill," has to progress.<sup>179</sup>

Indeed, the Framers took precautions to protect against evasion of the strict requirements of Article I, Section 7, Clause 2. During the final debate on that clause, James Madison expressed concern that congressional members might simply call a proposed law a "resolution," "order," or "vote" rather than a "bill," thus circumventing the Presentment Clause.<sup>180</sup> Clause 3 was subsequently added as a corollary to Clause 2 to address this concern.<sup>181</sup> Although similar protections were not put in place for tax treaties, the existence of which was not yet contemplated, one might take from this account a general intent that subsequent lawmakers not bypass the procedural limitations of Article I through nonbill vehicles.<sup>182</sup>

Following this reasoning, even if tax treaties do not directly fall under the scope of the Origination Clause, they should not serve as an end-run around it without causing grave constitutional concerns. International tax agreements

what constitutes a "bill," the principle of *Chadha* can serve as a gap-filling precedent that enhances our understanding of that term. In light of the special considerations given to revenue legislation, as evidenced by the Origination Clause and its history, we should construe the Origination Clause to encompass those laws, such as tax treaties, that serve to circumscribe it.

179. This adherence to process is illustrated further in *Clinton v. City of New York*, where the Court struck down the President's ability to effectively amend legislation outside of the Article I, Section 7 procedures. 524 U.S. 417 (1998). At issue in *City of New York* was the Line Item Veto Act of 1996 (LIVA), whereby the President was granted the ability to cancel, after signing legislation into law, (i) discretionary budget authority; (ii) new direct spending; or (iii) limited tax benefits. Pub. L. No. 104-130, § 2, 110 Stat. 1200, 1200 (1996). Congress could subsequently nullify any such cancellation by enacting a disapproval bill and overriding a veto of any such bill. The Supreme Court held that LIVA violated the Presentment Clause of the U.S. Constitution because it effectively allowed the President to amend or repeal statutes—a legislative function—without following the constitutional requirement of bicameralism. *Clinton*, 534 U.S. at 445-46.

180. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 25, at 301.

181. *Id.* at 304-05. Article I, Section 7, Clause 3 provides:

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

U.S. CONST. art. I, § 7, cl. 3.

182. One could potentially construe this argument to encompass administrative guidance, such as treasury regulations. Because such guidance does not originate in the House, so the argument would go, it violates the Origination Clause. Unlike tax treaties, however, administrative guidance exists under general or specific delegations from the House. Interpretive regulations, for instance, are issued under the authority delegated from 26 U.S.C. § 7805(a). Legislative regulations are authorized by specific Internal Revenue Code provisions. The House's involvement in this manner reduces or eliminates constitutional concerns regarding treasury regulations. *See also* *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 220-23 (1989) (rejecting the contention that the Origination Clause limits congressional authority to delegate its taxing power to the executive branch). Additionally, unlike tax treaties, both types of regulations are subject to challenge if they deviate from congressional intent regarding the interpretation of the Code or do not fall within these delegations. The House can also initiate legislation overriding regulations. Although the House has this option in the tax-treaty context as well, doing so violates international law. The House's omission in the tax-treaty context is accordingly of much greater concern. One could further argue, however, that the House's silence in the tax-treaty context could be interpreted as acquiescence to the model treaty, which is akin to delegation. For reasons explored in the text, I find it difficult to accept Congress's silence as acquiescence and instead interpret it as a product largely of historical happenstance and standing issues. *See infra* notes 285-294 and accompanying text. The author thanks Gillian Metzger and Michael Graetz for raising these issues.

should instead, as the thesis of this Article advances, consist of (a) tax treaties implemented with legislation or (b) congressional-executive agreements. This reading recognizes the constitutionally mandated special and exclusive means through which revenue-raising laws must pass.

B. *The Origination Clause as a Constitutional Limit on the Treaty Power*

The treaty power is bound by certain constitutional limits, one of which is the Origination Clause.<sup>183</sup> The best reading of the case law in this area<sup>184</sup> is that Congress may not invoke the treaty power to transgress an express constitutional prohibition that applies to the federal government. As discussed below, application of this principle to the matter at hand leads to the conclusion that the Origination Clause indeed limits the treaty power, despite *Missouri v. Holland*'s holding that the Tenth Amendment does not act as such a limit.

The *Reid v. Covert* Court distinguished *Missouri v. Holland* by concluding that the treaty at issue in *Holland* violated no express prohibitions otherwise found in the Constitution and thus differed from the executive agreement in *Reid*, which violated the Sixth Amendment.<sup>185</sup> By requiring that revenue laws be made within the Article I, Section 7 apparatus, the Origination Clause is an express prohibition akin to the Sixth Amendment. Both constitutional provisions limit the actions of the federal government as a whole. By contrast, Article I, Section 8's enumeration of powers (at issue in *Missouri v. Holland*), by its own terms, curtails only the powers of the legislative branch and not those of the federal government. In other words, Article I, Section 8 enumerates the limited areas in which Congress can legislate but does not foreclose the sharing of those powers with the rest of the federal government. In contrast, the Origination Clause prescribes precise and exclusive procedures through which revenue bills are to become law, necessarily applying to the federal government as a whole.

Moreover, the larger context of the Commerce Clause jurisprudence within which *Missouri v. Holland* resides casts doubt upon the case's constitutional significance. The environmental concerns of the Migratory Bird Act at issue in the case constitute matters of interstate and transnational importance. Under the modern Commerce Clause jurisprudence that developed within a few decades of the decision, Congress would no longer need an

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183. See *supra* notes 119-125 and accompanying text; see also *Reid v. Covert*, 354 U.S. 1, 17-18 (1985) ("The prohibitions of the Constitution were designed to apply to all branches of the National Government, including the Congress, the Executive . . . [and] the Executive and the Senate combined.").

184. See *supra* notes 117-125 and accompanying text (discussing *Missouri v. Holland*, 252 U.S. 416 (1920); *Reid*, 354 U.S. at 1). The *Missouri* Court held that a non-self-executing treaty can bestow upon Congress power prohibited by the Constitution while the *Reid* Court held that international agreements cannot authorize Congress to violate the Sixth Amendment. Although *Reid* produced a plurality opinion in which "the point was squarely made only in the opinion of Justice Black . . . the proposition seems inherent in the concurring opinions of [two justices]" and none of the justices took exception to Black's conclusion. Sedgwick W. Green, *The Treaty Making Power and the Extraterritorial Effect of the Constitution: Reid v. Covert and the Girard Case*, 42 MINN. L. REV. 825, 825 (1957).

185. *Reid*, 354 U.S. at 18.

expansive treaty power to regulate migratory birds but could instead rely upon the Court's robust interpretation of the Commerce Clause.<sup>186</sup> Even at the time of the decision, case law under the Commerce Clause, which upheld federal statutes regulating lottery ticket sales and the interstate transport of women for "immoral purposes," could have been used by the Court to uphold the Migratory Bird Act.<sup>187</sup>

Leaving aside the question of whether *Missouri v. Holland* was correctly decided under such case law, the subsequent case law establishing broad powers under the Commerce Clause has dramatically reduced the importance of the decision, even in light of more recent decisions that have somewhat reversed that trend.<sup>188</sup> Historical practice also supports a diminished view of *Missouri v. Holland*. Treatymakers have failed to seize upon the powers imparted by the decision to enact laws beyond the scope of congressional authority.<sup>189</sup> In fact, since the case was decided, not a single treaty depends on the decision for its constitutionality.<sup>190</sup> If one considers historical practice in establishing constitutional norms,<sup>191</sup> "the decision is no longer good law if it ever was."<sup>192</sup>

Others contend that the failure of the Bricker Amendment, which would have overruled *Missouri v. Holland* by limiting the treaty power to the enumerated powers in Section 8, indicates that the case is still good law.<sup>193</sup> An

186. Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 MO. L. REV. 1105, 1116-17 (2008).

187. *Id.* at 1116.

188. See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, No. 11-393 (June 28, 2012) (upholding the individual mandate portion of the Patient Protection and Affordable Care Act as within Congress's taxing powers but refusing to uphold the mandate under the Commerce Clause); *United States v. Morrison*, 529 U.S. 598 (2000) (striking down a provision that authorized damage actions against gender-based crime); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that a law making it a federal crime to possess a firearm within a school zone was not a valid exercise of Congress's power under the Commerce Clause).

189. Peter J. Spiro, *Resurrecting Missouri v. Holland*, 73 MO. L. REV. 1029, 1029 (2008).

190. *Id.*

191. See Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 1001-16 (2001) (using historical practice to determine constitutional norms). The failure of the federal government to utilize its powers under *Holland* stands in contrast to the failure of the House to assert its privileges under the Origination Clause in the context of tax treaties. The former situation does not involve heavy agenda constraints and other procedural obstacles that could explain the failure to act. Moreover, the House's willingness to instigate tax treaty overrides indicates that its failure to insist upon participation in the treaty process perhaps represents impotence, explained by historical happenstance and the difficulty of establishing congressional standing, rather than acquiescence. See *infra* notes 283-294 and accompanying text.

192. Spiro, *supra* note 189, at 1029.

193. Daniel M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1273-78 (2000) ("[T]he Bricker Amendment controversy actually revealed far greater consensus on the nationalist view than may at first have appeared, and the controversy ultimately enhanced its constitutional grounding."). Several scholars have argued that *Missouri v. Holland* should be overruled. Nicholas Rosenkranz, for instance, argues that *Missouri v. Holland* wrongly approves of implementing legislation involving subjects outside of the enumerated powers of Section 8, in conflict with constitutional text, history, and structure. Rosenkranz argues that the Necessary and Proper Clause does not grant Congress the power to make treaties but instead grants Congress only the power to make laws that are necessary to execute the treaty power, such as appropriations. Under this view, the Court erred in expanding Congress's powers beyond those enumerated in Section 8. Rosenkranz, *supra* note 121, at 1868, 1183. Rosenkranz also dismisses as historically inaccurate the argument made by Louis Henkin and relied upon by subsequent courts that

alternative account of this episode, however, sustains the view that *Missouri v. Holland* remains largely symbolic. Senator Bricker, who spearheaded the campaign for the amendment, conceded that the “executive branch acts as though the *Holland* case had never been decided.”<sup>194</sup> In retrospect, it appears that the amendment was unnecessary, since this sentiment continues to be true.<sup>195</sup> Admittedly, expansion of global activity could resurrect the need for treaty makers to utilize *Missouri v. Holland* in the future,<sup>196</sup> yet the long dormancy of the decision, coupled with the narrowness of the holding in light of modern case law, cast doubt upon its continued precedential value.<sup>197</sup>

*Missouri v. Holland* involved the issue of whether non-self-executing treaties and subsequent implementing legislation can address subjects *outside* of Congress’s enumerated powers. Another closely related question is whether self-executing treaties can address subjects *within* Congress’s enumerated powers. Some commentators have argued that treaties addressing subjects in Section 8 are not self-executing.<sup>198</sup> It is far from clear, however, whether Article I, Section 8 can fairly be read as bestowing powers upon the legislature and the legislature alone. Indeed, many of the enumerated powers, such as the power to regulate foreign commerce, involved subjects that, at the time of the Founding, were dealt with by treaties.<sup>199</sup> Article I, Section 8 therefore stands in contrast to the Origination Clause, which bestows upon the House the exclusive power to originate revenue law.

### C. Normative Justifications for Involvement of the House

Historical evidence, as well as constitutional and doctrinal analysis, weighs in favor of subjecting tax treaties to the demands of the Origination Clause. Normative considerations tip the balance even more heavily in favor of privileging the Origination Clause over the Treaty Clause to require that

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“[t]he [Necessary and Proper C]ause originally contained expressly the power to enforce treaties but . . . was stricken as superfluous.” *Id.* at 1912 (emphasis omitted) (quoting HENKIN, *supra* note 111, at 481 n.111); see also Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 100 (2000) (arguing that treaty makers have the power to conclude treaties on matters beyond Congress’s enumerated powers, but such treaties could not be self-executing, and Congress could not implement them); Carlos Manuel Vasquez, *Missouri v. Holland’s Second Holding*, 73 MO. L. REV. 939, 941 (2008) (arguing that Congress lacks the power to implement aspirational treaties addressing subjects beyond its enumerated powers).

194. John W. Bricker, *Constitutional Insurance for a Safe Treaty-Making Policy*, 60 DICK. L. REV. 103, 115 (1956).

195. Spiro, *supra* note 189, at 1029.

196. *Id.* Even if the treaty power were used in this manner, it is conceivable that, given the Court’s recent federalism jurisprudence, such treaties would be struck down. See Thomas Healy, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726 (1998).

197. In light of these developments, Judith Resnik understands the significance of *Missouri v. Holland* to be less about “dramatic and implicitly preclusive federal authority” and more about “the potential for overlapping federal and state action.” Resnik, *supra* note 186, at 1117-18.

198. See, e.g., Yoo, *Globalism*, *supra* note 9; Yoo, *Treaties and Public Lawmaking*, *supra* note 9, at 2255; see also HENKIN, *supra* note 111, at 203 (suggesting non-self-execution for treaties involving appropriations, crime, and war). But see HENKIN, *supra* note 111, at 115 (arguing that Congress is not free to refuse to appropriate funds to implement treaties).

199. Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 779 (1988).

international tax agreements involve the House. The Origination Clause bestows considerable democratic and political economy advantages while also creating more reliable international commitments. The motivations behind the Treaty Clause, on the other hand, have largely fallen away in modern times.

### 1. *Democratic Legitimacy and Enhanced Deliberation*

Including the House in the international tax agreement process would result in international tax policy with enhanced democratic legitimacy. Although this argument could be made to justify inclusion of the House in all treaties, it resonates particularly strongly in the revenue context. The Founders chose the House to act first on revenue matters precisely due to its more democratic features. Through frequent elections of its representatives and a population-based membership, the House is closer to the sentiments of the populace.

Tax treaties necessarily affect not only the revenue collected upon foreign persons, but also upon domestic persons. In many senses, our tax system functions as a zero-sum game, and to reduce the taxes of foreign persons will, at times, increase the taxes of domestic persons, to make up for the foregone revenue. Tax treaties also work on a reciprocal basis such that a foreign jurisdiction's taxation of United States persons will be reduced. Due to our system of worldwide taxation, the United States taxes on a residual basis and benefits when its citizens and residents pay lower foreign taxes, thus implicating the nation's overall revenue picture.<sup>200</sup> The exclusion of the House from the making of tax treaties is especially troubling in the modern era, where international and domestic tax policies are inevitably entwined. The proper domestic corporate-tax rate, for instance, is very much related to the tax benefits multinationals receive abroad under reciprocal agreements. These dynamics, by altering the tax bills of United States citizens and residents and the revenues collected by the United States, implicates the primary concern of the Origination Clause—that those farthest removed from the people have the ability to set the nation's taxing agenda. The current treaty process also problematically permits the Executive to intentionally circumvent the House to enact otherwise unfavorable policies,<sup>201</sup> a result which is especially noxious in the revenue context given the House's special constitutional role.

Other democratic benefits flow from the remedies' utilization of the legislative process and the enhanced deliberation that follows. Article II treaties

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200. This is due to the fact that reduced foreign taxes create a lower foreign tax credit. The foreign tax credit offsets the United States tax liability of United States citizens and residents. See 26 U.S.C. § 901 (2006).

201. An example of this phenomenon occurs in the International Monetary Fund context. Governments use pressure from that entity to secure policies unpopular on the domestic front. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 457 (1988). In the trade context, the executive branch has pursued treaties when it failed to secure the support of Congress to lift licensing restrictions on arms exports. See Duncan Hollis, *A Head-Spinning Self-Execution Story*, OPINIO JURIS (Nov. 11, 2010, 1:56 AM), <http://opiniojuris.org/2010/11/11/a-head-spinning-self-execution-story>.



evade various budget rules to deliver tax benefits without ever accounting for their costs.<sup>202</sup> Despite the complex, varied, and dynamic economic effects of tax treaties, the executive branch does not present economic analyses of tax treaties,<sup>203</sup> nor does the Joint Committee on Taxation publish revenue effects of tax treaties. The lack of economic consensus on whether tax treaties positively impact foreign direct investment<sup>204</sup> and the inability to generalize whether a tax treaty will negatively or positively affect United States revenues<sup>205</sup> makes these omissions glaring. Tax treaties' circumvention of the budget process altogether is troubling, especially in light of our fiscal crisis and congressional tendency to over-spend through the tax code. Processing tax treaties through legislation would have the additional benefit of creating transparency on their revenue effects because they then would be subject to the rigors of the budget process. The use of legislation would allow congressional members to see the real budgetary costs of treaty benefits and to judge them accordingly.

Indeed, the very process by which tax treaties would be implemented or approved through legislation may be seen as beneficial to democracy since it allows increased opportunities for deliberation. Deliberation over tax treaties is decidedly lacking, which is problematic given their impact on taxpayers. Although an elite group of taxpayers benefits from tax treaties, those benefits come at a cost to the general public. It is concerning, then, that groups like labor unions, who are very active in the debate over the reach of our international tax system as implemented through domestic law, are silent when the United States negotiates tax treaties, even though such treaties involve many of the same issues.<sup>206</sup> Indeed, domestic policy disfavoring outbound investment conflicts with the tax treaty practice of lower withholding rates, and yet robust debate focuses on only the former. These advocacy groups overlook tax treaties not because they are disinterested but because the tax treaty process excludes open and robust deliberation. Treaties are negotiated in closed meetings with Treasury and State officials and approved without fanfare by only one part of Congress.<sup>207</sup>

Enhanced deliberation might also clarify the objectives of tax treaties. Although current explanations of tax treaties are framed in terms of the avoidance of double taxation, modern welfare analysis supports increasing cross-border investment rather than preventing "the supposed evils of double taxation,"<sup>208</sup> goals which are not necessarily compatible with one another.

202. Steven Dean, *The Tax Expenditure Budget Is a Zombie Accountant*, 46 U.C. DAVIS L. REV. 265, 306-07 (2012).

203. See Patrick Driessen, *Is There a Tax Treaty Insularity Complex?*, 135 TAX NOTES 745, 746 (2012).

204. See KARL P. SAUVANT & LISA E. SACHS, *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS* 660 (2009).

205. See *supra* note 137 and accompanying text.

206. See Driessen, *supra* note 203, at 751.

207. *Id.* at 745-46.

208. Daniel Shaviro, *The Case Against Foreign Tax Credits*, 3 J. LEGAL ANALYSIS 65, 68-69 (2011). After all, double taxation does not necessarily constitute over-taxation, nor does the concept automatically address concerns of under-taxation. See Driessen, *supra* note 203, at 745, 748 n.18.

Indeed, recent treaties seem to focus on the former objective, despite not having this reflected in the explanation of the purpose or the discussion of the treaty.<sup>209</sup> Other possible treaty purposes such as maximizing national welfare, increasing revenue effects, and the prevention of tax evasion are similarly ignored or minimized in the treaty documents and deliberation.<sup>210</sup> Although some or all of these aspirations might justify the existence and form of modern tax treaties, fuller vetting of this empirical question is necessary. Implementing or approval legislation would further such an endeavor, improving the content of tax treaties as a result.

## 2. *Political Economy Benefits*

A more democratic treaty process also serves an important political economy benefit by combating tendencies in our tax system to oversupply benefits to concentrated special interests to the detriment of the disorganized and disinterested public.<sup>211</sup> Public choice scholars model the legislative process as a marketplace and predict that supply and demand patterns shift for different categories of policy issues according to willingness and ability to pay for legal rules.<sup>212</sup> Interest groups, as smaller entities, can easily organize with few transaction costs, to obtain benefits at the expense of the public. Meanwhile, these expenses are distributed across the general taxpaying public and are diffuse. Because each taxpayer bears only a miniscule part of the burden of supplying interest group legislation, we see more private-regarding and less public-regarding legislation in the tax area.<sup>213</sup>

Self-executing tax treaties deliver benefits to special interests with little deliberation and while evading congressional budgetary rules.<sup>214</sup> Implementing or approval legislation will likely increase the transparency of such previously off-budget items, adding to their costs. The need for coordination with the House also makes such interest group deals more costly. The bicameral aspect of my proposal serves to reduce special interest deals since the constituent bases of the two houses differ substantially.<sup>215</sup> This theory is bolstered by the

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209. Driessen, *supra* note 203, at 748. Aside from a lack of coherence within and between treaties, misstated purposes also present the danger of misleading the judiciary who is charged with interpreting the treaty.

210. *Id.* at 747-49.

211. WILLIAM N. ESKRIDGE, PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 59 (4th ed. 2007).

212. See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 371, 373-74 (1983); Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50, 62-63 (1987).

213. On the distinction between private- and public-regarding legislation, see JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 260-76 (1957); MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* (1981); DENNIS C. MUELLER, 2 *PUBLIC CHOICE* 205-06 (1989); MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 53-57 (1965); and JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* (1973).

214. See Dean, *supra* note 202, at 306-07.

215. See William F. Shughart II & Robert D. Tollison, *On the Growth of Government and the Political Economy of Legislation*, in 9 *RESEARCH IN LAW AND ECONOMICS* 111, 121 (Richard O. Zerbe, Jr. ed., 1986).

finding that as the difference in size between the House and the Senate became more pronounced, the output of laws decreased,<sup>216</sup> which, in turn, can be explained by the greater costs necessary to secure a majority in both Houses.<sup>217</sup> Bicameralism has the potential to mute the influence of special interests by making their preferences more difficult to enact. Because tax treaties dole out benefits, they are generally promoted by special interests and not opposed by them.<sup>218</sup> As a result, bicameralism will screen out treaty provisions favoring special interests without also reducing benefits to the general public.<sup>219</sup>

By increasing the costs of enactment, legislation that implements or approves tax treaties may thus help combat the problem of the over-supply of interest group benefits. This valuable political economy function supports the

216. *See id.* at 120-25.

217. *See* Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 366 (1988). Bicameralism may, however, serve to increase the duration of legislation, hence creating more valuable interest group deals. *See* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877-79 (1975).

218. An example of a tax treaty provision benefitting special interests is, for instance, the "equipment fee clauses" in the treaties with India, Indonesia, and Tunisia that exempt payments for the use of ships, aircrafts, and containers from any potential withholding tax. *See* Tax Convention, U.S.-Tunis., art. 12(3)(d), Oct. 4, 1989, S. TREATY DOC. NO. 99-13 (1989); Tax Convention, U.S.-India, art. 12(3)(b), Sept. 12, 1989, S. TREATY DOC. NO. 101-5 (1989); Tax Convention, U.S.-Indon., art. 12(3)(b), July 11, 1988, S. TREATY DOC. NO. 100-22 (1988); Tax Convention, U.S.-Austria, art. VIII(1), Oct. 25, 1956, T.I.A.S. No. 3923 (1956).

219. One might further argue that the shorter terms of House members guard against special interest deals for the following reason. Because interest groups have few ways to enforce legislative deals, other mechanisms, such as legislative committees and the independent judiciary, have arisen to increase the durability of legislation in order to accommodate interest-group politics. *See* Landes & Posner, *supra* note 217, at 877-78; *see also* W. Mark Crain & Robert D. Tollison, *The Executive Branch in the Interest-Group Theory of Government*, 8 J. LEGAL STUD. 555 (1979) (describing the executive veto as an instrument to increase legislative durability); Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 945-53 (1986) (discussing another strategy in coping with the unenforceability of legislative deals in which interest groups and lawmakers decrease the duration of such deals, a phenomenon particularly prevalent in the tax context); Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1051-56 (2011) (noting that although longer deals are more efficient for all parties, some features of the legislative process, such as campaign finance limitations, have made their achievement more difficult in recent decades). Greater legislative turnover reduces the stability of such deals since it can lead to legislative amendments or repeals of such benefits. *See* Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1028-29 (1994). It follows that legislators with longer tenure are better able to provide benefits to interest groups because their legislative deals are more durable. Longer terms among legislators will also reduce transaction costs such that logrolling is made easier, thereby further increasing interest group deal-making. *See* Tollison, *supra* note 217, at 344-45; Zywicki, *supra*, at 1029. With the inclusion in the treaty process of the House, comprised of representatives whose short terms prevent them from providing equally generous legislative benefits, the more generous Senate may be stymied in doling out interest group legislation. Nevertheless, other differences between the houses make it difficult to conclude with any certainty which one produces more interest group legislation. For instance, the Senate's larger, more diversified constituencies may make it more difficult for it to provide interest group benefits. *See* Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1123 (2011) (reviewing ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010)). Certain committees might also be in better positions to reward interest groups. *See* Kevin Grier & Michael Munger, *Comparing Interest Group PAC Contributions to House and Senate Incumbents, 1980-1986*, 55 J. POL. 615, 618 (1993) (revealing that interest groups spend substantial time and money to influence the Rules Committee of the House). Finally, despite the Senate's longer terms, members of the House tend to have longer tenure than senators, perhaps making them more susceptible to interest group pressure. *See* Frank H. Easterbrook, *The State of Madison's Vision of a State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1334 (1994) (positing that gerrymandering explains the longer tenure of representatives).

democratic rationales underlying the Origination Clause. Although tax treaties benefit the very few, their costs impact the general public and hence implicate the concerns of the Framers. Along with enhanced transparency, the vetogates imposed by the prescribed remedies would subject those costs to closer scrutiny.

### 3. *Increased Durability of International Commitments*

These heightened procedures, although more democratically legitimate and constitutionally coherent, may come at a cost. One practical concern that might be raised is that the requirement of implementing or approval legislation may result in fewer tax treaties or more protracted negotiations.<sup>220</sup> Although it is impossible to conclude that the Article II process will produce more international agreements than the congressional-executive agreement process,<sup>221</sup> either implementing legislation or congressional-executive agreements would create more reliable international tax commitments than the current Article II apparatus. The United States' enhanced reputational credibility gained by such increased stability would mitigate any reduction in the number of tax treaties that the additional complexity of the process would produce.<sup>222</sup>

First, the involvement of the House in the treaty process may stave off any later temptation for the House to initiate tax treaty overrides. Because of the equivalence of laws and treaties under the Supremacy Clause and the last in time rule, the United States can and does unilaterally override its treaty

220. Although the House would not participate in the negotiation stage under my proposal, such negotiations will naturally take into consideration the position of the House on relevant issues.

221. In some circumstances, however, congressional-executive agreements may be easier to enact than Article II treaties. After all, the two-thirds requirement of the Treaty Clause exceeds the simple majority vote required to pass a congressional-executive agreement. At least partially due to the high voting requirement of the Treaty Clause, nearly fifty treaties remain pending before the Senate, with the oldest dating back to 1949. Hathaway, *supra* note 8, at 1313-14. Although congressional-executive agreements may be subject to a filibuster, such an act entails political costs and can be overcome by a lower sixty-vote supermajority on cloture. Additionally, some congressional-executive agreements follow a fast track process that waives the possibility of a filibuster. *See, e.g.*, Trade Act of 1974 § 151, Pub. L. No. 93-617, 88 Stat. 1978, 2001 (1975) (codified at 19 U.S.C. § 2191 (2006)) (expired 2007). Also, Article II treaties proceed through the Senate Foreign Relations Committee, while congressional-executive agreements move through the relevant subject matter committees. As a result, congressional-executive agreements may face less opposition when the subject matter committees are less hostile to the international agreement than the Senate Foreign Relations Committee. Hathaway, *supra* note 8, at 1314-15. Of course, the opposite may also be true.

222. Some scholars have argued that tax treaties have deleterious effects that are often ignored. John Avery Jones has found fault with tax treaties since their proliferation removes incentives to reform the underlying domestic law sensibly and may lock in bad policy. John F. Avery Jones, *The David R. Tillinghast Lecture: Are Tax Treaties Necessary?*, 53 TAX L. REV. 1, 4 (1999); *see also* Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939 (2000) (concluding that tax treaties are not necessary to reduce double taxation and that they reallocate revenues from developing countries to developed countries); Adam H. Rosenzweig, *Thinking Outside the (Tax) Treaty*, 2012 WIS. L. REV. 717, 726-28 (contending that a non-treaty-based, rather than a treaty-based, cooperation mechanism among nations would incentivize poorer countries to help enforce the international tax regime). To the extent one agrees with such views, then the reduction in tax treaties, of course, may be seen as a favorable development. I take the different view that although tax treaties produce certain negative effects, an enhanced treaty process would improve upon their substance. *See supra* notes 200-219 and accompanying discussion.

obligations in violation of international law. Tax treaties are overridden with a greater frequency than other treaties,<sup>223</sup> as demonstrated by several examples well-known among tax professionals and our treaty partners.<sup>224</sup> In a statement aimed at the United States, the OECD has condemned tax treaty overrides, arguing that their prevalence disrupts the certainty of international tax matters.<sup>225</sup> Indeed, the Treasury Department has expressed the fear that overrides have made negotiating tax treaties “increasingly difficult.”<sup>226</sup>

All of these overridden tax treaties became law without the involvement of the House. Although it is difficult to conclude with certainty, it seems likely that some of these overrides occurred, at least in part, due to the House’s exclusion from the treaty process. This hypothesis is supported by the pattern in which the House, in contrast with the Senate, has consistently advocated for greater authority to override tax treaty obligations.<sup>227</sup> Given the House’s special role in formulating domestic tax legislation, the omission of the House from the treaty process threatens the power of House members, particularly those on the Ways and Means committee.<sup>228</sup> Involving the House in the tax

223. See Reuven S. Avi-Yonah, *International Tax as International Law*, 57 TAX L. REV. 483, 493 (2004) [hereinafter Avi-Yonah, *International Tax*] (“The most notorious difference between tax treaties and other U.S. treaties is the frequency of treaty overrides (other treaties are overridden, but much less frequently).”). *But cf.* Reuven S. Avi-Yonah, *Tax Treaty Overrides: A Qualified Defence of U.S. Practice*, in TAX TREATIES AND DOMESTIC LAW 65, 66 (Guglielmo Maisto ed., 2008) [hereinafter Avi-Yonah, *Tax Treaty Overrides*] (arguing that the problem of tax treaty overrides has been exaggerated).

224. For instance, expatriation provisions, which target U.S. citizens who lose their citizenship, are an example of tax treaty overrides. See, e.g., Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 2015, Pub. L. No. 104-191, 110 Stat. 1936, 2093 (1996); see also H.R. REP. NO. 104-736, at 329 (1996) (Conf. Rep.) (explicitly acknowledging an intent to override existing tax treaties). Other examples of tax treaty overrides abound and exhaustive lists can be found elsewhere in the literature. See, e.g., Richard L. Doernberg, *Overriding Tax Treaties: The U.S. Perspective*, 9 EMORY INT’L L. REV. 71, 82-115 (1995); Infanti, *supra* note 4, at 682-83; Mark J. Wolff, *Congressional Unilateral Tax Treaty Overrides: The “Latter in Time Doctrine” Is Out of Time!*, 9 FL. TAX REV. 700, 732-47 (2009).

225. See Org. for Econ. Cooperation & Dev., Comm. on Fiscal Affairs, *Report on Tax Treaty Overrides*, 2 TAX NOTES INT’L 25 (1990).

226. See *Pending Bilateral Tax Treaties and OECD Tax Convention: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 13 (1990) (statement of Kenneth W. Gideon, Assistant Secretary for Tax Policy, U.S. Dep’t of Treasury).

227. See Irwin Halpern, *United States Treaty Obligations, Revenue Laws, and New Section 7852(d) of the Internal Revenue Code*, 5 FL. INT’L L.J. 1, 10-11, 18-23 (1989) (discussing the House’s aggressive position with respect to overriding current treaty obligations in the context of the 1962, 1986, and 1988 revenue acts). The House has also, at times, mandated information on tax treaties from Treasury, while the Senate has not, perhaps as a result of the House’s omission from the treaty negotiation process. See H.R. Rep. No. 108-755, at 594-95 (2004) (Conf. Rep.) (setting forth a House bill request that Treasury study the impact of tax treaties); Driessen, *supra* note 203, at 746 n.8.

228. See Avi-Yonah, *International Tax*, *supra* note 223, at 494.

The reason that tax is particularly sensitive in [the context of treaty overrides] is first, that tax law changes all the time while treaties are slow to renegotiate, and second, that the U.S. House of Representatives has a special role to play in the tax area (all revenue measures must originate with it), but is excluded from involvement with treaties, and therefore insists on its right to change tax treaties through legislation even though this clearly violates customary international law . . . .

*Id.*; see also Doernberg, *supra* note 224, at 78 (“In the treaty ratification process, the House of Representatives has no official role. Consequently, some House members may resent the exclusive authority of the Senate in that area.”); CONG. RESEARCH SERV., TAX TREATIES: THE LEGISLATIVE

treaty process would likely reduce the need for the House to express its policy preferences in later, disruptive legislative overrides.<sup>229</sup> Also, tapping into the House's expertise (gained by its specialization in revenue policy) might decrease the number of overrides.<sup>230</sup> For instance, many overrides are enacted to address abusive transactions developed subsequent to the tax treaty. It could be argued that leveraging the House's familiarity with tax issues might result in addressing such abusive transactions upfront, reducing the necessity of later overrides, at least at the margin.

Second, the use of implementing legislation or congressional-executive agreements would result in agreements that are more likely to be enforceable by the judiciary, an issue that has long been a conundrum in the international law community. Whether a treaty is self-executing or requires implementing legislation—separate and apart from a constitutional requirement for such legislation—has never been clear in the United States. Since the Supreme Court's *Medellín* decision, in which it held that the circumstances and text of a treaty made it non-self-executing, this uncertainty has increased.<sup>231</sup> As discussed above, some international law experts have interpreted that decision to create a presumption against self-execution, and, since *Medellín*, lower courts have indeed adopted such a presumption.<sup>232</sup> This development should concern those who value the United States' honoring its international agreements. Even if this proposition does not appeal to intrinsic sensibilities, the United States' inability to uphold its international tax agreements may jeopardize its negotiating position or cause its treaty partners to terminate agreements. Either of these results would be detrimental to those U.S. entities and individuals who invest trillions of dollars abroad.

OVERRIIDE PROBLEM, reprinted in Harry G. Gourevitch, *CRS Report Favors Treaty Override Articles in Future Conventions*, 93 TAX NOTES INT'L 172-15, at \*4 (LEXIS).

Conflicts between tax treaties and domestic tax legislation ultimately arise from the Constitutional separation of powers between Congress and the executive branch, the one to make tax policy, the other to enter into treaties with the advice and consent of the Senate. Congress, especially the House of Representatives, has less input into the contents of tax treaties than the contents of domestic tax legislation.

CONG. RESEARCH SERV., *supra*, at \*4 (LEXIS). It should be noted that during the treaty-making process, the Senate Foreign Relations Committee sometimes consults with the House Ways and Means Committee. Doernberg, *supra* note 224, at 77. This minimal participation, however, does not replicate full participation by the House, let alone its role originating revenue legislation.

229. See Avi-Yonah, *Tax Treaty Overrides*, *supra* note 223, at 75-78. It is very unlikely, however, that either of my proposals would completely eliminate tax treaty overrides.

230. The House's origination power allows it to specialize in revenue policy, avoiding duplicative information gathering by the Senate, and to leverage its ability to obtain information more cheaply than the Senate due to its larger number of members. See Noel Sargent, *Bills for Raising Revenue Under the Federal and State Constitutions*, 4 MINN. L. REV. 330, 352 (1920) ("Perhaps the greatest present-day advantage of the system is that by it each House is able to concentrate on the preparation of certain kinds of bills, thus assuring more expert knowledge and less duplication than otherwise would exist."). Relatedly, Adrian Vermeule has argued that the House, without the Origination Clause, might capitalize on its informational expertise by bargaining for first-mover advantage, rendering the actual inclusion of the Clause unnecessary. Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 426-27 (2004).

231. Hathaway, *supra* note 8, at 1321; see *supra* notes 110-116 and accompanying text.

232. Hathaway et al., *supra* note 7, at 71-76.

In contrast to these precautionary measures, implementing legislation and congressional-executive agreements eliminate the risk of a court finding tax treaties unenforceable. Although the Senate has recently attached to their consent to tax treaties statements that the treaty is self-executing, it is unclear whether such a precaution suffices to establish obligations under domestic law. *Medellin* focused on the language of the treaty, rather than any statement by the Senate.<sup>233</sup> Moreover, if the treaty itself contained a statement of self-execution, it may be possible for the Senate to later contradict that statement in its consent, creating further uncertainty.<sup>234</sup> Finally, a declaration by the executive branch that a treaty is self-executing might present constitutional concerns.<sup>235</sup>

Implementing legislation and congressional-executive agreements provide a straightforward way to create international law that is binding both abroad and domestically. In light of *Medellin* and tax treaty overrides, the importance of stabilizing the United States' treaty obligations has risen. The proposals herein would improve the nation's reputation as an actor in the international community and its ability to negotiate treaties.<sup>236</sup> Private actors, here and abroad, would also benefit from greater stability in the legal regime.

#### 4. *The Enduring Value of the Origination Clause*

Because of the Senate's broad power to amend revenue legislation,<sup>237</sup> some might argue that the Origination Clause is largely toothless. Indeed, one of the Framers, James Wilson, poetically asserted this to be true:

With regard to the pursestrings, it was to be observed that the purse was to have two strings, one of which was in the hands of the [House of Representatives] the other in those of the Senate. Both houses must concur in untying, and of what importance could it be which untied first, which last.<sup>238</sup>

If Wilson is correct that the Origination Clause is practically meaningless, we should not risk compromising the important job of tax treaty-making by woodenly insisting upon implementing or approval legislation. Such a view, however, is unpersuasive.

233. *Medellin v. Texas*, 552 U.S. 491, 556 (2007).

234. This perplexing phenomenon recently occurred in two trade treaties. See Treaty with Australia Concerning Defense Trade Cooperation, U.S.-Aus., pmb., Sept. 5, 2007, S. TREATY DOC. NO. 110-10 ("Understanding that the provisions of this Treaty are self-executing in the United States . . ."); Treaty with United Kingdom Concerning Defense Trade Cooperation, U.S.-U.K., pmb., June 21-26, 2007, S. TREATY DOC. NO. 110-7; Hollis, *supra* note 201. It is unclear whether, in such instances, the intent of the Senate or the Executive should govern.

235. Vázquez, *Treaties as Law of the Land*, *supra* note 105, at 685-94.

236. Foreign governments, for instance, are more likely to agree to treaties if they have confidence that the President will be able to secure domestic support of the treaty obligations. See, e.g., Putnam, *supra* note 201, at 439.

237. See, e.g., *Rainey v. United States*, 232 U.S. 310, 317 (1914) (holding that the Senate's addition of an excise tax to a tariff bill was within its amendment powers under the Origination Clause, refusing to determine whether such amendment was within the purposes of the original bill); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911) (holding that the Senate's substitution of a corporate tax for an inheritance tax did not violate the Origination Clause); see also Kysar, *supra* note 22, at 3-4 (concluding that the Senate's amendment powers under the Origination Clause are necessarily broad due to separation of powers concerns).

238. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 25, at 275.

Although those proposed versions of the Clause that denied or limited the Senate's power to amend revenue legislation surely would have granted more power to the House, the House still enjoys significant influence relative to the Senate in the area of tax legislation. The Senate, after all, cannot act formally on revenue legislation until the House does so. This dynamic bestows upon the House the ability to dictate or control the policy agenda, or, in terms of political game theory, gives them first-mover advantage.<sup>239</sup> This advantage accrues because "the first-mover may obtain a disproportionate share of the gains" since the "ability to make an initial offer . . . gives the second player only an iota more than the second player would obtain at the end of the sequence of offers and responses."<sup>240</sup> The second player, put in this position, accepts because she can do no better.<sup>241</sup>

Another way to illustrate the importance of agenda control is through the Condorcet voting paradox. Assuming that Congress would prefer Policy A over Policy B, Policy B over Policy C, and Policy C over Policy A, the requirement of majority rule provides no clear winner consistent across voting variations. Policy A will win if it competes against the winner of a vote between Policy B and Policy C. Policy C, however, will be the victor if Congress first votes between Policy A and Policy B. In summary, the policy outcome depends upon the control of the agenda rather than majority preferences.<sup>242</sup> If Congressional preferences are intransitive as in this example, the House's ability to move first in the revenue arena is powerful indeed. Perhaps even more powerful, however, is the informal (and unquantifiable) advantage the House gains by framing the political discourse.

Furthermore, it has been suggested that the Origination Clause has no continuing relevance because Coasian bargaining can circumvent it due to the intra-congressional institutions that greatly reduce transaction costs.<sup>243</sup> Long before Coase, Madison also set forth this argument:

Experience proved that ["the exclusive privilege of originating money bills"] had no effect. If seven States in the upper branch wished a bill to be originated, they might surely find some member from some of the same States in the lower branch who would originate it. The restriction as to amendment was of as little consequence. Amendments could be handed privately by the Senate to members in the other house.<sup>244</sup>

239. Vermeule, *supra* note 230, at 424.

240. *Id.*

241. *Id.* Vermeule correctly notes that the advantage is of an uncertain degree and depends upon how rapidly the value of a later agreement declines, the relative rate at which the players discount future gains, and whether there are reputational costs. *Id.* Nevertheless, the literature indicates "an appreciable first-mover advantage in the legislative game." *Id.* at 425 (citing Gerald S. Strom & Barry S. Rundquist, *A Revised Theory of Winning in House-Senate Conferences*, 71 AM. POL. SCI. REV. 448, 450 (1977) ("[T]he chamber that acts first on a bill tends to have the greatest impact on the content of a bill prior to the conference.")).

242. See KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 3 (2d ed. 1963).

243. Donald Wittman, *The Constitution as an Optimal Social Contract: A Transaction Cost Analysis of the Federalist Papers*, in *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM* 73, 75-76 (Bernard Frofman & Donald Witman eds., 1989).

244. 2 PAPERS OF JAMES MADISON 1025-26 (Henry Gilpin ed., J. & H.G. Langley 1840).



Adrian Vermeule, however, rightly dismisses these concerns due to the incorrectness of the assumption that the House has no entitlement to the Clause or that such entitlement is unenforceable.<sup>245</sup> In other words, although the houses may contract around the Origination Clause as Madison suggested, the House will demand a payment for such a bargain and is thus advantaged by the Origination Clause.<sup>246</sup>

One might also object that the original justification for the Origination Clause has diminished. One aspect of the Clause's inclusion in the Constitution was that the House was directly elected by the people and thereby closer to them. This political proximity assisted, it was hoped, in the assessment of tolerable and fair taxes. Since 1913, however, the people, rather than state legislators, have directly elected Senators in accordance with the Seventeenth Amendment.<sup>247</sup> Does this render the purpose of the clause meaningless? Hardly; the primary consideration in exchange for the Origination Clause was, after all, the geographic apportionment of the Senate. Although direct election of representatives establishes a connection with the people, so does the proportional allotment of representatives, which the House, and the House alone, retains. Beyond that, Representatives are elected every two and Senators only every six years.<sup>248</sup> As a result, Representatives are more immediately and directly accountable to their constituents, who can effectuate a change in representation frequently. The Senate, by contrast, is more insulated from popular opinion.

##### 5. *The Diminished Value of the Treaty Clause*

The continued relevance of the Origination Clause and the democratic, political economy, and practical benefits resulting from the inclusion of the House in the tax treaty process strongly support implementing or approval legislation in that context. The case for such a requirement becomes even more apparent as the purported benefits of the Treaty Clause shrink under modern scrutiny.

Foremost among the reasons mentioned by the Framers in vesting the treaty power exclusively with the Senate was that matters of foreign importance required secrecy in negotiations and expertise upon foreign matters that the House could not provide.<sup>249</sup> As to the former consideration, if the remedy is implementing legislation, the House does not participate in the earlier stages of the treaty-making process. In reality, however, the House's participation in the

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245. Vermeule, *supra* note 230, at 425-26. As explored *supra* Subsection II.A.2, the Supreme Court has held the Origination Clause to be justiciable and has considered challenges under it on the merits. See *supra* notes 42-44 and accompanying text.

246. Vermeule, *supra* note 230, at 425-26.

247. U.S. CONST. amend. XVII.

248. Gerrymandering, however, may mute this difference between the two houses by lengthening the tenure of Representatives. See Easterbrook, *supra* note 219. It is difficult to conclude with certainty, however, whether the House's longer tenure is purely the result of undemocratic forces and hence the extent to which the democratic nature of the House, as compared with the Senate, has been compromised.

249. See *supra* notes 85-87 and accompanying text.

later stages will necessitate its early involvement to ensure that it is on board with the content of the treaty.

Still, this original justification of the Treaty Clause no longer seems to carry much weight. The Framers' concerns were based upon the House's larger number of members whose shorter terms meant that they might reveal national secrets during their more frequent trips home. The advent of modern technology, however, gives Senators ample opportunity to spread information from their seats in the capital, so it is doubtful this vulnerability remains solely in the House. Even immediately after the American Revolution, a Senator leaked the terms of a treaty to the press.<sup>250</sup> The inability to keep a secret has likely grown with the size of the Senate (originally twenty-two and now one hundred), as well as with technological advances. Similarly, Jay's and Hamilton's arguments that the House, as a discontinuous body, lacked mechanisms to transmit information on foreign affairs between successive houses and could not be convened in time to approve treaties, are irrelevant in the modern era.<sup>251</sup>

Another substantial concern expressed by the Framers was that the House members, as more transient than their counterparts in the upper house, lacked expertise in foreign matters and were not aligned with the national interest. Of course, we routinely trust the House with matters of international tax policy and indeed require that any such legislation originate in that body. Since such legislation serves as the framework around which our tax treaty system is negotiated, this historical concern is no longer relevant. Moreover, the House's ability to initiate a tax system that is nimble and responsive to the concerns of its constituents would seem to outweigh its lack of knowledge on general matters of foreign policy. Furthermore, this concern was more acute during a time when Senators were not directly elected and hence were thought to represent the sophisticated viewpoints of the state delegates, rather than the populace. Because Senators are now popularly elected under the Seventeenth Amendment, this justification has lost traction.<sup>252</sup> This concern may also have had greater importance if the Senate functioned as a true council of advisors, as originally envisioned by the Founders. Yet by the end of Washington's presidency, "'advice and consent' had been reduced to 'consent' alone."<sup>253</sup>

The other motivation for the Treaty Clause—the protection of regional interests or a minority of states—similarly carries little weight in the international tax context. Tax treaties usually will not implicate regional concerns or affect a minority of states disproportionately.<sup>254</sup> After all, in the

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250. Hathaway, *supra* note 8, at 1281.

251. See *supra* notes 88-90 and accompanying text.

252. U.S. CONST. amend. XVII.

253. Hathaway, *supra* note 8, at 1308 (arguing for participation by the House in all international agreements); see also *supra* notes 95-99 and accompanying text.

254. In rare instances, positions taken by the United States in tax treaties might conflict with the interests of the more populous states. For instance, until the mid-1980s, many states, such as California, employed a unitary method that taxed income based on a formula apportionment. This method was in tension with the position taken by the United States in its international agreements, which is based upon a separate accounting methodology and only imposes tax on the profits arising within a jurisdiction.

trade context, which increases the flows of trade between nations in a manner analogous to the tax treaty context, congressional-executive agreements are almost uniformly employed without concern that regional interests are being forsaken.<sup>255</sup> Although of historical interest, the regional and secrecy concerns that shaped the Treaty Clause are largely irrelevant from a normative perspective. To be sure, regional concerns also motivated the Origination Clause by benefitting the large states. Although tax treaties may not implicate the interests of large states, they do implicate the *democratic* concerns underlying the Origination Clause, as discussed above.<sup>256</sup> Finally, if indeed the large and small states gave the Senate the power to amend revenue bills in order to protect the Senate's jurisdiction over foreign matters,<sup>257</sup> then a mechanism is already built into the Constitution that achieves balance between the House's origination power and the Senate's treaty power—the Senate's amendment power over revenue legislation.<sup>258</sup>

#### D. *Relevant Precedent Supports Involvement of the House*

By and large, congressional practice, as well as case law, confirms the foregoing analysis. A discussion of the relevant precedent follows.

##### 1. *Judicial Views on the Constitutionality of Self-Executing Tax Treaties*

There is scant case law involving the Origination Clause and its relationship with international agreements. The only case where the issue was briefed directly is *Lidas v. United States*,<sup>259</sup> in which French citizens contested a summons by the United States Internal Revenue Service for information in accordance with a bilateral tax treaty entered into by the United States and France. Among the arguments set forth by the taxpayers was that the self-executing tax treaty was unconstitutional since it was a revenue-raising bill within the scope of the Origination Clause.<sup>260</sup> The *Lidas* court, however, did not directly address that argument, holding instead that the appellants only

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International outrage, perhaps most vehemently expressed by the United Kingdom, caused California to change its methodology. During a later renegotiation of the United Kingdom-United States treaty, a draft treaty initially curtailed the states' ability to employ the unitary method but was removed due to constitutional and political concerns. See Roger Berner & Gregory May, *The New U.K.-U.S. Income Tax Treaty*, in *PLI TAX STRATEGIES FOR CORPORATE ACQUISITIONS, DISPOSITIONS, SPIN-OFFS, JOINT VENTURES, FINANCINGS, REORGANIZATIONS & RESTRUCTURINGS* 518 (2008).

255. Hathaway, *supra* note 8, at 1286.

256. See *supra* notes 200-210.

257. See MADISON, *supra* note 28, at 415 (statement of Colonel Mason).

258. Perhaps even the fact that the Founders viewed the Origination Clause as a potential threat to the Senate's purview over foreign matters indicates that they assumed the Origination Clause to encompass international obligations as well as domestic legislation.

259. 238 F.3d 1076 (9th Cir. 2001).

260. Brief for Appellant at 4, *Lidas*, 238 F.3d at 1076 (No. 99-55692). The plaintiff's primary constitutional argument was that the treaty violated Article I § 8, the first clause of which enumerates the powers of Congress, including the power to lay and collect taxes, because it was not enacted by Congress. *Id.* at 9.

challenged the treaty's exchange of information provisions, rather than its revenue-related provisions, which did not violate the Constitution.<sup>261</sup>

Two cases speak of the interaction between the Treaty Clause and the Origination Clause, albeit in dicta, concluding that the latter limits the former. In *Swearingen v. United States*,<sup>262</sup> a taxpayer sued the United States to recover taxes, claiming that the Panama Canal Treaty exempted certain taxes. The district court held that conflicting provisions in the Code superseded the agreement and that the treaty itself did not contain the claimed exemption.<sup>263</sup> Also in dicta, the court ventured further, stating that even if the treaty could be interpreted to contain such an exemption, it would still be invalid as standing "in contravention of the exclusive constitutional authority of the House of Representatives to originate all bills for raising revenues."<sup>264</sup>

In another case, *Edwards v. Carter*, the D.C. Circuit dismissed a challenge to the same treaty.<sup>265</sup> Appellants had argued that the power to dispose of United States property required approval of both Houses of Congress because of Article IV, Section 3, Clause 2 of the Constitution,<sup>266</sup> which was an exclusive grant of such power. Accordingly, they argued, the Panama Canal Treaty, which was a self-executing treaty, could not convey such property to foreign states.<sup>267</sup> The court of appeals dismissed this challenge, reasoning that the language of the clause did not set forth an exclusive congressional power precluding the entering of a self-executing treaty.<sup>268</sup> The D.C. Circuit went on to note that, in contrast to the matter at hand, certain grants of authority are exclusively bestowed by the Constitution such as the appropriation of money and the imposition of taxes.<sup>269</sup>

261. 238 F.3d at 1080-81. In so doing, the court concluded that even if the treaty's double taxation provisions did require implementing legislation, the information provisions were severable. *Id.* at 1081. In conclusory fashion, the district court below dismissed the plaintiff's argument that tax treaties are not "bills for raising revenue." *Lidas, Inc. v. United States*, No. CV-98-4503-DT(RCX) 1999 WL 164409, at \*5 (C.D. Cal Feb. 5, 1999). The court also was persuaded that participation by the Joint Committee on Taxation in the preparation of the treaty's technical explanation provided requisite participation by the House. *Id.* at \*6. This latter argument seems especially weak; the participation of a few members of the House is not constitutionally equivalent to the requirement that tax laws originate in the House and are passed by a vote of its full body.

262. 565 F. Supp. 1019 (D. Colo. 1983).

263. *Id.* at 1020-21.

264. *Id.* at 1022. This language implicitly accepts the view that bills that reduce revenue are nonetheless "bills for raising revenue" under the Origination Clause. J. Michael Medina, *The Origination Clause in the American Constitution: A Comparative Survey*, 23 TULSA L.J. 165, 183 (1987). The dicta also acknowledges that tax treaties are "bills" for purposes of the clause.

265. 580 F.2d 1055, 1058 (D.C. Cir. 1978).

266. Article IV, Section 3, Clause 2 of the Constitution reads: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States, and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." U.S. CONST. art. IV, § 3, cl. 2.

267. 580 F.2d at 1057.

268. *Id.* at 1057-58.

269. *Id.* at 1058. The dissent also agreed with this contention. *See id.* at 1070 (MacKinnon, J., dissenting).

## 2. Congressional Views on the Constitutionality of Self-Executing Tax Treaties

Many treaties involving revenue, including all income tax treaties, have not been presented to Congress. Before the modern era, however, Congress regularly implemented treaties that modified domestic tax laws.<sup>270</sup> Indeed, the House systematically asserted its right to execute such treaties up until the early twentieth century as a means to protect its origination privilege.<sup>271</sup> On one occasion defending such a right in 1878, a representative commented:

[I]n all the history of the treaty-making of the United States, a question in respect to or touching upon the question of revenue, or where appropriation has been required to carry out the effect of the treaty, it has been the uniform practice, with a single exception, to submit those treaties and those matters to the House of Representatives; and the treaties have not gone into effect until the House of Representatives have joined in the proper legislation to change the revenue or make the appropriation.<sup>272</sup>

One commentator has concluded that for all treaties affecting revenue between 1796 and 1913, the House has “uniformly insisted upon, but the Senate has acquiesced in, legislation by Congress to give effect to such stipulations,”<sup>273</sup> with consistent cooperation from the Executive.<sup>274</sup> In the late 1880s, an extensive report was issued by the chairman of the House Judiciary Committee, analyzing the terms of the Constitution, English precedents, the debates of the Founders, and the precedents of the House between 1796 and 1816 to establish that, indeed, tax treaties could not be completed without assent of the House.<sup>275</sup> A nearly contemporaneous House report concludes with the following resolution: “Resolved, That the President by advice and consent of the Senate, cannot negotiate treaties with foreign Governments by which the duties levied by Congress can be changed or abrogated, and such treaties to be operative as law must have the sanction of an act of Congress.”<sup>276</sup>

270. Sargent, *supra* note 230, at 343.

271. For instance, in 1919, a Congressman declared the Canadian Reciprocity Act, a tariff act, illegal since the president’s treaty-making power does not extend to revenue measures, the origination of which must be in the House. *Id.* at 342; *see also* HENRY ST. GEORGE TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER 342-79 (1915) (discussing a report of the chairman of the House Judiciary Committee of the 49th Congress defending the claim that a treaty cannot change revenue laws without sanction of the House).

272. 2 HINDS’ PRECEDENTS, *supra* note 58, § 1459, p. 959.

273. SAMUEL B. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 195 (2d ed. 1916); *see also* H.R. REP. NO. 68-1569, at 8 (1925) (recounting the House’s general insistence upon implementation of treaties affecting revenue legislation and tariffs, with acquiescence by the Senate).

274. Another source indicates that between 1789 and 1936, thirteen House precedents involved the interaction between the Origination and Treaty Clauses. All but one of these precedents supported the conclusion that the treaty power gives way to the Origination Clause, and many of these affirmatively indicate support for such a proposition by the Executive and Senate. 2 HINDS’ PRECEDENTS, *supra* note 58, §§ 1520-1533; 6 CANNON’S PRECEDENTS, *supra* note 60, § 324.

275. This report is reproduced in TUCKER, *supra* note 271, at 342-79. The committee did not have time to vote on the report contemporaneously, however, three years later, the committee adopted a very similar version to support a resolution that a treaty involving duties on imports did not have legal affect without an act of Congress. 2 HINDS’ PRECEDENTS, *supra* note 58, § 1529.

276. H.R. REP. NO. 48-2680 (1885); *see also* 2 HINDS’ PRECEDENTS, *supra* note 58, § 1528.

For example, a 1796 treaty with Great Britain, which exempted certain British goods from tariffs imposed by the domestic revenue laws, was implemented by legislation that incorporated the relevant provisions into the domestic law.<sup>277</sup> Numerous other early treaties involving revenue were implemented through legislation, including one in which President Jackson sent a copy to Congress observing that some of its provisions could only be carried out by a legislative act.<sup>278</sup> Jackson did not proclaim the treaty until it was approved by legislation.<sup>279</sup> Although a senator offered a resolution declaring that this particular act should not be taken as precedent for the exercise of the treaty-making power, the resolution was tabled.<sup>280</sup> After several later treaties affecting revenue were enacted through implementing legislation,<sup>281</sup> the Senate itself approved ratification of one such treaty with the condition that it be implemented through legislation.<sup>282</sup>

Although the House has not asserted this right with any meaningful vigor since the advent and proliferation of modern bilateral tax treaties, the number and consistency of precedents involving the Origination Clause provides a great deal of historical support if such actions were taken today. The lack of action by the House to protect its participation in modern-day tax treaties also does not cure the constitutional concerns; it only heightens them.<sup>283</sup> As discussed above, the Court enforces the Clause even when the House has chosen not to do so.<sup>284</sup>

Additionally, the House's silence should not be read as acquiescence in this context.<sup>285</sup> The House, after all, is comprised of multiple actors, and a collective interpretation of its constitutional rights is difficult to discern from inaction.<sup>286</sup> This is, in part, due to the constraints placed on the House's agenda and procedural obstacles that any such measure faces.<sup>287</sup> The House's silence may also stem from the practical limitations of any objection to self-executing tax treaties. The President and the Senate, after all, may simply choose to

277. CRANDALL, *supra* note 273, at 183.

278. *Id.* at 188-89.

279. *Id.*

280. *Id.*

281. *Id.* at 189-91.

282. *Id.* at 192.

283. *INS v. Chadha*, 462 U.S. 919, 944-45 (1983) (stating that increasing frequency of unconstitutional conduct sharpens the Court's inquiry rather than blunts it); *see also Powell v. McCormack*, 395 U.S. 486, 546-47 (1969) (holding that misinterpretation of the Constitution by the other branches over an extended period of time does not bind the Court).

284. *United States v. Munoz-Flores*, 495 U.S. 385, 387-88 (1990) (holding that a revenue statute passed in violation of the Origination Clause did not present a non-justiciable political question).

285. Prescribing implementing legislation in the tax treaty context would thus be in keeping with findings that courts tend to not enforce treaties when enforcement would conflict with the desires of Congress. *See Wu*, *supra* note 111, at 583-87 (providing an institutional deference explanation for the case law involving self-execution, finding that judicial enforcement of treaties typically results from state breaches of treaties).

286. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 451 (2012); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

287. *Cf. Eskridge*, *supra* note 286, at 98-99 (speaking of such constraints in the context of Congress, as a whole).

ignore the House's protests. Although the Origination Clause is justiciable, it is unclear that members of the House would have standing to challenge any constitutional violation,<sup>288</sup> and enforcement of its rights by private parties is also limited in the tax treaty context.<sup>289</sup>

Moreover, the House's silence on the issue seems to have been born out of happenstance. Although the House had previously been involved in the implementation of tariff agreements, tariffs receded in importance once the Constitution permitted an income tax in 1913.<sup>290</sup> By the time of the first income tax treaty two decades later in 1932,<sup>291</sup> the House's guardianship over its role in international tax agreements may have been lost in the annals of history.<sup>292</sup> Additionally, because this was the era of the Great Depression, the House may have feared retribution for any action that could be construed as obstructing trade.<sup>293</sup> To conclude that the House forever waived its constitutional rights seems problematic considering the novelty of the instrument and the economic reality of the times in which it was failing to defend such rights. This is particularly true considering the uphill battle the House would face against the Senate and the President in reasserting its rights.<sup>294</sup>

That being said, the model treaties are powerful forces in shaping the negotiations of individual tax treaties,<sup>295</sup> and it is possible that the House sees little need to be heavily involved in the process as a result. Although the model treaties likely diminish the need for congressional involvement, they by no means eradicate it. The Senate actively attaches conditions to its consent to tax treaties and is somewhat involved in the negotiation process.<sup>296</sup> We could expect the House to act in a similar fashion, expressing its viewpoint at various stages in the process. The lack of revenue estimates and cohesive goals of tax treaties<sup>297</sup> also leave room for improvement in the process and areas that could benefit from House input. Moreover, the large states, as represented in the House and whose protection the Origination Clause sought, may have the

288. See *infra* notes 302-303.

289. See *infra* notes 305-315 and accompanying discussion.

290. U.S. CONST. amend. XVI.

291. Tax Convention, *supra* note 102.

292. Just prior to the modern income tax era, beginning in 1887, international agreements in the trade and tariff context were rising in importance as previously protectionist policies began to shift. Hathaway, *supra* note 8, at 1240. Some have argued that such agreements were enacted in the congressional-executive agreement format, rather than through treaties, because of the House's traditional prerogatives in the revenue area. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 reporters' n.9 (1987).

293. The author thanks Philip Postlewaite for this hypothesis.

294. Another theory explaining the House's reticence is the increasing nationalization of politics in the modern era, which ties together the fates of the two houses, possibly diminishing jealousy between them. See Charles Stewart III, *Congress and the Constitutional System*, in THE LEGISLATIVE BRANCH 3, 21 (Paul J. Quirk & Sarah A. Binder eds., 2005).

295. See *supra* notes 138-141 and accompanying discussion.

296. See *infra* note 317 and accompanying discussion.

297. See *supra* notes 202-210 and accompanying discussion.

market power necessary to demand deviation from the standard rules in the model treaty.<sup>298</sup>

### E. Responses to Possible Counter-Arguments

As discussed above, the text, history, and structure of the Constitution, as well as relevant precedent and normative considerations, support the conclusion that self-executing tax treaties raise deep constitutional concerns. Although this position is not without counterarguments, such concerns are ultimately unpersuasive.

#### 1. Last in Time Rule as Insufficient Protection

One critique of the view espoused in this Article might be that the last in time rule offers sufficient protection of the House's constitutional right to originate tax legislation.<sup>299</sup> The House, so the argument would go, can override any tax treaty by initiating a bill; if approved by the Senate and Executive, the later-enacted statute would trump the tax treaty. This reasoning, however, ignores the realities of global politics and the legislative process.

Of foremost concern, congressional overrides, although sanctioned by domestic law, violate international law.<sup>300</sup> We should not expect the House to protect its constitutional right through illegal means. Although the House has shown willingness to override tax treaties, it likely does so much less often than it would if such an act were authorized by international law and accepted without protest by our treaty partners. Indeed, many legislative proposals are abandoned or narrowed out of concern that the legislation would override tax treaties.<sup>301</sup>

Moreover, the constitutional bargain struck gave the large states the right to effectively veto revenue legislation through *inaction*. The response that the last in time rule protects such a right turns that bargain on its head by requiring action (and bicameral action at that) in order for the House to be able to dictate

298. See, e.g., *supra* note 254 (recounting the ability of California to impose formulary apportionment, in contradiction with many tax treaties).

299. Anthony Infanti has argued that Congress lacks the constitutional authority to override tax treaties because the Treaty Clause precludes its participation in the treaty-making process. Infanti, *supra* note 4, at 709-13. Infanti noted the important separation of powers concerns that arose from his thesis but concluded that the Origination Clause actually justifies it. The last in time rule, according to Infanti, improperly injects the House into the treaty-making process by giving it *de facto* amendment power to treaties; the Clause exacerbates this problem, he argues, because such amendments originate in the House. *Id.* at 709. I respectfully disagree with his thesis and go further to argue that the ability to override treaties does not sufficiently protect the constitutional prerogative of the House to originate legislation.

300. Under international law, "[e]very treaty in force is binding upon the parties and must be performed by them in good faith . . . . A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Vienna Convention on the Law of Treaties, art. 26-27, May 23, 1969, 11 U.N.T.S. 331, 339; see *Org. for Econ. Cooperation & Dev., Comm. on Fiscal Affairs, supra* note 225, at 26-28; Avi-Yonah, *Tax Treaty Overrides, supra* note 223, at 65 ("[Overrides] clearly violate[] international law as embodied by the Vienna Convention on the Law of Treaties . . . ."). It could be argued, however, that our treaty partners are well aware of the last in time rule and thus the violation of international law is only technical in nature.

301. See Driessen, *supra* note 203, at 750.



revenue policy in the treaty context, a much less powerful position for the House. Additionally, to immediately override a tax treaty, the House would need the cooperation of the Senate and the Executive, an extremely unlikely outcome given the passage of the treaty immediately prior. The remedy I propose protects the House's constitutional right by assuring revenue laws will not be changed by a treaty if the House chooses not to act.

## 2. *The Enforceability of the Constitutional Claim*

Who will prompt Congress and the Executive into adopting this remedy? It is my hope that Congress and the Executive would uphold their sworn duty to the Constitution and begin to implement or approve tax treaties through legislation, without prompting from the courts. This is especially necessary given that many challenges to the constitutionality of self-executing tax treaties would encounter standing problems.

Members of Congress may face an uphill battle in obtaining standing to challenge violations of the Origination Clause. Although a court of appeals has held that members of the House had standing to challenge whether revenue-raising bills improperly originated in the Senate,<sup>302</sup> the Supreme Court has since expressed reluctance to grant standing to members of Congress when they assert an injury to their institutional authority as legislators, rather than a personal injury.<sup>303</sup>

Private parties may also have difficulties in satisfying standing requirements. Tax treaties reduce the tax liabilities imposed upon foreign entities and individuals and only very indirectly do they increase the tax liabilities of domestic entities and individuals who may be taxed more as a result of the revenue lost from tax treaties.<sup>304</sup> It is hence unlikely that a plaintiff would have suffered an "injury in fact" to a legally protected interest that is "fairly traceable to the challenged action of the defendant" and likely to be redressed by a favorable judicial decision.<sup>305</sup>

There is, however, some support in the equal protection context for finding standing to challenge tax treaties. In the case of a statute that unconstitutionally benefits a particular class of individuals in a discriminatory fashion, the court has held that the redressability prong of the standing inquiry could be met by denying benefits to that class. *Heckler v. Mathews*, for instance, involved the challenge of an award of social security benefits in a manner that benefitted women. Although Congress provided that such an award should be severed and nullified in the case of unconstitutionality, thus

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302. *Moore v. U.S. House of Representatives*, 733 F.2d 946, 956 (D.C. Cir. 1984). Although the *Moore* court concluded that House members had standing, it dismissed the challenge due to general separation of powers concerns. *Id.*

303. *Raines v. Byrd*, 521 U.S. 811 (1997) (holding that members of Congress lacked standing to challenge the Line Item Veto Act).

304. Although for standing purposes, tax treaties do not directly increase the tax liabilities of domestic parties, they indeed do so indirectly in a manner sufficient to implicate the democratic concerns motivating the Origination Clause.

305. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

providing a remedy that would reduce the amount received by other beneficiaries rather than increase the amount given to the plaintiff, the Court nevertheless upheld the plaintiff's standing.<sup>306</sup>

Similar reasoning applied in an equal protection challenge to a tax statute. In *Allied Stores v. Bowers*, an Ohio resident challenged a state property tax statute that exempted similar property of nonresidents.<sup>307</sup> Although the Court could not extend the tax exemption to residents, its ability to nullify the exemption for nonresidents satisfied the redressability prong of the standing analysis.<sup>308</sup> In the matter at hand, although courts would be unable to extend treaty benefits, they could redress the injury by holding that the relevant treaty provisions bestowing such benefits are unconstitutional. Still, it is unclear whether the Court would extend this analysis to encompass constitutional violations under the Origination Clause. In the Equal Protection Clause context, the legislature's exclusion of the taxpayer from receiving benefits is itself the injury. In the tax treaty context, however, it is not at all clear that a taxpayer who was excluded from receiving tax treaty benefits would have fared better with the participation of the House. In essence, it would be difficult to argue that a taxpayer suffered an injury due to the violation of the Origination Clause.

To be sure, some provisions in tax treaties, such as information exchange requirements, impose burdens on foreign taxpayers and therefore may be better candidates for establishing standing. Such was the case in *Lidas v. United States*.<sup>309</sup> In *Lidas*, as discussed in Subsection IV.D.1, French citizens argued that the exchange of information provisions of the U.S.-France tax treaty were unenforceable in court because the treaty was constitutionally void.<sup>310</sup> The *Lidas* court held that, although the citizens suffered an injury in fact that was fairly traceable to the challenged treaty, they did not meet the redressability prong of the standing analysis.<sup>311</sup> The court reasoned that the Origination Clause did not require implementing legislation for the exchange of information provisions, even if it did for the double taxation provisions of the treaty.<sup>312</sup> Because the *Lidas* court held the exchange of information provisions to be severable from any unconstitutional portions of the treaty, the French citizens lacked standing to sue.<sup>313</sup> Following the case law interpreting the Origination Clause, however, obtaining information with regard to the economic activities of our treaty partners' citizens and residents seems essential to assessing the proper U.S. tax liability. It is central to the collection of tax and hence arguably "raises revenue" within the meaning of the Origination

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306. *Heckler v. Mathews*, 465 U.S. 728, 738-40 (1984).

307. 358 U.S. 522 (1959).

308. *Id.* at 526.

309. 238 F.3d 1076 (9th Cir. 2001).

310. Brief for Appellant at 4, *Lidas v. United States*, 238 F.3d 1076 (9th Cir. 2001) (No. 99-55692).

311. 238 F.3d at 1081.

312. *Id.*

313. *Id.*

Clause.<sup>314</sup> Other courts may not follow the overly formalistic severability analysis in *Lidas*.

It may also be possible to assert standing in the context of private contractual agreements. For instance, in a typical credit agreement, the lender agrees to pay any withholding taxes imposed at the time the lender acquires the debt (typically referred to as “day one withholding taxes”) and the borrower agrees to pay any withholding taxes imposed thereafter due to a change in the law.<sup>315</sup> If a lender found itself in the position of paying day one withholding taxes under a reduced treaty rate, they could argue that the treaty was unconstitutional; hence any withholding taxes imposed on the debt under the domestic law counterpart to the treaty would arguably be borne by the borrower since such taxes arise from a change in law. Thus, in these circumstances, an argument could be made that certain foreign entities and individuals have standing to challenge the constitutionality of tax treaties.

## V. DISCUSSION OF REMEDIES

In this Part, I briefly describe the two possible remedies to the constitutional defects caused by self-executing tax treaties—implementing legislation and congressional-executive agreements—and address practical concerns that they might present. I also suggest options to involve the House in the treaty process that fall short of a formal vote of the House. Although these other options likely do not cure the constitutional concern, they help to legitimize the process and are hence preferable to the status quo.

### A. *Implementing Legislation*

The problem I have identified in this Article is that self-executing tax treaties, by dictating revenue law and policy without the participation of the House, are likely unconstitutional abridgments of the Origination Clause. One cure to this problem is straightforward: tax treaties should be subsequently implemented with legislation originating in the House. On this account, the negotiation and ratification process of tax treaties would still involve only the Executive and the Senate. Subsequent to the exchange of ratification instruments, the House would originate and pass implementing legislation. The Senate and President’s approval should be simple to obtain since each ratified a treaty requiring such legislation. Language that such an implementation process is required by our Constitution and must precede the legal effect of the treaty should be inserted into the treaty, both as a courtesy to alert our treaty parties and to protect our negotiating reputation. To alleviate coordination concerns, the House could employ fast track procedures that would ensure such

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314. For an interpretation of the “revenue raising” language in the Origination Clause, see *supra* Subsection IV.A.1.

315. Michael L. Schler et al., *The LSTA Model Credit Agreement: Overview of Tax Changes*, EXPERT GUIDE: TAX, Sept. 2011, at 54, <http://www.corporativewire.com/guide.html?id=expert-guide-tax>.

legislation was placed first on the calendar with limited debate and amendments.<sup>316</sup>

In implementing the treaty, the House may also express reservations about its content by attaching these to its approval. The Senate currently engages in this practice in providing advice and consent, and does so somewhat frequently in the tax treaty context.<sup>317</sup> For instance, in 1999, the Senate attached a reservation to tax treaties with Italy and Slovenia for removal of anti-abuse provisions. Although Slovenia acquiesced to this request, Italy did not, and as a result the treaty with Italy was signed but never entered into force.<sup>318</sup> This practice is not without complications. For instance, a delay occurred in 1978 when the Senate attached a reservation to a treaty with the United Kingdom. In 1979 the Senate approved the treaty after the parties entered into a protocol taking the reservation into account.<sup>319</sup> The ratification process was delayed, but the Senate's ability to participate in the process altered the treaty's final content. The House could similarly obtain some of its preferences by attaching reservations.<sup>320</sup>

To mitigate the risk that the House's involvement would drastically slow down the tax treaty process, the Executive could communicate with members from the House of Representatives during the negotiation or drafting of the tax treaty. Early presidents, for instance, used this strategy when a treaty required an appropriation, and in some cases the House voted on the implementing legislation before the Executive presented the treaty to the Senate.<sup>321</sup> This custom would have the added benefit of obtaining the House's views on the

316. See Trade Act of 1974 § 151, Pub. L. No. 93-617, 88 Stat. 1978, 2001 (1975) (codified as amended at 19 U.S.C. § 2191 (2006)) (expired 2007) (establishing a fast-track procedure for trade agreements); Harold Koh, *Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*, 18 N.Y.U. J. INT'L L. & POL. 1191, 1202 (1986) (discussing such procedures).

317. For a comprehensive list of eighteen Senate reservations on tax treaties between 1946 and 1980, see Kevin C. Kennedy, *Conditional Approval of Treaties by the U.S. Senate*, 19 LOY. L.A. INT'L & COMP. L. REV. 89, 114 n.118 (1996).

318. Kirsch, *supra* note 147, at 1093 n.47.

319. LEGISLATIVE ACTIVITIES REPORT OF THE COMMITTEE ON FOREIGN RELATIONS, S. REP. NO. 97-29, at 7-10 (1980).

320. Some scholars have concluded that although treaties involving tax or appropriations require implementing legislation, the House is under an obligation to carry the treaty into effect and therefore cannot exercise independent judgment in so doing. See WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 67-68 (1825). Others argue that such a conclusion "is not in accordance with the conventional wisdom, which presupposes that Congress has political discretion in these subject areas." Kesavan, *supra* note 9, at 1599. To be sure, this latter view is a more modern understanding and is subject to debate. The Jay Treaty Debate of 1796 involved whether the House of Representatives could refuse to implement treaty obligations. Republicans, led by Jefferson, argued that this was their constitutional right, whereas Federalists, led by Hamilton and Washington, argued that the House had no such discretion. Eventually, the House voted to implement the Treaty. See JERALD A. COMBS, THE JAY TREATY: POLITICAL BATTLEGROUND OF THE FOUNDING FATHERS 187 (1970). Despite the House's "loss" on this issue, the rise of congressional-executive agreements in the modern era has resulted in an active role for the House in international lawmaking. It is doubtful that such a role would be considered problematic in the context of tax treaties, given the House's special role in producing revenue legislation. To require House approval but limit it to a mere formality would be rather meaningless from the standpoint of protecting the concerns animating the Origination Clause.

321. Hathaway, *supra* note 8, at 1321.

treaty's subject matter prior to the finalization of the treaty, which would reduce the risk of a failure to implement.<sup>322</sup>

The implementation remedy may appear overly formalistic; by including the House only after the treaty is negotiated by the Executive and approved by the Senate, how does the command for implementing legislation restore the House's first mover advantage? Although the requirement of implementation legislation would likely not *fully* restore the House in this regard, the House would indeed be able to impact tax policies in the treaty. Formal modeling of the treaty process helps us appreciate how adding the House alters its control over the content of the treaty. Borrowing somewhat from a familiar model,<sup>323</sup> let us adopt the following references:

SQ=status quo or current policy

H=preference of the House

H<sup>1</sup>=point at which House is indifferent between SQ and SE

SE=preference of the Senate and Executive

Let us assume that SQ is the non-existence of a bilateral treaty between Switzerland and the United States that would allow one country to request information on investments of its citizens and residents that they make in the other country.<sup>324</sup> In this scenario, one can further assume that the Executive and Senate prefer a treaty to the status quo but that these two players also prefer a high degree of information sharing. The House also would like a tax treaty with Switzerland but would like minimal information sharing requirements. Thus, the continuum of interests could be illustrated as such:

Preferences	SQ	H	H <sup>1</sup>	SE
Existence of Treaty	No	Yes	Yes	Yes
Degree of Information Sharing	None	Low	Medium	High

Under the Origination Clause, the House is the agenda-setter and therefore has first-mover advantage. The House could originate a proposal at H that would become law. This is because both the Senate and the Executive prefer H to SQ. In the tax treaty implementation context, however, the House lacks its typical agenda-setting ability. Thus, the Senate and Executive could, during treaty negotiations, set the policy at H<sup>1</sup>, the point at which the House is indifferent between keeping the status quo and implementing the treaty with a

322. Jean Galbraith makes the relevant argument that the Treaty Clause does not bar the Senate from providing prospective advice and consent during (as opposed to subsequent to) the negotiation phase of treaty-making. Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L. L. 247 (2012). Similarly, there should be no constitutional barriers from seeking implementing legislation prior to the treaty's final negotiation.

323. The example derives from positive political theory and is formally modeled in William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 529-32 (1992).

324. The author thanks Ruth Mason for this example.

high degree of information sharing. Even so, the incorporation, as opposed to exclusion, of House preferences aligns much more closely with the result contemplated by the drafters of the Origination Clause since otherwise the policy would be set at SE. Furthermore, it is conceivable that the House could move the policy more closely back to H by presenting an implementation bill that conforms to that preference or affecting the treaty negotiation by expressing its preference to the Treasury or State Departments early in the negotiation process. In this manner, the treaty will at least partially reflect the House's preferences whereas, in the absence of my proposal, the treaty would be enacted with a high degree of information sharing.

One might further contend that certain features of the tax treaty process negate any first mover advantage that the House might enjoy. As discussed above, the United States tax treaties are heavily based on the model treaties. Essentially, the model treaty writers enjoy the first-mover advantage and therefore cabin the discretion later exercised by the House. In drafting almost any tax policy proposal, however, the House is not writing upon a clean slate. The Ways and Means Committee is often encumbered with budgetary rules, drafts from interested parties, and existing Code structure in designing tax legislation, and yet the first-mover advantage is still valuable in those settings. The model paradigm surely mutes the House's agenda-setting ability. Yet the Senate and Executive set tough and significant policy choices working within that model, such as withholding tax rates or the level of information exchange. It is, after all, by no means unprecedented for the Senate to attach conditions to its consent to a tax treaty even though the treaty is based on the model.<sup>325</sup> A treaty implemented with the House's involvement will better reflect House policy choices on those issues than under the current system.

### B. *Congressional-Executive Agreements*

In addition to implementing legislation, congressional-executive agreements would also cure the Origination Clause defect by reinserting the House into the international tax agreement process. As compared with implementing legislation, congressional-executive agreements might fare better at restoring the House's first-mover advantage. The most common congressional-executive agreements are authorized in advance by legislation.<sup>326</sup> Because such legislation would originate in the House, the House's early involvement in such an agreement would bring it closer to the agenda-setting position it enjoys in formulating domestic revenue legislation. As with implementing legislation, the House should be able to condition its approval upon substantive requirements.<sup>327</sup>

Compared with treaties requiring implementing legislation, congressional-executive agreements will almost always lessen the number of

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325. See *supra* note 317 and accompanying discussion.

326. Hathaway, *supra* note 8, at 1255-56. The other type of congressional-executive agreement is approved by Congress after it is negotiated.

327. *Id.* at 1331-32.

hurdles to enactment due to its single stage process. The legislation approving of the agreement will include any necessary language implementing it. The House's early involvement may also lessen the likelihood that it later withholds assent to the obligation.

To be sure, the constitutionality of congressional-executive agreements is not beyond doubt. Certain scholars contend that some types of agreements must be concluded as Article II treaties.<sup>328</sup> Others argue that congressional-executive agreements are "complete alternative[s]" to the Article II process for enacting treaties,<sup>329</sup> arguing, for example, that democratic principles justify their use.<sup>330</sup> The democratic rationales underlying the Origination Clause make a uniquely strong case for using congressional-executive agreements in the tax area.<sup>331</sup> Indeed, Bruce Ackerman and Daniel Golove have argued that the Origination Clause provides an additional justification for the use of such agreements in trade contexts, such as NAFTA.<sup>332</sup> Larry Tribe takes a different view. He notes that the Origination Clause may prevent the President from entering into a "self-executing treaty that would directly impose taxes on United States citizens or draw funds from the public treasury."<sup>333</sup> Nevertheless, he rejects Ackerman and Golove's conclusion that the necessary involvement of the House in *implementing* a treaty requires its *approval* of the treaty.

Space constraints limit heavy engagement with the literature on the constitutionality of congressional-executive agreements, and thus my recommendation for their use assumes their constitutionality. I will note, however, that congressional-executive agreements have become standard and uncontroversial practice, indeed evolving into "the primary means of international lawmaking."<sup>334</sup> Additionally, the pro-constitutionality view has persuaded much of the scholarly community for decades,<sup>335</sup> in spite of recent arguments against it.<sup>336</sup>

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328. See Yoo, *supra* note 149, at 761-62.

329. HENKIN, *supra* note 111, at 217; see Ackerman & Golove, *supra* note 4.

330. Hathaway, *supra* note 8, at 1308-12 (justifying a move towards congressional-executive agreements and away from treaties because democratic rationales mandate the inclusion of the House); see also Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self Execution*, 55 STAN. L. REV. 1557, 1589-91 (2003) (drawing upon democratic concerns to justify the non-self-execution of the decisions and actions of international institutions).

331. See Ackerman & Golove, *supra* note 4, at 923.

332. *Id.*

333. Tribe, *supra* note 4, at 1261 n.133.

334. Hathaway, *supra* note 8, at 1306.

335. *Id.* at 1274; see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. E (1987) ("The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance."); HENKIN, *supra* note 111, at 217 ("[I]t is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty . . .").

336. See, e.g., Spiro, *supra* note 191, at 1038; Tribe, *supra* note 4, at 1252; Yoo, *supra* note 149, at 761-62.

### C. *Informal Input*

A final option would increase the informal input from the House. Although this option would likely not cure the constitutional problem of self-executing tax treaties, since it fails to obtain formal approval from the House, it would mitigate concerns over the democratic legitimacy of the process. For instance, members from the House Ways and Means committee could provide more robust input during the negotiation stage of a tax treaty. Access to surrounding facts and records of the negotiations would assist them in this endeavor. House hearings and floor debate may even be scheduled, with normal process proceeding just shy of a formal vote.<sup>337</sup> A greater role for the Joint Committee on Taxation through the provision of revenue estimates and other economic information on the treaties, even if non-binding, would further enhance deliberation.<sup>338</sup>

## VI. CONCLUSION

In conclusion, the Senate's treaty power cannot be used to circumvent the House's power to originate revenue bills. To give meaning and effect to the Origination Clause, and to honor the important principles it advances, international tax agreements require implementing legislation or congressional-executive agreements. The Framers created an elaborate system of checks and balances, including bicameralism, to keep at bay the Tocquevillian nightmare that the majority would rule in tyranny. The resultant two houses hold different characteristics, a distinction that further protects the nation against the ills of a democratic government. Self-executing tax treaties potentially read the Origination Clause out of the Constitution. In so doing, international tax policy is deprived of careful and robust deliberation by the most democratically accountable house. This atrophied process results in tax treaties with ill-defined and conflicting purposes, overly represented special interests, costs outside of the budgetary process, and unstable commitments. These are all predictable and real consequences of self-executing treaties. The use of implementing legislation or congressional-executive agreements allays these troubling concerns.

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337. See Driessen, *supra* note 203, at 753-54.

338. See *id.* at 754.