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A New Dynamics of Tax Policy?

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"Tax legislation has become a catch-as-catch-can affair that produces complexities, unfairness, conflicting moves in all directions, almost mindless provisions . . . ."

Stanley Surrey[1]

I. Introduction

During the 1980s, U.S. income tax policy followed an erratic and unusual pattern. This Article discusses some of the factors that are commonly associated with such policymaking. On the surface, the legislative process through which tax law was made in the 1980s was little different than that which had prevailed for decades. However, there were several important structural changes in American politics that impacted upon the tax policymaking process during this period. Perhaps the most significant of these were the post-Watergate reforms of the congressional hierarchy, the emergence of significant budget deficits, and the continued weakening of the American party system.

The structural weaknesses and deficiencies in American political institutions let a number of new players intrude into the tax policymaking arena. These included so-called policy entrepreneurs, tax experts, journalists, the media, policy promoters in Washington think tanks, and public interest groups. This opening up of the tax policymaking process was reflected in the tax policy enacted during the 1980s. The enactment of the Tax Reform Act of 1986 stands out as the major tax event of a decade of intense tax policymaking. The Tax Reform Act of 1986 has been referred to in the academic literature on tax policy as a temporary, aberrational departure from the prevailing patterns of "politics-as-usual" that otherwise has dominated the tax policymaking process during the post-War

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1. Stanley S. Surrey, Our Troubled Tax Policy 9 (1981)

period, and alternatively, as heralding the beginning of some "new era" of tax reform. Neither description is entirely satisfactory.

The conclusion here is that neither the passage of the 1986 Act nor the great instability of tax policy throughout the decade marked the beginning of any new era in tax policy—neither a new era of tax reform, supply-side economics, nor Republican hegemony. Rather, the instability of tax policymaking in the 1980s was the culmination of a number of long-term political trends that began decades earlier. Some of the trends, such as those which impel tax policymakers *qua* politicians to provide more public goods than the electorate is apparently willing to pay for through the income tax, reflect the influence of the dominant democratic electoral politics. The proliferation of tax policy entrepreneurs and public interest groups reflects the decline of the party hierarchy in Congress and the weaknesses of the American party system. Such developments in the political system began prior to the 1980s, but became more acute during the decade and exacerbated the existing deficiencies and weaknesses in the tax policymaking process. In other words, the erratic course of tax policy during the 1980s was a product of the continued deterioration in the political process through which tax policy is made. The unstable political framework and the lack of consensus over tax policy resulted in an unusually turbulent decade of tax politics. This unstable politics could produce tax legislation such as Reagan tax cuts in one year and a tax reform bill such as the 1986 Act only five years later. Events in the 1990s already suggest that much the same turbulence continues to haunt federal tax policy.

The goal in this Article is to identify those factors that were new to the tax policymaking process in the late 1970s and early 1980s. The presence of these factors is associated with the broader systemic trends—most particularly, the decline of the party system and the weakening of the congressional hierarchy. Whether the rise of a regenerate Republican Party in Congress will lead to a reversal of any of these trends, producing any greater coherence and stability in tax policy, remains to be seen. There is reason to be pessimistic.

II. The Development of Post-War Tax Policy

In the years following World War II, an implicit consensus was reached over the U.S. income tax. The intensely ideological zero-sum politics that had previously characterized the politics of the federal income tax gave way to an institutionalized nonpartisan use of the income tax as a tool of domestic policymaking. Tax politics in the post-War period was informed by a Keynesian faith in the capacity of the central government to manage the national economy; the income tax would be used as a fiscal tool to achieve long-term growth, stimulate the accumulation of capital, and further job creation and prosperity for capital and labor alike.[2]

During the 1950s and 1960s, policymaking for the income tax was supported by the unprecedented, sustained economic prosperity of the post-War era. Buoyed by the effect of long-term inflationary trends, congressional policymakers enjoyed a constantly increasing source of revenue attributable to so-called "bracket creep." Democrats and Republicans used the income tax to implement a significant portion of their domestic policies through the enactment of what later came to be known as "tax expenditures."[3] Through tax expenditures, congressional policymakers are able to target tax reductions to specific groups or interests with the goal of promoting social and economic policies as well as granting relief from oppressively high marginal tax rates. The relative stability of institutional structures and partisan politics in Congress contributed to the persistence of this pattern of tax policymaking into the early 1970s. By then, the post-War economic boom was already beginning to stall out.

During this period of easy financing, the politics surrounding the federal income tax took the classic form of a distributive policy.[4] Tax policy is essentially made within the confines of the con-

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2. This is the central theme of an important new study of federal income tax policy, RONALD F. KING, MONEY, TIME, & POLITICS: INVESTMENT TAX SUBSIDIES & AMERICAN DEMOCRACY (1993). According to King: "Public finance increasingly became an arena devoted to government efforts at non-zero-sum macroeconomic regulation, and taxation was thus transformed into an instrument promising class coordination, not polarization." *Id.* at 121.

3. Tax expenditures have been defined as "those revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability." The Congressional Budget and Impoundment Act, Pub. L. No. 93-344, § 3(a)(3), 88 Stat. 297, 299 (1974). For a comprehensive discussion of the dynamics of the political process of legislating tax expenditures, see STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES (1973); STANLEY S. SURREY & PAUL MCDANIEL, TAX EXPENDITURES (1985); JOSEPH A. PECHMAN, FEDERAL TAX POLICY 355-63 (5th ed. 1987). A recent study by the General Accounting Office (GAO) estimates that tax expenditures totaled approximately $402 billion in 1993 and are expected to increase by 4% annually. GENERAL ACCOUNTING OFFICE, TAX POLICY: TAX EXPENDITURES DESERVE MORE SCRUTINY (June 3, 1994)

4. *See* Theodore J. Lowi, *American Business, Public Policy, Case Studies, and Political Theory*, 16 WORLD POL. 677-715 (1964); *Four Systems of Policy, Politics, and Choice*, 32

gressional tax committees, and the individual members of these committees (as is the case with all members of Congress) are subject to strong political pressures from their home districts exerted through and enhanced by the "electoral connection."[5] Accordingly, there are strong institutional pressures on congressional tax policymakers that lead them to offer tax benefits to the dominant interests in their home districts or states in their efforts to secure reelection. Logrolling and interest group politics can potentially exert great pressures on the tax policymaking process.

Prior to the early 1970s, electoral and interest group pressures were generally felt less intensely by members of the tax committees than by other members of Congress. This was the result of the tight institutional grip exerted over the tax policymaking process in the House by Wilbur Mills, chairman of the Ways and Means Committee, as well as the control exercised by the Rules Committee.[6] Likewise, the entrenched seniority system that had evolved as a progressive reform of Congress following the 1910 revolt against Speaker Cannon and the party hierarchy that then dominated the House, served to reinforce the power of committee chairmen such as Mills.

This institutional control over the congressional tax policymaking process loosened significantly during the mid-1970s in the wake of the post-Watergate reforms of congressional structures of hierarchy and procedure in which the tax policymaking arena was radically transformed.[7] The post-Watergate reforms weakened the hold of senior majority members over their committees as the power to ratify committee chair assignments was transferred to the Democratic steering committee. Similarly, while Mills had abolished subcommittees in Ways and Means, thereby strengthening his control over virtually all revenue measures passing through the

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PUB. ADMIN. REV. 298 (July-Aug. 1972); *see also* Daniel Shaviro, *Beyond Public Choice and Public Policy: A Study of the Legislative Process as Illustrated By Tax Legislation in the 1980's*, 139 U. PA. L. REV. 1, 44, 56-57 (1990) (describing tax legislation as "distributive").

5. Two well-known accounts of Congress emphasize the notion that the behavior of members is best explained in terms of the pursuit of their own individual electoral goals, *i.e.*, reelection. DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974); MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977).

6. The classic description of Wilbur Mills' control over the Ways and Means Committee and tax policy is JOHN F. MANLEY, THE POLITICS OF FINANCE: THE HOUSE COMMITTEE ON WAYS AND MEANS (1970); *see also* John F. Manley, *Wilbur D. Mills: A Study in Congressional Influence*, 63 AM. POL. SCI. REV. 442-64 (1969).

7. The best account of the new directions taken by the House Ways and Means Committee after the reforms of the 1970s is RANDALL STRAHAN, NEW WAYS AND MEANS: REFORM AND CHANGE IN A CONGRESSIONAL COMMITTEE (1990).

committee, reformers reinstituted them soon after Mills' fall from grace. The closed markup sessions under which Ways and Means operated under Mills were also abandoned in favor of open sessions. Finally, under the chairmanship of Mills, the Ways and Means Committee invariably asked for and received a closed rule from the Rules Committee. After 1975, major tax bills were often reported under an open rule. Initially tax reformers believed that this would be to their advantage, but that has not necessarily been the result. While there is some disagreement over the exact effect of open rules, the clearest losers were the party leadership and the Chairman of Ways and Means, whose tight control over the tax process was further weakened when open rules became common. This loss of control over the tax policy agenda was also evidenced in the rise of committee defeats on the House floor—a phenomenon virtually unheard of during Mills' period of domination.[8] All this occurred while national political parties continued their century-long decline into loose coalitions of locally elected political elites, which in many ways are beyond the control of any central party apparatus—including that of their own leadership in Congress.[9] As a result, following the post-Watergate reforms legislators became further immune from institutional and partisan constraints exerted within Congress.[10]

Ironically, the effect of these institutional innovations on tax policy, as well as public policy in general, was to further expose policymakers to interest group pressures in the absence of any strong countervailing partisan majoritarian forces.[11] When political parties are weak and there are no clear majorities in control of the

8. The increase in failures of the chairman in floor votes is described in STRAHAN, *supra* note 7, at 80-82.

9. The general decline of the national political parties is described in JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM (1973), and DAVID S. BRODER, THE PARTY'S OVER: THE FAILURE OF POLITICS IN AMERICA (1972); *cf.* LARRY J. SABATO, THE PARTY'S JUST BEGUN: SHAPING POLITICAL PARTIES FOR AMERICA'S FUTURE (1988).

10. The best account of the dynamic relationship between the congressman and his local district is RICHARD FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978). Understanding the weakness of congressional party leadership vis-à-vis the individual member of Congress helps to explain the ease by which the October 1990 Budget Summit Compromise was defeated on the floor of the House despite the support of most of the House leadership. See Tim Gray, *Budget Agreement Mired in Political Brinkmanship*, 49 TAX NOTES 127 (Oct. 8, 1990).

11. One of the post-Watergate reforms, adoption of open markup sessions, probably accounted most for exposing members to interest group pressures. Conversely, adopting closed sessions in 1983 seems to have reversed that trend. *See, e.g.*, STRAHAN, *supra* note 7, at 144.

legislative agenda, the impact of interest groups can be magnified.[12] Likewise, the same breakdown of institutional control over the tax committees that opened the door to greater interest group pressures created an increased opportunity for the success of tax reform politics pursued by policy entrepreneurs—both those outside government and members operating within Congress but outside the confines of party discipline and platforms, who promoted themselves and their personal principles from their vantage point on Capitol Hill. As is discussed further below, committee members themselves became rather adept at playing the role of the policy entrepreneur in the absence of party cohesion or independent committee chairmen.

As a result of the congressional reforms implemented in the 1970s, the door was left open to political interest groups and policy entrepreneurs, including proponents of tax reform, allowing them play a much greater role in shaping tax policy. By the 1980s, as political scientist John Witte has observed, the political reality was that "*no one* controls tax policy and that the tendency is for politicians to confer as many benefits on as many groups as is politically feasible."[13] More than ever before, tax policy in the 1980s displayed this lack of control and direction.

III. Tax Legislation in the 1980s

One of the most significant effects of the loosening of the reins over congressional tax policymaking in the 1970s was a deluge of tax legislation in the 1980s. Six major tax bills were enacted during the 1980s, including the most important tax bill in the history of the federal income tax—the Tax Reform Act of 1986.[14]

The decade of tax legislating began with the Economic Recovery Tax Act of 1981 (ERTA).[15] ERTA was inspired by supply-side economics, and its defining feature was tax rate reduction.[16] At the

12. This was found to be the case by John Kingdon in his study of how issues are brought to the political agenda: "[T]he lower the partisanship, ideological cast, and campaign visibility of the issues in a policy domain, the greater the importance of interest groups." John W. Kingdon, Agendas, Alternative, and Public Policies 49 (1984).

13. John F. Witte, The Politics and Development of the Federal Income Tax 121 (1985).

14. Pub. L. No. 99-514, 100 Stat. 2085.

15. Pub. L. No. 97-34, 95 Stat. 172.

16. ERTA effected the greatest tax rate reduction in the history of the federal income tax. The tax rate cuts proposed in 1963 by President John F. Kennedy and enacted after his death in March 1964, reduced the top marginal tax rate from 91% to 70%—a 23% rate reduction. Revenue Act of 1964, Pub.L. No. 88-272, § 111, 78 Stat. 19, 19. ERTA reduced

same time, the politics that led to the enactment of the 1981 Act reflected what has become a rarity in American politics—a highly partisan majoritarian coalition led by a strong executive with an apparent electoral mandate, *i.e.*, the 1980 Reagan landslide. However, almost as soon as the 1981 tax bill was enacted, Congress shifted course again in the wake of increased budget deficits attributable to the ERTA tax rate cuts. Led by Republican Robert Dole in the Senate, Congress passed the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA),[17] and soon after, the Deficit Reduction Act of 1984 (DEFRA).[18] These tax bills reversed many of the supply-side economic policies of ERTA.

Thereafter, beginning in 1985, tax policy again unexpectedly changed course as tax reform emerged as the driving ideology behind the tax legislative process. This culminated in the enactment of the Tax Reform Act of 1986. The 1986 Act was the most comprehensive and significant legislation enacted in the 81-year history of the federal income tax; it also came closest of any legislation to codifying the tax reformist's vision of the ideal income tax.[19] Yet, notwithstanding the success of tax reform in 1986, within only a few short years, prior patterns of tax policymaking were reasserted as proclamations of the triumph of tax reform proved greatly premature. There is little agreement even now among scholars as to how to explain the success of tax reform in 1986 and the radical changes that it inflicted upon the Code. Some students of income tax policy have simply pronounced the 1986 Act an aberration and let it go at that, while others have portrayed the events leading up to tax reform as extraordinary and unlikely to be repeated.[20] In either event, by the close of the decade, it was evident that tax policymaking was already returning to the traditional, pre-reform patterns.

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the top marginal tax rate from 70% to 50%, a 29% reduction. Pub. L. No. 97-34, § 101, 95 Stat. 172, 176.

17. Pub. L. No. 97-248, 96 Stat. 324.

18. Pub. L. No. 98-369, 98 Stat. 494.

19. *See, e.g.*, John F. Witte, *The Tax Reform Act of 1986: A New Era in Tax Politics?"* 19 AM. POL. Q. 438, 441 (Oct. 1991) [hereinafter *New Era*], ("TRA can only be viewed as a remarkable legislative accomplishment and by far the most radical example of peacetime tax reform in history."); Shaviro, *supra* note 4, at ("[T]he 1986 Act was the all-time leading example of tax reform."). For a critical account of the tax reform movement that succeeded in 1986, see Sheldon D. Pollack, *Tax Reform: The 1980's in Perspective*, 46 TAX L. REV. 489 (1991).

20. *See, e.g.*, TIMOTHY J. CONLAN, MARGARET T. WRIGHTSON, AND DAVID R. BEAM, TAXING CHOICES: THE POLITICS OF TAX REFORM 1 (1990) ("Especially in political terms, the TRA was little less than a modern miracle.").

To summarize: tax policy in the 1980s went off in two distinctly different ideological directions—first pursuing supply-side economics and then, only five years later, tax reform. As such, tax policy in the 1980s expressed contradictory political interests and economic goals, as well as conflicting ideological motives. The difficult question is to discern what was different about the politics of the federal income tax during the 1980s that would account for this new pattern of tax policymaking.

The politics leading up to, and the actual enactment of the 1986 Act, cannot be explained either from the perspective of the dominant model of American politics, pluralism,[21] or by incrementalism—which is often put forth as a model of the long-term pattern of development of the federal income tax.[22] Similarly, the crude interest group model, so popular among both law school faculty members and journalists, fails to account for the kind of decisionmaking that characterized tax policymaking in the 1980s. The goal of political analysis is to explain political events by reference to identifiable factors and through verifiable propositions.[23] Thus, any explanation of why supply-side economics and tax reform succeeded in the 1980s, but were nowhere to be found in the 1990s, must identify what was different about the tax policymaking

21. A pluralistic politics is one in which power is widely dispersed, the apparatus of policymaking is readily accessible to various groups and interests with no single group or interest capable of dominating the decisionmaking institutions or the outcomes arising therefrom, and policy outcomes are generally dictated by bargaining among those groups that are organized and represented in the political decisionmaking process. As such, pluralistic power structures are highly conducive to incremental policymaking to the extent that many different interest groups possess, or potentially possess, the power to influence specific and narrow policymaking, with no single group capable of forcing upon the rest wholesale or radical departures from existing policy. Robert A. Dahl is the preeminent pluralist theorist, incorporating pluralism into his theory of "polyarchy." Dahl's most important writings include: A PREFACE TO DEMOCRATIC THEORY (1956); WHO GOVERNS? (1961); POLYARCHY (1971); DILEMMAS OF PLURALIST DEMOCRACY (1982); DEMOCRACY AND ITS CRITICS (1989).

22. Incrementalism is both a descriptive model of empirical policymaking and a normative theory for such policymaking. As a descriptive model of decisionmaking, incrementalism holds that policies generally evolve through evolutionary or incremental departures from existing policies, rather than through radical breaks in existing policies, or the adoption of wholly new policies. Incrementalism purports to describe the way in which decisionmakers actually reach solutions to problems of public policy, and it also emerges as a strategy for rational problem-solving. The term "incrementalism" as it pertains to decisionmaking may have first been introduced to public policy analysis in 1953 by Charles E. Lindblom and Robert A. Dahl. CHARLES E. LINDBLOM & ROBERT A. DAHL, POLITICS, ECONOMICS, AND WELFARE (1st ed. 1953); *see also* Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79-88 (1959).

23. *See* ARTHUR L. STINCHCOMBE, CONSTRUCTING SOCIAL THEORIES 5 (1968) ("[A] theory to be useful must be specific enough that it can be disproved.").

process during the prior decade. That requires some consideration of who controls or sets the tax policy agenda.

IV. The Tax Policy Agenda

Tax policy is made through a dynamic process reflecting the interplay of many different economic and political interests. These interests and institutions compete for control or influence over the policymaking process within Congress and its committees. This includes the president, the national political parties, special interest groups, individual congressmen, tax experts and professionals from within the legislative and executive branches, public interest groups, policy promoters from Washington think tanks, as well as the journalists who report on politics and legislative events. In the struggle for influence over tax policy, the ultimate goal is to shape the outcomes of the legislative process, and the first step in exerting such influence is to control what is on the political agenda.

Political scientist John Kingdon has contrasted the power to set the political agenda (defined as "the list of subjects or problems to which governmental officials, and people outside of government closely associated with those officials, are paying some serious attention at any given time") with the power to define the policy alternatives from which policymakers choose.[24] Kingdon concludes that while presidents generally have the power to influence, and even in some cases set the agenda of Congress, experts play a much greater role in defining the alternatives from which congressional decisionmakers ultimately must choose in deciding how to address a perceived problem of public policy. The influence of interest groups in defining the political agenda is more significant in terms of "negative blocking" and less significant in putting issues on the agenda.[25]

A. EXPERTS AND THE TAX POLICY AGENDA

Kingdon's destinction between the policy agenda and policy alternatives is readily applicable to the tax policymaking process. For instance, on account of the highly technical nature of tax law, the experts in the tax bureaucracy play a more significant role in controlling the tax policy agenda than they do in most other policy

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24. John W. Kingdon, *supra* note 11, at 3.
25. *Id.* at 52-53.

areas.[26] Rather than merely defining the policy alternatives available to congressional policymakers, the tax bureaucracy itself often has had success in setting the tax policy agenda.

Perhaps the most prominent example of this dynamic was the enactment of tax reform in 1986. The tax experts in Treasury, along with academic proponents, had been campaigning for tax reform for decades. The issue arose on the tax policy agenda only after the president and congressional leadership were prodded into action by congressional policy entrepreneurs. It is true that in the end, the traditional leadership of Congress was most responsible for assuring a legislative victory. The tax policy agenda, however, had been set well before the time congressional leadership became crucial. In addition, much of the real impact of tax reform was felt only later in the implmentation of particular policies through regulations devised by the experts and professionals in the tax bureaucracy.

In many more mundane cases, the agenda may be set and controlled by tax experts, who in particularly technical matters may be the only ones in the federal government who are aware of and comprehend the specific abuses of the tax law that are to be corrected. Many of the more technical and highly arcane provisions enacted into the the tax law in the past decade found their way onto the tax agenda, and then into law, exclusively on account of the persistence of tax experts and professionals in the bureaucracy and on the staffs of the tax committees.

The role of experts in the tax policymaking process increased dramatically in the post-World War II era. The staffs of the congressional tax committees—the House Ways and Means and the Senate Finance Committees—became an institutional niche for tax experts. Much the same can be said for the staff of the Joint Committee on Taxation, which makes its technical expertise available to members of Congress in an effort to counter-balance the impact of the Treasury Department, with its great resources, in the tax legislative process.[27] Staff members (both tax lawyers and econo-

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26. "As the complexity of the decision facing legislators increases so too does the likelihood that the staff will exert influence on the outcomes. Tax policy, infinitely complex, maximizes the importance of expertise." John F. Manley, *Congressional Staff and Public Policy-Making: The Joint Committee on Internal Revenue*, 30 J. POL. 1046, 1066 (Nov. 1968).

27. Originally known as the Joint Committee on Internal Revenue Taxation, this committee was created pursuant to the Revenue Act of 1926 upon the recommendation of the Ways and Means Committee, which sought to improve the administration of the Bureau of

mists) have the task of transforming what are often vague congressional initiatives into concrete, administrable tax policy. This role of congressional staff in defining and drafting legislative proposals is well-known.[28]

What is less understood is the role of experts defining the policy alternatives, which inturn, sets the tax policy agenda. By defining the alternatives for presidential and congressional decisionmakers, tax experts exert considerable influence in determining what ultimately ends up as public law. Furthermore, there is a strong consensus among tax experts as to what kinds of proposals constitute good tax policy. The prevailing norm that informs tax experts is in favor of tax reform, defined as the adoption of a comprehensive tax base.[29] This was the ideology that motivated tax reformers in 1986. As one insider at Treasury during the period leading up to the enactment of the 1986 Act has put it:

> Within the government, the Office of Tax Policy at the Department of Treasury had become an institutional base for promoting the view that different forms of income and consumption should be treated equally for both efficiency and equity reasons. The office, comprised of mainly economists and lawyers trained in public finance and tax law, gave testimony year after year about the difficulties created when income from different sources was taxed differently.[30]

Others have described this consensus among tax professionals within the federal government in Treasury, as well as those working on the staffs of the tax committees on the Hill, as a shared

Internal Revenue and promote the simplification of the tax laws. Originally made up of five members from the Senate, five from the House, and five from the general public, the Joint Committee quickly evolved into a nonpartisan research tool of Congress. For an account of the politics behind the creation of the Joint Committee, as well as its early activities, see ROY G. BLAKELY & GLADYS C. BLAKELY, THE FEDERAL INCOME TAX 256-58, 348-53, 542-43 (1940). The staff of the Joint Committee traditionally played a neutral role in advising Congress. The Committee was most respected under the long tenure of Laurence N. Woodworth, who headed the staff of the Joint Committee for over ten years prior to joining the Carter administration as Assistant Treasury Secretary for Tax Policy. After Woodworth's death in December 1977, the stature of the Committee declined, perhaps because it has been perceived as playing a more partisan role in recent years.

28. For a general discussion of the role of congressional staff in the legislative process, see JOHN W. KINGDON, *supra* note 11, at 43-45; MICHAEL J. MALBIN, UNELECTED REPRESENTATIVES (1980); HARRISON W. FOX & SUSAN W. HAMMOND, CONGRESSIONAL STAFFS (1977); Samuel C. Patterson, *Professional Staffs of Congressional Committees*, 15 ADMIN. SCI. Q. 22 (Mar. 1970).

29. The classic discussion and critique of the search for a comprehensive tax base as the goal of tax reform is Boris I. Bittker, *A Comprehensive Tax Base as a Goal of Income Tax Reform*," 80 HARV. L. REV. 925 (1967).

30. C. EUGENE STEUERLE, THE TAX DECADE 91 (1992).

commitment to tax reform and a comprehensive tax base.

While these tax experts would likely describe their own commitment in terms of professional standards and objective principles derived from economics and tax law, these shared values constitute an ideological perspective that dominates the thinking of middle and high level bureaucrats. This shared perspective of tax experts has been summarized as follows:

> The movement for tax reform rested above all else on the shared conviction of knowledgeable experts that the federal income-tax system had grown indefensible from the standpoint of professionally salient values. Furthermore, the ideas and activities of tax policy professionals—notably economists, but also reform-minded tax attorneys—strongly influenced the content of tax reform throughout the policymaking process. Professionals had come to agree on both the need for and, to a lesser but still important extent, the proper design of tax-reform legislation. They worked both outside and inside the government for its inclusion on the policy agenda. They devised proposals conforming to professional standards, thus establishing the parameters of debate. Finally, through the uniquely professional status of the Joint Tax Committee, they exerted influence over many details of the legislation.[31]

Once the first initiatives for tax reform gained political momentum in the 1980s, tax professionals in the federal government were instrumental in formulating more precise legislative proposals, thereby introducing their own very distinct vision of tax reform to the forefront. The tax experts were uniformly committed to a notion of tax reform as the adoption of a comprehensive tax base. This vision constitutes a shared ideology among tax experts.

In addition to defining the alternatives, and accordingly influencing what tax issues emerge on the policy agenda, tax experts also play a significant role in influencing how legislation is actually translated into concrete policy. This is accomplished through the adoption of administrative regulations, as well as interpretive regulations. In the highly arcane and technical world of tax law, policies can be created, and not just implemented, through these regulations issued by Treasury and the Internal Revenue Service. While a generation ago, it was judicial gloss upon the barebone statutes that added the real substance to the Code, tax laws now are given their substance by the tax experts in the Treasury Department and Service who issue the regulations and other pub-

31. CONLAN, WRIGHTSON, & BEAM, *supra* note 19, at 242.

lished authority that guides the actual practice of tax law. Courts seldom overturn the Service's interpretations of the Code, and even more rarely overturn a regulation as contrary to the intention of Congress, granting bureaucrats extraordinary deference and leeway in administering the tax laws.

As such, tax experts enjoy a considerable degree of autonomy in implementing their view of the ideal tax world, undoubtedly more so than in other areas of public administration. If the 1986 Act was qualitatively distinguishable from prior tax legislation, it was so by the extraordinary influence of tax experts and the unpredicted success of the policy entrepreneurs in raising the whole issue of tax reform. The success of tax reform legislative measures demonstrates how major policy initiatives, especially tax policy initiatives, have their origins within the bureaucracy, rather than in interest group politics, as is commonly asserted.

The limits of any explanation of developments in tax policy in the 1980s based upon the role of tax experts is that while such experts may have influenced what appeared on the tax policy agenda in 1985, *e.g.*, Treasury I, they hardly had the final say on what was enacted into law. Congressional politics ultimately exercised that prerogative. Furthermore, tax experts have played a much more minor role in the tax policy process since 1985. This leads to the question of why tax reform has not reappeared on the policy agenda since 1986? Or more precisely, why has prereform politics made such a successful return, contrary to what one would expect if tax experts play such a significant a role in tax policymaking? Obviously, even if tax experts influenced what appeared on the tax policy agenda in the mid-1980s, they have in no sense gained control over the tax policymaking process. Particular and peculiar political circumstances may have temporarily opened the door to tax experts to put tax reform on the policy agenda. But when that door closed again in the late 1980s with a change of political circumstances, tax reform disappeared from the tax policy agenda altogether and the traditional tax politics as usual reemerged.

Thus, setting the tax policy agenda is only the first, albeit crucial step in defining tax policy outcomes. Notwithstanding that an idea has been in the air for decades, it takes more than that to bring it serious consideration in the halls of Congress. What then led to the opening of the door to tax experts and reformers in the 1980s? There is a consensus among scholars that the tax policy agenda was once largely controlled by House Ways and Means

Chairman Wilbur Mills and a small number of other members during the 1960s. In the early 1970s, the rules of the game were changed dramatically following the post-Watergate reforms, thereby opening the door of opportunity to those who would shape the tax policy agenda—the tax experts and reformers. In addition, the door was opened to those within Congress itself who stood to gain from the loosening of the reins of party leadership and the weakening of the committee senority system.

B. TAX POLICY ENTREPRENEURS

In contemporary public policy analysis, a new phenomenon has been observed wherein certain policy entrepreneurs have begun to play a significant role in setting the policy agenda. Acting both within and without the formal institutions of the legislative process, individuals who promote their own particular causes (rather than those of political parties) have played a role in determining the course of policymaking. Such individuals may include members of Congress, as well as those acting within the broader Washington community.

In a 1980 study of new trends in public policy, James Q. Wilson described such policy promoter as a "skilled entrepreneur" who is a "vicarious representative" mobilizing "latent public sentiment."[32] Policy entrepreneurs are said to adopt certain policies in order to promote their own interests, gain favors and obligations for future bargaining, or simply because they personally favor those particular policies.[33] The policy entrepreneur peddles ideas—often ideas that have already been in the air for decades, but which find a place on the policy agenda as some political figure finds it convenient and appealing to promote such issue at that particular time. Pronouncing the importance of ideas in influencing political outcomes also has become a common theme in the public policy literature.[34] So-called think tanks have played an in-

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32. THE POLITICS OF REGULATION 370-71 (James Q. Wilson ed. 1980); *see also* DANIEL P. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING 21-37 (1969); NELSON POLSBY, POLITICAL INNOVATION IN AMERICA: THE POLITICS OF POLICY INITIATION (1984); Nancy C. Roberts, *Public Entrepreneurship and Innovation*, 11 POL'Y STUD. REV. 55 (Spring 1992).

33. *See, e.g.*, KINGDON, *supra* note 11, at 129-30, 214-15.

34. *See, e.g.*, THE POWER OF PUBLIC IDEAS, (Robert B. Reich ed. 1988), especially the essays by Steven Kelman, *Why Public Ideas Matter*, and Gary R. Orren, *Beyond Self-Interest*; CONLAN, WRIGHTSON, & BEAM, *supra*, note 19, at 240-42 (discussing this recent political science literature and examining this "ideational model"); Mark V. Nadel, *Making Regulatory Policy*, in MAKING ECONOMIC POLICY 221-56 (Schick ed.); KINGDON, *supra* note 11, at

creasingly important role in providing policy entrepreneurs with an arsenal of well-defined and researched ideas and ideologies to promote.[35]

In the 1970s and 1980s, ideas seemed to matter more than partisan interests and traditional political coalitions in many policy areas. For instance, the drive to deregulate the trucking industry in the 1970s was led by a most unlikely figure, Democratic Senator Kennedy, and was supported by the trucking industry itself. Such an unusual coalition of liberal politics and regulated industry has become common in the past two decades.[36] Such strange political unions presented evidence contradicting the conventional wisdom regarding the pattern of politics that is said to emerge out of interlocking and common political interests that develop between congressional committees, bureaucratic regulators, and interest groups—the so-called "iron triangles" of interest group politics.[37] Policy entrepreneurs found the issue of deregulation convenient and useful in furthering their own personal ambitions as well as their vision of politics. Furthermore, satisfying these goals contributed to their success within congressional institutions and hierarchy.

Much the same pattern of politics evidenced with respect to deregulation was also witnessed in tax policymaking during the 1980s. Key political actors, beholden to neither special interests nor the traditional partisan politics that usually dominates the tax policymaking process, were able to shape the debate over tax policy in the 1980s. In many respects, they were outsiders from the

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131-32.

35. Two recent and comprehensive accounts of the rise of think tanks are DAVID M. RICCI, THE TRANSFORMATION OF AMERICAN POLITICS: THE NEW WASHINGTON AND THE RISE OF THINK TANKS (1993); JAMES A. SMITH, THE IDEA BROKERS: THINK TANKS AND THE RISE OF THE NEW POLICY ELITE (1991).

36. Taxation was not the only policy area in which well-organized special interests were subordinated in the 1970s and 1980s to some broader pursuit of the public interest. *See generally* MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION (1985) (a study of the deregulation of three industries—trucking, railroads, and aviation—cases where Congress took positions apparently contrary to the interests and preferences of these entrenched economic interests).

37. In the 1960s, it was common in political science textbooks to write of the "iron triangle" and the "capture" of agencies by the very interest groups they were set up to regulate. However, new bureaucratic structures characterized the regulatory agencies of the 1970s—OSHA and the EPA, for example. These agencies took very different approaches and displayed different styles in regulating interest groups. As John Kingdon has put it, "the triangles between bureaucrats, congressional committees, and clienteles that used to dominate policy are not so iron as they once were." KINGDON, *supra* note 11, at 51; *see also* WILSON, *supra* note 30, ch. 10, esp. 384-90.

entrenched leadership on Congress who realized the potential appeal and effectiveness of playing to reformist impulses and speaking in the reformist's rhetoric to mobilize political support for their own domestic policy agendas.

The political actors in Congress who first recognized the potential for successfully aggregating a broad coalition in favor of tax reform are generally considered to have been Senator Bill Bradley, Representative Richard Gephardt, and Representative Jack Kemp—with President Reagan only belatedly joining the ranks of the converted. Senator Bill Bradley is widely recognized as one of the political elite most committed to tax reform by personal principle, and he was instrumental in bringing tax reform to the fore of the policy agenda by the force of his convictions. Congressman Kemp also performed as a tax reform policy entrepreneur motivated by personal commitment to reform the tax laws.[38] It has been correctly recognized, however, that both Bradley and Kemp were mostly promoters, relying upon their staff advisers for the technical expertise that allowed them to actually embody their broad, sweeping, and often contradictory notions of tax reform into formal legislative proposals.[39] Indeed, without experts to implement the vague notions of fairness and reform that were popularized by policy entrepreneurs such as Bradley and Kemp, little of significance would have ever come of the whole business.

In comparison with the policy entrepreneurs who set in motion the initiative for tax reform in the early 1980s, subsequent congressional proponents of the 1986 Act such as Ways and Means Chairman Dan Rostenkowski, Senate Finance Committee Chairman Robert Packwood, former OMB Director and Assistant Secretary for Tax Policy in Treasury Richard Darman, and even President Reagan himself, are all viewed as political Johnny-come-latelies who jumped on the bandwagon merely out of fear of being

38. *See, e.g.*, CONLAN, WRIGHTSON & BEAM, *supra* note 19, at 27 ("Entrepreneurs like Kemp and Bradley seized upon professional concepts like horizontal equity and investment neutrality and converted them into powerful populist themes like fairness and economic growth."). The fact that the term "tax reform" could be applied to describe the policy agendas of two individuals holding such totally dissimilar views about the role of government in shaping the economy and how taxation should be imposed upon business and individual taxpayers serves to further highlight the emptiness of the concept of tax reform.

39. For instance, during the 1980s, economist Joseph Minarik was Bradley's chief tax expert (among others on Bradley's staff who had previously served in Treasury and on the Joint Committee on Taxation) when the Senator was instrumental in stirring interest in lower tax rates and tax reform. Minarik is currently the Associate Director for Economic Policy in the Office of Management and Budget for the Clinton administration.

left behind or, worse yet, being cast in the role of opponents of fairness, equity, and reform. To a large extent this view of the political entrepreneur as the catalyst of tax reform is accurate. However, it also is a perspective that underestimates the role of political leadership in seeing the thing through to the end—in actually shepherding through the legislative process, with all its divided and parochial interests, a legislative bill that intruded upon virtually every major organized interest such as the bill introduced in 1985.

C. THE OLD FASHIONED VIRTUES OF POLITICAL LEADERSHIP

Focusing upon the role of policy entrepreneurs and tax experts in instigating political momentum for tax reform is most useful in describing the sources of policy initiatives. On the other hand, in the intense political maneuvering that ultimately is required to secure passage of any major tax legislation, the skillful guidance of the Chairmen of the House Ways and Means and Senate Finance Committees is crucial in determining whether (and in what form) such legislation is enacted.

This was particularly the case in 1986, as the political leadership of Chairman Dan Rostenkowski (and to a lesser extent, Senate Finance Committee Chairman Robert Packwood) made the passage of the Act a reality.[40] They certainly were the final arbiters who determined that tax reform would even make it onto the agenda for tax policy. This is especially ironic, and perhaps somewhat painful to tax reformers, as it indicates that it was the traditional political institutions and actors (namely, the president and the chairmen of the tax committees) who mattered most in the struggle for tax reform. The importance of leadership in congressional politics, especially on the House Ways and Means Committee, lies not only in determining whether particular legislation is enacted and in what form, but also in shaping broader institutional trends. For instance, the different leadership styles of Wilbur Mills, Al Ullman, and Rostenkowski are important factors in explaining the behavior of the Ways and Means Committee during

40. JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH 287 (1987)("Dan Rostenkowski became a reformer because the president's endorsement of reform represented a challenge and a threat to both him and his party . . . Bob Packwood became a reformer out of desperation: With Reagan and Rostenkowski moving together, he had no choice but to produce a bill or be branded a sellout to special interests . . . .").

the years of their respective chairmanships, as well as domestic tax policy outcomes during the terms of their chairmanships.[41]

The new phenomenon of significance for tax policymaking is that the origin of so many recent tax reform proposals can be traced to policy entrepreneurs, the halls of academia, or the corridors of some Washington think tank, rather than to the dictates and demands of the tax lobbyists. The role of policy entrepreneurs in initiating policy and shaping the political agenda must be kept in perspective. Congressmen have long used their power to introduce legislation that they know has no chance of passing to enhance their own positions.[42] If the policy entrepreneurs "kicked the ball off" for tax reform, in the end they "orchestrated little of what followed."[43] Likewise, if the ideas of Stanley Surrey or Joseph Pechman eventually became the policy initiatives of policy entrepreneurs, it must be recognized that those ideas had been circulating for a considerable period of time—since the 1930s, to be precise. This leaves unanswered the crucial questions of why such ideas rose to the forefront of the political agenda when they did and why policy entrepreneurs suddenly found these ideas so attractive, both to themselves personally and to their constituencies.[44]

If Rostenkowski and Speaker of the House O'Neill ultimately came to accept and even embrace the theme of tax reform, it surely was because they correctly perceived that the political benefits to them, their party, and the House (the political institution most dear to them) outweighed whatever countervailing pressures would be exerted by the lobbyists representing the interest groups that would be most adversely affected by the pending proposals for

41. *See, e.g.*, STRAHAN, *supra* note 7, at 101.

42. Perhaps the best example in the Senate is Jesse Helms. *See* HEDRICK SMITH, THE POWER GAME: HOW WASHINGTON WORKS (1988), p. 60 ("[I]t did not matter to Helms's strategy that he was doomed to lose the Senate vote. He was playing to the grandstand—trying to fire up his reelection effort.").

43. CONLAN, WRIGHTSON, & BEAM, *supra* note 19, at 249.

44. For instance, the recent attack upon tax expenditures has been motivated less by the sudden conversion to Stanley Surrey's views, than by economic considerations making such revenue losers unattractive in today's deficit conscious political climate. *See* Rob Bennett, *From Ivory Towers to the Halls of Power*, 50 TAX NOTES 1301, 1301 (Mar. 18, 1991). The new economic reality contributed to institutionalized changes in the tax committees. *See, e.g.*, STRAHAN, *supra* note 7, at 136 ("Under Rostenkowski's leadership and the fiscal and political pressures created by massive budget deficits, by 1984 politics on the committee appeared in some respects to have come almost full circle since the [1974] reforms—back to the moderate partisanship, attention to fiscal responsibility, and consensual decisionmaking style of the Mills years.").

tax reform. This should be recognized as the beneficial side of an electoral politics which subjects political elites to the constraints of the electorate, and accordingly, forces them to weigh the various interests and reach viable compromises capable of aggregating enough support to give them effect. Institutional and party leaders in Congress often must take the high road, acting on principle and in favor of broader constituencies than is typically the case with nonleaders.[45]

The traditional politics eventually reasserted itself and shaped the bill that emerged from conference committee. This was nowhere more evident than in the blatant efforts to protect key interest groups, such as labor and oil and gas, from reform initiatives and by providing them with overly generous transition rules tailored to protect very specific narrow interests—some even targeted to specific individuals.[46] This is in distinct contrast with the initial proposals for tax reform that were very clear statements of political values and ideology. For instance, Treasury I was the personification of the tax expert's vision of tax reform, ignoring all political practicalities, broadening the tax base, and eliminating almost all special preferences.[47] Later, political considerations were taken into account and the White House became more practical in its proposals, generally reflecting the president's own rather limited vision of reform—lower tax rates.[48] Thereafter, the traditional

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45. *See, e.g.*, DERTHICK & QUIRK, *supra* note 34, at 103 ("Leaders on an issue will be more prone to act on their conceptions of the public interest . . . Compared with other congressmen, leaders will have diminished regard for the wishes of organized interest groups . . . .").

46. For a thoughtful discussion of the role of transition rules in furthering the passage of tax legislation, in particular the Tax Reform Act of 1986, see Lawrence Zelenak, *Are Rifle Shot Transition Rules and Other Ad Hoc Tax Legislation Constitutional?*, 44 TAX L. REV. 563 (1989). Journalists Donald L. Bartlett and James B. Steele won a Pulitzer Prize in 1989 for a lengthy investigative report, *The Great Tax Giveaway*, detailing the use of transition rules used to protect narrow, special interests from the reforms of the 1986 Act. THE PHILADELPHIA INQUIRER, April 10-16, 1988. Perhaps the best-known and most blatant example of a transition rule designed to benefit individual taxpayers was the infamous Gallo amendment (to the sole benefit of the families of Ernest and Julio Gallo of the California winery that bears their name). This transition rule effectively exempted the Gallo family from the new tax on generation-skipping transfers enacted under the 1986 Act. For a discussion of the politics behind the Gallo amendment, as well as the use of transition rules in general with respect to the 1986 Act, see BIRNBAUM & MURRAY, *supra* note 38, at 140, 146-47, 240-43.

47. U.S. TREASURY DEP'T, TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH (1984).

48. See *President Reagan Unveils His Tax Reform Plan*, 27 TAX NOTES 1145 (June 3, 1985) (full text of President Reagan's May 28, 1985 speech announcing his comprehensive federal income tax reform proposals).

politics reasserted itself as Rostenkowski and Packwood each shaped his committee's respective version of tax reform legislation. Tax reformists sneer at the "corrupt" use of transition rules to benefit special interests located in the districts of committee members. However, the granting of favors by transition rules was one of Rostenkowski's most skillful tactics in gaining passage of a purer reform package than what would otherwise have been possible.[49] On the whole, aggregating support for a tax bill by offering generous transition rules (to permit certain industries or even individuals to retain more favorable tax treatment under prior law) should be viewed as preferable to offering new special tax provisions or expenditures that become a permanent fixture in the Code. The old maxim that politics is the art of the possible is lost upon those who seek the radical implementation of their ideal tax policies.

If the policy entrepreneurs set the process in motion, what was finally adopted as the 1986 Act was shaped by the executive branch, molded by the traditional players of partisan and interest group politics, and implemented through the technical regulations drafted by tax experts in the Treasury Department. Thus, the 1986 Act can be said to have reflected the combined input of both Houses of Congress and the executive branch, with the final product given substance by tax experts.

D. PUBLIC INTEREST GROUPS, THINK TANKS, AND TAX POLICY

Another new development in American politics over the course of the past two or three decades has been the intrusion of so-called public interest groups into the formal policymaking process. Interest groups purporting to represent the "public," "the environment," and even "taxpayers" generally, increasingly used the courts and the media to exert influence over the policymaking process.[50] The rise in importance of public interest groups was largely

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49. See CONLAN, WRIGHTSON & BEAM, *supra* note 19, at 117-20.

> Thus, a great many provisions in the Ways and Means bill took care of the needs of supportive members and key constituencies . . . Many more won additional favors in the form of transition rules . . . Rostenkowski skillfully blended the old distributive politics of tax expenditures with the new politics of reform. By preserving tax provisions of greatest value to key members in the process of enacting reform legislation, the committee retained its all-important power to influence the tax code in beneficial ways.

Id. at 117-18.

50. The newly emerging role of public interest group lobbying is discussed in JEFFREY

a development of the 1970s. As late as 1972, the United States Supreme Court was still insisting that standing was required to bring a suit against an agency of the federal government, thereby denying public interest groups access to the federal courts to litigate on behalf of the "public."[51] Nevertheless, in a trend-setting case the same Court permitted a challenge to a governmental decision to put a highway through a park under the Federal Aid-Highways Act of 1968, even though there was no statutory authority for such a citizens suit.[52]

During the 1970s, the principle was established that public interest groups would be allowed to actively participate in the policymaking process. In a similar development, civil rights groups were permitted entry into the policymaking process within the Office for Civil Rights. Organized civil rights groups were granted such access by cooperative federal courts, leaving the agency in disarray from the nearly constant litigation over defining its purpose and mission.[53] Other comparable cases involved the Occupational Safety and Health Administration, the Food and Drug Administration, and the Environmental Protection Agency.[54] All these agencies were subjected to a high level of pressure and litigation from private public interest groups during the 1970s. Notwithstanding the election of a conservative Republican administration in 1980, the trend toward greater access to policymaking in administrative agencies for public interest groups persisted into the 1980s.

The tax policymaking process was not generally subjected to

M. BERRY, LOBBYING FOR THE PEOPLE (1977); MARK V. NADEL, THE POLITICS OF CONSUMER PROTECTION (1971); ANDREW MCFARLAND, PUBLIC INTEREST LOBBIES: DECISION MAKING ON ENERGY (1976); JEFFREY H. BIRNBAUM, THE LOBBYISTS: HOW INFLUENCE PEDDLERS GET THEIR WAY IN WASHINGTON (1992).

51. Sierra Club v. Morton, 405 U.S. 727 (1972). The Sierra Club had brought a legal action in federal court challenging a ruling by the Interior Department. As the litigant, the Sierra Club asserted that it had standing based upon its long-standing interest in environmental matters, supposedly thereby establishing a legitimate interest in intervening in policymaking in this area. The Supreme Court, however, refused to allow a private interest group to assert a right to bring such an action against the government in its own name in order to litigate the issue, rather than a "case or controversy," as is required under the U.S. Constitution. U.S. CONST. art. III, § 2.

52. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

53. This story is the subject of JEREMY RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY (1988).

54. *Id.* at ch. 7 (OSHA); R. SHEP MELNICK, REGULATION AND THE COURTS (1983) (interest group access to EPA policymaking); Paul J. Quirk, *The Food and Drug Administration* in THE POLITICS OF REGULATION (James Q. Wilson ed. 1980).

the same intense challenges in the federal courts by public interest groups.[55] Nevertheless, such groups played an important role in shaping the tax policy agenda during the 1980s. It is commonly asserted that one of the most important stimulants for tax reform was the publication in October 1984 of a study prepared by public interest lawyer Robert McIntyre of Citizens for Tax Justice, an activist group funded by labor and affiliated with Ralph Nader's umbrella organization, Public Citizen.[56] McIntyre's study showed that 128 large U.S. corporations had paid no federal income tax in at least one year from 1981 to 1983—and 17 had paid no taxes at all during these 3 years—notwithstanding that such corporations purportedly had made billions of dollars in profit.[57] This study was given wide exposure by the media. Some have asserted that McIntyre's report helped to stimulate committee action in favor of a tax reform bill.[58]

On the opening day of the conference committee on the 1986 bill, Citizens for Tax Justice issued an update of McIntyre's report, purportedly widely circulated among the conferees, showing that 42 major American corporations had paid no income tax at all from 1982 to 1985.[59] Again, the popular press seized hold of this report, helping to propagate the notion that corporations did not pay their fair share, thereby creating an atmosphere in which the interests of corporations could be successfully challenged by the tax committees.

While most public interest groups are liberal in their political persuasion, they often function (like the media) in a role as classic muckrakers—challenging the Washington establishment regardless of partisan affiliation. For instance, Robert McIntyre of Citizens for Tax Justice (associated with a pro-labor, liberal politics) expressed great displeasure with President Clinton's appointment of Lloyd Bentsen to be Secretary of the Treasury on the grounds that

55. *But see* Bob Jones University v. United States, 461 U.S. 574 (1983). In this unusual case, the U.S. Supreme Court on its own initiative appointed a private advocate to challenge an administrative determination by the Service that this religious educational institution was entitled to tax-exempt status under section 501(c). The Court sided with the advocate, withdrawing tax-exempt status.

56. The importance of McIntyre's report is emphasized in BIRNBAUM & MURRAY, *supra* note 38, at 12; CONLAN, WRIGHTSON & BEAM, *supra* note 19, at 202.

57. ROBERT S. MCINTYRE, CORPORATE INCOME TAXES IN THE REAGAN YEARS 65-68 (1984).

58. *See* BIRNBAUM & MURRAY, *supra* note 38, at 12.

59. This incident is described CONLAN, WRIGHTSON & BEAM, *supra* note 19, at 202.

Bentsen was an insider, and hence, necessarily suspect.[60] Furthermore, liberal public interest groups do not have a corner on the market for lobbying in behalf of tax policy. The Tax Foundation, a conservative public interest group, has continually lobbied against any form of tax increase, including those supported by Republican presidents, such as the 1990 Act. Each year, the Tax Foundation announces "Freedom Day"—based upon the number of days in the year that the average taxpayers must work to satisfy their annual income tax liabilities.[61] Ironically, Citizens for Tax Justice, the Tax Reform Research Group (another Nader affiliated public interest group), Common Cause, and the Tax Foundation all favored the tax reforms included in Treasury I. The common interest among these very different politically motivated groups was their shared preference for lower tax rates, a theme that similarly drew together conservatives and liberals in Congress to support tax reform in 1986.

Washington think tanks have also played a role similar to that of public interest groups in championing some tax policies and lobbying against others. Think tanks are instrumental in supplying policy entrepreneurs with academic studies and all sorts of reports that support their respective policy positions. Perhaps the most notable example of such a successful campaign on behalf of public policy was the publication of the 1,000-page *Mandate for Leadership* by the Heritage Foundation. Presented to President Reagan soon after his election in November 1980, this report collected various studies defining a policy agenda for the new conservative Republican administration.[62] Included in the *Mandate for Leadership* was considerable ammunition supporting significant reductions in federal income tax rates.[63] Many of these proposals found their way into ERTA in 1981.

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60. Jill Abramson & John Harvard, *Some Say Likely Choice of Bentsen, the Insider, For Treasury Post Could Send the Wrong Signal*, WALL ST. J., Dec. 9, 1992, at A-26.

61. Just for the record, the Tax Foundation's latest calculation is that for 1994 the average American taxpayer must work 126 days (or until May 5, 1994) to satisfy all liabilities under federal, state, and local taxes. TAX FOUNDATION, SPECIAL REPORT (Apr. 1994). Compared with other developed Western industrial democracies, this is not a particularly oppressive tax burden.

62. MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION (Charles L. Heatherly ed. 1981). The success of the *Mandate for Leadership* in shaping the policy agenda during the Reagan administration, as well as promoting the Heritage Foundation itself, is recounted in Smith, *supra* note 35, 194-202.

63. See Norman B. Ture, *The Department of the Treasury*, *in* MANDATE FOR LEADERSHIP, *supra* note 62, at 647-64.

The visibility and influence of conservative public interest groups (such as the Tax Foundation and the Project for the Republican Future) and think tanks (such as the Heritage Foundation, the Hoover Institution, the Manhattan Institute, the Hudson Institute, and the American Enterprise Institute) have only been enhanced by the ascendancy of the Republican Party in Congress in 1995.[64] These organizations are likely to play an even more important role in advising policymakers and in cultivating public support for the traditional Republican tax issues—lower marginal tax rates, a preferential rate for capital gains, and tax credits for favored conservative social and economic policies.

If public interest groups and think tanks played an unusually significant role in stimulating the movement for tax reform in 1986, there has been nothing of the same since that time. In addition, the importance of public interest groups is inextricably linked to their access to the courts and the media. The relationship between public interest groups and the federal courts is beyond the discussion here; the relationship between the media and public interest groups is discussed further below.

E. THE MEDIA AND THE TAX POLICY AGENDA

The importance of public interest groups in influencing tax policymaking is directly connected to the rise of the popular media as a force in its own right in shaping the tax policy agenda. The increased role played by the media, especially television, in the political process has been much discussed among political scientists.[65] How the media actually shapes the policy agenda is less clear.[66] The fact that the media has focused on tax policy in recent years is itself surprising, and the phenomenon has been linked to the new politics of the income tax witnessed in the 1980s.[67] Because the

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64. The trend has already begun. *See* David Rogers & John Harwood, *Conservative, Pro-Business Think Tanks Take Center Stage Before House Panel*, WALL STREET J., Jan. 12, 1995, at A16,.

65. *See, e.g.*, RICHARD JOSYLN, MASS MEDIA AND ELECTIONS (1984); BENJAMIN GINSBERG, THE CAPTIVE PUBLIC: HOW MASS OPINION PROMOTES STATE POWER (1986); Martin Linsky, *The Media and Public Deliberation*, *in* THE POWER OF PUBLIC IDEAS (Robert B. Reich ed. 1988).

66. John Kingdon concludes that the media plays a minimal role in putting issues on the agenda of government. He concedes, however, that the media is instrumental in affecting public opinion, thereby playing an important role in indirectly shaping the agenda. KINGDON, *supra* note 11, at 71-72.

67. Timothy J. Conlan, David R. Beam & Margaret T. Wrightson, Tax Reform Legislation and the New Politics of Reform 28-30 (unpublished paper delivered at the 1988 An-

substance of tax policymaking is highly technical and arcane, a high degree of attention by the popular media would not be expected. During the mid-1980s, however, the media was in the vanguard in directing public opinion on the issue of tax reform. It has been calculated that stories on tax reform were featured on the front page of the Washington Post 12 times in 1984, 54 in 1985, and 46 in 1986.[68]

More often than not, journalists view the policymaking process through a narrow interest group model of politics.[69] In many respects, this is just one more manifestation of the long tradition of muckraking that has characterized American journalism. In a particularly apt description, journalists have been portrayed as "having received the views of the academic professions and reinforced them with a cynicism of their own about the relations among economic interests, government agencies, and congressional committees."[70] For those who might consider this to be an overly pessimistic assessment of the capacity of journalists to comprehend in a sophisticated way the tax policymaking process, a recent example should give reason to pause and reflect.

A journalistic account written by Donald L. Barlett and James B. Steele was published in 1991 by *The Philadelphia Inquirer*, a highly respected newspaper that has won numerous awards for the quality of its investigative reporting.[71] These same authors previously won a Pulitzer Prize in 1989 for a widely praised seven-part exposé of the special tax breaks embodied and buried in the Tax Reform Act of 1986 Act, especially in the transition rules used to protect special interests from the very reforms enacted by the 1986 Act.[72]

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nual Meeting of the American Political Science Association, Washington, D.C.).

68. CONLAN, WRIGHTSON & BEAM, *supra* note 19, at 250. The authors also determined that the New York Times featured 15 stories on the front page in 1984, 53 in 1985, and 46 in 1986. These figures far exceed the coverage given to tax reform during prior periods of legislative initiative.

69. Typical of this approach by journalists are MORTON MINTZ & JERRY S. COHEN, AMERICA, INC.: WHO OWNS AND OPERATES THE UNITED STATES (1971); PHILIP M. STERN, THE RAPE OF THE TAXPAYER (1974); MARTIN L. GROSS, THE GOVERNMENT RACKET 5 (1992) ("Much of government spending is dictated by the needs of special-interest groups."); BIRNBAUM, *supra* note 48.

70. DERTHICK & QUIRK, *supra* note 43, at 12.

71. Donald L. Barlett & James B. Steele, *America: What Went Wrong?*, THE PHILADELPHIA INQUIRER, Oct. 20-28, 1991.

72. *The Great Tax Giveaway*, THE PHILADELPHIA INQUIRER, Apr. 10-16, 1988. Barlett and Steele also won a Pulitzer Prize in 1975 for a series of articles titled *Auditing the IRS*, which reported on inequities in the Service's audits.

The more recent series by Messrs. Barlett and Steele investigated the impact of special interests on tax policymaking and was awarded the George Polk award for economic reporting in 1991. The series was extremely well-received by the newspaper's readers, and soon after it appeared, was republished as a paperback book, *America: What Went Wrong?*, that amazingly enough became an immediate national best-seller.[73] The series catalogues nearly every imaginable negative economic trend of the 1980s and blames them all on an evil conspiracy of special interests—the "powerful and influential" ruling elite who along with their "lackeys in Congress" actually "write the complex tangle of rules" for their own express benefit.

Not content with the success of this series, Barlett and Steele pretty much rewrote the same polemic—the second time entitled *America: Who Really Pays the Taxes*.[74] Once again, their distorted account of tax policy emerged as a literary success. It is beyond the scope of the discussion here to catalogue the numerous unsubstantiated claims or to critique these two massive polemics of Barlett and Steele, which add up to little more than one-sentence paragraphs asserting the same general and unproven theme over and over—that Congress passes every tax statute, bankruptcy law, and labor law, for the sole purpose of benefitting "the privileged, the powerful and the influential . . . at the expense of everyone else."[75] If this description sounds like an exaggeration merely to provide a strawman for the argument that journalists are obsessed with the crudest version of the interest group model of policymaking, the reader is referred to the third part of the series which is based upon the singular premise that "Congress has stood for the rich" and thus has enacted "laws and regulations crafted for the benefit of special interests."[76]

Other journalistic accounts adopt a similar interest group model, although it is seldom as crudely expressed as by Barlett and Steele. For instance, a December 1992 investigative series also appeared in *The Philadelphia Inquirer* focusing upon the "preda-

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73. DONALD L. BARLETT & JAMES B. STEELE, AMERICA: WHAT WENT WRONG? (1992). The book was on the New York Times paperback bestseller list for a number of months in 1992.

74. DONALD L. BARLETT & JAMES B. STEELE, AMERICA: WHO REALLY PAYS THE TAXES (1994).

75. Barlett & Steele, *supra* note 66, Oct. 20, 1991, at A1.

76. *Id.*, *Big Business Hits the Jackpot with Billions in Tax Breaks*, Oct. 22, 1991, at A1, A18.

tory" pricing policies of the U.S. pharmaceutical industry.[77] A major theme of the series was that pharmaceutical companies have exploited the tax credit provided under section 936 of the Code, which credit was enacted by Congress to strengthen the economies of U.S. commonwealth nations, most particularly Puerto Rico.[78] The authors were apparently dismayed to learn that U.S. drug companies have relocated some of their drug manufacturing facilities to Puerto Rico in order to take advantage of the section 936 tax credit.

While there is a real critique to be made of the misguided attempt by Congress to create jobs through such geographical tax credits, journalists uniformly misunderstand it, focusing instead upon the unwarranted profits of those who make use of such tax benefits. Congress responded to the increasingly shrill outcry against the section 936 credit stimulated by such journalistic accounts as that in *The Philadelphia Inquirer*. There was strong political sentiment emanating from the White House and floating about Congress in early 1993 for the outright repeal of the credit. The political compromise ultimately reached in the Revenue Reconciliation Act of 1993 imposed only relatively minor limitations on the amount of the credit.[79] This was a much less radical approach than most of the proposals bandied about by congressmen engaged in grandstanding.[80]

Of course, many of the tax provisions sensationalized by investigative journalists were indeed enacted at the behest of special interest groups, and thus, can be said to be the product of interest group politics. It was not, however, interest group politics that allowed Puerto Rico to somehow pull the wool over the collective eyes of Congress, but rather misguided economic policies that overestimate what can be accomplished through tax incentives such as the section 936 credit. Journalists miss this in their analysis, instead portraying the tax laws as the direct transmutation of the economic power of special interests into public policy.

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77. Donald C. Drake & Marian Uhlman, *Making Medicine, Making Money*, THE PHILADELPHIA INQUIRER, Dec. 13-16, 1992.

78. "Nothing better illustrates the industry's profitmaking ingenuity than the way drug companies have taken advantage of Section 936 of the U.S. tax code." *Id.*, Dec. 16, 1992, at A17.

79. Pub. L. No. 103-66, § 13227, 107 Stat. 312, amending I.R.C. § 936.

80. For an account of the drug industry's successful effort to moderate any congressional cutback to the section 936 tax credit, see Rick Wartzman and Jackie Calmes, *How Drug Firms Saved Puerto Rico Tax Break After Clinton Attack*, WALL ST. J., Dec. 21, 1993, at A1.

The obsession of journalists with interest group politics has contributed to the widespread popular cynicism about policymaking, and tax policy in particular.[81] The underlying interest group model through which journalists view tax policymaking fails to explain why some groups are successful in achieving their goals through tax legislation while others are not. If certain industries and economic sectors are protected by the tax laws, it is not just because they are big and powerful, hired the right lobbyist, or contributed to the right political action committee. Particular interests can succeed, even without lobbying, logrolling, and other political devices characteristic of interest group politics, as ideas, movements, and political entrepreneurs set the agenda for debate. None of this is explained by the simplistic interest group model held so dear by journalists.

Journalists can mold popular perceptions about even such a dry and technical subject as the federal income tax. Greater pressure can be exerted by reports such as that of Citizens for Tax Justice when publicized through the media than when circulated only among the members of the tax committees. Similarly, policy entrepreneurs such as Bradley and Kemp found the media a convenient source of direct access to the public—something otherwise difficult to obtain by those outside the inner circle of party leadership, which is characteristic of the policy entrepreneur loner.

Like the public interest groups, the media by nature adopts the muckraker's posture in attacking corruption and questioning the motives and integrity of lawmakers.[82] Indeed, some have argued that the media now constitutes a "fourth estate," challenging and checking the institutional powers of the presidency and Congress, and serving to restrain the overweening ambition of political elites.[83] Whether fair and accurate or not, the media definitely

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81. Yet another investigative report attempts to link the Code to abuses perpetrated by the rich and powerful through charities. *See, e.g.*, Gilbert M. Gaul & Neill A. Borowski, *Warehouses of Wealth: The Tax-Free Economy*, THE PHILADELPHIA INQUIRER, Apr. 18-24, 1993. This is an exposé of how nonprofit, tax-exempt entities (generally, and inaccurately, lumped together under the category of "charities") have grown wealthy, expanding their activities far beyond traditional notions of charity.

82. *See* THOMAS J. REESE, THE POLITICS OF TAXATION 56 (1980) ("Since the content of tax policy is both complex and uninteresting to most readers, the press prefers to write about corruption and lobbying. The ideal story reports on a political campaign contribution to a member of the tax committee who has gotten a special interest amendment adopted for the contributor.").

83. *See, e.g.*, S. ROBERT LICHTER, STANLEY ROTHMAN, & LINDA S. LICHTER, THE MEDIA ELITE: AMERICA'S NEW POWER BROKERS (1986).

played a significant role in aligning congressmen in favor of tax reform in the mid-1980s.[84] In general, the media portrayed the politics of tax reform as a battle between good and evil, with reformers intent on cleansing the tax laws on one side and lobbyists representing special interests on the other.[85] Early news stories targeting opponents of tax reform initiatives taught a clear lesson on which way the wind was blowing on this issue, although it was still hard to discern any evidence of a groundswell of popular sentiment in favor of tax reform. Later, highly critical accounts of Chairmen Rostenkowski and Packwood's initial opposition and indifference to tax reform are credited with having moved them in the other direction toward a more favorable stance with respect to tax reform.[86]

In the end, the media certainly did not dictate that tax reform would become a reality in 1986. However, the sympathies of reporters and journalists was clearly in favor of tax reform, and the unusual interest in tax policy that was stimulated by the publication of Treasury I in 1985 can be credited with having pushed committee members toward supporting tax reform proposals that they otherwise might have opposed.

F. THE IMPACT OF DEFICITS AND REVENUE NEUTRALITY ON TAX POLICY

One common theme that runs throughout the academic literature on federal tax policy is that in the mid-1980s revenue neutral-

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84. Jeffrey H. Birnbaum and Alan S. Murray concluded that the media's favorable response to tax reform during the initial bargaining suggested to committee members that if they "allowed tax reform to die, they would take a beating in the press, and probably in public opinion." Birnbaum & Murray, *Tax Reform: The Bill Nobody Wanted*, PUB. OPINION, Mar./Apr. 1987, at 43.

85. Daniel Shaviro has described the perspective of the media as having, "[S]implistically portrayed each tax reform proposal as the outcome of a struggle between 'good' reformers serving the public interest and 'bad' lobbyists serving the special interests." Shaviro, *supra* note 4, at 97; *see also* CONLAN, WRIGHTSON & BEAM, *supra* note 19, at 251 ("[I]t is clear that populist rhetoric, bright lights, and the casting of tax reform as something legislators could only be 'for' or 'against' converted many who would not have sympathized with the cause under other circumstances.").

86. An infamous story in *The New Republic* portrayed Senator Packwood in most unflattering terms as "Senator Hackwood" on account of his perceived opposition to tax reform and his stated preference for protecting the favored treatment of certain special interest groups in the tax code. See Fred Barnes, *Senator Hackwood*, THE NEW REPUBLIC 194:12-14 (May 5, 1986). Indeed, Senator Packwood was quoted as having said: "I kind of like the tax code the way it is." Quoted in Timothy B. Clark, *Real Estate Industry, Other Corporate Losers Open Fire on Tax Proposals*, 16 NAT'L J. 2333 (Dec. 8, 1984).

ity created a new framework for tax policymaking that resulted in the enactment of tax reform in 1986. The main thrust of the argument is that serious budget deficits forced policymakers to adopt revenue neutrality as an overall structure for tax policymaking. The impact of the "deficit" on the tax policymaking process has likewise received considerable attention.[87] Budget constraints originating with the tax cuts implemented by ERTA dictated that subsequent tax legislation could not increase revenues overall, thereby limiting the options available to policymakers. Purportedly, structural change led decisionmakers to embrace tax reform.

This argument has been expressed as follows: "The revenue reductions contained in the 1981 Act [ERTA], coupled with Reagan's immense defense buildup and the bipartisan opposition to substantial domestic budget cuts, established a dominant political framework for the 1980s."[88] The conclusion is that decisionmakers were forced to abandon incremental decisionmaking, thereby minimizing the impact of interest groups on the tax bill and maximizing their own autonomy.

A related and complimentary argument is that the indexing of tax brackets pursuant to the enactment of ERTA in 1981 barred Congress from taking the easy path previously available. Before the tax brackets were indexed, inflation caused continual bracket creep that in effect resulted in automatic tax increases. This meant that Congress could always count on these hidden tax increases to provide nonlegislated revenue increases for funding the grant of tax preferences—a valuable currency for appeasing constituents. Indexing tax brackets stripped Congress of the automatic revenue increases, and thereby, altered the structure and framework for decisionmaking. The fiscal responsibility formerly imposed by Wilbur Mills and the House Rules and Ways and Means committees would be imposed again by the budget deficits generated during the 1980s.

Former Treasury Department economist Eugene Steuerle has

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87. Joseph White and the late Aaron Wildavsky stressed the centrality of the budget deficit in recent American politics: "Now we are living in the era of the budget . . . . Virtually all other issues are discussed and decided in terms of the impacts on the deficit." AARON B. WILDAVSKY & JOSEPH WHITE, THE DEFICIT AND THE PUBLIC INTEREST: THE SEARCH FOR RESPONSIBLE BUDGETING IN THE 1980s at xv-xvi (1989). Wildavsky dryly noted that: "Nowadays the State of the Union and the state of the budget have become essentially equivalent." AARON B. WILDAVSKY, THE NEW POLITICS OF THE BUDGETARY PROCESS vii (1988). *See also* JOHN H. MALKIN & NORMAN J. ORNSTEIN, TAXES & DEBT (1994).

88. Shaviro, *supra* note 4, at 21.

emphasized the importance of the adoption of indexing in the tax policymaking process:

> The major individual reform instituted in 1981 was not the direct reduction in tax rates, but the establishment of indexing of tax brackets. . . . [T]his provision was not even part of the original Reagan proposals, but is has dramatically altered the nature of tax legislation ever since. No longer could Congress follow the pattern of providing tax reductions that merely offset tax increases due to inflation. By 1990, the adjustment for inflation alone was estimated to have reduced receipts by over $57 billion relative to an unindexed tax code. . . . Eventually the indexing provision will dominate all other provisions of the 1981 Act.[89]

According to Steuerle, tax policymaking could no longer continue as purely distributive, porkbarrel politics when a new level of fiscal integrity was demanded of the tax policymaking process. Operating within the new fiscal framework, policymakers responded by cutting back or eliminating as many special interest provisions as possible from the tax code.

The revenue shortfalls that emerged in the 1980s forced policymakers to adopt distributional neutrality, which meant that tax burdens could no longer be shifted among income classes, as was normally the case in tax policymaking.[90] Presumably, this forced members of Congress to weigh the respective equities among various preferences for special classes of taxpayers, rather than being able to increase preferences for as many groups as possible. According to one prominent account of tax policymaking in the 1980s:

> [R]evenue neutrality altered the tax-writing process. Prior revenue bills were often constructed through political logrolling, whereby special interest provisions were added one to the next, until a winning coalition was achieved. As intended, revenue neutrality converted this process into a "zero-sum game:" each interest was in competition with all others, because "spending" limited tax expenditure revenues to benefit one interest precluded using them to aid

89. C. EUGENE STEUERLE, THE TAX DECADE: HOW TAXES CAME TO DOMINATE THE PUBLIC AGENDA 43 (1992). Steuerle, an economist and senior fellow at the Urban Institute, was Deputy Assistant Secretary of the Treasury for Tax Analysis from 1987 to 1989.

90. C. Eugene Steuerle, *Tax Reform and the Capital Gains Debate*, 44 TAX NOTES 719 (Aug. 7, 1989) (noting that it was accepted that the tax reform process "would be basically neutral with respect to both revenues and the distribution of tax liabilities, that is, aimed less at the distribution of the tax burden among income classes than at efficiency and equity within income classes.").

another.[91]

The traditional structures of tax policymaking were altered as "the constraints of producing a revenue-neutral bill forced the distributive politics of taxation into a redistributive mold."[92] This in turn created a new set of constraints and a new pattern for policymaking that "effectively prevented many of these interest groups from uniting against reform."[93]

There is much about this argument that makes sense. Notwithstanding its initial appeal, however, the argument rests upon a number of questionable assumptions. First, the flawed assumption is that the immediate response of Congress to budget deficits is, and will continue to be, to impose revenue neutrality upon its own tax policymaking process. In fact, there are other responses that would more readily follow based upon the interests of congressional policymakers. The alternative that Congress actually chose in 1982, 1984, 1990, and 1993 was to raise taxes. With support from Republicans such as Robert Dole, Chairman of the Senate Finance Committee, the majority of both Houses voted to raise revenue in TEFRA and DEFRA. Catherine Rudder has described Dole's stand for revenue raising, rather than revenue neutrality:

> Senate Finance Committee Chairman Dole was able to produce legislation that meshed with fiscal policy and improved the integrity and equity of the tax code. He did so, however, only under extraordinary pressure stemming from the economy and with the aid of a new source of responsibility, the congressional budget process, which was established in 1974. But even with the help of the reconciliation procedures . . . the process that produced the 1982 tax bill was far from a model of deliberation.[94]

This response is similar to that of President Clinton's in 1993 in the face of the same persistent budget shortfalls—taxes were raised in lieu of cutting expenditures.

Budget deficits do not necessarily dictate the framework for congressional tax policymaking, even if that was the case in 1986. The question should not be how did some new independent variable known as revenue neutrality impose changes upon the tax policymaking process, but rather why would members of Congress ever

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91. CONLAN, WRIGHTSON & BEAM, *supra* note 19, at 101.

92. *Id.* at 234.

93. STEUERLE, *supra* note 84, at 107.

94. Catherine Rudder, *Tax Policy: Structure and Choice*, *in* MAKING ECONOMIC POLICY IN CONGRESS 214 (Allen Schick ed., 1983).

choose revenue neutrality (rather than higher taxes) as the framework for congressional tax policymaking?

Those who suggest that revenue neutrality was imposed upon tax policymakers are too quick to assume that congressmen can somehow transform their own interests and incentives and turn tax policy from a distributive to redistributive policy. Of course, even if congressional policymakers had the power to so transform tax policy, this still leaves the question of why policymakers operating within the context of a highly distributive political arena would ever impose constraints upon themselves that so clearly work to their own political disadvantage.[95] To do so would be contrary to the interests of congressmen acting within the context of electoral politics.[96] Such a radical shift in tax policymaking is not simply a matter of choice, but rather would require either broad institutional changes or strong external forces capable of altering the very nature of tax policymaking.

Even if revenue neutrality continues as a precondition for tax policymaking, there is little reason to believe that this will ever again result in tax reform defined as it was in 1986 as the elimination of special preferences. Indeed, since 1986 there has been no significant effort to further cleanse the Code of tax preferences and adopt a broad comprehensive tax base, even as budget deficits and the demand for revenue neutrality have persisted.

Revenue neutrality clearly was a new significant fact of tax policymaking in the 1980s, and its impact during the 1990s will likely persist as the deficit persists. Continual revenue shortfalls have imposed some restraint on Congress in its use of the income tax as a vehicle for bestowing porkbarrel tax benefits upon constituents. In the end, however, revenue neutrality does not explain the erratic course of tax policy in the 1980s, although it helps to explain why tax reform was possible in 1986. Whether a Republican Congress will abandon or constitutionalize the principle of revenue neutrality (*via* a balanced-budget amendment) is uncertain. In any event, while budget deficits and revenue neutrality imposed a new framework on the tax policymaking process in the 1980s, neither

95. Daniel Shaviro comes close to recognizing this when he ponders the question why "Congress decided to adopt a revenue-neutral (or any) tax reform bill in the first place—a decision that clearly did *not* reflect predominant interest group influence." Shaviro, *supra* note 4, at 57, n.262.

96. The argument that congressmen use distributive politics to further their interests in competing for reelection is the recurring theme of FIORINA, *supra* note 5, and MAYHEW, *supra* note 5.

explains very much about the *substance* of the tax policy that has been enacted. And hence, neither the end of budget deficits (highly unlikely in the foreseeable future) nor the abandonment of the framework of revenue neutrality (also unlikely) will have any certain impact upon the specific outcomes of contemporary tax policymaking.

V. Tax Policy in the 1990s

The 1980s were a decade of tax policy, and the glut of tax legislation continued into the 1990s. Major tax legislation was enacted in 1990 and again in October of 1993. Thus, it is useful to consider whether, and to what extent, the trends and factors discussed above as possibly shaping the tax policymaking process in the 1980s have persisted into the 1990s, or whether these represented merely temporary changes in the political landscape with no lasting impact.

A. *THE AGONIES OF THE BUSH ADMINISTRATION*

Tax policy in the 1990s got off to a dubious start. Propelled by its inability to persuade Congress to impose further spending cuts on federal expenditures, the Bush administration entered into ill-fated negotiations with Democratic congressional leadership during the summer of 1990 in an effort to reach reconciliation over budget cuts and increases in tax rates. The administration lacked a certain degree of principle, which allowed the congressional tax committees to largely control the negotiations. The final bill—the Omnibus Budget Reconciliation Act of 1990[97]—was very much a congressional tax bill.

Rather than marking any new trend in tax policymaking, the 1990 bill merely evidenced the beginning of the retreat from the tax reform that had prevailed in 1986. This was as much attributable to the political weaknesses of the Bush administration as it was to any inroads into the tax policymaking process by either the media, public or private interest groups, tax experts, or any of the other factors discussed above in the context of changes in the 1980s. Likewise, the clear (although distinct) ideological perspectives adopted in 1981 and 1986 were entirely absent from policy concerns in 1990. Revenue shortfalls clearly were the clear driving force behind the 1990 bill. And in the end, the traditional political

97. Pub. L. No. 101-508, 104 Stat. 1388-1400.

interaction between the executive and Congress (in this case, with the executive in a relatively weakened position as compared with 1981 and 1986) dictated the final outcome once the proposals were placed on the tax policy agenda.

During the second half of the Bush administration, pre-reform patterns of tax policy were reasserted in the absence of any strong countervailing commitment from the White House to either supply-side economics or tax reform. Indeed, the Bush administration had no tax policy of its own to stand on after 1990. The strategic political decision to repudiate the premises of the 1990 budget agreement, *i.e.*, accepting higher taxes in exchange for modest budget cuts, left the administration without either moral authority or direction in its tax policy. As a result, when initiatives commenced in Congress for a new tax bill in the spring of 1992, the White House was left as more of an observer, at best responding to congressional initiatives, rather than exercising control over the tax policymaking process.

The result was a tax bill that reflected all the trends that had led to the budget crisis in the first place. The 1992 tax bill represented a retreat to the more comfortable days of tax policymaking in the 1960s—the only thing missing was the revenue. In October, a bill passed conference committee and both Houses, notwithstanding Bush's open threat of a veto—which came on November 4, 1992. The legacy of the Bush administration was the 1990 failure and the 1992 tax bill—the tax bill that mercifully never was.

B. TAX POLICY AND THE CLINTON ADMINISTRATION

Within the first few weeks of the new Clinton administration, major tax legislation was already in the works.[98] The president's formal economic plan was presented to Congress on February 17, 1993, in his State of the Union address. These proposals set the stage for the political debate that continued for the next six months. Clearly, the president started the ball rolling for tax legislation in 1993, but once in motion, the executive played only a secondary role in determining the legislative outcome. In this respect, Congressional politics as usual quickly took over the legislative process. In 1993, there simply was no extraordinary source of popular sentiment, executive commitment, or any other countervailing

98. For a more complete discussion of the Clinton economic plan, see Sheldon D. Pollack, *Farewell to Tax Reform: The 1993 Tax Act in Historical Perspective*, 64 TAX NOTES 1081 (Aug. 22, 1994).

political force to overcome the congressional-based politics that seized control of the executive's initiative.

In the House Ways and Means Committee, the executive's imitative was compromised in response to pressures from regional interests that penetrate the congressional decisionmaking process. Similar dynamics were evidenced in the Senate's consideration of the bill. All those tendencies uniquely characteristic of the Senate since the 1960s (excessive generosity in bestowing tax preferences) were evident in markup in the Senate Finance Committee. However, in the end, the Senate followed the House bill, with only several notable departures; the conference committee markup quickly resulted in agreement on most issues.

As in the House and Senate, floor voting on the conference committee's bill followed unusually strict party lines. The Senate vote, which came one day after the House had passed the bill by the narrow margin of 218-216, resulted in a tie which was decided by Vice President Gore in his capacity as president of the Senate. On August 10, 1993, the bill became law.[99]

The politics behind the 1993 bill can only be described by reference to the traditional components of the American legislative process: parties, presidents, and most especially, congressional committees. The media covered the politics of the 1993 Act, but played no noticeable role in determining the outcome. Much the same can be said for journalists, academics, tax experts, and policy entrepreneurs. None of these played any particularly prominent role in defining the policy agenda, determining the policy alternatives, or influencing the legislative outcome. Much as one would explain tax policymaking process in the 1970s in terms of presidents establishing initiatives and congressional committees shaping outcomes, so too must the 1993 tax bill be explained in these traditional patterns of legislative politics.

C. THE NEW REPUBLICAN TAX AGENDA

In November 1994, the Republican Party gained eight seats in the Senate and 52 in the House, providing it with majorities in both Houses of Congress for the first time since January 1955. During the fall 1994 elections, House Republicans had advanced their campaign platform through the so-called "Contract With America." A considerable portion of the Contract consisted of

99. The Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312.

traditional Republican policies to be implemented through amendments to the Internal Revenue Code. These included: an exclusion of 50 percent of net long-term capital gains, indexing of the basis of capital assets, the allowance of capital losses recognized on the sale of a principal residence, certain modifications of the Modified Accelerated Cost Recovery System, increasing the current $600,000 unified estate and gift tax life-time credit to $750,000, increasing the annual expensing allowance under section 179 of the Code to $25,000, expanding the availability of deductions (and tax-free withdrawals) for IRA contributions, eliminating the so-called marriage penalty, and a new $500 per child tax credit for families with income up to $200,000.

With the Republican victory, tax policy has taken on a distinctly partisan character in opening months of the 104th Congress. Beyond the provisions included in the Contract with America, proposals for flat income taxes and consumption taxes have drawn considerable attention with conservative Republicans in control of Congress and the tax committees.[100] These proposals provide excellent opportunities for grandstanding before constituents. However, there remains considerable institutional resistance to such wholesale assaults upon the federal tax regime. Furthermore, the revenue loss attributable to the tax provisions included in the Contract alone, which are relatively minor tax expenditures, makes the chances of their being enacted highly unlikely.[101] Nevertheless, it must be acknowledged that legislative proposals that appeared entirely outside the realm of political possibilities only a few months ago are now prominently on the tax policy agenda. As such, the 1990s promise to be as interesting and unpredictable for tax policy as were the 1980s.

VI. Whither Tax Policy?

Notwithstanding the success of tax reform in 1986, within only a few short years, the politics as usual characteristic of prior periods of tax policymaking was reasserted. The unravelling of the historic 1986 tax legislation began in earnest in 1990 as the Bush ad-

100. For a more complete discussion of the Republican proposals, see Sheldon D. Pollack, *Consumption Taxes, Flat Taxes, Capital Gains, And Other Tax Fantasies*, 66 Tax Notes 577 (Jan. 23, 1995).

101. The Treasury Department estimated that the tax cuts included in the Contract would cost $197.2 billion over the first five years and $514.8 billion over the five subsequent years.

ministration and Democratic congressional leadership addressed the problem of a widening deficit. If President Bush's veto of the 1992 congressional tax bill was the final act of resistance to a return to pre-reform tax politics, the enactment of the Revenue Reconciliation Act of 1993 seemed to be the resurrection of traditional tax politics.

The intrusion of the media, public interest groups, policy entrepreneurs, and tax reformers into the tax policymaking process in the late 1970s and early 1980s reflected the weakening of the congressional institutions of tax policymaking—in particular, the House Ways and Means Committee. With declining national parties and leadership, there was little resistance to such encroachments upon the tax policymaking process by interests external to the formal institutions of government. It is not only private special interests which find access to public decisionmaking through the tax committees; the media and lobbyists for public interest groups do as well. Institutional boundaries have weakened so much that nearly every organized interest has open access. As a result, tax policy has had little direction. Or more properly, whatever direction tax policy may take in the short term, regardless of how strong the apparent commitment to such policy, political coalitions soon melt away, and tax policy takes off in a new direction. As has been noted, the "inability of the [tax] system to resist change create[s] a policy morass that is perpetuated by its own structure."[102]

The 1980s strongly evidenced this pathological condition. In 1981, the strong Reagan conservative coalition was able to impose a distinct partisan perspective on tax policy. Even then, the distributive, porkbarrel politics of the congressional tax committees prevailed at the last minute and warped the final bill. And the inability of the tax system to resist change left the Reagan tax revolution only a fleeting memory within little more than five years.

In 1986, proponents of tax reform took advantage of the openness of the institutions of tax policymaking, capitalizing upon the opportunities arising from the unusual convergence of interests of supply-side conservatives in the White House and tax reformers to enact major tax reform legislation. However, that too proved to be only a passing coalition of convenience, and its demise left the tax policymaking arena open again to inroads by special interest groups, policy entrepreneurs, the media, and public interest

102. WITTE, *supra* note 12, at 20.

groups. Tax policy in the 1990s will undoubtedly continue to reflect these weaknesses of the formal institutions of policymaking.