Curtailing Tax Treaty Overrides: A Call to Action

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CURTAILING TAX TREATY OVERRIDEs: A CALL TO ACTION

Anthony C. Infanti

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.¹

INTRODUCTION

During the past quarter-century, Congress has “taken an increasing interest in the formulation and reformulation of tax policy, including the tax rules applying to international business and investment transactions.”² An unfortunate concomitant of this increased congressional interest in international tax policy has been the passage of legislation that is intended to override inconsistent provisions in existing (and, in some cases, even future) bilateral tax treaties. By enacting such legislation, Congress has been able to bypass the renegotiation process and unilaterally conform tax treaties to the now frequent changes in U.S. international tax policy.

The utility and expediency of this legislative tool notwithstanding, treaty overrides constitute a breach of our obligations to our treaty partners as well as of international law. Legislative overrides damage the reputation of the United States as a member of the international community, undermine the trust of our treaty partners, and harm U.S. citizens and residents by hindering the Department of the Treasury in its efforts to obtain favorable concessions from foreign governments when negotiating and renegotiating tax treaties. For these reasons, members of the executive branch, our treaty partners, and commentators have consistently decried the practice of enacting legislative overrides, and have urged Congress to leave to the renegotiation process the task of adapting tax treaties to legislative changes in U.S. international tax

¹ Assistant Professor of Law, University of Pittsburgh School of Law. I would like to thank Michael Imbacuan and my Fall 2000 Legal Process class for their support and understanding during my first semester of teaching. I would also like to acknowledge the role of my Legal Process students in shaping this essay, because the inspiration for the argument made in the text below came to me while preparing the materials for their class.


policy. Unfortunately, Congress has ignored these pleas and has continued to enact legislative overrides with impunity.

Since there is no effective remedy (either legal or diplomatic) under international law for breach of a tax treaty obligation, it falls to adversely affected taxpayers to force Congress to abide by these obligations as a matter of domestic law. To aid these taxpayers and advance this cause, I call on commentators to cease pleading with Congress to eschew the harmful practice of enacting legislative overrides, and urge them instead to redirect their efforts toward developing theories that circumscribe Congress' power to override tax treaties. By widely disseminating such theories among the practicing tax bar, challenges to what has become an accepted (albeit repugnant) congressional practice are more likely to be entertained (and, hopefully, upheld) by the courts.

Having issued this call, I feel obliged to be the first to respond. I have included below an argument, based on the Supreme Court's decision inClinton v. City of New York,\textsuperscript{3} that Congress lacks the power to enact legislation that overrides inconsistent provisions in tax treaties. I invite members of the practicing tax bar to explore, verify, and (assuming they have satisfied themselves as to its soundness) adopt this argument in challenging tax deficiencies that are based on Internal Revenue Code provisions that purport to override the otherwise applicable provisions of a tax treaty.

\textbf{The Treaty Override Problem}

\textit{The History and Purpose of Tax Treaties}

Following World War I, the movement to eliminate double taxation "gathered considerable momentum, due to the high postwar tax rates and to the growing realization that double taxation... is unscientific and unsound."\textsuperscript{4} Double taxation\textsuperscript{5} was perceived, even then, as a "barrier to the expansion of

\textsuperscript{3} 524 U.S. 417 (1998).
\textsuperscript{4} International Double Taxation: Hearing on H.R. 10,165 Before the House Comm. on Ways and Means, 71st Cong. 4 (1930) (statement of A.W. Mellon, Secretary of the Treasury), reprinted in STAFF OF JOINT COMM. ON INTERNAL REVENUE TAXATION, 87TH CONG., 1 LEGISLATIVE HISTORY OF UNITED STATES TAX CONVENTIONS 18 (Comm. Print 1962) [hereinafter Hearing on International Double Taxation].
\textsuperscript{5} Double taxation occurs when the same income is subject to tax in two different countries. For example, one country may assert taxing jurisdiction over certain income on the basis of the residence of the taxpayer who received it while another country may assert taxing jurisdiction over the same income on the basis of its source. See AM. LAW INST., FEDERAL INCOME TAX PROJECT: INTERNATIONAL ASPECTS

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foreign trade and investments," the "evils and burdens" of which were in need of mitigation. During the 1920s, the League of Nations and the International Chamber of Commerce began to study the problem of double taxation, and the League of Nations undertook the further task of drafting model conventions for the prevention of double taxation. During this same time period, European countries began to conclude bilateral treaties with each other in an effort to reduce the burdens of double taxation. After exploring alternative means of mitigating the burdens of double taxation, the United States joined this effort and concluded its first bilateral tax treaty in 1932.

In the nearly seventy years since the conclusion of this treaty, the United States' network of bilateral tax treaties has expanded dramatically. The U.S. network of income tax treaties has grown to embrace more than sixty countries, while the U.S. network of estate and gift tax treaties now embraces sixteen countries. The terms of these treaties have not remained static, but have been the subject of continuous refinement through the negotiation of protocols and, where appropriate, superseding treaties. The U.S. network of tax treaties has the potential for even further growth; in fact, the Department
of the Treasury is currently negotiating tax treaties with an additional eleven countries.\footnote{11} The U.S. network of income tax treaties has grown at such a remarkable pace because income tax treaties are an important element in the overall international economic policy of the United States. One of the fundamental objectives of this policy is to minimize impediments to the free international flow of capital and technology. This objective is fostered by the broadest possible network of income tax treaties. Among the major impediments to free capital and technology flows are the rules of national tax systems and their interaction with the systems of other countries. Tax treaties seek to eliminate, or at least mitigate, the impact of these impediments.\footnote{12}

Estate and gift tax treaties serve a similar purpose:

\[\text{Treaties for the avoidance of double taxation... are an important means by which governments create a favorable atmosphere for foreign trade and investment. Estate tax treaties along with income tax treaties help to bring about adjustments in two tax systems in such a way that movements of trade and investment between two countries may be facilitated and that conflicts in tax policy are substantially reduced or eliminated... The elimination of double taxation in connection with the settlement in one country of estates in which nationals of another country have interests contributes also toward greater international understanding by removing a deterrent to the movement of individuals between countries.}\footnote{13} \]

\footnote{11. Fogarasi et al., supra note 10. I have included in this category Sri Lanka, with which the United States concluded an income tax treaty in 1985. This treaty was not ratified due to the existence of open issues relating to bank secrecy. The Department of the Treasury has also been considering whether negotiations with Sri Lanka need to be re-opened to take into account the impact of the Tax Reform Act of 1986 on the terms of the treaty. \textit{Id.}}

\footnote{12. Tax Treaties: Hearing on Various Tax Treaties Before the S. Comm. on Foreign Relations, 97th Cong. 7-8 (1982) (statement of John E. Chapoton, Assistant Secretary of the Treasury, Tax Policy). The importance of the global tax treaty network has been underscored by the Organisation for Economic Co-operation and Development, which has stated that double taxation agreements (tax treaties) are an essential element in facilitating economic relations between States and encouraging flows of capital and labor. They form a firm and reliable basis for tax relations between States. They limit and regulate the taxing jurisdiction of the States entering into them so as to ensure the orderly application of the domestic tax laws of what are often quite different systems. Their importance is underlined by the large numbers that are currently in force and the fact that international organizations and the business community repeatedly recommend the enlargement and improvement of the treaty network. COMP. ON FISCAL AFFAIRS, ORG. FOR ECON. CO-OPERATION & DEV., TAX TREATY OVERRIDES ¶ 1 (1990) (footnote omitted), \textit{available at LEXIS 90 TNI 7-13 [hereinafter OECD REPORT].}}

Tax treaties have also come to serve another purpose, namely the prevention of tax evasion. This purpose is accomplished through information exchange provisions that are now routinely included in U.S. tax treaties.\(^1\)

**The Recent Rise in Legislative Overrides**

In 1962, Congress for the first time expressed an intent to override\(^1\) tax treaties through the passage of legislation.\(^6\) Since that time, Congress has with increasing frequency\(^17\) enacted legislation that is intended to override inconsistent provisions in existing (and, in some cases, even future\(^8\)) tax treaties.\(^14\)

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15. **Revenue Act of 1962, Pub. L. No. 87-834, § 31, 76 Stat. 961, 1069 (1962) (generally providing that the Act would override all existing tax treaties). In fact, the Department of the Treasury determined that there were "no conflicts between provisions of the bill and provisions of tax treaties, with one minor exception relating to the... Greek Estate Tax Treaty," which the Department of the Treasury indicated it would attempt to renegotiate before July 1, 1964. H.R. CONF. REP. NO. 87-2508, at 48 (1962), reprinted in 1962 U.S.C.C.A.N. 3732, 3770.**

17. **GOUREVITCH, supra note 2, available at LEXIS 93 TNI 172-15 ("Since about 1980 Congress has enacted tax legislation almost yearly. With increasing frequency such legislation has overridden provisions in U.S. bilateral income tax treaties with other countries."); OECD REPORT, supra note 12, ¶ 2, available at LEXIS 90 TNI 7-13 ("The certainty that tax treaties bring to international tax matters has, in the past few years, been called into question, and to some extent undermined, by the tendency in certain States for domestic legislation to be passed or proposed which may override provisions of tax treaties."); Treaty Overrides: OECD Committee on Fiscal Affairs Report on Tax Treaty Overrides, 2 Tax Notes Int'l 25, 25 (1990) (indicating that, even though the OECD Report "never mentions the United States, the [report] was almost certainly written in response to the recent treaty override actions, and threatened actions, of the U.S. Congress").**

18. **See, e.g., I.R.C. § 269B(d) (2001).**
treaties. Indeed, nearly every major piece of tax legislation since the mid-1970s has contained one or more provisions that were intended to override (or that have had the effect of overriding) tax treaties:

- Tax Reduction Act of 1975—section 601 (foreign tax credits)\(^9\);
- Tax Reform Act of 1976—section 1031 (foreign tax credits)\(^10\);
- Foreign Investment in Real Property Tax Act of 1980—section 1125(c) (concerning the tax consequences to non-U.S. persons of disposing of a direct or indirect interest in U.S. real property)\(^11\);
- Deficit Reduction Act of 1984—section 136 ("stapled" stock)\(^12\);
- Tax Reform Act of 1986—section 1241 (the branch profits tax)\(^13\) and section 1810(a)(4) (foreign tax credits)\(^14\);
- Revenue Reconciliation Act of 1989—section 7210 (the "earnings stripping" rules), section 7403 (concerning information reporting with respect to foreign-owned domestic corporations), and section 7815(d)(14) (concerning the estate tax marital deduction for non-citizen spouses)\(^16\);
- Omnibus Budget Reconciliation Act of 1993—section 13,238 (authorizing the promulgation of regulations recharacterizing multiple-party financing transactions)\(^17\);

27. Pub. L. No. 101-239, 103 Stat. 2106, 2359-61 (1989). See H.R. REP. No. 101-247, at 1301-02 (1989), reprinted in 1989 U.S.C.C.A.N. 1906, 2771-72 (arguing that the information reporting requirements do not violate the nondiscrimination provisions found in many income tax treaties, but stating that, if the reporting requirements are found to violate the nondiscrimination provisions of a treaty, the reporting requirements will override inconsistent treaty provisions). But see Sanford H. Goldberg & Peter A. Gillick, Treaty-Based Nondiscrimination: Now You See It Now You Don't, 1 FLA. TAX REV. 51, 78 (1992) (indicating that the reporting provisions may, in fact, violate the nondiscrimination provisions in many income tax treaties).
The Devolving Congressional Attitude Toward Tax Treaties

The alarming nature of this pattern of legislative overrides was confirmed in 1988, when Congress amended the provision governing the interaction between tax treaties and the Internal Revenue Code. Prior to 1988, § 894(a) of the Internal Revenue Code provided that “[i]ncome of any kind, to the extent required by any treaty obligation of the United States, shall not be included in gross income and shall be exempt from taxation under this subtitle.” In 1988, this provision, which appeared to give priority to treaties (but which Congress had characterized as a mere “cross reference to treaties”), was replaced by § 894(a)(1), which now provides 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.”

At first blush, the switch from the more emphatic language of pre-1988 § 894(a) to the “due regard” standard may not appear to have effected a radical change in the relationship between tax treaties and the Internal Revenue Code; however, the true import of this change cannot be fully...
understood without reading § 894(a)(1) in conjunction with § 7852(d), which was also replaced in 1988. New § 7852(d) fleshes out the “due regard” standard in § 894(a)(1) by providing that “[f]or purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being a treaty or law.” The addition of § 7852(d) to the Internal Revenue Code was an attempt by Congress to codify its own peculiar interpretation of the judicially-created “later-in-time” rule. Upon which its legislative overrides have been based.

Under the later-in-time rule, in the event of a conflict between a treaty and a statute, “the one last in date will control the other.” This rule is premised on the dubious notion that treaties and statutes are on equal footing under the Supremacy Clause of the Constitution because “no superior efficacy is given to either over the other.” The later-in-time rule was first articulated in 1855 in a trial court opinion written by Supreme Court Justice Curtis (acting in his capacity as circuit justice), and was subsequently


39. U.S. Const. art. VI, cl. 2 (providing that the “Constitution, and the 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”). Income tax conventions are “treaties” in the constitutional sense. Samann v. Commissioner, 313 F.2d 461, 463 (4th Cir. 1963); Am. Trust Co. v. Smyth, 247 F.2d 149, 153 (9th Cir. 1957), overruled on other grounds by Maximov v. United States, 373 U.S. 49 (1963).


Commentators have questioned the logical underpinning of the later-in-time rule, which, if carried to its natural conclusion, would also put statutes and the Constitution on equal footing under the Supremacy Clause because “no superior efficacy is given to either over the other.” Whitney, 124 U.S. at 194. See supra notes 38-39 and accompanying text; Sachs, supra; Doenenberg, supra note 26, at 79-80; Louis Henkin, Treaties in a Constitutional Democracy, 10 Mich. J. Int'l L. 406, 425-26 (1989); Comm. on U.S. Activities of Foreign Taxpayers and Foreign Activities of U.S. Taxpayers, N.Y. State Bar Ass'n, Legislative Overrides of Tax Treaties (1987), reprinted in New York State Bar Association Tax Section Opposes Treaty Override Provisions in the Technical Corrections Bill, 37 Tax Notes 931, 932 n.5 (1987) [hereinafter NYSBA REPORT]; Lobel, supra, at 1104.

adopted by the Supreme Court in a series of cases.\textsuperscript{42} By the close of the 19th century, the later-in-time rule had come to be viewed as "black-letter law."\textsuperscript{43}

Since that time, the Supreme Court has limited and clarified the later-in-time rule by providing that "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."\textsuperscript{44} This "firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action" has been reiterated in a number of cases\textsuperscript{45}; however, when Congress codified the later-in-time rule in § 7852(d), it specifically rejected this canon of construction. Congress instead opted for its own peculiar interpretation of the later-in-time rule under which any conflict between a later statute and an earlier treaty would be resolved in favor of the statute—without regard to whether Congress had expressed an intent to override the treaty or had even considered the impact of the statute on the treaty:

The committee does not believe that Congress can either actually or theoretically know in advance all of the implications for each treaty, or the treaty system, of changes in domestic law, and therefore Congress cannot at the time it passes each tax bill address all potential treaty conflict issues raised by that bill. This complexity, and the resulting necessary gaps in Congressional foreknowledge about treaty conflicts, make it difficult for the committee to be assured that its tax legislative policies are given effect unless it is confident that where they conflict with existing treaties, they will nevertheless prevail.\textsuperscript{46}

The codification of this sweeping interpretation of the later-in-time rule provides concrete evidence of Congress' devolving attitude toward our tax treaty network. Some commentators have speculated that this congressional antipathy toward tax treaties may have its roots in the tension that inheres in our constitutional system of separated powers and checks and balances.\textsuperscript{47} The

\textsuperscript{42} See The Chinese Exclusion Case, 130 U.S. 581, 585-86 (1889); Whitney, 124 U.S. at 193-94; The Head Money Cases, 112 U.S. 580, 599 (1884).
\textsuperscript{43} Sachs, supra note 40, at 870.
\textsuperscript{44} Cook v. United States, 288 U.S. 102, 120 (1933).
Constitution vests the power to negotiate and ratify treaties in the President, subject to the advice and consent of the Senate: "[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."48 Although the framers may have envisioned an active advisory role for the Senate during the treaty-making process, the Senate has not often played such a role49; in practice, the President "appoints and instructs the negotiators and follows their progress in negotiation," while the Senate "deliberate[s] and pass[es] judgment" after the fact.50 The Senate's limited role in the treaty-making process (and the notable absence of any role for the House of Representatives51) has probably engendered resentment on the part of Congress, because the Treaty Clause vests in the President a quasi-legislative power52 that permits him to create supreme law of the land53 without running the gauntlet of Article I of the Constitution. The fires of this resentment can only have been stoked by Congress' perception that it is "extremely

49. See Louis Henkin, Foreign Affairs and the Constitution 131 (1972); Joseph Story, Commentaries on the Constitution of the United States § 1517, at 370 (1833).
50. Henkin, supra note 49, at 130-31. See also United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("The President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.").
51. The House of Representatives does, however, play a role in implementing a treaty when the treaty is "non-self-executing." Henkin, supra note 49, at 156-62. Chief Justice Marshall described the difference between a self-executing and a non-self-executing treaty as follows:

A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the Court.

Foster v. Neilson, 27 U.S. (2 Pet.) 253, 313-14 (1829). By their terms, tax treaties are generally self-executing; in other words, they are intended to operate "without the aid of any legislative provision." Id. at 314. See Lidas, Inc. v. United States, 83 A.F.T.R.2d (RIA) 99-1112, 99-1115 (C.D. Cal. 1999), aff'd, 238 F.2d 1076 (9th Cir.), cert. denied, 121 S. Ct. 2245 (2001); Am. Law Inst., supra note 5, at 22; S. Exec. Rep. No. 103-20, at 89 n.74 (1993). Thus, the House of Representatives normally plays no role in either the making or implementation of tax treaties.

52. The Federalist No. 75, at 504 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (the treaty power "partake[s] more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them").
53. U.S. CONST. art. VI, cl. 2.
difficult to renegotiate tax treaties to ensure that their provisions reflect legislative changes in U.S. international tax policy.

Congress' failure to respect our treaty obligations harms the United States in a number of ways. First, each time it enacts a legislative override, Congress causes the United States to violate international law, damaging the United States' reputation as a member of the international community as well as the international legal order itself. Second, because treaties are really no

55. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 8 I.L.M. 679, 690 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”) [hereinafter Vienna Convention]; id. art. 39, 8 I.L.M. at 694 (“A treaty may be amended by agreement between the parties.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(b) (1986) (“That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation.”); AM. LAW INST., supra note 5, at 73 (“That a statute may be effective to supersede a prior treaty as a matter of U.S. internal law does not relieve the United States of its obligations under the treaty. By failing to honor its international obligation, the United States violates the established international law principle pacta sunt servanda.”) (footnotes omitted)); I OPPENHEIM'S INTERNATIONAL LAW: PEACE § 624, at 1254 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (“A treaty may be amended by a further treaty between the parties[,] . . . by an oral agreement, or by a tacit agreement evidenced by the subsequent practice of the parties.”).


One should not, however, be deceived into believing that mutual agreement of the parties is the only means of extrication from a treaty. A party to a treaty may terminate the treaty (or suspend its operation) in whole or in part if the other party materially breaches the treaty. Vienna Convention, supra, art. 60, 8 I.L.M. at 701. In addition, impossibility of performance or a fundamental change of circumstances (clausula rebus sic stantibus) may justify the termination (or the suspension of the operation) of a treaty. Id. arts. 61-62, 8 I.L.M. at 702.

56. Professor Verzijl made the following remarks concerning the importance of the basic principle pacta sunt servanda [agreements must be kept], which is codified in article 26 of the Vienna Convention:

Without its operation and general acceptance as an axiom of inter-state intercourse no true and effective international law is indeed conceivable: when and where, and to the extent to which, that foundation-stone of the international system crumbles, the entire legal order is doomed to collapse, as experience has only too often demonstrated. This self-evident truth is the incontrovertible corollary of the fact that, whereas a municipal legal order is erected on the command “You shall”, the international legal system rests on the undertaking “We shall”. Whenever those “We” break
more than contracts between sovereign nations, legislative overrides erode the trust of our treaty partners by undermining their expectation that the United States will remain faithful to its treaty obligations. \(^{57}\) Finally, legislative overrides harm U.S. citizens and residents who may wish to avail themselves of the benefits of tax treaties, because (i) concern with the congressional proclivity for enacting legislative overrides has led an increasing number of our treaty partners to insist upon a right to renegotiate or retaliate in the event of a legislative override, \(^{58}\) and (ii) the Department of the Treasury has indicated that "it is also becoming increasingly difficult to negotiate reciprocal concessions when the foreign government fears that the United States may unilaterally reverse the bargain by legislative action." \(^{59}\)

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1 J.H.W. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 244 (1968). See also PHILLIP C. JESSUP, A MODERN LAW OF NATIONS 2, 154 (1948) (arguing for a "basic recognition of the interest which the whole international society has in the observance of its law"); J.L. BRIERLY, THE LAW OF NATIONS 331 (Humphrey Waldock ed., 6th ed. 1963) ("It is a truism to say that no international interest is more vital than the observance of good faith between states, and the 'sanctity' of treaties is a necessary corollary.").


59. 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. Department of the Treasury); Richard E. Andersen, Senate Hearings Focus on Policies Toward Developing Nations and Treaty Overrides, 1 J. INT'L TAX'N 189, 191 (1990) ("Successive presidential administrations have vigorously opposed this legislative trend, on the theory that unilateral treaty overrides impede the negotiation of binding treaties with trading partners and run the risk of retaliatory action against U.S. investors.").
The Call to Action

For these reasons, members of the executive branch, our treaty partners, and commentators have decried the use of legislative overrides...


In at least one instance, commentators have proposed eliminating income tax treaties as a means of solving the legislative override problem. See Postlewaite & Makarski, supra, at 800-40. These commentators have instead advocated the codification of the 1996 U.S. Model Income Tax Convention in place of the current international tax regime in the Internal Revenue Code. Id. While the codification of certain treaty provisions may be advisable as a policy matter, the soundness of a wholesale elimination
to conform tax treaties to the now frequent changes in U.S. international tax policy, and they have called on Congress to respect U.S. treaty obligations by limiting modifications of tax treaties to the renegotiation process. Congress has not heeded these calls to observe the norms of international law, but rather has continued to override tax treaties with impunity. Congress' continued enactment of legislative overrides despite these numerous, strident protestations is ample evidence of their futility.

The time has come to stop expressing outrage at the enactment of legislative overrides and to start taking action. Congress can no longer be permitted to undermine the integrity of our tax treaty network, to the detriment not only of our treaty partners but also of U.S. citizens and residents with investments and/or activities abroad. Since there is no effective remedy (either legal or diplomatic) under international law for a breach of a tax treaty obligation, it falls to the taxpayers adversely affected by breaches of these obligations to force Congress to abide by their terms as a matter of domestic law.

Fortunately, given the interest expressed by commentators in curtailing legislative overrides, the task need not fall to these taxpayers alone. I call on commentators to stop urging Congress to refrain from enacting legislative overrides and, instead, to devote their energies to (i) developing theories for circumscribing Congress' power to enact legislative overrides and (ii) disseminating those theories among the practicing tax bar. By more widely calling into question Congress' ability to enact legislative overrides, commentators may be able to chip away at the patina of legitimacy that the

of the U.S. tax treaty network in favor of this codified regime is subject to question. See Rosenbloom, supra note 47, at 80. Among other things, this codified regime would eliminate (i) the discretion that the United States currently exercises in targeting the application of treaty provisions (and the most beneficial treaty rates of tax) to the residents of certain countries and (ii) the benefits that U.S. citizens and residents receive from concessions obtained by the U.S. Department of the Treasury during treaty negotiations. It is also worth noting that a codified regime was considered, and rejected, by the United States as an alternative to tax treaties in the early 1930s. See supra notes 4-9 and accompanying text.

63. See supra notes 17-31 and accompanying text. At least one member of Congress has espoused the view that legislative overrides no longer "constitute[] a violation of the treaty," because the parties entering into these treaties know full well that the Congress has been prepared to override these tax treaties, and therefore they go into them with that knowledge. Now, you can make an argument that we should not do it, or you do not want us to do it, but I think to term it a violation is an overstatement.


64. See Postlewaite & Makarski, supra note 62, at 748; Doemberg, supra note 26, at 115-121; AM. LAW INST., supra note 5, at 73.

65. See supra note 62.
passage of time has conferred on this questionable practice. In addition, by disseminating their theories among the practicing tax bar, commentators will increase the likelihood that the courts will squarely and cogently address the question whether Congress has the power to enact legislative overrides, and, as a result, may finally achieve indirectly through the courts what they have never been able to achieve through direct appeals to Congress.

The Response

Having issued this call, I will be the first to respond. The most obvious means for constraining congressional authority to override tax treaties is a challenge to the validity of the judicially-created later-in-time rule, which serves as the basis for Congress' legislative overrides. Such a challenge could take the form of (i) a direct challenge to the logical underpinning of the later-in-time rule, which has already been questioned by commentators, or (ii) a collateral attack on the constitutionality of the later-in-time rule.

Unfortunately, the likelihood of a successful direct challenge is probably relatively low, because the doctrine of stare decisis would prove a difficult hurdle to overcome. The Supreme Court has indicated that, even in constitutional cases, the doctrine of stare decisis requires some "special justification" as a basis for departure from precedent. Simple disagreement with the reasoning behind the later-in-time rule, which has been considered "black-letter law" for more than a century, would probably not constitute such a special justification.

Given the difficulty inherent in mounting a direct challenge, I have developed below a collateral attack on the constitutionality of the later-in-time rule. This attack, which should provide the "special justification" necessary to overcome the doctrine of stare decisis, is patterned after the U.S. Supreme Court's decision in Clinton v. City of New York. The discussion of this

66. See supra note 40.
67. See supra note 40.
68. Dickerson v. United States, 530 U.S. 428, 443 (2000) ("Whether or not we would agree with Miranda's reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now. While "'stare decisis is not an inexorable command,'" particularly when we are interpreting the Constitution, "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'""") (citations omitted).
69. Id.
70. 524 U.S. 417 (1998). During the course of my research, I came across two pre-Clinton extradition treaty cases in which a similar argument was made; however, neither court reached the merits.
collateral attack is divided into two parts: first, the Court’s decision in *Clinton* is briefly summarized; then, the challenge to the constitutionality of the later-in-time rule is developed using the rationale for the Court’s decision in *Clinton* as a guide.

**Clinton v. City of New York**

The Line Item Veto Act\(^7\) empowered the President “to ‘cancel in whole’ three types of provisions that have been signed into law: ‘(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit.’”\(^7\)\(^2\) At issue in *Clinton* was the constitutionality of the President’s cancellation pursuant to the Act of an “item of new direct spending” in the Balanced Budget Act of 1997\(^7\)\(^3\) (namely, foregoing the return by the State of New York of as much as $2.6 billion in federal subsidies for financing medical care for the indigent) and a “limited tax benefit” in the Taxpayer Relief Act of 1997\(^7\)\(^4\) (namely, the extension of tax-free reorganization status to acquisitions by certain food refiners and processors of certain farmers’ cooperatives).\(^7\)\(^5\)

The President was required to follow a specific procedure in cancelling these items. First, the President had to “consider the legislative history, the purposes, and other relevant information about the items” when identifying them for cancellation.\(^7\)\(^6\) The President was then required to “determine, with respect to each cancellation, that it will ‘(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest.’”\(^7\)\(^7\) The President was finally required to “transmit a special message to Congress notifying it of each cancellation within five calendar days (excluding Sundays) after the enactment of the canceled provision.”\(^7\)\(^8\) Unless a “disapproval bill” was enacted into law, “the cancellation prevent[ed] the item ‘from having legal force or effect’”\(^7\)\(^9\) as of the time of the argument. See DeSena Gouveia v. Vokes, 800 F. Supp. 241 (E.D. Pa. 1992); Hilario v. United States, 854 F. Supp. 165 (E.D.N.Y. 1994).

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75. *Clinton*, 524 U.S. at 436.
76. Id.
77. Id. (quoting 2 U.S.C. § 691(a)(3)(A)).
78. Id.
79. Id. at 437 (quoting 2 U.S.C. § 691e(4)(B)-(C) (Supp. 1994)).
Congress received the special message from the President concerning the cancellation.

The Court invalidated the Line Item Veto Act on the narrow ground that it permitted the President, both legally and practically, to amend "two Acts of Congress by repealing a portion of each," thereby circumventing the procedure for enacting legislation prescribed by Article I of the Constitution. The Court pointed out that "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." The Constitution expressly envisions only two roles for the President in the legislative process: (i) initiating and influencing legislative proposals and (ii) returning (normally referred to as "vetoing") a bill passed by both Houses of Congress to which the President objects. Given the limited express role of the President in the legislative process and the silence of the Constitution on the subject of unilateral Presidential action that either repeals or amends part of duly enacted statutes, the Court concluded that

[i]there are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to express prohibition. The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only "be exercised in accord with a single, finely wrought and exhaustively considered, procedure." . . . What has emerged in these cases from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the "finely wrought" procedure that the Framers designed.

Thus, in reaching its decision in *Clinton*, the Court first turned its attention to ascertaining the true nature of the power that had been granted to the President by the Line Item Veto Act. Once the Court concluded that the President had been granted the power to amend Acts of Congress, the Court then examined the Constitution to determine whether the President had been expressly granted such a power. Finding no such express grant of power and further finding that the President had been expressly granted only a limited

80. *Id* at 447-49.
81. *Id* at 438.
82. *Id*.
83. U.S. CONST. art. II, § 3.
role in the legislative process, the Court held that the constitutional silence on this question should be construed as equivalent to an express prohibition of a power to amend, because legislation may only be enacted or amended in accordance with the "single, finely wrought and exhaustively considered, procedure" established by the framers.

The Argument

Adopting this analytical framework as a guide, the remainder of this essay is devoted to the development of an argument that Congress lacks the power to enact legislative overrides. First, the nature of the power granted to Congress under the later-in-time rule is considered. Concluding that the later-in-time rule grants Congress, in essence, a power to amend treaties, the text of the Constitution is then examined to determine whether Congress has been expressly granted such a power. Finding no such express grant of power and recalling the limited express role granted to Congress in the treaty-making process, historical materials are next examined in an effort to establish that the silence of the Constitution on this question should be construed as equivalent to express prohibition because the framers intended the power to make and amend treaties to be exercised in accordance with the "single, finely wrought and exhaustively considered, procedure" prescribed by the Treaty Clause.87

The Nature of Legislative Overrides

The first step in the Clinton analysis is to ascertain the true nature of the power at issue, which, in this case, is the power to enact legislative overrides. Similar to the President's power to cancel certain items pursuant to the Line Item Veto Act, Congress' power to pass legislation that supersedes inconsistent provisions in tax treaties has the practical and legal effect of

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87. Id. This argument should not present a non-justiciable political question. See Baker v. Carr, 369 U.S. 186, 211 (1962) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."); Michael J. Glennon, Foreign Affairs and the Political Question Doctrine, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 107, 112 (Louis Henkin et al. eds., 1990) ("The purported merits of judicial abstention in foreign affairs decision-making disputes thus shrink under scrutiny, while the drawbacks . . . are substantial."). Judicial abstention is no more warranted in this case than it was in Immigration & Naturalization Service v. Chadha. In Chadha, the Court rejected the application of the political question doctrine, indicating that none of the factors identified in Baker v. Carr were applicable and stating that "[n]o policy underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts." 462 U.S. 919, 941-42 (1983).
amending those treaties. By way of example, consider the effect of the enactment of § 59(a)(2) of the Internal Revenue Code on article XXIV(4) of the income tax treaty concluded between the United States and Canada.88

Article XXIV(4) of the U.S.-Canada Income Tax Treaty, which entered into force in 1984, provides in pertinent part that "[w]here a United States citizen is a resident of Canada, the following rules shall apply: ... (b) For the purposes of computing the United States tax, the United States shall allow as a credit against United States tax the income tax paid or accrued to Canada ..."89 This provision plainly requires the United States to allow each U.S. citizen who is residing in Canada a credit against her U.S. federal income tax liability equal to the entire amount of Canadian tax that she has paid.90

In 1986, Congress enacted § 59(a)(2) of the Internal Revenue Code,91 which limits the amount of foreign taxes that a taxpayer can credit against her U.S. alternative minimum tax liability.92 Section 59(a)(2) caps the amount of the taxpayer's foreign tax credit for alternative minimum tax purposes at an amount equal to 90% of the taxpayer's alternative minimum tax liability. Section 59(a)(2) is designed to ensure that all U.S. citizens residing abroad will pay some tax to the United States, even if the amount of creditable foreign taxes paid by them exceeds the amount of their U.S. alternative minimum tax liability.93 Thus, to the extent of her alternative minimum tax liability, a U.S. citizen residing in Canada (where the top marginal income tax rate exceeds the rate at which the U.S. alternative minimum tax is imposed)

89. Id. (emphasis added).
92. The alternative minimum tax, which is computed at a lower rate than the highest regular income tax rate but with respect to a broader tax base than that used for regular income tax purposes, is intended as a “means of ensuring that every taxpayer with substantial economic income pays meaningful amounts of tax, regardless of how many tax incentives and other special allowances the taxpayer might utilize.” 4 Borris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates & Gifts ¶ 111.4.1, at 111-88 (2d ed. 1992). The alternative minimum tax was enacted in response to reports of high-income individuals who were paying little or no income tax due to the “extensive use of allowances authorized by the Code.” Id. Its enactment was intended to forestall a loss of confidence in the fairness of the income tax system, which could make it more difficult to collect taxes. Id. at 111-89.
would be subject to double taxation (i.e., taxation by the United States and Canada on the same income).

One might naturally assume that the double taxation caused by § 59(a)(2) would be just the sort of impediment to the cross-border flow of capital and labor targeted by the U.S. and Canadian governments when they drafted article XXIV(4) of the U.S.-Canada Income Tax Treaty. Nevertheless, because § 59(a)(2) was enacted by Congress in 1986, some two years after the U.S.-Canada Income Tax Treaty entered into force, it has been held that § 59(a)(2) overrides article XXIV(4), resulting in the double taxation of a portion of the income of a U.S. citizen residing in Canada. Therefore, by enacting § 59(a)(2), Congress has effectively amended article XXIV(4) to provide as follows:

"Where a United States citizen is a resident of Canada, the following rules shall apply:

(b) For the purposes of computing the United States tax, the United States shall allow as a credit against United States tax the income tax paid or accrued to Canada . . . . except that, for purposes of the United States alternative minimum tax, the credit shall not exceed 90% of the United States alternative minimum tax liability."


95. U.S.-Canada Income Tax Treaty, supra note 88, art. XXIV, para. 4, S. Exec. Doc. T, 96-2, at 22 (emphasized text not in original). Even though Congress effectively amended article XXIV(4) when it enacted § 59(a)(2), the original obligation embodied in article XXIV(4) continues to have legal effect for purposes of international law. Restatement (Third) of Foreign Relations Law § 115(1)(b) (1986) ("That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation."). The existence of this continuing obligation under international law will not, however, serve as a basis for arguing that Congress did not actually amend article XXIV(4). In Clinton, the Supreme Court rejected a similar argument that no repeal of the cancelled provisions had occurred because the cancelled provisions continued to have budgetary effect under the "lockbox" provisions of the Line Item Veto Act:

That a canceled item may have "real, legal budgetary effect" as a result of the lockbox procedure does not change the fact that by canceling the items at issue . . . the President made them entirely inoperative as to appellees. Section 968 of the Taxpayer Relief Act no longer provide[d] a tax benefit, and § 4722(c) of the Balanced Budget Act of 1997 no longer relieve[d] New York of its contingent liability.

Clinton, 524 U.S. at 441. In the instant situation, the application of article XXIV(4) to our U.S. citizen residing in Canada has similarly been limited, with the result that she now owes a tax to the United States that she would not have been required to pay had § 59(a)(2) never been enacted. Accordingly, notwithstanding the United States' continuing obligation under international law, Congress will be treated as having amended a treaty obligation of the United States when it enacted § 59(a)(2).
Constitutional Silence on Congressional Power to Amend Treaties

The next step in the Clinton analysis is to examine the Constitution to determine whether Congress has been expressly granted the power to amend treaties. As explained above, the express role of Congress in the treaty-making process is rather limited: the Senate is confined to reviewing and approving treaties after their negotiation has been completed, and the House is effectively foreclosed from playing any role in the treaty-making process. The Constitution is, therefore, silent on the subject of Congress' ability to amend treaties. Following the Court's line of reasoning in Clinton, in light of the limited express role granted to Congress in the treaty-making process, this constitutional silence should be construed "as equivalent to express prohibition." The same powerful reasons that militated in favor of this conclusion in Clinton should hold sway in this situation as well: first, the Treaty Clause, like the Article I procedures for enacting statutes at issue in Clinton, was "the product of the great debates and compromises that produced the Constitution itself," and second, as elucidated below, "familiar historical materials provide abundant support for the conclusion that the framers intended the power to make and amend treaties to be exercised in accordance with the "single, finely wrought and exhaustively considered, procedure" prescribed by the Treaty Clause.

Debates at the Federal Convention of 1787

The best historical evidence of the "finely wrought" and "exhaustively considered" nature of the Treaty Clause is found in the record of the debates at the Federal Convention of 1787. After working through procedural issues, the delegates to the Federal Convention began their work on May 29, 1787. The first concrete proposal for structuring the treaty power was made a few

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96. See supra notes 47-53 and accompanying text.
98. Id.
99. Id.
100. Id. at 439-40 (quoting Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983)). It is worth noting at the outset of this discussion that the framers were not unfamiliar with treaties that touched on matters of taxation; under the Articles of Confederation, the United States concluded several treaties of commerce that granted "[m]ost-favored-nation treatment in respect of . . . imposts and duties." Samuel B. Crandall, Treaties: Their Making and Enforcement § 20, at 32-33 (1916).
weeks later on June 18, when Alexander Hamilton offered his “sketch of a plan” for a federal government. Hamilton’s plan was offered to address perceived deficiencies in the Virginia and New Jersey plans that were then being debated by the delegates to the convention. Under his plan, Hamilton proposed to vest the power to make treaties in the President, whom Hamilton referred to as the “Governour,” with the “advice and approbation” of the Senate. Hamilton’s plan was not intended “as a proposition to the Committee,” but rather was offered “to give a more correct view of his ideas.” Accordingly, although Hamilton’s plan was recorded in the notes of several of the delegates to the Federal Convention, “his plan was never the subject of a formal debate.”

As Professor Arthur Bestor has pointed out, by the time that Hamilton presented his plan for a federal government, “the question of the nature and scope of executive power was already being pushed aside by a developing crisis over representation.” It was not until the acceptance of the Great Compromise on representation on July 17 that the delegates were “able to turn [their] attention back to broader questions of constitutional structure and power.” Matters proceeded quickly, and, by late July 1787, a Committee of Detail was charged with drafting a Constitution that embodied the resolutions passed by the delegates during the preceding two months of debate. These resolutions “set forth various major principles of political organization, together with a few specifications of the powers to be exercised by the several contemplated governmental organs.”

On August 6, the Committee of Detail reported a draft of the Constitution. This draft was then discussed clause by clause, the Treaty Clause not being reached until August 23. In this draft, the power to make treaties was vested in the Senate alone, and the Senate was permitted to make treaties by majority vote. It had apparently been the “tacit assumption of

102. Id. at 291.
104. Id.
105. Id.
108. 2 RECORDS, supra note 101, at 183.
most delegates, once the principle was accepted that two Houses should be constituted in place of the old unicameral Congress of the Confederation,\textsuperscript{109} that the power to make treaties would be vested in the Senate. It was not, however, until this “tacit assumption” appeared in the August 6 report of the Committee of Detail that the framers realized its impact on the Great Compromise on representation.\textsuperscript{110} The Great Compromise had “struck a reasonable balance between [the] competing interests”\textsuperscript{111} of the smaller and larger states with regard to domestic lawmaking; however, by vesting the exclusive control over the power to make treaties in the Senate, “a significant moiety of the intended compromise was in fact non-existent”\textsuperscript{112} because “[t]he larger states would not have the weight to which they felt entitled when it came to the making both of commercial treaties and of agreements regarding territory and other rights.”\textsuperscript{113}

This issue was first raised even before the formal debate on the Treaty Clause began. During a discussion of the Origination Clause\textsuperscript{114} on August 15, George Mason voiced concern over the ability of the Senate to cede territory by treaty, indicating his firm commitment to deprive the Senate of the power to originate spending and appropriations bills because it “could already sell the whole Country by means of Treaties.”\textsuperscript{115} John Francis Mercer agreed with Mason, commenting that the treaty power should be vested in the executive department rather than the legislative. Mercer also addressed the absence of the House of Representatives from the treaty-making process when he asserted that treaties should “not be final so as to alter the laws of the land, till ratified by legislative authority.”\textsuperscript{116}

On August 23, the delegates began to debate the Treaty Clause itself. At the start of this debate, James Madison broached the subject of presidential participation in the treaty-making process when he proposed that “the President should be an agent in Treaties” because the Senate “represented the States alone.”\textsuperscript{117} Gouverneur Morris also questioned whether the treaty power should be vested in the Senate, and further raised “an issue that was genuinely

\textsuperscript{109} Bestor, supra note 107, at 93.
\textsuperscript{110} Id. at 94-95.
\textsuperscript{111} Id. at 94.
\textsuperscript{112} Id. at 94-95.
\textsuperscript{113} Id. at 95.
\textsuperscript{114} 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.”).
\textsuperscript{115} 2 RECORDS, supra note 101, at 297.
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 392.
controversial, . . . the exclusion of the House of Representatives from the
treatymaking process and the placement of the treaty power in a body where
differences of size among the states counted for nothing.” To address this
issue, Morris moved to amend the language proposed by the Committee of
Detail to provide that treaties would not be binding on the United States until
“ratified by a law.”

Morris’ motion, which kept the power to make treaties in the hands of the
Senate but required the concurrence of the House of Representatives,
engendered considerable debate among the framers. Madison indicated that
requiring treaties to be ratified by a law would be inconvenient in the case of
treaties of alliance. Nathaniel Gorham adverted to the “[m]any other
disadvantages” that would result from requiring treaties of peace to be ratified
by a law, including the fact that the treaty negotiators would “go abroad not
instructed by the same Authority (as will be the case with other Ministers)
which is to ratify their proceeding.” Morris responded that he “was not
solicitous to multiply [and] facilitate Treaties.” He also hoped that these
difficulties would force foreign nations to negotiate treaties of alliance in the
United States.

John Dickinson concurred with Morris’ proposed amendment, but recognized that “it was unfavorable to the little States,”
which “would otherwise have an equal share in making Treaties.” James
Wilson suggested that Morris’ proposed amendment was no different than the
procedure in Great Britain, where the King was “obliged to resort to
Parliament for the execution of [the most important Treaties].” William
Samuel Johnson, however, disputed Wilson’s statement, asserting that full and
complete power to make treaties was vested in the King. At the close of
this debate, Morris’ motion to require treaties to be ratified by a law was
defeated by a vote of 8 to 1, with one state being divided on the question.
Following the defeat of Morris’ motion, James Madison “hinted for
consideration, whether a distinction might not be made between different sorts
of Treaties—Allowing the President [and] Senate to make Treaties eventual

118. Bestor, supra note 107, at 109.
119. 2 RECORDS, supra note 101, at 392.
120. Id.
121. Id.
122. Id. at 392-93.
123. Id. at 393.
124. Id.
125. Id.
126. Id. at 394.
and of Alliance for limited terms—and requiring the concurrence of the whole Legislature in other Treaties.\textsuperscript{127}

Because of the disagreements among the delegates, the Treaty Clause was referred to the Committee of Five,\textsuperscript{128} and later, on August 31, was referred to the Committee of Eleven, which had been charged with addressing the postponed parts of the Constitution.\textsuperscript{129} On September 4, the Committee of Eleven presented its report, which proposed that "[t]he President by and with the advice and Consent of the Senate, shall have power to make treaties . . . . But no Treaty . . . shall be made without the consent of two thirds of the members present."\textsuperscript{130} On September 7 and 8, the Committee of Eleven draft of the Treaty Clause "was the subject of a protracted debate."\textsuperscript{131}

As will be borne out by the summary below, this debate focused on two issues: (i) whether to require both the House and Senate to consent to treaties and (ii) whether to remove or alter the requirement that two-thirds of the Senators present must consent to treaties.\textsuperscript{132} The debate concerning the inclusion of the House of Representatives in the treaty-making process reflected a resurgence of the conflict between the larger states and the smaller states that had been resolved, insofar as domestic lawmaking was concerned, by the Great Compromise on representation.\textsuperscript{133} The debate over the supermajority requirement was not, however, prompted by the conflict between the larger and the smaller states, but rather by conflicting sectional economic interests.\textsuperscript{134} It represented "a confrontation between the southern states with their plantation base and their extensive interests in western land, and the maritime and commercial states of the north and east, small and large alike."\textsuperscript{135} In fact, when the delegates met in Philadelphia, the wounds from a bitter sectional conflict that had taken place the year before, involving negotiations with Spain over a commercial treaty, were still fresh in their minds.\textsuperscript{136}

On September 7, James Wilson moved to require both the House and Senate to consent to treaties because, "[a]s treaties . . . are to have the

\begin{enumerate}
\item 127. \textit{id.}
\item 128. \textit{id.}
\item 129. \textit{id.} at 481.
\item 130. \textit{id.} at 498-99.
\item 131. CRANDALL, supra note 100, § 24, at 44.
\item 132. BESTOR, supra note 107, at 123.
\item 133. \textit{id.} at 97.
\item 134. \textit{id.} at 97-98.
\item 135. \textit{id.} at 97.
\item 136. \textit{id.} at 97-98.
\end{enumerate}
operation of laws, they ought to have the sanction of laws also." Roger Sherman opposed this motion on the ground "that the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature." Wilson countered that the need for secrecy in negotiating treaties was outweighed by the need for the legislative sanction of them. Wilson's motion was then brought to a vote, and was defeated by a margin of 10 to 1.

Also on September 7, Wilson objected to the super-majority requirement on the ground that it would "put[] it in the power of a minority to control the will of a majority." Rufus King concurred with Wilson's objection, asserting that the participation of the President served as a check. Madison moved to except treaties of peace from the super-majority requirement, and this motion was passed without opposition. Hugh Williamson and Richard Dobbs Spaight later moved that a treaty of peace affecting territorial rights should be made only with the concurrence of two-thirds of the Senate.

Madison further moved to permit "two thirds of the Senate to make treaties of peace, without the concurrence of the President," because the President "would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace." Pierce Butler seconded this motion "as a necessary security against ambitious [and] corrupt Presidents." Nathaniel Gorham thought Madison's motion unnecessary, because "the means of carrying on war would not be in the hands of the President, but of the Legislature." Gouverneur Morris also disagreed with Madison's motion, believing that "no peace ought to be made without the concurrence of the President." Elbridge Gerry thought that treaties of peace should actually require a higher threshold for approval than other treaties, because "[i]n Treaties of peace the dearest interests will be at stake, as the fisheries, territory &c." Madison's motion to permit two-thirds
of the Senate to make treaties of peace without the concurrence of the President was defeated by a vote of 8 to 3.150

On September 8, 1787, Rufus King moved to strike from the super-majority requirement the "exception of Treaties of peace" language that had been added on Madison's motion during the prior day's debate.151 Wilson then moved to strike out the super-majority requirement altogether, because "[i]f the majority cannot be trusted, it was a proof . . . that we were not fit for one Society."152 After these two motions were made, "[a] reconsideration of the whole clause was agreed to."153

Gouverneur Morris opposed King's motion on the grounds that (i) if two-thirds of the Senate is required to make peace, the legislature "will be unwilling to make war,"154 and (ii) if a majority of the Senate wishes to make peace and is not permitted to, "they will be apt to effect their purpose in the more disagreeable mode, of negativing the supplies for the war."155 Williamson voiced some concern that treaties would be made in the branch of government "where there may be a majority of the States without a majority of the people."156 Wilson also remarked that if two-thirds of the Senate were necessary to make peace, a minority could perpetuate war.157 Gerry "enlarged on the danger of putting the essential rights of the Union in the hands of so small a number as a majority of the Senate, representing perhaps, not one fifth of the people."158 Roger Sherman moved that no rights established by a treaty of peace should "be ceded without the sanction of the Legislature."159 Morris seconded Sherman's motion.160

King's motion to strike the "except Treaties of peace" language from the super-majority requirement passed by a vote of 8 to 3.161 Wilson's motion to strike the super-majority requirement was defeated by a vote of 9 to 1, with one state being divided.162 A number of other motions were also made on that day:

150. Id.
151. Id. at 547.
152. Id. at 547-48.
153. Id. at 548.
154. Id.
155. Id.
156. Id.
157. Id.
158. Id.
159. Id.
160. Id.
161. Id. at 548-49.
162. Id. at 549.
• John Rutledge and Elbridge Gerry moved to require the consent of two-thirds of all of the members of the Senate, rather than two-thirds of the members present (as proposed by the Committee of Eleven). This motion was defeated by a vote of 8 to 3.

• Roger Sherman moved "that 'no Treaty be made without a Majority of the whole number <of the Senate>,," and Elbridge Gerry seconded his motion. Hugh Williamson argued that this amendment provided "less security than 2/3," but Sherman countered that it would "be less embarrassing." Sherman's motion was defeated by a vote of 6 to 5.

• James Madison moved "that a Quorum of the Senate consist of 2/3 of all the members," which would have "put it in the power of one man to break up a Quorum." This motion was also defeated by a vote of 6 to 5.

• Hugh Williamson and Elbridge Gerry moved that no treaty should be made without prior notice to the members of the Senate and a reasonable time for their attendance. This motion was defeated by a vote of 8 to 3.

Following this lengthy debate, the Treaty Clause, as reported by the Committee of Eleven on September 4, was approved by a vote of 8 to 3, with Pennsylvania, New Jersey, and Georgia opposed. The Treaty Clause was then sent to the Committee of Style, which had been charged with arranging and polishing the various provisions that had been approved by the delegates during the preceding month. The Treaty Clause emerged from the Committee of Style "with some reordering of its phrases, and on the 15th of September the Convention loaded it down with additional details relating to appointments." On September 17, the U.S. Constitution "was laid before the Convention, agreed to, and signed." The Treaty Clause was "frequently the topic of debate" during the state ratifying conventions, and was the subject of a number of amendments proposed during the ratification process, none of which was ultimately adopted.

163. Id.
164. Id.
165. Id. (alteration in original).
166. Id.
167. Id.
168. Id.
169. Id.
170. Id. at 549-50.
171. Id. at 550.
172. Bestor, supra note 107, at 131.
173. Id.
174. Id. at 131-32.
175. CRANDALL, supra note 100, § 31, at 56. See also 3 STORY, supra note 49, § 1508.
Further historical support for the argument that the Treaty Clause was "finely wrought" and "exhaustively considered" by the framers can be found in the detailed explanation and justification of the Treaty Clause set forth in The Federalist. In The Federalist No. 64, John Jay described the treaty power and the manner in which it should be vested as follows:

The power of making treaties is an important one, especially as it relates to war, peace and commerce; and it should not be delegated but in such a mode, and with such precautions, as will afford the highest security, that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good.176

Jay explained that the treaty power had properly been vested in the President and Senate because the manner of their selection177 and the age restrictions imposed on their offices should produce candidates of "whom the people have had time to form a judgment, and with respect to whom they will not be liable to be deceived by those brilliant appearances of genius and patriotism, which like transient meteors sometimes mislead as well as dazzle."178 Thus, "the president and senators . . . will always be of the number of those who best understand our national interests . . . and whose reputation for integrity

176. THE FEDERALIST NO. 64, at 432 (John Jay) (Jacob E. Cooke ed., 1961) [hereinafter THE FEDERALIST NO. 64].
177. Originally, neither the President nor Senators were to be directly elected by the people. The President was "to be chosen by select bodies of electors to be deputed by the people for that express purpose," and the appointment of Senators was to be made by the state legislatures. Id. While the President continues to be chosen by electors, the Seventeenth Amendment altered the manner in which Senators are chosen. Senators are now directly elected by the people. U.S. CONST. amend. XVII, cl. i. While the change in the manner in which Senators are chosen may, to a certain extent, undermine the rationale set forth in The Federalist No. 64 for vesting the treaty power in the Senate and President, this change is irrelevant to the instant discussion because it came some 125 years after the Constitution was drafted and submitted to the states for ratification. The focus here is on whether the Treaty Clause was "finely wrought" and "exhaustively considered" by the framers, not on whether the facts supporting their rationale for the structure of the Treaty Clause remain unchanged today. See Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 HARV. L. REV. 1221, 1247 (1995) ("Those provisions of the Constitution that are manifestly instrumental and means-oriented and that frame the architecture of the government ought to be given as fixed and determinate a reading as possible—one whose meaning is essentially frozen in time insofar as the shape, or topology, of the institutions created is concerned.").
178. THE FEDERALIST NO. 64, supra note 176, at 433.
inspires and merits confidence. With such men the power of making treaties may be safely lodged.”179

Jay also explained that by vesting the power of negotiating treaties primarily in the President, “he will be able to manage the business of intelligence in such manner as prudence may suggest,”180 because the negotiation of treaties sometimes requires “perfect secrecy and immediate dispatch.”181 Having the Senate participate in the treaty-making process assures “that the affairs of trade and navigation [will] be regulated by a system cautiously formed and steadily pursued.”182 Thus, Jay concluded that the Treaty Clause ensures “that our negociations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations on the one hand, and from secrecy and dispatch on the other.”183 In The Federalist No. 75, Alexander Hamilton concurred with this view, and concluded that “the joint possession of the power in question by the president and senate would afford a greater prospect of security, than the separate possession of it by either of them.”184

Jay justified the omission of the House of Representatives from the treaty-making process on the ground that it is a popular assembly whose members are “constantly coming and going in quick succession”185 and, therefore, do not continue in office for “sufficient time to become perfectly acquainted with our national concerns, and to form and introduce a system for the management of them.”186 The term of office of a Senator is considerably longer than that of a Representative (six years versus two),187 thereby giving Senators “an opportunity of greatly extending their political informations and of rendering their accumulating experience more and more beneficial to their country.”188 Furthermore, the staggering of senatorial elections “obviates[s] the inconvenience of periodically transferring those great affairs entirely to new men, for by leaving a considerable residue of the old ones in place, uniformity and order, as well as a constant succession of official information,

179. Id.
180. Id. at 435.
181. Id. at 434.
182. Id.
183. Id. at 436.
185. THE FEDERALIST NO. 64, supra note 176, at 433-34.
186. Id. at 434.
188. THE FEDERALIST NO. 64, supra note 176, at 434.
will be preserved. In *The Federalist No. 75*, Alexander Hamilton echoed Jay's defense of the omission of the House of Representatives from the treaty-making process:

The remarks made in [*The Federalist No. 64*] will apply with conclusive force against the admission of the house of representatives to a share in the formation of treaties. The fluctuating, and taking its future increase into the account, the multitudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character, decision, secrecy and dispatch; are incompatible with the genius of a body so variable and so numerous. The very complication of the business by introducing a necessity of the concurrence of so many different bodies, would of itself afford a solid objection. The greater frequency of the calls upon the house of representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the progressive stages of a treaty, would be source of so great inconvenience and expence, as alone ought to condemn the project.

*A Single, Finely Wrought and Exhaustively Considered, Procedure*

Thus, the records of the Federal Convention, along with the explanation in *The Federalist* of the plan of government forged during that convention, provide "abundant support for the conclusion" that the framers intended the power to make treaties to be exercised in accordance with the ""single, finely wrought and exhaustively considered, procedure" prescribed by the Treaty Clause.

189. *Id.*
192. *Id.* at 439-40 (quoting *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983)). The finely wrought and exhaustively considered procedure prescribed by the Treaty Clause represents the "single" procedure found in the Constitution for making a treaty. HENKIN, supra note 49, at 173. During the first 150 years of our republic, this procedure was viewed as the exclusive method for entering into treaties. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 808-13 (1995). It was not until the mid-twentieth century that the congressional-executive agreement came to be accepted, in practice, as an alternative to agreements concluded pursuant to the Executive Clause. Despite its acceptance in practice, the constitutionality of the congressional-executive agreement remains hotly debated. Compare Ackerman, *supra*, with Tribe, *supra* note 177. See also *Made in the USA Found. v. United States*, 56 F. Supp. 2d 1226 (N.D. Ala. 1999) (finding NAFTA constitutional, despite the fact that its conclusion did not comply with the requirements of the Treaty Clause), *vacated and case ordered dismissed*, 242 F.3d 1300 (11th Cir. 2001) (vacating the district court decision and dismissing the case on the ground that determining whether an international commercial agreement—such as NAFTA—is a "treaty" presents a non-justiciable political question), *petition for cert. filed*, 70 U.S.L.W. 3074 (U.S. June 28, 2001) (No. 01-5). Given the questionable constitutionality of the congressional-executive agreement and, more importantly, its recent vintage, the existence of this alternative method for making
Clause. Much in the same way that the amendment or repeal of a statute must conform with the Article I procedures for enacting a statute, the amendment of a treaty should also conform with the "single, finely wrought and exhaustively considered, procedure" prescribed by the Treaty Clause for making treaties. While certain of the founders may have disagreed with this proposition (because of their belief that the Constitution would not render treaties binding on Congress), John Jay effectively refuted their contrary interpretation and supported the reasonableness of this proposition in the following passage from *The Federalist No. 64*:

Others, though content that treaties should be made in the mode proposed, are averse to their being the SUPREME laws of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. *This idea seems to be new and peculiar to this country*, but new errors as well as new truths often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain; and that *it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it*. They who make laws may without doubt amend or repeal them and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made not by only one of the contracting parties, but by both, and consequently that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution therefore has not in the least extended the obligation of treaties. *They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government.*

In this passage, Jay not only dispels any notion that Congress has the power under the Constitution to enact legislation that overrides treaties, but also

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international agreements should not undercut the argument that familiar historical materials provide abundant support for the conclusion that the framers intended the power to make treaties to be exercised in accordance with the "single, finely wrought and exhaustively considered, procedure" prescribed by the Treaty Clause.

193. It is not surprising that the framers would have devoted a considerable amount of time and thought to treaty-related issues, because problems encountered under the Articles of Confederation in enforcing treaties were an impetus for calling the Federal Convention. *See 1 RECORDS, supra note 101, at 18-19; CRANDALL, supra note 100, § 29, at 51; THE FEDERALIST NO. 22, at 136-44 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).*


196. *THE FEDERALIST NO. 64, supra note 176, at 436-37 (emphasis added). See also 4 ELLIOTT, supra note 195, at 119 (statement of Mr. Davie during the ratification debate in North Carolina indicating that "[a]ll civilized nations have concurred in considering [treaties] as paramount to an ordinary act of legislation").*
warns of the danger inherent in granting such a power to Congress—a warning whose prescience has been confirmed by our experience with legislative overrides of tax treaties.197

Jay’s views concerning legislative overrides are consistent with the framers’ choice, after thorough debate and consideration, to vest the treaty power in the President with the advice and consent of the Senate. One of the most contentious issues faced by the framers in structuring the Treaty Clause was whether to require the consent of the entire Congress to proposed treaties.198 The records of the Federal Convention and The Federalist Nos. 64 and 75 make clear that the framers decisively rejected any role for the House of Representatives in the treaty-making process. As explicated in The Federalist, the House was excluded from this process principally because its fundamental characteristics (e.g., its greater number, shorter term of office, and frequent turnover) were considered inimical to the formation of consistent policies that take into account the national interest.199

The later-in-time rule upsets this careful balance of power. First, the later-in-time rule permits the House of Representatives to play a role in the “amendment” of treaties, even though it was allocated no role in their formation; however, the considerations that militated against granting the House a role in the formation of treaties are no less present when treaties are “amended.” In fact, one might convincingly argue that the case for excluding the House of Representatives from the “amendment” process is even more compelling because of the unilateral nature of that process. Second, in the case of tax treaties, the later-in-time rule not only injects the House into the “amendment” process, but also accords it de facto primacy in that process because the Origination Clause requires all bills that raise revenue to originate in the House of Representatives.200 Finally, if a super-majority of each House can be mustered, Congress can “amend” a treaty even in the face of opposition from the President, because Congress has the power to override a presidential veto of legislation that it enacts.201

Jay’s views concerning legislative overrides are also consistent with the writings of Grotius, Vattel, Burlamaqui, and Pufendorf, all of whom influenced the thinking of the framers in the area of international law.202

197. See supra note 61 and accompanying text.
198. Bestor, supra note 103, at 7, 11-12.
199. See supra text accompanying notes 185-90.
201. U.S. Const. art. I, § 7, cl. 3.
202. See BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 22-54
These writers acknowledged the important role that treaties play in international law, and stressed the sanctity and inviolability of a nation's treaty obligations. This core principle of international law, as explicated by Grotius, Vattel, Burlamaqui, and Pufendorf, simply cannot be reconciled with granting a power to Congress that would permit it unilaterally to alter (i.e., breach) the obligations undertaken in a treaty.

Hugo Grotius, who has been described as "the founder of modern international law," expounded "the most basic and indispensable governing principle of the law of nations," namely pacta sunt servanda [agreements must be kept]. Samuel Pufendorf generally addressed the importance of this principle in the following passage:

[When]ever men enter into any agreements, the social nature of man requires that they must be faithfully observed. For if an agreement lacks this guarantee, much the largest part of the advantage which accrues to mankind from the mutual interchange of duties would be lost. . . . It is, therefore, a most sacred precept of natural law, and one that governs the grace, manner, and reasonableness of all human life, That every man keep his given word, that is, carry out his promises and agreements.

Jean-Jacques Burlamaqui underscored the importance of the principle pacta sunt servanda:

[Sovereigns are] no less obliged, than individuals, inviolably to keep their word, and be faithful to their engagements. The law of nations makes this an indispensable duty; for it is evident, that were it otherwise, not only public treaties would be useless to nations, but moreover, that the violation of these would throw them into a state of diffidence and continual war; that is to say, into the most terrible situation. The obligation therefore of sovereigns, in this respect, is so much the stronger, as the violation of this duty has more dangerous consequences, which interest the happiness of numbers of individuals. The sanctity of an oath, which generally accompanies public treaties, is an additional motive


204. 1 Verzul, supra note 56, at 244. See also Lauterpacht, supra note 203, at 325 (describing the principle pacta sunt servanda as "one of the cornerstones of Grotius' teaching").


to engage princes to observe them with the utmost fidelity. The royal word ought therefore to be inviolable and sacred.207

Emmerich de Vattel described "[t]he question of treaties" as "one of the most important presented by the mutual relations and intercourse of Nations,"208 and asserted that a nation that makes a promise to another has conferred "a valid right to require the thing promised."209 According to Vattel, respecting the rights of others, including rights created by the promises embodied in treaties, is "[t]he basis of peace, welfare, and safety of the human race"; thus, if nations were not to respect their word "[t]here would be no longer any security among men, nor any intercourse possible."210 For these reasons, Vattel concluded that "[n]ations and their rulers should . . . observe their promises and their treaties inviolably."211

Due to the importance of a nation's obligation to keep its promises, "not only to the contracting parties but also to all Nations as members of the universal society of mankind," Vattel dedicated an entire chapter in Le Droit des Gens, ou Principes de la Loi Naturelle to the exploration of "The Faith of Treaties."212 In this chapter, Vattel emphasized the "sacred and inviolable"213 nature of treaties, and described a nation that shows contempt for treaties, that "violates them and treads them under foot," as a "public enemy" with respect to whom all other nations should "unite together to check."214 Nevertheless, given the seriousness of the matter, Vattel warned that one should not lightly conclude that a nation that breaks its treaties "despises their binding force;
rather, "[i]t is the sovereign who fails to keep his promises on clearly trivial grounds, or who does not even take the trouble to offer reasons, or to disguise his conduct and cover up his bad faith—it is he who deserves to be treated as an enemy of the human race."\textsuperscript{215}

The notion that a contracting state may not unilaterally alter its treaty obligations is but a corollary of the principle that treaty obligations should be kept sacred and inviolable. The need for mutual consent is implicit in the writings of Grotius, Pufendorf, and Vattel. In his text, Grotius addressed the effect of conflicting agreements between the same parties as follows:

In case the contradiction is real, a later agreement between the contracting parties will annul earlier agreements, since no one could at the same time have had contradictory desires. Such is in truth the nature of acts dependent on the will that they can be relinquished through a new act of volition, either 'on the one part', as in a law or a will, or conjointly, as in the case of contracts and compacts.\textsuperscript{216}

It is of particular interest that, in articulating this rule, Grotius made a clear distinction between laws and wills, which can be unilaterally altered, and contracts and compacts, which can only be altered "conjointly" (i.e., through the mutual consent of the parties). In his exposition of the rules applicable to the interpretation of pacts, Pufendorf, "following almost . . . [in the very footsteps] of Grotius,"\textsuperscript{217} adopted this same distinction. In his discussion of the rules applicable to conflicts among laws and among treaties, Vattel posited conflicts between two laws and between two treaties, but, in the course of articulating ten separate rules applicable to such conflicts, notably made no mention of the rules applicable to conflicts between laws and treaties.\textsuperscript{218}

Additionally, in a separate chapter on the manner in which treaties may be dissolved, Vattel discussed only two grounds for dissolution: (i) violation

\textsuperscript{215} Id. at 188-89.


by the other contracting party and (ii) mutual consent.\textsuperscript{219} Similarly, in discussing the means by which obligations arising from pacts may be met, Pufendorf mentioned three grounds for release from an obligation: (i) breach by the other contracting party, (ii) forgiveness by the other contracting party, and (iii) mutual consent.\textsuperscript{220} Grotius, in the context of discussing breaches of peace treaties, made the following statement, which indicates that a contracting state cannot unilaterally relieve itself of its treaty obligations:

Certainly even after a broken agreement it is within the power of the injured party to preserve peace, as Scipio did after many treacherous acts of the Carthaginians; no one frees himself from an obligation by acting contrary to it. And if the provision has been added, that the treaty of peace should be considered broken by such an act, this provision ought to be considered as added merely for the benefit of the innocent party, in case he wishes to take advantage of it.\textsuperscript{221}

Neither Grotius, Pufendorf, nor Vattel appears to have contemplated the unilateral, unprovoked modification, amendment, or dissolution of a treaty obligation; instead, each appears to contemplate (as reported by John Jay in \textit{The Federalist No. 64}) that such changes will be made only through the mutual consent of the contracting states.

Thus, using the Supreme Court's rationale in \textit{Clinton} as a guide, a strong case can be made that Congress lacks the power to enact legislation that overrides inconsistent provisions in tax treaties. The Constitution grants Congress only a limited express role in the making of treaties, and is silent on the question whether Congress has the power to override inconsistent provisions in treaties through the passage of legislation. In accordance with \textit{Clinton}, this constitutional silence should be construed as equivalent to express prohibition of a power to override treaties, because, as evidenced by the historical materials discussed above, the Treaty Clause represents the "single, finely wrought and exhaustively considered, procedure" established by the framers for making and amending treaties.


\textsuperscript{220} PUFENDORF, \textit{supra} note 206, bk. 5, ch. 11, §§ 7-9, \textit{translated in} \textit{THE CLASSICS OF INTERNATIONAL LAW, 2 DE JURE NATURAE ET GENTIUM LIBRI OCTO} 787-89 (James Brown Scott ed., 1934).

\textsuperscript{221} GROTIUS, \textit{supra} note 205, bk. 3, ch. 20, § 38, \textit{translated in} \textit{THE CLASSICS OF INTERNATIONAL LAW, 2 DE JURE BELLI AC PACIS LIBRI TRES} 818 (James Brown Scott ed., 1925) (emphasis added).
CONCLUSION

A strong, broad network of tax treaties is widely acknowledged to be an important element of the overall international economic policy of the United States. Congress has unfortunately done a great deal of damage to the integrity of this network during the past quarter-century by enacting an alarming amount of legislation that is intended to override inconsistent provisions in tax treaties. Congress has enacted these legislative overrides despite the vociferous, long-standing opposition of members of the executive branch, our treaty partners, and commentators. I have framed this essay as a call to action in the hope that, by urging commentators to redirect their energies toward a cooperative effort with members of the tax bar, we may finally achieve what nearly twenty-five years of pleading with Congress has not: curtailing tax treaty overrides and restoring respect for our treaty obligations and the treaty-making process.