

## Exploring the “How” of Tax Legislation

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**Date :** December 14, 2015

- Michael Doran, *Tax Legislation in the Contemporary U.S. Congress*, 67 **Tax L. Rev.** 555 (2014), available at [SSRN](#).
- Rebecca M. Kysar, [The ‘Shell Bill’ Game: Avoidance and the Origination Clause](#), 91 **Wash. U. L. Rev** 659 (2014).

Much of tax scholarship—past and present—focuses on the “what” of taxation: the substantive content of the tax laws, and what that content is or ought to be. As [Leigh Osofsky](#) recently observed in a delightful series of posts on PrawfsBlawg (see [here](#), [here](#), [here](#), [here](#), and [here](#)), a growing trend in tax scholarship considers tax administration, which one might describe as the “how” of taxation, or at least part of it. A separate, but related, strain of tax scholarship concerns the “how” of taxation from a different perspective, that of the tax legislative process. Two recent articles published last year offer interesting insights into this aspect of taxation: [Michael Doran’s](#) *Tax Legislation in the Contemporary U.S. Congress*, and [Rebecca Kysar’s](#) *The ‘Shell Bill’ Game: Avoidance and the Origination Clause*.

Doran styles his article as an update of our understanding of the tax legislative process. He describes the old process as a tug-of-war between “tax instrumentalism,” with Congress “us[ing] the Internal Revenue Code to pursue nontax economic and social objectives” and cluttering up the Code with “particularistic provisions setting out narrow rules and exceptions for specific constituents and interest groups,” and “tax reform,” with Congress repealing those instrumentalist provisions. Doran posits that, since the late 1980s, gridlock has become the norm. (Pp. 555-556.) At the same time, he suggests that “major items of tax legislation” adopted during that period are “strikingly ‘clean’—that is, nonparticularistic.” To support this proposition, Doran looks at 25 years of “major tax legislation,” listed in a handy table. He documents a decline in the length of tax legislation and draws from that admittedly “very rough proxy”—in addition to his own impressions—that contemporary tax legislation is simply less particularistic than in the past.

Doran also documents past explorations of the tax legislative process as divided between “traditional policy” accounts that “explain tax legislation almost exclusively in policy terms” and “legislator-motivation” accounts that “explain tax legislation in terms of legislator motivations.” (P. 559.) He argues that neither of these descriptions adequately accounts for contemporary trends of congressional gridlock and cleaner, less particularistic tax legislation. Doran endeavors to develop a more nuanced account that appreciates

- the role of exogenous events (overweighted by traditional policy accounts but underweighted by legislator motivation accounts);
- the multiplicity of legislator motivations (including re-election, institutional power and prestige, and good policy, but generally rejecting personal enrichment);
- legislative organization (defined as “the institutional structures by which individual legislators collectively determine the processes for their policymaking activity);
- and also takes into account
- the influence of polarization between Republicans and Democrats;
- strong cohesion within those groups;
- the re-establishment of centralized chamber management, particularly as managerial control in the House of Representatives has shifted from committee chairs to the Speaker of the House; and
- the relaxation of the congressional budget process via the expiration of PAYGO rules and greater use of the Congressional Budget Act’s reconciliation mechanism.

Doran does not seem to give any one of the elements he discusses greater rank or weight as a contributor, leading one to conclude instead that contemporary trends in tax legislation defy easy labels or explanations. Doran also acknowledges that his account offers neither a positive nor a normative theory of the tax legislative process. Regardless, Doran's article is nicely rich as a description of the context and environment of contemporary tax legislation.

Kysar's article approaches the tax legislative process from an entirely different angle—that of the Constitution's Origination Clause. The Origination Clause requires legislation that raises government revenue to originate in the House of Representatives. The Clause gives the Senate the power to amend such legislation, however, and the Senate has interpreted that power broadly as allowing it to strike the language of the House bill entirely and replace that language with the Senate's own, completely different revenue bill. Hence "the 'shell bill' game" of Kysar's title. The Affordable Care Act was adopted this way, and Kysar's paper is at least partly a defense of that legislation against claims that the ACA violates the Origination Clause. But as Kysar notes, Congress used the same technique in adopting the American Taxpayer Relief Act of 2012, the Emergency Economic Stabilization Act of 2008, and "even" the Tax Reform Act of 1986. Hence, her defense of the ACA's constitutionality extends beyond that legislation. (As an interesting side note, the table of major tax legislation in Michael Doran's article includes the American Taxpayer Relief Act and the Tax Reform Act, but not the Affordable Care Act or the Emergency Economic Stabilization Act. An explanatory footnote distinguishes "major tax legislation" from legislation with a large number of tax provisions but nontax central policy objectives. One wonders whether including the latter would alter the picture Doran presents.)

According to Kysar, although the Supreme Court has claimed a judicial role in policing congressional compliance with the Origination Clause, the Court's jurisprudence also demonstrates real reluctance to intrude upon the legislative process. The Court has rejected a searching inquiry into the purposes of legislation—concluding that any legislation that funds the general treasury falls within the Clause, and declining to distinguish between regulatory and revenue-raising taxes or to impose a germaneness requirement on the Senate's amendment power. The Court's jurisprudence has thus opened the door for the Senate's expansive reading of its amendment power. Kysar goes on to defend this "legislative process avoidance doctrine"—"that courts should construe ambiguous constitutional provisions in a manner that avoids searching review of the legislative process"(P. 698.)—as a matter of constitutional theory, focusing particularly on separation of powers principles as embodied in the Rulemaking Clause and the political question doctrine.

One does not have to be a process-and-procedure guru to appreciate that how Congress makes the tax laws substantially affects their substance. Although Doran and Kysar approach the tax legislative process from different directions, their articles both offer tremendous insights into the "how" aspect of taxation. Hopefully, their efforts will inspire others to follow suit.

Cite as: Kristin Hickman, *Exploring the "How" of Tax Legislation*, JOTWELL (November 16, 2015) (reviewing Michael Doran, *Tax Legislation in the Contemporary U.S. Congress*, 67 **Tax L. Rev.** 555 (2014), available at SSRN and Rebecca M. Kysar, *The 'Shell Bill' Game: Avoidance and the Origination Clause*, 91 **Wash. U. L. Rev.** 659 (2014)), <http://tax.jotwell.com/?p=1916>.