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The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy

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I. Introduction ............................................ 289
II. The Role of Public Discourse in Legislation ............ 294
   A. A Short History of the Estate Freeze Legislation... 294
   B. Abstract Discourses of Tax Legislation ............. 299
      1. Tax Policy Analysis ............................ 299
         a. Conflicting Goals .......................... 299
         b. Pragmatic Reconciliation ................... 301
         c. Understanding of the Estate Freeze
            Legislation: Protecting a Comprehensive
            Tax Base Against Abuses .................... 304
            i. Tax Policy Analysis of the Estate Freeze
               Legislation ............................... 304
            ii. Gaps in Tax Policy Analysis ............ 307
      2. Interest Group Politics ............................ 308
         a. Interest Groups, Politicians and Patterns of
            Legislation .................................. 308
         b. The Estate Freeze Legislation: Seesaw
            Battle Between Organized and Unorganized
            Interests ..................................... 310
            i. Patterns in the Estate Freeze
               Legislation ............................... 310
            ii. Gaps in the Interest Group Model ........ 313
   C. The Public Discourse of Symbols and Stories ........ 314
      1. Symbols and Stories of Estate Tax Legislation .. 315
         a. The Object of Taxation: Concentrations of
            Wealth and Family Businesses ............... 315

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b. The Purpose of Taxation: Balancing the Budget ........................................ 317

2. The Public Discourse in the Estate Freeze Legislation ........................................ 319
   a. Passage of Legislation ........................................ 320
   b. Substantive Decisions ........................................ 323

III. Implications of the Public Discourse for Tax Theory ........................................ 325
   A. Divided Democracy: Symbols as Extrinsic to Policy ........................................ 325
   B. Democracy as Discussion: The Translation of Symbols into Goals ................................. 327
   C. Identifying Goals ........................................ 330
      1. Reward ........................................ 332
      2. Community ........................................ 333
      3. Conclusion ........................................ 336
   D. Evaluating Modes of Analysis ........................................ 336
      1. Comprehensive Tax Base ........................................ 339
      2. Ability to Pay ........................................ 343
      3. Benefit ........................................ 349

IV. Conclusion ........................................ 354
Although tax theorists almost unanimously agree that taxation of wealth should play a larger role in the revenue system, they have not been successful in convincing Congress.1

I. INTRODUCTION

Joseph Pechman's observation aptly captures the quandary of the many theorists2 who advocate taxing wealth through the federal transfer tax.3 These scholars make powerful arguments for the tax. They claim that the tax contributes as much as 30% to the total progressivity of the entire federal tax system.4 Furthermore, they argue that the transfer tax is more equitable5 and more efficient6 than an income tax.


5 See Walter J. Blum & Harry Kalvin, Jr., The Uneasy Case for Progressive Taxation, 19 U. Chi. L. Rev. 417, 502-03 (1952) [hereinafter Progressive Taxation] ("[T]he case for les-

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These arguments have had little apparent impact on legislation. Since 1945, the federal transfer tax never has accounted for more than 2.5% of receipts and seldom has applied to more than 3% of the population. After neglecting the tax in the 1950's and 1960's, Congress cut it in the 1970's and 1980's, and the first Republican Congress in 30 years has promised further reductions.

Some scholars use this legislative track record to argue against the transfer tax and for other means of taxing inherited wealth. Taxing inequalities in ... inheritance is surely stronger than the case for lessening inequalities of income. The windfall aspect of inheritance clearly distinguishes the two cases.

They argue that the tax does not distort the allocation of resources because individuals discount taxes that will be due upon their death. See Graetz, Praise, note 2, at 280; Gutman, Reforming, note 2, at 1188; Westfall, note 2, at 989.


The federal experience is not an isolated development. Estate taxes have fared poorly in other jurisdictions as well. California and Massachusetts have repealed their independent taxes, leaving only a “pick-up” tax completely creditable against the Federal estate tax. See Cal. Rev. & Tax. Code § 13301 (West 1996) (prohibiting the imposition of an estate tax), added by Initiative Measure 1982, Cal. Stat. ch. 1535, § 15. for decedents dying after 1996, Massachusetts has only a “pick-up” tax, equal to the Federal Credit. See IRC § 2A. A number of foreign countries, including Australia, Canada and Israel have eliminated estate taxes as well. See Richard M. Bird, Canada’s Vanishing Death Taxes, 16 Osgoode Hall L.J. 133 (1978); Willard H. Pedrick, Oh, to Die Down Under! Abolition of Death and Gift Duties in Australia, 35 Tax Law. 113 (1981); Jeff Broide, Inheritance No Longer Liable to Taxation, Jerusalem Post, June 7, 1990, at 8.

The Contract with America would have increased the estate tax exemption from $600,000 to $750,000. See Job Creation and Wage Enhancement Act, H.R. 9, 104th Cong. (Title XII) (1995) [hereinafter Job Creation Act]. A recent flat tax proposal sought to abolish the transfer tax. See, e.g., Freedom and Fairness Restoration Act, H.R. 2060, S. 1050, 104th Cong. § 106 (1995).

See Joel C. Dobris, A Brief for the Abolition of All Transfer Taxes, 35 Syracuse L. Rev. 1215, 1225 (1985) (arguing for repeal in part because “[p]eople do not like a death tax”); John E. Donaldson, The Future of Transfer Taxation: Repeal, Restructuring and Refinement, or Replacement, 50 Wash. & Lee L. Rev. 539, 542-44 (1993) (arguing that lack of legislative will prevents transfer tax from reducing concentrations of wealth or increasing progressivity); Charles O. Galvin, To Bury the Estate Tax, Not to Praise It, 52 Tax Notes 1413, 1414 (Sept. 16, 1991) (arguing for repeal based on political realties); McCaffery, Uneasy Case, note 2, at 327-28 (criticizing transfer tax based in part on political obstacles to meaningful transfer tax reform).

See, e.g., Donaldson, note 10, at 557-63 (proposing transferee-centered models for wealth taxation); Galvin, note 10, at 1418-19 (proposing taxation of capital gains at death or inclusion of gifts and bequests in income); McCaffery, Uneasy Case, note 2, at 350-53 (proposing progressive consumption tax).
Theorists, however, resist integrating this experience into tax theory. They fail to use the legislative record to evaluate norms such as progressivity, equality, and efficiency.

This failure stems from the standard theorist account of the legislative process. Theorists usually divorce policy from politics by separating the merits of proposals from the means by which they are adopted. This divorce impoverishes both policy and politics. It reduces policy analysis to the technical pursuit for universal and quantifiable truth and politics to the exercise of raw economic power. Furthermore, this truncated vision distances tax theory from the legislative debate. Dismissing that debate as driven by ignorance...

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12 See Edward J. McCaffery, Cognitive Theory and Tax, 41 UCLA L. Rev. 1861, 1933 (1994) (hereinafter Cognitive Theory) ("It has, indeed, been a striking feature of tax policy scholarship that there have been few if any systematic attempts to bring popular, democratic input to bear on questions of ideal tax policy and design.").

13 This distinction is by no means limited to tax theorists. It pervades policy analysis generally. See Charles E. Lindblom, The Policy-Making Process 26 (1980) ("When we say that policies are decided by analysis, we mean that an investigation of the merits of various possible actions has disclosed reasons for choosing one policy over others. When we say that politics rather than analysis determines policy, we mean that policy is set by the various ways in which people exert control, influence, or power over each other."); see also Deborah A. Stone, Policy Paradox and Political Reason 305 (1988) ("The enterprise of extricating policy from politics assumes that analysis and politics can be, and are in some essential way, separate and distinctive activities."); Aaron B. Wildavsky, Speaking Truth to Power: The Act and Craft of Policy Analysis 120 (1979) (distinguishing between intellectual cognition and social interaction in policymaking).

14 See, e.g., Laurence H. Tribe, Policy Science: Analysis or Ideology?, 2 Phil. & Pub. Aff. 66, 79-83 (1972) (describing tendency of policy analysis to focus on outcomes without regard to the procedure that produces those outcomes).

15 See Richard Goode, Lessons from Seven Decades of Income Taxation, in Options for Tax Reform 13, 27 (Joseph A. Pechman ed., 1984) (describing professional preference for "formal presentation, preferably with a good deal of mathematics"). Tax policy shares this trait with economics and policy science. See Donald N. McCloskey, The Rhetoric of Economics 5 (1985) ("Their official rules of speaking well, to which economists pay homage in methodological ruminations and in teachings to the young, declare them to be Scientists in the modern mode.").

16 See Arjo Klamer, The Textbook Presentation of Economic Discourse, in Economics as Discourse: Analysis of the Language of Economists 129, 151 (Warren J. Samuels ed., 1990) ("The conventional picture of science [adopted in economics] ... highlights the products of scientific research and makes it seem as if they are inscribed in stone expressed in a universal language (logic).").


18 Tax theorists generally blame the failure of taxes on inherited wealth on powerful groups. See Lester C. Thurow, Generating Inequality: Mechanisms of Distribution in the U.S. Economy 198 (1975) (attributing low inheritance taxes to political power of the wealthy); see also note 123.
and economic self interest, theorists remain puzzled by public opinion regarding wealth taxation. This Article rejects the sharp division of policy and politics. It urges theorists to go beyond their narrow categories and take seriously the public discourse, by which I mean the language used in newspapers and legislative hearings. Reflecting the perspective of the public at large, the public discourse fills critical gaps in theorist accounts and provides a fertile source for enriching policy analysis. Although dominated by symbols and stories, the public discourse nevertheless conveys widespread social values.

This Article falls into two parts. One part demonstrates that the public discourse describes features of legislation that conventional tax theorist accounts of policy and politics do not. It does so with a case study of particular legislation, that governing estate freeze transactions. In that legislation, Congress enacted a theorist proposal, only to repeal and replace it a few years later. Understanding such reversals is critical if theorists are to influence future legislation.

The first part also describes the standard theorist view of the legislative process. Theorists typically understand legislation in terms of policy analysis and conventional interest group politics. Both descriptions have their gaps. Tax policy analysis describes the estate freeze legislation as a pragmatic discussion about how to protect the tax base from "abuses" but does not explain why Congress addressed some abuses but not others. The political account popular with tax theorists describes that legislation as a battle between organized and unorganized interest groups but does not indicate why power shifted between groups. Thus, neither tax policy analysis nor conventional

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19 See McCaffery, Cognitive Theory, note 12, at 1933 ("[S]ome combination of the thoughts that the subject matter is too complex; that the people are driven by base and predictable self-interest, and so need not be consulted directly... that special interest group politics, more or less corrupt, dominate the landscape, all combine to block any richer populist or pragmatic tradition [in tax theory].").

20 See, e.g., Cooper, Voluntary Tax, note 2, at 230 ("It is somewhat puzzling why this [the estate] tax... should have been so resistant to reform."); Graetz, Praise, note 2, at 285 ("The most puzzling obstacle to estate tax revision is that the American people do not seem to like heavy taxes on bequests."); McCaffery, Uneasy Case, note 2, at 357 n.259 (discussing "puzzling persistence of wealth transfer taxation").

21 The conventional views of policy and politics reflect the perspectives of policy specialists and political actors. See Karl N. Llewellyn, The Constitution as Institution, 34 Colum. L. Rev. 1, 19 (1934) (distinguishing between specialists, interested groups and general public). These different perspectives are described most carefully in John W. Kingdon, Agendas, Alternatives and Public Policies (1984). Kingdon identifies three independent streams in the legislative process: policies, politics and problems. The policy stream consists of the reasoned analysis made by communities of specialists. The political stream refers to electoral, partisan or pressure group factors influencing politicians. The problem stream consists of a value judgment that something should be done about a condition, sometimes triggered by a powerful symbol. This judgment is mostly a product of the larger culture.
interest group politics fully explains the product or process of the estate freeze legislation.

The first part concludes by presenting the public discourse. The public views legislation largely through the lens of popular symbols and stories. These cultural archetypes give content to abstract accounts of policy and politics. They provide clues as to which abuses are most troubling and which interests receive legislative attention. Symbols of balanced budgets, concentrations of wealth and family businesses shed light upon the abuses addressed and the power shifts in the battle.

Going beyond the case study, the second part considers the implications of the public discourse for wealth tax theory. Viewing policy and politics as largely autonomous, theorists currently regard the symbols as either independent goals or political forces. Adopting a vision in which policy analysis feeds into and enriches a larger public discussion, this Article urges that symbols be used as evidence of social preferences currently glossed over in the theorist search for the universal and quantifiable. The symbols reflect value systems generally ignored in policy discussion.

The derivation of policy analysis from cultural archetypes requires translating the public discourse into tax policy analysis, a huge project that this Article only begins. Such translation allows theorists to identify new policy goals and to evaluate existing modes of analysis. The family business symbol, for example, points to the importance of reward and community, norms currently neglected. Serious consideration of these norms would alter tax policy analysis radically.

Moreover, the history of archetypes in legislation casts doubt upon the relevance of the dominant, "pragmatic" school of tax policy analysis for wealth taxation. Pragmatists have long favored ability to pay over benefit as the normative baseline of taxation, and generally equate ability to pay with a comprehensive tax base. The history of inheritance taxation indicates, however, that the comprehensive tax base ideal is less persuasive in the taxation of inherited wealth than in other contexts, and that appeals to ability to pay have diminishing power. In contrast, benefit analysis reflects deeply held popular views. Theorists would do well to consider analytical modes that treat tax payments like consumer purchases.

Although the public discourse is dominated by popular symbols and stories, it is not necessarily more emotional or irrational than other discourses. There is substantial evidence that all human cognition develops from simple images. See note 231. Moreover, symbols and stories play an important role in policy analysis. See note 164.

See, e.g., Laurence H. Tribe, Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality, 46 S. Cal. L. Rev. 617, 630 (1973) (describing tendency of policy analysis to overlook complex structures and soft variables).
II. THE ROLE OF PUBLIC DISCOURSE IN LEGISLATION

A. A Short History of the Estate Freeze Legislation

An estate freeze is a transaction in which a member of an older generation gives to a member of a younger generation an interest in property that is likely to appreciate in value (the "growth interest") while retaining, generally until death, an interest in the property that is unlikely to appreciate (the "income interest"). The gift tax applies to the transfer of the growth interest whereas the transfer of the income interest is potentially subject to estate tax.\textsuperscript{24} The value of the growth interest generally is determined by subtracting the value of the income interest from the value of the entire property.\textsuperscript{25} Because the value of the income interest seldom appreciates, the transaction "freezes" the value of property ultimately includable in the gross estate. An estate freeze reduces transfer taxes\textsuperscript{26} while allowing the donor to retain a steady income.

Taking advantage of double digit inflation, estate planners perfected numerous freeze techniques in the late 1970's.\textsuperscript{27} In the preferred stock freeze, the donor gave away common stock in a corporation while retaining preferred stock. In the grantor retained income trust (GRIT), she gave away a remainder interest in a trust while retaining a term of years. In a buy-sell agreement, the donor transferred an option to purchase property while retaining the underlying property.\textsuperscript{28}

All these transactions were designed to avoid § 2036(a), which includes in the gross estate the full value of property subject to a retained life estate. This inclusion rule does not apply if income and growth interests are separate properties,\textsuperscript{29} if the income interest lapses before death or if the growth interest is sold for its fair value.\textsuperscript{30} Dur-
ing the 1970’s and 1980’s, theorists in the academy and executive department proposed taxing estate freezes. These proposals reached Congress through its own theorists, the professional committee staff who draft statutory language and committee reports.

Congress took no action on these proposals until growing budget deficits in the late 1980’s forced tax increases. Adopting a proposal first described in a staff pamphlet, Congress in 1987 extended the inclusion rule of § 2036(a) by enacting new § 2036(c). The House committee report analogized the retention of preferred stock to a retained life estate in corporate assets. Although the committee reports described only the preferred stock freeze, the unusual statutory language was not so confined. Section 2036(c) applied when a person “in effect” transferred property having a “disproportionately large share” of potential appreciation in an “enterprise” while retaining

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31 See 2 Treasury Dep’t, Tax Reform for Fairness, Simplicity and Economic Growth: General Explanation of the Treasury Department Proposals 378-79 (1984) [hereinafter Treasury I] (proposing to treat the owner of an income interest in property as owning entire property for transfer tax purposes); Cooper, Voluntary Tax, note 2, at 236-43 (proposing reforms to address estate freezes).

In addition to arguing that ownership of preferred stock was tantamount to a retained life estate in corporate assets, see Boykin, 53 T.C.M. (CCH), at 345, the Service issued a revenue ruling containing guidelines for valuing the growth interest in a preferred stock freeze, see Rev. Rul. 83-120, 1983-2 C.B. 170, and private rulings stating that the failure to exercise retained rights could result in a gift, see Ltr. Rul. 8726005 (Mar. 13, 1987) (finding gift on the failure to exercise conversion right); Ltr. Rul. 8723007 (Feb. 18, 1987) (finding gift on the failure to declare noncumulative dividend); Ltr. Rul. 8610011 (Nov. 15, 1985) (finding gift on the failure to redeem stock).


33 See Staff of the Joint Comm. on Tax’n, 100th Cong., 1st Sess., Description of Possible Options to Increase Revenues, Prepared for the Comm. on Ways and Means 265-67 (Comm. Print 1987).


35 See H.R. Rep. No. 100-391, at 1043 (1987). The committee report explained that it was adopting the Service’s litigating position. See id. at 1042 (citing Boykin).

rights in such enterprise. Unlike § 2036(a), § 2036(c) applied to sales between family members, even if made for full value.

After enactment, it became clear that § 2036(c) had wide reach. The retained life estate analogy applied well beyond the preferred stock freeze to other freezes such as the GRIT and buy-sell agreement, and to business transactions as common as a loan, lease or employment contract. Alarmed at the scope of the section, professional associations urged repeal. One lawyer declared § 2036(c) a Frankenstein’s monster to be destroyed.

In the Technical and Miscellaneous Revenue Act of 1988 ("TAMRA"), Congress amended § 2036(c). The accompanying committee report detailed the problems raised by estate freezes. Although exempting most loans, leases and employment contracts from the section, TAMRA confirmed that § 2036(c) applied beyond the preferred stock freeze. Congress deliberately extended § 2036(c) to a GRIT, even if the term interest lapsed before death, and sug-

36 See IRC § 2036(c)(1)(A) (1987). Although the House report defined an enterprise as “a business conducted in any form whether it be through a corporation, partnership or proprietorship,” H.R. Rep. No. 100-391, note 35, at 1044, the Conference Committee report broadened the definition to include “a business or other property which may produce income or gain,” H.R. Rep. No. 100-495, at 996 (Conf. Rep.) (1987), reprinted in 1987-3 C.B. 193, 276.

37 See IRC § 2036(c)(2)(A) (1987) (bona fide sale exception not applicable to transfers to family members).

38 See Technical Corrections Act of 1988: Hearing Before the Senate Comm. on Finance, 100th Cong. 37 (1988) [hereinafter Technical Correction Hearing] (statement of Malcolm A. Moore, Pres. of the Am. College of Probate Counsel) (the statute “has virtually paralyzed what used to be the every-day transfer of property from one generation to another”); Miscellaneous Tax Bills—1989: Hearing Before the Senate Comm. on Finance, 101st Cong. 158-59 (1989) [hereinafter Miscellaneous Tax Bill Hearing] (Resolution of Am. Bar Ass’n Aug. 1988) (“[N]ew section 2036(c) of the code is totally flawed . . . . It is unfair to place all family transactions, many of which are not done for tax reasons, in jeopardy for a substantial period of time.”).


42 The amendments triggered a deemed gift of the value of the appreciation interest upon the disposition of the retained interest. See IRC § 2036(c)(4)(A) (1988). For these purposes, the lapse of a retained interest in a GRIT was treated as a disposition of the retained interest. See IRC § 2036(c)(4)(D)(iv) (1988) (treating termination as a lapse); H.R. Rep. No. 100-795, note 41, at 420 (“[I]f a person gives away a remainder interest in a trust the assets of which consist of property capable of producing income or gain while retaining an income interest for a term of years in the trust, there is a deemed gift with respect to the property when the term of years lapses.”).
gested that the section usually applied to property subject to buy-sell agreements. 43

Critics were not assuaged. In 1989, business groups 44 joined the fray. They argued that § 2036(c) burdened the family business and found sympathetic journalists, 45 willing sponsors 46 and receptive committees. 47 In October, the Senate Finance Committee passed a budget bill containing numerous tax cuts, including repeal of § 2036(c). 48

This bill was widely criticized. Senator Bradley found its provisions “troubling.” 49 Major newspapers denounced its betrayal of the 1986 Tax Reform Act and the victory of special interests. 50 Recalling from this criticism, Senate leaders dropped the cuts from the budget bill. 51

Thereafter, interest group pressure intensified around § 2036(c). 52 A task force drawn from the American Bar Association and the American College of Probate Counsel offered a replacement. 53 Dan Rostenkowski, Chairman of the Ways and Means Committee, re-

43 See IRC § 2036(c)(7)(A)(iii) (1988) (creating safe harbor for agreement to buy or sell property at fair market value at the time of sale).
44 See Miscellaneous Tax Bill Hearing, note 38, at 32-40, 88-118 (statements of the Nat'l Retail Hardware Ass'n, the Ass'n Equip. Dists., the Associated Gen. Contractors of America, the Ass'n for Advanced Life Underwriting, the Nat'l Ass'n of Life Underwriters, the Nat'l Ass'n of Mfrs., the Small Bus. Council of America, the Chamber of Commerce); To Examine the Impact of Current Tax Laws on Small Business: Hearing Before the Senate Comm. on Small Bus., 101st Cong. at 16-193 (1989) [hereinafter Small Business Hearing] (statements of the Nat'l Grocers Ass'n, the Small Bus. Legislative Council, the U.S. Chamber of Commerce, the Nat'l Small Bus. United, the Nat'l Fed'n of Indep. Bus., the U.S. Small Bus. Ass'n).
47 The Senate Finance and Small Business Committees held hearings on § 2036(c). See Miscellaneous Tax Bill Hearing, note 38; Small Business Hearing, note 44.
49 Crenshaw, Panel, note 48 (quoting Senator Bradley).
leased a staff Discussion Draft\textsuperscript{54} that replaced § 2036(c) with rules affecting the taxation of the gift of the growth interest. After public hearings\textsuperscript{55} and further revisions,\textsuperscript{56} Congress, in the Omnibus Budget Reconciliation Act of 1990,\textsuperscript{57} repealed § 2036(c) and enacted in its stead new Chapter 14.

Chapter 14 created special valuation rules. In valuing gifts of interests in corporations, partnerships or trusts, it valued at zero certain rights retained by the donor.\textsuperscript{58} Furthermore, it valued property without regard to options to purchase the property or restrictions on the right to sell or use such property.\textsuperscript{59} Finally, it contained special rules governing lapsing rights or restrictions.\textsuperscript{60}

Chapter 14 was more lenient than § 2036(c) in two respects. First, it largely replaced estate tax inclusion with rules increasing the value of the gift of the income interest. The rules governing preferred stock freezes and GRITs applied for gift tax purposes only. By disregarding many retained rights in corporations and trusts, Chapter 14 resulted in a gift equal to the value of the entire property.\textsuperscript{61} Only a few rules, principally those governing buy-sell agreements, affected estate tax liability.\textsuperscript{62} Second, Chapter 14 applied to limited, specified transactions. It applied only to preferred stock transactions, GRITs, buy-sell agreements and transactions utilizing lapsing rights.\textsuperscript{63} It had no application to loans, leases or employment agreements.

In addition, Chapter 14 created a hierarchy among freeze transactions. Rights in trusts received the harshest treatment. Chapter 14 valued a retained interest in a trust at zero unless denominated as a fixed amount or percentage of trust assets.\textsuperscript{64} Failure to pay as prescribed resulted in an immediate gift under generally applicable rules. Rights in corporations received more favorable treatment. Here, Chapter 14 accommodated one common arm's length transaction: Cumulative preferred rights to distributions usually were accorded

\textsuperscript{54} See "Discussion Draft" Relating to Estate Freezes: House Comm. on Ways and Means, 101st Cong. (1990). The accompanying press release noted that the Draft was not "reviewed by any member of the Ways and Means committee."


\textsuperscript{58} See IRC §§ 2701, 2702.

\textsuperscript{59} See IRC § 2703.

\textsuperscript{60} See IRC § 2704.

\textsuperscript{61} This is because, under the subtraction method, the value of the gift would not be reduced by the value of the retained income interest.

\textsuperscript{62} See, e.g., IRC § 2703(a).

\textsuperscript{63} See IRC §§ 2701-2704.

\textsuperscript{64} See IRC § 2702(a)(2).
value even though not fixed as to amount, and failure to make such distributions as predicted resulted in a taxable gift only after four years. Finally, rights created by buy-sell agreements received the most lenient treatment. Chapter 14 respected these rights if comparable to those found in arm's length transactions.

B. Abstract Discourses of Tax Legislation

The estate freeze legislation followed a pattern common in transfer tax legislation of the last 20 years. Congress adopted a theorist reform only to reverse itself several years later. If theorists are to make meaningful legislative contributions, they must learn from such reversals.

Standard theorist accounts make such learning difficult. Tax theorists commonly describe legislation with one of two abstract discourses. One is policy analysis, the language used to evaluate tax proposals. The other is interest group politics, the language used to describe power. As the estate freeze legislation demonstrates, both perspectives leave substantial gaps.

I. Tax Policy Analysis

a. Conflicting Goals

Tax policy analysis, like all policy analysis, involves choosing a goal and then selecting the best means for achieving it. Tax policy ana-
lysts acknowledge at least a half dozen different goals or criteria. Perhaps the most obvious relate to the use of the proceeds. The revenue norm focuses on the amount of funds raised or lost by a tax proposal. The benefit criterion examines what the taxpayer receives in exchange for her taxes. Fairness and economic efficiency, determined independently from expenditure, command the most attention among theorists. Analysts frequently distinguish horizontal equity, the comparison of those in the same economic class, from the more controversial vertical equity, the comparison of those in different classes. The traditional argument for redistribution among classes rests on the diminishing marginal utility of money: Each additional dollar brings less enjoyment than the last.

For analysts, efficiency refers to the effect of taxation on aggregate wealth. Efficiency analysis has both macroeconomic and microeconomic dimensions. It can consider how taxation affects the national economy and how specific tax proposals affect individual decisionmaking. Efficiency analyses of the estate tax consider its effects on savings and entrepreneurial innovation.

Revenue, benefit, efficiency and fairness by no means exhaust the relevant criteria. Administrability and taxpayer comprehension also play a role. In discussing administrability, theorists consider liquidity and valuation, whether the amount of tax can be ascertained readily and whether the taxpayer has funds available to pay the tax. In con-


71 See Kiesling, Public Goods, note 17, at 31 ("[J]ust as with individuals, groups . . . must have funds with which to operate, and so it is incumbent on each member to faithfully pay membership fees, or dues. In return for this payment, the individual gets to enjoy any benefits conferred by membership in the group.").


WEALTH TAX POLICY

sidering taxpayer comprehension, analysts ask whether the tax is perceived as familiar, certain and simple.\(^{76}\)

These goals have their shortcomings. For one, they often conflict. Equity often clashes with benefit and efficiency.\(^{77}\) By definition, a tax that redistributes wealth benefits those who do not pay the tax. Likewise, a tax that decreases inequalities in wealth may create inefficiencies by reducing incentives to work and save.\(^{78}\) Moreover, the norms raise intractable empirical issues. Benefit can be measured by either the value received, or the cost of services rendered, both of which are difficult to ascertain. Efficiency effects cannot be determined without knowledge of relative elasticities.\(^{79}\) Evaluating fairness claims requires making difficult interpersonal comparisons of utility.\(^{80}\)

b. Pragmatic Reconciliation

The conflict and imprecision of tax policy norms\(^{81}\) lead to considerable disagreement.\(^{82}\) To reach consensus, tax theorists invariably narrow their focus.\(^{83}\) For the last 50 years, scholars such as Henry Simons, Richard Musgrave and Stanley Surrey have reconciled tax policy goals through a specific, “neutral” mode of analysis that minimizes normative and empirical controversy in order to make specific

\(^{76}\) See, e.g., Witte, Politics, note 70, at 31 (“[C]omplexity, and the public’s perception of that complexity, may affect the legitimacy of the tax system.”).

\(^{77}\) See id. at 31-32.

\(^{78}\) See Arthur M. Okun, Equality and Efficiency: The Big Tradeoff 88-120 (1975) (describing taxation as an area in which society is obligated to trade off between efficiency and equality). At the extreme, most theorists conclude that taxing only the wealthy incurs unacceptable efficiency losses. See, e.g., Kiesling, note 17, at 47-54; Witte, Politics, note 70, at 35-36.

\(^{79}\) See, e.g., Joseph M. Dodge, The Logic of Taxation: Federal Income Tax Theory and Policy 288 (1989) [hereinafter Logic] (“Whether the quantity of an item is affected by a tax depends principally upon the elasticity of demand and supply.”); Witte, Politics, note 70, at 41 (noting that optimal tax rates are “extremely sensitive to assumptions concerning the elasticity of substitution of labor for leisure, capital accumulation, and other factors” and that empirical knowledge of these factors is lacking).

\(^{80}\) See Klein, note 72, at 5-8 (noting the need for personalized judgments in determining a perfect measure of ability to pay); Witte, Politics, note 70, at 56 (arguing that differences in individual circumstance cannot be intellectually ranked).


\(^{82}\) Dodge et al., note 73, at 25-26 (“Because the norms and criteria [used in tax policy analysis] are imprecise, subjective, sometimes conflicting, and sometimes difficult to implement in the real world, tax policy analysis is an inexact science leading to much disagreement.”).

\(^{83}\) See, e.g., Witte, Politics, note 70, at 32 (noting that “range and inconsistency of values” cause policymakers to proceed incrementally from a few norms); Sneed, note 70, at 599-604 (creating hierarchy among tax policy norms).
In this Article, I refer to this mode of analysis as “pragmatism.” Although early pragmatists focused on the income tax, their successors extended that analysis to the transfer tax as well.

Pragmatists adopt two assumptions designed to sidestep controversial issues. The first makes ability to pay the normative baseline for taxation. This assumption allows pragmatists to refrain from discussing revenue and benefit, which they regard as too indeterminate for reform.

Adherence to ability to pay raises the difficult trade off between equity and efficiency. Pragmatists acknowledge this trade-off in discussing tax rates. Here, they frankly defend progressivity but concede troubling efficiency losses. Professors Blum and Kalvin describe the case for progressivity as “uneasy,” and Professor Simons bases his case ultimately on an “aesthetic” preference. Likewise,


See Utz, note 85, at 41 (“[T]he approach that claims the largest following among prominent tax policy experts is one that made welfare the central issue. It requires that taxes be levied in accordance with taxable capacity or “ability to pay.””). Although he flirted with benefit theories, Professor Musgrave finally adopted ability to pay, observing that, in any event, a benefit approach would have to be supplemented by one that rectified distribution. See Musgrave, Defense, note 72, at 46 n.3. Professor Simons espoused a comprehensive tax base without the intermediate assumption of ability to pay. See Simons, note 84, at 15 (criticism of factor theories).

See Klein, note 72, at 112 (“Adequacy [of revenue] is not a pertinent criterion in the kind of tax policy analysis with which tax reformers are concerned, where the choice is among competing provisions or systems and where, consequently, aggregate revenue and expenditure must be held constant.”).

Professor Simons discussed benefit only with respect to a few minor levies like the gasoline tax. See Simons, note 84, at 31-40; see also Klein, note 72, at 2 (half-page discussion of benefit principle as applied to tolls and gas taxes).

See, e.g., Dodge, Logic, note 79, at 90-91 (concluding benefit principle lacks a “sufficient degree of specificity” for reform).

See, e.g., id. at 301-12 (discussing efficiency concerns with respect to rates); Klein, note 72, at 32-35 (efficiency considerations discussed as part of progression).

Blum & Kalvin, Progressive Taxation, note 5, at 519.

Simons, note 84, at 18-19 (“The case for drastic progression in taxation must be rested on the case against inequality—on the ethical or aesthetic judgment that the prevailing
pragmatists find that progressivity constitutes the strongest argument for the estate tax,\(^9^4\) outweighing any efficiency losses.\(^9^5\)

Pragmatists, however, do not discuss the trade off between equity and efficiency with respect to the tax base. Here, they limit controversy with a second assumption: The tax base should be comprehensive. They define a comprehensive tax base algebraically as consumption plus change in wealth\(^9^6\) for the income tax, and wealth for the transfer tax. They interpret that base as treating all income the same, whatever its source, and all transfers alike, notwithstanding their nature, form or time.\(^9^7\)

Pragmatists argue that a comprehensive tax base is a point of agreement that furthers both efficiency and equity.\(^9^8\) They assert that this base places economic decisions on equal footing.\(^9^9\) Equating ability to pay with objective well-being,\(^1^0^0\) pragmatists find that a broad base promotes fairness.\(^1^0^1\)

Although formulated by scholars, the comprehensive tax base ideal molds professional understanding outside the academy. For at least

\(\text{distribution of wealth and income reveals a degree (and/or kind) of inequality which is distinctly evil or unlovely.} \)\(^9^4\)

\(^9^4\) See, e.g., Kurtz Statement, note 4, at 3978 (stating estate and gift taxes are “an essential ingredient of the progressive element of our tax system”); Graetz, Praise, note 2, at 273-74 (“The principal reason . . . to revise the estate tax is to rescue this mechanism for achieving progressivity.”); Gutman, Reforming, note 2, at 1193-94 (noting that the most persuasive defenses of transfer tax focus on its contribution to progressivity).

\(^9^5\) See, e.g., Graetz, Praise, note 2, at 278-83.


\(^9^7\) See, e.g., Michael J. Graetz, The Estate Tax—Whither or Wither?, in The Promise of Tax Reform 165 (1985) [hereinafter Estate Tax] (“The more specific goal of estate and gift taxation must be the elimination of large differences in tax liability based on the nature, form, or time of the transfer.”); Gutman, Reforming, note 2, at 1217-18 (“Applying these policy goals to a wealth transfer tax requires the formulation of a principle . . . that defines the tax base uniformly without regard to the nature of the property transferred, the time of the transfer, or the form of the transfer.”); Kurtz & Surrey, note 2, at 1368 (noting equity requires that “aggregate wealth transfers of equal size should bear equal amounts of taxes”).

\(^9^8\) See Kurtz Statement, note 4, at 3908 (“Fairness and equity demand that [estate and gift taxes] be apportioned so that equal amounts of wealth bear equal amounts of taxes regardless of the technicalities of dispositive arrangements.”); Dodge, Redoing, note 2, at 252-53 (“Whether one is liberal or conservative, . . . a broad based low rate version [of the wealth transfer tax system] is better than a narrow based high rate version . . . .”).

\(^9^9\) See Dodge, Logic, note 79, at 288 (stating neutrality favors comprehensive tax base); Musgrave, Defense, note 72 at 48 n.8 (arguing comprehensive tax base furthers neutrality).

\(^1^0^0\) See, e.g., Dodge, Logic, note 79, at 97 (recognizing ability to pay as the ultimate norm); Klein, note 72 at 72 (treating income as a proxy for ability to pay).

\(^1^0^1\) See, e.g., Dodge, Logic, note 79, at 86; Klein, note 72, at 7.
30 years, the Treasury Department has used a comprehensive tax base to formulate a tax expenditure budget\textsuperscript{102} and tax reform proposals.\textsuperscript{103} Attention to that base also underlies much private tax planning. Although practicing lawyers, accountants and financial planners seldom advocate base broadening, they carefully attend to the ways in which current law falls short of the ideal. They reduce clients' taxes by exploiting rules that differentiate among sources of income or the nature, form or time of a wealth transfer. Thus, in the legislative arena, pragmatism pits theorists, in and out of the government, against tax planners in a battle over "loopholes."\textsuperscript{104}

c. Understanding of the Estate Freeze Legislation: Protecting a Comprehensive Tax Base Against Abuses

Tax policy analysis views the estate freeze legislation as a rational discussion over how to approximate a comprehensive transfer tax base, that is, wealth. Theorists in the academy and government argued with estate planners over presumed behavior, finally agreeing to address a few abuses. This discussion underlay much of Chapter 14.

i. Tax Policy Analysis of the Estate Freeze Legislation

In debating estate freeze legislation, theorists and estate planners both made arguments premised on taxpayer behavior. Theorists identified several potential taxpayer abuses.\textsuperscript{105} They first asserted that the

\textsuperscript{102} Under Surrey's tenure as undersecretary, Treasury published the first tax expenditure budget in 1968. See Surrey & McDaniel, note 84, at 1.

\textsuperscript{103} See generally 2 Treasury I, note 31; Treasury Dep't, Tax Reform Studies and Proposals (1969). Professors Surrey and McDaniel understood the tax expenditure budget as a "hit list" of tax reform proposals. Surrey & McDaniel, note 84, at 87 (concluding that "many tax expenditure incentives or corresponding direct programs may have little justification").

\textsuperscript{104} See generally Byrle M. Abbin, Taxing Appreciation Hits Everything Up Front: Retirement Benefits, Deferred Compensation and . . ., 58 Tax Notes 1659, 1660 (Mar. 22, 1993) (describing "strong disagreement between practitioners who deal with clients in their 'real world,' and the more theoretically oriented academicians, tax policy economists, and attorneys").


\textsuperscript{105} See, e.g., H.R. Rep. No. 100-795, note 41, at 422-23 (describing problems of undervaluation at the time of the initial transfer, transfer of wealth through inaction in the exercise of rights and retention of enjoyment of the entire enterprise).
donor might value the gift inaccurately, thereby reducing the total value subject to transfer tax.\(^{106}\) Next, they claimed that the donor would make later, difficult to detect transfers, either through subsequent failures to exercise retained rights in an arm's length manner,\(^ {107}\) or through performance of uncompensated services and diversion of business opportunities.\(^ {108}\) Finally, theorists argued that the donor would retain control over the entire property. In that situation, the freeze converts a testamentary bequest into a lifetime gift, effectively subject to lower rates.\(^ {109}\) By deferring taxation of the entire property until death, former § 2036(c) met these concerns. It reduced the opportunity for inaccurate valuations, assured taxation of subsequent transfers and applied estate tax rates.

Estate planners countered that the donee might add value to the frozen entity after the gift. Inclusion of such value overtaxed the de-

\(^{106}\) In a preferred stock freeze, for example, the taxpayer might assume low interest rates at the time of the gift, reducing the value of the common stock, and high interest rates at death, reducing the value of the preferred interest. In a GRIT, the taxpayer could transfer property with greater appreciation than that assumed under the Service's tables. Finally, in the buy-sell agreement, a taxpayer might value equally mutual rights to purchase property for a fixed price upon death, notwithstanding differing life expectancies of the holders of the rights.

\(^{107}\) Failure to exercise a put, call or liquidation to a fixed amount effectively enriches the person with use of the funds. See William F. Nelson & Peter J. Genz, New Uncertainties in the Equity Freeze: The Impact of Dickman on Capital Call Rights and Other Issues, 63 Taxes 999, 1005-09 (1985). Failure to pay preferred dividends as assumed at the time of the freeze enriches the common shareholders. See id. at 1009-10. Failure to revise the purchase price in a buy-sell agreement may have the same effect. See generally id. at 1004.

\(^{108}\) Academics explicitly defended § 2036(c) as a means of taxing wealth attributable to services or control exercised by the decedent. See Joseph M. Dodge, Rethinking Section 2036(c), 49 Tax Notes 199, 206 (Oct. 8, 1990) [hereinafter Rethinking] (discussing problem of transferring wealth through performance of uncompensated services); Gutman, Comment, note 104, at 672-73. Although not mentioned in the legislative history, this concern was implicit in one of the safe harbors. See IRC § 2036(c)(7)(D)(ii)(II) (1988) (safe harbor for qualified start-up debt conditioned on no transfer of goodwill or "customers or business opportunities").

\(^{109}\) Although the estate and gift taxes share a unified rate schedule, see IRC §§ 2001, 2502, gifts are subject to a lower effective tax rate. One reason is that the estate tax base includes the amount of the tax whereas the gift tax base does not. For example, a 50% estate tax on a $100 bequest results in a $50 tax and $50 passing to the heir. In contrast, a 50% gift tax on a person with a $100 results in a $33.33 tax and $66.67 passing to the heirs. Other features favoring lifetime gifts are the time value of the rate brackets and unified credit, and the $10,000 per donee annual gift tax exclusion, see IRC § 2503(c). See generally Gutman, Comment, note 104, at 656-60. The exclusion of subsequent appreciation from the gift tax base itself is not favorable because the gift tax is paid earlier. See Alvin C. Warren, Jr., The Timing of Taxes, 39 Nat'l Tax J. 499, 499 (1987), stating that: The present value to a taxpayer of a consistently defined tax will be the same whether the tax is deferred or accelerated, as long as the tax rate remains constant and the base of a deferred tax increases over time by the rate of return generally applicable to investment of proceeds available after payment of an accelerated tax. (emphasis deleted).
Therefore, planners rejected an inclusion rule and dismissed concerns based on transfers of services and business opportunities.\textsuperscript{111} 

Estate planner concession of theorist concerns formed the nucleus of Chapter 14. First, estate planners conceded the need to address inaccurate valuation.\textsuperscript{112} Chapter 14 addressed this abuse with several rules designed to promote accurate valuation. One increased the information available for audit by requiring full disclosure of the facts of a freeze transaction to commence the gift tax statute of limitations.\textsuperscript{113} Another approximated likely value by presuming that common stock was worth at least 10\% of total corporate equity.\textsuperscript{114} A third reduced the opportunity for undervaluation by valuing at zero retained income interests not fixed as to amount or percentage.\textsuperscript{115} 

Later, estate planners conceded concerns about the failure to exercise retained rights.\textsuperscript{116} Chapter 14 addressed this abuse with other rules aimed at the initial gift. Retained rights that facilitated hard to detect transfers—discretionary put, call and liquidation rights—were valued on the assumption that they would be so used.\textsuperscript{117} Failure to pay dividends on cumulative preferred stock as predicted resulted in a transfer tax inclusion.\textsuperscript{118} 

Planners never admitted abuses relating to transfers of uncompensated services and business opportunities or to differences between gift and estate taxes. Consequently, Chapter 14 barely touched these problems. Neither the statute nor the legislative history alluded to


\textsuperscript{111} Estate planners took the position that nonproperty transfers lay outside the transfer tax system. See, e.g., Aucutt, note 104, at 348-50. They noted that services and business opportunities could be transferred without a frozen entity. See, e.g., Miscellaneous Tax Bill Hearing, note 38, at 92 (letter of Richard L. Dees to Sen. Daschle).

\textsuperscript{112} In 1988, a task force of the American College of Probate Counsel proposed a substitute for § 2036(c) that would treat a gift as incomplete if undervalued by more than 25\%. See Moore Statement, note 38, at 101; see also Dees Letter, note 111, at 93-94 (proposing disclosure regime).

\textsuperscript{113} See IRC § 6501(c)(9).

\textsuperscript{114} See IRC § 2701(a)(4).

\textsuperscript{115} See IRC § 2702(a)(2).

\textsuperscript{116} After 1988, two groups offered rules designed to address the failure to exercise rights. The Section 2036(c) Task Force, drawn from the American Bar Association and American College of Probate Counsel, proposed a presumption that “discretionary liquidation, conversion, dividend or put rights” would not be exercised in a manner adverse to the interest of a family member. See Discussion Draft Hearing, note 53, at 78-79. Later that year, the District of Columbia Bar Association issued a report recommending that property transferred to a family member be valued as if it were held in conjunction with property retained by the transferor. See id. at 202-11 (statement of Donald C. Lubick, Chair, Tax Policy Comm., Tax Sec., D.C. Bar Ass'n).

\textsuperscript{117} See IRC § 2701(c)(2)(A).

\textsuperscript{118} See IRC § 2701(d).
them. The statute sparingly applied an inclusion rule to rare situations: buy-sell agreements not made on arm's length terms and partnership agreements with lapsing rights or restrictions on liquidation.

ii. Gaps in Tax Policy Analysis

Tax policy analysis provides an incomplete account of the estate freeze legislation. For one, it does not account for the give and take of the legislative process. Policy analysis first selects ends and later weighs the means for achieving them. In the estate freeze legislation, however, ends and means were discussed together. Theorists continued analyzing the problems posed by estate freezes after § 2036(c) was enacted. Planner concessions increased as efforts at repeal without replacement failed. Clearly, the legislation involved more than policy analysis.

Furthermore, policy analysis does not account fully for substantive decisions reached in the legislation. This analysis ultimately does not explain the decision to replace estate inclusion with rules increasing the gift tax value of the income interest. Tax policy analysis demonstrates that estate tax inclusion addresses potentially more abuses than rules addressing gift tax valuation but does not itself provide a basis for choosing between these approaches. The comprehensive tax base ideal provides no such basis as it does not answer questions about presumed behavior—whether donors are more likely to misvalue gifts and to fail to exercise retained rights than to transfer services or to retain control. Nor do tax policy norms of valuation and liquidity provide a basis. Inclusion rules permit more accurate valuation, and gift tax approaches assure greater taxpayer liquidity. Yet, tax policy analysis provides no means of trading valuation off against liquidity.

Tax policy analysis has even greater difficulty accounting for the hierarchy among GRITs, preferred stock freezes and buy-sell agreements. This differentiation lacks any foundation in fairness or efficiency. There is no evidence that the hierarchy treated similarly situated taxpayers the same or that it minimized interference with private decisions. Indeed, the hierarchy conflicts with the comprehensive

119 See IRC § 2703.

120 See IRC § 2704.

121 See Dodge, Rethinking, note 108, at 201 (noting that the “compelling reason” to tax property when the transferor ceases to own a retained interest is that it is the only way to accurately value amount actually transferred); Gutman, Comment, note 104, at 655 (noting that “if postponing the taxable event results in more accurate measurement of the amount transferred, there is no tax reason to reject deferring the taxable event”).

122 A taxpayer is more likely to have funds available to pay a gift tax, which results from a voluntary act and involves lower nominal amounts.
tax base ideal by violating the precept that transfers should be treated alike, notwithstanding their nature, form or time.

2. **Interest Group Politics**

   a. **Interest Groups, Politicians and Patterns of Legislation**

   Tax theorists do not believe that policy alone accounts for legislation; they acknowledge the power of special interests. In doing so, they invoke a model of politics based on economic self interest. This model takes as its starting point the group, persons having a common interest. Different groups have different organizational capacities. Large diffuse interests have difficulty organizing because they cannot prevent noncontributors from free riding upon their efforts. Small cohesive interests organize more easily because they can exclude free riders.

   Organization affects political reception. By simply taking public positions, politicians can appeal to diffuse interests. In contrast, politicians must produce legislative results to satisfy cohesive interests, whose organization permits close monitoring of legislation.

   Diffuse and cohesive groups each produce distinct patterns of conflict and cooperation, which may be termed partisan confrontation.

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124 An interest group has been defined as "any group that, on the basis of one or more shared attitudes, makes certain claims upon other groups in the society for the establishment, maintenance, or enhancement of forms of behavior that are implied by the shared attitudes." David B. Truman, The Governmental Process: Political Interests and Public Opinion 33 (1951). The interest group model described in this Article is only that conventionally used by tax theorists. There are, of course, more complex models that recognize the importance of ideas and culture. See Agenda Formation (William H. Riker ed., 1993); note 163.

125 See Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups 165 (1976) ("[L]arge or latent groups have no tendency voluntarily to act to further their common interests.").

126 Cohesiveness is not the only factor affecting organization. Financial capacity also affects the ability to organize. See Kay Lehman Schlozman & John T. Tierney, Organized Interests and American Democracy 65-73 (1986) (noting that interest group representation is skewed toward business groups and against those representing the less advantaged).

127 See David R. Mayhew, Congress: The Electoral Connection 132 (1974) ("[I]n a large class of legislative undertakings the electoral payment is for positions rather than for effects.").

128 See id. at 92 (noting importance of credit claiming in appealing to interest groups).
and interest group accommodation.\textsuperscript{129} In partisan confrontation, high profile politicians, such as the President and congressional leadership, pursue partisan ends, most importantly seizing control of the White House or Congress. Appealing to the public at large, they stake out ideological and social class positions. On issues of revenue, Republicans generally advocate low taxes while Democrats favor taxing the rich.\textsuperscript{130}

In interest group accommodation, organized interest groups push low visibility proposals, opposed principally by the media, congressional staff and executive bureaucracy.\textsuperscript{131} Incumbent politicians react by cooperating across party lines\textsuperscript{132} and logrolling legislation. Institutions display varying responsiveness to such groups. In tax legislation, the President and the Treasury Department are traditionally the most independent,\textsuperscript{133} while within Congress, the House of Representatives

\textsuperscript{129} These patterns correspond to the distributive and redistributive patterns first described by Theodore J. Lowi, American Business, Public Policy, Case-Studies, and Political Theory, 16 World Pol. 677, 692-95, 703-15 (1967). See also Randall B. Ripley & Grace A. Franklin, Congress, the Bureaucracy, and Public Policy 17-20, 21-22 (5th ed. 1991); David J. Vogler, The Politics of Congress 193-99 (1974) (describing patterns); James Q. Wilson, Political Organizations 153 (Princeton Univ. Press 1995) (1973). I use the terms "partisan confrontation" and "interest group accommodation" to clarify that these patterns do not refer to "distribution" as used in the economic literature.

\textsuperscript{130} See Susan B. Hansen, The Politics of Taxation 72 (1983) ("Democrats supposedly prefer higher taxes (to finance more government services) and more progressive forms of taxation; Republicans have historically opted for lower taxes, especially on business, and flat rate or regressive taxes."); Witte, Politics, note 70, at 358 (noting Democrats preference for progressivity); id. at 367-68 ("[I]t appears that most people perceive a substantial difference between parties on the issues of tax cutting (in 1980) and progressivity (1972, 1976).")

\textsuperscript{131} See Steven Kelman, Making Public Policy 62 (1987) (describing tendencies of congressional staff and journalists to "regard themselves as representatives for poorly organized groups and as people trying to do the right thing").

\textsuperscript{132} See Mayhew, note 127, at 105 (describing the "cult of universalism [that] has the appearance of a cross-party conspiracy among incumbents to keep their jobs").


The President's high visibility and broad constituency makes him least vulnerable to interest group pressure. See Kelman, note 131, at 83-87 (ascribing the President's public spiritedness to voters' conception of the Presidency); Mayhew, note 127, at 169 ("Since presidents can be held individually accountable for broad policy effects and states of affairs, they are likely to go about their business with a vigorous insistence on instrumental rationality."). In addition, executive agencies focus on policy goals. See Kelman, note 131, at 112-13 (describing tendencies of civil servants to promote the missions of their agency).
and Ways & Means Committee exercise more autonomy than the Senate and Senate Finance Committee.

b. Understanding of the Estate Freeze Legislation: Seesaw Battle Between Organized and Unorganized Interests

An interest group model of politics views the estate freeze legislation as a battle pitting large diffuse interests (the public at large) against small cohesive ones (those subject to the tax). This alignment underlies the legislative process. The estate freeze legislation alternated between partisan confrontation and interest group accommodation.

i. Patterns in the Estate Freeze Legislation

Section 2036(c) originated in the partisan confrontation of the late 1980's. Democrats yearned to capture the Presidency while Republicans dreamt of controlling Congress. Seeking to mobilize public opinion, the parties emphasized their ideological differences.

134 Some attribute this to the rules governing amendment on the House floor. See John F. Manley, The Politics of Finance: The House Committee on Ways and Means 223 (1970) ("The closed rule acts as a shield for Ways & Means bills against hundreds of interest group demands that would be articulated if not fulfilled if the bill appeared naked on the floor.").
135 See id. at 279 ("Senate decisions [on tax bills] are more in line with the demands of interest groups, lobbyists, and constituents than House decisions.").
136 See Richard F. Fenno, Jr., Congressmen in Committees 181-84 (1973); Thomas J. Reese, The Politics of Taxation 164 (1980) (noting that the Senate Finance Committee "responds to interest group pressures by being more generous with tax expenditures and tax cuts than the House tax committee").
138 Particular tax proposals commonly shift between partisan confrontation and interest group accommodation. For example, Democrats supported a tax on luxury goods that was enacted in 1990 as a means of soaking the rich, but supported repeal of that same tax two years later because of its economic impact on particular industries. See Tim Gray, Ways and Means Democrats Forge Tax Package; Stage Set for Battle over Tax Rate Increases, 49 Tax Notes 255, 257 (Oct. 15, 1990); Lawrence J. Haas, Jet Set Tax Woes, 23 Nat'l J. 2177 (1991).
140 Divided government aggravates the natural institutional rivalry between President and Congress. See Harold J. Laski, The American Presidency, an Interpretation 116 (1940) ("There can be no doubt that, in its own eyes, Congress establishes its prestige when it either refuses to let the president have his own way, or compels him to compromise with it.").
140 See Samuel Kernell, Facing an Opposition Congress: The President's Strategic Circumstance, in The Politics of Divided Government 87, 97 (Gary W. Cox & Samuel Kernell
Republicans advocated low taxes and Democrats argued for higher taxes on the wealthy.  

Section 2036(c) came to the fore in the midst of this clash. In the summer of 1987, President Reagan set the tone by blasting the "tax and spend" Democrats in Congress and promising to veto any bill increasing taxes. Congressional Democrats countered by drafting a partisan budget bill reaching out to traditional Democratic constituencies. Among the bill's "soak the rich" provisions was § 2036(c). The budget bill struck a two-year agreement, during which taxation fell off the partisan agenda.

Throughout this period, organized interest groups wielded little influence on the estate freeze legislation. The enactment of § 2036(c) in 1987 may have caught them unprepared and the breadth of the provision became apparent only over time. Estate planners made their views known in 1988 but without much success.

In 1989, partisan interest in taxation resumed, now focused on President Bush's proposed cut in the maximum tax rate on capital gains.

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141 See Lawrence J. Haas, The Capital Gains Game, 22 Nat'l J. 2569 (1990) ("While the Democrats' Far Left has turned to soak-the-rich themes, the Republicans' Hard Right has clung ever more fiercely to the party's trademark 'no-new-taxes' pledge . . . Democrats want to be Democrats; Republicans want to be Republicans. Only by distinguishing their party from their opponents' can each side hope to ever get what it wants—for the Democrats, the White House; for the Republicans, a Republican Senate, if not a GOP House.").


143 See Lawrence J. Haas, Witching Hour for the '88 Budget, 19 Nat'l J. 1787 (1987).


145 See John A. Bogdanski & Lawrence R. Brown, Farewell to "Freezes": Section 2036(c), 42 Tax Notes 1633, 1653 (Mar. 27, 1989) ("Until now, the legislative process resulting in section 2036(c) has seemed devoid of effective lobbying by private 'special interests.' . . . Section 2036(c) seems the product of just a single interest—the government itself."); Dees, note 39, at 877 (noting § 2036(c) "was drafted from a perspective of those who had seen only abusive freezes").

146 Bogdanski & Brown, note 145, at 1653 (suggesting that § 2036(c) "slipped into the Code without the notice of vocal private interests").

147 For one planner's perspective, see Dees, note 39, at 877 ("For every well-meaning but ill-conceived theory advanced, someone in Washington was willing to assert that, of course, Section 2036(c) applied and it was drafted that way intentionally. Thus grew the Monster.").

President Bush had made the cut a top priority, and congressional Democrats dug their heels in opposition.\footnote{149}{See Lawrence J. Haas, Gaining Political Capital, 21 Nat’l J. 2132, 2132 (1989) (describing capital gains debate as an opportunity to “remind voters of the Democrats' traditional strength as the party of ‘average’ Americans”).}

This resumption did not affect the estate freeze issue, which in early 1989 fell prey to interest group accommodation.\footnote{150}{Interest groups often require time to mobilize against taxes on inherited wealth. The enactment of carryover basis and a generation skipping transfer tax in 1976 attracted more lobbying after enactment than before. Carryover basis was repealed in 1980 and the generation skipping transfer tax was replaced in 1986. See note 68.} The tide turned when business associations joined estate planners in urging repeal. The center of gravity shifted from high profile politicians to organizations representing economic interests, opposed only by academics\footnote{151}{See Discussion Draft Hearing, note 53, at 343 (statement of Elias Clark) (“I am not convinced that section 2036(c) is so lacking in merit or unworkable as to justify its abandonment without further effort to correct its deficiencies.”); Bogdanski & Brown, note 145, at 1634 (concluding “that, despite poor draftsmanship, [§ 2036] is quite sensible as a matter of policy”); Dodge, Rethinking, note 108, at 200-01; Edward J. McCaffery, The Iceman Cometh Again: Return of the Estate Freeze?, 46 Tax Notes 1327, 1328 (Mar. 12, 1990) (“While the current law is certainly unworkable, we should be suspicious of the reform claims advocated by the few directly affected by the law.”).} and staff. This shift reversed institutional alliances. In 1987, Congress passed § 2036(c) despite a reluctant President Reagan. In 1989, by contrast, Treasury supported the provision\footnote{152}{See Miscellaneous Tax Bill Hearing, note 38, at 136-37 (1989) (statement of Dana Trier, Tax Legis. Counsel, Treas. Dep’t) (opposing repeal of § 2036(c) on revenue grounds).} in the face of pressure from Congress, where both parties proposed repeal of § 2036(c) to attract votes on partisan issues. Republican William Archer,\footnote{153}{See ESOP Amendments Win Out; Panel Rejects Capital Gain Plan, 89 TNT 145-1, available in LEXIS, Fedtax Library, TNT File (July 14, 1989) (describing Archer's “all-encompassing proposal”).} and Democrat Lloyd Bentsen each included repeal in packages designed to advance their parties' capital gains positions.\footnote{154}{See Crenshaw, Panel, note 48, at A1 (quoting Senator Bensten as saying, “I couldn't beat something with nothing.”).}

The Senate Finance Committee package represented the highwater mark of interest group accommodation on estate freezes. Widespread criticism of the Senate Finance bill gave the estate freeze issue a partisan taint.\footnote{155}{Repeal of § 2036(c) was viewed as a troubling tax break. See id.; see also Jeffrey H. Birnbaum, Senate Panel's Tax Measure Is Jammed With Billions of Dollars in Giveaways, Wall St. J., Oct. 5, 1989, at A4.} Caught between heavy lobbying and the claim that repeal of § 2036(c) was a concession to special interests, Congress struck a middle ground by repealing § 2036(c) and replacing it with the less onerous Chapter 14.

In negotiating Chapter 14, organized interests expressed distinct preferences among transactions. Their highest priority was weakening
the buy-sell provision contained in the staff Discussion Draft. The traditional preferred stock freeze ranked a distinct second, and the GRIT received the least attention.

ii. Gaps in the Interest Group Model

The conventional narrow interest group model of politics does not explain certain aspects of the estate freeze legislation. First, that model does not account for the dynamics of legislation. Because organizational capacity remains relatively constant, the interest group model suggests a static struggle between beneficiaries and victims of tax proposals. Thus, the model describes but does not explain the fluctuations between partisan confrontation and interest group accommodation. It identifies the patterns but not the reason they shift.

Second, the interest group model does not account for specific lobbying positions. That model gives no hint of the arguments that transcend self interest. Economic interest would suggest that groups would be indifferent among forms of relief so long as the tax savings were the same. Yet, organized interests gave priority to repeal of an inclusion rule over other benefits such as wider exclusions and wholesale rate cuts.

Nor does interest group politics explain why organized interests lobbied for buy-sell agreements more than preferred stock freezes and for preferred stock freezes more than GRITs. There is no evidence that these preferences maximized tax savings. If anything, these preferences ran counter to economic self interest. Tax savings alone

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This effort was successful. The Discussion Draft disregarded all options held by family members in valuing property, see note 54, whereas Chapter 14 disregarded only those containing terms not comparable to similar arrangements made by those operating at arm's length. See IRC § 2703(b)(3).

157 See Burton Statement, note 156, at 274 (mentioning trusts towards end of submission); Discussion Draft Hearing, note 53, at 146-50 (statement of Donald Carlson, Nat'l Ass'n of Wholesaler-Distribs.) (omitting mention of trusts); Zaucha Statement, note 156, at 167-72 (same).

158 These lobbying positions do not seem to reflect the perspectives of different groups. All these arrangements were part of the standard estate planning repertoire. Moreover, to the extent that groups had different perspectives, one would expect that estate planners who favor GRITs would have been the most cohesive and exerted the greatest power.
would have favored the more popular GRIT over the expensive preferred stock freeze.160

C. The Public Discourse of Symbols and Stories

As established above, the abstract descriptions of tax policy analysis and interest group politics both have gaps. These gaps can be filled by looking to pervasive cultural understandings, evident in the public discourse, by which I mean the common, everyday symbols and stories found in newspapers and congressional hearings. These understandings comprise the terrain161 in which policy analysis and interest group politics operate.162 Constructs from the public discourse define policy problems163 and frame issues around which interest groups organ-

159 Informal surveys at estate planner conferences attended by the author during the debate over estate freeze legislation revealed that most planners had used GRITs, while only a handful had used a stock freeze. In addition, legal commentary indicates that GRITs were far more popular than the congressional testimony suggested. Search of WESTLAW, Tax Law Reviews, Texts and Periodicals (Feb. 25, 1995) (108 articles published between 1986 and 1991 discussing § 2036(c) and preferred stock, in contrast to 72 articles discussing that section and GRITs). Surveys taken after the enactment of Chapter 14 suggest that trusts are more popular estate planning tools than corporate freezes. See Malcolm A. Moore & Jeffrey N. Pennell, Practicing What We Preach: Esoteric or Essential?, 27 Philip E. Heckerling Inst. on Est. Plan. ¶ 1216 (1993) (survey finding that estate planners discuss grantor trusts with clients more often than they discuss corporate freezes).

160 The corporate stock freeze usually entails a costly recapitalization prior to the gift. See, e.g., Freeman, note 27, at 2-1 to 2-12.

161 See Steven L. Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 Cal. L. Rev. 1443, 1502 (1990) [hereinafter Indeterminacy] (describing cultural understandings as a "sedimented social field in which transformative efforts necessarily take place").


Every politician understands that arguments are needed . . . to bring other people around to this position. Even when a policy is best explained by the actions of groups seeking selfish goals, those who seek to justify the policy must appeal to the public interest . . . . Perhaps these are only rationalizations, but even rationalizations are important since they become integral parts of political discourse. We miss a great deal if we try to understand policy-making solely in terms of power, influence, and bargaining, to the exclusion of debate and argument.

(footnote omitted); McCaffery, Cognitive Theory, note 12, at 1933 ("Special interest politics clearly operate against a background of broadly popular constraints.").

The public discourse is no more complete than the other accounts; it does, however, fill some gaps left by them.

1. Symbols and Stories of Estate Tax Legislation

   a. The Object of Taxation: Concentrations of Wealth and Family Businesses

   The public views legislation as a parade of popular symbols. Two clusters of symbols dominate transfer tax legislation. One cluster centers around the object of taxation: concentrations of wealth and family businesses. Users of both symbols assume that taxes “destroy” their object; where they differ is in their sympathy for the thing being taxed.

   Since the 19th century, estate tax advocates have conjured up images of concentrations of wealth. Andrew Carnegie argued that “[b]y taxing estates heavily at death the State marks its condemnation of the selfish millionaire’s unworthy life.” Theodore Roosevelt railed against “fortunes swollen beyond all healthy limits.” Herbert Hoover decried “frozen and inactive capital.” Franklin Roosevelt

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164 Groups organize around popular stories and symbols because they move people to action. See Charles D. Elder & Roger W. Cobb, The Political Uses of Symbols 28 (1983) (noting that symbols provide the vehicle through which diverse motivations, expectations and values are synchronized to make collective action possible); Stone, note 13, at 125 (noting that ambiguity of symbols “allows highly conflictual issues to move from stalemate to action”).

   Ideology is particularly critical to the formation of small business organizations. See Wilson, note 129, at 162-63:

   Many businessmen can be attracted once to a militant, ideological cause, but few will renew their membership after the initial enthusiasm passes . . . . To sustain the interest of those who rejoin and to attract the interest of those who might join for the first time, it is essential for the [small business] organization to maintain a combative, ideological posture.


   For most men most of the time politics is a series of pictures in the mind, placed there by television news, newspapers, magazines, and discussions. The pictures create a moving panorama taking place in a world the mass public never quite touches, yet one its members come to fear or cheer, often with passion and sometimes with action.

166 See McCulloch v. Maryland 17 U.S. (4 Wheat.) 316, 431 (1819) (“the power to tax involves the power to destroy”); Webster’s New World Dictionary 1458 (2d College ed. 1979) (alternatively defining “tax” as “heavy demand; burden; strain”).


168 18 The Works of Theodore Roosevelt 578 (1925). Later he wrote that the very large fortunes “are needless and useless, for they make no one really happy and increase no one’s usefulness, and furthermore they do infinite harm and they contain the threat of far greater harm.” Letter from Theodore Roosevelt to Jacob August Riis (Apr. 18, 1906), in 5 The Letters of Theodore Roosevelt 212 (Elting E. Morison ed., 1952).


Critics of the estate tax appealed to the family business, a symbol that draws upon both the image of the family and the story of the founder.\footnote{See Michael Patrick Allen, The Founding Fortunes: A New Anatomy of the Super-Rich Families in America 103 (1987) ("The focal point for the social identity of the corporate rich family is the founding entrepreneur."); Edward N. Saveth, The American Patriarchian Class: A Field for Research, 15 Am. Q. 235, 238 (1963) ("[I]t is the achieving individuals within the achieving family who become family history.").} Nineteenth century criticisms stressed the effect of the tax on families,\footnote{See 31 Cong. Rec. 5081 (1898) (statement of Sen. Allen) (asking whether the state should "stand with the widow and the children at the grave side of a dead father to collect a tax").} while arguments made in the 1920's and 1930's emphasized the burden the tax placed on the founder.\footnote{See Proposed Taxation of Individual and Corporate Incomes, Inheritances and Gifts: Hearing Before the House Comm. on Ways and Means, 74th Cong. 279, 295 (1935) [hereinafter 1935 Hearing] (appendix to statement of Roy C. Osgood, U.S. Chamber of Commerce):

To the extent that the desire to assure continuance in a family of the possession and development of a going business is a strong inducement to the hard application of energy and prudent administration of affairs, the knowledge that estate and inheritance taxes will defeat such a purpose would mean inevitably a lessening of incentive upon the part of men of ability.

See id. at 131 (statement of John Day Jackson, publisher and proprietor of the New Haven Register) ("[S]ome of us who had individual businesses that we had built up ourselves and wanted to pass on to our families . . . were likely to find ourselves in a position where our own families . . . would be prevented from inheriting by virtue of" the estate tax.); id. at 198-99 (statement of Robert H. Jackson, Asst. Gen. Counsel, Treas. Dep't) (describing effect of estate tax on Henry Ford); Revenue Revision, 1925: Hearings Before the House Comm. on Ways and Means, 69th Cong. 328 (1925) [hereinafter 1925 Hearings] (statement of State Sen. W.S. Baird):

We want to help the individual who is willing to advance his money and take his chances in the enterprises of the country . . .; we want him to have the results of his enterprise himself. We do not want somebody else after he is dead to come in and take it away through any subterfuge whatever.

See Andrew W. Mellon, Taxation: The People's Business 117-18 (1924) (noting the particularly destructive effect of estate taxes on active, closely held businesses).} A Treasury Undersecretary argued, for instance, that high estate taxes would result in "more golf players and fewer Henry Fords and Thomas Edisons."\footnote{See Louis Eisenstein, The Rise and Decline of the Estate Tax, 11 Tax L. Rev. 223, 233 (1956) (quoting Winston, State and Federal Relations, in Inheritance Taxation, in Proceedings of Nat'l Tax Ass'n 249-51 (1925)).} In the 1970's and 1980's, critics successfully appealed to the plight of farms and small businesses to roll back the estate tax.\footnote{The family business symbols played critical roles in initiatives to raise the estate tax exemptions in 1976 and 1981. See Various Tax Proposals: Hearings Before the Subcomm. on Taxation and Debt Management Generally of the Senate Comm. on Finance, 96th Cong. 175 (1979).}
Although Americans agree in principle about the threat of concentrations of wealth and the virtue of family businesses, they often disagree over whether that threat or virtue is present in a particular case. Whether an entity constitutes a concentration of wealth or a family business depends upon its size and activity. Current estate tax relief provisions for family businesses require that the enterprise be small, have active management and involve family members personally. Conversely, a concentration of wealth is a large, passive entity lacking personal involvement. A first generation family business often becomes a concentration of wealth in succeeding generations.

b. The Purpose of Taxation: Balancing the Budget

The other cluster of symbols revolves around the purpose of taxation—raising funds for the fisc. This analogy does not view taxation as inherently destructive, but as constructive, not as an attack on de-
spised persons, but as a voluntary contribution to a common welfare. Whereas symbols associated with the object of taxation divide society into warring factions, those based on the budget rally people around a shared goal.\textsuperscript{181}

Budgetary symbols presume that citizens pay taxes in return for goods and services and that the government budget itself is the sum of individual preferences. The level of spending depends upon the value received for each tax dollar: Tax increases provide needed “services;”\textsuperscript{182} tax cuts reduce unnecessary “waste.”\textsuperscript{183} Balanced budgets represent the fiscal responsibility\textsuperscript{184} necessary for living within one's means. As such, they constitute a point of concurrence. Although Americans argue over whether taxes should be cut or increased, they agree that the budget should be balanced.\textsuperscript{185}

Americans historically have supported balancing the federal budget.\textsuperscript{186} Prior to the Civil War, most believed that balanced budgets combatted political corruption by limiting the size of the central gov-

\textsuperscript{181} See Elder & Cobb, note 164, at 122 (distinguishing between symbols of differentiation and cohesion); Joseph R. Gusfield, Symbolic Crusade: Status Politics and the American Temperance Movement 171-72 (1963) (“[G]estures of cohesion . . . serve to fix the common and consensual aspects of the society as sources of governmental support. . . . Gestures of differentiation point to the glorification or degradation of one group in opposition to others within the society.”).

\textsuperscript{182} See Thomas J. Anton, Roles and Symbols in the Determination of State Expenditures, 11 Midwest J. Pol. Sci. 27, 40 (1967) (“The need [to justify increased expenditures] is met by resorting to the imagery of ‘services’ provided by the recurring increases.”).

\textsuperscript{183} See id. at 40 (“Grounded in the folklore of ‘rampant bureaucracy,’ building ‘empires’ through ‘padded budgets’ which ‘waste the hard-earned dollar of the taxpayer,’ and fed by the demand for ‘a dollar’s worth of service for every dollar spent’, the cut symbolizes a popular check on governmental excess.”).

\textsuperscript{184} See id. at 40 (describing balanced budget as symbol of “responsibility”).

\textsuperscript{185} See Lewis H. Kimmel, Federal Budget and Fiscal Policy 1789-1958, at 57 (1959) (“[Before the civil war,] [p]ublic attitudes toward the federal budget were influenced by the assumed similarity between governmental finance and private or household finance. The criterion of family or household financial management was the ability to live within one’s income.”); James M. Buchanan & Richard E. Wagner, Democracy in Deficit: The Political Legacy of Lord Keynes 21 (1977) (footnote omitted):

[T]hroughout the pre-Keynesian era, the effective fiscal constitution was based on the central principle that public finance and private finance are analogous, and that the norms for prudent conduct are similar. Barring extraordinary circumstances, public expenditures were supposed to be financed by taxation, just as private spending was supposed to be financed from income.

The pre-Keynesian or classical fiscal constitution was not written in any formal set of rules. It was, nonetheless, almost universally accepted.

\textsuperscript{186} See Carolyn Webber & Aaron Wildavsky, A History of Taxation and Expenditure in the Western World 377 (1986) (“Though the balanced-budget concept had its ups and downs, circumstantial evidence until the 1930's, and opinion polls thereafter, strongly indicate that most citizens supported it. . . . Budget balancing was a meeting place for American political cultures.”).
After the Civil War, they believed that balanced budgets promoted efficiency in a large national government. From roughly 1930 to 1980, opinions divided. Following John Maynard Keynes, many economists argued that deficits were often appropriate, while politicians adhered to the balanced budget ideal. Since 1980, however, balanced budgets once again have had tremendous impact on governmental decisions.

2. The Public Discourse in the Estate Freeze Legislation

As demonstrated above, tax policy analysis and interest group politics leave open crucial questions about the process and product of the estate freeze legislation. These perspectives neither indicate why Congress acted when it did, nor do they describe why Chapter 14 focused on the initial gift or differentiated among GRITs, preferred stock freezes and buy-sell agreements.
The public discourse addresses these questions. It explains why Congress took up the issue. Popular symbols and stories generated the broad support necessary for the passage of legislation. Moreover, these archetypes were no mere subterfuge. They also played a powerful role in the substantive decisions underlying Chapter 14.

a. Passage of Legislation

Passage of legislation requires more than interest group pressure or policy analysis. The many hurdles to passage of legislation make mass support, or at least acquiescence, necessary for a bill to become law. In the estate freeze saga, the public discourse provided just such support. The budget problem appeared as objective reality to Democrats and Republicans alike. The family business symbol generated support far beyond the economic stakes of owners of farms and small businesses.

Each cluster of symbols played a different role in the estate freeze legislation. The budget problem provided the occasion for taking action. It engaged those lacking interest in the details of taxation and transcended partisan interests. Although disputing the level of federal spending, Democrats and Republicans agreed that the budget should be balanced and that steps should be taken to reduce the deficit. Budget politics played a critical role in enacting § 2036(c) in 1987. Democrats would not have marked up a tax bill had budget reconcilia-

\footnotesize{192} See generally McNollgast, Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation, 57 L. & Contemp. Probs. 3, 16-21 (1994) (describing "veto gates" through which legislation must pass to be enacted).

\footnotesize{193} See Graetz, Praise, note 2, at 285 (noting that clout of owners of small businesses and farms "far outweighs their actual stake in general estate tax policies"); see also Gutman, Reforming, note 2, at 1210 (noting that family businesses constitute only 7% of the gross value of reported transfers subject to estate tax); Nat'l Resource Economics and Nat'l Economic Analysis Divisions, U.S. Dep't of Agriculture, Contemporary Studies Project: Large Farm Estate Planning and Probate in Iowa, 59 Iowa L. Rev. 797, 929-30 (1974) (finding that farmers' estates had sufficient liquidity to pay estate taxes).

Furthermore, transfer tax provisions designed to protect the family business provide little benefit because modern dispositional practices would break up most family businesses anyway. See Carole Shammas, Marylynn Salmon & Michel Dahlin, Inheritance in America from Colonial Times to the Present 211-12 (1987):

[O]ur findings cast doubt on the belief . . . that parental desires to perpetuate family fortunes would, if only such disincentives as estate and inheritance taxes were removed, play an important role in capital formation. . . . Once physical wealth could be converted more easily into cash and financial assets, inheritance became more egalitarian among the majority of wealth holders, but capital also became less concentrated and less often channeled directly into production.
tion not required revenues, and that bill might not have passed\textsuperscript{194} if the stock market crash had not focused attention on the deficit.\textsuperscript{195}

Budget politics created the opportunity for later activity as well. The two-year agreement struck in 1987 diverted attention from taxation in 1988, while the renewed obligation to meet Graham-Rudman goals provided the occasion for the Senate Finance Committee bill in 1989. In 1990, even after two years of lobbying, estate freezes still only occupied an intermediate place on the agenda.\textsuperscript{196} Enactment of Chapter 14 awaited yet another budget bill.

Despite their influence on the overall legislative agenda, the budget symbols had little impact on priorities within the tax agenda. Rather, the concentration of wealth and family business symbols mobilized support. Those symbols broke legislative impasses and changed legislative fortunes. Seldom discussed in legislative hearings,\textsuperscript{197} the concentration of wealth symbol nevertheless prompted the initial interest in estate freezes. The "soak the rich" theme sounded by the Democratic leadership in 1987 provided fertile soil for enacting § 2036(c).

 Conversely, the family business symbol was critical to generating resistance to § 2036(c). Technical objections made by estate planners had little effect. The repeal movement did not gain momentum until interest groups appealed to the plight of family businesses. That appeal was not limited to groups claiming to represent small business. General business groups sent family business owners to testify against the provision\textsuperscript{198} and trade associations portrayed their members as


\textsuperscript{195} After the largest one day drop ever in the stock market on October 19, 1987, President Reagan called for a financial summit with congressional leaders to reduce the deficit. See Lou Cannon, Reagan Pledges Deficit Negotiations in Bid to Calm Market; Tax Boost No Longer Ruled Out; Economy Called Sound, Wash. Post, Oct. 23, 1987, at A1.

\textsuperscript{196} See Crenshaw, Tackling, note 52, at F6 (describing estate freeze controversy as "a major sideline on Capitol Hill," after capital gains and "other revenue struggles"); Lawrence J. Haas, Thinking Small, 22 Nat'l J. 841, 843 (1990) (describing § 2036(c) as part of a small-item agenda).

\textsuperscript{197} These hearings provided a forum principally for those opposing estate freeze legislation.

\textsuperscript{198} See Discussion Draft Hearing, note 53, at 261 (statement of Richard Larson, Nat'l Ass'n of Mfrs.) (chairman of the board of a family-owned and operated business); Carlson statement, note 157, at 146 (president of a family-owned business).
small family businesses. Even the American Bar Association branded § 2036(c) as “the anti-family business provision.”

These groups elaborately developed the family business symbol. They presented stories of the founder, who leaves his job, musters meager resources and devotes time, money and labor to building up a successful business. The groups also conjured up familial images. A tightly knit family itself, the business also displayed compassion and commitment toward its employees, consumers and community.

199 See Discussion Draft Hearing, note 53, at 392 (statement of William E. Galbraith, Nat'l Am. Equip. Dealers Ass'n) (“Many of our members are operating family businesses which have been passed down through several generations.”); id. at 308 (statement of Paul B. Horsey, Sr., Nat'l Home Furnishings Ass'n) (“While we represent retailers of all sizes and shapes, the ‘classic’ member is the independently-owned, family-owned, main street retailer.”).

200 See Miscellaneous Tax Bill Hearing, note 38, at 151 (statement of L. Henry Gissel, Jr., Am. Bar A'ssn).

201 See Discussion Draft Hearing, note 53, at 301 (statement of David McKenney, Sheet Metal & Air Conditioning Contractors' Nat'l Ass'n) (appealing to “the entrepreneurial heritage of the American worker who puts down his tools, starts a business and if he becomes successful, dreams of passing the business onto future generations”); see also id. at 299:

My great-grandfather . . . founded the company in Southwest Washington State in 1890, as we say with ‘50 men and 12 horses.’ I represent the fourth generation of ownership and some of the children of my generation—those being the fifth generation—have completed their education and are starting with the company. They are preparing to continue business.

(Statement of William G. Reed, Jr., Chairman, Simpson Timber Co.); id. at 314 (statement of Leo Weber, Weber Elec. Inc.) (“Like many construction business owners, I spent many long years in training before I became an entrepreneur. . . . [A]fter 18 years, I borrowed $10,000 from a friend, purchased three used trucks, rented space in a (sic) old butcher shop; and opened up Weber Electric Inc.); Horsey Statement, note 199, at 306:

My training started 45 years ago working in and learning the retail furniture business. . . . I also wanted a family owned furniture business. Thirty-three years ago, I moved to Virginia and have operated a family business since. Now, our desire is that our family business will be around another 33 years and longer, hopefully.

202 See Weber Statement, note 201, at 314 (“Not only has my business grown over the past 30 years but so has my family. . . . Two of my sons work for Weber Electric, and my youngest son is currently undergoing apprenticeship training.”).

203 See Zaucha Statement, note 156, at 165; Discussion Draft Hearing, note 53, at 283 (statement of James H. Woody, Union Tel. Co.) (“My grandfather founded our company in 1914. . . . Today, my father, mother, wife, two brothers, sister, son and nephew work for the company.”).

204 See Reed Statement, note 201, at 299 (“[F]amily businesses can be more interested in long-term goals rather than short-term profits.”); Larson Statement, note 198, at 265 (“A family firm . . . does not measure its success quarter by quarter. It takes a longer view stretching years or decades into the future.”).

205 See Woody Statement, note 203, at 286 (“We also employ nearly 30 others from the local community. . . . [W]e have made a commitment to our customers and our community.”); see also Discussion Draft Hearing, note 53, at 241, 243 (statement of Gerard O.
Finally, the clash of popular symbols underlay the final resolution reached in 1990. On one side, business groups invoked the family business symbol against § 2036(c). On the other, newspaper descriptions of repeal revived the image of concentrations of wealth. In the end, Congress respected both symbols by repealing § 2036(c) and enacting the more lenient Chapter 14.

b. Substantive Decisions

Not only does the public discourse mobilize support, it also influences substantive decisions. Popular symbols and stories fill gaps in abstract tax policy and interest group explanations. Shaping beliefs about which transactions abuse the tax system and which lobbying positions persuade, the family business and concentration of wealth symbols left their imprint on Chapter 14.

The public discourse explains, as tax policy analysis and interest group politics cannot, why Congress replaced estate tax inclusion with rules aimed at valuing the gift of the income interest. Tax policy analysis describes potential abuses but not why Congress addressed some and not others. Interest group politics explains the conflict among economic interests but not the attraction of a regime that increased the gift tax value of the income interest.

The public discourse fills these gaps. In that discourse, § 2036(c) was portrayed as destroying family businesses. The section created a potentially huge estate tax liability, leading to forced sale of the family business to a conglomerate or foreigner. Gift tax rules did

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206 See Birnbaum, note 155, at 4 (noting new loopholes would affect only the richest Americans); Alan Murray, Senate Panel Democrats Opposed Gains-Tax Cut But Voted for Giant Loopholes in Estate Levies, Wall St. J., Oct. 13, 1989, § 1, at A16 (describing repeal of § 2036(c) as one of "two giant loopholes in the estate tax, benefitting only the very wealthiest people. If the provisions become law, tax experts say, they'll go a long way toward eliminating what little is left of the nation's only tax on inherited wealth.").

207 Budgetary symbols created the vehicle for the estate freeze legislation. Aside from imposing revenue constraints, however, they had little impact on the contents of Chapter 14.

208 See Zaucha Statement, note 156, at 161 ("My biggest fear is that if Congress doesn't fix it right, we will be forced to sell the business.") (quoting an association member); Discussion Draft Hearing, note 53, at 251 (statement of Frank W. Greenhaw, Nat'l Retail Hardware Ass'n) ("[T]he assets of hardware stores are largely illiquid, and the application of heavy estate taxes, therefore, often causes the break-up of these businesses."); id. at 256 (statement of Frank Merlino, Associated Gen'l Contractors of Am.) ("Since section 2036(c) has been enforced, these family-owned entities have been faced with a major decision as to whether they want to continue operating as a family entity or sell their company."); Horsey Statement, note 199, at 308-09 (describing liquidation of family business).

209 See Carlson Statement, note 157, at 147 ("Studies of our industry point to a steady trend away from closely-held private corporations to more publicly and foreign-owned en-
not have that effect. A voluntary act, a gift is unlikely to create a huge tax liability.

Likewise, the public discourse explains differentiation among transactions. Conventional understanding of tax policy analysis and interest group politics cannot explain the hierarchy within Chapter 14. In fact, that hierarchy runs contrary to such understandings. The comprehensive tax base ideal treats economically identical transactions the same. Economic self interest points to intense lobbying for the GRIT, which, in fact, received the least support.

The concentration of wealth and family business symbols, however, ground these distinctions. Transactions evoking concentration of wealth seem abusive; transactions evoking family businesses appear legitimate, even praiseworthy. Accordingly, Congress reacted harshly towards arrangements resembling estate planning for the disposition of a concentration of wealth, and leniently toward arrangements resembling a family business transaction.

The stringent rules for GRITs reflect the widespread belief that trusts pass wealth. Since at least the trust busting era, trusts have represented concentrations of wealth in the public eye. The more favorable rules applied to preferred stock freezes mirror the popular association of corporations with family businesses. Although some corporations simply hold passive assets, most involve activity and joint operation. Indeed, the presence of business and associates distinguish a corporation from a trust. Finally, the lax rules governing buy-sell agreements reflect the assumption that such agreements usually occur in a small, active enterprise that unites management and ownership.

210 The popular symbols may underlie the reluctance to tax transfers of business opportunities and services. See 5 Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates and Gifts § 121.3.6, at 121-19 (2d ed. 1993) (“property” for transfer tax purposes does not include uncompensated services); Aucutt, note 104, at 349-50 (arguing that taxation of opportunities is “simply too intrusive into family relationships. Everyone knows that family members advise one another, affirm one another, and assist one another in innumerable ways. Such is the stuff of family.”); Case Hoogendoorn, Transfers of Opportunities—An Opportunity to Avoid Transfer Tax?, 71 Taxes 892, 900-01 (1993) (exemption of transfers of opportunities necessary to encourage “family-based economic activity”).

211 See, e.g., Henry Stimson, Trusts, I Harv. L. Rev. 132 (1887) (decrying the power of trusts).

212 See Reg. § 301.7701-4(a) (“[A]n arrangement will be treated as a trust under the Internal Revenue Code if it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit.”).
A principal purpose of a buy-sell agreement is to eliminate passive owners.\textsuperscript{213}

III. IMPLICATIONS OF THE PUBLIC DISCOURSE FOR TAX THEORY

Viewing policy and politics as largely autonomous, theorists generally regard popular symbols and stories as outside their domain. There is, however, another vision, which, recognizing policy and public discourse as interlocking conversations, incorporates preferences revealed in the public discourse.

A. Divided Democracy: Symbols as Extrinsic to Policy

The dominant, scientific vision of tax theory is rooted in professional understandings. Theorists focus on a few objective tools.\textsuperscript{214} Their professional identity resides in the distinctive discourse shared with colleagues,\textsuperscript{215} not in communications with a wider audience.\textsuperscript{216} In society at large, they view themselves as one interest among many,\textsuperscript{217} preaching pristine truth to corrupt power.\textsuperscript{218}

This vision limits theorist understanding of popular symbols, which become either independent policy goals or extrinsic forces. Theorists generally find the balanced budget, concentration of wealth and family business symbols lacking as independent goals. Since Keynes, most economists have believed that a balanced budget has little impact on

\footnotesize{\textsuperscript{213} See Elliott Manning, Corporate Buy-Sell Agreements xxii (1995) ("[A] buy-sell arrangement protects the active shareholders by insuring . . . that all corporate shares are owned either by active shareholders or by persons who are willing to terminate ownership when active involvement of a related person ends.").

\textsuperscript{214} See Kiesling, Public Goods, note 17, at 2-3 (describing economists' belief in specialization among the social sciences and avoidance of ethical positions).

\textsuperscript{215} See Goode, note 15, at 27 (In tax theory, "[a]cademic prestige attaches mainly to writings addressed to other specialists."). Indeed, through texts, discourse plays an important role in establishing and maintaining professional identities. See generally Textual Dynamics of the Professions: Historical and Contemporary Studies of Writing in Professional Communities (Charles Bazerman & James Paradis eds., 1991) (providing case studies in textual construction of the professions, dynamics of discourse communities and operational force of texts).

\textsuperscript{216} See Klamer, note 16, at 151 ("The conventional picture of science [adopted in economics] deletes the role of the audience altogether.").

\textsuperscript{217} See Bruce Jennings, Counsel and Consensus: Norms of Argument in Health Policy, in The Argumentative Turn in Policy Analysis and Planning 101, 102 (Frank Fischer & John Forester eds., 1993) [hereinafter Argumentative Turn] (noting tendency to incorporate "policy analysis as simply one more specialized discourse of advocacy within a pluralistic politics of interest group liberalism").

\textsuperscript{218} See generally Wildavsky, note 13, at 120 [check: quote is not on or near cited page] [there is a 1987 edition of this book; I think the 1979 is cited] [ILL request 2/4/97 - MSS] ("[S]peaking truth to power remains the ideal of analysts who hope they have truth, but realize that they have not . . . power.").}
national economic health. Likewise, tax theorists reject revenue raising and the dilution of concentrations of wealth as justifications for estate taxation. They conclude that preservation of the family business presents no policy issue apart from liquidity.

Having dismissed the symbols as independent policy goals, theorists can only view them as political forces to be accommodated in achieving predetermined objectives. The theorist becomes a surfer, catching or avoiding waves of public opinion. Tax increases and fears of concentrations of wealth present opportunities for strengthening the estate tax, whereas tax cuts and sympathy for family businesses present obstacles.

Accommodation of symbols sometimes entails revising substantive proposals. A blunt approach carves family businesses out of the estate tax altogether. A subtler one crafts substantive rules that conform to cultural archetypes while advancing existing policy goals. Government lawyers adopting this view might have minimized the controversy engendered by § 2036(c) by focusing more on trusts and less on buy-sell agreements. They might have maximized the coverage of Chapter 14 by deliberately drawing upon the concentration of wealth and family business symbols in drafting the statute, that is, by

219 See note 189.

220 See Gerald R. Jatscher, The Aims of Death Taxation, in Death, Taxes and Family Property, note 74, at 40, 40-41 ("The modern state has many alternatives to death and gift taxation. Indeed, in view of the small proportion of total receipts that these taxes contribute and the high cost of administering them, it is arguable that if the taxes were only imposed to raise revenue, they ought to be abolished."); Graetz, Praise, note 2, at 269 ("[T]he estate tax has very limited potential as a source of federal revenues.").

221 See Dodge, Redoing, note 2, at 249 (noting that it is debatable whether a wealth transfer tax curbs undue accumulations of wealth); Gutman, Reforming, note 2, at 1209 (criticizing claim that the goal of estate tax is breaking up concentrations of wealth); Graetz, Praise, note 2, at 271 (describing claim that the estate tax is intended to break up large concentrations of wealth as a myth that narrows the tax and reduces its contribution to progressivity).

222 See Gutman, Reforming, note 2, at 1259-71 (describing special relief for closely held businesses and farms as "subsidies" not conforming to "normative principles"); Kurtz & Surrey, note 2, at 1399 (rejecting special rules for family farms or closely held businesses as "unwise . . . [because they] encourage or reward one type of consumption more than another"). For criticism of this social policy, see Neil E. Harl, Does Farm and Ranch Property Need a Federal Estate and Gift Tax Break?, 68 Tax Notes 875 (Aug. 14, 1995) (finding little reason to increase the estate tax unified credit); Douglas Holtz-Eakin, Should Small Businesses Be Tax-Favored?, 48 Nat'l Tax J. 387, 393 (1995) (concluding that standard equity and efficiency criteria do not support current tax subsidies).


224 See Graetz, Estate Tax, note 97, at 182 ("Prospects of rescuing the transfer tax system might well be increased greatly by exempting all farms and small businesses from estate tax."); see also text accompanying notes 176-80 (discussion of §§ 2032A and 6166).
proposing even harsher rules for GRITs\textsuperscript{225} and conditioning the relatively lenient treatment accorded corporations and buy-sell agreements upon family activity and cohesion. Such revisions show some concern for cultural understandings.

B. Democracy as Discussion: The Translation of Symbols into Goals

Mere accommodation of popular symbols, however, still leaves broader cultural understandings at the margins of policy analysis. These understandings show up only in taxpayer comprehension, one of the secondary tax policy goals. This marginalization flows from a social vision that sharply distinguishes policy from politics. Such sharp distinction is by no means necessary. There is, however, another vision of society that joins policy and politics. This vision defines democracy itself as discussion\textsuperscript{226} divided among interlocking conversations occurring in different fora.\textsuperscript{227}

In this vision of society, policy analysis is but one conversation feeding into a larger, public discussion.\textsuperscript{228} Its role is to offer a valuable

\textsuperscript{225} The drafters might have retained an inclusion rule for such trusts. See Clark Statement, note 151, at 343; Dodge, Rethinking, note 108, at 205; Gutman, Comment, note 104, at 676 (all advocating hard to complete rule for trusts). Alternatively, they might have dispensed with the exclusion for personal residence trusts. See IRC § 2702(a)(3)(A)(ii). That provision was modeled upon rules governing charitable trusts. Gifts to individuals, however, likely enjoy less public support than do gifts to charities.


\textsuperscript{227} See Majone, note 162, at 1-2: [D]emocracy has been called a system of government by discussion. Political parties, the electorate, the legislature, the executive, the courts, the media, interest groups, and independent experts all engage in a continuous process of debate and reciprocal persuasion. . . . Each of the stages and organs of public deliberation is independent, but only within the limits, and as a part, of the entire process: “the free and sovereign thing is the whole process of discussion.” (quoting Ernest Baker, Reflections on Government 37 (1958)); Robert Hoppe, Political Judgment and the Policy Cycle: The Case of Ethnicity Policy Arguments in the Netherlands, in Argumentative Turn, note 217, at 77:

In the case of democracies, [political] conflict is managed by a public debate on and a negotiated definition of shared meanings. Policy-making becomes the capacity to define the nature of shared meanings; it is a never-ending series of communications and strategic moves by which various policy actors in loosely coupled forums of public deliberation construct intersubjective meanings. These meanings are continually translated into collective projects, plans, actions, and artifacts, which become the issues in the next cycle of political judgment and meaning constructions, and so on.

\textsuperscript{228} See Majone, note 162, at 7-8:
In this vision, the larger discussion does not constrain policy analysis; it nourishes it. Indeed, policy analysis contributes to society only insofar as it bears upon that larger discussion. Accordingly, theorists must take the language used in that larger discussion seriously, if not uncritically.

The larger discussion over the estate tax revolves around the balanced budget, concentration of wealth and family business symbols. Dominating estate tax legislation, these symbols transcend partisan politics. Americans want to cut "excessive" expenditures and pay for necessary services even if they disagree over the level of governmental spending. Americans fear concentration of wealth and sympathize with family business even if they dispute the boundary between the two.

These symbols dominate the larger discussion because they evoke vivid images that abstract policy norms do not. The budget symbols

\[\text{Wildavsky, note 13, at 405 (The truth analysts have to tell is in "their give and take with others whose consent they require, not once and for all, ..., but over and over again. This policy process is certainly exhausting, hardly exhilarating, but hopefully enlightening."; Jennings, note 217, at 101, 102 (arguing "that policy analysis ought to be held to a ... normative standard ... that attempts to capture a civic conception of participatory governance and policy debate leading to the emergence of a guiding consensus on the fundamental and common ends of public life"); Michelman, Plea, note 226, at 258 ("Pragmatic political argument is ... constrained by a consciousness of its situation within, and answerability to, a public normative culture and history—within and to, if you like, a normative practice."; Mark H. Moore, What Sort of Ideas Become Public Ideas?, in The Power of Public Ideas 55, 83 (Robert B. Reich ed., 1990) [hereinafter Public Ideas]:}

Instead of thinking of ideas as scientific conclusions, we [analysts] must recognize them as society's effort, groping in the dark, to help itself deal with intractable problems. To assist in this enterprise, we must not only sharpen our own vision of problems and possible approaches, but stay close to the society and its current understandings.

229 See John S. Dryzek, Policy Analysis and Planning: From Science to Argument, in Argumentative Turn, note 217, at 213 ("Instrumental rationality ... is a widely held normative model for the behavior of individuals and for the conduct of public policy."). This model is "so pervasive that it has even reached the checkout counter magazines." Stone, note 13, at 5.

230 See Michael Livingston, Risky Business: Economics, Culture and the Taxation of High-Risk Activities, 48 Tax L. Rev. 163, 231 (1993) ("Academics ... should be prepared to debate culture as well as economics, applying the same rigor and skepticism in one area that they would apply in the other."); see also Michelman, Plea, note 226, at 258 ("If pragmatic political argument does locate itself within a public normative history, it also adopts a critical and always potentially transformative attitude toward that history.").

231 See Moore, note 228, at 79 ("[I]t is not clear reasoning or carefully developed and interpreted facts that make ideas convincing. Rather, ideas seem to become anchored in peoples's minds through illustrative anecdotes, simple diagrams and pictures, or connec-
evoke a ledger book, a concrete picture lacking in economic models of inflation and full employment\textsuperscript{232} and a human agent\textsuperscript{233} missing in institutional decisions.\textsuperscript{234} Family businesses and concentrations of wealth conjure up images such as those in Frank Capra’s It’s a Wonderful Life, which pits the communitarian savings and loan against the plutocratic banker.\textsuperscript{235} For most people, tax policy norms like horizontal equity and capital formation are substantially less gripping.\textsuperscript{236}

Unfortunately, the imagery that makes these symbols easily grasped may also make them too particular and unreliable\textsuperscript{237} to be unmediated policy goals. The image of a ledger book with offsetting debits and

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\textsuperscript{232} See Stein, note 189, at 4 (defining fiscal policy as the “policy about the large aggregates in the budget—total expenditures and total receipts and the difference between them—as directed toward affecting certain overall characteristics of the economy, such as employment and unemployment, price levels, and the total share of government activity in the economy”).

\textsuperscript{233} See Anton, note 182, at 40 (“The budget, as document and process, creates symbolic satisfaction built upon the idea that affairs of state are being dealt with, that responsibility is being exercised, and that rationality prevails.”).

\textsuperscript{234} See id. at 36-38 (noting that government budgets are largely determined largely by impersonal forces).

\textsuperscript{235} It’s a Wonderful Life (Liberty Films 1946). This struggle continues in American films of the 1980’s. See Other People’s Money (Warner Brothers 1991) (corporate raider dismantles family business); Wall Street (Twentieth Century Fox 1987) (Wall Street magnate plans to take over airline and fire its employees).

\textsuperscript{236} Cognitive science suggests an analogy for understanding the relationship of popular symbols to tax policy analysis. Research indicates that categories first develop at a basic level and become more abstract according to the situation. See Eleanor Rosch, Principles of Categorization, in Cognition and Categorization 27 (Eleanor Rosch & Barbara B. Lloyd eds., 1978); see also Diane Gillespie, The Mind’s We: Contextualism in Cognitive Psychology 169 (1992) (“In interactions with the environment, we do not easily shed [the basic] level for the sake of abstraction alone, but go upward to abstractions and downward to particulars given certain purposes or undertaken actions.”); George Lakoff, Women, Fire and Dangerous Things: What Categories Reveal About the Mind 49 (1987) (“Basic-level categories have an integrity of their own. They are our earliest and most natural form of categorization. Classical taxonomic categories are later ‘achievements of the imagination.’”). This taxonomy makes the basic level the common denominator and the abstract category the understanding of specialists. For example, the biological categories of family and genus exemplify basic and abstract categories. The genus level was established at the level at which most human beings could perceive distinctions. As such, it coincided with folk understandings. See id., at 34-36. Lacking such grounding, the more abstract category of family is the domain of the specialist.

Although not basic in this sense, the balanced budget, concentration of wealth and family business symbols have more basic attributes than do efficiency and fairness. They conjure up a single mental image and are more “human sized.” See id. at 46-47, 51-52.

\textsuperscript{237} Cf. Winter, Cognitive Dimension, note 231, at 2259-60 (arguing that narrative lacks the generality, unreflexivity and reliability necessary for an institutionalized discourse).
credits does not address the treatment of particular items or the timetable for balancing the budget. Nor do the family business and concentration of wealth symbols address the size of the enterprise or the level of familial involvement. The fuzzy boundaries surrounding the archetypes make it difficult to dispose of these symbols once and for all. They crop up over and over again in legislation.\textsuperscript{238} Moreover, the archetypes inspire overbroad rules with unintended beneficiaries. An owner of passive wealth can shop for tax results simply by adopting a form associated with the family business, by freezing her estate with a corporation rather than a trust, for example.\textsuperscript{239}

Although perhaps untenable as policy goals themselves, the budget, family business and concentrations of wealth symbols still provide important evidence of social preferences neglected in theorist pursuit of the universal and quantifiable. To access those preferences, theorists must translate\textsuperscript{240} the public discourse into tax policy terminology. Translation is a huge task, which this Article only begins.

Translation permits tax theorists to learn from the legislative track record of the last 50 years. To identify neglected goals, they can examine the family business symbol recently so powerful in wealth tax legislation. To evaluate their modes of analysis, theorists can examine the history of symbols in tax legislation.

\textbf{C. Identifying Goals}

Tax theorists traditionally reject popular opinion as simply misguided. They attribute popular resistance to the estate tax to a widespread fantasy of "striking it rich" by winning the lottery or by inheriting from an unknown relative.\textsuperscript{241} Apparently, most people irra-

\textsuperscript{238} See text accompanying notes 334-43 (describing influence of concentration of wealth symbol upon legislation from 1916 to 1935); text accompanying notes 357-60 (describing influence of family business symbol upon legislation in 1976, 1980 and 1981).

\textsuperscript{239} See, e.g., Estate of Snyder v. Commissioner, 93 T.C. 529 (1989) (preferred stock freeze of a corporation with assets consisting of publicly traded stock).

\textsuperscript{240} The metaphor of translation receives considerable attention in cultural studies. See, e.g., Beyond Boundaries: Understanding, Translation and Anthropological Discourse (Gísli Pálsson ed., 1993); Translation, History and Culture (Susan Bassnett & André Lefevre eds., 1990).

\textsuperscript{241} See Ronald Chester, Inheritance, Wealth and Society 51 (1982) (noting strong desire of majority of Americans to have a chance to "win big" by inheriting wealth); Okun, note 78, at 48-49 (attributing resistance to the possibility of "making it big"); Mark L. Ascher, Curtailing Inherited Wealth, 89 Mich. L. Rev. 69, 119 (1990) ("Americans seem attached not only to buying tickets in state lotteries and watching television game shows, but also to dreaming about 'rich uncles' whose imminent death will make them instant millionaires."); Graetz, Praise, note 2, at 285:

The most puzzling political obstacle to estate tax revision, however, is that the American people do not seem to like heavy taxes on bequests. . . . The only convincing explanation that has occurred to me for this phenomenon lies in the
tionally believe that they will someday be wealthy enough to worry about the transfer tax. Public resistance to transfer taxation, however, may be rooted not in irrational hopes but in value preferences. Regardless of their own prospects for accumulating wealth, people harbor substantial misgivings about estate taxation. The widespread appeal of the family business symbol is persuasive evidence that resistance to the estate tax is rooted largely in normative understandings. Not working in such businesses themselves, most Americans support family businesses for reasons beyond personal self-interest.  

The family business symbol taps into deeply held values. Extraction of specific policy goals from popular symbols requires a deeper theory of cognition than those currently employed in tax theory, most of which emphasize only the errors in human reasoning. One such account emphasizes the experiential foundation of language. Symbols persuade by drawing upon the audience’s prior experience. This experience is sedimented in cognitive models.

optimism of the American people. In California, at least, sixty-four percent of the people [who voted to repeal the state's inheritance tax] must believe that they will be in the wealthiest five to ten percent when they die. McCaffery, Uneasy Case, note 2, at 328 n. 170 (noting that opposition to gift and estate taxes derives from ordinary citizen's belief that she might inherit money).

242 Cf. Gary R. Orren, Beyond Self-Interest, in Public Ideas, note 228, at 25 (reviewing evidence that people's attitudes toward economic policy are shaped more by their beliefs about the national economy than by their personal financial situation).

243 See McCaffery, Cognitive Theory, note 12, at 1943-45 (identifying need for deeper theory of cognition in tax theory).

244 See id.; Shaviro, note 137, at 46-48 (discussion of cognitive bias in tax law).

245 Symbols and stories can be understood as having a sedimented social meaning. See Maurice Merleau-Ponty, Phenomenology of Perception 129-30 (1962) (“[T]here is a 'world of thoughts', or a sediment left by our mental processes, which enables us to rely on our concepts and acquired judgments as we might on things there in front of us . . . without there being any need for us to resynthesize them.”); see also Winter, Indeterminacy, note 161, at 1488:

Sedimentation is the 'deposit' of the subject's past interactions with its physical and social situation. It operates as a gestalt that, once integrated, can be invoked without being fully reactivated. Once a meaning is sedimented, it can become self-reinforcing. . . . Because many subjects are situated in the same environment, social experiences such as routine or habitual interactions between subjects give rise to mutual or reciprocal sedimentations.

The family business symbol draws upon two such models—"business" and "family"—the story of the founder and the basic social unit. These models, in turn, suggest the importance of the goals of reward and community. Although perhaps less universal and quantifiable than existing tax policy goals, these norms feed into the larger, public discussion. Representing an honest effort to grapple with society's expressed preferences, they deserve overt consideration in tax policy analysis. Mere discussion of them could radically alter current tax theory. The following account initiates this discussion.

1. Reward

The cognitive model "business" suggests that tax theorists should consider desert or reward, a return given for merit.\(^{248}\) Most Americans share the "American Dream," in which virtue and hard work lead to economic independence. The family business symbol persuades because it affirms this aspiration. Indeed, the family business is perhaps the prototypical American Dream, with a lineage traceable to the 18th century yeoman farmer and his successor, the 19th century small businessman.\(^{249}\)

Current tax policy norms of fairness and efficiency fail to capture the idea of reward.\(^^{250}\) Reward authorizes inequality, notwithstanding the diminishing marginal utility of money. Permitting returns that are economically inefficient,\(^^{251}\) reward looks to the taxpayer's praiseworthiness rather than her contribution to gross national product.\(^^{252}\)

Recognition of reward would prompt theorists to reconsider which effects of inheritance taxation are most troubling. Tax policy currently focuses on the impact on savings and, sometimes, innovation.\(^^{253}\) In contrast, the public discourse shows the greatest concern for the effect on work incentives.\(^^{254}\) The persuasive power of the story draws from


\(^{249}\) See text accompanying notes 298-303.

\(^{250}\) See Kiesling, Public Goods, note 17, at 119 ("The idea of reward... is the most neglected ethical idea in public finance.") (emphasis in original).

\(^{251}\) See id. at 121-23 (distinguishing a reward from an incentive).

\(^{252}\) See id. at 123-24.

\(^{253}\) See text accompanying notes 74-75.

\(^{254}\) The family business is nothing other than the hard work of its founder, see Horsey Statement, note 199, at 308 ("The transfer of a successful family-owned business looks like the transfer of wealth on paper, but in the end, it is nothing more than the transfer of the original sweat equity."), and the curse of concentration of wealth is that it encourages laziness, see Carnegie, note 167, at 50 ("[T]he parent who leaves his son enormous wealth generally deadens the talents and energies of the son, and tempts him to lead a less useful and less worthy life than he otherwise would."); see also John Bartlett, Familiar Quotations 661 (1980) ("Genius is one percent inspiration and ninety-nine percent perspiration."
the hard work that identifies the founder with the populace rather than the savings and innovation that differentiate him. Americans traditionally believe that wealth derived from labor is worthier than that derived from capital.255

Recognition of reward also would encourage empirical examination of how the transferor accumulated her wealth. The reward norm regards wealth differently depending on its source: Wealth derived from effort is most praiseworthy; wealth from savings, less so; wealth derived from luck, the least.256 Arguments over the merits of inheritance taxation often turn on the source of wealth.257

Finally, recognition of reward would influence discussion of tax design. Serious consideration of reward raises the question of how to structure taxes to reward praiseworthy behavior. Reward provides a basis for favoring earned income under the income tax258 and for taxing wealth inherited by the decedent more heavily than wealth earned by him.259 Through use of the reward norm, tax theory could shed light upon whether such schemes actually further the American Dream.260

2. Community

The cognitive model "family" suggests that tax theorists should consider community as a normative goal. Americans value community,261

(1994) (noting that under the American tradition, "earned income is morally distinguishable from (and superior to) unearned income").


256 See Kiesling, Public Goods, note 17, at 126-31. Presumably, wealth derived from theft is even less deserving.

257 Thus, many proponents of inheritance taxation argue that wealth is attributable to luck. See David G. Duff, Taxing Inherited Wealth: A Philosophical Argument, 6 Can. J. Law & Jur. 3, 52-57 (1993); Graetz, Praise, note 2, at 275-76 (noting that much wealth is attributable to luck).

258 For examples of such treatment in the current Code, see IRC § 32 (earned income credit), § 911 (exclusion of foreign earned income). The passive loss rules limit losses from unearned income. See IRC § 469.

259 This proposal was first made by Eugenio Rignano, The Social Significance of the Inheritance Tax (William J. Shultz trans., 1924). For recent discussions of Rignano's scheme, see Kiesling, Public Goods, note 17, at 157-59; John K. McNulty, Fundamental Alternatives to Present Transfer Tax Systems, in Death, Taxes and Family Property, note 74, at 85, 87-89.

260 See Chester, note 241, at 71 (noting that Rignano plans would benefit American "Horatio Algers").

particularly as institutionalized in the family.\textsuperscript{262} Reacting to the instability borne of geographic and occupational mobility,\textsuperscript{263} middle class Americans strive to recreate community in family biographies\textsuperscript{264} and genealogies.\textsuperscript{265} The family business symbol plays upon this deep longing to be rooted in place and time. Middle class Americans project their aspirations upon rich families.\textsuperscript{266}

The community norm receives little attention in tax theory.\textsuperscript{267} Indeed, communitarianism\textsuperscript{268} only recently has received attention in

\textsuperscript{262}See John Demos, Images of the American Family, Then and Now, in Changing Images of the Family 43 (Virginia Tufte & Barbara Myerhoff eds., 1979) (describing American images of the family as a community, as a refuge from the outside world, and as a source of personal growth); Peter Laslett, The World We Have Lost Further Explored 4 (1984) (describing modern tendency to view social roles prior to the industrial revolution as "all highly symbolic and highly satisfying . . . everyone belonged in a group, a family group. Everyone had his or her circle of affection: every relationship could be seen as a love-relationship.").

\textsuperscript{263}See Allan Carlson, From Cottage to Work Station: The Family's Search for Social Harmony in the Industrial Age 1-2 (1993) ("For over a millennium . . . residence and workplace were normally one and the same. . . Household production . . . bound each family together as a basic economic unit, a 'community of work.' Industrialization tore asunder this settled, family-oriented European world."); Williams, note 254, at 58-59 (describing how geographic and social mobility weaken the American extended family).

\textsuperscript{264}See Bernard Farber, Kinship and Class: A Midwestern Study 107-08 (1971): Perhaps one of the reasons that the symbolic family estate has maintained its importance is that the family is one of the few ascriptive groups to which the individuals in modern society belong. They can shift occupations easily, migrate from one region to another, or move from one house to another, but they cannot deny their family of orientation . . . In contemporary society, therefore, biography may become an important mechanism for sustaining identity within a kinship group and, through this identity, a basis for establishing status and a sense of belonging.

\textsuperscript{265}See Williams, note 254, at 58 ("A thriving business is done in ferreting out genealogies, tracing descent from notable persons, discovering (or inventing) coats of arms, and so on. One does not need a specialized search for traditions, genealogies and symbols where these things are part of actual family life.").

\textsuperscript{266}See George E. Marcus, Lives in Trust: The Fortunes of Dynastic Families in Late Twentieth-Century America 89-90 (1992):

[T]he story of rise from obscurity and dynastic hopes for the future . . . speaks . . . strongly to certain aspirations and fantasies of middle-class thought . . . Dynastic sagas . . . play out these hopes in a way that at least would be realistic for people in middle-class situations to imagine—the self-made person or couple keeping the family together well into the children's adulthood and perhaps beyond.


\textsuperscript{268}Communitarianism generally is defined by contrast to liberalism, which posits individual welfare as the ultimate good. See Taibi, note 261, at 1469 ("Liberal perspectives do not treat building community institutions as an end in itself.").
political theory, and has yet to spread to mainstream economics. Tax theorists do discuss the family, but avoid talking about communal values. Some sidestep overt normative discussion entirely by striving for rules that are "neutral" or conform to existing social practices. Even theorists discussing normative issues generally confine themselves to efficiency and other liberal norms.

Recognition of the community norm would allow theorists to help clarify and potentially conflicting visions of society. It also would lead to a discussion of whether modifying the tax system advances that ideal. Extended families are largely a product of wealth itself. Protecting them may do little to nourish middle class community.

Recognition of community as a norm also would alter discussions of tax design. Use of that norm facilitates discussion of proposals to reduce transfer taxes on properties that represent community, such as

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270 See Taibi, note 261, at 1469 ("Although the 'American Dream' of strong communities and financial independence remains an essential part of our culture and politics, the idea that the purpose of economic policy should be to promote this dream has not enjoyed intellectual respectability since the downfall of the Populist movement in the late nineteenth century.").
273 Professor McCaffery, for one, asks whether preferential treatment of particular family structures promotes social welfare by adjusting for labor elasticities or market failure, as well as whether such treatment would promote liberal ideals such as the right to choose among family structures or the elimination of gender discrimination. See Edward J. McCaffery, Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code, 40 UCLA L. Rev. 983, 1035-58 (1993). But see Duff, note 257, at 50-62 (arguing for pluralistic and egalitarian concept of the family in tax theory).
275 For example, families are sometimes in tension with other communities. A close knit family may divide a local community and a strong local community can intrude upon families.
276 See Allen, note 171, at 93 (noting that "members of wealthy capitalist families often possess a sense of family identity and an awareness of kinship ties that . . . is attributable to the fact that these families control large fortunes"); E. Digby Baltzell, Puritan Boston and Quaker Philadelphia 207 (1980) (describing wealth as the "fertilizer of family trees"); Maurice Zeitlin, Lynda Ann Ewen & Richard Earl Ratcliff, "New Princes" for Old? Large Corporations and the Capitalist Class in Chile, 80 Am. J. Soc. 87, 109 (1974) (describing wealthy family as "a complex kinship unit in which economic interests and kinship bonds are inextricably intertwined").
277 See Allen, note 171, at 8-9 (noting that for most Americans, "family" corresponds to nuclear family).
family heirlooms or mementoes, or that physically bring people together, such as a family residence or small business. Reliance on communal norms also affects understanding of proposals to reduce transfer taxes within the family. The transfer tax has long reduced taxes on transfers to spouses and there have been occasional proposals to extend preferential treatment to other family members, perhaps varying according to the beneficiaries' age.

3. Conclusion

Recognition of reward and community in policy analysis would narrow the gap between tax theory and the public discourse, thereby potentially changing both theorist and public attitudes. Acknowledgement of these goals might erode the theorist consensus for wealth taxation. Rational analysis of them might reduce the appeal of the family business symbol.

Such recognition also could alter the estate tax. Enactment of proposals directly tailored to reward and community might reduce the demand for rules accommodating the family business. Decreased reliance on this fuzzy concept would permit a closer fit between goal and rule. Similar transactions would receive more uniform treatment and taxpayers would find it more difficult to obtain a particular tax consequence by adopting a mere form.

D. Evaluating Modes of Analysis

Theorists can use the public discourse not only to find neglected tax policy goals, but also to evaluate existing modes of analysis. The public understands policy analysis by reference to cultural archetypes. Consequently, the appeal of an analytical mode depends upon its relationship to the archetypes and upon the strength and scope of the archetypes in the public eye.

278 The reduced taxation could be conditioned upon the assets continuing to perform a communal function. Cf. IRC § 2032A(c) (requiring recapture of benefit of special use valuation if family member sells or fails to materially participate in the business); Reg. § 25.2702-5(c)(5) (exempting certain trusts from § 2702 only so long as trust is used as personal residence of grantor).

279 See IRC §§ 2056, 2523 (deductions against estate and gift taxes for property passing to spouses).

280 See Osgood Statement, note 173, at 280 (arguing for heavier taxes on legacies to “a blood stranger”).

281 In 1976, Congress enacted a deduction for amounts passing to a minor orphan, see Tax Reform Act of 1976, Pub. L. No. 94-455, § 2057(a), (c), 90 Stat. 1520, 1890-91, which was repealed five years later, see Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 427(a), 95 Stat. 172, 318.
One means of ascertaining the relative importance of the archetypes is by examining the history of archetypes in transfer tax legislation. To profit from this examination, one need not assume that archetypes are the most important determinant of legislative success, or that the symbols that prevail in legislation necessarily command the greatest support among the public at large. All that is necessary is a recognition that archetypes do play a role in legislation and a desire to address the legislature.

The history of archetypes in tax legislation suggests that pragmatic wealth tax policy has substantial shortcomings. The comprehensive tax base ideal enjoys less popular support than theorists assume, and the appeal of ability to pay, though greater, is diminishing. Benefit, by contrast, resonates deeply with popular understandings.

These conclusions run counter to longstanding theorist assumptions. In discussing wealth and income taxes, theorists conventionally relegate benefit, and (to a lesser extent) ability to pay to bygone, less scientific, eras. They associate benefit with the rise of 18th century parliamentary democracy, and ability to pay, with 19th century class conflict. Theorists believe that both approaches lost favor because

282 For summaries of the history of the transfer tax, see Roy G. Blakey & Gladys C. Blakey, The Federal Income Tax (1940); Randolph E. Paul, Taxation in the United States (1954); Sidney Ratner, Taxation and Democracy in America (1967); Witte, Politics, note 70; Eisenstein, note 174, at 224-38; C. Lowell Harriss, Legislative History of Federal Gift Taxation, 18 Taxes 531 (1940); David M. Hudson, Tax Policy and the Federal Taxation of the Transfer of Wealth, 19 Willamette L. Rev. 1, 9-32 (1983).

283 Political actors no doubt often use symbols in order to rally public opinion. Nevertheless, the symbols have an independent content that affects legislation. See text accompanying notes 207-213.

284 Filtered through institutions, the public discourse reflects biases in group formation. It is likely that the difficulty of organizing diffuse interests diverts attention away from the threat of concentrations of wealth and toward the plight of the family business, and distorts the size of government. See William N. Eskridge, Jr. & Philip P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 55-56 (1988) (discussing effect of group formation on size of government). Thus, the historical account below is not the complete story of American attitudes towards wealth. It traces only the beliefs that ultimately prevailed in the legislative process.

285 Relatively little has been written on the history of tax policy. See Kiesling, Public Goods, note 17, at 30 (noting that “very little systematic inquiry into the history of tax [policy] analysis has been carried out since Seligman’s monumental efforts around the turn of this century”).


287 See Witte, Politics, note 70, at 32 (“As issues of equality exploded in the industrialized world of the nineteenth century, there was a parallel expansion in theories of income taxation.”); Neil H. Jacoby, Guidelines for Tax Reform in the 1960’s, 1 Tax Rev. Comp., Ways & Means Comm., 86th Cong., 1st Sess. 157, 159 (1959) (“During the 19th and early
they were needlessly subjective.\textsuperscript{288} In contrast, the comprehensive tax base fits the modern welfare state,\textsuperscript{289} and provides essential objectivity.

The conclusions of this Article are not reactionary so much as they are democratic. They do not turn back the clock so much as they make the discussion more accessible to society at large. Professor Simons' "peculiarly narrow"\textsuperscript{290} approach is that of highly specialized tax professionals. By contrast, ability to pay theory was championed

\textsuperscript{288} Eighteenth century writers divided over measuring benefit. See Kiesling, Public Goods, note 17, at 32 (discussing different applications of benefit theory to income tax); Max West, The Inheritance Tax 201-03 (1908) (describing partnership, value of service and cost of service theories for estate taxation). John Stuart Mill is credited with discrediting inquiry into benefit. See Groves, note 286, at 29; Kiesling, Public Goods, note 17, at 33-35; see also 2 John Stuart Mill, Principles of Political Economy 805 (W. Ashley ed., Longmans Green 1926) (1848):

The practice of setting definite values on things essentially indefinite and making them a ground of practical conclusions, is particularly fertile in false views of social questions. . . . Government must be regarded as so pre-eminently a concern of all, that to determine who are most interested in it is of no real importance.

Nineteenth century writers differed over whether ability to pay mandated minimizing total sacrifice or equalizing sacrifice among taxpayers. Compare F.Y. Edgeworth, Minimum Sacrifice Versus Equal Sacrifice, in 2 Papers Relating to Political Economy 239-40 (1925) (arguing that minimum sacrifice maximizes social utility) with Mill, supra, at 805 ("As a government ought to make no distinction of persons or classes in the strength of their claim on it, whatever sacrifices it requires from them should be made to bear as nearly as possible with the same pressure upon all.").

Moreover, depending on one's assumptions about utility, equal sacrifice might require regressive, proportional or progressive rates. See Kiesling, Public Goods, note 17, at 43-45; Witte, Politics, note 70, at 33-34. Twentieth century writers are generally skeptical of this utilitarian analysis. See Groves, note 286, at 5-15; Kiesling, Public Goods, note 17, at 34; Blum & Kalven, Progressive Taxation, note 5, at 465-71.

\textsuperscript{289} Arguably, the modern welfare state presumes broad, progressive taxes. See Witte, Politics, note 70, at 154. See Witte, supra note 70, at 154 ("It is not coincidental that it was also during [the period of a growing federal government] that debates over the classical prescriptive theories were replaced by analysis of the proper structure of the tax code, which meant consideration of the work of Henry Simons. By the 1960s interest in Simon's work had reached a point where actions began to be taken in his name and 'tax reform' efforts were guided by his tax base standard.").

\textsuperscript{290} Utz, note 85, at 12.
by economists conversant with politics, and benefit theory was favored by writers with broad understandings of society.

1. Comprehensive Tax Base

Theorists view the comprehensive tax base ideal as a weapon for beating back organized interests. Its effectiveness depends upon popular stories and symbols. It persuades by equating deviations from a comprehensive tax base with wasted expenditures and tax breaks for the wealthy.

This equation presumes popular consensus for a broad-based, progressive tax that redistributes property widely within the middle class. The history of archetypes in legislation casts doubt upon this assumption. That history reveals clear support only for taxes on the upper crust of society. More often than not, Congress has regarded the family business as the social norm and concentration of wealth as the exception.

This pattern first emerged prior to the Civil War. A product of the Protestant "work and savings ethic," the family business exemplified the American Dream. At the time of the revolution, the family

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291 Ability to pay theory flourished when political economy was just emerging as a profession. See John Kenneth Galbraith, Economics in Perspective: A Critical History 89 (1987) (during the last three quarters of the 19th century, economics "ceased to be a subject for contemplation and discussion by people who were otherwise employed and became instead a profession"). John Stuart Mill, for example, wrote on economics only in his spare time while employed by the British East India Company. See Charles E. Staley, A History of Economic Thought: From Aristotle to Arrow 109 (1989).


293 See Edward J. McCaffery, The Holy Grail of Tax Simplification, 1990 Wis. L. Rev. 1267, 1317-18 (noting that tax expenditure concept requires Congress to go public with what might be an unpopular concession to a narrow interest group); Musgrave, Defense, note 72, at 50 ("loophole pressures are difficult to meet without reference to a basic income concept").

294 See McCaffery, Cognitive Theory, note 12, at 1941-42 (noting that tax expenditure analysis characterizes deviations from norm as needless government spending).


296 This conclusion is also supported by public opinion polls. See, e.g., Walter J. Blum & Harry Kalven, Jr., The Uneasy Case For Progressive Taxation x (1963) ("Except for a relatively small elite, the very notion of a progressive tax proved beyond grasp.") (emphasis in original); id. at xi ("[T]he public, unlike a few intellectuals, virtually never thinks of the progressive tax as an instrument for reducing economic inequality.").

business generally took the form of the family farm.\textsuperscript{298} The yeoman farmer ideally combined frugality, honesty, piety and hard work,\textsuperscript{299} with self sufficiency and economic independence.\textsuperscript{300} In the early 19th century, the family business ideal extended\textsuperscript{301} to small scale industry occurring in the home or workshop, as success in industry was ascribed to agrarian values.\textsuperscript{302} Thus, the agrarian ideal of the family farm and the small business typified American life.\textsuperscript{303}

During the antebellum period, legislators regarded concentrations of wealth as exceptions. Discrete obstacles to the American Dream, they could be broken apart with minor reforms. After the revolution, the chief threat to the yeoman's dream was the landed gentry, successors of the English aristocracy. Legislatures addressed this menace by eradicating "feudal relics," most notably primogeniture and entail.\textsuperscript{304}

\textsuperscript{298}Unlike the European peasant, the American farmer owned his own land, a commodity in its own right, see, e.g., James Oliver Robertson, America's Business 25-30 (1985), and produced for market, id. 23-25; see also Mansel G. Blackford, A History of Small Business in America 12 (1991).

\textsuperscript{299}See James Mickel Williams, Our Rural Heritage 83 (1925) ("The early farmer was, above everything else, a mighty worker. . . . There was no place in rural life for men who could not work.").

\textsuperscript{300}See generally Rex Burns, Success in America: The Yeoman Dream and the Industrial Revolution 1 (1976) (describing yeoman's virtues as "competence, independence and morality, [i.e.,] wealth somewhat beyond one's basis needs, freedom from economic or statutory subservience, and the respect of the society for fruitful, honest industry.").


\textsuperscript{302}See Williams, note 299, at 229:

The farmer maintained that any man of enterprise could take up land and become an independent producer . . . . Now many of the early manufacturers were also farmers or had been farmers before they became manufacturers. . . . These manufacturers maintained that any man of enterprise could save money, borrow what more he needed and start in manufacturing.

\textsuperscript{303}See, e.g., Peter d'A. Jones, The Consumer Society: A History of American Capitalism 110 (1965) ("Rural Americans idealized the small entrepreneur: the family farm, the independent business, the modest partnership. Theirs was a homely image, fired in the small-town forge and hammered out on the frontier. It was the ideal of a farming and trading people."); Richard Hofstadter, What Happened to the Antitrust Movement?, in The Paranoid Style in American Politics and Other Essays 188, 196 (1965) ("From its colonial beginnings through most of the nineteenth century, ours was overwhelmingly a nation of farmers and small-town entrepreneurs. . . .").

In the early 19th century, the danger was governmentally sanctioned, special privilege, such as the Bank of the United States, and the response was general incorporation statutes.

After the Civil War, the belief that concentrations of wealth represented discrete obstacles molded the transfer tax. When enacted, the estate tax was a modest response toward the threat of big business. Thereafter, the estate and gift tax applied only to a small percentage of the population. The transfer tax legislation of the last 50 years has only reaffirmed the initial vision. The most important changes in the tax were increases in the exemption amount in 1976 and 1981—adjustments for inflation that limited the tax to a relatively few large concentrations of wealth. During that period, pragmatic transfer tax reform foundered. Treasury proposals failed to spur congressional action in 1950, 1969 and 1985.

Admittedly, pragmatic income tax reform has fared better, initiating legislation in 1969 and 1986. This success is attributable to the deeply entrenched social practices supporting the income tax. A low exemption and wage withholding make the income tax a prominent part of everyday life, against which pragmatists credibly can

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had little effect. See Orth, supra, at 42 ("'reform' of the law of inheritance, so long as it stopped short of placing legal limits on the size of estates or denying freedom of testations was largely irrelevant compared to social custom and individual interest.").

305 See Hofstadter, note 303, at 196 (describing assault on the Bank of the United States as part of American belief in decentralized economic and political power).

306 See Rowland Berthoff, Independence and Enterprise: Small Business in the American Dream, in Small Business in American Life 28, 34 (Stuart W. Bruchey ed., 1980) ("By the 1850's, the passage of state laws for granting general charters ... helped reassure any remaining doubters that the business corporation represented not privilege but equal freedom.").


308 See Proposals, note 7, at 39 (stating that in 1940, estate tax returns filed by 1% of decedents); Kathy Medve, Estate Tax Returns Revisited, 1916-1931, SOI Bull., Spring 1987, at 59, 60 (noting that estate tax returns from 1916 to 1931 never exceeded more than 1.4% of total U.S. deaths).

309 See, e.g., S. Rep. No. 97-144, at 124 (1981), reprinted in 1981-2 C.B. 412, 460 (justifying increased exemption by reference to concentrations of wealth); H.R. Rep. No. 97-201, at 154, 156 (1981), reprinted in 1981-2 C.B. 352, 376 (noting that the purpose of the exemption was to exempt small and moderately sized estates); Edward A. Zelinsky, The Estate and Gift Tax Changes of 1981: A Brief Essay on Historical Perspective, 60 N.C. L. Rev. 821, 830 (1982) ("By focusing the federal estate and gift levies upon a wealthier, more restricted economic elite, the Ninety-seventh Congress ... has defined the future of the federal transfer taxes in essentially populist terms, that is, the propriety of large inheritances in a democratic society.").

310 See Witte, Politics, note 70, at 137.

311 See Surrey & Kurtz, note 2.

312 See Treasury I, note 30.


equate deviations from a comprehensive tax base with tax breaks for the wealthy. The low visibility of the estate tax makes it difficult to generate moral outrage over gaps in its base. A charge of "loopholes" rings hollow in a tax that deliberately excludes 98% of the population.

Pragmatists often attempt to draw upon existing practices by tying wealth taxation more closely to the income tax. They claim that the transfer tax "backstops" the income tax, filling gaps in that tax's base. They also propose treating inherited wealth more like income, by including gifts and bequests in income, or taxing unrealized capital gains at death, or taxing accessions to wealth. All these proposals reduce the incentive to freeze estates.

It remains to be seen whether appeals to income taxation can broaden the historically narrow view of inheritance taxation. Thus far they have not. This was demonstrated most recently in the carryover basis legislation of the late 1970's, during which appeals to the family business symbol successfully galvanized support against proposals taxing appreciation passing at death. Claims that death taxes sabotage the American Dream carry great weight, even in the income tax context.

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315 See Gutman, Reforming, note 2, at 1191. This backstop argument is also implicit in the pragmatic argument that the estate tax is necessary to preserve progressivity among income classes. See Graetz, Praise, note 2, at 272-73.


318 See McNulty, note 259, at 90.

319 See Winter Statement, note 175, at 340 (Capital gains at death could "amount to a tax on the invested work of the owners" of closely held corporations and could force them to sell out to larger corporations.); 1976 Hearings, note 175, at 403 (additional statement of William C. McCamant, Nat'l Ass'n of Wholesaler-Dists.) (Capital gains on assets transferred at death "would sound the death knell for small businesses."). Later it also was invoked in the successful campaign to repeal the carryover basis provision enacted that year. See Estate and Gift Tax Problems Arising from the Tax Reform Act of 1976: Hearing before the Subcom. on Tax and Debt Management Generally of the Senate Comm. on Finance, 95th Cong. 151 (1977) (joint statement of Nat'l Livestock Tax Comm., Am. Nat'l Cattlemen's Ass'n, Nat'l Livestock Feeders Ass'n & Nat'l Wool Growers Ass'n) ("Many family farm and ranch operations may not be able to pay [the added tax attributable to carryover basis] without liquidating the business."); Technical Corrections Act of 1977 (Including Carryover Basis Provisions): Hearing before the Subcom. on Tax and Debt Management Generally of the Senate Comm. on Finance, 95th Cong. 272 (1977) (statement of L. Keville Larson, Forest Indus. Comm.) ("Ironically it is the persons that [the 1976] revisions in estate tax laws were designed to assist—surviving spouses, farmers and small businessmen and persons with small estates—who suffer most from the 'incidental' adverse effects of the carryover basis provision."); see also Hoffman, note 123, at 444 (describing role of small businesses and family farms in the repeal of carryover basis).
2. Ability to Pay

The weakness of the comprehensive tax base ideal as a justification for inheritance taxation has inspired greater interest in ability to pay. Professors Ascher and Duff have revived ability to pay theories by emphasizing the role of estate taxation in wealth redistribution. Professor Ascher builds his case squarely on the need to curtail inheritance, and Professor Duff explicitly rejects traditional tax principles in favor of distributive justice. In contrast to the pragmatists, Professors Ascher and Duff defend an exceptional transfer tax, applying high rates to a few. They recognize concentrations of wealth as narrow exceptions to the American Dream.

The history of tax legislation indicates that appeal to redistribution has substantial but diminishing power. Such appeal plays upon fears of big business that underlay enactment of the estate tax but that have waned over time. In the last 120 years, changes in mainstream portrayals of big business have inspired three overlapping phases in estate taxation. During the first, the threat represented by big business stories captured legislative attention. During the second, decreased antagonism between big business and the American Dream dampened enthusiasm for estate taxation. During the third, the growing prevalence of big business values eroded the transfer tax. Each phase reflects long-term social and institutional changes.

From the 1870's to the 1930's, big business stories were widely regarded as threatening popular aspirations. The growth of big business in the late 19th century inspired increasingly materialistic and competitive success stories. Horrified by them, critics rallied Ability to pay theorists justified the estate tax as diluting wealth or as abolishing inheritance altogether. See Schultz, note 286, at 193-95 (describing diffusion of wealth argument for estate tax); West, note 288, at 200-01 (same).

See Ascher, note 241, at 99 (quoting Andrew Carnegie); Duff, note 257, at 20 (citing Roosevelts).

See Ascher, note 241, at 76-112.

See Duff, note 257, at 4-18.


The portrayals described here are drawn from mainstream newspapers, magazines, academic works and books. "Fringe" sources might well offer a different perspective.

See Hofstadter, note 303, at 197 (describing American apprehension at concentration of wealth in the last third of the 19th century).

See id. at 196 (In the last three decades of the 19th century, the small enterprise economy was "overwhelmed by the giant corporation.").

See, e.g., Robert G. McCloskey, American Conservatism in the Age of Enterprise 12-13 (1951) (describing business's appeal to materialism); Burns, note 300, at 167 ("By the last third of the 19th century, the dominant concept of success was one of opulent materialism competitively won."); id. at 63 (describing increasing materialism and praise of competition in the 1830's and 1840's).

The old tradition of self-made men, a tradition that stressed industry, frugality, honesty and piety gave way to a definition of success that was largely economic and "endorsed
around the ideal of the small producer. Horatio Alger, for one, told stories of men who embodied agrarian virtues and achieved modest material success, such as junior partner in a small partnership. For many Americans, the businessman ceased being a hero and became a "robber baron."

During this stage, the threat of big business galvanized support for social reform, including estate taxation. Grass roots movements among labor, small business and agriculture agitated for the tax. The Socialist Labor Party, the Populist Party, the Progressive Party, the Union Party and the Farmer-Labor Party, all adopted planks supporting inheritance taxation in their national platforms. High pro-

such secular qualities as initiative, aggressiveness, competitiveness and forcefulness." Cawelti, note 302, at 5; see also James O. Robertson, American Myth, American Reality 180-82 (1980).

330 See William Miller, The Realm of Wealth in the Reconstruction of American History 142 (John Higham ed., 1962) ("[T]hese stories about my wealth . . . have a bad effect on a class of people . . . the stress which is laid in those stories arouses hatred and envy.") (quoting John D. Rockefeller).


333 The robber baron concept began with the Greenbackers and Populists, see Hal Bridges, The Robber Baron Concept in American History, 32 Bus. Hist. Rev. 1, 1-2 (1958), and was adopted by contemporary observers, see Henry D. Lloyd, Wealth Against Commonwealth (1936). See also Matthew Josephson, The Robber Barons (1934).

334 See W. Woodruff, History and the Businessman, 30 Bus. His. Rev. 241, 244 (1956) ("[T]he businessman became the focal point of [a] movement of protest, the political side of which was expressed through the Populist and later the Progressive Party.").

335 The Sherman Act was the most prominent attack on concentration. See Hofstadter, note 303, at 205 ("[I]n one respect, the Sherman Act was simply another manifestation of an enduring American suspicion of concentrated power."); David Millon, The Sherman Act and the Balance of Power, 61 S. Cal. L. Rev. 1219, 1220 (1988) (arguing that the Sherman Act was "a final effort of [a] longstanding, deeply rooted ideology . . . that aimed to control political power through decentralization of economic power.").

336 See Gustavus Myers, The Ending of Hereditary American Fortunes 113 (1939) (noting that George E. McNeill, one of the founders of the Knights of Labor, advocated taxing "wealth out of being").

337 See Ratner, note 282, at 355 (In 1916, "[r]ecommendations for a federal inheritance tax gained wide publicity and support from labor unions, small businessmen, and farmers."). This alignment was similar to that of the income tax. See John D. Buenker, The Income Tax and the Progressive Era 407-08 (1985) (describing efforts of interest groups on behalf of income tax); Stanley, note 307, at 107 (describing advocacy of income tax by centrist as attempt to fend off the left); id. at 123 (describing petitions from farm and labor groups). Besides Ratner, I have found no evidence on the position of small business with respect to the estate tax. Divisions within the business community described by other historians make Ratner's assertion plausible. See Robert H. Wiebe, Businessmen and Reform: A Study of the Progressive Movement 10-15 (1962) (describing urban-small town, east-west and small-large divisions in the business community during progressive era).

338 See National Party Platforms, 1840-1956, at 96 (Kirk H. Porter & Donald Bruce Johnson eds., 1956) (Socialist Labor Platform of 1892); id. at 116 (People's (Fusion Fac-
file politicians staked out positions on the transfer tax, which enjoyed substantial legislative successes: enactment of the estate tax in 1916, enactment of the gift tax in 1924, and large increases in both in 1934 and 1935.

In the second stage, beginning in the 1930's and extending through the 1960's, big business stories were portrayed as less threatening to popular aspirations. Americans showed growing appreciation of big business as a source of jobs and consumer goods. Ordinary Americans began to identify with the founder-manager of the big business and to see in him their own aspirations for success through hard work. The search for middle class respectability merged with the business mogul's drive to the top, as the import of the "Horatio Alger Story" changed from an agrarian tale to the prototypical capitalist ascent from rags to riches. Big Business produced heroes, like

339 See text accompanying notes 162-67 (statements of Presidents Theodore Roosevelt, Herbert Hoover and Franklin Roosevelt). Members of Congress also staked out positions for the tax. A few stubborn congressmen fought to preserve the tax in 1924, see Eisenstein note 282, at 232 & n.50, and Senators Couzens and LaFollette led the fight to strengthen the tax in 1934, see Mark H. Leff, The Limits of Symbolic Reform: The New Deal and Taxation, 1933-1939, at 107 (1984).


343 See Revenue Act of 1935, ch. 829, §§ 201(b), 301(b), 49 Stat. 1014, 1022, 1025.

344 See Hofstadter, note 303, at 212-15 (describing rise in the standard of living, acceptance of big business and the vanishing of the fears of the progressive era); id. at 223 (describing acceptance of bureaucratic corporate career by a majority of Americans); Moses Rischin, The American Gospel of Success: Individualism and Beyond S (1965) ("In the second half of the twentieth century, America has become inseparably wedded to the terms of success and to the style of the giant corporations.").

345 See Sigmund Diamond, The Reputation of the American Businessman 178-79 (1955) (noting shift in press coverage of entrepreneurs: early 19th century focus on unique business qualities of businessman and use (not acquisition) of his wealth; 20th century focus on his universal qualities, the enterprise he created, how he exemplified the virtues of American capitalism).

346 See Gary Scharnhorst & Jack Bales, The Lost Life of Horatio Alger, Jr. 149-56 (1985) (attributing transformation to the need to defend the "American Way of Life" during World War II).

347 See Russell B. Nye, Midwestern Progressive Politics: A Historical Study of Its Origins and Development 1870-1950, at 321 (1951) ("The cycle had run from thorny old Commodore Vanderbilt to Rockefeller to Henry Ford, from admiration to hatred to faith. The same public that hated Morgan and the elder Rockefeller made Henry Ford (a less able man) into a national idol. . . .")
Henry Ford and Thomas Edison, and even the Robber Barons merited rehabilitation. This change in attitude affected transfer tax legislation. Reduced concern about the threat of concentration of wealth made that tax less appealing to partisan interests. In the 1950's and 1960's, the estate and gift taxes became the "neglected stepchildren of the Federal revenue system."

In the third stage, beginning in the 1970's, values associated with big business may even have become central to the American Dream. Hoping to maintain standards of living in the midst of declining productivity, Americans voiced greater concern about their material well-being. Savings was severed from the work ethic, becoming an independent value. Economists increasingly proposed replacing the income tax with a consumption tax.

This change in values influenced perception of small business. Many now looked to small business for productivity and jobs formerly associated with big business. The entrepreneur became a hero,
admired for his competitive attitude and productivity. This new perception of small business reversed the relationship of transfer taxation and the agrarian ideal. The estate tax was now an attack on the American Dream, not a means of preserving it.

In the third stage, the family business symbol dominated wealth tax legislation. Organized groups used that symbol in battling congressional staff and Treasury over the Tax Reform Act of 1976, the repeal of carryover basis in 1980 and the Economic Recovery Tax Act of 1981. They persuaded Congress to enact savings incentives that pushed the federal income tax closer to a consumption base.

These legislative stages reflect long-term social and institutional changes occurring over the 20th century. One change was increasing occupational mobility. A growing middle class found concentrations of wealth less threatening. Another change was the eclipse of broad-based political movements by narrow commercial groups: Radical labor and populist movements lost steam and commercial groups organized to beat back governmental regulation. These institutional changes radically altered the labor-small business-farm coalition. The volunteeristic American Federation of Labor succeeded the radical Knights of Labor as the representative of the labor move-

355 See David E. Gumpert, Stalking the Entrepreneur, Harv. Bus. Rev., May-June 1986, at 32 (describing entrepreneurs as holding “a mythical status in America” and as being symbols of individualism and drive which were “the embodiment of our romantic view of capitalism”).

356 See Hebert & Link, note 351, at 3-4 (“Academics and policymakers have responded to waning productivity growth and increased global competition by calling for a revival of entrepreneurship.”).


358 See Hoffman, note 123, at 444-45.


360 See Don Fullerton, The Consumption Tax: An Idea Whose Time Has Come?, 27 Tax Notes 435, 438 (Apr. 22, 1985) (describing recent enactment of provisions compatible with a consumption tax); see also Pechman, note 1, at 208 (noting interest in consumption tax after World War II).


362 See generally Hofstraeder, note 303.

363 See Robert H. Wiebe, Businessmen and Reform: A Study of the Progressive Movement 16-41 (1962) (describing organization of the National Association of Manufacturers and the U.S. Chamber of Commerce during the progressive era); Wilson, note 129, at 153 (describing how threats of government interference led to growth of general business associations).
Right wing business groups claimed the small business mantle. The conservative American Farm Bureau replaced the Grange and Populist parties as the voice of the American farmer.

Thus, the history of the public discourse casts doubt on the appeal of redistribution as a justification for wealth taxation. One response to this trend is to advocate redistribution through a different tax base, usually through a progressive consumption tax, perhaps with higher rates on funds spent from gifts and bequests. This approach would not tax wealth transfers until ultimately consumed.

The history of the public discourse suggests the time is not yet ripe for such an approach. Consumption taxes have long been unpopular and it is uncertain how deep the new-found enthusiasm for them runs. As the 1986 Act demonstrated, concern about wealth concentration still can generate substantial legislative activity. Even assuming a long-term drift toward consumption taxes, the demand for progressivity in such taxes seems weak. Images of wealth inspire progressivity more than images of consumption. The rich plutocrat is more threatening than the conspicuous consumer. Taxes on luxury goods have had fleeting appeal.

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366 After 1970, the American Farm Bureau consistently testified against the estate tax. See Discussion Draft Hearing, note 53, at 328 (statement of Am. Farm Bureau against § 2036(c)); Major Estate and Gift Tax Issues: Hearings on S. 395, S. 404, S. 574 & S. 858 Before the Subcomm. on Estate and Gift Taxation of the Senate Comm. on Finance, 97th Cong. 237 (1981) (statement of the Am. Farm Bureau for estate tax relief); 1976 Hearings, note 175, at 8 (statement of the Am. Farm Bureau in favor of higher credit, widow deduction and current use valuation).


369 See McCaffery, Uneasy Case, note 2, at 350-53.

370 See McCaffery, Hybrid, note 297, at 1154 (noting the 1986 Act stepped away from consumption and towards taxation of wealth); see generally Jeffrey H. Birnbaum & Alan S. Murray, Showdown at Gucci Gulch: Lawmakers, Lobbyists, and the Unlikely Triumph of Tax Reform (1987).

371 See generally Pechman, note 1, at 305-07, 326-27 (describing federal imposition of excise taxes on luxury goods from early 1930s to 1965). More recent luxury taxes have been even shorter lived. See note 137.
3. Benefit

Like 19th century redistributional theories, benefit has recently resurfaced in arguments for increased wealth taxation. In 1988, Congress briefly enacted a progressive income tax surcharge on senior citizens to pay for a catastrophic health care program for them. Since then, representatives have introduced bills financing long-term health care with transfer tax increases on the theory that long-term health care benefits the decedent by preserving her assets. Academics, too, have invoked benefit. Herbert Kiesling has argued for considering public goods in taxation and Marjorie Kornhauser has defended progressive income tax rates with arguments based on benefit.

The history of tax legislation shows that benefit is critical in enacting tax legislation. The belief that the government procures services for individuals lies beneath the budgetary symbols that transcend partisan divisions. The power of those symbols attests to the importance of benefit in the public mind. Although the concentration of wealth and family business symbols bring estate taxation into public awareness, larger budgetary issues generally spark enactment. In this respect, the estate freeze legislation was typical. Budget bills provided the vehicle for enacting § 2036(c) and Chapter 14. Without budgetary pressure, there would have been insufficient support for legislation on estate freezes.

History also reveals that beliefs about benefit affect the choice among taxes. For example, appeal to the use of tax proceeds was critical to making the income tax the dominant tax of the 20th century.

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373 See H.R. 5393, 100th Cong. (1988); S. 2305, 100th Cong. (1988); see also H.R. 1200, 103th Cong. (1993); S. 491, 103th Cong. (1993).
374 See Kiesling, Public Goods, note 17, at 201-07.
375 See Kornhauser, Rhetoric, note 267, at 267, at 491-97.
376 See Witte, Politics, note 70, at 265 (stating most partisan votes occur prior to ultimate enactment; final votes on tax bills invariably provide wide margins); see also James M. Verdier, The President, Congress, and Tax Reform: Patterns Over Three Decades, Annals Am. Acad. Pol. & Soc. Sci., Sept. 1988, at 114, 123 (noting that “Congress's ability to play a leadership role in tax reform is greatest when economic forces help push the issue onto the agenda” and that “[t]he prospect of partisan political advantage may help stimulate congressional leadership, but it is not crucial.”).
377 Estate tax increases most often are driven by revenue demands. See Eisenstein, note 282, at 237 (concluding that from 1916 to 1942 the estate tax primarily was imposed for revenue). Conversely, tax cuts provide the occasion for erosion of the tax. See generally Witte, Politics, note 70, at 93-95 (describing repeal of gift tax as part of general tax reduction in 1924), 218-19 (describing repeal of carryover basis as part of larger tax reductions); Gutman, Reforming, note 2, at 1202-06 (describing transfer tax cuts pursuant to overall reductions in 1981).
Prior to 1940, the income tax, like the estate tax, was confined to a small class. During World War II, Treasury shifted its defense of the tax from reducing concentrations of wealth to paying for democracy and the income tax became "a people's tax." Although the war ended, the need to preserve democracy did not. The income tax became the price of living in a free society.

The history of tax legislation reveals that benefit arguments draw upon two distinct cognitive models. The first is the life threatening emergency. Politicians appeal to personal crises requiring urgent mobilization of resources to obtain support for legislation. Accordingly, tax increases generally occur in dire situations, most often war. Crisis provides an overriding but fleeting basis for action. With safety comes tax cuts.

More consistent support is provided by the second model underlying benefit, that of the everyday consumer purchase. Consumers exchange money for goods and services, and sometimes view tax payments as doing the same. The consumer purchase model is most prominent in the social security payroll tax. The only tax to experience sustained peacetime growth, the payroll tax has done so

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378 See 79 Cong. Rec. 3394 (1935) (describing people subject to income tax as "overfed and underworked millionaires") (statement of Rep. Charles Truax); Leff, note 339, at 2-5 (describing prewar income tax as a symbolic tax "designed more to quell abuses than to shift income with the rest of society").


380 Revenue Act of 1942: Hearings on H.R. 7378 Before the Senate Comm. on Finance, 77th Cong. 3 (1942) (statement of Treas. Sec'y Henry Morgenthau, Jr.). The percentage of workers filing income tax returns increased from 15% to 90%. See Witte, Politics, note 70, at 126.

381 See Witte, Politics, note 70, at 137 (attributing failure to cut taxes after World War II to changed role of government, its responsibility for well-being of its citizens and need to maintain high defense expenditures).

382 Hence the appeal to war to rally support for social programs, from the war on poverty to the war on crime. See Elder & Cobb, note 164 at 76, 79.

383 See Hansen, note 130, at 65 (explaining level of taxation by reference to "war" model; "revenue amounts certainly increased during the major wars in our history"); Witte, Politics, note 70, at 248-49 (noting that tax increases occur almost exclusively in response to war). The only peacetime increase, that of 1932, was a response to a different emergency, the Great Depression. See id. at 96 (quoting Treasury Secretary as generally supporting low taxes but acknowledging that "these are not normal times").

384 See Bartlett, note 254, at 564 ("All's fair in love and war.") (quoting Francis Edward Smedley).

385 See Witte, Politics, note 70, at 248-49 (describing bias towards peacetime tax reduction).

386 Some view the purchase itself as a normative goal. See Gordon, note 248, at 90-94 (describing fair exchange as a criterion for justice).

387 See Graetz, Praise, note 2, at 265-67 (describing growth of employment taxes from 15% to 35% of federal revenues during the period from 1959 to 1983); Michael J. Graetz & Deborah H. Schenk, Federal Income Taxation, Principles and Policies 16-17 (1995) (describing growth from 1981 to 1994 from 30% to 35%).
largely because social security is perceived as insurance, comparable to private programs.\textsuperscript{388}

Appeal to the consumer purchase model seems necessary if a tax is to sustain peacetime support. The income tax remained a mass tax after World War II because it was perceived as more than an emergency measure. Treasury deliberately analogized the tax to a consumer purchase\textsuperscript{389} and emphasized its routine nature.\textsuperscript{390}

So far, the estate tax has drawn only upon the emergency model. Crisis, usually war,\textsuperscript{391} has precipitated most inheritance taxation. Tensions with France resulted in a stamp tax on legacies from 1797 to 1802;\textsuperscript{392} the Civil War gave rise to legacy, stamp and succession taxes from 1864-1870;\textsuperscript{393} and the Spanish-American War prompted an inheritance tax from 1898 to 1901.\textsuperscript{394} Efforts to pass the current estate tax did not succeed until the advent of World War I,\textsuperscript{395} and major increases occurred again during World War II.\textsuperscript{396} Crisis, however, has

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It would seem logical that both citizens and politicians would be more willing to increase Social Security taxes than income taxes simply because it is known how the money will be spent, but such has hardly been the case. Payroll taxes have increased—but the increases have been delayed consistently, have been enacted reluctantly, tend to lag behind benefit increases, and have an actuarial value much lower than benefits paid out.

\textsuperscript{389} See Jones, note 379, at 723-24 ("The concept of a consumer war, of buying weapons and, ultimately, victory, seemed to be quite popular with government propagandists . . . To the average American, war was portrayed as a market transaction with enormous consequences—a mundane means of defeating a mortal enemy.").

\textsuperscript{390} See id. at 728-32 (describing propaganda designed to portray paying taxes as a simple, routine burden of citizenship).

\textsuperscript{391} Estate tax increases in response to revenue shortfalls resulting from the Great Depression also seems to draw upon the emergency model. See Eisenstein, note 282, at 235 (describing effect of the Great Depression on the 1932 Act).

\textsuperscript{392} See Act of July 6, 1797, ch. 11, § 1, 1 Stat. 527 (made effective on July 1, 1798 by Act of Dec. 15, 1797, ch. 1, § 1, 1 Stat. 536).

\textsuperscript{393} See Act of July 1, 1862, ch. 119, 12 Stat. 432, 475, 483, 485-87.


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not generated continuing support.\textsuperscript{397} With peace comes estate tax cuts and a return to the legislative stalemate borne of divisive symbols.\textsuperscript{398} The history of tax legislation suggests that a critical issue for wealth taxation is whether it can draw upon the consumer purchase model. Most theorists dismiss benefit theory because they find it difficult to allocate the benefit of governmental expenditures and because they fear the distributional consequences.\textsuperscript{399} Recent scholarship casts doubt on both concerns. Pragmatism raises its own measurement problems,\textsuperscript{400} and depending on the allocation of government services, benefit theory can support progressive taxation.\textsuperscript{401}

Study of the public discourse complements this scholarship by deepening one's understanding of benefit. The consumer purchase model suggests the importance of linking taxes to expenditures. One way of linking a tax is by "earmarking" it, that is, designating its proceeds for specific uses.\textsuperscript{402} Mere designation, however, does not assure popular acceptance. Efforts to label the catastrophic health insurance surcharge a "premium" failed.\textsuperscript{403} The fate of that legislation suggests the importance of matching payment with receipt of benefit.\textsuperscript{404} It also

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  \item See 1925 Hearings, note 173, at 426 (statement of F.W. Denio, Am. Bankers Ass'n) (arguing that the estate tax is only appropriate in emergencies such as war); Mellon, note 173, at 124 ("The Federal Government should keep estate taxes as a reserve in times of national stress.").
  \item See notes 350, 370. Progressive income tax rates show the same pattern. See Witte, Foundations, note 388, at 35 ("Whatever progressivity is built into the income tax system was introduced during wars and financial crises. In normal times there has been a constant pressure to lower taxes and to remove progressivity . . .").
  \item See Groves, supra note 286, at 29 (noting that poor probably benefit more from the government).
  \item Pragmatists assume away difficult empirical issues. In asserting that the comprehensive tax base places economic decisions on equal footing, pragmatists assume that all behavior has equal elasticities, and in equating the comprehensive base with basic fairness, they assume that all persons value money equally. These assumptions have been challenged. See Witte, Politics, note 70, at 54 ("The proposition that all income adds equally to the exercise of market choices seems wholly untenable."); Thomas D. Griffith, Should "Tax Norms" be Abandoned? Rethinking Tax Policy Analysis and the Taxation of Personal Injury Recoveries, 1993 Wis. L. Rev. 1115, 1152.
  \item See Kiesling, Public Goods, note 17, at 202: The received doctrine among economists seems to be that the benefit principle cannot be applied to public goods that are redistributive in nature. This is surely erroneous. Redirective public goods, such as welfare payments to the poor, have public good benefits also, or they would not have been enacted into law.
  \item See Pechman, note 1, at 306 (describing earmarking as a major excise tax innovation, beginning in 1956 with the Highway Trust Fund).
  \item See David P. Fan & Lois Norem, The Media and the Fate of the Medicare Catastrophic Extension Act, 17 J. Health Pol., Pol'y & L. 39, 51 (1992) (noting that shift in rhetoric used to describe financing from "premiums" paid by beneficiaries to "taxes" paid to support the program).
suggests that the payor must identify with the beneficiary. Believing that they one day will benefit from social security, the young acquiesce in social security taxes. Those who already possessed catastrophic coverage rebelled at the income tax surcharge.

The consumer purchase model has implications for general revenue taxes as well. Tax theorists generally assume that, liquidity constraints aside, taxpayers are indifferent between taxes of equal present value. The consumer purchase model denies this assumption. That model persuades by portraying taxes as one more every day expenditure. Thus, it suggests a preference for paying taxes in small gradual increments rather than in one large lump sum. This preference is not necessarily irrational. More easily anticipated, small taxes do not produce large swings in standards of living.

This factor suggests that benefit arguments fit annual taxes better than “lumpy” ones. The lumpiness of wealth taxes can be reduced through withholding mechanisms, gift taxes and annual wealth taxes. For estate freezes, aversion to lumpiness suggests a preference for Chapter 14 over § 2036(c), even if the latter taxed the same present value and accommodated liquidity constraints.

...made a severe political blunder by front-loading the increased cost of the [Catastrophic Health Insurance] program.... Congress raised the premiums... much faster, and much sooner, than the actual receipt of benefits by the elderly.

See Paul F. Harstad, Interpreting Americans’ Attitudes Toward Taxes, 13 Tax Notes 1083, 1096 (Nov. 9, 1981) (“The reasons for [the] unique acceptance [of the social security tax] are fairly obvious.... Taxpayers perceive a direct link between social security taxes and benefits....”).

The problem of catastrophic health expenditures did not concern the majority of the elderly, who already were covered by private insurance. See Morreale, note 404, at 142, 145.

See Gene Steuerle, On Lumpy Taxes, 62 Tax Notes 1777, 1777 (Mar. 28, 1994) ("To the tax expert... often there is no economic difference between lumpy taxes and other taxes. In theory, an individual builds up tax liabilities over time.").


See Steuerle, note 407, at 1778 (“Taxes on current flows of income or consumption can be associated most easily with current flows of government benefits, and the rates of taxation can be made to rise or fall with rates of government outlays.”).

See id. (“Perhaps another difficulty with lumpy taxes is that they are harder to associate with the benefits of government.... [They] are in theory associated with expenditures from the past. In practice, they appear closer to arbitrary confiscations of wealth than to taxes related to the current benefits of government.”).

See Cooper, Voluntary Tax, note 2, at 244-46 (proposing annual wealth tax); Graetz, Praise, note 2, at 283 (same).
IV. Conclusion

Tax theorists view the legislative process principally as a constraint on their craft. Legislation contrary to current analysis is attributed to power politics, devoid of policy content. This Article argues that legislation involves more than policy and politics. There is also a cultural dimension, reflected in the public discourse, the language used to justify legislation to the public at large. As the estate freeze legislation demonstrates, the public discourse comprises the terrain in which other perspectives operate. It sheds light on legislative action and why certain issues receive attention.

The popular symbols and stories of the public discourse dominate democratic discussion. To participate in that discussion, theorists must uncover the values beneath those archetypes and translate them into policy norms. The power of the family business symbol suggests that theorists should give more attention to norms based on reward and community. The history of the archetypes in legislation suggests that pragmatic policy analysis has limited appeal for inheritance taxation. Theorists would do well to explore a benefit analysis that took seriously popular understandings equating tax payments with consumer purchases.

This Article has far reaching implications. The project of translating popular understandings into policy goals extends well beyond the taxation of wealth. Although unfamiliar, this project promises to make tax theory more relevant.