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Tax law as political gesture: 2017 US Tax Cuts and Job Act through the lens of political anthropology

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Schedule for 2021 Tax Research Seminars Online

1. **25 February 2021**, A new-knowledge approach to corporate income tax efficiency – Associate Professor Mark Bowler-Smith (Deakin University), discussant Professor John Freebairn (University of Melbourne)
2. **25 March 2021**, The Law and Policy of VAT Tourist Tax Refund Schemes: A Comparative Analysis – Associate Professor Tingting Wang (University of Melbourne/ Southwest University of Political Science and Law, China) and Professor Miranda Stewart (University of Melbourne), discussant Mr Michael Evans (University of Melbourne)
3. **29 April 2021**, MLSTRSO-Special Edition: *Rebellion, Rascals, and Revenue*. A discussion with Joel Slemrod (University of Michigan) and Mike Keen (Deputy Director of the Fiscal Affairs Department at the International Monetary Fund) on their new book, [*Rebellion, Rascals, and Revenue*](#) (Princeton Press, 2021)
4. **27 May 2021**, History of Tax Reform in Australia. – Mr Paul Tilley (University of Melbourne/ ANU TTPI), discussant Mr Greg Smith (Former Head of Treasury Budget and Revenue Groups)
5. **29 July 2021**, Tax law as political gesture: 2017 US Tax Cuts and Job Act through the lens of political anthropology – Ms Viva Hammer (Melbourne Law School, Visiting Fellow), discussant Associate Professor Lael Weis (Melbourne Law School)
6. **18 August 2021**, Identifying tax aggressive behavior: testing the proxies - Dr Bronwyn McCredie (QUT), discussant Associate Professor Antony Ting (University of Sydney)
7. **30 September 2021**, Taxation of the Commercialised Body – Mr Micah Burch (University of Sydney)
8. **28 October 2021**, The Luxury Car Tax – Dr Kathryn James (Monash University)
9. **25 November 2021**, Excess Profit Tax – Professor Emeritus John Taylor (UNSW)

Tax law as political gesture: United States' Internal Revenue Code through the lens of political anthropology

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The Internal Revenue Code of the United States is known for its length and complexity, and virtually every change in the law has made it longer and more complex.¹ Scholars continue to evaluate and propose changes to the law based on norms of equity, efficiency, simplicity and administrability,² from which successive legislative changes consistently depart. This paper proposes that enacted laws are not failed attempts to implement good policies. Rather, each enacted tax law is a record of the outcome of conflict and cooperation between individuals with diverse motivations coming together in the lawmaking process. Every tax law is a political “gesture,” a term adapted here from Walter Benjamin's readings of Franz Kafka's political allegories.³

Prelude: American attitude to taxes

Taxation holds a foundational position in the history of the United States. The Boston Tea Party, purportedly provoked by a change in English tax law, is one of the creation myths of the nation.⁴ A distaste for taxation is a recurring theme. Immediately after Americans freed themselves from British control, the excise taxes imposed to fund the new democracy provoked a revolt in Pennsylvania. Tax authorities were attacked, and the new President had to send in troops (funded by taxes) to assert federal control.⁵

Aspects of game theory applied in an anthropological context provide useful tools to understand the opposition of many Americans, including elected lawmakers,⁶ to federal taxation.⁷

¹ Partlow, Jeffrey. "The necessity of complexity in the tax system." *Wyo. L. REv.* 13 (2013): 303; Davis, Steven J.

"Regulatory complexity and policy uncertainty: headwinds of our own making." *Becker Friedman Institute for Research in economics working paper* 2723980 (2017).

² See, for example, Holtzman, Yair. "Challenges in achieving transparency, simplicity and administering of the United States tax code." *Journal of management development* (2007).

³ Walter Benjamin, *The work of art in the age of mechanical reproduction*, Penguin 2008 (tr. J. A. Underwood), p. 64. Benjamin states his belief that Kafka's novels are not allegories, but I depart from him on this point.

⁴ Ammerman, David L. "The tea crisis and its consequences, through 1775." *A Companion to the American Revolution* (2003): 195-205.

⁵ Nantell, Sharon C. "A cultural perspective on American tax policy." *Chap. L. Rev.* 2 (1999): 33

⁶ Rosenberg, Joshua D. "The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane." *Va. Tax Rev.* 16 (1996): 155.

⁷ Christopher C. Fennell and Lee Anne Fennell, *Fear and Greed in Tax Policy: A Qualitative Research Agenda*, 13 WASH. U. J. L. & POL'Y 75 (2003).

It is well accepted that humans prefer reciprocity as the method of exchange, rather than a system of centralized collection and disbursement.⁸ Individuals relinquish costly resources to others because they expect resources of similar value will be returned in the foreseeable future. When communities grow too large for individuals to observe and police give and take, the problem of free riders arises. If people suspect that the resources they are giving up will not be returned, or it becomes hard to compare the value of what is given and what is returned, the willingness to give resources up declines.

This simple model of sharing - the requirement of a measurable give and take - breaks down with the growth in group sizes. But it can be simulated even in large populations if there is a sense of common purpose, "imagined communities" in Benedict Anderson's language⁹. This idea offers a substitute for measurable reciprocity. Social elites in large groups broadcast a mantra that what is good for one is good for all, and what is good for all is good for one. This provides a framework for a virtual experience of reciprocity in which people give up resources to a go-between who redistributes what has been contributed. Whoever controls the messaging and the go-between must have some persuasive power to encourage people to consume less today, in exchange for the promise of something else in the future. Religion, with its elaborate mythmaking, is well-equipped to demand a tithe of tangibles, for example, in exchange for intangible benefits not directly connected with the value of the tithe contributed (for example, a place in the world to come). The go-between does not have to account for how the tithes are used if contributors have already received their virtual quid pro quo.

Over time, people may change the imagined communities they belong to.¹⁰ If religion declines, other institutions move in to replace the functions of religion in managing resources. The Nation-State apparatus is one substitute, which comes with founding myths that create a sense of joint enterprise among disparate individuals and groups. The nation is too large a body to give individuals enough comfort regarding simple reciprocity, and they become concerned that their contributions to a go-between will not be returned in a timely manner and of similar value. Moreover, the ethos of the liberal democratic nation is antithetical to propagating the kinds of myths (for example, the world to come) that might encourage individuals to relinquish resources that will not necessarily be returned in a recognizable form. The individual takes center stage in a liberal democracy,¹¹ not the group. The communitarianism necessary to secure voluntary tangible contribution to the group in exchange for an intangible shared benefit, has been replaced by the pursuit of material self-interest.

⁸ Id. at p. 115.

⁹ Anderson, Benedict. *Imagined communities: Reflections on the origin and spread of nationalism*. Verso books, 2006.

¹⁰ For example, religion's power has declined in the U.S., see, Simon. "The surprising predictable decline of religion in the United States." *Journal for the Scientific Study of Religion* 57, no. 4 (2018): 654-675. The status of religion in Western Europe is controversial, but it would be hard to argue that any religion has the ability to confiscate resources and redistribute them, see, Clark, Jonathan CD. "Secularization and modernization: The failure of a 'grand narrative'." *The Historical Journal* 55, no. 1 (2012): 161-194.

¹¹ Deveaux, Monique. "Personal autonomy and cultural tradition." In *The Proceedings of the Twenty-First World Congress of Philosophy*, vol. 7, pp. 87-92. 2007.

Citizens of the United States, live in a democracy with a strong individualist ethos¹² and a large diverse population, It is no surprise that they generally have a negative view about forced contributions of resources into a common fund. The possibility of free riders is rife and the impossibility of discovering whether what is paid into the common fund is ever returned, creates a conflict for taxpayers. The value of what the federal government provides to an individual is too hard to calculate. And the government itself, consisting of individuals educated in the idea of individualism, does not broadcast a consistent myth of resource sharing.¹³ Even Members of Congress openly express ambivalence about the role of their collection agency, the Internal Revenue Service, disparaging it, and distancing themselves from the laws they themselves vote on, which instruct the IRS to remove resources from their constituents.¹⁴

There is an additional complication in taxation and resource sharing in the U.S., akin to the finding that most Americans believe they have above average intelligence.¹⁵ Americans may not mind paying tax, as long as they pay less than their neighbor. This is a motivation inverse to equity, namely, if it is impossible to avoid paying into the common pool, let me not be the “sucker” who gives more than the next one. Or, better be a free rider than a sucker. This aspect of the American tax system was on display during the *Tax Cuts and Jobs Act* regarding the relative tax cuts to flow-through business entities and corporations. When the corporate tax cut was proposed, the flow-through representatives demanded that their owners get a tax cut too. The flow-through entity demands had no policy justification, as the owners of flow-throughs get taxed once whereas the owners of corporations are taxed twice (at the corporate level and by the shareholders). Owners of flow-throughs had in the past, all things being equal, paid less tax than owners of corporations, but with the prospect of the corporate owners achieving a leveling of the playing field, the flow-through owners wanted to make sure that their relative advantage was maintained. Hence, section 199A was enacted. This is an example of the power of sustaining above-averages, even through major reform. When the Congress had a chance, in this case, to move toward both equity and efficiency, it chose to do neither.¹⁶

The importance of the peer group when calculating tax obligations is evident in the publicly listed corporate world. Investors who evaluate corporate performance, judge a corporation against its competitors. Total tax positions, expressed in the financial statements, are determined by taking into account not only the government, but also the peer group. A corporation that is out of step with its peers, with too great or too little a tax obligation, may suffer a reputational loss,¹⁷ and potentially greater scrutiny. Publicly traded corporations may be more egalitarian when it comes to tax than groups of

¹² Guenther CL, Alicke MD. Deconstructing the better-than-average effect. *Journal of Personality and Social Psychology*. 2010;99(5):755–70, on the individualist ethos of Western societies as compared to Eastern societies.

¹³ See, for example, an analysis of the change of school curricula over the last century regarding the education to self-actualization and the individual, Meyer, John W. "World models, national curricula, and the centrality of the individual." In *School knowledge in comparative and historical perspective*, pp. 259-271. Springer, Dordrecht, 2007.

¹⁴ Rosenberg, Joshua D. "The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane." *Va. Tax Rev.* 16 (1996): 155.

¹⁵ Heck, Patrick R., Daniel J. Simons, and Christopher F. Chabris. "65% of Americans believe they are above average in intelligence: Results of two nationally representative surveys." *PloS one* 13, no. 7 (2018): e0200103.

¹⁶ <https://www.cpajournal.com/2018/01/22/tax-act-first-look-complex-new-world-qualified-business-deduction-rule/>

¹⁷ Loretz, Simon, and Padraig J. Moore. "Corporate tax competition between firms." *International Tax and Public Finance* 20, no. 5 (2013): 725-752.

individuals, but both types of taxpayers are keenly aware of the problems of the sucker and the free rider when paying their share.

This introductory section is intended to describe aspects of the tax paying and collecting environment in the United States as a prelude to the discussion of how tax laws are made.

The tax law as the product of individuals working together

The Internal Revenue Code is the final expression of the work of individuals coming together for the purpose of legislative action. Those individuals wish to advance their self-interests, and those interests may coincide, or clash, with others' interests. Individuals' interests change over time as they join and leave institutions which constrain or assist them in advancing their interests.

Which individuals make the tax law?

Only the US Congress can pass legislation,¹⁸ including tax legislation.¹⁹ The Administration, under the President, particularly the Treasury Department (and within it, the Internal Revenue Service), has only powers of interpretation, implementation and enforcement. Any Member of Congress (Member) can introduce a Bill into their respective chamber of Congress (House of Representatives or Senate), but there are committees in each chamber assigned special responsibility for the tax laws. In the House, it is the Committee on Ways and Means²⁰ (Ways & Means) and in the Senate, the Senate Finance Committee²¹ (Senate Finance) (together, Tax Committees).

In addition, the Joint Committee on Taxation²² (Joint Tax) is comprised of Members from the House and Senate, from both minority and majority parties. Joint Tax employs a large staff of tax professionals which is responsible by law or custom, for a broad range of tasks, such as developing policy, assisting in drafting, revenue estimation, writing legislative histories, as well as research and informational documents for Members and the public.

The House and the Senate each have Legislation Counsel specializing in tax, who, on instruction, write the words of the statute.

Members of Congress do not write tax laws. They employ staff for this purpose. A new law might be developed and written by one of all of the following: the staffs of individual Members, House and

¹⁸ U.S. Constitution, Article 1, Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

¹⁹ U.S. Constitution, Article 1, Section 7. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

²⁰ <https://waysandmeans.house.gov>

²¹ <https://www.finance.senate.gov>

²² <https://www.jct.gov>

Senate leadership staff, Tax Committee staffs, by Joint Tax and by staffs of one or both Legislation Counsel.²³

If individuals in the Congressional staffs hold the pen to write the tax laws, there are many outside those circles who come to aid or hinder them. They might do so by influencing Members, by direct communication with staffs, and by writing or speaking publicly. The outside influencers include constituents, lobbyists, academics, and think tanks.

Taxation is exceptional for the number and quality of staff employed to advise Members in making their decisions. No other subject within Congressional jurisdiction has so many resources devoted to it.²⁴

The Congress is a decentralized body. Employees of Congress are not part of the civil service or the Administration. Members hire their own staff, and staff are answerable only to their Members. Committee staff are hired and answerable to their Chiefs of Staff and Members of the committee. The Congress is not subject to any labor laws other than the ones it chooses to adhere to. Employee and Member pay is low relative to the pay that can be expected on leaving Congress. Congressional staff is expected to work long hours and be continuously available even when not at work. Staffers agree to these conditions because of tangible and intangible factors. Congressional work is prestigious and stimulating and there are opportunities on departure. With expertise in the tax area, opportunities for staffers leaving Congress are particularly lucrative.

Of the Congressional staffs who have influence on the tax law, there is a range of attributes that differentiate them. These are: age, expertise, pay, contact with constituents and lobbyists, and time expected to work with Congress. Member staff are generally young, inexperienced, poorly paid, spend much of their time in contact with constituents and lobbyists. They leave on average about three years after starting on the Hill.²⁵ Senate Finance and Ways & Means staff are older, have tax experience, are better paid, spend significant time with constituents and lobbyists and generally work more years on the Hill than Member staffers. Joint Tax consists of Ph.D. economists, lawyers and accountants with substantial practice experience. Joint Tax pay is at the high end of the Congressional scale. The staff spend varying amounts of time with constituents and lobbyists, depending on their prior experience. Joint Tax career paths vary from lifetime in Congress to short tours of duty. Legislation Counsel staff are generally well-paid lifetime Congressional lawyers who spend no time with constituents and lobbyists.

²³ There are periods when the White House, the Office of Tax Policy at the Treasury Department and the Internal Revenue Service might also come to the table to discuss drafting of laws. But, over the last two decades, the involvement of these bodies in the minutiae of lawmaking has waned.

²⁴ Congressional Budget Office is the office with the largest number of employees, but they are spread across multiple program areas. The Budget Committee staffs used to dwarf the Ways & Means and Senate Finance tax staffs. They shrunk considerably in the 1990s but their staff count may exceed W&M and SFC. Budget Committee staffers are spread across different program areas. Likewise appropriations committee staffs. They have defense experts, transportation experts, etc.

²⁵ Sara Lynn Hagedorn, "Taking the Lead: Congressional Staffers and Their Role in the Policy Process" (dissertation, University of Colorado-Boulder, 2015), 10. http://scholar.colorado.edu/psci_gradetds/42/ 44 Harrison W. Fox, Congressional staffs

The independence of each of these staff groups from each other, the high turnover of staffers, and the need to build alliances in order to accomplish goals, mean that much Member and staff time is spent in meetings with one another and with outside parties. Writing laws capable of being passed requires a grasp of the needs and wants of diverse groups. It is the job of the Congressional staffers to translate conflicting needs and wants into legislative language. Staffers are accurately dubbed “policy entrepreneurs.”²⁶

Members of Congress are answerable to their constituents. They spend the majority of their time connecting with constituents, and in fundraising for their party and their own next elections. In the House of Representatives, elections are frequent, every two years. Members delegate to their staff policy and technical matters. How staff are evaluated depends on their Members’ needs. Meeting those needs does not happen through a bureaucratic process, but by the operation of personalities that are effective in the complex Congressional environment. Effectiveness of Members and staff is not measurable as it might be in a business environment. Members are effective if they are reelected and meet constituent needs and wants. Neither Members nor staff need to achieve any legislative goals to be considered a success. Paul Ryan, who became Chairman of Ways & Means and then Speaker of the House, the highest position in the House of Representatives, had only one law sponsored by him, signed by the President: to rename a Post Office. His many other proposals, to privatize social security and Medicare, for example, failed. Nevertheless, he reached the pinnacle in the Congressional hierarchy.

The only measure of success in Congress is election for Members and for staff, maintaining employment in a manner that meets their individual interests.

Writing the tax law

The Internal Revenue Code is anonymous; those who write its words do not sign their name to it. Bills are voted on by Members of the House and Senate, in a public process, and are signed by the President. But the laws are not written on the floors of the House and Senate. Nor are they written in any of the public events in which a draft law might be discussed, such as a hearing, or a markup. By the time a markup is scheduled, a draft law is written and available to Members and the public, either in legislative language, or conceptually, depending on the rules. Which individuals took an idea and brought it into legislative language, is not on the record.

Although the making of the tax laws is not directly observable, from time-to-time by journalists, as outsiders, write about the making of a significant law.²⁷ These narratives are unverifiable because the

²⁶ Price, David E. 1971. “Professionals and “Entrepreneurs”: Staff Orientations and Policy Making on Three Senate Committees.” *The Journal of Politics*. 33:316-336.

²⁷ See, for example, Murray, Alan. *Showdown at Gucci Gulch*. Vintage, 2010.

process of lawmaking before the markups and votes is secret. Members and committees are not required to keep records, nor are they required to archive the records if they keep them.²⁸

Congress appears to have become increasingly transparent over time. Whenever either House of Congress is in session, its operations are filmed, and every official word spoken is recorded by stenographers. Hearings and markups are similarly under a camera's eye, and the documents that are raised in those sessions are available to the public.

However, the more that a Congressional event becomes public, the more it is a scripted performance in which no decisions are made and certainly no writing of laws is accomplished. Once a law comes up to vote, the leadership has to be certain about the outcome of the vote. Debates in Congress involve no spontaneous back and forth, and Members do not speak on matters as complex as the tax law without having experts helping them decide what to say.

The staff of Congress is responsible for the form and substance of the tax law. Without staff, the complex American social and economic systems would require lawmakers to have expertise in multiple disciplines, and no Member is elected because they have such expertise. Members hire staff to read and write for them, to listen to outside counsel and be the ear to constituents and make decisions on minutiae of the law. How staffers do this has never been directly observed or recorded.

Sources of information available to learn how the tax law is made

The Congress is the most transparent of the three branches of American government, but the process of making the tax law is concealed. There are several public sources that can be used to discover how the laws are made. This paper contends that the character and goals of individuals involved in lawmaking can also be extracted, at least partially, from these documents, as well as the conflict and cooperation between them.

- a. Successive Bills leading up to the enacted law. Legislation is drafted in a strict formula, but by careful parsing of the changes in the language through the life of a law, older and failed Bills, some part of the conflicts before its enactment are revealed. Legislation never dies; it goes dormant to be picked up when opportunity is ripe.
- b. Legislative histories. These may be available for the House, Senate and final conference drafts, as well as the Joint Tax's Blue Book after the law is enacted. The histories are drafted by several of the staff of the Joint Committee on Taxation, with input from Senate Finance and Ways & Means, and the various parts of the documents are not edited to ensure consistency of style. The history of each provision is explained by a particular staffer who, through their descriptions, reveals their approach to policy, and their view of the enacted provision. For example, the

²⁸ Croft, Nahali R. "'No Rhyme or Reason:': Surveying Legislative Records Retention Practices in the US House of Representatives." *Provenance, Journal of the Society of Georgia Archivists* 35, no. 1 (2018): 3.

histories of some provisions include examples, algebraic formulae, while some provide wordy explanations or, in contrast, leanly follow the legislative language. Joint Tax has the largest and most expert tax staff on Capitol Hill and so their explanations are essential to understanding the legislative process. The history of a particular provision in the law, and the role individuals played in it, may be revealed by the style of the history of that provision.

- c. Hearing documents. As tax policies are being considered, the Tax Committees invite experts to testify in public Hearings on a range of issues relevant to existing and proposed laws. Joint Tax writes background documents to inform Members and staff as to the issues to be addressed in the Hearings. Different parts of the hearing documents are written by different staffers, with a considerable independence of style and approach permitted. Witnesses also provide written testimony which is part of the Congressional record.
- d. Revenue tables. Every major tax bill must by law be accompanied by a revenue estimate provided by Joint Tax. These tables offer considerable information not just in the estimates themselves, but in the cumulative way the tables are built. Titles of provisions, the order in which legislative provisions are listed and changing effective dates are all valuable information. A revenue estimate is a major factor in the decision to vote on provision in a tax bill. How these estimates are presented in the tables, and how they change over the life of a tax bill, provides key information as to the evolution of the bill.
- e. Member statements for the record, colloquies, mark-up questions and answers, Members' speeches on the floor.
- f. Members' and staffs' speeches and publications outside the Congressional record. These sources offer a clearer sense of which individuals are working on which provisions, what policies are being considered, who is advocating for those policies and who disagrees with them. Formal presentations off the Congressional record allow Hill personnel to be more candid about their views.

Discovering the authorship of these anonymous texts can lean on research on text decoding.²⁹ They can be analyzed by using analytical methods for parsing the words and structures of documents. What biases are revealed in the texts? Are there conflicts between the different parts of the texts? Have parts of older texts been copied into newer ones? Do the parts of the texts fit together well, or do they reveal fault lines, indicating conflict? At what point in the development of the law did the conflict appear to arise? Can that be linked to the introduction of someone new into the tax-writing process?

²⁹ Zhang, Chunxia, Xindong Wu, Zhendong Niu, and Wei Ding. "Authorship identification from unstructured texts." *Knowledge-Based Systems* 66 (2014): 99-111. <https://www.cs.umb.edu/~ding/papers/KBS2014.pdf>

The role of meetings in making the tax law

Without direct evidence regarding the creation of the tax law, this paper hypothesizes that policy is turned into legislation in meetings of individuals with diverse interests. For example, the President campaigns for corporate and individual tax cuts. Corporate lobbyists meet with Members and staff to support tax cuts. Member staff meet with Senate Finance and Ways & Means Committee staff to find out how to accomplish the President's goals. Because a tax vehicle is moving, staff want to add other tax provisions to the vehicle, ideas they have developed or others have suggested. Some Members object to the budget effect of the tax cuts. Other lobbyists meet with Members and staff to inform them that if corporations are getting tax cuts, then pass-through businesses must also get tax cuts. Multinational corporations view this tax reform as an opportunity to rationalize the international tax regime for U.S. business. Such rationalization is supported by tax policy goals but has insufficient support among the Members or the American people to move on its own. With a moving tax vehicle that includes a tax cut, international reform could also travel, especially as it raises money to pay for the President's goals.

Each of the meetings hypothesized above discuss broad concepts. The implementation of these ideas within the tax code requires specification for drafting, putting new words into the tax code and deleting other words from the code. Several groups of staff work on the hypothesized President's tax cut separately and simultaneously. The separate staffs talk to Joint Tax and to Legislation Counsel. Neither of these staffs tell those who are working simultaneously and separately what they are working on. Joint Tax and Legislation Counsel help Tax Committee and Member staffs to put their ideas into revenue numbers and words.

This paper suggests several propositions regarding the meetings in which tax laws are created. 1. The individuals who attend these meetings do so voluntarily, and act in their own self-interests. 2. The meetings are unrecorded. 3. Each of the institutions from which the staffers come include different customs, hierarchy, leadership. 4. There is no single source of control over the individuals attending meetings, no agenda setting, and no means to determine whether a meeting is a success or failure. 5. The material being discussed is complex and understood by few people. 6. Staffers with tax expertise are highly employable outside of Congress and can leave at any time for jobs that pay several times more than what they are paid in Congress. Staffers are employable whether or not they work on a major piece of legislation. 7. Staffers are agnostic as to policy outcomes except to the extent they impact their personal self-interest.

This paper proposes that under these conditions, the outcome of meetings are the following: 1. Agreement is rare and 2. If it occurs, the outcome is dependent on factors unconnected to policy. That is, the drafted law is dependent on the personal characteristics and institutional support of particular participants, whose decision to support a particular policy outcome is in the nature of a "gesture."

Osborne, et al.³⁰, model an analogous collective decision-making process for regulatory bodies. They find that where a population has heterogeneous preferences, where meeting participation is costly and the final outcome is a compromise among the participants, then the following are likely outcomes: participation is low, moderates do not participate, and the policy outcome is random. The model outlined in this paper begins one step earlier than Osborne's, in that the participants in this paper's meeting are initially agnostic as to policy outcomes. The participants do, however, adopt policies for the purpose of advancing their self-interest, and then Osborne results follow. Both the adoption of the policies by staffers and the outcome of conflict between the policies, are random. A cursory examination of the successive U.S. laws supports this conclusion.

This paper is not arguing, as has been argued before, that the self-interest of highly motivated small groups which are making or losing large amounts by a change of law overrides the interests of large groups which are unaware of their loss of small amounts with a change or failure to change a law. Rather, this paper argues that the final policy outcome of meetings between Congressional staffers that is enacted into law is random.

At the most general level, the President drives the tax agenda, and obtains support from the segments of the voting population that care about it to agree to change the law. But anything below that most general level is controlled by Congressional staff. They may initiate ideas, or respond to lobbyists' ideas, but they are not accountable for the manner in which those ideas are implemented. The decentralization of control in Congress, and the absence of accountability except in a popular vote after a law has been enacted, means that decisions are made by force of the staffers' personalities. This mirrors decision making within the House and Senate as well, in which Members win elections and win seats in Committees by force of their personalities, their ability to gain others' support. Persuasion, intimidation, persistence, obfuscation, distraction, canvassing support from others, understanding the rules of procedure, all are available to a staff moving a law into the statute. It may be that laws drafted by an effective staffer signed by the President are equitable and simple, but there is no reason for that to be so. More likely, the laws enacted by an effective staffer will reflect whatever can be achieved to advance the draft forward, in a continuously repeating process of meetings.

Because of the way lawmaking is delegated and structured, it is a process driven by group dynamics, not by policy.

What is a gesture?

Walter Benjamin, in an essay analyzing Franz Kafka's oeuvre, states, "...Kafka's entire work represents a codex of gestures that do not, in and of themselves, possess any fixed symbolic meaning...instead, in

³⁰ Osborne, Martin J., Jeffrey S. Rosenthal, and Matthew A. Turner. "Meetings with costly participation." *American Economic Review* 90, no. 4 (2000): 927-943.

constantly changing contexts and ever-different experimental arrangements, they are asked to furnish such meaning.”³¹

This description fits well to the process of tax law making. Each tax law is a gesture made by Members and their staffers *to each other and a few outsiders* as to their relative strength in achieving their self-interests. Those self-interests are rarely if ever connected to the content of the laws. A staffer attaches herself to an idea and has it written into legal language, and it becomes an instrument for the achievement of her self-interest. This draft changes meaning in different meetings. The substance is not what is communicated in meetings; what is communicated is something about the relationship between the participants. The potential law is the gesture the staffer uses to express and advance her goals. The term “gesture” is used here, because it has an ephemeral sense, indicating that the substance of drafts are of no intrinsic importance.

Walter Benjamin continues, “Each gesture constitutes a process, one might almost say a drama, of its own. The stage on which that drama plays out is the world theatre...”³²

Each enacted tax law, and each law that fails to be enacted, represents a process, a drama, of its own, and the stage is Capitol Hill. Outside the broadest headlines, such as an income tax vs. a consumption tax, the details of the laws, in which all the policy is contained, is a “codex of gestures.”

Congressional staff self-interests

The thesis proposed in this paper is that the interests of Congressional staffers are primary drivers in the development of the details of the tax law. What are those interests? It is proposed that Congressional staffers have the same interests as other humans, which are described, for example, by Maslow,³³ or other theorists of human motivation and behavior. No special inquiry needs to be made into this particular group of humans to understand that their personal goals and the ideals of a tax system do not necessarily coincide. This is not intended to suggest that Congressional staffers are looking for special treatment on their tax returns in the tax code that they write. Rather, there has been no investigation of human motivation that provides that an individual would benefit personally from a territorial or a worldwide corporate tax system. Therefore, when individuals participate in a meeting in which a debate such as one on a territorial vs. worldwide tax one takes place, their interests must be other than resolving the debate in a manner that follows what the literature claims is the ideal outcome.

Aligning motivation with the classical tax goals

The US tax law raises revenue in a costly and inefficient manner. The costs of that inefficiency are borne by every member of society. The benefits of inefficiency are extensive. They extend to well-

³¹ “The work of art in the age of mechanical reproduction,” Walter Benjamin, Penguin 2008 (tr. J. A. Underwood) p. 64.

³² *Id.* p. 65.

³³ Wahba, Mahmoud A., and Lawrence G. Bridwell. "Maslow reconsidered: A review of research on the need hierarchy theory." *Organizational behavior and human performance* 15, no. 2 (1976): 212-240.

advised stakeholders, to Members of Congress who negotiate with stakeholders in exchange for rents, and to Congressional staffers, who improve their marketability by attending meetings and gaining technical and negotiating skills.

This paper inquires as to whether the process of lawmaking could be improved to reduce the costs of inefficiency in complying and enforcing the tax law.

1. Making lawmaking more transparent - Would the tax law come closer to ideal if a record were required of every meeting, formal and informal, in which prospective tax laws were contemplated?³⁴
2. For all new tax laws, requiring an accounting of the cost of the complexity, inefficiency, inequity and likely cost of compliance and enforcement relative to a “perfect law” baseline.
3. Educating the voting population into the mechanics of the tax return and tax system.
The reason the elite few, including lobbyists and staffers, have such control over the tax law is because most voting/tax paying Americans know nothing about it.

These ideas could undoubtedly be improved upon, but they all suffer from the same flaw: there is no one to advocate for them. There is no pressure either from elected Members or the American people for the tax law to come closer to an ideal. David Foster Wallace, in his monumental work on the Internal Revenue Service, “The Pale King,” discusses this.

“The real reason why US citizens were/are not aware of these conflicts, changes and stakes [within the IRS] is that the whole subject of tax policy and administration is dull. Massively, spectacularly dull...Consider, from the Service’s perspective, the advantages of the dull, the arcane, the mind-numbingly complex...such qualities help insulate them against public protest and political opposition, and that abstruse dullness is actually a much more effective shield than is secrecy.”³⁵

There are few areas of the law that the ordinary citizen encounters regularly. Traffic law is one, and everyone must sit a test in that subject before obtaining a driving license. Tax law is another, and despite its importance, the ordinary citizen has such a strong aversion to the subject that a vacuum is created in which experts operate without any supervision other than from each other.³⁶

³⁴ There is substantial evidence that more Congressional transparency has resulted in more benefits to focused interest groups, although the causation has never been proven: each could be independently caused.

³⁵ Wallace, David Foster. *The pale king*. Penguin, 2011, p. 83.

³⁶ During the passage of the Tax Cuts and Jobs Act in 2017, the coverage of the law in the major newspapers was superficial and infrequent, relative to its importance.

Participation in lawmaking

Eisenstadt, et al.³⁷ have shown that when a country is adopting a new constitution, the process can be divided into three stages: drafting, debate, and ratification. Citizen participation at the drafting stage is the critical factor in the survival of the constitution and the democracy. Ensuring public “buy in” at the beginning of the constitution-making process is more important than ratification, plebiscites, and referenda at the end.

Participatory lawmaking has a lasting effect, giving people a stake in the institutions and the ideas. Constitutions are power plays of governing elites under siege by social movements - and so is the tax law. The timing of participation is particularly important, mostly coming too late in the process. Early buy-in is more important than ratifications and debates later in the process when the issues have hardened into a text.

These findings regarding constitutions apply in the case of the tax laws as well. Participating in the early development process is a prerequisite for stability of the law. Hearings and mark-ups held after the law has been drafted offer little opportunity for citizen learning and input. And yet, increasingly, with the antipathy towards the tax law and the competitiveness between groups not be left the sucker, this has become impossible. The only tax law that can be passed is one that no one has seen. No one except Congressional staff.

Is tax law different?

It could be argued that the process of lawmaking described here is not particular to tax. Many areas of law are too complex for anyone but the most expert. Elected Members and citizens are unable to evaluate the issues and are forced to delegate decisions to those whose interests do not align with the good of the country as a whole, and whose performance is difficult to evaluate. Is tax law different?

Tax law is exceptional for its ubiquity, its cultural cache, its reach, its degree of complexity, and its social, economic and political cost. And in the United States, tax law is increasingly symbolic rather than revenue raising. As deficits grow and elected Members understand that they do not have to pay for government expenditures through the tax system, what is taxed and what is not becomes a “codex of gestures.”

Concluding thoughts

The US tax law fails to meet widely accepted tax policy goals. The reasons for this have been laid at the feet of a few well-advised stakeholders who have more to gain lobbying for inefficient laws than the large population loses with those laws. This paper argues that the reasons are more complex. Americans

³⁷ Eisenstadt, Todd A., A. Carl LeVan, and Tofigh Maboudi. *Constituents before assembly: Participation, deliberation, and representation in the crafting of new constitutions*. Cambridge University Press, 2017.

and their elected representatives find tax law and administration “massively, spectacularly dull” and the benefits of improving the Internal Revenue Code are outweighed by the costs of having to read and understand it. In that context, Congressional staffers who are delegated the task of managing the tax law, use the law-making process as a means to develop their political acumen. Which tax policies staffers chose as the means to exercise their political entrepreneurship is random, as is the outcome of the meetings in which competing policies are brought forward. For policy entrepreneurs on Capitol Hill, which law is enacted is a gesture the tax staffers make to each other, and a few others off the Hill, as to who was successful in the lawmaking process. They are assured that no one except the most motivated, will read the results of their battles.