

CRAFTING STRUCTURAL TAX LEGISLATION IN A HIGHLY POLARIZED CONGRESS

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I INTRODUCTION

To the surprise of many, Congress passed a major tax reform bill at the very end of 2017.¹ Skeptics had doubted this result because of the failure of many earlier tax reform efforts, Congress's inability to replace or repeal the Affordable Care Act (ACA)—or pass any other major legislation—in 2017, and the incredible incompetence (and dishonesty) of the Trump Administration generally. But doubters overlooked the tremendous amount of pressure exerted by Republican donors not to waste completely the opportunity provided by Republican control of the White House and both houses of Congress. Doubters may also have underestimated the strength of Republican interest in changing tax policy relating to businesses with cross-border income.

The new tax bill is highly complex for many reasons, including especially the hasty and secretive manner in which Congress considered it. The focus of this essay is on a category of tax legislation, termed “structural” legislation, which is complex for a different reason. Structural legislation tries to protect the integrity and existing policy objective of various networks of tax rules that are part of the tax system. The legislation is complicated because the networks are intricate and any change may affect, and be affected by, all of the other rules in the network. Examples include changes to many of the provisions in subchapters S, K, and C of the Internal Revenue Code. Although major tax reform may also be complex in part because of structural elements that carry out its policy changes, this article is concerned with structural legislation that is not part of a major reform. Rather, the legislation merely maintains the sound operation and policy objectives of existing law. Both old and new structures can benefit from having functional plumbing.

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1. See Pub. L. No. 115-97, 131 Stat. 2054 (2017). “Tax reform” is a misnomer for this bill in view of the complications and distortions it adds to the law.

Changes in the tax legislative process have made it increasingly difficult to enact structural legislation that is not a component of major reform. Somewhat ironically, because such legislation's policy objectives are more modest than those of major reform, it may actually be harder to develop and pass in today's environment. Successfully crafting such legislation requires knowledge of the network of rules affected, sensitivity to the interactions of those rules, and respect for their overall policy objective, but without the impetus of a major change in policy. It is an example of hard, non-sexy, "good government" legislation that "merely" improves the execution of current policies by advancing the efficiency, equity, or administrability of existing law.

Prior analysts who have attempted to connect the process and product of tax legislation have sometimes ignored the details of process or considered product only on a bill-by-bill basis. This article partly disaggregates both process and product by considering the professional staff who actually craft tax legislation and subdividing such legislation into a few major categories. The purpose of disaggregation is to show that a decline in the production of structural legislation may be a natural outgrowth of changing legislator and staff interests and incentives during the past twenty-five to thirty years.

Part II of this essay reviews some important changes in Congress and its staff principally over the last twenty-five to thirty years. Part III then introduces an additional important variable—the changing composition of the professionals working on tax legislation—and considers the impact of all of the changes on the production of structural legislation. Part IV illustrates the hypothesis by examining amendments to subchapters S, K, and C of the Code as well as efforts to codify the federal statutes as positive law, and part V concludes.

II

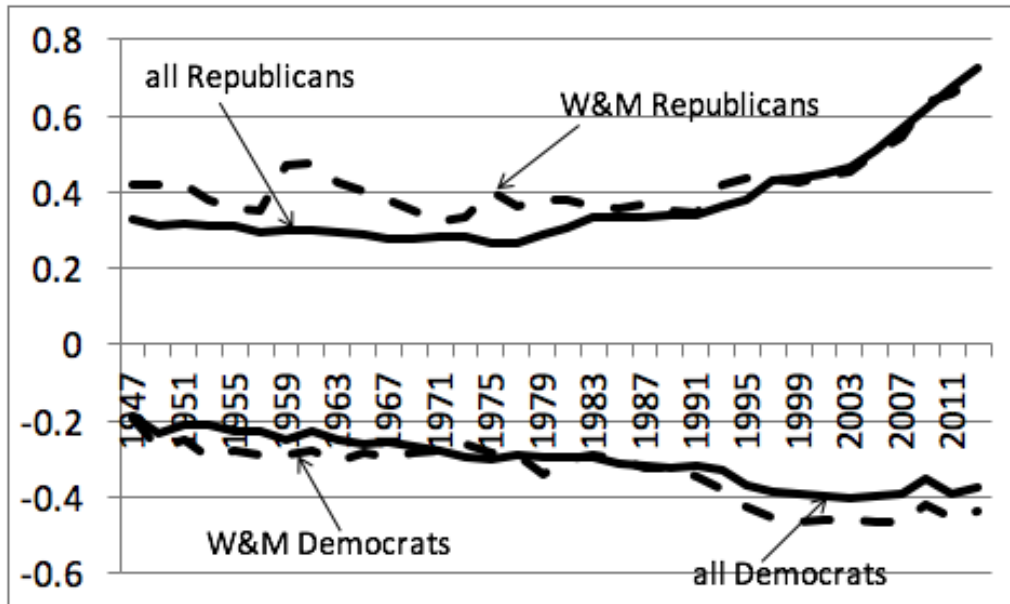
CHANGES IN CONGRESS AND ITS STAFF

Subpart A describes four major changes in Congress that have occurred over recent periods: an increased ideological division between the parties but cohesion within them, the growing costs of campaigning, an increased external focus of Congress, and a more centralized management structure. Subpart B then identifies changes in the number, composition, and workplace of congressional staff.

A. Some Major Changes in Congress

1. Increased Ideological Division Between Parties but Cohesion Within Them

Figure 1 illustrates an increased ideological division between the parties in the House over approximately the last twenty-five years.

Fig. 1: Ideological Positions—Representatives, by Party, 1947–2014²

The figure draws on a widely used annual measure developed by two political scientists to rate the ideological preferences of every member of Congress based on their votes during the prior year.³ The scores range from “+1,” representing the most conservative members, to “-1,” representing the most liberal. A score of “0” represents a centrist.

As the two solid lines show, the ideological distance between the generally conservative Republicans and the generally liberal Democrats in the House remained roughly the same from 1947 to around 1990. But since then, the separation between them has grown. Both parties have contributed to the increase, although the Republicans have contributed more.

This figure only shows the average ideology of all House Democrats and Republicans. Within that average, there might be a considerable range of views. But, in general, that appears not to have been the case. Since the early 1970s, members of both the House and Senate have increased their levels of party loyalty by voting in accordance with their party’s positions.⁴ In early 2017,

2. *Vital Statistics on Congress*, BROOKINGS INST. (Sept. 7, 2017), <https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress> [<https://perma.cc/68LY-R8CW>] (follow “Click here to access the *Vital Statistics* data tables” hyperlink; then download the data tables for tbl.8-7).

3. See Keith T. Poole & Howard Rosenthal, *A Spatial Model for Legislative Roll Call Analysis*, 29 AM. J. POL. SCI. 357 (1985) (explaining development of DW-Nominate). The data for most figures is from *Vital Statistics on Congress*, *supra* note 2. For data limitations, see Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1699–1702 (2015).

4. See STEVEN S. SMITH ET AL., *THE AMERICAN CONGRESS 120* Figure 4.8 (9th ed. 2015). Party unity, however, is not necessarily the same as ideological unity. It is possible that even as party unity

Congressional Quarterly (CQ) reported that during the 114th Congress (2015-16), when House Republicans had their largest majority in eighty-six years, they were also the most unified they have ever been since CQ began tracking party unity in 1956.⁵ House Democrats also had a near record party unity during that Congress. The increased ideological separation of the parties, but apparent cohesion within them, have heightened partisanship in Congress in the sense that party labels represent sharply distinct policy views.⁶

Figure 1 also includes two dashed lines representing the ideological views of the Republicans and Democrats serving on the House Ways and Means Committee. The lines show that since around the early 1990s, the ideology of the Ways and Means Republicans has basically tracked the positions of their Republican House colleagues. The ideology of Ways and Means Democrats, however, has been more liberal than their Democratic colleagues. As a result, since the early 1990s, members of the two parties have been ideologically more different on the Ways and Means Committee than in the entire House.⁷

The solid lines in Figure 2 show much the same trend in the Senate. There is increased ideological separation between the parties beginning around 1995 with Republicans contributing more than Democrats. The dashed lines show the ideological views of Senate Finance Committee Republicans and Democrats. During certain periods—between 1947–1965, the early 1980s, and 1995–2005 for the Democrats, and during the 1980s and early 1990s for the Republicans—members of the Finance Committee played the role of centrists in that they were less liberal or conservative than their average Senate colleagues of the same party. As a result, during certain prior periods, the ideological division between members of the Finance Committee was less than that for the chamber as a whole. Overall, however, since the early 1990s, the ideological split of Finance Committee Republicans and Democrats has grown, consistent with the general

increases, ideological unity might decrease if a growing number of members of a given party take ideological positions at variance from the orthodox party position. There might then be failed legislative efforts (without votes) on some initiatives and successful ones (based on strict party-line votes) on most or all others (the ones counted in the party unity measure). The divisions exhibited by congressional Republicans in 2017 on issues such as replacing the Affordable Care Act may be a recent indication of this phenomenon.

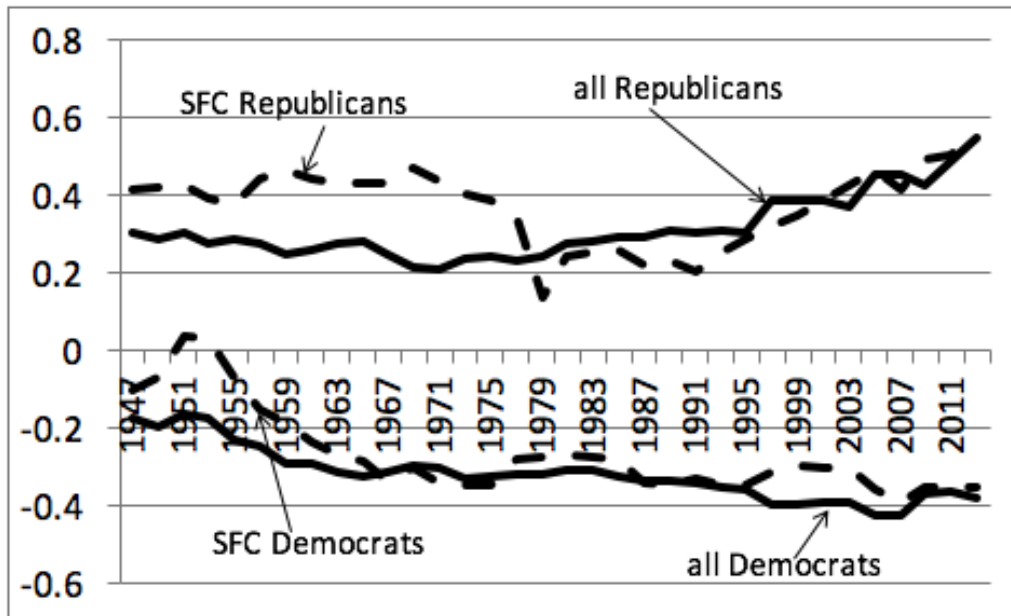
5. See *2016 Vote Studies: House GOP More Unified Than Ever*, CQ MAG. (Feb. 6, 2017), <http://library.cqpress.com.proxy.lib.duke.edu/cqweekly/weeklyreport115-000005034993>; Farina, *supra* note 3, at 1694 (reporting that in 2013, there were only four Representatives and no Senators who occupied the space between the most liberal Republican and most conservative Democrat, compared to 344 and 58, respectively, in 1982).

6. See BARBARA SINCLAIR, UNORTHODOX LAWMAKING 166 (5th ed. 2017) (“Intense partisan polarization is the single most salient characteristic of contemporary politics and one that increasingly shapes the legislative process[.]”); William A. Galston & Pietro S. Nivola, *Delineating the Problem*, in 1 RED AND BLUE NATION? CHARACTERISTICS AND CAUSES OF AMERICA’S POLARIZED POLITICS 1, 16 (Pietro S. Nivola & David W. Brady eds., 2006).

7. The figure shows that the members of the Ways and Means Committee have been ideologically more different than their House colleagues during earlier periods as well, although the gap between them was not as great as in recent years.

trend in the Senate.

Fig. 2: Ideological Positions—Senators, by Party, 1947–2014⁸



2. Growing Costs of Campaigning

The next figures illustrate the increased cost of campaigning during the last forty years.

8. *Vital Statistics on Congress*, *supra* note 2, tbl.8-8.

Fig. 3: Average House Campaign Expenditures, 1974–2014 (in 2014 dollars)⁹

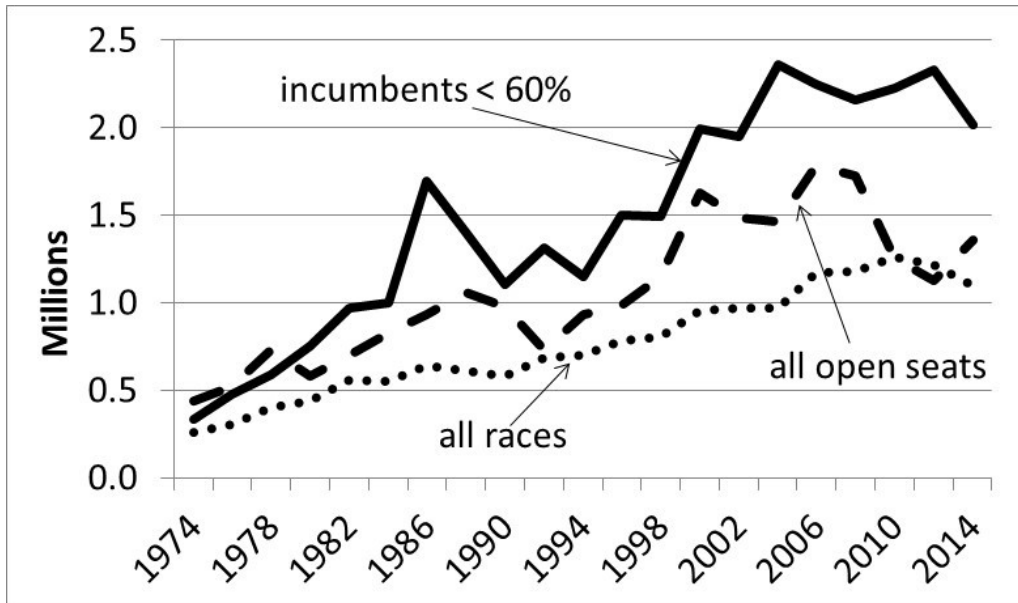


Figure 3 shows the average campaign expenditures of House candidates since 1974, as measured in 2014 dollars. Three groups are presented. The dotted line is the average expenditure of all major party candidates in all House races. This figure includes uncompetitive races, including ones with unopposed candidates, where campaign expenses may have been quite low. The dashed line represents the same information but only for open seat races that generally are competitive. Finally, the solid line shows the information only for incumbents who ended up with less than 60% of the vote and were, therefore, in reasonably competitive races. The last group thus excludes the expenditures of poorly financed challengers. The trend in each case is essentially straight up, with the average expenditure of incumbents in competitive races in 2014 being about five times that of 1974, in inflation-adjusted dollars.

9. *Vital Statistics on Congress*, *supra* note 2, tbls.3-2, 3-3.

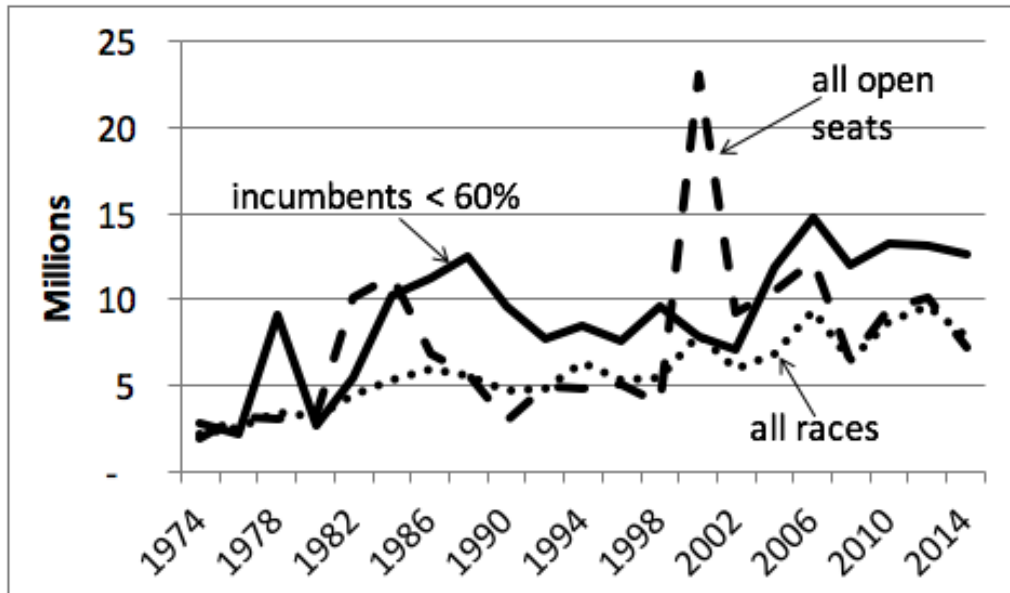
Fig. 4: Average Senate Campaign Expenditures, 1974–2014 (in 2014 dollars)¹⁰

Figure 4 shows the same information for Senate campaigns. There is greater variation than the House data because there are fewer races and the possible conjunction in one election year of several well-financed candidates running for competitive seats in very populous states. The expenditures in those races may dramatically skew the average in that year.¹¹ Still, the clear trend of all three measures is up, with incumbents in competitive Senate races in 2014 (the solid line) spending about four times what they did in 1974, again in inflation-adjusted dollars.

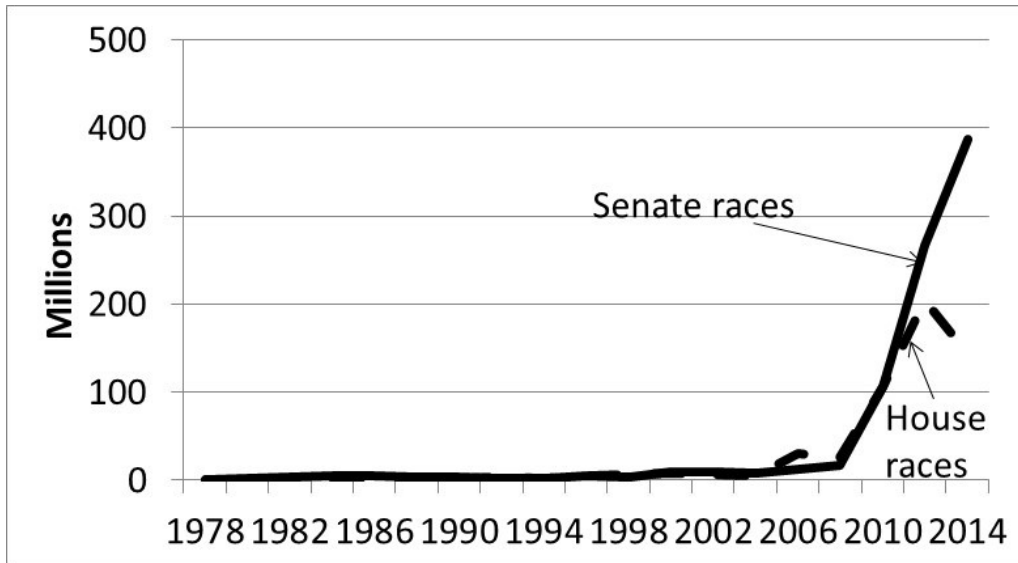
The previous figures show only part of the story because they are limited to the reported expenditures of candidates. There are also party and non-party independent expenditures that finance campaign activity.¹² Figure 5 shows the dramatic growth of the latter category since 2008 for House and Senate races. If money is contributed disproportionately by persons with strong ideological views, then the increased cost of campaigning may help to promote the ideological divide.

10. *Id.* tbls.3-5, 3-6.

11. For example, the spike in the expenditures for all Senate open seats in 2000 included large amounts spent in the races in New York (Hillary Clinton), New Jersey (Jon Corzine), and Florida (Bill Nelson).

12. According to the Federal Election Commission (FEC), an independent expenditure is one that advocates for the election or defeat of a candidate, but not in concert with the candidate or opponent. *See* Independent Expenditure, 11 C.F.R. § 100.16(a) (2014).

Fig. 5: Total Non-Party Independent Expenditures, 1978–2014 (2014 dollars)¹³



3. “Fracturing” and External Focus of Congress

In addition to party polarization and the increased cost of campaigning, there have been two other important major changes. These developments may initially seem to be contradictory but, in fact, may follow naturally from one another.

One change is a fracturing of Congress into individual members with an increasingly external focus. According to one recent observer, the current Congress is comprised of “only individual actors, pursuing their own political interests and ideological missions willy-nilly, like excited gas molecules in an overheated balloon.”¹⁴

This change has been influenced by developments over several decades. In the 1970s, there were reforms, principally in the House, to satisfy the post-Watergate liberal Democrats who rebelled against the controls exerted by the mostly conservative, southern Democrats who chaired the committees. The reforms enhanced the ability of individual members, including relatively junior members, to gain visibility and prominence.¹⁵

Over time, party polarization and the increased cost of campaigning have fostered the individualism of members and encouraged them to be more

13. *Vital Statistics on Congress*, *supra* note 2, tbl.3-14.

14. Jonathan Rauch, *How American Politics Went Insane*, THE ATLANTIC, July/Aug. 2016, at 50, 52; see SMITH ET AL., *supra* note 4, at 25; George K. Yin, *Is the Tax System Beyond Reform?*, 58 FLA. L. REV. 977, 1025–29 (2006).

15. See SINCLAIR, *supra* note 6, at 139–40; cf. JULIAN E. ZELIZER, GOVERNING AMERICA: THE REVIVAL OF POLITICAL HISTORY 259–89 (2012) (claiming that these and other congressional reforms supported by liberal Democrats in the early 1970s backfired).

externally focused. Polarization has made time spent working on legislative matters less productive because policy differences are greater and compromises much harder to achieve. The need for campaign funds has provided the same incentive: the less time devoted to legislative work, the more time available for fund-raising and related reelection activities. Partly as a result, during the last twenty years or so, Congress has generally not scheduled any votes before Tuesday evenings or after Thursday, and fewer members of Congress set up real residences in D.C.¹⁶ Government service as an elected official has been described as being engaged in a “permanent campaign.”¹⁷

Technological changes have facilitated the fracturing. Improvements in transportation have allowed every member of Congress to spend each Friday through Tuesday in their home state or district if they so wish. Changes in communication methods and the explosion of media outlets give legislators many opportunities to obtain publicity entirely separate from any accomplishments connected to their legislative work. The process of working one’s way up through Congress into senior, leadership roles to attain some degree of national prominence is clearly a thing of the past.¹⁸ An increasing number of members do not try to obtain senior positions but use Congress as a steppingstone to lucrative lobbying opportunities.¹⁹

Senate rules—described as the “most permissive rules of any legislature in the world”²⁰—have long favored the individual rights of Senators. But the increased individualism has resulted in less restraint in the exercise of those rights by Senators and greater use of practices like “holds” on action or filibusters.²¹ This

16. See THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 169–70 (2006); SINCLAIR, *supra* note 6, at 266; SMITH ET AL., *supra* note 4, at 110–11.

17. See Norman J. Ornstein & Thomas E. Mann, *Conclusion: The Permanent Campaign and the Future of American Democracy*, in *THE PERMANENT CAMPAIGN AND ITS FUTURE* 219, 220 (Norman J. Ornstein & Thomas E. Mann eds., 2000) (“The permanent campaign means that campaigns are nonstop and year-round, and governing/campaigning/governing/campaigning takes place in a continuous loop.”); Gary C. Jacobson, *Partisanship, Money, and Competition: Elections and the Transformation of Congress since the 1970s*, in *CONGRESS RECONSIDERED* 117, 128 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 10th ed. 2013).

18. Cf. SMITH ET AL., *supra* note 4, at 59, 101 (describing informal norms of the earlier era).

19. See TIMOTHY M. LAPIRA & HERSCHEL F. THOMAS, *REVOLVING DOOR LOBBYING: PUBLIC SERVICE, PRIVATE INFLUENCE, AND THE UNEQUAL REPRESENTATION OF INTERESTS* 8–9 (2017) (reporting that between the 1970s and 2006, “the number of lawmakers turned lobbyists increased 433 percent”); Sam Schwarz, *Former Members Follow a Variety of Paths*, *CQ MAG.*, June 8, 2015, at 15 (reporting that out of 64 former members of the 113th Congress (2013–14), by far the highest percentage (38%) of those who did not retire had joined a law, lobbying, or consulting firm five months after leaving office).

20. Barbara Sinclair, *Spoiling the Sausages? How a Polarized Congress Deliberates and Legislates*, in *2 RED AND BLUE NATION? CONSEQUENCES AND CORRECTION OF AMERICA’S POLARIZED POLITICS* 55, 70 (Pietro S. Nivola & David W. Brady eds., 2008).

21. A “hold” is a threatened objection to a unanimous consent request to set aside one or more of the Senate’s standing rules in order to expedite consideration of legislation on the Senate floor. See VALERIE HEITSHUSEN, *CONG. RESEARCH SERV.*, 96-548, *THE LEGISLATIVE PROCESS ON THE SENATE FLOOR: AN INTRODUCTION* 5 (2017).

is one reason action in the Senate is so often stalled.²² Moreover, the heightened polarization and need for campaign funds give Senators the same incentive to cut short their legislative activities.

4. More Centralized Management Structure (or Chaos?)

Even as Congress has fractured with more and more of its members going their separate ways, party leaders have assumed greater control over each chamber. These two trends might seem at first blush to be contradictory since many cats scurrying around independently is not the picture of an orderly and disciplined organization under strong leadership. But the increased individualism has enhanced the need for strong leaders if Congress is to function at all. Because of the homogeneity of views within each party, members of Congress are more willing to delegate authority to a small group of leaders with the same or similar views. Meanwhile, the greater ideological separation between the parties has heightened the incentive of members in a given party to work together as a cohesive team under a strong leader.²³

This trend has been especially evident in the House. The Speaker and top deputies exercise control over the Rules Committee and floor debate, influence the composition of committees and identity of committee chairs, and help determine the substantive content of bills by swaying committee decisions and making post-committee adjustments.²⁴ Senate rules limit the ability of the Majority Leader to control that chamber to the same extent. But two key rights of the Leader are the privilege of first recognition and the scheduling of legislation on the Senate floor, and the Leader has employed various parliamentary procedures in the Senate that are outside of “regular order” in order to carry out the will of the majority party.²⁵ The Leader also influences committee assignments and is increasingly involved in developing the content of legislation.²⁶

Interestingly, this strange combination of a highly individualistic, outward-looking Congress run by strong leaders was envisioned forty years ago:

22. See SINCLAIR, *supra* note 6, at 55, 59–61, 157 tbl.6.4.

23. See John H. Aldrich & David W. Rohde, *The Consequences of Party Organization in the House: The Role of the Majority and Minority Parties in Conditional Party Government*, in POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA 31, 33–34 (Jon R. Bond & Richard Fleisher eds., 2000); David W. Rohde, *Reflections on the Practice of Theorizing: Conditional Party Government in the Twenty-First Century*, 75 J. POLS. 849, 850 (2013).

24. See SINCLAIR, *supra* note 6, at 21–22, 24–30, 38–39, 149 fig.6.2, 164–65; SMITH ET AL., *supra* note 4, at 191–92, 201, 206–08; 1 GUIDE TO CONGRESS 571–72, 648 (CQ Press, 7th ed., 2013); Sinclair, *supra* note 20, at 57–58.

25. See HEITSHUSEN, *supra* note 21, at 2, 5; SINCLAIR, *supra* note 6, at 47 (describing greater use by majority of “hardball procedural plays”), 57, 83–85; cf. ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 558–59 (2002) (describing Majority Leader Lyndon Johnson’s use of the privilege of recognition to exercise power in the Senate).

26. See SINCLAIR, *supra* note 6, at 53–55; SMITH ET AL., *supra* note 4, at 201.

Were members solely preoccupied with reelection, we would expect them to spend little time in Washington and devote their personal efforts to constituent speeches and district casework. One would expect Congress to be run by a centralized, efficient staff who, in league with policy-oriented interest groups, would draft legislation, investigate the issues, frame palatable solutions, and present the members with the least controversial bills possible. Members of Congress would give little attention to committee work, and then only to committees that clearly served reelection interests. The primary activity of [members of] Congress, rather, would be extended, televised floor debates and symbolic roll call votes, all for show. Such a system would allow the appearance of work while providing ample opportunity for the mending of home fences [O]ne might expect a centralized system with a few leaders exercising power and all others spending their time on personal or electoral matters.²⁷

Other than failing to anticipate the changed economics of campaigning and the consequent increased involvement of interest groups in all aspects of the legislative process, this 1977 description would seem to resemble closely the Congress of the last two to three decades. In the most recent past, however, there have been indications—the failure of party establishment to curb the rise of the Tea Party, Senator Bernie Sanders, and President Donald Trump and the inability of congressional leaders to maintain control over their chambers—that the forces favoring fracturing may be overwhelming the efforts to maintain order through strong, centralized management. If true, the short-term consequence might be chaos in Congress.²⁸ Any such condition would presumably be temporary since chaos seems like an inherently unsustainable state of affairs, but what might follow is anyone’s guess. The 2017 tax bill, approved by a strict party-line vote, marked a return of strong, centralized party management, however ephemeral it may prove to be.

B. Changes in Congressional Staff

1. Change in Number of Committee Staff

Figure 6 shows the changing number of House and Senate committee staff for selected years since 1914. Until the late 1940s, the committees had few staff and most were clerical and secretarial aides. Legislative reorganization acts in 1946 and 1970 authorized the appointment of professional aides to assist the committees, and the number of committee staff especially grew beginning the mid-1970s.²⁹ Following the 1994 election, the Republicans who took control of Congress instituted committee staff cuts.³⁰

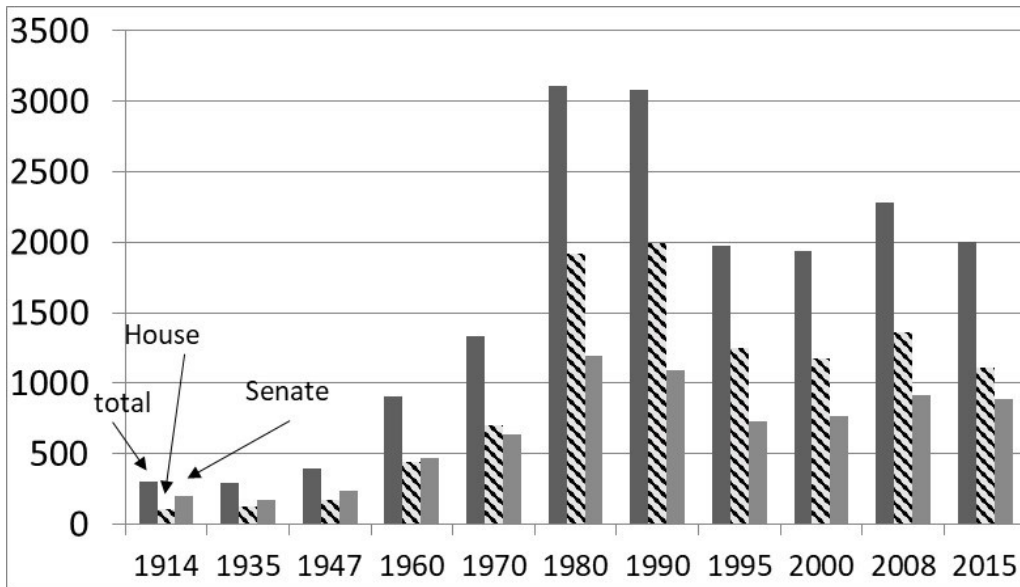
27. Lawrence C. Dodd, *Congress and the Quest for Power*, in CONGRESS RECONSIDERED 269, 271–72 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 1977).

28. See Rauch, *supra* note 14, at 53 (claiming that many reforms have helped produce “chaos syndrome . . . a chronic decline in the political system’s capacity for self-organization”).

29. See Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 202(a), 60 Stat. 812, 834 (1946); Legislative Reorganization Act of 1970, Pub. L. No. 91-510, §§ 301(a), 302(b), 84 Stat. 1140, 1175–77 (1970); George K. Yin, *Legislative Gridlock and Nonpartisan Staff*, 88 NOTRE DAME L. REV. 2287, 2290–92 (2013).

30. SMITH ET AL., *supra* note 4, at 215–16.

Fig. 6: Number of House and Senate Committee Staff, Selected Years, 1914–2015



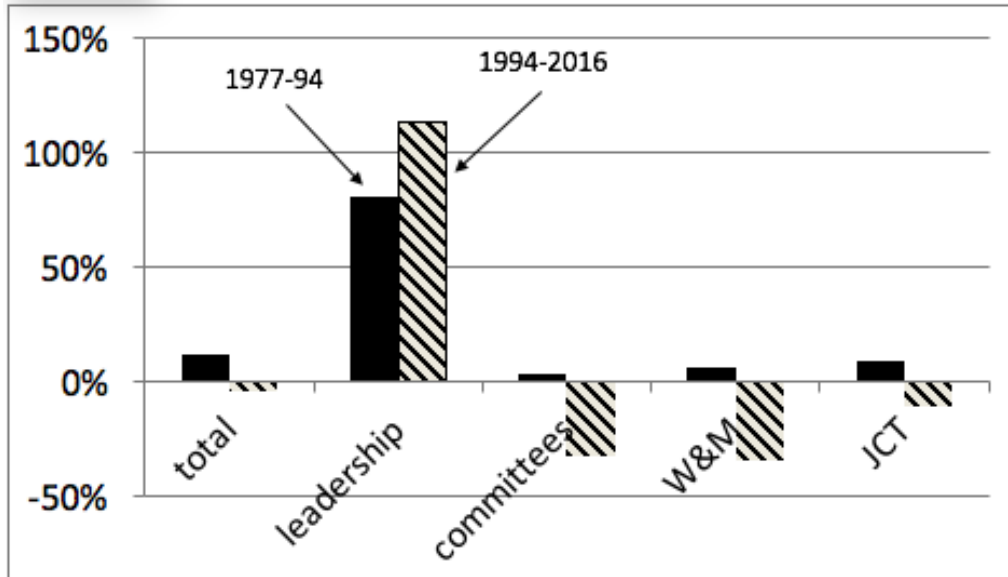
2. Change in Composition of House and Senate Staff

Figure 7 shows the percentage change in different categories of House staff over the last forty years, both before (solid bar) and after (patterned bar) the Republican takeover in 1994. Whereas the number of staff for the entire House, the committees, the Ways and Means Committee (W&M), and the Joint Committee on Taxation (JCT), all saw little change or decreases in each period, the number of leadership staff sharply increased.³¹ This result reflects the much more prominent role played by leadership in the legislative process. Figure 8 shows a roughly similar consequence in the Senate during those two periods.³²

31. The percentage change in the number of JCT staff during the first period in both figures 7 and 8 is from 1978 (not 1977) to 1994. See LARA E. CHAUSOW ET AL., CONG. RESEARCH SERV. R43947, HOUSE OF REPRESENTATIVES STAFF LEVELS IN MEMBER, COMMITTEE, LEADERSHIP, AND OTHER OFFICES, 1977-2016 17 tbl.7 (2016).

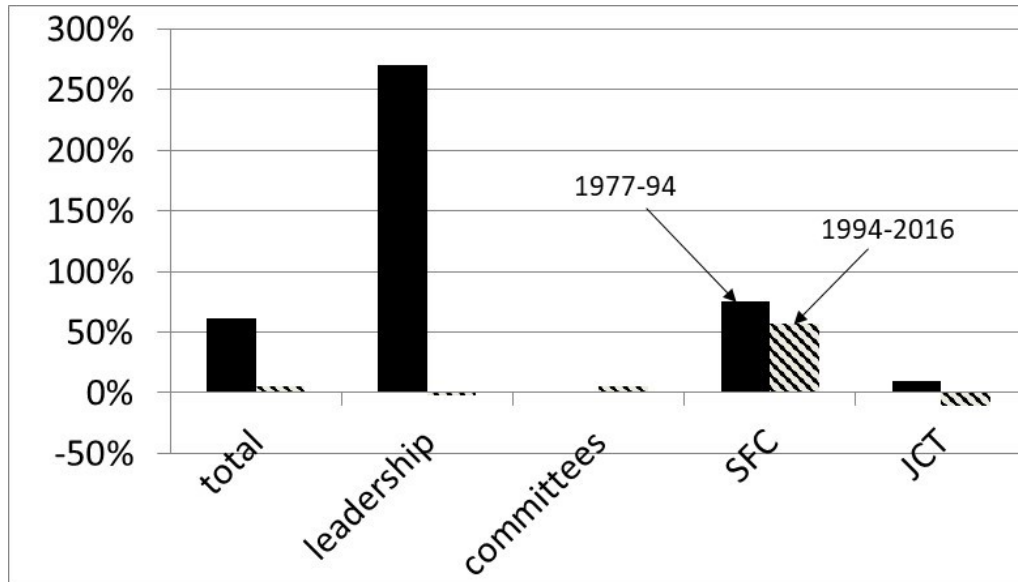
32. Until the mid-1970s, the Senate Finance Committee (SFC) had a very small staff, with no separate staff for the minority party members, and relied heavily on the JCT staff for assistance. See Bernard M. “Bob” Shapiro, *The Last 50 Years: The Evolving Role of the Joint Tax Committee*, 151 TAX NOTES 1125, 1125–26 (2016). Some of the increases for the Finance Committee staff shown in figure 8 reflect its effort to catch up on the size of its staff.

Fig. 7: Percentage Change, Number of House Staff by Category, 1977-94 and 1994-2016³³



33. CHAUSOW ET AL., *supra* note 31.

Fig. 8: Percentage Change, Number of Senate Staff by Category, 1977–94 and 1994–2016³⁴

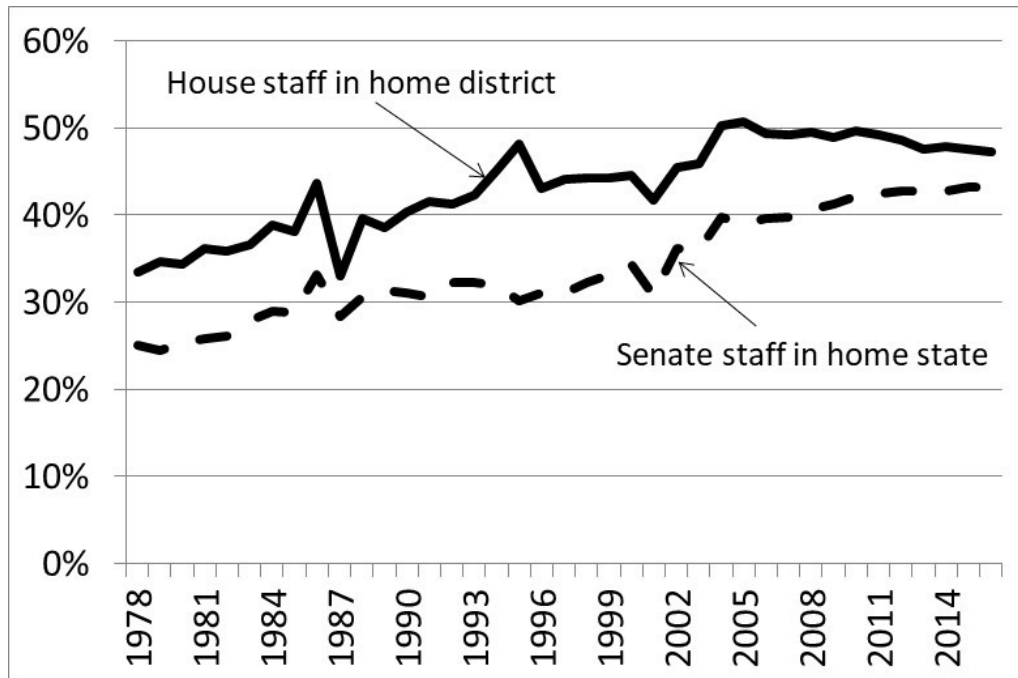


3. Change in Workplace of Congressional Staff

Figure 9 shows the proportion of staff allocated by members of Congress to their home districts or states, rather than Washington, D.C., over the last forty years. There has been a steady shift of member staff away from D.C., rising in the House from about one-third to almost one-half outside D.C., and in the Senate, from about one-quarter to over 40%. These trends are consistent with the increasingly individualistic, outward-looking focus of members of Congress. They see their responsibilities and future opportunities more and more in performing constituent services and building electoral connections at home rather than performing legislative and oversight functions in D.C.

34. *Id.*

Fig. 9: Percentage of Member Staff Working in Home District/State, 1978–2016³⁵



III

EFFECT OF CHANGES ON TYPE OF TAX LEGISLATION PRODUCED

A. Changing Role of Committees and Decline in Deliberation

The changes described in Part II have especially affected the role of the committees and committee chairs. Under an “informational” model of committee function,³⁶ committees provide members of Congress with an opportunity to specialize and develop expertise for the benefit of the entire chamber. Respect for a committee’s recommendations depends upon how closely they align with the general preferences of the chamber majority. When partisan differences are not too stark, committee members have an interest in setting aside some of their differences to locate the “sweet spot” that will win chamber approval. As Representative Mills, long-time chair of the House Ways and Means Committee, explained it: “I think if I can get a vast majority of the membership of the Ways and Means Committee to agree on something, that I’ve

35. *Vital Statistics on Congress*, *supra* note 2, tbls.5-3, 5-4.

36. SMITH ET AL., *supra* note 4, at 178.

got a vast majority of the House to agree on the same thing.”³⁷ Committees that repeatedly accomplish this feat become influential. Overall, the informational model gives the chair and committee members an incentive to take their committee responsibilities seriously and reach compromises.³⁸

In contrast, under a “partisan” model of the committee system,³⁹ the committees are essentially branches of the congressional parties and exist largely to serve their interests. The party leadership determines the committee’s chair, membership, and agenda, all with an eye on furthering the party’s policy preferences. If partisan differences are very stark, then compromise may be neither feasible nor necessary since cohesion within the majority party controls outcomes—both in committee and the congressional chamber.⁴⁰ Under this model, for committee members, “substantive expertise and hard work on one’s committee [produce] relatively little payoff in influence.”⁴¹

At any given time, committees perform both informational and partisan roles. But the changes over roughly the last twenty-five years have caused some shift from the former function to the latter. Combined with the abbreviated legislative schedule in D.C.—making it harder for committees to perform serious work even if they were so inclined—and term limits and other procedural restraints placed on the chairs (restricting their effectiveness), the overall result has been to reduce the influence of the committees and committee chairs.⁴² In the extreme case, the committees are bypassed altogether and legislation is developed by the chamber’s leadership and the leader’s top aides.⁴³

These changes have perhaps been no more evident than in the House Ways and Means Committee. Because of the Origination Clause and the reputation of the House as the “workhorse” of Congress, the Ways and Means Committee has traditionally been the venue to develop virtually all serious tax legislation. Over the years, the committee maintained its influence by reporting balanced bills

37. See JULIAN E. ZELIZER, *TAXING AMERICA: WILBUR D. MILLS, CONGRESS, AND THE STATE, 1945-1975*, at 123 (1998).

38. See SINCLAIR, *supra* note 6, at 16–17; SMITH ET AL., *supra* note 4, at 178–79; ZELIZER, *supra* note 37, at 145 (quoting view that members who earned prestige among their peers performed their legislative “homework”).

39. SMITH ET AL., *supra* note 4, at 180.

40. *See id.*

41. SINCLAIR, *supra* note 6, at 265.

42. *See id.* at 266; SMITH ET AL., *supra* note 4, at 191–92, 209–12; Craig Volden & Alan Wiseman, *How Term Limits for Committee Chairs Make Congress Less Effective*, WASH. POST (Jan. 4, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/04/how-term-limits-for-committee-chairs-make-congress-less-effective/> [<https://perma.cc/AL3D-G6EW>] (“[C]ommittee chairs are being replaced just as they hit their stride.”).

43. See SINCLAIR, *supra* note 6, at 18–21, 51–53, 151 fig.6.3; Sean Sullivan & Robert Costa, *Republicans Are in Full Control of Government—But Losing Control of Their Party*, WASH. POST (July 23, 2017), https://www.washingtonpost.com/powerpost/republicans-are-in-full-control-of-government—but-losing-control-of-their-party/2017/07/23/b1ab6bbc-6d92-11e7-9c15-177740635e83_story.html [<https://perma.cc/J2U8-5QH6>] (reporting that Senate’s 2017 health reform bill was written by Majority Leader and his aides).

designed to appeal to a broad cross-section of the House. Only more senior members holding safe congressional seats were generally assigned to the committee to enable them to follow a norm of restrained partisanship in their committee work.⁴⁴

Today's committee is much different. Increasingly, newer members from competitive districts are assigned to the committee to give them an electoral and fund-raising boost. Meanwhile, the power of the committee has largely been transferred to party leaders.⁴⁵ Speaker Boehner's famed disparagement of a 2014 tax reform bill developed by Ways and Means Committee Chairman Camp and resolution of the 2012 fiscal cliff crisis without the participation of the tax committees and their chairs are just two recent illustrations.⁴⁶ Although one hesitates to draw too strong a conclusion from the truly bizarre 2017 session of Congress, the process it followed in trying to repeal and replace the ACA seems to have been an extreme version of the change just described. For important legislation affecting millions of Americans, committee involvement in both the House and Senate was essentially nonexistent.⁴⁷

Congress followed largely the same process in passing the 2017 tax bill. Each tax committee considered the massive legislation, potentially affecting every person and business in the country, in less than two weeks and marked up its bill

44. See JOHN F. MANLEY, *THE POLITICS OF FINANCE: THE HOUSE COMMITTEE ON WAYS AND MEANS* 45–53, 63–87 (1970); ZELIZER, *supra* note 37, at 42; Hon. Thomas B. Curtis, *The House Committee on Ways and Means: Congress Seen Through a Key Committee*, 1966 WIS. L. REV. 121, 125, 141 (1966). Figure 1 shows that there clearly were partisan differences on Ways and Means during earlier periods, but legislative conditions apparently gave the committee members sufficient incentive to overcome their differences.

45. See John H. Aldrich et al., *Richard Fenno's Theory of Congressional Committees and the Partisan Polarization of the House*, in CONGRESS RECONSIDERED, *supra* note 17, at 193, 209; Yin, *supra* note 14, at 1027, 1040–41 (appendix).

46. See SMITH ET AL., *supra* note 4, at 192–93 (describing Camp's absence from fiscal cliff resolution as a "shocking turn of events"); Ed O'Keefe, *Boehner on Tax Reform: "Blah, Blah, Blah, Blah,"* WASH. POST (Feb. 26, 2014), <https://www.washingtonpost.com/news/post-politics/wp/2014/02/26/boehner-on-tax-reform-blah-blah-blah-blah/> [<https://perma.cc/67AT-S4YH>]. For a summary of the fiscal cliff events, see Wesley Elmore & Lindsey McPherson, *U.S. Goes Over Fiscal Cliff, but Just for a Day*, 138 TAX NOTES 12 (2013).

47. See Robert Pear, *Law Took Months to Draft; Repeal May Be Much Swifter*, N.Y. TIMES, Mar. 8, 2017, at A14 (describing secretive and "lightning fast" first consideration by House committees and House); Erin Mershon & Lindsey McPherson, *How the House Finally Got to "Yes" on Health Care*, CQ ROLL CALL (May 5, 2017), <https://www.rollcall.com/news/politics/house-finally-got-yes-health-care> [<https://perma.cc/3YMU-TJEP>] (describing chaotic second House effort); Jennifer Steinhauer et al., *How a Health Care Bill Failed: G.O.P. Divisions and a Fed-Up President*, N.Y. TIMES, July 19, 2017, at A14 (describing process failures in first Senate effort); Thomas Kaplan, *Five Takeaways from the Failed Senate Effort to Repeal Obamacare*, N.Y. TIMES (July 28, 2017), <https://www.nytimes.com/2017/07/28/us/politics/senate-health-care-highlights-mccain-murkowski.html> [<https://perma.cc/2W2B-FCY5>] (describing failures in second Senate effort); Paul Kane, *The ACA Repeal Effort Was Bad News from the Start, with Little Public Scrutiny and Little Chance for Success*, WASH. POST (Sept. 25, 2017), https://www.washingtonpost.com/powerpost/the-aca-repeal-effort-was-bad-news-from-the-start-with-little-public-scrutiny-and-little-chance-for-success/2017/09/25/635a060e-a1e4-11e7-b14f-f41773cd5a14_story.html?utm_term=.15a02e659d8b [<https://perma.cc/57QD-BKRC>] (describing final Senate failure).

in just four days. Neither committee convened a single hearing subsequent to introduction of the proposed legislation.⁴⁸ In contrast, Congress took about two years to consider and approve the last major rewrite of the tax laws—the Tax Reform Act of 1986—with the House Ways and Means Committee holding thirty days of full committee hearings, ten days of subcommittee hearings, and twenty-six days of markup, and the Senate Finance Committee holding thirty-six days of full committee hearings, six days of subcommittee hearings, and seventeen days of markup.⁴⁹ Senate floor action on the 2017 bill was so rushed and non-transparent that the Senate approved its almost 500-page bill just hours after receiving it, when it still contained indecipherable, hand-scribbled changes.⁵⁰ The secrecy and speedy passage of the far-reaching legislation contributed to its complexity and seems destined to produce many dubious outcomes, both intended and unintended.⁵¹

The demise of the committees has meant a loss of deliberation and legislative expertise.⁵² The “hard work” of legislating that has mostly been performed by the committees—identifying and investigating problems, devising and analyzing possible solutions, obtaining and evaluating input from the public and outside experts, debating solutions and reaching compromises during markups, floor debate, and conferences, and drafting careful legislative language to reflect the intended solution—has simply become more and more rare in today’s Congress.⁵³ The unwillingness to undertake the “admittedly arduous . . . robust deliberative process” is symptomatic of a contemporary attitude in Congress that “deliberation, fairness, bipartisanship, and debate are impediments to the larger goal of achieving political and policy success.”⁵⁴

48. See Jonathan Curry, *Tax Bill Takes a Topsy-Turvy Road to GOP Victory*, 157 TAX NOTES 1667, 1668 (2017); Erica Werner, *Precision Sacrificed for Speed as GOP Rushes Ahead on Taxes*, WASH. POST (Dec. 10, 2017), https://www.washingtonpost.com/business/economy/precision-sacrificed-for-speed-as-gop-rushes-ahead-on-taxes/2017/12/10/876ab274-dc62-11e7-b1a8-62589434a581_story.html?utm_term=.898e19eea17f [<https://perma.cc/3ASQ-97FB>].

49. See STAFF OF J. COMM. ON TAX’N, JCS-10-87, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 1–5 (Comm. Print 1987).

50. See John Cassidy, *The Passage of the Senate Republican Tax Bill Was a Travesty*, NEW YORKER (Dec. 2, 2017), <https://www.newyorker.com/sections/news/the-passage-of-the-senate-republican-tax-bill-was-a-travesty> [<https://perma.cc/NY7J-8LAA>]; Jim Tankersley & Alan Rappoport, *A Hasty, Hand-Scribbled Tax Bill Sets Off an Outcry*, N.Y. TIMES (Dec. 1, 2017), <https://www.nytimes.com/2017/12/01/us/politics/hand-scribbled-tax-bill-outcry.html> [<https://perma.cc/S2DV-XF5X>].

51. See Brian Faler, *“Holy Crap”*: Experts Find Tax Plan Riddled with Glitches, POLITICO (Dec. 6, 2017), <https://www.politico.com/story/2017/12/06/tax-plan-glitches-mistakes-republicans-208049> [<https://perma.cc/EK8T-FA5B>]; Jim Tankersley, *A Curveball from the New Tax Law: It Makes Baseball Trades Harder*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/us/politics/baseball-tax-law.html?smprod=nytcare-ipad&smid=nytcare-ipad-share> [<https://perma.cc/U3W2-VACT>] (describing surprising effect of new tax law on trading of professional athletes).

52. See LAPIRA & THOMAS, *supra* note 19, at 12–17 (summarizing recent literature on reduced legislative expertise); MANN & ORNSTEIN, *supra* note 16, at 216; SINCLAIR, *supra* note 6, at 265–66.

53. Cf. Curtis, *supra* note 44, at 128–43 (describing extended deliberative process undertaken by Ways and Means Committee in 1964).

54. MANN & ORNSTEIN, *supra* note 16, at 170–71.

How have these changes affected the substance of tax legislation? Michael Doran has argued that some of the changes previously noted—heightened polarization in Congress and its more centralized management structure—as well as relaxed budgetary constraints on tax legislation in recent years, have all facilitated legislation that is less “particularistic” than legislation in the past.⁵⁵ In general, he defined a particularistic provision as one that is narrow in scope affecting few taxpayers.⁵⁶ He very roughly illustrated the reduced particularism by comparing the shorter average length of tax statutes enacted between 2001 and 2013 with those passed between 1981 and 1998.⁵⁷

His reasoning is straightforward. The changes in party ideology—increased divisions between the parties but cohesion within them—and congressional organizational structure have reduced tax committee influence and involvement in producing legislation. This effect is important because the tax committees have historically been the “pre-eminent vehicle for pork-barrel legislation,” that is, highly particularistic changes that benefit certain constituents and interest groups and not others.⁵⁸ More generally, the greater party control over legislative outcomes has made it less necessary to engage in logrolling—the trading of votes to secure a majority in favor of the bill—and “less logrolling implies less legislative particularism.”⁵⁹ Finally, relaxed budgetary constraints, such as non-enforcement of PAYGO rules that require revenue losses to be offset by revenue increases, have further facilitated less particularism. Proposed tax increases, including those that merely offset revenue losses in an overall revenue neutral bill, encounter interest group opposition that causes legislators to step gingerly and develop more particularistic proposals. Proposed tax cuts do not face the same problem and therefore do not have the same effect.⁶⁰

Prior analysts have tried to explain tax legislation principally by focusing on legislator motivations, but Doran smartly shows that exogenous events and institutional structures are additional factors to consider.⁶¹ His claim may also complement my assertion regarding structural legislation. Since such legislation may well be particularistic, its absence may contribute to the phenomenon Doran identifies.

55. See Michael Doran, *Tax Legislation in the Contemporary U.S. Congress*, 67 TAX L. REV. 555, 561, 586–96 (2014).

56. See *id.* at 568.

57. See *id.* at 568–69.

58. See *id.* at 593; SMITH ET AL., *supra* note 4, at 179; ZELIZER, *supra* note 37, at 123 (describing Mills partaking in interest group politics).

59. Doran, *supra* note 55, at 591.

60. See *id.* at 595–96, 600.

61. See Richard L. Doernberg & Fred S. McChesney, *Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986*, 62 N.Y.U. L. REV. 891 (1987); Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913 (1987); Doran, *supra* note 55, at 580, 586–88; Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 (1990).

Still, his explanation for the lack of particularism in recent years seems incomplete. He asserts, for example, that because of institutional changes in the House, “a powerful speaker can turn aside the distributive tendencies of the tax-writing committees and . . . bring a clean bill to the floor under a rule that precludes or sharply limits amendments.”⁶² What he does not explain is why party leaders may have made that choice in the recent past (or might do so in the future). Given the heightened ideological polarization between the parties in Congress and the escalating cost of campaigns, is there any reason to believe legislators have less reason than previously to make particularistic changes that reward friends or punish enemies, whether inside or outside the legislature?

One possible account is that a clean tax amendment, such as a change in tax rates, sends an especially salient policy message to supporters. The problem with this explanation is that tax bills are not limited to a handful of provisions. Party leaders can produce legislation that changes tax rates, or makes other non-particularistic changes with strong policy signals, and also includes particularistic provisions that pick winners and losers. Another possibility is that the decline in deliberation has left Congress unable to produce particularistic tax legislation, but this claim is implausible. Without deliberation, it may be harder to identify and develop good policy. But it’s not especially challenging to produce bills establishing tax benefits and burdens, and there is always plenty of private-sector help available to lend a hand if the work gets too hard.

Yet another account is that a clean bill may have started out messy, with the removal of particularistic harmful tax provisions having produced the desired return from interest groups and other legislators.⁶³ The validity of this proposition could be researched, although it would be tricky to determine exactly which prior harmful tax ideas should be considered. Moreover, at some point, the effect of crying wolf might be expected to exhaust itself. This account also does not explain the absence of provisions favoring particular taxpayers.

Finally, it is conceivable that the policy preference of the majority in recent years was for clean tax legislation, with that preference being strong enough to swamp other competing objectives—including interest in using legislation to maximize campaign contributions. Perhaps this outcome resulted from a confluence of conservative and liberal principles antagonistic to the picking of winners and losers, at least at the level of discrete taxpayers or industries. This proposition would be interesting to examine and establish, a development essentially contrary to the general manner tax legislation has been produced in this country.

In summary, Doran has usefully identified some legislative conditions—high interparty division but intraparty cohesion, centralized congressional management and reduced committee influence, and little or no budget

62. Doran, *supra* note 55, at 599.

63. *See id.* at 572–73.

constraints—that may permit the enactment of non-particularistic legislation. But none of these factors would lead party leaders to choose that form of legislation, and other developments give reason to think leaders would be reluctant to do so. If tax legislation has become less particularistic in the recent past, the reason remains a mystery. Even with all of the factors present, the 2017 tax bill is marked by considerable particularity.

Doran shows the challenge of explaining tax legislative outcomes, let alone making predictions for the future. Focusing on just structural tax legislation both simplifies and complicates the task. Because such legislation generally has modest policy objectives and probably low political salience, its production would likely not be much affected by concerns about campaign contributions, budgetary impact, or the picking of winners and losers.⁶⁴ On the other hand, the technical nature of such legislation requires delving a little deeper into the legislative process to consider the impact of the professional tax staff who would almost certainly craft the legislation. The next subpart reviews changes in such staff over the years.

B. Changes in Professional Staff Working on Tax Legislation⁶⁵

The following discussion describes the professional staff involved in the formation of tax legislation during four periods since passage of the first Act of the modern income tax in 1913. The dates specified for each period are very approximate. Although specific events help to mark some of the transitions, the practical implementation of change varied, and evidence of change is limited. Moreover, some of the shifts occurred because of factors that are not clearly date-specific, such as the increased partisanship in Congress illustrated in Figures 1 and 2. Finally, the effect of any change is necessarily a function of the particular persons involved—the legislators and their staff—and variation from the general trend may result merely from that factor. Still, although the dates of change are approximate, the trends described below should present an accurate overall picture.

1. Period I: 1913–1926: Treasury Staff Only

During this period, Treasury dominated the tax legislative process. As a result of its sole custody of tax returns, responsibility for tax administration, and detailed knowledge of the nation's fiscal situation, the Department was especially well situated to identify the need for possible tax legislative changes. Moreover, Treasury had professional staff, including economists, to prepare analysis from the data and other information that could serve as the basis for specific

64. One exception was the repeal of the *General Utilities* doctrine in 1986, a long-sought structural change that ultimately was approved in part because the doctrine became associated with merger activity in the oil and gas industry. See Lee Sheppard, *General Utilities Repeal and "Dynasty,"* 30 TAX NOTES 85 (1986).

65. Portions of this section have been drawn from George K. Yin, *Codification of the Tax Law and the Emergence of the Staff of the Joint Committee on Taxation*, 71 TAX L. REV. (forthcoming 2018).

proposals.⁶⁶ Members of Congress had few resources of their own and were generally forced to make somewhat uninformed choices between the Treasury's position on proposed legislation and those of the private sector. One Senator rued Congress's role as "mere rubber stamps" to Treasury during this period.⁶⁷

2. Period II: 1927–1975: Treasury and JCT Staffs Only

Congress established the JCT and its staff in 1926,⁶⁸ and from 1927 until sometime in the mid-1970s, the Treasury and JCT staffs were essentially the only unelected professionals directly involved in the formation of tax legislation. During this period, Congress also received help from professionals working for a legislative reference unit in the Library of Congress (created in 1914 and now the Congressional Research Service), the House and Senate Offices of Legislative Counsel (formed in 1924 from legislative drafting services approved in 1918), and the General Accounting Office (created in 1921 and now the Government Accountability Office). But none of those staffs worked directly for the committees or helped with day-to-day work on the formation of legislation.⁶⁹

As shown in Figure 6, the committees had few staff of their own before 1946 and most were clerical and secretarial aides. Aside from the JCT staff, about the only professional committee staff until 1946 belonged to the House and Senate Appropriations Committees.⁷⁰

In part due to satisfaction with the JCT staff, Congress in 1946 authorized a small number of nonpartisan professionals for each committee.⁷¹ The committees, however, were only partly successful in hiring qualified personnel. According to one noted congressional scholar, roughly half of the new committee staffers—supposedly picked on a nonpartisan basis—were selected with political considerations in mind.⁷² Moreover, by that point, the JCT staff had a twenty-year head start in working on tax legislative matters and developing close relationships with key legislators. Thus, it was not until sometime after the Legislative Reorganization Act of 1970, which authorized a greater number of professionals for the committees with separate allocations for the majority and

66. See ROY BLOUGH, *THE FEDERAL TAXING PROCESS* 97–99, 104–06 (1952).

67. *Revenue Act of 1926: Hearings on H.R. 1 Before S. Comm. on Finance*, 69th Cong. 215–16 (1926) (statement of Sen. Andrieus Jones).

68. See *Revenue Act of 1926*, Pub. L. No. 69-20, § 1203, 44 Stat. 9, 127–28 (1926). Until 1976, the name of the committee was the "Joint Committee on Internal Revenue Taxation." See *Tax Reform Act of 1976*, Pub. L. No. 94-455, § 1907(a)(1), 90 Stat. 1520, 1835 (1976).

69. See Yin, *supra* note 29, at 2290–97. The Congressional Budget Office was not created until 1974 and its staff also does not work directly on legislation like the JCT or committee staff. See *id.* at 2300–01.

70. See CHARLES L. CLAPP, *THE CONGRESSMAN: HIS WORK AS HE SEES IT* 255 (1963).

71. See *Legislative Reorganization Act of 1946*, Pub. L. No. 79-601, § 202(a), 60 Stat. 812, 834 (1946); 92 CONG. REC. H6518 (June 8, 1946) (statement of Sen. La Follette, Jr.); Michael J. Malbin, *Delegation, Deliberation, and the New Role of Congressional Staff*, in *THE NEW CONGRESS* 134, 138 (Thomas E. Mann & Norman J. Ornstein eds., 1981).

72. See George B. Galloway, *The Operation of the Legislative Reorganization Act of 1946*, 45 AM. POL. SCI. REV. 41, 55 (1951); JOSEPH COOPER, *CONGRESS AND ITS COMMITTEES* 264–65 (1988); WILLIAM L. MORROW, *CONGRESSIONAL COMMITTEES* 53–56 (1969).

minority parties, that the monopoly of the JCT and Treasury staffs in the tax legislative area truly began to be broken.⁷³

Three other important events occurring between 1974 and 1980 contributed to the end of the monopoly: Representative Mills lost his chair of the Ways and Means Committee in 1974 (after seventeen years in that position), Larry Woodworth resigned as JCT chief of staff in 1977 (after fourteen years in that position and thirty-four years total on that staff), and Senator Long lost his chair of the Finance Committee in 1980 (after sixteen years in that position). Since Woodworth's departure, due to frequent turnover among the tax committee chairs or the JCT chief of staff, there has never been a period even close to the length of time Woodworth and his predecessor at the JCT (Colin Stam, who was chief of staff for twenty-six years and a staff member for thirty-seven years) were able to work with the same committee chairs and develop a close, trusting relationship with them.⁷⁴

The comparative influence of the JCT and Treasury staffs fluctuated during this period, with Treasury generally being more dominant throughout the 1930s and the JCT staff playing an increasingly influential role thereafter. But for purposes of this article, the main takeaway is that for almost fifty years in the middle of the twentieth century, the tax legislative process was principally served by just two staffs—Treasury's and the JCT's—known for their nonpartisan expertise.⁷⁵

3. Period III: 1976–1990: Treasury, JCT, and Mostly Nonpartisan Other Staffs

The Legislative Reorganization Act of 1970 formally gave birth to the bipartisan staff structure that remains today on most committees—but not the JCT—where the majority and minority members have separate staff. As shown in Figure 6, the mid-1970s marked the beginning of a sharp increase in the number of committee staff that continued until the first half of the 1990s. As a result, during period III, the JCT and Treasury staffs were joined by professional tax committee aides working for either the majority or minority parties. But the committee staff during this period, especially from the Senate, generally acted

73. See Legislative Reorganization Act of 1970, Pub. L. No. 91-510, §§ 301(a), 302(b), 84 Stat. 1140, 1175–77 (1970); MICHAEL J. MALBIN, *UNELECTED REPRESENTATIVES: CONGRESSIONAL STAFF AND THE FUTURE OF REPRESENTATIVE GOVERNMENT* 181 (1979); Walter Kravitz, *The Advent of the Modern Congress: The Legislative Reorganization Act of 1970*, 15 LEGIS. STUD. Q. 375, 379 (1990); Yin, *supra* note 29, at 2292.

74. See E. W. Kenworthy, *Colin F. Stam: A Study in Anonymous Power*, in *ADVENTURES IN PUBLIC SERVICE* 105, 116 (Delia Kuhn & Ferdinand Kuhn eds., 1963) (describing Stam's ability "to keep the committees out of trouble, and individual members from making fools of themselves"); MALBIN, *supra* note 73, at 170–77, 186 (describing Woodworth's influence); ZELIZER, *supra* note 37, at 49 ("More than any other individual, Mills would come to rely on Woodworth as a confidant and advisor.").

75. See Curtis, *supra* note 44, at 126–28 (describing role of JCT staff in early 1960s in formation of tax legislation); Ronald A. Pearlman, *The Tax Legislative Process: 1972-1992*, 57 TAX NOTES 939, 941–42 (1992); Shapiro, *supra* note 32, at 1127.

with restrained partisanship, consistent with the views of the tax committee members at the time.⁷⁶

4. Period IV: 1991–Present: Treasury, JCT, and Mostly Partisan Other Staffs

During period IV, the Treasury, JCT, and committee staffs have been joined by additional professionals working directly on tax legislative matters. Beginning in the mid-1980s, it became increasingly common for individual members of the committees to hire tax specialists on their personal staffs to help with the member's tax committee responsibilities. In addition, beginning sometime in the early 1990s, the leadership of each house of Congress began playing a more active role in the formation of all legislation including tax legislation. Thus, since around the early 1990s until the present, there have been four main groups of legislative staff participating in the formation of tax legislation: leadership staff, partisan committee staff (majority and minority), personal staff of members, and the JCT staff.⁷⁷

The first three staffs have become increasingly partisan, consistent with the heightened partisanship in Congress and the tax committees during this period. Leadership and personal staff tend to reflect closely the political and policy preferences of their bosses. With some exceptions, committee staff have also become more partisan. As stated by one recent observer, “it is a mistake to think that committee staff are apolitical bureaucrats Committee staff work for the committee chair or ranking member, and it is rarely the case that they are not extremely closely aligned with their boss's personal preferences and political agenda”⁷⁸

The JCT staff's role in the tax legislative process has changed during this period and not simply because of the greater number of participants. Effective beginning in 1974, the staff was formally designated as the official scorekeeper in Congress on tax matters, a responsibility that continues to this day.⁷⁹ Revenue estimating, described as largely an “afterthought” in 1972, has since become much more sophisticated and important.⁸⁰ At the same time, however, the staff's influence in developing tax legislation has been overshadowed somewhat by the

76. See Figure 2; CLAPP, *supra* note 70, at 261; MANLEY, *supra* note 44, at 63–87; Curtis, *supra* note 44, at 141.

77. See Shapiro, *supra* note 32, at 1128–29.

78. Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 88 (2015); see Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 845–46 (2014); Christine DeGregorio, *Staff Utilization in the U.S. Congress: Committee Chairs and Senior Aides*, 28 POLITY 261, 272 (1995) (reporting (albeit for an earlier era) greatest delegation of responsibility to committee staff whose principal goal was loyalty to the committee chair). Once again, committee staff of the Senate are generally less partisan than the House's.

79. The designation was enacted in 1985 but subsequently included as section 201(f) of the 1974 Congressional Budget Act. See Pub. L. No. 99-177, § 273, 99 Stat. 1037, 1098 (1985); Pub. L. No. 101-508, § 13202(b), 104 Stat. 1388, 1388-615 (1990); Pub. L. No. 105-33, § 10102(c), 111 Stat. 251, 678 (1997).

80. See Pearlman, *supra* note 75, at 940–41.

other professionals involved in the process.⁸¹

There are a number of reasons for the change. As nonpartisan staff of a joint committee, the JCT staff serves two or four principal masters—the chairs and ranking members of the tax committees—and 535 members in all, whereas all of the other professionals essentially serve just one legislator and can closely align their professional responsibilities to that person. The other professionals also have much closer physical proximity to their boss than the JCT staff and are therefore more accessible.⁸² It is thus not hard to understand why members of Congress may prefer to rely more on their “own” personal or committee staff rather than a nonpartisan staff that belongs to no one. The JCT staff’s position as scorekeeper tends to underscore the different staff roles. A scorekeeper is analogous to a referee in a sporting contest, and as Congress has increasingly separated itself into opposing “teams,” members of Congress reasonably perceive the JCT staff, unlike their own staff, as standing apart from their “side.” Thus, as its revenue-estimating role has grown in visibility and importance, the JCT staff is increasingly viewed like staff of a legislative support organization (such as CBO, CRS, and GAO) rather than committee staff helping directly in the formation of legislation.

Finally, during this period, a similar phenomenon has occurred in the executive branch. It too has developed a more centralized organizational structure with important initiatives originating from, and controlled by, the White House and OMB rather than the agencies. This change has tended to introduce more partisan players from the executive branch into the legislative process. In short, a greater number of partisan voices have tended to dominate the formation of tax legislation during period IV.⁸³

C. Impact on Structural Legislation

To determine the impact of these changes in the legislative process on the production of tax legislation, this section subdivides legislation into a few broad categories. Because tax bills typically include a range of different types of provisions, drawing conclusions based on the entirety of a bill may obscure important distinctions.⁸⁴

Two types of complex tax changes are structural elements of a major tax reform and structural changes unconnected to major reform. A difference between the two is their policy impact. In general, unlike major tax reform, a

81. See Shapiro, *supra* note 32, at 1130. A recent text about Congress does not even mention any role of the JCT staff other than revenue estimating. See SMITH ET AL., *supra* note 4, at 177.

82. The JCT staff’s locational disadvantage was exacerbated in recent years when it lost its long-time suite of offices on the first floor of the Longworth Building and was relocated to offices about six blocks from the Capitol.

83. See Pearlman, *supra* note 75, at 943 (describing less significant role of Treasury since 1986 and greater involvement of White House and OMB); Shapiro, *supra* note 32, at 1129.

84. Cf. Doran, *supra* note 55, at 581 (criticizing accounts that “collapse the entire legislative package, with all its complexity, into [a single theme]”).

structural change that is not part of a major reform has modest policy significance since it is merely trying to maintain the sound functioning of existing law.

Non-complex tax changes may also have high or low policy significance. The first type might be a change in tax rates, although some rate changes have complicated collateral effects.⁸⁵ A non-complex change with low policy significance would be a straightforward technical correction, such as revision of an incorrect term or grammatical error in the statute. A technical correction that has a collateral effect on many parts of the tax law might be analogous to a structural change—complex legislation with low policy significance.

Table 1 summarizes the expected cost and benefit to tax staff and legislators who produce these categories of tax provisions. The analysis assumes that complex changes cost more, in terms of time and effort, than non-complex ones. It also assumes that, at least for strongly partisan legislators and staff, tax changes having higher policy significance provide a greater benefit than those that do not.

Type of tax legislative change	benefit	cost
Structural change unconnected to major reform	Low	High
Structural change implementing a major tax reform	High	High
Non-complex change with high policy impact (tax rate change)	High	Low
Non-complex change with low policy impact (straightforward technical correction)	Low	Low

Table 1 suggests that a non-complex change with a high policy impact, such as a tax rate change, would be an especially favored form of tax provision. This conclusion might seem to support Doran's thesis since a tax rate change is his quintessential example of a non-particularistic provision.⁸⁶ His claim, however, relates to the non-particularistic nature of an entire bill. As previously discussed, he must therefore explain the exclusion of other changes in tax bills in the recent past, including provisions picking individual winners and losers. They may provide a high benefit, in terms of policy significance or political or monetary return, be particularistic, and yet involve a fairly low cost of production, especially if private-sector help is supplied.

Table 1 also suggests that a structural change unconnected to major reform would be a disfavored form of tax provision. To a partisan staffer or legislator looking to achieve a significant policy change, this high-cost, low-return form of legislation would seem to have little appeal.

Importantly, the cost-benefit analysis of such legislation may differ for a nonpartisan staffer such as one working for the JCT. To understand why, it is

85. The tax law may now be so entangled as to make virtually any change a complex one. If so, the only meaningful difference may be the high or low policy significance of a change.

86. See Doran, *supra* note 55, at 568.

necessary to consider some differences between JCT and partisan staff positions and the type of professionals who are commonly attracted to each.

In general, the JCT's staff is larger than any of the job settings of partisan staff. Partisan staffers who assist leadership or a single member of Congress generally perform their tax responsibilities on their own. In addition, partisan committee staffers work on smaller staffs than the JCT's in part because the division of committee staff between majority and minority parties produces some duplication of staff effort. The different size of the staff settings enables JCT staff to specialize more than partisan staff and perform more in-depth work in fewer areas of responsibility.

Partisan staff positions are generally more political than the JCT's. Partisan staffers work more closely with members of Congress and may perform some "political" tasks, such as obtaining intelligence from other offices about legislation, helping to assemble interest group and legislator coalitions in favor or against a particular initiative, strategizing on legislative tactics, and generally assisting their boss in determining the politics of a particular issue. In contrast, JCT staff spend more time developing and evaluating legislative proposals. The staff's lawyers, economists, and accountants typically work closely together to identify and analyze options and try to anticipate all of their legal and economic consequences. The staffers continue the analytical process as they help draft the proposed legislation, document its meaning and intended purpose, and estimate its revenue consequences. The difference in staff size and duties generally means that partisan staffers spend less time than JCT staff analyzing the details of legislative proposals.⁸⁷

Staff involvement in policy debates is also different. If they wish, partisan staffers can simply echo the policy views of their particular boss. Nonpartisan staffers generally do not have this option. Because they serve legislators on all sides of an issue, to maintain their credibility and potential influence, they must carefully balance any positions that they articulate. As described by one member of Congress, the position of the JCT chief of staff is like being "a juggler on a tightrope."⁸⁸ The starker the policy differences presented by an issue, the harder the balancing act. It is for this reason that nonpartisan staffers are sometimes viewed as fading into the background when a policy debate becomes especially heated.⁸⁹ By contrast, partisan staffers may thrive in that environment by

87. Cf. Shobe, *supra* note 78, at 846 ("The political nature of committee and individual-member staff positions make it difficult for these staff to focus on the technical language of statutes.").

88. Curtis, *supra* note 44, at 127; see Stanley S. Surrey, *The Federal Tax Legislative Process*, 31 REC. ASS'N B. CITY N.Y. 515, 519 (1976) (describing role as "almost impossible"); THOMAS J. REESE, *THE POLITICS OF TAXATION* 63 (1980); John F. Manley, *Congressional Staff and Public Policy-Making: The Joint Committee on Internal Revenue Taxation*, 30 J. POLS. 1046, 1052 (1968) (describing nonpartisan staff norms of objectivity, bipartisanship, and neutrality).

89. See BERTRAM M. GROSS, *THE LEGISLATIVE STRUGGLE: A STUDY IN SOCIAL COMBAT* 282 (1953); Surrey, *supra* note 88, at 520 (claiming that staff's "need to maintain a posture of neutrality is basically inconsistent with a real leadership role"); Yin, *supra* note 29, at 2316-20 (describing incompatibility of neutrality with full utilization of nonpartisan staff's expertise); cf. David E. Price,

becoming more visible to legislators and interest groups with specific policy agendas.

These different features of the staff jobs are generally well known and tend to make partisan positions more attractive to professionals who envision involvement in a legislative practice following their time on the Hill. That type of practice typically values professionals who have connections with key legislators and interest groups and savvy knowledge of the legislative process.⁹⁰ It may not, however, place much premium on a staffer's detailed familiarity with complex statutory provisions, especially ones with modest policy significance.⁹¹ In contrast, JCT staff positions tend to be more attractive to professionals who plan to work in a tax practice when they leave the Hill. Those jobs commonly reward persons with perceptive understanding of intricate parts of the law, including structural tax provisions, and especially value the analytical work typically performed by a JCT staffer. A JCT staffer may, thus, relish the opportunity to work on a structural revision of the law and view its generally low policy significance as an appealing feature and not something to disdain. A partisan staffer may perceive the same task as largely taking time away from more productive pursuits.

Could partisan and nonpartisan staffers divide legislative responsibilities with each working on the type of project especially appealing to them? A possible problem is agenda control. Although legislators typically do not get very involved in the background details and actual preparation of legislation, they often set the agenda of what projects should be undertaken. They may not place a very high priority on a complex project with unfamiliar and modest policy significance, especially if the partisan staffers on whom they most rely share the same attitude. The effect is exacerbated if agenda is set by leadership and leadership staff, who generally are more political and less familiar with the substantive consequences of the tax law than committee members and staff. Indeed, if heightened polarization has led legislators and partisan staffers to "increasingly view issues through the prism of politics,"⁹² they may be skeptical or even suspicious of projects involving unfamiliar substance. For the same reason, legislators may be unwilling to delegate the task of structural revision to the Treasury.

Overall, the increased involvement and influence of partisan staffers in the formation of legislation during period IV provide reason to believe that structural

Professionals and "Entrepreneurs": Staff Orientations and Policy Making on Three Senate Committees, 33 J. POLS. 316, 335 (1971) (summarizing differences between staff professionals and policy entrepreneurs).

90. See LAPIRA & THOMAS, *supra* note 19, at 6–7 (claiming that prior government experience is key attribute for a successful lobbyist and that insider knowledge of legislative procedures is more important than connections); Jordi Blanes i Vidal et al., *Revolving Door Lobbyists*, 102 AM. ECON. REV. 3731, 3731–32 (2012) (claiming that connections are more important). Both authorities document the growing percentage of congressional and government staffers who become "revolving door lobbyists." See LAPIRA & THOMAS, *supra* note 19, at 10–11, 36–40; Blanes i Vidal et al., *supra*, at 3731, 3736 tbl.1.

91. Cf. LAPIRA & THOMAS, *supra* note 19, at 47–50 (summarizing common tasks of lobbyists).

92. Shobe, *supra* note 78, at 846.

legislation is and will be more difficult to enact. The other developments reducing committee influence and the legislative branch's expertise have had a similar effect.

The decline of structural tax legislation may be just one example of a larger phenomenon. Reduction in congressional oversight during periods when the executive and legislative branches are controlled by the same party may also be attributable to the perception by strong partisans that the task is high-cost and low-benefit. Yet:

There is . . . a considerable price to be paid for abdicating oversight. A salutary wariness about possible congressional oversight keeps executive agencies, appointees, and the president himself on their toes. Some of the crony appointments and misguided decisions . . . might never have been made had there been at least a fear of oversight . . . [C]areful examination of how well [big changes in government organization] subsequently work is essential to good government.⁹³

Finally, the changes in Congress may have had collateral effects in the private sector. In the past, groups like the American Law Institute (ALI) have put together thoughtful proposals to influence the development of structural legislation in the tax law. But from the organization's website, it appears that the last completed federal income tax project was the reporter's study on the taxation of private business enterprises issued in the late 1990s.⁹⁴ Perhaps the project was viewed as so unsuccessful that the ALI lost interest in trying another. But it is also possible that the ALI's perception of the legislative process has had some effect. ALI members are busy and probably unwilling to devote precious time working on projects that are unlikely to gain a thoughtful reception on Capitol Hill.⁹⁵

93. Sinclair, *supra* note 20, at 77.

94. See AMERICAN LAW INSTITUTE, PAST AND PRESENT ALI PROJECTS 5 (July 2017), available at https://www.ali.org/media/filer_public/5f/20/5f20bac1-76ce-4343-871f-05a9cec806bc/projects-past-present-2017.pdf [<https://perma.cc/4KY8-SF4C>] (last visited Feb. 20, 2018); AMERICAN LAW INSTITUTE, TAXATION OF PRIVATE BUSINESS ENTERPRISES, REPORTERS' STUDY (GEORGE K. YIN AND DAVID J. SHAKOW, REPORTERS, 1999); George K. Yin, *The Future Taxation of Private Business Firms*, 4 FLA. TAX REV. 141 (1999); cf. Daniel Halperin, *Saving the Income Tax: An Agenda for Research*, 77 TAX NOTES 967, 968 (1997) (urging revival of the ALI approach); Lawrence Zelenak, *The Almost-Restatement of Income Tax of 1954: When Tax Giants Roamed the Earth*, 79 BROOK. L. REV. 709, 709–10 (2013) (describing ALI's 1954 goal of providing an "improved and modernized income tax statute"). There is a current ALI restatement project on charitable nonprofit organizations. Earlier valuable projects, some involving collaboration with the JCT and Treasury staffs, dealt with partnership tax, the income taxation of trusts and estates, the estate and gift tax, corporate acquisitions and dispositions, corporate integration, and international aspects of the income tax.

95. A similar indication is the apparent discontinuation of any congressionally-initiated collaborative tax projects involving practitioners, academics, and government representatives. These projects also have generally tried to improve structural features of the tax system. One of the last ones—perhaps the last major one—was a 1985 project that proposed revisions to the tax rules relating to mergers and acquisitions and was based largely on an earlier ALI study. See STAFF OF S. COMM. ON FINANCE, 99TH CONG., THE SUBCHAPTER C REVISION ACT OF 1985 (Comm. Print 1985); AMERICAN LAW INSTITUTE, FEDERAL INCOME TAX PROJECT: SUBCHAPTER C (1982).

IV

ILLUSTRATING THE HYPOTHESIS

Because it is not possible to provide a precise definition of structural legislation and test the hypothesis in any systematic way, this section merely examines a few areas of the law, including amendments to subchapters S, K, and C of the Code—all areas with the type of provisions described as structural legislation—and legislative efforts to enact as positive law the titles of the U.S. Code, to see if the pattern of legal change conforms with the hypothesis. The codification effort is an example of structural legislation unconnected to major reform because it entails complex, technical work whose desired result is not to change tax law or policy. As reference, Table 2 summarizes the discussion in Part III.B. regarding the changes in professional tax staffs in Congress over the last approximately 100 years. In general, the hypothesis is that as the legislative process has become more dominated by partisan legislators and staffers, such as during period IV, there should be fewer examples of structural change.⁹⁶ “Fewer” is a comparative term and a more rigorous examination (if the data were available) would compare the productivity of structural and non-structural legislation during these periods.

<u>Period</u>	<u>Approximate years</u>	<u>Tax staff</u>
I	1913–1926	Treasury only
II	1927–1975	Treasury and JCT only
III	1976–1990	Treasury, JCT and mostly nonpartisan other staffs
IV	1991–present	Treasury, JCT and mostly partisan other staffs

A. Subchapter S

Subchapter S was enacted in 1958.⁹⁷ That bill was major reform, and not structural legislation unrelated to reform, since it changed policy to let certain corporations elect to avoid paying tax and to pass through their income and losses to their shareholders. The bill provided tax relief because it permitted shareholders to deduct corporate losses, allowed corporate income of low-bracket shareholders to be taxed at rates less than the corporate rate (52%), and continued to let corporate income of high-bracket shareholders (subject to rates up to 91%) to be taxed at only 52% if their corporations did not make the election. Congress provided a crude mechanism that allowed electing corporations to treat both distributed and undistributed corporate income as

96. The claim is limited to the existence of structural legislation and not necessarily its quality. The soundness of a change from a policy standpoint may depend on factors not considered in this article.

97. See Technical Amendments Act of 1958, Pub. L. No. 85-866, § 64, 72 Stat. 1606, 1650 (1958).

dividends (with resulting basis adjustments) and to pass through losses (limited to shareholder basis).⁹⁸ The income pass-through roughly previewed the controlled foreign corporation legislation that would be approved in 1962.⁹⁹

The 1982 revision of subchapter S, however, was structural legislation unrelated to major reform.¹⁰⁰ Although passed in period III, it had its origins in a period II JCT report recommending structural improvements to subchapter S.¹⁰¹ When an attorney who worked on that report became chief of staff in 1977, the staff returned to the project and prepared another report in 1980 on the same topic.¹⁰² Among the 1982 changes were to have subchapter S follow more closely the pure conduit model and to address some issues presented by S corporations with a prior history as a C corporation.¹⁰³

Since the early 1990s, not much has happened to subchapter S. Congress approved in 2002 the rule closing the loophole created by the Supreme Court in *Giltitz*,¹⁰⁴ amended in 2006 the basis adjustment rule for charitable contributions of appreciated property,¹⁰⁵ and enacted various S corporation eligibility expansions, although these expansions would not seem to qualify as structural changes.¹⁰⁶

In the proper environment, important improvements to subchapter S could be made, including curbing the avoidance of employment and net investment income taxes using subchapter S,¹⁰⁷ reexamining the one class of stock rules (including the disregard of certain stock rights for that purpose),¹⁰⁸ providing a straightforward way to allow corporate debt to pass through to shareholder basis in the same manner as in subchapter K,¹⁰⁹ and simplifying the law by imposing some type of C to S toll charge. There also remains question whether any eligible corporation should be allowed to elect out of subchapter S, effectively reversing

98. For brief explanation, see STAFF OF J. COMM. ON INTERNAL REVENUE TAX'N, JCT-3-59, 85TH CONG., SUMMARY OF 1958 SMALL BUSINESS TAX LEGISLATION 3-6 (Comm. Print 1959).

99. See Revenue Act of 1962, Pub. L. No. 87-834, § 12(a), 76 Stat. 960, 1006 (1962).

100. See Subchapter S Revision Act of 1982, Pub. L. No. 97-354, 96 Stat. 1669 (1982).

101. The report was never released to the public but was briefly referenced in a closed 1969 hearing. See *Briefing on Tax Reform Act of 1969 Before S. Comm. on Finance*, 91st Cong. 102 (1969) (statement of Laurence N. Woodworth).

102. See STAFF OF J. COMM. ON TAX'N, JCS-24-80, 96TH CONG., STAFF RECOMMENDATIONS FOR SIMPLIFICATION OF TAX RULES RELATING TO SUBCHAPTER S CORPORATIONS (Comm. Print 1980).

103. See H.R. REP. NO. 97-826, at 13-19 (1982); S. REP. NO. 97-640, at 14-20 (1982).

104. See I.R.C. § 108(d)(7)(A); *Giltitz v. Comm'r*, 531 U.S. 206 (2001) (interpreting statute as permitting conversion of tax-deferred income into tax-exempt income).

105. See I.R.C. § 1367(a)(2) (last sentence).

106. See I.R.C. § 1361.

107. See Karen C. Burke, *Exploiting the Medicare Tax Loophole* (Sept. 22, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3041694 [<https://perma.cc/SE8B-YGW8>]. The same problem may arise for businesses organized as limited liability companies taxed as partnerships.

108. See Treas. Reg. § 1.1361-1(l)(4)(iii)(C); Notice 2004-30, 2004-1 C.B. 828.

109. See I.R.C. § 752.

one of the relief aspects of the 1958 legislation.¹¹⁰ The principal portion of the 2017 tax bill affecting passthrough entities, including S corporations, LLCs, and partnerships, is not structural legislation unrelated to reform since it tries to make a major change in policy, although the precise policy objective is very hard to discern.¹¹¹

B. Subchapter K

Congress enacted many core provisions of subchapter K in 1954 with help from the ALI and other private lawyers.¹¹² There has been a lot of development since then, although much of it in the regulations. Congress approved changes in 1976 and 1984 that led to extensive regulations under sections 704(b) and 752, respectively.¹¹³ Congress also passed structural legislation (and authorized more regulations) in amending sections 704(c), 706, 707, and 724 during the mid-1980s, section 704(c) again in the late 1980s, and section 737 in the early 1990s.¹¹⁴

Since then, again, not much structural legislation has been passed. Congress added the marketable security rule (section 731(c)) in 1994, the section 732(c) basis allocation rules in 1997, a small 1999 loophole closer relating to the basis in stock of a corporation controlled by a corporate partner, and 2004 changes primarily to prevent loss duplication.¹¹⁵ Nothing has approached the 1999 ALI Reporters' Study recommendations to tax partnership distributions and restructure the taxation of private businesses more generally.¹¹⁶ The tremendously important partnership allocation rules remain an unsatisfactory muddle. Treasury appears to have fixed the longstanding flaws in section 751(b), but not with the help of any new legislation.¹¹⁷ Revising the taxation of carried interests, another long-term tax problem, may no longer qualify as structural

110. Cf. George K. Yin, *Corporate Tax Reform, Finally, After 100 Years*, in TOWARD TAX REFORM: RECOMMENDATIONS FOR PRESIDENT OBAMA'S TASK FORCE 114 (Tax Analysts 2009).

111. See Pub. L. No. 115-97, § 11011, 131 Stat. 2054 (2017) (adding new I.R.C. § 199A).

112. See Mark P. Gergen, *The Story of Subchapter K: Mark H. Johnson's Quest*, in BUSINESS TAX STORIES 207 (Steven A. Bank & Kirk J. Stark eds., 2005); Zelenak, *supra* note 94, at 710.

113. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 213(d), 90 Stat. 1520, 1548 (1976); Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 79, 98 Stat. 494, 597 (1984); Treas. Reg. §§ 1.704-1, 1.704-2, 1.752-1, 1.752-2, 1.752-3.

114. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 71(a), 98 Stat. 494, 589 (§ 704(c)) (1984); *id.*, § 72(a), 98 Stat. at 589 (§ 706(d)); *id.*, § 73(a), 98 Stat. at 591 (§ 707(a)); *id.*, § 74(a), 98 Stat. at 592 (§ 724); Tax Reform Act of 1986, Pub. L. No. 99-514, § 806(a)(1), 100 Stat. 2085, 2362 (§ 706(b)) (1986); Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7642(a), 103 Stat. 2106, 2379 (§ 704(c)) (1989); Energy Policy Act of 1992, Pub. L. No. 102-486, § 1937(a), 106 Stat. 2776, 3032 (§ 737) (1992).

115. See Uruguay Round Agreements Act, Pub. L. No. 103-465, § 741(a), 108 Stat. 4809, 5006 (§ 731(c)) (1994); Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1061(a), 111 Stat. 788, 945 (§ 732(c)) (1997); Tax Relief Extension Act of 1999, Pub. L. No. 106-170, § 538(a), 113 Stat. 1860, 1939 (§ 732(f)) (1999); American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 833, 118 Stat. 1418, 1589 (§§ 734, 743) (2004).

116. See ALI REPORTERS' STUDY, *supra* note 94.

117. See REG-151416-06, 2014-47 I.R.B. 870.

legislation since the issue has become a poster child for favoritism to private equity and the wealthy.¹¹⁸ The 2015 change to the partnership audit rules previewed the manner Congress passed the 2017 tax bill and seems characteristic of what can be expected during period IV—hastily drafted and technically dubious legislation produced with little advance public knowledge or input.¹¹⁹

C. Subchapter C

Subchapter C draws many of its roots from period I when Congress generally followed the recommendations of the Treasury. Some of those rules were quite crude yet remain in the law despite many proposals, especially during the 1970s and 1980s, to undertake major revision.¹²⁰ Congress added section 306 in 1954 and section 338 in 1982.¹²¹ Congress also had an on-again, off-again relationship with section 355, first adding it in 1918 and 1924 as an example of a qualifying reorganization exchange (but leaving open Mrs. Gregory's loophole), then partially repealing it in 1934 when reorganizations came into some disfavor, and then reenacting it in 1951 and 1954 to reflect much of the law today.¹²² The last two major structural amendments to subchapter C were probably repeal of *General Utilities* and the rewriting of section 382, both passed in 1986 and drawing on the work of the ALI in the early 1980s.¹²³

In 2003, the George W. Bush Administration proposed enactment of corporate integration through dividend exclusion.¹²⁴ Although this proposal was major reform and not a structural change unconnected to reform, it may be instructive to consider what happened to the period IV initiative. Congress favored its policy effect of reducing taxation of corporate-source income but could not resolve some technical aspects, such as determining which corporations could pay excludible dividends, since only dividends of previously taxed

118. See Alec MacGillis, *The Billionaires' Loophole*, NEW YORKER (Mar. 14, 2016), <https://www.newyorker.com/magazine/2016/03/14/david-rubenstein-and-the-carried-interest-dilemma> [<https://perma.cc/A8K9-KQR3>]; James B. Stewart, *The Birthday Party: How Stephen Schwarzman Became Private Equity's Designated Villain*, NEW YORKER (Feb. 11, 2008), <https://www.newyorker.com/magazine/2008/02/11/the-birthday-party-2> [<https://perma.cc/5NEB-ZLXB>]. The 2017 tax act makes a minor change to the taxation of carried interests that should do little to solve the basic problem. See Pub. L. No. 115-97, § 13309 (2017).

119. See Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 1101(b)(1), 129 Stat. 584 (2015) (adding Code §§ 771-777). Extensive technical corrections to these provisions were enacted in early 2018. See Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. U, §§ 201-207, 132 Stat. 348, 1171-1183 (2018).

120. See *supra* note 95.

121. See Internal Revenue Code of 1954, Pub. L. No. 83-591, § 306, 68A Stat. 3, 90 (1954); Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 224(a), 96 Stat. 324, 485 (1982).

122. See Charles S. Whitman, III, *Draining the Serbonian Bog: A New Approach to Corporate Separations under the 1954 Code*, 81 HARV. L. REV. 1194, 1198-1210 (1968).

123. See Tax Reform Act of 1986, Pub. L. No. 99-514, §§ 621(a), 631, 100 Stat. 2085, 2254, 2269 (1986); ALI FEDERAL INCOME TAX PROJECT, *supra* note 95.

124. See U.S. DEPT. OF TREASURY, GENERAL EXPLANATION OF THE ADMINISTRATION'S FISCAL YEAR 2004 REVENUE PROPOSALS 12-15 (2003).

corporate income qualified for exclusion. That condition had been included in the proposal partly to curb corporate tax shelters. Eventually, Congress settled on a simple rate cut for the dividend income of domestic individuals and applied the same rate to all long-term capital gain—not just gain from corporate stock dispositions.¹²⁵ Congress, thus, accepted and expanded the tax relief of the proposal, took a step towards structural improvement by conforming the taxation of corporate source income of shareholders who are domestic individuals, but declined the proposal's attempt to achieve broader structural reform.

Many parts of subchapter C are in need of structural improvement. The acquisitive reorganization rules remain impossible to rationalize.¹²⁶ In addition, sections 302, 304, 306, and 355 were all designed in part to prevent conversion of dividend income into preferentially-taxed long-term capital gain. None has been updated to reflect the 2003 rate conformity of those two types of income for domestic individuals.¹²⁷ Meanwhile, collateral rules, such as the section 318 constructive ownership rules that are generally tilted towards protecting dividend characterization of a transaction, may now primarily serve as strategic opportunities for taxpayers benefiting from that characterization.¹²⁸ Section 355 has also never been carefully reworked to adapt to the repeal of *General Utilities* in 1986, with sections 355(d), (e), and (g), passed in 1990, 1997, and 2006, all representing large patches to an obsolete underlying structure.¹²⁹

In fact, section 355 may not just be out-of-date and include some unnecessary conditions; it may now be exactly backwards. Because of the “device” clause, the law has long given close to a free pass to non-pro-rata separations.¹³⁰ But presently, because of other changes in the law, the biggest threat to the fisc from a corporate division may well be a non-pro-rata transaction that constitutes a disguised exchange.¹³¹ It might make sense to flip current law on its head to favor pro-rata separations and disfavor non-pro-rata ones.

D. Enacting the Titles of the U.S. Code as Positive Law

A final illustration involves the ongoing congressional effort to enact the titles of the U.S. Code as positive law. Congress approved the code in 1926 as only *prima facie* evidence of the law. As a result, the statutes underlying the code were not repealed and in the event of conflict, the statutes take precedence over the

125. See Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, §§ 301, 302, 117 Stat. 752, 758, 760 (2003).

126. See I.R.C. § 368; *supra* note 95.

127. See Bret Wells, *Reform of Corporate Distributions in Subchapter C*, 37 VA. TAX REV. 365, 368 (2018) (describing existing corporate distribution provisions as “public nuisance”).

128. See I.R.S. Notice 2001-45, 2001-2 C.B. 129 (describing opportunistic use of option attribution rule).

129. See Herbert N. Beller, *Section 355 Revisited: Time for a Major Overhaul?*, 72 TAX LAW. (forthcoming 2018) (urging major overhaul of provision)

130. See Rev. Rul. 64-102, 1964-1 C.B. 136; Treas. Reg. § 1.355-2(d)(5).

131. See I.R.C. § 355(g); GEORGE K. YIN & KAREN C. BURKE, CORPORATE TAXATION 502–04 (2d ed. 2016).

code. Congress took this action out of concern that the 1926 codification contained errors and was incomplete. A similar set of concerns had arisen during the 1870s when Congress undertook an earlier effort to codify the federal statutes. The expectation after 1926 was to enact each title as positive law, and repeal its underlying statutes, once Congress was confident the title was accurate and complete.¹³²

Codifying the federal statutes and enacting a title as positive law is a prime example of structural legislation because it is a technically challenging revision without any intended change to the law represented by the underlying statutes. The JCT staff spent about a dozen years working on codifying the tax statutes and when the Internal Revenue Code of 1939 was enacted, it became the first portion of the U.S. Code to be approved as positive law.¹³³

Although the discussion in this essay has focused on changes in the tax legislative environment and therefore may not be relevant to the production of legislation in other areas of the law, it may, nevertheless, be useful to examine the pace of enacting the U.S. Code titles as positive law to see whether it conforms to the basic hypothesis. Presently, exactly half of the fifty-six titles of the U.S. Code have been enacted as positive law.¹³⁴ Table 3 provides the timing of those enactments since 1926 and shows the total number of pages of the titles enacted and the yearly averages to estimate the approximate amount of work accomplished in each period.¹³⁵ As is shown, the pace of work has definitely slackened during period IV. There obviously may be reasons for this phenomenon quite apart from the hypothesis.

Period	Dates	# Years	Positive Law Enactments			
			# titles	titles/year	pages	pages/year
I	1913–1926	14	0	0	0	0
II	1927–1975	49	19	0.39	11719	239
III	1976–1990	15	4	0.27	2732	182
IV	1991–2017	27	5	0.19	969	36

132. For background, see Yin, *supra* note 65.

133. In addition to helping users, enactment of a title as positive law benefits legislators and staff by simplifying the process of approving subsequent amendments. *See id.* For this reason, one might expect codification legislation to be a higher priority for Congress than other structural legislation without this attribute.

134. This count includes the tax title (Title 26) as positive law, even though the U.S. Code does not so indicate. *See* United States Code (2012 ed.). For the explanation, see Yin, *supra* note 65.

135. A listing of each title, its page length, and positive law status (and date of enactment) is included in the Appendix.

V

CONCLUSION

Changes in the tax legislative process, including particularly the greater dominance of partisan legislators and staffers during the last twenty-five to thirty years, have made it more difficult to enact structural tax legislation that is not part of a major reform. Such legislation potentially improves the execution of current policies by advancing the efficiency, equity, or administrability of existing law. But because the legislation is complex and generally has modest policy significance, it has limited appeal to strong partisans interested in achieving a major policy change. Thus, a decline in the production of structural legislation may be a natural outgrowth of changing legislator and staff interests and incentives during the past twenty-five to thirty years.

APPENDIX¹³⁶

This appendix lists the title number, name, page length, and positive law status (including date of enactment) of each title of the U.S. Code. Page length is based on either the 2012 edition of the U.S. Code or the U.S. Code supplement III, vol. IV (2016) for titles added since 2012. For date of positive law enactments, see 1 U.S.C. § 204 note.

TITLE NUMBER & NAME	PAGES	POSITIVE	ENACTED
1. General Provisions	16	Y	1947
2. The Congress	612		
3. The President	61	Y	1948
4. Flag and Seal, Seat of Government, and the States	21	Y	1947
5. Government Organization and Employees; and Appendix	589	Y	1966
6. Domestic Security	273	**	
7. Agriculture	2015		
8. Aliens and Nationality	540		
9. Arbitration	7	Y	1947
10. Armed Forces	2555	Y	1956
11. Bankruptcy; and Appendix	457	Y	1978
12. Banks and Banking	1948		
13. Census	38	Y	1954
14. Coast Guard	151	Y	1949
15. Commerce and Trade	2105		
16. Conservation	2485		
17. Copyrights	203	Y	1947

136. Certain titles (designated by “**”) are undergoing revision for codification as positive law. Title 35 is positive law but is under revision. See OFF. OF THE L. REVISION COUNCIL, U.S. CODE, POSITIVE LAW CODIFICATION, http://uscode.house.gov/codification/legislation.shtml#current_plaw [https://perma.cc/B9DF-BN9U] (last visited Feb. 20, 2018).

TITLE NUMBER & NAME	PAGES	POSITIVE	ENACTED
18. Crimes and Criminal Procedure; and Appendix	1044	Y	1948
19. Customs Duties	1021		
20. Education	1675		
21. Food and Drugs	770		
22. Foreign Relations and Intercourse	1781		
23. Highways	348	Y	1958
24. Hospitals and Asylums	45		
25. Indians	891		
26. Internal Revenue Code	3870	Y ¹³⁷	1939
27. Intoxicating Liquors	20		
28. Judiciary and Judicial Procedure; and Appendix	1075	Y	1948
29. Labor	792		
30. Mineral Lands and Mining	361		
31. Money and Finance	500	Y	1982
32. National Guard	53	Y	1956
33. Navigation and Navigable Waters	759		
34. [Navy: This titled eliminated by Title 10]	0		
35. Patents	141	Y	1952
36. Patriotic and Natl Observances, Ceremonies, and Organizations	298	Y	1998
37. Pay and Allowances of the Uniformed Services	261	Y	1962
38. Veterans' Benefits	1001	Y	1958
39. Postal Service	124	Y	1960
40. Public Buildings, Property, and Works	235	Y	2002
41. Public Contracts	149	Y	2011

137. See *supra* note 134.

TITLE NUMBER & NAME	PAGES	POSITIVE	ENACTED
42. The Public Health and Welfare	8271		
43. Public Lands	581		
44. Public Printing and Documents	161	Y	1968
45. Railroads	268		
46. Shipping	461	Y	1983
47. Telecommunications	399		
48. Territories and Insular Possessions	309		
49. Transportation	1314	Y	1978
50. War and National Defense; and Appendix	968		
51. National and Commercial Space Programs	135	Y	2010
52. Voting and Elections	135		
53. Small Business	unknown	**	
54. National Park Service and Related Programs	152	Y	2014
55. Environment	unknown	**	
56. Wildlife	unknown	**	