
ARTICLE

WILL TAX REFORM BE STABLE?

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Stability is essential to any reform's success, yet it is hardly guaranteed. This is particularly true in tax policy, where Congress persistently tinkers. This Article offers a novel approach to studying the stability of reform proposals in taxation. Any reform proposal can be decomposed into its constituent policies. I show that politically extreme policies are more likely to be reversed than are moderate ones. This basic intuition allows one to decompose any tax reform proposal into stable and unstable pieces.

Stability analysis has important implications for tax reform, potentially upending normative prescriptions. First, reform is often justified by appeals to efficiency and fairness. These claims must be appropriately discounted for instability. I demonstrate that some "efficient" or "fair" reforms can be quite inefficient or unfair due to their inherent instability. Second, the overall revenue effect of a proposal depends on its stability. Many so-called "revenue-neutral" proposals may actually reduce revenue once stability is incorporated into the analysis. Such reforms are particularly troubling today given the growing federal deficit.

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INTRODUCTION

Will tax reform stick together or fall apart? Stability is essential to any reform's success, yet it is hardly guaranteed. This is particularly true in the tax context. The last century has seen a multitude of well-intentioned tax law changes. Some have lasted while others have not.

When tax reform scholars discuss stability, it is generally from an ex post perspective, after reform has already unraveled.¹ These historical accounts are context-rich but fail to provide specific guidance about the stability of future reforms. This means that tax reform proposals are generally analyzed under the flawed assumption that enacted reforms will remain untouched.²

¹ See, e.g., Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 926-45 (1987) (using interest-group theory to explain the increased rate of tax reform observed in the 1980s); Michael J. Graetz, *Tax Reform Unraveling*, J. ECON. PERSP., Winter 2007, at 69, 71-72 (arguing that the Tax Reform Act of 1986 unraveled because of a "fragile political coalition," a lack of public support, the failure to address the deficit, and the Act's failure to replace the income tax with "some form of consumption tax"). *But see infra* Section III.C (offering an alternative explanation of the partial instability of the 1986 reform from an ex ante perspective). See generally ERIC M. PATASHNIK, REFORMS AT RISK: WHAT HAPPENS AFTER MAJOR POLICY CHANGES ARE ENACTED (2008) (arguing that sustainable reforms create positive policy feedbacks, change institutions, and unleash market forces, while noting the absence of these features in the Tax Reform Act of 1986).

² Martin Feldstein noted this failure in his critique of the growing literature on optimal tax and tax reform. See Martin Feldstein, *On the Theory of Tax Reform*, 6 J. PUB. ECON. 77, 90-91 (1976) ("In practice, tax reform is piecemeal and dynamic in contrast to the once-and-for-always character of tax design. . . . The growing literature on optimal taxation and tax reform does not fully recognize this distinction. . . . Moreover, reform is treated as a one-time change with the new tax law etched immutably in stone rather than as a process of change.").

This Article provides an empirical approach to analyzing the ex ante stability of tax reform and demonstrates the importance of stability when evaluating proposals. Tax reform proposals often have major features that are designed to fit together in ways that improve the efficiency, fairness, or simplicity of the tax code.³ Take one example from the 1986 Tax Reform Act.⁴ The capital gains rate was increased to 28%, and the ordinary income rate was decreased to match.⁵ There were policy reasons that justified either rate change individually, but notably, several of the strongest arguments were based on the coherence of the two changes taken together. Harmonizing the rates would make the tax system fairer by taxing all income at the same rate.⁶ From an efficiency standpoint, it would reduce the money and time spent converting ordinary income into capital gains.⁷

The weight given to these normative justifications should depend on whether these changes are likely to stick. If the harmonization of the capital gains rate and the ordinary income rate is stable, the fairness and efficiency arguments are compelling. On the other hand, if the rates are likely to diverge, those same normative arguments should be discounted by that likelihood.

This Article's intuition is straightforward and powerful. Future Congresses are not required to accept the internal coherence of prior legislation. In fact, Congress often makes changes that undo prior reform efforts.⁸ This Article therefore explores stability by *decomposing* reform and then separately analyzing the political stability of *individual* policies.

The goals of this Article are both positive and normative. From a positive perspective, the Article shows that some policies are likely to be stable while others are not. It also demonstrates that decomposing reform is a useful way to think about a reform's overall coherence.⁹ Normatively, the Article argues

³ See MOLLY F. SHERLOCK, CONG. RESEARCH SERV., R43060, TAX REFORM IN THE 113TH CONGRESS: AN OVERVIEW OF PROPOSALS 1 (2014) [hereinafter CONG. RESEARCH SERV., 113TH CONG.] ("Tax systems are often evaluated using the criteria of efficiency, equity, and simplicity.")

⁴ Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085.

⁵ *Id.* §§ 101, 302.

⁶ See JOINT COMM. ON TAXATION, JCS-10-87, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 6-11 (1987) [hereinafter JOINT COMM. ON TAXATION, JCS-10-87] ("After extensive review of virtually the entire prior tax statute, Congress concluded that only a thorough reform could assure a fairer, more efficient, and simpler tax system.")

⁷ *See id.*

⁸ *See, e.g.*, discussion *infra* Section III.C.

⁹ To be explicit, this Article does *not* predict when major reform will be passed. That is an interesting question that others have addressed. Scholars point to presidential and congressional leadership, budgetary surpluses, and broad bipartisan support (among other factors) as important in passing the Tax Reform Act of 1986. *See* JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH 286 (1987) ("The most important player in tax reform was Ronald Reagan himself."); Edward J. McCaffery, *The Missing Links in Tax Reform*, 2 CHAP. L. REV. 233, 233-36 (1999) ("Ronald Reagan had gotten the modern bandwagon started, first in California in the 1970s and later, from

for a shift in how tax reform proposals are evaluated. Appeals to efficiency and fairness should be appropriately discounted for stability. The stability of a proposed reform is an important variable in how much revenue it ultimately raises (or loses).

Part I describes the Article's approach to studying the stability of individual policies. It focuses on determining how moderate or extreme a policy is relative to legislators' preferences. The U.S. legislative process significantly favors the status quo.¹⁰ Legislative action is only possible if the President and congressional majorities can agree to change policy in the same direction.¹¹ However, if the President wants to move policy in one direction while the House or Senate wants to move policy in the other, legislative action is impossible.¹² As a consequence, extreme policies are easier to change and tend to be less stable. It is relatively more likely that the President and legislative majorities will be able to agree to move an extreme policy in the same direction.

Part II explores the stability of various tax reform proposals. Any proposal can be decomposed into its constituent policies. The tools described in Part I differentiate the stability of those policies based on how politically moderate

the White House, in the 1980s.”); 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, 24-29 (1990) (“On several occasions, the conference nearly broke down over the issue of how steeply taxes on corporations should be increased, with House Democratic conferees aiming about \$40 billion higher over five years than Republican Senate conferees. Eventually Rostenkowski and Packwood, in closed door sessions, succeeded in negotiating a compromise, and the resulting Tax Reform Act of 1986 was passed by both houses and signed by President Reagan.”); George K. Yin, *Is the Tax System Beyond Reform?*, 58 FLA. L. REV. 977, 1035 (2006) (“Although the history of the Tax Reform Act of 1986 is not the only model by which tax reform might be enacted, a review of that history reveals the critical role the chairs of each tax-writing committee played in overcoming the strategic behavior and collecti[ve] action problems arising within the committee.”). See generally Michael Doran, *Tax Legislation in the Contemporary U.S. Congress*, 67 TAX L. REV. 555 (2014) (examining multiple theories explaining the successful passage of the Tax Reform Act of 1986). John W. Kingdon argues that policy change is most likely when a pressing problem, a ready set of policy proposals, and the political environment simultaneously align. JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 201-05 (updated 2d ed. 2011). With respect to the Tax Reform Act of 1986, Kingdon describes the problem of an inefficient and unfair tax code, an evolution of policy proposals that shared broad similarities (lowering rates and broadening the base), and the politics of taxpayer anger and a President who wanted to reduce top rates. *Id.* at 213-17. This Article addresses the aftermath of reform. How will tax law evolve after reform has been enacted?

¹⁰ See *infra* note 18 and accompanying text.

¹¹ See U.S. CONST. art. I, § 7.

¹² Procedural rules in the House and Senate actually may make it even harder to pass legislation. Generally, legislation can be blocked by a determined minority of Senators through the filibuster or by the House majority party through its control of the legislative agenda. See *infra* notes 51-54 and accompanying text.

or extreme they are.¹³ Understanding the stable and unstable parts of a reform proposal allows an analysis of the proposal's overall stability.

For example, consider a recent proposal to harmonize the top individual income tax rate, capital gains rate, dividend rate, and corporate rate at 28%.¹⁴ The stability of this reform can be analyzed by considering how moderate or extreme each of these rates is politically. The analysis in Part I suggests that the top marginal rate of 28% and the corporate rate of 28% are slightly conservative policies—right of center but moderate. By contrast, a capital gains and dividend rate of 28% is an extremely liberal policy. This suggests that the top marginal rate and the corporate rate changes will likely be sticky, while the capital gains and dividend rate will not be.¹⁵ The overall proposal is unlikely to be stable.

Part III moves from the positive to the normative. The goal is to incorporate stability explicitly into the evaluation of tax reform. The stability of any proposal informs its ultimate effect on efficiency, fairness, simplicity, and revenue. The normative gains of any reform will often be fleeting if the reform is unstable. Part III works through several examples in which reforms were intended to make the tax system fairer or more efficient but led to unfair and inefficient results when those reforms unraveled in predictable ways.

Parts I through III focus on the stability of reforms of the *existing* income tax system within the *default* legislative process. Part IV explores stability outside of this context. First, would a special legislative procedure rule make tax reform more stable? Some scholars have suggested “locking in” a reform by requiring two-thirds congressional supermajorities to enact subsequent

¹³ This approach provides a powerful tool for studying the stability of reform proposals. However, it has important caveats. Legislators' preferences may change—what was once an extreme policy may not be an extreme policy in the future. *See infra* subsection I.C.2. Legislators' preferences may also be linked across policies—sometimes, it may not be sensible to think about the stability of each constituent policy separately. *See infra* subsection I.C.1.

¹⁴ This type of rate harmonization reform remains popular. *See, e.g.*, Reuven S. Avi-Yonah, *And Yet It Moves: Taxation and Labor Mobility in the Twenty-First Century*, 67 TAX L. REV. 169, 183 (2014) [hereinafter Avi-Yonah, *Taxation and Labor Mobility*] (“We should go back to the rate structure of the Tax Reform Act of 1986, which imposed the same tax rate (28%) on ordinary income (including dividends and interest) and capital gains.”); Reuven S. Avi-Yonah, *Reinventing the Wheel: What We Can Learn from the Tax Reform Act of 1986* (Univ. of Mich. Law & Econ. Research Paper Series, Paper No. 14-018, 2014) [hereinafter Avi-Yonah, *Reinventing the Wheel*] (“I thus believe that funding for reductions in the top individual rate to 28% can be found by raising the rate on capital gains and dividends to 28% and by cutting the corporate rate to 28% but eliminating the large corporate tax expenditures.”).

¹⁵ Under the current configuration of Congress (and most sessions of Congress since 2000), a 28% top marginal rate and 28% corporate rate would be stable. *See infra* Figure 4A and accompanying text. Under *every* configuration of Congress since 2000, a 28% capital gains rate and 28% dividend rate would be unstable. *See infra* note 129 and accompanying text.

changes.¹⁶ I argue that this procedural change would have only a small effect on making tax reform more stable. Second, do the tools described in this Article provide any insight on the design of non-income taxes? I explore how the tools developed in this Article might inform the design of a federal value-added tax in the future.

I. MEASURING THE STABILITY OF INDIVIDUAL POLICIES

Tax reform is complicated—one piece of legislation will simultaneously change rates, deductions, credits, and exclusions, among other provisions. Understanding the stickiness of each individual change is a necessary first step to evaluate whether the overall reform will be stable.¹⁷

The more moderate a policy, the more likely it is to be stable. The U.S. legislative process has a strong status quo bias.¹⁸ Legislative action generally requires the approval of the President and congressional majorities.¹⁹ It is more probable that the necessary consensus will form around changing an extreme policy.²⁰ Thus, extreme policies are less stable because relatively, they are more likely to be changed.

¹⁶ See John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115, 1142-43, 1147 n.101 (2007) (arguing that supermajority voting rules reduce costs associated with vote trading, leading to more stable legislation); John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 372, 438 (1999) [hereinafter McGinnis & Rappaport, *Supermajority Rules*] (discussing the stabilizing effect of supermajority voting requirements); Max Minzner, *Entrenching Interests: State Supermajority Requirements to Raise Taxes*, 14 AKRON TAX J. 43, 46 (1999) (stating that supermajority voting requirements prevent “future legislative meddling”).

¹⁷ Some tax law changes are intended to be temporary. For example, Congress has often increased the bonus depreciation provisions in Section 168(k) during economic downturns. CONG. RESEARCH SERV., *THE SECTION 179 AND BONUS DEPRECIATION EXPENSING ALLOWANCES: CURRENT LAW AND ISSUES FOR THE 114TH CONGRESS* 10 (2015), <https://fas.org/sgp/crs/misc/RL31852.pdf> [<https://perma.cc/7XV4-M44S>]. The goal is to accelerate capital investments. *Id.* The stability of those temporary provisions is important, and I discuss that in a separate article. See generally Jason S. Oh, *The Pivotal Politics of Temporary Legislation*, 100 IOWA L. REV. 1055 (2015) (providing a framework for analyzing the impact of uncertainty surrounding temporary legislation). This Article focuses on tax law changes that are not intended to be temporary.

¹⁸ See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 330-31 (2011) (discussing the gridlock-inducing effect of increasingly polarized and partisan institutional structures in Congress); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 386-431 (2004) (examining how constitutional rules of congressional procedure naturally favor the status quo). See generally KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* (1998) (outlining the theory of pivotal politics, which explains that there is an identifiable pivotal decisionmaker for policy decisions on well-defined issues).

¹⁹ If the President exercises his veto, the Constitution requires congressional supermajorities to enact legislation. See *infra* note 49.

²⁰ Of course, even moderate policies can be changed depending on the configuration of Congress and the White House. For example, a moderate liberal policy (such as a top rate of 39.6%) can be reduced if the Republicans control both houses of Congress and the White House. On the other hand,

It is possible to measure how moderate or extreme a policy is based on the ideology of the legislators that identify the policy as their ideal. I employ DW-NOMINATE scores to measure how liberal or conservative various legislators are. DW-NOMINATE is an algorithm that scores each legislator's ideology on a scale from -1 (very liberal) to +1 (very conservative) based on his roll call voting history.²¹

By looking at the policy preferences of liberal, moderate, and conservative legislators, I can locate where various policies are located on the liberal-conservative spectrum. It surprises no one that such analysis extends to issues of taxation, as ideologically similar legislators share many of the same opinions on tax issues.²² For example, there are some legislators whose ideal top marginal tax

an extreme liberal policy (such as a top rate of 60%) likely can be reduced regardless of which parties control Congress and the White House. The point is that extreme policies are always unstable (while moderate policies are only sometimes unstable). See *infra* Section II.B.

²¹ See Royce Carroll et al., *DW-Nominate Scores with Bootstrapped Standard Errors*, U. GA., <http://voteview.uga.edu/dwnomin.html> [<https://perma.cc/42GG-TFVL>] (last updated Sept. 17, 2015) (establishing the data and general bases for the DW-NOMINATE program). A significant finding in political science is that voting in Congress largely can be characterized by a simple one-dimensional structure, particularly since the end of the Civil Rights era. The canonical citation for this widely known result is KEITH T. POOLE & HOWARD ROSENTHAL, *IDEOLOGY & CONGRESS* 32-57 (2d. rev. ed. 2007). Each legislator can be given a single left-right score—a summary of how “liberal” or “conservative” he is relative to fellow legislators. Moreover, most votes in Congress can be represented by a cut-line, a point in the liberal-conservative spectrum that separates those legislators who vote in favor and vote against. *Id.* at 32-41. DW-NOMINATE is a popular algorithm in the political science literature that calculates these ideology scores and cut-lines.

Intuitively, DW-NOMINATE can be understood as a more analytically rigorous measure of ideology than the scores produced by partisan interest groups like Heritage Action or Americans for Democratic Action. See, e.g., *Scorecard*, HERITAGE ACTION FOR AM., <http://heritageactionscorecard.com> [<https://perma.cc/7YG8-S3W6>]; *Voting Records*, AMERICANS FOR DEMOCRATIC ACTION, <http://www.adaction.org/pages/publications/voting-records.php> [<https://perma.cc/PZN5-XQMF>]. DW-NOMINATE has two important advantages relative to these scorecards. First, DW-NOMINATE includes almost all votes covering a wide variety of areas of law. See Carroll et al., *supra*. In contrast, interest group scorecards are based on a handful of votes deemed important by the interest group. See POOLE & ROSENTHAL, *supra*, at 216-23 (explaining that interest groups select a set of roll calls to construct ratings, and concluding that fears about “bias in interest group ratings . . . are well founded”). Second, DW-NOMINATE scores are linked between Congresses so that scores are readily comparable across sessions of Congress and between the House and Senate. See Carroll et al., *supra*. Such comparisons are difficult with interest group scorecards because the votes on which those scorecards are based change each year. See POOLE & ROSENTHAL, *supra*, at 216 (“Interest groups, as part of their efforts to influence the political process, regularly publish ratings of members of Congress.”); see also *id.* at 217 tbl.8.1 (showing a list of interest groups that evaluated congressional votes in 1979–1980 and the number of votes that each interest group selected for that year).

²² See Jason S. Oh & Chris Tausanovitch, *Quantifying Legislative Uncertainty: A Case Study in Tax Policy*, 69 TAXL. REV. 485, 486 (2016) (“By referring to a pivot’s place on the liberal-conservative spectrum, we can calculate his or her tax rate preference.”); cf. *Rates Congress*, NTU, <http://www.ntu.org/ratecongress> [<https://perma.cc/P67M-H2NH>] (highlighting disparities in voting tendencies on taxation and spending issues between Republican and Democratic members of Congress).

rate is 25%.²³ DW-NOMINATE can measure how conservative such legislators are on average, a fact exploited in this Article.

In this Article, an “extreme” policy is one that is outside the range of *most* legislators’ preferences, with two important clarifications.²⁴ First, the analysis defines preferences based on how legislators would *vote*, rather than on their latent personal opinions. In studying policy stability, how a legislator would vote is more important than his latent personal preference. For example, a Southern Democrat may personally support a top rate of 50% but vote as if his ideal rate were 40%.²⁵ The legislator’s voting preference of 40% is the relevant one for purposes of studying the stability of policies because the vote represents the effective move toward action, and only the vote carries quantifiable implications for tax policy. Second, the relevant voting preferences are *current* preferences. Thus, a 70% top marginal rate is extremely liberal for the purposes of this analysis even though it may once have been considered a more moderate policy position.²⁶

Section I.A examines roll call votes and public statements by legislators to roughly locate where various policies fall on the liberal–conservative spectrum.²⁷ Section I.B develops the intuition that extreme policies are less stable than are moderate policies.

A. *Where Policies Fall on the Liberal–Conservative Spectrum*

One way to measure legislators’ preferences on a particular issue is to study roll call votes.²⁸ How did legislators vote on that issue in the past? A

²³ See *infra* Figure 1 and accompanying text.

²⁴ Section II.B *infra* will make more precise what I mean by “most” legislators.

²⁵ For example, this could be due to the influence of party leaders, pressure from public interest groups or other constituencies, or fears of a primary challenge.

²⁶ In fact, the top marginal rate was 70% until the top rate was reduced to 50% by the Economic Recovery Tax Act of 1981. Pub. L. No. 97-34, § 402, 95 Stat. 172, 300.

²⁷ In general, tax reform proposals take two shapes: those intended to reform the current income tax system and those intended to replace the income tax system with a consumption tax. See CONG. RESEARCH SERV., 113TH CONG., *supra* note 3, at 9–14 (discussing the major types of legislative tax reform proposals in the 113th Congress, organized into categories of income tax reform, replacement, and other). This Part focuses on the stability of various proposals to reform the income tax. Section IV.B *infra* discusses the stability of reforms outside of the income tax context (for example, a federal value-added tax).

²⁸ There are other ways to study legislators’ preferences. For example, both the Republican and Democratic parties periodically update their platforms on various policy positions. See, e.g., Democratic Nat’l Comm., *Our Platform*, DEMOCRATS (2016), <http://www.democrats.org/party-platform> [<https://perma.cc/VJ4L-5AQ7>] (detailing the policy positions adopted by the Democratic Party in 2016); Republican Nat’l Comm., *Republican Platform: We Believe in America*, GOP (2016), <https://www.gop.com/platform> [<https://perma.cc/JNM8-YQS3>] (listing the policy positions adopted by the Republican Party in 2016). These platforms roughly identify the conservative and liberal positions on a given policy question. But greater granularity is needed—there are many policy questions on which the moderate and extreme wings of a party will differ. This granularity is

limitation of this approach is that tax bills are rarely “clean”; they usually make many different changes simultaneously. Where votes on clean bills are unavailable, roll call votes are best interpreted as indicating legislators’ preferences on the most salient issues.²⁹

In an earlier work, Chris Tausanovitch and I found that past roll call votes are strongly correlated with legislators’ preferences regarding the top marginal rate and the capital gains rate.³⁰ That study considered congressional votes on capital gains and top marginal rates over the past forty years.³¹ Each vote provides information regarding where tax rates fall on the liberal–conservative spectrum.³² We combine this information using a series of linear regressions. The results of the regressions are presented in Figure 1, *infra*. The figure shows the relationship between how liberal or conservative a legislator is and that legislator’s predicted rate preferences.

Figure 1 can be consulted to assess roughly how liberal or conservative various rates are. The dotted line shows how the top marginal rate preferences change along the liberal–conservative spectrum. For example, the current top marginal rate of 39.6% corresponds to a DW-NOMINATE score of -0.33, which indicates a liberal policy but one that is slightly more conservative than a policy of the median member of the Democratic Party.³³ By contrast, a 30% top marginal rate corresponds to a DW-NOMINATE score of +0.10 and is therefore a moderately conservative policy.³⁴

important for determining stability because more extreme policies are generally less stable on both the conservative and liberal sides of the spectrum.

²⁹ For example, tax rates are usually highly salient. See Oh & Tausanovitch, *supra* note 22, at 517-18 (noting that some blame former President George H.W. Bush’s failed reelection bid on his breaking of a “no new taxes” pledge).

³⁰ See *id.* at 495-97 (discussing the general partisan breakdowns of roll call votes with regards to capital gains and top marginal tax rate votes).

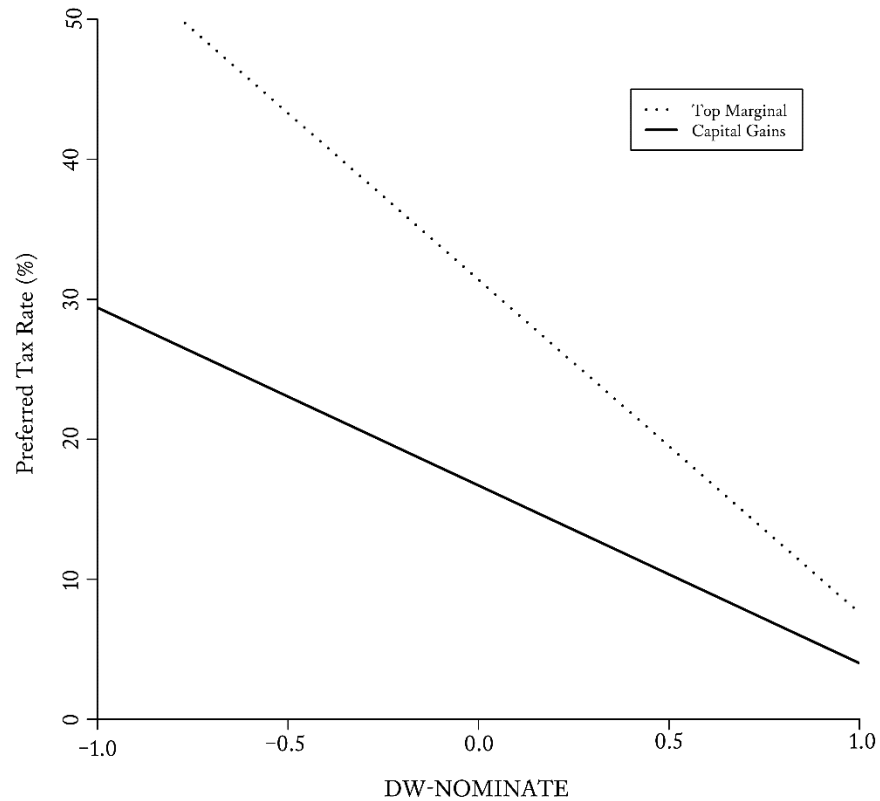
³¹ See *id.* at 490 (“Our sample consists of the twenty-three major tax policy bills of the last forty years.”).

³² DW-NOMINATE calculates a cut-line for each vote. This cut-line identifies the legislators who are closest to indifferent between the old law and the proposed bill. For example, the cut-line for the 1997 capital gains rate reduction from 28% to 20% was roughly -0.55. Legislators with higher (more conservative) scores voted for the lower rate. Legislators with lower (more liberal) scores voted for the status quo 28% rate. Legislators with DW-NOMINATE scores close to -0.55 prefer a capital gains rate of approximately 24%. See *id.* at 523-25 (analyzing congressional votes on the Tax Payer Relief Act of 1997).

³³ For context, former President Obama’s DW-NOMINATE score while in the Senate was roughly -0.37. See Royce Carroll et al., “Common Space” DW-NOMINATE Scores with Bootstrapped Standard Errors, VOTEVIEW.COM, http://voteview.com/dwnomin_joint_house_and_senate.htm [<https://perma.cc/XU33-U6MQ>] (last updated Sept. 2, 2015) (presenting the DW-NOMINATE scores of the 112th Congress).

³⁴ For context, Senator Susan Collins’s DW-NOMINATE score is roughly +0.10. See *id.*

Figure 1: Where Top Marginal Rates and Capital Gains Rates Fall on the Liberal–Conservative Spectrum³⁵



The solid line shows how capital gains rates map onto the liberal–conservative spectrum. For example, the top capital gains rate of 20% is predicted to be a moderately liberal policy (DW-NOMINATE score of -0.26).

When roll call votes are unavailable, it may be possible to use public statements by legislators instead.³⁶ The goal is the same: to figure out where various policies fall on the liberal–conservative spectrum. For example, consider the corporate tax rate. In the past forty years, there have been only

³⁵ These lines are plotted using the results of regressions run in Oh & Tausanovitch, *supra* note 22, at 506.

³⁶ Roll call votes and public statements are not mutually exclusive and can be used simultaneously. Both are useful indicators of where policies fall on the liberal–conservative spectrum.

three changes to the top corporate rate.³⁷ In each instance, the corporate rate change accompanied significant changes to other rates, and in only one instance was the change to the corporate tax rate itself more than two percentage points.³⁸ Roll call votes therefore are not particularly useful for exploring legislators' preferences on the corporate tax rate.

Instead, I employed several research assistants to gather public statements made by lawmakers regarding the corporate tax rate since 2008, an alternative that can closely approximate legislators' preferences despite its drawbacks discussed below.³⁹ Each point in Figure 2A represents a statement made by a different legislator. The x-axis is the legislator's DW-NOMINATE score. The y-axis is the corresponding preferred corporate tax rate. The curve is a local polynomial regression fit.

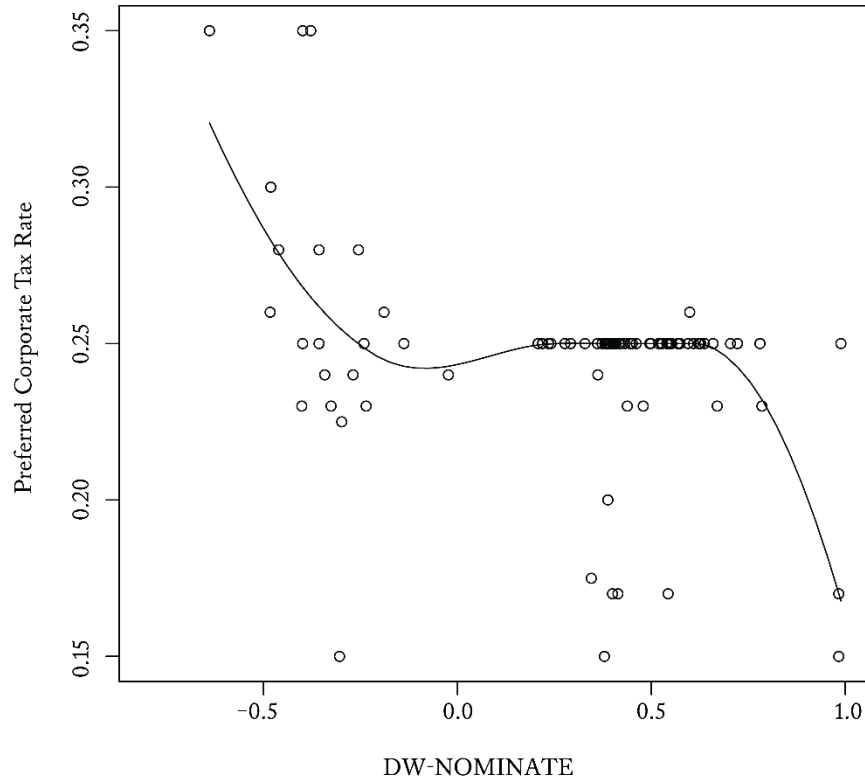
The curve in Figure 2A provides a rough estimate of where various corporate tax rates fall on the liberal-conservative spectrum. Figure 2A shows that Democrats generally prefer higher corporate tax rates than Republicans prefer. There is some support among moderate Democrats for a lower rate of 25% to 28%. Among Republicans, there is significant support for a 25% rate and a few statements calling for more significant rate reductions.

37 The Revenue Act of 1978 reduced the corporate tax rate from 48% to 46%. Pub. L. No. 95-600, § 301(a), 92 Stat. 2763, 2820. The Tax Reform Act of 1986 reduced the top corporate tax rate from 46% to 34%. Pub. L. No. 99-514, § 601(a)-(b), 100 Stat. 2085, 2249. The Omnibus Budget Reconciliation Act of 1993 increased the top corporate rate from 34% to 35%. Pub. L. No. 103-66, § 13221(a)(2), 107 Stat. 312, 477.

38 In addition to reducing the corporate tax rate by two percentage points, the 1978 legislation reduced the capital gains rate from 35% to 28%. Revenue Act of 1978 § 403. In addition to increasing the corporate tax rate by one percentage point, the 1993 legislation substantially increased ordinary income rates on high-income taxpayers from 31% to 39.6%. Omnibus Budget Reconciliation Act of 1993 § 13202. The 1986 Tax Reform Act was the only significant change to corporate tax rates in the past forty years. See Tax Reform Act of 1986 § 601. However, there were many other simultaneous important changes: an increased capital gains rate, reduced ordinary income rates, and an expanded income tax base. See *id.* §§ 101 (reduced ordinary income tax rates), 302 (increased capital gains rate). Since so many different changes were being made, it is impossible to infer legislators' preferences from the roll call votes.

39 See *infra* text accompanying notes 40-46. Lawmakers include members of the House, Senators, and the President.

Figure 2A: Where Corporate Tax Rates Fall on the Liberal–Conservative Spectrum



Public statements are helpful but should be used cautiously. There are a number of caveats to keep in mind. First, one can imagine situations in which a legislator's public statement does not reflect his voting preference.⁴⁰ Public statements are relatively costless—talk can be cheap.⁴¹ Public statements may have little connection to the legislative endeavor.⁴²

Moreover, some public statements may reflect a directional preference rather than a specific preference. When a particular legislator publicly states that he supports a 25% rate, he may be saying that the rate should be lowered rather than stating a specific preference for a 25% rate. Put even more starkly, if the

⁴⁰ It is important to distinguish a legislator's *voting* preference from his latent personal opinion. See *supra* text accompanying notes 24–25.

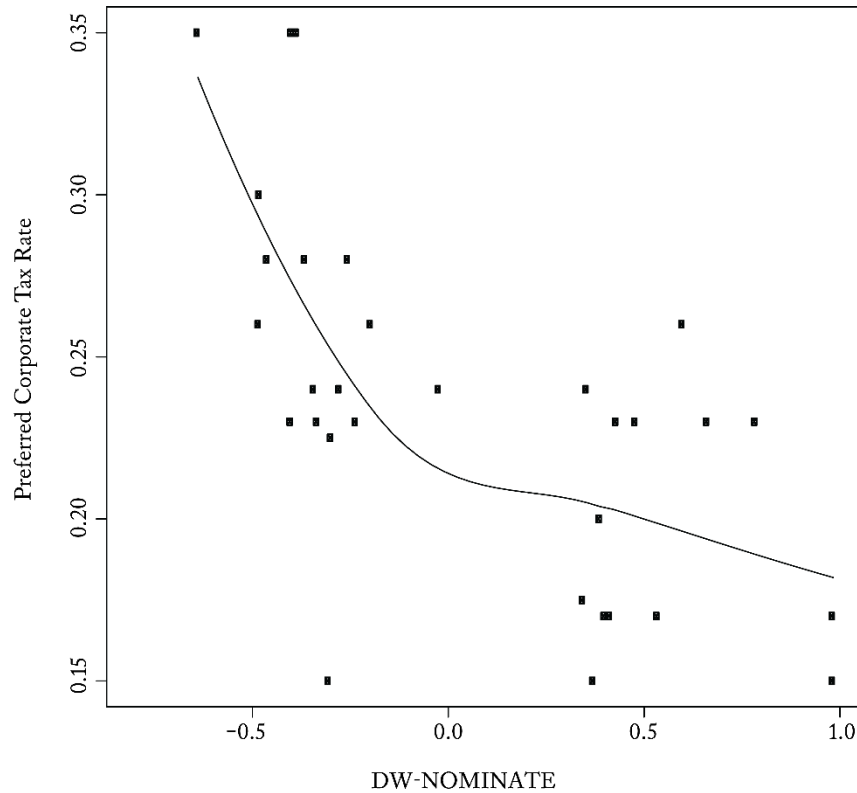
⁴¹ David Mayhew used the term “position taking” to describe when legislators publicly endorse legislative proposals without regard to whether such bills will pass (especially because most bills go nowhere). See DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 61–77 (1974).

⁴² Rather, these types of statements can be a type of “electoral connection,” targeted toward constituencies rather than other legislators. See *id.*

current corporate tax rate were 10%, Figure 2A would likely look different. I am skeptical that the median Republican would want to increase the corporate rate to 25%. Nevertheless, legislators' public statements are useful in determining where policies roughly fall on the liberal–conservative spectrum.

Second, statements tend to cluster around salient proposals. For example, there are many statements in favor of a 25% rate because a number of important proposals have suggested that particular rate.⁴³ It is interesting to see the same data omitting all statements in favor of 25%, as shown in Figure 2B. Although this removes more than half of the data, it may provide a better sense of where legislators' ideal rates are. Figure 2B shows the same general trend that liberals prefer higher rates and conservatives prefer lower rates. Once again, the curve is a local polynomial regression fit.

Figure 2B: Where Corporate Tax Rates Fall on the Liberal–Conservative Spectrum (Suppressing 25% Tax Rate Responses)



⁴³ See, e.g., Jobs Through Growth Act, S. 1720, 112th Cong. § 2201(a) (2011) (proposing to lower the corporate tax rate to 25%); HOUSE WAYS & MEANS COMM., THE TAX REFORM ACT OF 2014: FIXING OUR BROKEN TAX CODE SO THAT IT WORKS FOR AMERICAN FAMILIES AND JOB CREATORS 19 (2014) (suggesting a corporate tax rate of 25% to promote economic growth).

A third caveat to exclusive reliance on public statements is concern about potential sampling bias. Imagine that legislators are more likely to make a statement regarding the corporate tax rate if they disagree with the existing rate. The result would be an inaccurate reflection of liberal preferences—the curves in Figures 2A and 2B would be too low. Why are there so few public statements supporting the current 35% corporate rate? One explanation is that it is an unpopular policy. Another explanation is that legislators who favor the status quo simply choose not to make public statements, perhaps because public statements are less necessary when one agrees with current law.⁴⁴

A final issue with inferring preferences from public statements is that they are often context-dependent. For example, former President Barack Obama supported a reduction to a 28% corporate tax rate in connection with repealing tax expenditures and changes to the worldwide taxation of foreign-source income.⁴⁵ That is a very different preference regarding corporate taxation than one of a Republican who supports a reduction to a 28% corporate tax rate in connection with a move to a territorial tax system, under which foreign-source income would go untaxed.⁴⁶

Divorcing corporate-rate preferences from preferences regarding the taxation of foreign-source income may seem artificial because these policies are currently considered together. However, there is no guarantee that this will always be the case. One can imagine a different political and fiscal environment (probably one in which there is no budget deficit), in which the statutory corporate tax rate will be dealt with independently from the taxation of foreign-source income. Alternatively, after international tax reform, one can imagine the rate being revisited separately. This is key to this Article's approach to studying the stability of tax reform—policies that are considered simultaneously today may be revisited separately in the future.

⁴⁴ The available roll call votes provide weak evidence that some Democrats may support the current rate. The Omnibus Budget Reconciliation Act of 1993 raised the corporate tax rate from 34% to 35%. Pub. L. No. 103-66, § 13221(a)(2), 107 Stat. 312, 477. (It also made a more significant increase in ordinary income rates. *Id.* § 13202.) The cut-line for the roll call votes on that legislation was -0.14. See Carroll et al., *supra* note 33 (click on the "Roll Call Estimates" spreadsheet; then scroll to line 81,297 for the roll call vote in the House (showing a cut-line of -0.129) and to line 82,247 for the roll call vote in Senate (showing a cut-line of -0.14)). Liberals generally supported that rate increase (with some conservative Democrats joining Republicans in opposition). This only provides limited information regarding corporate rate preferences since the corporate rate change was small relative to the other parts of the bill.

⁴⁵ See Press Release, Office of the Press Sec'y, The White House, Fact Sheet: A Better Bargain for the Middle Class: Jobs (July 30, 2013), <http://www.whitehouse.gov/the-press-office/2013/07/30/fact-sheet-better-bargain-middle-class-jobs> [<https://perma.cc/3EE6-M9GA>] (detailing former President Obama's plan to increase middle class jobs through tax policies).

⁴⁶ When policies are linked, they will generally be more stable. See *infra* subsection I.C.1.

These are all important caveats. However, the scope of this endeavor renders them peripheral. As I explain in Part II, it is only necessary to approximate where a particular policy falls on the liberal–conservative spectrum to study its stability. Public statements made by legislators can help make that determination even if they do not perfectly reflect how individual legislators would vote on particular bills.⁴⁷

B. *Extreme Policies Are Less Stable than Moderate Ones*

The political science literature has developed powerful tools that specify when legislative action is possible. The literature identifies a handful of key legislators, called “pivots,” whose preferences determine whether a policy can be changed legislatively.⁴⁸ The Constitution generally requires that a majority in the House, a majority in the Senate, and the President must agree in order to enact legislation.⁴⁹ Thus the President, the median member of the House, and the median member of the Senate are all pivots.⁵⁰ In order for a bill to be enacted, the pivots must prefer the bill to current law.

There are other legislators that sometimes also act as pivots due to procedural rules in the House and Senate. In the House, the majority party can prevent bills from reaching a vote even if that bill would command majority support.⁵¹ There is strong empirical support showing that the median member of the House majority acts as a pivot in the U.S. legislative

⁴⁷ Given his veto power over the enactment of any policy, it is particularly important to know the President’s preference on a given issue. See U.S. CONST. art. I, § 7, cl. 2. On almost all important tax policy questions, the President will have an articulated policy position.

⁴⁸ KREHBIEL, *supra* note 18, at 23–24.

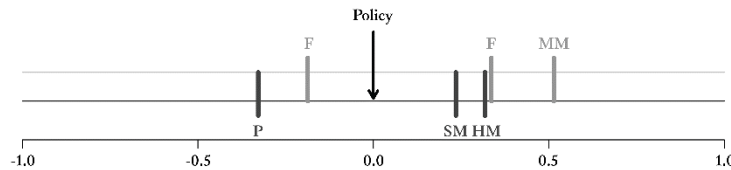
⁴⁹ A presidential veto can be overcome by a joint two-thirds supermajority vote in the House and the Senate. U.S. CONST. art. I, § 7, cl. 2.

⁵⁰ KREHBIEL, *supra* note 18, at 23–28; see also DAVID W. BRADY & CRAIG VOLDEN, *REVOLVING GRIDLOCK: POLITICS AND POLICY FROM CARTER TO CLINTON* 8 (1998) (“It is our view that, even when multiple policy dimensions are present, the median members of the dimension of primary concern will be determinative of the outcome, because they will be easier to move and are thus considered pivotal.”). There are also veto-override pivots—the legislators who are the marginal voters for a two-thirds supermajority in each chamber. KREHBIEL, *supra* note 18, at 23–28.

⁵¹ See Jonathan Bernstein, *Breaking ‘Hastert,’* WASH. POST: POSTPARTISAN (Oct. 17, 2013), <http://www.washingtonpost.com/blogs/post-partisan/wp/2013/10/17/breaking-hastert> [https://perma.cc/BT6Z-CWT8] (detailing the Hastert rule, a custom under which the majority leader only allows bills to be voted on the floor when they have the support of the majority of his party). For example, the Republican Party can prevent an immigration bill from reaching a vote even if that bill could pass with support from Democrats and a few moderate Republicans. See Steven T. Dennis, *Boehner Doesn’t See Immigration Without GOP Majority*, ROLL CALL (June 18, 2013, 10:50 AM), <http://blogs.rollcall.com/218/boehner-doesnt-see-immigration-without-gop-majority> [https://perma.cc/4TFM-YUHK] (highlighting then–House Speaker John Boehner’s hesitancy to break the Hastert rule even on a polarizing, purportedly urgent issue like immigration).

process (the “majority median pivot”).⁵² In the Senate, sixty votes are generally necessary to close debate on a bill.⁵³ Thus, the sixtieth Senator is also a pivot (the “filibuster pivot”).⁵⁴ Figure 3A plots the pivots in the 114th Congress in the DW-NOMINATE space.

Figure 3A: Moderate Policy Relative to Pivots in the 114th Congress: President (P); Median Member of the House (HM); Median Member of the Senate (SM); Median Member of the House Majority (MM); Filibuster Pivots (F)



When a policy falls in between the pivots, legislative action is impossible. For example, consider a moderate policy that corresponds to 0.0 in the DW-NOMINATE space as shown in Figure 3A. Based on Figures 1 through 2B, this policy could be a 17% capital gains and dividend rate, a 32% top marginal rate, or a 25% corporate tax rate. This hypothetical policy falls in between the preferences of the President (who wants to increase the rate) and the median members of the House and Senate (who want to decrease it). Legislative action is impossible because the President would veto any bill lowering the rate, and a bill raising the rate would not pass the Senate or the House. Thus the 17% capital gains and dividend rate, the 32% top marginal rate, and the 25% corporate tax rate would all be predicted to be stable in the 114th Congress.

For the same reason, policies that map onto DW-NOMINATE scores between -0.3 and +0.5 would also be stable in the 114th Congress. Policies that

⁵² Gary W. Cox & Mathew D. McCubbins, *Agenda Power in the U.S. House of Representatives, 1877–1986*, in *PARTY, PROCESS, AND POLITICAL CHANGE IN CONGRESS: NEW PERSPECTIVES ON THE HISTORY OF CONGRESS* 150, 159–60 (David W. Brady & Mathew D. McCubbins eds., 2002). See generally GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* (2005) (arguing, based on empirical evidence, that the majority party controls the agenda of the legislative process).

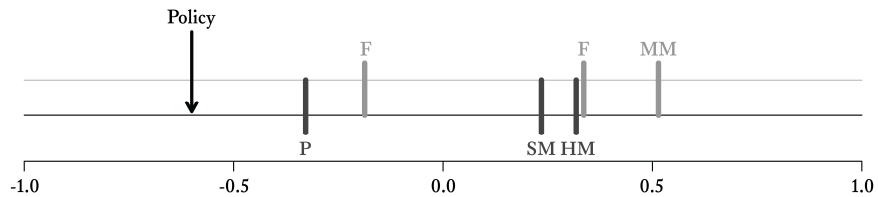
⁵³ See *STANDING RULES OF THE SENATE* r. XXII(2), reprinted in S. DOC. NO. 113–18, at 16 (2013) (providing that closing debate requires that “three-fifths of the Senators duly chosen and sworn” vote affirmatively to do so).

⁵⁴ KREHBIEL, *supra* note 18, at 23; see also BRADY & VOLDEN, *supra* note 50, at 14–15 (“If forty-one Senators wish to kill a bill through a filibuster, they can do so by voting against cloture.”). Depending on whether a bill proposes to move policy to the left or to the right, the sixtieth Senator will be different. Thus, there are actually two filibuster pivots on any given issue.

fall in between the pivots are described as being inside the *gridlock zone*.⁵⁵ The gridlock zone for each policy will be different depending on how preferences map onto the DW-NOMINATE space. For example, by consulting Figures 1 through 2B, we see that the gridlock zone for the capital gains and dividend rate stretches from 10% to 21% approximately. The gridlock zone for the top marginal rate spans from 20% to 39%. The gridlock zone for the corporate rate extends from 20% to 28% roughly.

However, if policies fall outside of the gridlock zone, it means that all the pivots agree that the policy is too liberal or too conservative. For example, consider a liberal policy that maps onto a DW-NOMINATE score of -0.6. Based on Figures 1 through 2B, this policy could be a 24% capital gains and dividend rate, a 45% top marginal rate, or a 35% top corporate rate.

Figure 3B: Extreme Policy Relative to Pivots in the 114th Congress



All of the pivots agree that the policy represented in Figure 3B is too liberal. In other words, the President, sixty Senators, and a majority of House members (including a majority of the House Republicans) all agree that the rate is too high. Thus, legislative action is possible. None of the 24% capital gains rate or dividend rate, 45% top marginal rate, or 35% top corporate rate would be expected to be stable in the 114th Congress.

C. Other Factors That Influence Policy Stability

Whether an individual policy is extreme or moderate relative to pivotal legislators' preferences is important in determining its stability. Although this intuition is powerful, there are at least three important limitations. First, legislators' preferences are often linked in ways that can affect stability. As described further below, institutional design features like earmarking may cause certain policies to be linked in the minds of legislators.⁵⁶ In such cases, it is necessary to consider the stability of the linked policies together. Second,

⁵⁵ KREHBIEL, *supra* note 18, at 38.

⁵⁶ See *infra* subsection I.C.1.

legislators' preferences can shift over time.⁵⁷ Interest groups and other constituencies may cause legislators' preferences on an issue to change. This may lead to policies being more stable than would otherwise be expected. Third, legislators may have strategic reasons to resist legislation even if current policy is relatively extreme.⁵⁸

1. Linked Preferences

Provisions will generally be more stable if preferences are linked across several policies.⁵⁹ If legislators think that a particular policy should only be modified in concert with other changes, gridlock with respect to one policy can result in stability with respect to the related policies. One of the key arguments of this Article is that such links between policies are often transient. However, so long as policies remain linked in the public discourse and the minds of legislators, stability may be increased.⁶⁰

It may sometimes be possible to explicitly link policies through institutional design features like earmarking or trust funds. These policy tools make the linked nature of changes more salient. For example, changes to the Social Security system would tend to be more closely linked because any subsequent adjustment to those policies would affect the expected funding level of the Social Security trust fund. One can imagine that if certain revenue-raisers were explicitly earmarked for particular spending programs, it would be less likely for legislators to roll back the revenue-raisers without addressing the related spending programs. For instance, if a gasoline tax increase were intended to fix highways, then earmarking or placing that money in a trust fund might sufficiently link the policies to keep the policy package stable.⁶¹

Other procedural restrictions may form similar links across policies. Consider PAYGO, a rule requiring revenue offsets so that new legislation does not add to the federal deficit.⁶² It is an open question in the budgetary literature

⁵⁷ See *infra* subsection I.C.2.

⁵⁸ See *infra* subsection I.C.3.

⁵⁹ See, e.g., Tammy M. Frisby, *The Politics of Tax Reform*, 176 POL'Y REV. 3, 9-10 (2012) (explaining that although bipartisan agreement exists to reform corporate tax rates, the general disagreement over whether these proposals should be revenue-generating or revenue-neutral poses a significant obstacle to reform).

⁶⁰ This is closely related to the prior discussion that legislators' preferences may be context-dependent. See *supra* text accompanying notes 45-46.

⁶¹ See Tax Relief and #FixTheTrustFund for Infrastructure Certainty Act of 2015, S. 1994, 114th Cong. (2015) (proposing an increase in the gasoline tax and earmarking those funds to the Mass Transit Account of the Highway Trust Fund).

⁶² See Cheryl D. Block, *Pathologies at the Intersection of the Budget and Tax Legislative Process*, 43 B.C. L. REV. 863, 918 (2002) ("PAYGO, adopted as part of the 1990 Budget Act, simply codified the revenue neutrality principle that Congress informally began in 1986."); Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 515-26

whether PAYGO meaningfully restricts tax legislation.⁶³ If effective, PAYGO would make it more difficult to enact revenue-losing changes after reform. For example, assume that tax reform significantly limits the mortgage interest deduction. Reversing that limitation would substantially increase the deficit and require a significant revenue-raiser under PAYGO. This requirement might make the limitation on the mortgage interest deduction more stable.⁶⁴

Policies can be linked specifically through procedural devices like earmarking or more generally through procedural restrictions like PAYGO. An important question is whether these policy links will remain salient and restrict future legislative action. It is important to differentiate two dimensions of salience: *individual policy* salience and the salience of *links between policies*.

If an individual policy is particularly salient, then it may in fact be less stable. A salient policy is more likely to be revisited in the future when the necessary coalitions are elected into office. Due to their salience, such policies are likely to rise to the top of the legislative agenda. For example, if there are enough legislators that want to make a change to the top rate, it is relatively unlikely that Congress will fail to act.⁶⁵

However, if policy links are particularly salient, then the linked policies are more likely to be stable. Changing one policy requires changing multiple policies. This is generally more difficult to accomplish.

(1998) (describing the costs that PAYGO imposes on groups pursuing tax subsidies). Given the current fiscal crisis, there is a great deal of political focus on revenue. *See, e.g.*, A BETTER WAY, TAX 5 (2016), https://abetterway.speaker.gov/_assets/pdf/ABetterWay-Tax-PolicyPaper.pdf [<https://perma.cc/CB4Y-M6W5>] (detailing Senator Paul Ryan's tax plan, which emphasizes increasing federal revenue through economic growth). The Congressional Budget Office projects budget deficits of more than \$6 trillion over the next decade. CONG. BUDGET OFFICE, AN ANALYSIS OF THE PRESIDENT'S 2015 BUDGET 2 (2014), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/45230-APB_0.pdf [<https://perma.cc/HQL6-3N9T>]; CONG. BUDGET OFFICE, OPTIONS FOR REDUCING THE DEFICIT: 2014 TO 2023, at 8 (2013), <https://www.cbo.gov/sites/default/files/cbofiles/attachments/44715-OptionsForReducingDeficit-3.pdf> [<https://perma.cc/XD7R-2YS5>].

⁶³ *See* Block, *supra* note 62, at 919 ("Despite the apparent costs of PAYGO, it appears that Congress can easily buy its way out of the fiscal constraints as it did so brazenly with the retroactive repeal of the installment sale provision."); Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1033-34 (2011) (stating that the ability of PAYGO rules to restrict tax legislation is "tenuous" at best because both the House and Senate have frequently waived these rules as of late).

⁶⁴ Revenue-raising changes may also be more stable because they cannot be reversed through various fast-track legislative procedures. *See* Rebecca M. Kysar, *Reconciling Congress to Tax Reform*, 88 NOTRE DAME L. REV. 2121, 2130-35 (2013) (explaining the partisan disagreement that exists regarding whether the fast-track process of reconciliation may be used for passing deficit-increasing legislation). Congressional Democrats have long argued that the process of reconciliation may only be used to pass deficit-reducing legislation. *Id.* at 2133-35. Congressional Republicans, on the other hand, have used the reconciliation process to pass tax cuts and reductions in spending. *Id.*

⁶⁵ *See* Oh & Tausanovitch, *supra* note 22, at 518-19 (suggesting that the higher salience of the top marginal rate has led to the top rate being changed more quickly when the political configuration has shifted).

There are reasons to think that individual policy salience is usually more likely to persist than salience of links between policies. Legislative entrepreneurs, interest groups, and changing conditions can dissipate the connections between policies.⁶⁶ But the big moving pieces of income taxation—the rates and the provisions that define the base (including the major tax expenditures)—have persistently been highly salient. Nevertheless, the links between policies are important to analyzing stability.

2. Shifting Preferences and Public-Choice Considerations

Shifting preferences can also affect policy stability. The basic intuition offered in this Article is that extreme policies will be less politically stable. It is possible that simply by being enacted, a previously extreme policy becomes more politically acceptable. There are numerous reasons why legislators' preferences might shift after enactment. Here, I consider a few possibilities: (a) taxpayer reliance, (b) changing external circumstances or information, and (c) the intervention of an interest group.

If taxpayers *rely* on a particular tax provision, for example, by adjusting their behavior or investments, legislators may be less willing to reverse such change.⁶⁷ There is an extensive debate in the literature about whether such reliance interests should be protected.⁶⁸ Nevertheless, reliance arguments can be rhetorically powerful and may make policies more stable.⁶⁹

Changes in *external circumstances* or *information* may cause legislators' preferences to shift. For example, in earlier work, Chris Tausanovitch and I

⁶⁶ See *infra* subsections I.C.2–3.

⁶⁷ See Stephen Coate & Stephen Morris, *Policy Persistence*, 89 AM. ECON. REV. 1327, 1327 (1999) (arguing that if taxpayers take advantage of a provision, they may be more willing to exert political pressure to retain the policy).

⁶⁸ See Richard A. Epstein, *Beware of Legal Transitions: A Presumptive Vote for the Reliance Interest*, 13 J. CONTEMP. LEGAL ISSUES 69, 70 (2003) (discussing the difference between an “anticipation-based” and a “reliance-based” approach to the risk of legal change); Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 47-48 (1977) (noting the importance of the transition process for new rules); Michael J. Graetz, *Retroactivity Revisited*, 98 HARV. L. REV. 1820, 1823 (1985) (claiming that the expectation-based argument is circular); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 522-36 (1986) (challenging both the reliance- and expectation-based rubrics for analyzing transition policy); Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129, 1138 (1996) (“The Graetz-Kaplow view of tax transitions, sometimes referred to as the ‘new view,’ has largely supplanted the old reliance-based view as the dominant scholarly paradigm.” (footnote omitted)); Steven Shavell, *Risk Aversion and the Desirability of Attenuated Legal Change*, 16 AM. L. & ECON. REV. 366, 366, 370-78 (2014) (noting that individuals are not insured against legal change and proffering a regulatory standard on that basis); Kirk J. Stark, *The Elusive Transition to a Tax Transition Policy*, 13 AM. J. TAX POL’Y 145, 164-65 (1996) (arguing that the problem of “legislative drift” has become increasingly pronounced).

⁶⁹ When a change to a provision would disturb reliance interests, one solution is to create rifle-shot exemptions or grandfathering rules.

showed that top-rate preferences shifted substantially between the 60s and 80s.⁷⁰ This shift has largely been attributed to increased salience of the disincentive effects of high tax rates and the fading relevance of mass-mobilization wars.⁷¹ Legislators' preferences can also shift if a policy proves to be more or less successful than expected.⁷² Most theories of legislator behavior argue that legislators are at least partially motivated by the desire to make good policy.⁷³

Finally, *interest groups* may influence the stability of policies.⁷⁴ In some cases, a group may develop around a policy change.⁷⁵ Alternatively, a policy may benefit an already-existing interest group.⁷⁶ There are a number of avenues through which interest groups can influence legislators' preferences.

⁷⁰ See Oh & Tausanovitch, *supra* note 22, at 502 (showing that moderate liberals prefer much lower top ordinary income rates than they did four decades ago).

⁷¹ See generally KENNETH SCHEVE & DAVID STASAVAGE, *TAXING THE RICH: A HISTORY OF FISCAL FAIRNESS IN THE UNITED STATES AND EUROPE* 200 (2016) (arguing that rates declined because fairness arguments for high rates of taxation were tied closely to mass-mobilization for wars).

⁷² Cf. Steven Callander & Gregory J. Martin, *Dynamic Policymaking with Decay*, 61 AM. J. POL. SCI. 50, 51 (2016) (arguing that legislative action may occur with greater frequency if policies decay—i.e., become less efficient over time).

⁷³ See, e.g., RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* 1 (1973) (identifying “good public policy” as one goal of House members (emphasis omitted)); Shaviro, *supra* note 9, at 85 (noting studies that show how legislators' desires to make “good policy” influence legislative voting).

⁷⁴ See Doernberg & McChesney, *supra* note 1, at 926 (describing tax policy as legislation crafted to benefit well-organized special interest groups that in return provide benefits to legislators); Thomas J. Purcell, III, *An Analysis of the Formation of Federal Income Tax Policy*, 18 CREIGHTON L. REV. 653, 666 (1985) (discussing the ability of special interest groups to organize and assert greater influence over legislators than individual taxpayers or voters); Yin, *supra* note 9, at 1029-30 (explaining the willingness of legislators to pass laws benefitting narrow interest groups as a result of the newly developed, outward focus of Congress); 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, 898 (1987) (reviewing BIRNBAUM & MURRAY, *supra* note 9) (characterizing the tax legislative process as an auction where favorable legislation is “sold” to the highest bidders or private interest groups).

⁷⁵ In Patashnik's account of reform stability, the creation of interest groups is a key factor. See PATASHNIK, *supra* note 1, at 29-30 (explaining that the sustainability of “general-interest reform laws” depends on the feedback that those laws stimulate from “policy elites, especially interest groups”); see also Coate & Morris, *supra* note 67, at 1327 (arguing that policy-specific investments may increase a group's willingness to exert political pressure and expend political resources to retain the policy); Eric T. Laity, *The Corporation as Administrative Agency: Tax Expenditures and Institutional Design*, 28 VA. TAX REV. 411, 431 (2008) (“Over time, the legislator may create new interest groups through the legislation she sponsors. Legislation may create interest groups after the fact, as voters organize to protect their newfound benefits under the statute. The statute may also encourage indirect beneficiaries to organize as an interest group.”).

⁷⁶ See Raquel Alexander, Stephen W. Mazza & Susan Scholz, *Measuring Rates of Return on Lobbying Expenditures: An Empirical Case Study of Tax Breaks for Multinational Corporations*, 25 J.L. & POL. 401, 451-52 (2009) (noting that the majority of lobbying benefits accrue to corporate interest groups clustered in a small group of industries); cf. Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 TEX. L. REV. 1269, 1332 (1993) (“Interest group theorists may stress the degree of group organization or the intensity of the preferences of their members, in addition to their economic resources, in explaining the groups' ability to dominate the political process.”).

Interest groups can provide information on the effects of a policy and why such a policy is desirable.⁷⁷ They may also mobilize their members to highlight the importance of a policy to a legislator's constituency through opinion polls and letter campaigns.⁷⁸ Finally, they may be able to influence legislators through campaign contributions (or through threats of withholding such contributions).

Public-choice theory predicts that interest groups are more effective if a policy provides concentrated benefits to a small number of taxpayers.⁷⁹ The intuition is that it is easier to overcome collective action problems when there are a limited number of beneficiaries.⁸⁰ This theory suggests that interest groups would be most important with respect to narrow tax expenditures and similar provisions.

3. Strategic Stability

Just because a policy is extreme relative to the preferences of legislators does not guarantee that it will be immediately addressed.⁸¹ Even if the pivots agree that an existing policy should be moved in a particular direction, strategic considerations may prevent a change from being made. If legislators agree to a change today, a new status quo will shape future legislative battles.⁸² Legislators may prefer instead to wait with the hopes of achieving a better

⁷⁷ See JOHN R. WRIGHT, INTEREST GROUPS & CONGRESS: LOBBYING, CONTRIBUTIONS, AND INFLUENCE 93-94 (1996) (explaining that lobbying groups have specialized expertise about policy performance because of their "professional research staff[s]" and their "individual group members'" direct experiences with the policies at issue).

⁷⁸ *Id.* at 89-90.

⁷⁹ See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 127-28 (3d prt. 1973) (arguing that small groups lobby more effectively because they are better able to organize and become active than are large groups); see also William Blatt, *The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy*, 51 TAX L. REV. 287, 308 (1996) (acknowledging the advantage that small, cohesive interest groups have in lobbying for beneficial legislation because they can avoid or at least manage problems of free riding); Susannah Camic Tahk, *Making Impossible Tax Reform Possible*, 81 FORDHAM L. REV. 2683, 2707-10 (2013) (contending that tax policies with concentrated benefits receive interest group protection and are, therefore, more stable). *But see* Shaviro, *supra* note 9, at 64-68 (arguing that public-choice theory forms a "shallow and incomplete" caricature of human nature by focusing solely on monetary exchanges between interest groups and politicians).

⁸⁰ There are some large interest groups that have effectively overcome the collective action problem. See OLSON, *supra* note 79, at 132-35 (characterizing successful large interest groups as those that have some "other purpose" aside from lobbying (emphasis omitted)).

⁸¹ See Oh & Tausanovitch, *supra* note 22, at 538-39 (observing that the transient stability of politically extreme rates might suggest a "temporary unwillingness" to disturb previous compromises).

⁸² See Wioletta Dziuda & Antoine Loeper, *Dynamic Collective Choice with Endogenous Status Quo*, 124 J. POL. ECON. 1148, 1171-72 (2016) (stating that if legislators vote strategically to avoid setting a new status quo that may be disadvantageous in the future, the result is that pivots vote as if their ideal points were further apart than they actually are).

outcome when external circumstances are more favorable or when the balance of political power has shifted in their party's favor.

Conversely, there are other circumstances in which strategic considerations might make policies less stable. Legislators may be more likely to agree to a policy change if they are worried about an unfavorable shift in future political power. Thomas Romer and Howard Rosenthal point out that an extreme policy gives more leverage to an agenda-setter in the future.⁸³ Thus, whether strategic behavior leads to more or less policy stability depends on expectations regarding future elections, risk aversion, and uncertainty regarding future (exogenous) conditions.⁸⁴

4. Case Study of the Sticky Corporate Tax Rate

Linked preferences, public-choice considerations, and strategic considerations are particularly relevant to the enduring stability of the corporate tax rate. As discussed earlier in connection with Figure 3B, the current corporate rate of 35% is a relatively extreme policy.⁸⁵ Former President Obama (DW-NOMINATE score of -0.37) was the most liberal pivot in the 114th Congress and explicitly stated that he preferred a lower corporate rate.⁸⁶ Yet the corporate rate remains at 35%.⁸⁷

Legislators seem to have linked preferences between the corporate rate and the tax treatment of foreign-source income.⁸⁸ Foreign-source income is

⁸³ Thomas Romer & Howard Rosenthal, *Political Resource Allocation, Controlled Agendas, and the Status Quo*, PUB. CHOICE, Dec. 1978, at 27-28.

⁸⁴ See Sarah Anderson et al., *Legislative Holdouts* (Nw. Univ. Inst. for Policy Research, Working Paper No. WP-14-21, 2014), <http://www.ipr.northwestern.edu/publications/docs/workingpapers/2014/IPR-WP-14-21.pdf> [<https://perma.cc/4BKS-MR8J>] (using empirical analysis to describe conditions that make legislators more likely to hold out).

⁸⁵ Multiple reform proposals have argued for a reduction in the corporate rate from 35% to somewhere in the 24% to 25% percent range. See Tax Reform Act of 2014, H.R. 1, 113th Cong. § 3001 (2014) (proposing a reduction in the corporate rate to 25%); Bipartisan Tax Fairness and Simplification Act of 2011, S. 727, 112th Cong. § 201 (2011) (proposing a 24% flat rate for corporate taxable income).

⁸⁶ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2015, at 21 (2014) ("The President favors adopting these measures as part of [a] long run revenue neutral business tax reform that would also cut the corporate tax rate to 28 percent . . .").

⁸⁷ The corporate tax rate has not been changed since 1993. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13221(a)(2), 107 Stat. 312, 477; see also Deborah H. Schenk, *The Income Tax at 100*, 66 TAX L. REV. 357, 359-64 (2013) (discussing the history and interaction of the corporate tax rate and individual income tax rate). There is some momentum building in Congress to reduce the corporate rate.

⁸⁸ See Martin A. Sullivan, *Top 10 Reasons There Is No Corporate Tax Reform*, TAXANALYSTS: TAX ANALYSTS BLOG (Feb. 3, 2014), <http://www.taxanalysts.org/tax-analysts-blog/top-10-reasons-thereno-corporate-tax-reform/2014/02/03/166741> [<https://perma.cc/X7LP-MTRN>] (arguing that reducing the corporate rate is difficult because legislators cannot agree on the taxation of foreign-source income and because some legislators only want corporate reform if accompanied by individual reform).

income earned outside of the United States by U.S. corporations and their subsidiaries. There is widespread support within the Republican Party to move toward a territorial regime in which foreign-source income would not be taxed.⁸⁹ On the other hand, many Democrats prefer shoring up the current worldwide tax system where foreign-source income is taxed (with tax credits given for foreign taxes paid).⁹⁰ Republicans and Democrats may generally agree on a reduction in the statutory corporate rate, but there is still significant partisan disagreement regarding the proper tax treatment of foreign-source income.⁹¹ To the extent that these two policies remain linked, a rate reduction will be politically difficult.⁹²

Strategic considerations may exacerbate this. Each party may see the high corporate rate as a rare opportunity to enact the type of corporate tax reform that it prefers. Imagine that the Republicans have the following order of preferences: (1) lower corporate rate and territorial regime, (2) lower corporate rate and worldwide regime, and (3) current regime. If they compromise with Democrats and enact the second option now, they might find it more difficult to enact their ideal policy in the future without the (highly salient) rallying point of a high corporate tax rate.

⁸⁹ See HOUSE BUDGET COMM., THE PATH TO PROSPERITY: FISCAL YEAR 2015 BUDGET RESOLUTION 83 (2014), https://budget.house.gov/uploadedfiles/fy15_blueprint.pdf [<https://perma.cc/3GKE-GZAH>] (proposing that Congress enact legislation that moves the tax code “to a more competitive system of international taxation”); Tony Nitti, *Tax Aspects of Paul Ryan’s FY 2014 Republican Budget Proposal*, FORBES (Mar. 12, 2013, 12:19 PM), http://www.forbes.com/sites/anthony_nitti/2013/03/12/tax-aspects-of-paul-ryans-fy-2014-republican-budget-proposal [<https://perma.cc/T3NK-B5JS>] (describing the tax aspects of Senator Paul Ryan’s proposed budget, including the transition to a territorial system for the international tax regime). In 2017, the Republicans are discussing other options for corporate tax reform, including a destination-based cash flow tax.

⁹⁰ See THE WHITE HOUSE & THE DEP’T OF TREASURY, THE PRESIDENT’S FRAMEWORK FOR BUSINESS TAX REFORM 14-15 (2012) (proposing a minimum tax rate levied on all corporate income generated abroad); Tim Anson et al., *Obama FY 2016 Budget: Minimum Tax on Foreign Income, Other Significant International Tax Proposals*, J. INT’L. TAX’N, May 2015, at 23, 25 (listing specific proposals for a minimum tax rate for foreign-generated corporate income).

⁹¹ See Howard Gleckman, *Growing Consensus on Corporate Tax Reform? Not So Much*, FORBES: BUS. BELTWAY (Feb. 28, 2012, 5:31 PM), <http://www.forbes.com/sites/beltway/2012/02/28/growing-consensus-on-corporate-tax-reform-not-so-much> [<https://perma.cc/P45X-PZL6>] (describing the shared goals but drastically different methods of Democrats and Republicans); Jim Puzzanghera, *Big Differences Divide Democrats, GOP on Overhauling U.S. Tax Code*, L.A. TIMES (Apr. 17, 2015, 4:55 PM), <http://www.latimes.com/business/la-fi-tax-reform-20150418-story.html> [<https://perma.cc/7HS7-MPUP>] (observing that the use of the term “tax reform” by both parties does not indicate any agreement about the content of the reform).

⁹² The treatment of foreign-source income also has important revenue implications. A rate reduction paired with a move to a territorial tax regime would substantially increase the deficit. See CONG. BUDGET OFFICE, OPTIONS FOR TAXING U.S. MULTINATIONAL CORPORATIONS 21-22 (2013), <https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/43764multinationaltaxesrevo2-28-2013..pdf> [<https://perma.cc/Y34D-3UJR>] (describing the potential revenue implications for the U.S. tax base if dividend income from investments abroad were excluded).

Public-choice considerations also help explain the stability of the corporate tax rate. Currently, corporations pay markedly different effective tax rates depending on their industry and the extent of their international operations. Corporations in certain industries, including utilities, have effective tax rates close to 10%, while those in other industries like retail and construction have effective rates closer to the statutory rate of 35%.⁹³ Corporate managers would rather lobby for a tax expenditure that helps their particular industry than for a rate reduction that would have broader benefits.⁹⁴ Jennifer Arlen and Deborah Weiss further argue that corporate managers prefer tax provisions that lower the cost of raising new capital rather than a rate reduction that would benefit both old and new capital.⁹⁵ Thus, despite the corporate rhetoric calling for a lower corporate tax rate, most interest groups would rather concentrate their efforts on more targeted tax relief.

Part I has developed a powerful tool for exploring stability. Whether a policy is extreme or moderate relative to current legislators' preferences is important to measuring its stability. The example of the corporate tax rate demonstrates that policy links, strategic disagreement, and changes in preferences can also be relevant to stability. However, these considerations should not be overstated. Policy links will often be transitory. Strategic considerations may actually accelerate policy change under certain circumstances. Legislative preferences on important tax issues tend to be fairly stable.

The rest of this Article leverages the insight that extreme policies are less stable than moderate ones. As Part II shows, this information can be utilized to study the overall stability of reform proposals.

II. THE STABILITY OF REFORM

Reform proposals make tax law changes that are designed to fit together in particular ways.⁹⁶ But will that coherence persevere? Will reform stick

⁹³ See U.S. DEP'T OF THE TREASURY, AVERAGE EFFECTIVE FEDERAL CORPORATE TAX RATES 2 tbl.1 (2016), <https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/Average-Effective-Tax-Rates-2016.pdf> [<https://perma.cc/3YP4-ZQC3>].

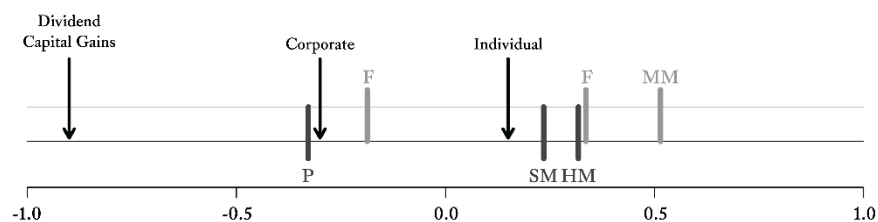
⁹⁴ See Jennifer Arlen & Deborah M. Weiss, *A Political Theory of Corporate Taxation*, 105 YALE L.J. 325, 341 (1995) (stating that some corporate managers prefer certain provisions, such as accelerated depreciation and investment tax credits, over integration because those provisions benefit their industries while integration would affect firms across all industries). For a discussion of numerous corporate tax provisions and their differential impact among industries, see generally Michael Doran, *Managers, Shareholders, and the Corporate Double Tax*, 95 VA. L. REV. 517, 535-42 (2009).

⁹⁵ See Arlen & Weiss, *supra* note 94, at 347 ("Most integration plans would subsidize old capital. Most managers do not oppose this, but, because their interests differ from those of shareholders, they place a lower priority on integration than on ACRS, ITCs, and other tax preferences for new investments.")

⁹⁶ The coherence can exist within the legislation itself or between the legislation and existing tax law. As an example of the former, the Tax Reform Act of 1986 harmonized the capital gains and

together or fall apart? Consider for example, a reform recently suggested by Reuven Avi-Yonah: he proposed that the corporate, individual, capital gains, and dividend rates should all be harmonized at 28%.⁹⁷ I focus on where *each individual policy* (i.e., each rate) falls on the liberal–conservative spectrum. Based on Figures 1 through 2B, the 28% capital gains and dividend rate is extremely liberal, the 28% corporate rate is moderately liberal, and the 28% individual rate is moderately conservative.

Figure 4A: Decomposing the 28% Rate Harmonization Proposal into Individual Policies



Focusing for the moment on the 114th Congress, the 28% corporate rate and 28% individual rate would be expected to be stable, while the 28% capital gains and dividend rate would be relatively unstable. The proposed capital gains and dividend rate falls outside of the gridlock zone. In other words, if Congress were to later consider the 28% capital gains and dividend rate separately, there would be obvious coalitions to move that rate downward—overwhelming supermajorities in both the House and Senate with the support of the President. I will later show that the capital gains rate is not just extreme relative to the 114th Congress: that policy is extreme relative to every session of Congress over the past twenty years.⁹⁸

A policy like the 28% capital gains and dividend rate can seem reasonable within the context of a larger reform—e.g., in the context of comprehensive rate harmonization. However, when that rate is considered in the future, it is likely to be changed because it is politically extreme. Past experience shows that most legislators will vote in favor of lowering that rate once it is considered in

ordinary income rates by increasing the former and decreasing the latter. Pub. L. No. 99-514, §§ 101(f), 302, 100 Stat. 2085, 2097, 2218. But one can imagine that rate harmonization could (in theory) be achieved by increasing the capital gains rate to match the existing ordinary income rate.

⁹⁷ See Avi-Yonah, *Taxation and Labor Mobility*, *supra* note 14, at 183 (“We should go back to the rate structure of the Tax Reform Act of 1986, which imposed the same tax rate (28%) on ordinary income (including dividends and interest) and capital gains.”); Avi-Yonah, *Reinventing the Wheel*, *supra* note 14 (“I thus believe that funding for reductions in the top individual rate to 28% can be found by raising the rate on capital gains and dividends to 28% and by cutting the corporate rate to 28% but eliminating the large corporate tax expenditures.”).

⁹⁸ See *infra* note 129 and accompanying text.

isolation. For example, the Taxpayer Relief Act of 1997 reduced the capital gains rate from 28% to 20%.⁹⁹ Roughly 90% of all legislators supported that change.¹⁰⁰

However, the other policies included in the reform—the 28% corporate rate and the 28% top marginal rate—are likely to be stable. Both policies fall within the gridlock zone. Any attempt to move either rate further down will be resisted by the President. Any attempt to move either rate upward will be stymied in the House and the Senate.

Decomposing the reform into individual policies reveals that some pieces of the reform will be more stable than others.¹⁰¹ This means that the overall rate harmonization is likely to be unstable. Over the medium run, the expectation is that the corporate rate and the individual rate will be stable while the capital gains and dividend rate may well be reduced. To be clear, I am not claiming that Congress will in fact deal with policies one at a time. Rather, decomposing reform into its constituent pieces and considering each piece separately provides a first-order estimate of each policy's stickiness, and therefore the reform's overall stability.¹⁰²

For an example of a reform that may be more stable than an across-the-board rate harmonization, consider the Tax Reform Act of 2014, a bill introduced by Dave Camp before he stepped down as Chair of the House Ways and Means Committee.¹⁰³ This bill would change rates but keep them relatively moderate. It proposes to change the top marginal rate to 35%,¹⁰⁴ the capital gains and dividend rate to 21%,¹⁰⁵ and the corporate rate to 25%.¹⁰⁶ As seen in Figure 4B, all of those rates are politically moderate. If this reform were enacted, the expectation is that the rates would be fairly stable.

⁹⁹ Pub. L. No. 105-34, § 311, 111 Stat. 788, 831.

¹⁰⁰ In the House, the vote was 389 to 43. 143 CONG. REC. H6664-65 (daily ed. July 31, 1997). In the Senate, the vote was 92 to 8. 143 CONG. REC. S8480 (daily ed. July 31, 1997).

¹⁰¹ Where pieces of a reform fit together, there may be some politicians who have linked preferences. For example, one can imagine a legislator who thinks a 28% capital gains rate is too high in isolation but supports that rate if the ordinary income rate is also 28%. *See supra* subsection I.C.1 (discussing linked preferences).

¹⁰² For those who are mathematically inclined, my approach is akin to examining the stability of an equilibrium by taking partial derivatives with respect to each dimension. Such an approach would identify certain dimensions along which the equilibrium is relatively more or less stable.

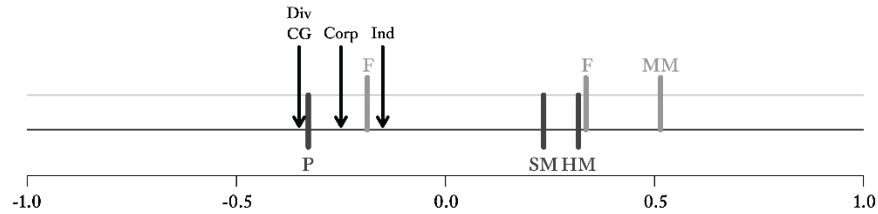
¹⁰³ Tax Reform Act of 2014, H.R. 1, 113th Cong. (2014).

¹⁰⁴ *Id.* § 1001.

¹⁰⁵ *Id.* § 1002; *see also* JIM NUNNS ET AL., TAX POLICY CTR., URBAN INST. & BROOKINGS INST., DESCRIPTION AND ANALYSIS OF THE CAMP TAX REFORM PLAN 4 (2014), <http://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/413176-Description-and-Analysis-of-the-Camp-Tax-Reform-Plan.PDF> [<https://perma.cc/A7VG-GTNG>].

¹⁰⁶ H.R. 1 § 3001.

Figure 4B: Decomposing the Tax Reform Act of 2014 into Individual Rate Policies



The fact that reform can be unstable has important implications. Within any reform, various provisions may be designed to “fit together” in terms of their overall effect on revenue or taxpayer behavior. This coherence can be lost if some pieces of the reform are more stable than others. Consider revenue-neutral tax reform that combines the repeal of tax expenditures and the reduction of tax rates.¹⁰⁷ Such a package might be enacted with the intent to leave overall revenue unchanged. But revenue-neutrality can be frustrated if some pieces of the reform are stickier than others. If the repeal of tax expenditures is relatively less stable than is the rate reduction, then the reform may actually lose revenue. Part III further expands on the normative implications of reform’s stability.

A. *Why Are Extreme Policies Enacted?*

Why is an extreme policy enacted in the first place? Unpopular policies can sometimes be included in legislation by lawmakers that have disproportionate access. For example, members of tax committees or party leadership can sometimes add provisions that reflect their own personal preferences (or the preferences of key constituencies).¹⁰⁸ Through the committee drafting process, legislation can accrete legislator-specific policies that would be unpopular if voted on by Congress in isolation. One interesting example is the tax credit

¹⁰⁷ See CONG. RESEARCH SERV., 113TH CONG., *supra* note 3, at 2-4 (discussing the congressional debate regarding the elimination of tax expenditures—i.e., “base broadening”). So-called “base-broadening” reform is further discussed in Section III.B.

¹⁰⁸ See Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 AM. POL. SCI. REV. 797, 804-05, 809-13 (1990) (arguing that the influence of special interests may be greatest at the committee level and reporting evidence of that influence in the context of three different committees); cf. Eleanor Neff Powell & Justin Grimmer, *Money in Exile: Campaign Contributions and Committee Access*, 78 J. POL. 974, 975 (2016) (analyzing campaign contributions to legislators who are involuntarily removed or added to committees, and finding that “business PACs contribute to seek short-term access to legislators with policy-relevant influence rather than to cultivate long-term relationships”); *id.* at 982 (finding, specific to tax, that exile from the Ways and Means Committee results in a decrease in PAC contributions of over \$300,000).

for electric motorcycles championed by Ron Wyden of Oregon, a key member of the Senate Finance Committee.¹⁰⁹ When enacted, this credit primarily benefitted Oregon-based manufacturer Brammo Inc.¹¹⁰ Wyden successfully added the provision to the extenders package in 2011.¹¹¹ Despite a brief expiration at the end of 2014, the tax credit has been renewed as of the end of 2015.¹¹²

The example of the electric motorcycle tax credit also demonstrates the importance of intensity of preferences. Where legislators have varying intensity of preferences across issues, it may be possible to logroll or trade votes.¹¹³ The deliberative nature of debate in the Senate is particularly conducive to accommodating differences in intensity.¹¹⁴ Intense preferences are particularly important when the legislator plays a key procedural role, as with Senator Wyden.

Other “extreme” policies are enacted in response to extraordinary circumstances. In the past, higher tax rates have been enacted during periods of mass-mobilization for wars.¹¹⁵ During significant economic downturns, Congress has enacted tax provisions designed to stimulate investment or consumption.¹¹⁶ Once the military or economic emergency passes, these policies may be perceived as extreme and susceptible to legislative adjustment.

¹⁰⁹ I.R.C. § 30D (West 2016); Press Release, Ron Wyden, Senator for Or., Wyden Amendment Extends Tax Credit for Electric Motorcycle Purchases (Aug. 2, 2012), <https://www.wyden.senate.gov/news/press-releases/wyden-amendment-extends-tax-credit-for-electric-motorcycle-purchases> [https://perma.cc/P8E2-F5U6].

¹¹⁰ See Press Release, Ron Wyden, *supra* note 109.

¹¹¹ *Id.*

¹¹² Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, div. Q, § 183, 129 Stat. 3072 (2015).

¹¹³ See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 119–22 (1962) (explaining that because political choices occur in sequences, a legislator will seek “gains from trade” by exchanging a vote on one issue for a vote on another issue); WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 157 (1982) (describing vote trading, which requires that traders vote against their “true tastes on some issues”); Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 *YALE L.J.* 1219, 1278–79 (1994) (“[V]ote trading, or logrolling, allows legislators to reveal intensity of preferences rather than mere ordinal ranking of preferences.” (footnote omitted)).

¹¹⁴ See DAVID R. MAYHEW, *PARTIES & POLICIES: HOW THE AMERICAN GOVERNMENT WORKS* 279–81 (2008).

¹¹⁵ See STEVEN A. BANK, KIRK J. STARK & JOSEPH J. THORNDIKE, *WAR AND TAXES* 167 (2008) (concluding that except for the George W. Bush–era tax cuts, “[i]n every major conflict, . . . the country has raised taxes to fund increased military expenditures”); Kenneth Scheve & David Stasavage, *The Conscription of Wealth: Mass Warfare and the Demand for Progressive Taxation*, 64 *INT’L ORG.* 529, 530 (2010) (arguing that there were increased demands for taxation during the twentieth century wars because it was perceived as unfair that some individuals were fighting on the front lines while others were profiting at home).

¹¹⁶ To stimulate consumption, Congress at various times has enacted individual tax cuts and tax rebates. See, e.g., Economic Stimulus Act of 2008, Pub. L. No. 110–185, 122 Stat. 613 (codified as amended in scattered sections of I.R.C.); Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107–16, 115 Stat. 38 (codified as amended in scattered sections of I.R.C.). To stimulate

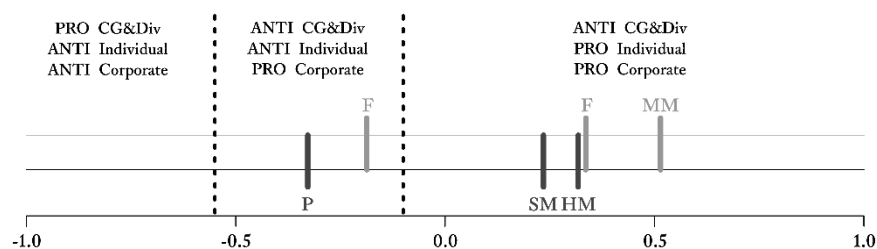
However, Congress often enacts extreme policies even absent extenuating circumstances like a war or recession. It may seem unlikely that Congress would ever enact a policy so divorced from legislators' preferences. That intuition is generally correct—if each policy question were confronted independent of others, then extremely liberal or extremely conservative policies are unlikely to exist. However, extreme policies are often imbedded within major reform. When an extreme policy is considered in concert with other changes, legislators may support the reform on net.

Consider the rate harmonization proposal discussed earlier.¹¹⁷ We can use DW-NOMINATE to decompose the hypothetical support for each piece of that proposal. Starting with the corporate rate, the reduction from 35% (DW-NOMINATE score of roughly -0.7) to 28% (DW-NOMINATE score of roughly -0.3) would have a cut-line of roughly -0.5. All Republicans and all-but-the-most-liberal Democrats are predicted to be in favor of the corporate tax reduction.

Turning to the capital gains and dividend rate, the increase from 20% (DW-NOMINATE score of roughly -0.25) to 28% (DW-NOMINATE score of roughly -0.9) would have a cut-line of roughly -0.5. This is a similar cut-line to the corporate rate change except in the opposite direction. Only the most liberal Democrats would support this rate increase.

Finally, with respect to the ordinary income rate, the decrease from 39.6% (DW-NOMINATE score of roughly -0.35) to 28% (DW-NOMINATE score of roughly +0.15) would result in a cut-line of roughly -0.1. All Republicans and the most conservative Democrats are predicted to support that rate decrease.

Figure 5: Proposal Divides Legislators into Three Different Groups



These cut-lines divide the legislators into three groups. There is the first group of liberal Democrats who are in favor of the capital gains and dividend rate increase but oppose the decrease in the corporate and individual rates.

capital formation and investment, Congress has enacted provisions like Section 168(k) bonus depreciation and Section 179 expensing.

¹¹⁷ See *supra* text accompanying notes 97–102.

There is a second group of moderate Democrats who favor the corporate rate reduction but oppose the decrease in the individual rate and the increases in the capital gains and dividend rates. Finally, there is a third group of Republicans and conservative Democrats who support the decrease in the individual rate and the corporate rate but oppose the increase in the capital gains and dividend rates.

How a legislator votes on this legislation depends on how he weighs those tradeoffs. Consider the third group. Some Republicans may value the individual and corporate rate decreases more than the capital gains and dividend rate increases and support the legislation. Other Republicans may have different priorities and oppose the legislation.¹¹⁸ My point is not to predict whether enough legislators will support the proposal for it to be enacted. Rather, the example highlights that major reform can result (and in the past, has resulted) in the enactment of extreme policies.

B. *Political Stability Across Congresses*

The discussion to this point has focused on the stability of policies within the 114th Congress, simply to provide context. But, as the composition of Congress and control of the White House shift, the gridlock zone will change. This Section considers stability in a broader temporal context. Policies that fall inside the gridlock zone in one session of Congress may fall outside of the gridlock zone in another. For example, a moderately liberal policy like a 39.6% ordinary income rate will be less stable if all of the pivots are conservative and the gridlock zone shifts to the right. Similarly, a moderately conservative policy like a 15% capital gains rate will be less stable if all of the pivots are liberal and the gridlock zone shifts to the left.

A rough measure of a policy's stability is the percentage of the time that the policy would have fallen inside the gridlock zone over the past fifty years. This Section explores the recent history of gridlock zones and shows that there is substantial overlap between sessions of Congress. There is a range of moderate policies that fall in the gridlock zone 80% or more of the time. In contrast, there is a range of extreme policies that almost always fall outside of the gridlock zone—these policies are unstable *regardless of the current configuration of Congress*.

¹¹⁸ Rational legislators would incorporate their beliefs regarding the stability of each individual policy in their decisions on whether to support the reform legislation. So, for example, one can imagine the first group of legislators would not be particularly enthused about the trade of a capital gains and dividend rate increase (that is likely temporary) for stickier changes to the individual and corporate rates.

Figure 6A: Policy Stability over the Past Half Century

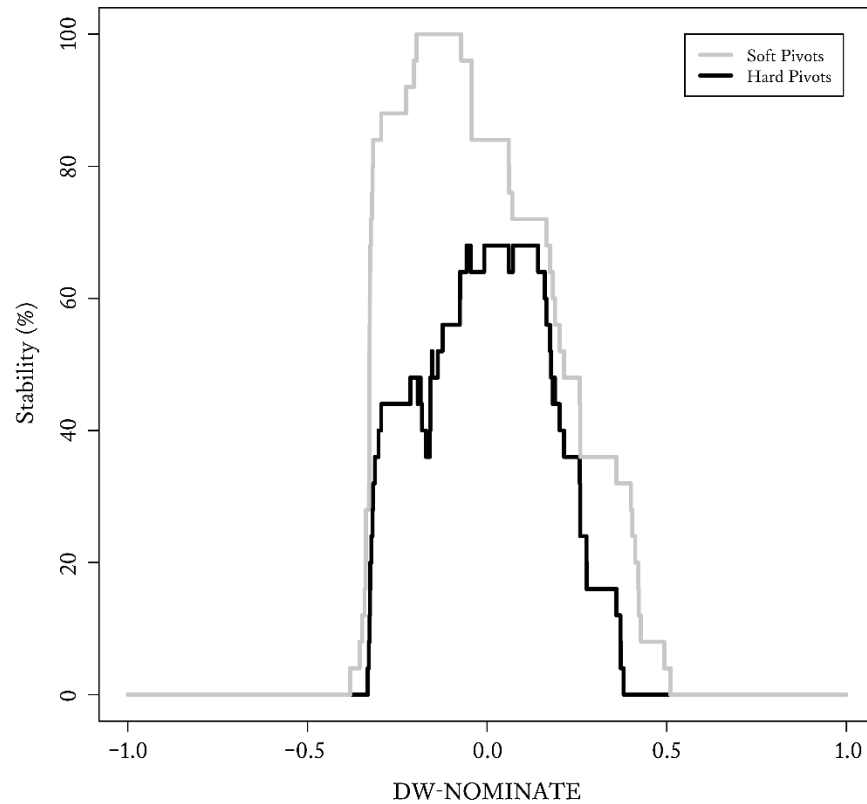


Figure 6A summarizes the likelihood that a particular policy falls within the gridlock zone over the past fifty years.¹¹⁹ The black line focuses just on the constitutional (or “hard”) pivots—the President, the median member of the House, and the median Senator.¹²⁰

The gray line incorporates several nonconstitutional (or “soft”) pivots—the median member of the House majority party and the filibuster pivots.¹²¹ Whereas majorities of each chamber and the President carry constitutional legitimacy, the soft pivots are more susceptible to charges of “obstructionism” and

¹¹⁹ The graph covers the 89th through 113th sessions of Congress.

¹²⁰ It also includes the veto-override pivots. *See supra* notes 49–50 and accompanying text.

¹²¹ *See supra* notes 51–54 and accompanying text (discussing procedural rules in the House and Senate that create additional pivots in the U.S. legislative process). Since the soft gridlock zone includes both the hard and soft pivots, the soft gridlock zone is necessarily larger than the hard gridlock zone. One can imagine circumstances under which there are additional soft pivots. For example, if the Chair of the House Ways and Means Committee is particularly powerful (true with past Chairs like Dan Rostenkowski), then he could be added as another pivot in the tax legislative process.

to procedural rule changes—a drastic step but not an impossible one.¹²² Since it is *difficult* (rather than impossible) to pass legislation without the consent of these pivots, I refer to them as “soft” pivots.¹²³

For example, a policy that maps onto a DW-NOMINATE score of -0.6 has never fallen within the gridlock zone over the past fifty years.¹²⁴ Such policy is predicted to be unstable in every configuration of Congress in the last half century. By contrast, a policy that maps onto a DW-NOMINATE score of 0.0 has fallen within the soft gridlock zone 84% of the time.¹²⁵ In other words, in 84% of Congresses, such policy would be difficult to change. Even looking at just the hard pivots (effectively ignoring the power of the majority party to control the legislative agenda in the House and the filibuster in the Senate), such policy would be stable in 68% of Congresses.

Moderate policies are generally much more stable than extreme policies. Policies that map onto DW-NOMINATE scores between -0.32 and +0.06 are predicted to have been stable in at least 80% of Congresses over the past half century.¹²⁶ By contrast, policies more liberal than -0.34 or more conservative than +0.42 are predicted to have been stable in less than 20% of Congresses over that same time period. Moreover, there are some policies that are so extreme that they would not have been stable in *any* session of Congress.

¹²² Chamber majorities sometimes exercise their ability to change the rules and strip power from nonconstitutional veto players. For instance, in November of 2013, the majority in the Senate limited the power of the filibuster to block executive appointments. See Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), <http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html> [<https://perma.cc/BXM4-6MJV>] (explaining the Senate’s rule change, which permitted it to “cut off debate on executive and judicial branch nominees with a simple majority rather than rounding up a supermajority of 60 votes”). The filibuster rule was also overturned during the confirmation of Justice Gorsuch. Darla Cameron et al., *Vote Count: How the Senate Changed Its Rules and Confirmed Gorsuch*, WASH. POST, https://www.washingtonpost.com/graphics/politics/gorsuch-senate-votes/?utm_term=.4aaf3dfa7de9 [<https://perma.cc/2M58-KDN9>] (last updated Apr. 7, 2017, 12:12 PM). This sets a clear precedent for eliminating the filibuster entirely if the majority chooses to do so at some future date. Some congressional scholars might argue that committees once held veto authority, but most would agree that committee chairs in recent decades do not have the power to block important legislation. See, e.g., STEVEN S. SMITH, JASON M. ROBERTS & RYAN J. VANDER WIELEN, *THE AMERICAN CONGRESS 208-13* (8th ed. 2013) (discussing the decline in power of committee chairs in both the House of Representatives and Senate as compared to their 1950s and 1960s predecessors).

¹²³ For example, the sixtieth Senator’s support is unnecessary if the tax bill is passed through the reconciliation procedure. For a further discussion of reconciliation and tax reform, see generally Kysar, *supra* note 64.

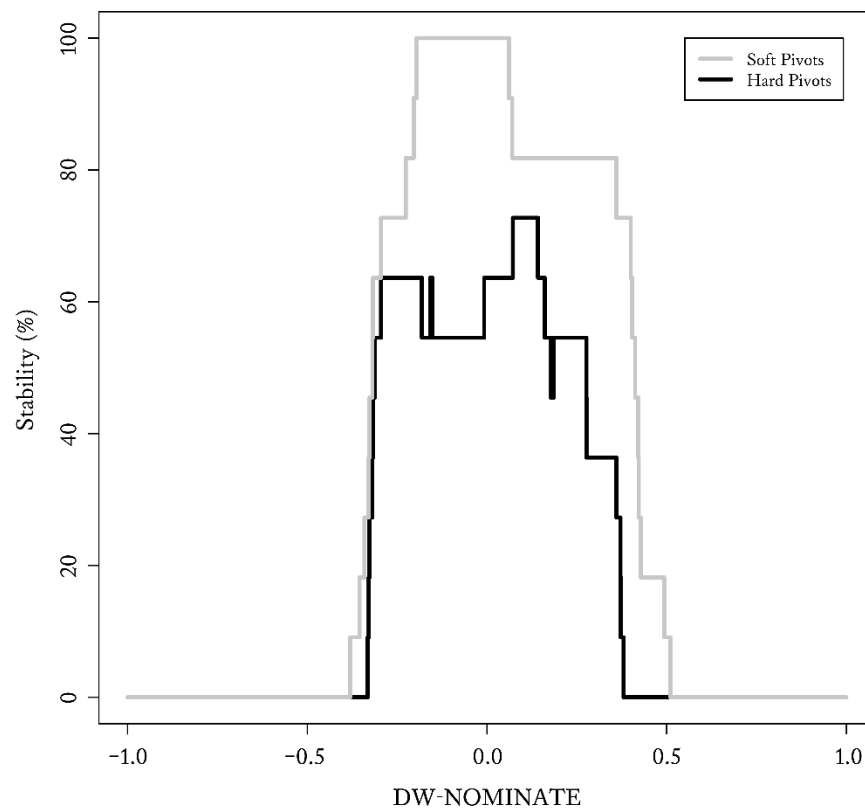
¹²⁴ A DW-NOMINATE score of -0.6 roughly corresponds to a 24% capital gains and dividend rate, a 45% top marginal rate, or a 35% top corporate rate.

¹²⁵ A DW-NOMINATE score of 0.0 roughly corresponds to a 17% capital gains and dividend rate, a 31% top marginal rate, or a 25% corporate rate.

¹²⁶ There is a liberal skew to the stability graph because Democrats consistently controlled Congress early in the sample.

Since there is evidence that Congress is becoming increasingly polarized,¹²⁷ Figure 6B focuses on the past two decades (since the Republican Revolution of 1994). Figure 6B is very similar to Figure 6A. There is a range of moderate policies (from -0.23 to $+0.36$) that are *stable* in at least 80% of Congresses. Extreme policies—those more liberal than -0.36 or more conservative than $+0.43$ —are *unstable* in at least 80% of Congresses. In fact, policies that are more liberal than -0.34 or more conservative than $+0.49$ were not stable in any Congress over the past two decades.

Figure 6B: Policy Stability Since 1994



127 See POOLE & ROSENTHAL, *supra* note 21, at 315 (“[S]ince we started our research collaboration, we have been convinced that contemporary American politics are ideological and polarizing.”); Doran, *supra* note 9, at 560-62 (describing interparty polarization as one of three institutional developments within Congress that have led to a new tax legislative process); Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 YALE J. ON REG. 253, 307 (2011) (“The rise in the power of the party has also been accompanied by interparty polarization. The last decade has witnessed virtually no bipartisan efforts in Congress.”); Yin, *supra* note 9, at 1023 (“Electoral changes have also contributed to greater centralization of decision making by increasing the intra-party homogeneity and inter-party polarization in Congress.”).

These graphs are useful to examine the stability of reform. Consider the proposal to harmonize all rates at 28%.¹²⁸ The 28% capital gains and dividend rate map onto a DW-NOMINATE score of roughly -0.9. This rate would have been unstable in every session of Congress in the past half century.¹²⁹ Projecting into the future, it is not a stretch to say it would be unstable in every conceivable configuration of Congress going forward. The 28% corporate rate roughly maps onto a DW-NOMINATE score of -0.3. That policy is predicted to be stable in 84% of Congresses in the past half century (and 63% of Congresses since 1994). Finally, the 28% individual rate approximately maps onto a DW-NOMINATE score of +0.15. That policy is predicted to be stable in roughly 72% of Congresses in the past half century (and 82% of Congresses since 1994). Thus, the reductions to the individual and corporate rates are likely to be relatively more stable than the capital gains and dividend rate increase. The overall rate compromise is likely to be unstable.¹³⁰

The next Part shows how this information can be incorporated into the normative evaluation of tax reform proposals.

III. DISCOUNTING NORMATIVE JUSTIFICATIONS FOR LIKELY INSTABILITY

Tax reform has the potential to make the tax system more efficient, fairer, and simpler while raising the same or more revenue.¹³¹ But these normative appeals will often lose their persuasiveness if the reform is unstable. Efficiency, fairness, simplicity, or revenue justifications should be appropriately discounted by the likely stability of the reform package.

Most efficiency gains will only be achieved if the tax reform persists and is expected to persist. If taxpayers think that reform is unstable, efficiency gains will be limited even while the unstable tax reform is in effect.¹³² The tax

¹²⁸ See *supra* text accompanying note 97.

¹²⁹ Note that historical gridlock zones are useful to see how large the gridlock zone tends to be in the ideological space. The mapping of politics onto the ideological space has shifted over time (and may shift again in the future). See *supra* note 70 and accompanying text.

¹³⁰ In contrast, the rates proposed by the Tax Reform Act of 2014 would be significantly more stable. The capital gains and dividend rate is predicted to be stable in roughly 20% of Congresses in the past half century. The corporate rate and the individual rate are predicted to be stable 90% of the time.

¹³¹ See CONG. RESEARCH SERV., 113TH CONG., *supra* note 3, at 1 (noting that any tax reform proposals are evaluated by assessing their impact on efficiency, equity, simplicity, and revenue). For example, former House Ways and Means Chairman Dave Camp said the Tax Reform Act of 2014 was a step toward “strengthening the economy, and making the tax code simpler and fairer.” 160 CONG. REC. E1800 (daily ed. Dec. 12, 2014) (statement of Rep. Camp). The Simpson–Bowles plan claimed to simplify the tax code while making it more efficient and fair. THE NAT’L COMM’N ON FISCAL RESPONSIBILITY & REFORM, THE MOMENT OF TRUTH 12 (2010).

¹³² Efficiency gains are based on changing taxpayer behavior in desirable ways. Sophisticated taxpayers will adjust their behavior to account for expected future changes in the law.

code will only be simpler if the simplifications to the tax law persist. Uncertainty about the stability of reform will increase the compliance and planning burdens on taxpayers, undermining the potential benefits of a simpler code. Similarly, improvements in fairness or increases in revenue will be transient unless the reform survives.

There are two important caveats. First, the stability of a proposal is not its most important characteristic.¹³³ *Stability is not an intrinsic normative justification. Analyzing stability allows normative justifications like efficiency and fairness to be appropriately discounted.* The rest of this Part assumes that the considered reform (if stable) is determined to be desirable on one or more normative dimensions.

Second, instability matters more if it is directional. If a policy is equally likely to change in either direction (i.e., if a rate is equally likely to increase or decrease in the future), then incorporating stability into normative analyses is less informative. The approach described in Parts I and II identifies extreme policies characterized by directional instability, where a subsequent change is more likely to change extreme policies in a moderate direction.

A. *The Effect of Reform Instability on Fairness and Efficiency*

One difficulty with efficiency and fairness arguments in the tax context is that almost any proposal will improve matters on at least one margin. The tax system differentially treats categories of income, behavior, economic activity, and taxpayer. These differences are easily assailed as being inefficient or unfair.

It is always possible to focus on a different efficiency or fairness margin to motivate another change to the tax law. These arguments generally take the following form: “The tax system taxes X differently than it taxes Y, and this is inefficient and/or unfair.” In the U.S. income tax system, there are innumerable Xs and Ys. Thus, an almost countless number of proposals will seek to equalize treatment between categories. The general theory of second best cautions against such myopic reasoning. Where a system has multiple distortions, reducing a single distortion may not improve the overall result.¹³⁴ The tax system has a very large number of “distortions” from both an efficiency perspective and a fairness perspective. Despite the general theory

¹³³ To be clear, stability is not always a positive. For example, imagine a tax reform proposal that makes the tax code less efficient and less fair. It may be better for that inefficient and unfair reform to be unstable.

¹³⁴ See generally R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956). The general theory of second best has broad application to optimization problems with multiple variables. *Id.* at 12. Where one variable is constrained, preventing the first-best solution, it is possible that the second-best solution requires changing other variables away from their values in the first-best solution to reach the second-best. *Id.*

of second best, legislators and tax policy analysts continue to argue that their particular proposals to improve the tax system on specific margins will improve the system overall, even though theory cautions that they should often be more agnostic.

For example, consider the question of whether the dividend tax rate should be harmonized with the capital gains rate or the ordinary income rate. How should the fairness concept of horizontal equity be applied?¹³⁵ Consider an example. Albert earns \$100,000 of dividend income this year. Is Albert more similar to Beth, who realizes \$100,000 of long-term capital gains this year, or more similar to Cathy, who earns \$100,000 of salary income this year? The point is not to offer an answer to this question but to highlight its intractability. Harmonizing the dividend rate with the capital gains rate will equalize the treatment of Albert and Beth, but that harmonization will lead to unequal treatment of Albert and Cathy. Equalizing the dividend rate and the ordinary income rate will level the tax treatment of Albert and Cathy, but doing so will treat Albert and Beth unequally. Depending on his preference regarding the dividend rate, a legislator or policymaker can emphasize one or the other fairness margin.

Similar rhetorical appeals can be made with respect to efficiency. For example, how should income from communication structures be taxed? It depends on what type of asset is used as a comparison. The current effective tax rate on the income from communication structures is approximately 17%.¹³⁶ Income from petroleum and natural-gas structures is taxed at an effective rate of approximately 9%.¹³⁷ Income from commercial buildings is taxed at an effective rate of approximately 30%.¹³⁸ Differences in effective tax rates cause distortions in the allocation of capital. Should the effective tax rate on income from communication structures be raised or lowered from an efficiency perspective? Depending on the comparison chosen (commercial buildings, petroleum and natural-gas structures, or others), an (incomplete) efficiency claim can be made for either policy change.

¹³⁵ Horizontal equity is a conception of fairness that similarly situated people—here taxpayers—should be treated similarly. Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT'L TAX J. 139, 139 (1989). "Vertical equity" arguments focus on the relative treatment of different types of people. *Id.* at 140. Louis Kaplow has argued that horizontal equity and vertical equity are inextricably linked. *Id.* at 143-45. *But see* Richard A. Musgrave, *Horizontal Equity, Once More*, 43 NAT'L TAX J. 113, 114 (1990) ("The independent role of [horizontal equity] becomes apparent once focus on an optimal outcome is replaced by comparison of second-best solutions."). Regardless of whether Kaplow or Musgrave is theoretically right, horizontal equity arguments remain popular.

¹³⁶ CONG. BUDGET OFFICE, TAXING CAPITAL INCOME: EFFECTIVE RATES AND APPROACHES TO REFORM 10 tbl.2 (2005).

¹³⁷ *Id.* at 11 tbl.2.

¹³⁸ *Id.* at 10 tbl.2.

Rather than focus on particular efficiency margins,¹³⁹ the ideal (but often impractical) approach would consider all margins simultaneously and reduce aggregate deadweight loss.¹⁴⁰ Such an approach would require a general equilibrium model that is beyond what is currently available. Similarly, fairness arguments should be rooted in a proposal's overall effect on tax and spending programs.¹⁴¹

This is not intended to completely discard all fairness or efficiency arguments. The general theory of second best can be taken too far. There are times when the distortions on a particular margin are more important than the distortions on others—situations in which a change would clearly result in a net benefit.¹⁴² Instead, the point is that “micro-fairness” and “micro-efficiency” arguments can be marshaled for or against almost any policy change. It simply requires the advocate to focus on particular margins to the exclusion of others.¹⁴³

¹³⁹ This is particularly problematic in the taxation of foreign-source income. See David A. Weisbach, *The Use of Neutralities in International Tax Policy 2* (Univ. of Chi. Law Sch. Coase-Sandor Inst. for Law & Econ., Working Paper No. 697, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482624 [<https://perma.cc/PC77-NCTU>] (arguing that the focus on particular margins in international tax policy undermines the international tax reform debate). Many policy analysts argue for a territorial regime because they focus on particular margins of behavior. See, e.g., Mihir A. Desai & James R. Hines Jr., *Evaluating International Tax Reform*, 56 NAT'L TAX J. 487, 488-89 (2003) (arguing that a territorial tax regime reduces the distortion of capital ownership). Other policy analysts argue for a worldwide regime because they focus on other margins of behavior. See, e.g., PEGGY B. MUSGRAVE, UNITED STATES TAXATION OF FOREIGN INVESTMENT INCOME: ISSUES AND ARGUMENTS 109-11 (1969) (arguing that a worldwide regime with unlimited foreign tax credits would avoid distorting taxpayers' decisions regarding where to invest). Since each margin is identified by a different acronym (e.g., CEN, CON, CIN, and NN), this debate has been called “alphabet soup” or the “battle of acronyms.” DANIEL N. SHAVIRO, FIXING U.S. INTERNATIONAL TAXATION 14 (2014).

¹⁴⁰ The analysis would incorporate deadweight loss from behavioral distortions, tax-avoidance costs, and rent-seeking costs. See David Gamage, *How Should Governments Promote Distributive Justice?: A Framework for Analyzing the Optimal Choice of Tax Instruments*, 68 TAX L. REV. 1, 16 (2014) (discussing the deadweight loss that results from taxpayers incurring costs to avoid taxes); David Gamage, *The Case for Taxing (All of) Labor Income, Consumption, Capital Income, and Wealth*, 68 TAX L. REV. 355, 365 (2015) (including tax-avoidance as a cost); cf. Weisbach, *supra* note 139, at 14 (making a similar argument in the context of international taxation).

¹⁴¹ See Eric M. Zolt, *Inequality in America: Challenges for Tax and Spending Policies*, 66 TAX L. REV. 641, 688-92 (2013) (arguing that tax and spending programs should be altered to “reflect [the] substantial changes in the distribution of wealth and income”).

¹⁴² For example, the efficiency argument with respect to the dividend tax rate is probably stronger for lowering the rate than for raising it. Lowering the dividend rate would (1) reduce the differential taxation of corporate income and income earned in passthroughs, (2) reduce the distortion regarding whether to finance corporate investment with debt or equity, and (3) reduce capital lock-in.

¹⁴³ I have left aside the difficulty of integrating fairness and efficiency considerations. One approach taken by the optimal tax literature is to specify a social welfare function. See, e.g., Patrick B. Crawford, *The Utility of the Efficiency/Equity Dichotomy in Tax Policy Analysis*, 16 VA. TAX REV. 501, 510 (1997) (establishing the minimal conditions for an acceptable social welfare function).

That the principles of efficiency and fairness can be used to endorse such a wide variety of tax law changes strengthens the basic approach to stability taken in this Article. When designing future legislation, there is no guarantee that future Congresses will place the same weight on the same margins that past or present Congresses do. It is convenient to hope that the internal coherence of the current reform will remain relevant and evident to legislators. But history has shown us this is not the case. Past reform combined the ordinary income and capital gains rates.¹⁴⁴ More recent reform has combined the capital gains rate and dividend rate.¹⁴⁵ Future reform may (and probably will) combine pieces in different ways.

Why do legislators dismantle previously enacted reforms? Why do they disturb the links between policies established by prior Congresses? One partial explanation is that a wide variety of tax law changes can be supported by arguments that are at least rhetorically appealing. A second explanation is that legislators are generally rewarded politically for enacting legislation.¹⁴⁶

Another explanation may be the phenomenon of “bracketing.” The behavioral economics literature has shown that individuals will sometimes make decisions by assessing all of the consequences of an action taken together (“broad bracketing”) and sometimes make decisions in isolation (“narrow bracketing”).¹⁴⁷ When enacting reform, legislators broadly bracket their tax policy decisions, but they may later narrowly bracket those same decisions. This is consistent with the behavioral economics literature, which shows that individuals will make different choices at various times based on how broadly they bracket those choices.¹⁴⁸

The political science literature has long appreciated the importance of the bracketing and framing of issues. In his classic work, E.E. Schattschneider famously said, “The substitution of conflicts is the most devastating kind of

¹⁴⁴ Tax Reform Act of 1986, Pub. L. No. 99-514, §§ 101(f), 302, 100 Stat. 2085, 2097, 2218.

¹⁴⁵ Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, §§ 301-02, 117 Stat. 752, 758-60.

¹⁴⁶ See FENNO, JR., *supra* note 73, at 1 (stating that basic goals of House members include “re-election, influence within the House, and good public policy” (emphasis omitted)); Doran, *supra* note 9, at 584-86 (noting that key decisions regarding the finer points of tax legislation are driven by three legislator motivations: re-election, power and prestige, and desire for good policy); Shaviro, *supra* note 9, at 93 (describing “policy entrepreneurship,” which is “the investment of personal resources in promoting a particular policy, with the anticipated ‘return’ often depending on the enactment of legislation”).

¹⁴⁷ See generally Daniel Read et al., *Choice Bracketing*, 19 J. RISK & UNCERTAINTY 171 (1999) (introducing the “choice bracketing” concept, which analyzes decisionmaking by grouping individual choices into sets).

¹⁴⁸ *Id.* at 174.

political strategy.”¹⁴⁹ Since policy questions can be complicated, strategic advocates often try to frame issues in a favorable light.¹⁵⁰ When successful, reframing can change legislative outcomes.¹⁵¹ Both bracketing and framing explain why decisions made today may not be durable in the future when considered in a different context.

John Kingdon’s description of policy alternatives as akin to a primordial soup seems particularly apt in the tax reform arena.¹⁵² He described a process with many ideas bumping into one another, forming combinations and re-combinations.¹⁵³ Discarded ideas can be revived or combined with new ideas when circumstances change to address new problems.¹⁵⁴ In the tax context, we often observe different tax law changes being proposed, reintroduced, and combined with other changes.

Therefore, when considering a reform proposal, it is important to qualify efficiency and fairness justifications by the reform’s likely stability. At their core, efficiency arguments can be reduced to dollar amounts of deadweight loss. Incorporating stability into that analysis becomes an exercise in discounting to present value. For example, Reform A will reduce deadweight loss by \$100 million per year but will be relatively unstable. Reform B will reduce deadweight loss by only \$50 million per year but will be stable.¹⁵⁵ Reform A appears more efficient if reform is assumed to be stable, but it may be less efficient if instability is incorporated in the analysis.

¹⁴⁹ E.E. SCHATTSCHEIDER, *THE SEMI-SOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 71 (1960).

¹⁵⁰ There is an expansive literature on the framing of political issues. *See, e.g.*, FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 25 (2d ed. 2009) (describing how competing “policy images” can shape preferences and political outcomes); KINGDON, *supra* note 9, at 20 (arguing that legislative action is “much more likely if problems, policy proposals, and politics are all coupled into a package”); WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* 142-43 (1986) (observing that political outcomes can be altered by changing the way that questions or relevant factors for consideration are posed to voters); SCHATTSCHEIDER, *supra* note 149, at 60-75. Although political actors are constantly trying to reframe debates, these efforts are usually unsuccessful. In a study of roughly 100 issues, Baumgartner and his coauthors found that only four issues were even partially reframed over the four years of the study. FRANK R. BAUMGARTNER ET AL., *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* 176 (2009).

¹⁵¹ A commonly cited example in taxation is the framing of the estate tax as a “death tax.” *See, e.g.*, MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* 3-4 (2005) (noting how opponents of the estate tax in the 1990s effectively renamed it the “death tax”).

¹⁵² KINGDON, *supra* note 9, at 19, 200-01.

¹⁵³ *Id.* at 200.

¹⁵⁴ *Id.* at 200-01. Kingdon’s account focuses on the importance of ideas. *Id.* He argues that particular proposals are selected based on technical feasibility, congruence with values such as fairness and efficiency, and budgetary or political constraints. *Id.*

¹⁵⁵ In other words, assume that one or more of the policies included in Reform A are extreme, while all of the constituent policies of Reform B are relatively moderate.

It is also important to take into account how taxpayers react to the likely stability of reform. There is a tendency in the policymaking arena to assume that all reforms will be equally stable and that taxpayers will change their behavior as if all reforms are equally permanent. Expectations regarding future rates shape taxpayer behavior.¹⁵⁶ If taxpayers expect future rates to be change, they will adjust their current behavior in anticipation of those changes.¹⁵⁷ It is well understood, for example, that taxpayers accelerate or delay the sale of capital assets in anticipation of changes in capital gains rates.¹⁵⁸

Fairness arguments can be similarly qualified. Consider, for example, the proposal to harmonize the corporate, individual, dividend, and capital gains rates at 28%.¹⁵⁹ There are compelling fairness arguments for such a regime. Taxing all income at the same rate seems to make the tax system more horizontally equitable.¹⁶⁰ Since high-income taxpayers predominantly report capital gains, the equalization of rates may also seem fairer from a vertical equity perspective.¹⁶¹

However, these fairness arguments must be discounted by the reform's likely stability. Section II.B suggests that a reduction in the corporate rate and the top marginal rate will be sticky, but any similar change to the capital gains and dividend rate will not be. Post reform, the capital gains and dividend rate may well be reduced in the medium term.¹⁶² The result would be a rate regime in which the top individual and corporate rates stay at 28%, while the dividend and capital gains rates are reduced to 20% or lower.

¹⁵⁶ See Oh & Tausanovitch, *supra* note 22, at 521-27 (discussing how uncertainty in the capital gains rate affects taxpayer behavior).

¹⁵⁷ Taxpayers can respond to taxes (and expected changes in taxes) by either adjusting their real behavior or by tax planning. Changes in real behavior include taxpayers changing how they work and adjusting how much they save and invest. Tax planning includes taxpayers accelerating or deferring income or restructuring transactions to change the character of income or loss. See generally GERALD AUTEN & LAURA KAWANO, OFFICE OF TAX ANALYSIS, U.S. DEP'T OF TREASURY, HOW THE RICH RESPOND TO TAX RATE INCREASES: EVIDENCE FROM HIGH-INCOME TAXPAYER RESPONSES TO THE 1993 TAX ACT, <http://www.aeaweb.org/aea/2013conference/program/retrieve.php?pdfid=418> [<https://perma.cc/9N8E-7GNH>] (examining the elasticity of taxable income, or ETI, of high-income taxpayers).

¹⁵⁸ *What Is the Effect of a Lower Tax Rate for Capital Gains?*, TAX POL'Y CTR., <http://www.taxpolicycenter.org/briefing-book/what-effect-lower-tax-rate-capital-gains> [<https://perma.cc/2QKN-Y9XC>] (discussing various schemes to anticipate change in capital gains and ordinary income rates).

¹⁵⁹ See *supra* text accompanying note 97; see also *supra* note 14.

¹⁶⁰ See Avi-Yonah, *Reinventing the Wheel*, *supra* note 14 (proposing to unify the capital and ordinary income rates at 28% in order to tax higher earners at a fair rate).

¹⁶¹ See *supra* note 135 (defining horizontal and vertical equity).

¹⁶² In making that subsequent change, one can imagine some of the traditional efficiency and fairness arguments being trotted out for reduced taxation of capital gains and dividends. Efficiency arguments include encouraging savings and investment, reducing the alleged "double-taxation" of corporate income, and removing the incentive to consume currently. Fairness arguments include the questionable but popular argument that taxing returns to capital is unfair "double" taxation.

Incorporating stability reveals a significant weakness in the fairness justification for this proposal.¹⁶³ The reform may result in a significant reduction in the progressivity of the tax system. What was intended as a fairness-enhancing reform may result in a less fair tax system in the medium run.¹⁶⁴

B. *Will Revenue-Neutral Reform Remain Revenue-Neutral?*

Claims that a particular reform will be revenue-neutral or revenue-raising can also be qualified by stability. In the current fiscal environment, it is widely accepted that any tax reform should not lose any revenue. For example, in his recent tax reform proposal, Representative Dave Camp (R-Mich.), the former Chair of the House Ways and Means Committee, focused on developing a revenue-neutral package because he thought it was necessary for the proposal to have any bipartisan viability.¹⁶⁵ This restriction made it impossible for him to reduce marginal rates as much as other Republicans wanted.¹⁶⁶

Revenue-neutrality is particularly relevant in base-broadening reform, in which tax expenditures are repealed to expand the income tax base. Tax expenditures are deductions, credits, and exclusions that act like spending programs by reducing the taxes owed by those who claim them. Almost every substantial reform proposal involves some base broadening (often paired with rate reductions).¹⁶⁷ The broader income tax base allows for lower rates without affecting overall

¹⁶³ With respect to efficiency, the overall reform may still be a success. Effective rates have come down, and the differential between rates has also shrunk even if the rates do not stay perfectly harmonized.

¹⁶⁴ Some reform proposals explicitly attempt to remove fairness as a variable (and source of potential political disagreement) by leaving unchanged the distribution of the tax burden across income classes. So-called “distribution-neutral” tax reform proposals should also be subjected to stability analysis.

¹⁶⁵ See Press Release, U.S. House of Representatives, Comm. on Ways & Means, Camp Releases Tax Reform Plan to Strengthen the Economy and Make the Tax Code Simpler, Fairer and Flatter (Feb. 26, 2014), <http://waysandmeans.house.gov/camp-releases-tax-reform-plan-to-strengthen-the-economy-and-make-the-tax-code-simpler-fairer-and-flatter> [https://perma.cc/HE5Y-URWK] [hereinafter Camp Proposal] (advocating for the Tax Reform Act of 2014 and specifically stating that the proposal was not projected by the Congressional Budget Office to reduce revenue).

¹⁶⁶ There is significant evidence between roll call votes and public statements that the median Republican congressman preferred a top marginal tax rate closer to 25%. See Gene Sperling, *Believe It or Not, Corporate Tax Reform Is Doable in 2015*, WALL STREET J. (Oct. 8, 2014, 6:52 PM), <http://www.wsj.com/articles/gene-sperling-believe-it-or-not-corporate-tax-reform-is-doable-in-2015-1412808733> [https://perma.cc/WF33-S47L] (stating that Republicans desire a straight 25% tax rate as opposed to the 28% rate for corporations and 25% rate for manufacturers proposed by former President Obama). In Representative Camp’s proposal, the top marginal rate was 35%. See Camp Proposal, *supra* note 165. Many Republicans expressed disappointment that the proposed top rate was not lower. See Lisa Mascaro, *Dim Prospects for House Republicans Plan to Overhaul Tax Code*, L.A. TIMES (Feb. 26, 2014), <http://articles.latimes.com/2014/feb/26/news/la-pn-house-republican-tax-overhaul-20140226> [https://perma.cc/F68J-853R] (discussing Representative Camp’s reform proposal, including the potential surtax on high-income earners and subsequent bipartisan pushback).

¹⁶⁷ See, e.g., CONG. RESEARCH SERV., 113TH CONG., *supra* note 3, at 2 (“Both the Tax Reform Act of 2014 and the Fiscal Commission’s 2010 tax reform proposal pay for, at least in part, reduced tax rates by repealing or reforming most major tax expenditures.”).

revenue. Politicians on both sides of the aisle support base broadening in theory but differ on which expenditures should be cut.¹⁶⁸

Once political stability is taken into account, the challenge of base broadening is more difficult than simply selecting which expenditures to repeal or limit. Will those expenditures stay repealed or will they be reenacted in some form? Will any limitations be rolled back? If the overall package is designed to be revenue-neutral, will the reform package remain revenue-neutral moving forward?¹⁶⁹ If the overall package is designed to be revenue-raising (in order to cut into the deficit), will the package actually raise the projected revenue?

Consider these questions in the context of three major tax expenditures for individual taxpayers—the exclusion for employer-provided healthcare, the home mortgage interest deduction, and the charitable contribution deduction. The Joint Committee on Taxation projects that from 2014 to 2018, these three tax expenditures will cost the government \$785 billion, \$405 billion, and \$252 billion, respectively.¹⁷⁰ To give a rough sense of how much revenue is involved, the Congressional Budget Office projects that raising all tax rates on ordinary income by one percentage point would raise roughly \$287 billion over the same time period.¹⁷¹ Repealing the three aforementioned expenditures would therefore produce roughly five times the amount of revenue than would increasing all marginal rates by one percentage point.

Any serious base-broadening attempt would need to confront these provisions. However, these provisions enjoy significant popular and legislative support;¹⁷² as such, their repeal may not be stable.

168 Former President Obama stated that “the classic problem [is] that people are in favor of tax reform in the abstract’ while opposing some of the specifics.” Angela Greiling Keane & Richard Rubin, *Obama Says Still Chance for Tax Code Deal with Republicans*, BLOOMBERG, <http://www.bloomberg.com/news/articles/2014-12-03/obama-says-still-chance-for-deal-with-republicans-on-tax-code> [https://perma.cc/XK4X-QRUQ] (last updated Dec. 3, 2014, 3:02 PM).

169 Revenue cost is not the only cost that may be affected by a policy’s stability. See Jason S. Oh, *The Social Cost of Tax Expenditure Reform*, 66 TAX L. REV. 63, 64-65 (2012) (discussing the effect that a reform’s predicted stability has on behavioral and rent-seeking social costs).

170 See JOINT COMM. ON TAXATION, JCX-97-14, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2014–2018, at 22 tbl.1 (2014) (providing projected numbers for all tax expenditures through 2018). There is a difference between revenue estimates of a policy change and the tax expenditure estimates. *Id.* at 16. The revenue estimates take into account various behavioral effects that would result from the repeal of the proposal. *Id.* But see Yair Listokin, *Tax Expenditure Estimates Approximate Revenue Estimates*, TAX NOTES, Oct.–Dec. 2014, at 701, 701 (arguing that so long as a tax expenditure has no close substitutes, the tax expenditure estimates should approximate revenue estimates).

171 See CONG. BUDGET OFFICE, OPTIONS FOR REDUCING THE DEFICIT: 2014 TO 2023, at 106 (2013), <http://www.cbo.gov/sites/default/files/cbofiles/attachments/44715-OptionsForReducingDeficit-3.pdf> [https://perma.cc/3EQQ-F47R] (projecting revenue gains by raising different tax rates by a single percentage point).

172 Of the recent reforms that have been put forward, none have proposed to eliminate all, or even two, of these expenditures. See Tax Reform Act of 2014, H.R. 1, 113th Cong. §§ 1402, 1403(c) (2014) (retaining both the mortgage-interest and charitable-contribution deductions); Bipartisan Tax Fairness

As an example, consider two revenue-neutral proposals. Proposal A would *repeal* the home mortgage interest deduction entirely and reduce all ordinary income tax rates by 1.5%. Proposal B would *limit* the mortgage interest deduction (by capping eligible mortgages at \$500,000 and replacing the deduction with a 15% nonrefundable credit) and reduce all ordinary income tax rates by 0.3%.¹⁷³

How stable are the constituent policies of the two proposals? Under either proposal, the reduction to ordinary income rates is likely to be stable. According to Figure 1, either reduction to the top rate makes the current liberal policy more moderate.

However, there is evidence suggesting that *limiting* the home mortgage interest deduction would be much stickier than *repealing* it entirely. With the help of research assistants, I collected a broad range of statements by legislators on limiting or repealing the home mortgage interest deduction since 2008.¹⁷⁴ We found broad support for the mortgage interest deduction across the political spectrum. In fact, the search unearthed only one statement that favored outright repeal over keeping the deduction.¹⁷⁵ The legislator behind this statement, Tim Huelskamp, is extremely conservative: his DW-NOMINATE score is +0.75.¹⁷⁶

and Simplification Act of 2011, S. 727, 112th Cong. § 2(B) (2011) (retaining both the mortgage interest and charitable contribution deductions). *But see* THE NAT'L COMM'N ON FISCAL RESPONSIBILITY & REFORM, *supra* note 131, at 29 (proposing to eliminate all income tax expenditures and to use the revenue generated to add back expenditures that "promote work, home ownership, health care, charity, and savings").

¹⁷³ This is similar to the 15% cap proposed by President George W. Bush's 2005 Advisory Panel on Federal Tax Reform. *See* PRESIDENT'S ADVISORY PANEL ON FEDERAL TAX REFORM, SIMPLE, FAIR, AND PRO-GROWTH: PROPOSALS TO FIX AMERICA'S TAX SYSTEM 61 tbl.5.1 (2005). The Tax Policy Center projected that capping the eligible amount of debt and replacing the deduction with a 15% nonrefundable credit would increase revenue between 2014 and 2018 by \$81 billion. AMANDA ENG ET AL., TAX POLICY CTR., URBAN INST. & BROOKINGS INST., OPTIONS TO REFORM THE DEDUCTION FOR HOME MORTGAGE INTEREST 6 tbl.1 (2013), <http://www.urban.org/sites/default/files/publication/23411/412768-Options-to-Reform-the-Deduction-for-Home-Mortgage-Interest.PDF> [<https://perma.cc/496B-QXD2>].

¹⁷⁴ These statements were gathered using searches on Westlaw and Google. For each member of Congress, the following search string was used on Westlaw's newspapers database: ((Senator! Representative! Sen. Rep. Congress!) /p [LAST NAME]) & DA(aft 1-1-2007) & ((home mortgage) /p interest /p deduction). Similarly, the following search string was used on Google: allintext: "Rep. * [LAST NAME]" home OR mortgage interest deduction -8,000. For each search, the phrase "[LAST NAME]" was replaced with the Congressman's last name. The resulting data was then reviewed for relevance. The searches were run during October and November of 2014.

¹⁷⁵ "[O]ne of the top tax exemptions is the mortgage interest deduction, which is worth about [six] trillion dollars, Huelskamp said. 'That's the battle in Washington, to figure out which special interest, what particular industry will lose their tax preferences,' Huelskamp said. 'I don't think anyone should get a preference in the US tax code.'" Ryan D. Wilson, *Huelskamp: Budget Should Be Balanced Without Cutting Military*, INSURANCENEWSNET.COM (Oct. 3, 2014), <http://insurancenewsnet.com/oarticle/Huelskamp-Budget-should-be-balanced-without-cutting-military-a-563045> [<https://perma.cc/9828-KCV9>].

¹⁷⁶ *See* Carroll et al., *supra* note 33.

As mentioned, though, the majority of legislators from across the political spectrum have expressed support for limiting the mortgage interest deduction in various ways. Options include restricting the mortgage interest deduction to a single house, reducing the mortgage cap from \$1.1 million, or replacing the mortgage interest deduction with a tax credit.¹⁷⁷ For example, both extreme liberal Keith Ellison¹⁷⁸ and extreme conservative Mike Lee¹⁷⁹ support reducing the \$1.1 million cap.¹⁸⁰ In fact, our search yielded statements from over forty legislators from all over the ideological spectrum that wanted to limit the mortgage interest deduction in some way.¹⁸¹ This suggests that relative to repeal, limiting the mortgage interest deduction enjoys substantial legislative support and is likely a more stable policy.

Having analyzed the stability of the constituent pieces of the proposals, how stable will each proposal be? Proposal B, which pairs a modest rate reduction with a limit on the mortgage interest deduction, is likely to be more stable. The revenue gained from limiting the deduction will be sticky, offsetting the revenue lost from a sticky reduction in tax rates. By contrast, Proposal A, which pairs a more significant rate reduction with repeal of the deduction, is likely

¹⁷⁷ See, e.g., Tax Reform Act of 2014, H.R. 1, 113th Cong. § 1402(B) (2014) (proposing to reduce the mortgage cap to \$500,000, with a multiyear phase-in period); PRESIDENT'S ADVISORY PANEL ON FEDERAL TAX REFORM, *supra* note 173, at 61 tbl.5.1 (proposing a 15% credit on all mortgage interest paid, available to all homeowners, but limited to the average regional price of housing). In addition to reducing the revenue cost of the mortgage interest deduction, each option reduces its regressivity. See ERIC TODER ET AL., TAX POLICY CTR., URBAN INST. & BROOKINGS INST., REFORMING THE MORTGAGE INTEREST DEDUCTION 5 (2010), <http://www.urban.org/sites/default/files/publication/28666/412099-reforming-the-mortgage-interest-deduction.pdf> [<https://perma.cc/3PHN-RLWM>].

¹⁷⁸ Representative Ellison is one of the most liberal Democrats in Congress (DW-NOMINATE score of -0.56). See Carroll et al., *supra* note 33 (presenting the DW-NOMINATE scores of the 113th Congress).

¹⁷⁹ Senator Lee has one of the most conservative voting records in Congress (DW-NOMINATE score of +0.99). *Id.*

¹⁸⁰ See Keith Ellison, *Give the National Housing Trust Fund Its Due*, N.Y. TIMES (Mar. 23, 2015, 11:20 AM), <http://www.nytimes.com/roomfordebate/2013/10/16/housing-thats-not-a-luxury/give-the-national-housing-trust-fund-its-due> [<https://perma.cc/Y9EF-QEJF>] (“I’ve introduced the Common Sense Housing Investment Act (H.R. 1213) The bill would raise about \$200 billion over 10 years . . . by replacing the current mortgage interest deduction with a 15 percent flat-rate tax credit on mortgage interest and lowering the cap on the mortgage interest deduction from \$1.1 million to \$500,000.”); see also Senator Mike Lee, Remarks to the Heritage Foundation: Opportunity, Cronyism, and Conservative Reform (Apr. 30, 2014), <http://www.lee.senate.gov/public/index.cfm/speeches?ID=002A1917-732E-48B4-BD3D-F314B60A9338> [<https://perma.cc/MLR8-L2DK>] (“Last year, I introduced legislation to eliminate most credits and deductions from the individual tax code, while lowering the mortgage-interest deduction to \$300,000 worth of principal.”).

¹⁸¹ There is slightly more Republican support for replacing the deduction with a tax credit and slightly more Democrat support for reducing the mortgage interest deduction cap.

to be less stable. If the rate reduction is sticky while the repeal of the mortgage interest deduction is not, the first reform will lose significant revenue.¹⁸²

What are the larger lessons for base broadening? If base broadening is paired with rate reductions that are intended to be revenue-neutral, it is important to keep in mind that rate reductions are likely to be politically stable.¹⁸³ Therefore, the focus should be on limiting and/or repealing tax expenditures in a stable way. This is particularly true for big-ticket tax expenditures that enjoy wide political support.¹⁸⁴ These provisions include the mortgage interest deduction, the exclusion for employer-provided healthcare, and the charitable contribution deduction. Outright repeal of these provisions would offset more significant rate decreases, but may well be unstable given their political and popular support.¹⁸⁵

Rather, limiting these provisions may be a more stable approach. In fact, both the charitable contribution and the home mortgage interest deductions are already subject to limitations that have proved to be relatively politically

¹⁸² If a revenue restriction like PAYGO were effective, then perhaps the first proposal would also be stable. *But see supra* text accompanying notes 62–64 (discussing PAYGO and its limitations).

¹⁸³ Current rates (top marginal, corporate, capital gains, and dividend) are moderately liberal. Reductions in those rates would make them more centrist.

¹⁸⁴ The analysis may be different for tax expenditures that benefit a narrow group of taxpayers. How stable would the repeal of narrow expenditures be? Most of these provisions do not have widespread legislative support, so one might be tempted to think that their repeal would be fairly stable. On the other hand, this raises the question of how they came to be enacted in the first place. Mancur Olson predicted that small groups would have more success in lobbying and rent-seeking than would large groups. *See OLSON, supra* note 79, at 127–28. This does not explain, however, why certain small constituencies have been relatively more successful at securing tax expenditures than others have been. One possible explanation appears to be access to tax committee members. (Most tax expenditures are usually attached to larger tax legislation.) *See, e.g., supra* text accompanying notes 109–12 (describing the role of Senator Wyden in securing a tax credit for electric motorcycles).

Instead of repealing or limiting these tax expenditures separately, an alternative approach would apply an overall limitation to itemized deductions. Mitt Romney has suggested this approach, among others. *See* Debate Between President Barack Obama and Former Governor Mitt Romney (Oct. 16, 2012), <http://www.debates.org/index.php?page=october-16-2012-the-second-obama-romney-presidential-debate> [<https://perma.cc/UEL9-GJU4>] (“I’m going to bring rates down across the board for everybody, but I’m going to limit deductions and exemptions and credits, particularly for people at the high end . . .”). Would an umbrella limitation be politically stable? Affected taxpayers would have a much stronger incentive to seek an exception for their particular tax provisions rather than an increase in the overall limitation. Thus the overall limitation might be quite stable, but the tax expenditures covered by the limitation might not be. The experience with the alternative minimum tax (AMT) is suggestive. The AMT was designed to ensure that taxpayers were not using deductions to excessively reduce their tax liability. The AMT applies a lower tax rate to a broader income tax base. To calculate alternative minimum taxable income, the taxpayer takes his taxable income and adds back certain preference items (i.e., deductions and exclusions). Instead of trying to repeal the AMT, special interests have focused on removing their pet tax expenditure from the list of preference items added back to the calculation of alternative minimum taxable income.

¹⁸⁵ *See* CONG. RESEARCH SERV., 113TH CONG., *supra* note 3, at 2 (“[M]ost of these tax expenditures arise from a limited number of provisions, many of which are very popular and broadly used, are difficult to eliminate in a technical sense, and/or are considered desirable provisions.”).

stable.¹⁸⁶ Since 1969, the charitable contribution deduction has been capped at 50% of a taxpayer's adjusted gross income.¹⁸⁷ Since 1987, the home mortgage interest deduction has been limited to the interest on \$1.1 million of mortgage debt.¹⁸⁸ I suspect that further limiting these provisions would be more stable than repealing them.

The potential revenue gains from limiting these three tax expenditures should not be underestimated. The Congressional Budget Office recently projected that converting the mortgage interest deduction to a 15% credit would raise \$52 billion over the next decade, that creating a floor on charitable deductions of 2% of AGI would raise \$212 billion over the next decade, and that capping the exclusions of employer-paid health insurance premiums would raise roughly \$537 billion over the same time period.¹⁸⁹ These three limitations would still roughly offset a three percentage point reduction in all income tax rates.

C. *The Partial Unraveling of the Tax Reform Act of 1986*

Reform often unravels. The aftermath of the Tax Reform Act of 1986 is instructive.¹⁹⁰ The Act combined many of the pieces discussed in Sections III.A and III.B. With respect to rates, the 1986 reform harmonized the top marginal and capital gains rates. It moved the top rate from 50% down to 28% and increased the capital gains rate from 20% to 28%.¹⁹¹ It also substantially

¹⁸⁶ The exclusion for employer-provided healthcare is not subject to a limitation, but high-premium plans (so-called Cadillac plans) will be subject to an excise tax starting in 2020 under the Affordable Care Act. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 9001(a), 124 Stat. 119, 847 (2010) (codified at I.R.C. § 4980I (2012)).

¹⁸⁷ I.R.C. § 170(b)(1)(A). This cap has been changed legislatively several times. As enacted in 1917, the charitable contribution deduction was limited to 15% of net taxable income. Vada Waters Lindsey, *The Charitable Contribution Deduction: A Historical Review and a Look to the Future*, 81 NEB. L. REV. 1056, 1061 (2003). In 1944, Congress changed the contribution base from net taxable income to adjusted gross income (which had the effect of raising the limitation for most taxpayers). *Id.* at 1062. The percentage limitation was increased to 20% in 1952. *Id.* In 1954, the percentage was again increased to 30%. *Id.* at 1062-63. Finally in 1969, Congress increased the percentage to 50%. *Id.* at 1065.

¹⁸⁸ Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10102, 101. Stat. 1330, 1330-385. See generally Dennis J. Ventry, Jr., *The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest*, 73 LAW & CONTEMP. PROBS. 233, 275 (2010) (discussing the \$1.1 million cap on the mortgage interest deduction).

¹⁸⁹ CONG. BUDGET OFFICE, PUB. NO. 4664, OPTIONS FOR REDUCING THE DEFICIT: 2014 TO 2023, at 115, 119, 248 (2013). See generally *id.* (providing more details on the specific proposals that the Congressional Budget Office scored for deficit purposes).

¹⁹⁰ Others have written about how the 1986 Tax Reform Act came to be enacted. See generally BIRNBAUM & MURRAY, *supra* note 9; Shaviro, *supra* note 9, at 23-30.

¹⁹¹ Tax Reform Act of 1986, Pub. L. No. 99-514, §§ 101(a), 302(a), 100 Stat. 2087, 2096-97, 2218-19. This is similar to the reform proposed by Reuven Avi-Yonah. See Avi-Yonah, *Taxation and Labor Mobility*, *supra* note 14; Avi-Yonah, *Reinventing the Wheel*, *supra* note 14.

reduced the corporate tax rate from 46% to 34%.¹⁹² The reform repealed a host of tax expenditures, so the Congressional Budget Office forecasted that the reform would be revenue-neutral.¹⁹³ Even though the corporate rate was reduced, corporate tax revenue was projected to increase over the five-year budgetary window.¹⁹⁴

How did rates change in the aftermath of the 1986 reform? In 1990, the top marginal rate was increased from 28% to 31%.¹⁹⁵ In 1993, the top marginal rate was further increased from 31% to 39.6%.¹⁹⁶ In 1997, the capital gains rate was reduced from 28% to 20%.¹⁹⁷ The only stable rate change over the decade following the enactment of the Tax Reform Act of 1986 was the change to the corporate tax rate (which was increased by only one percentage point in 1993).¹⁹⁸

How stable was the base broadening? After the reform, Congress began enacting new tax expenditures in short order.¹⁹⁹ The 1990 legislation introduced an enhanced oil recovery credit and a credit for small producers of ethanol.²⁰⁰ In 1993, Congress added several tax expenditures benefiting small business stock and businesses in empowerment zones.²⁰¹ Even more tax expenditures—like the Child Tax Credit and the Hope and Lifetime Learning Credit—were added in 1997.²⁰² Since 1988, the total cost of tax expenditures has steadily increased.²⁰³ In recent years, both the number and the aggregate cost of tax expenditures have increased at an accelerating rate.²⁰⁴

The legislation of the 1990s showed how future Congresses could make changes that render prior reform incoherent. The 1990 legislation changed the top marginal rate (delinking it from the capital gains rate) and added a few tax expenditures.²⁰⁵ The 1993 Act increased the top marginal rate and the

¹⁹² Tax Reform Act of 1986 § 601(a)–(b).

¹⁹³ JOINT COMM. ON TAXATION, JCS-10-87, *supra* note 6, at 1378.

¹⁹⁴ *Id.* at 1378 tbl.A-2.

¹⁹⁵ Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11101(a), 104 Stat. 1388, 1388-403.

¹⁹⁶ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13202(a)(1), 107 Stat. 312, 461.

¹⁹⁷ Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 311, 111 Stat. 788, 831.

¹⁹⁸ Omnibus Budget Reconciliation Act of 1993 § 13221(a)(2).

¹⁹⁹ See generally JOINT COMM. ON TAXATION, JCX-15-11, BACKGROUND INFORMATION ON TAX EXPENDITURE ANALYSIS AND HISTORICAL SURVEY OF TAX EXPENDITURE ESTIMATES (2011) (describing the tax expenditures that were enacted subsequent to the 1986 reform).

²⁰⁰ Omnibus Budget Reconciliation Act of 1990 §§ 11501–02.

²⁰¹ Omnibus Budget Reconciliation Act of 1993 §§ 13113–114.

²⁰² Taxpayer Relief Act of 1997 §§ 101, 201.

²⁰³ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-339, CORPORATE TAX EXPENDITURES: INFORMATION ON ESTIMATED REVENUE LOSSES AND RELATED FEDERAL SPENDING PROGRAMS 9 fig.1 (2013) (showing an increase from less than \$800 billion in tax expenditures in 1986 to more than \$1 trillion in 2011).

²⁰⁴ *Id.*; see also *id.* at 10 fig.2.

²⁰⁵ Omnibus Budget Reconciliation Act of 1990 §§ 11101(a), 11511, 11611.

corporate rate and added a significant number of tax expenditures.²⁰⁶ The 1997 Act reduced the capital gains rate and added still further tax expenditures.²⁰⁷ The tax legislation of the 1990s did not maintain the coherent structure of the Tax Reform Act—its rate-harmonizing and base-broadening features steadily unraveled.

This is not to say that the reform was futile. The top rates have not returned to pre-1986 levels. The passive-activity-loss rule was largely successful at curbing the use of certain personal income tax shelters, and it remains a part of the tax code.²⁰⁸ The investment tax credit has not returned. The 1986 Act is a good example of how some pieces of reform will remain stable while others will unexpectedly unravel. This dynamic is critical.

D. Should Revenue Estimates Incorporate Political Stability?

When a tax bill is considered, the Joint Committee on Taxation prepares estimates of how much the bill will raise or lower revenue.²⁰⁹ These estimates are very important both substantively and procedurally. Since reform stability can affect revenue, should stability be incorporated when scoring the budgetary effect of a proposed reform? The answer is a qualified no.

It is helpful to analogize this question to an ongoing debate regarding whether tax proposals should be scored dynamically from a macroeconomic perspective. Proponents argue that estimates would be more accurate if they incorporated changes to growth and employment.²¹⁰ Although so-called “dynamic” scoring would arguably result in *more accurate* estimates, there is no question that the estimates would be *less precise*.²¹¹

JCT models usually produce a significant range of outcomes. For example, the JCT recently estimated the macroeconomic effects of David Camp’s tax reform proposal.²¹² The predicted average change in GDP over ten years

²⁰⁶ Omnibus Budget Reconciliation Act of 1993 §§ 13113, 13116, 13202, 13221(a)(2).

²⁰⁷ Taxpayer Relief Act of 1997 §§ 101, 201, 311.

²⁰⁸ I.R.C. § 469 (2012).

²⁰⁹ See *Joint Committee Revenue Estimation Process*, JOINT COMMITTEE ON TAXATION, <https://www.jct.gov/about-us/revenue-estimating.html> [<https://perma.cc/9JNQ-S6N6>] (“The Joint Committee staff is required by the budget resolutions to present revenue estimates as point estimates (that is, present one dollar figure rather than a range of possibilities) calculated in nominal dollars.”).

²¹⁰ Camp argued that his own tax reform plan would have raised revenue if macroeconomic effects (particularly effects on growth) were taken into account. See Camp Proposal, *supra* note 165.

²¹¹ See Martin A. Sullivan, 3 *Critical Issues with Dynamic Scoring*, TAX NOTES, Oct.–Dec. 2014, at 605, 605 (“The [Joint Committee on Taxation], as well as many commentators on the topic, have stressed the uncertainty surrounding numerical estimates of the effects of taxes on the macroeconomy.”).

²¹² Tax Reform Act of 2014, H.R. 1, 113th Cong. (2014).

ranges from a low 0.1% to 1.6%.²¹³ Commentators have argued that the precision of the current methodology is more valuable than any hypothetical gains in accuracy from implementing dynamic macroeconomic scoring.²¹⁴

I generally agree that incorporating macroeconomic effects into the official revenue estimates would be a bad idea. Current estimates of macroeconomic effects are subject to substantial uncertainty.²¹⁵ The budgetary process may be manipulated if uncertain increases in growth or employment are formalized in the official scoring of legislation.

Many of the counterarguments to implementing dynamic scoring can also be applied to incorporating political stability.²¹⁶ The approach described in this Article can provide insight regarding the relative stability of various provisions. However, it stops short of predicting exactly when a specific unstable policy will be changed or repealed. An unstable policy may last one session of Congress or several. Extreme policies will probably be changed at some point during the ten-year budgetary projection window. Moderate policies are more likely to survive, but they may also be changed depending on the composition of Congress going forward.

Instead, the thrust of the argument is that the political stability of tax reform proposals can inform the debate of tax reform design in the same way that the macroeconomic effects of tax reform have entered the tax debate. Putting aside whether the macroeconomic effects of rate reductions are or should be incorporated into official revenue estimates,²¹⁷ they are studied and debated. It is widely acknowledged that significant changes to the tax system may have significant effects on labor supply, growth, and revenue. The JCT produces alternate revenue estimates under various macroeconomic assumptions.²¹⁸

²¹³ JOINT COMM. ON TAXATION, JCX-22-14, MACROECONOMIC ANALYSIS OF THE "TAX REFORM ACT OF 2014," at 12-14 (2014); Camp Proposal, *supra* note 165.

²¹⁴ See Sullivan, *supra* note 211.

²¹⁵ The JCT uses several different classes of macroeconomic models. Even if one could settle on a single class of model, the predictions depend on the values assigned to several uncertain parameters. These models also do not take into account the political stability of the proposal. They are estimated by assuming that the proposal will remain untouched after enactment.

²¹⁶ Generally, dynamic macroeconomic scoring would make revenue projections look rosier (more revenue). In contrast, scoring that incorporates stability would generally make revenue projections look worse (less revenue). This is because revenue-raising changes (e.g., limiting tax expenditures and higher tax rates) tend to be less stable than revenue-losing changes.

²¹⁷ The use of dynamic scoring in official estimates has increased. See Douglas W. Elmendorf, "Dynamic Scoring": Why and How to Include Macroeconomic Effects in Budget Estimates for Legislative Proposals, BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2015, at 91, 92 ("That debate has achieved greater prominence recently because a rule adopted by the House of Representatives and the budget resolution approved by the House and the Senate both call for dynamic scoring in certain circumstances.").

²¹⁸ See generally JOINT COMM. ON TAXATION, JCX-3-15, MACROECONOMIC ANALYSIS AT THE JOINT COMMITTEE ON TAXATION AND THE MECHANICS OF ITS IMPLEMENTATION, OUTLINE PRESENTATION OF THE JOINT COMMITTEE STAFF AT THE BROOKINGS INSTITUTION PROGRAM "DYNAMIC SCORING: NOW WHAT?" (2015), <https://www.jct.gov/>

Similarly, political stability should enter tax reform debates. Stability can influence how efficient or fair a reform will be and how much revenue a reform will raise or lose. The JCT could provide alternate estimates under various stability assumptions, as it currently does with macroeconomic factors. For example, the JCT could produce alternate revenue estimates for base-broadening reform if 25%, 50%, or 75% of the changes to tax expenditures were rolled back. This information would aid legislative deliberation and reform design even if stability were not incorporated into the official revenue estimates. It might also underscore the importance of maintaining base-broadening measures for legislators.

IV. APPROACHES TO DESIGNING STABLE REFORM

Parts I through III have focused on the stability of reform of the existing income tax through the default legislative process. Part IV considers tax reform more broadly to include stability-inducing changes to the post-reform legislative process, as well as tax reform outside of the income tax. This Part focuses on two popular proposals: (1) supermajority voting for post-reform changes and (2) a federal value-added tax (VAT).

A. *Are Supermajority Requirements the Answer?*

An intuitively appealing solution to make reform more stable is to impose a supermajority requirement for legislative changes subsequent to reform. Scholars have suggested that this would meaningfully increase stability.²¹⁹ The tools developed in this Article can be adapted to analyze this approach to reform stability. A supermajority rule specifies a different set of pivots—it increases the gridlock zone and may increase the stability of certain policies.

Before engaging in that analysis, it is important to emphasize a number of preliminary points. First, the normal legislative process already has significant supermajoritarian aspects.²²⁰ Second, to be completely effective, the supermajority requirement would need to be passed as a constitutional amendment.²²¹ Any other approach would be subject to amendment at any time. For example, imagine that the House and the Senate adopt two-thirds supermajority requirements for the consideration of tax legislation as internal points of order. Those points of order could be revised by simple majority

publications.html?func=startdown&id=4687 [https://perma.cc/ZMH3-DM3N] (describing the JCT's macroeconomic estimates).

²¹⁹ See *supra* note 16.

²²⁰ See *supra* Section I.B.

²²¹ See McGinnis & Rappaport, *Supermajority Rules*, *supra* note 16, at 456 n.354.

votes. Similarly, imagine the House and the Senate include the two-thirds supermajority requirement in the tax reform legislation itself.²²² That supermajority requirement could be repealed by subsequent legislation (which would not be subject to the supermajority requirement).²²³ This is not to say that nonconstitutional supermajority requirements are completely ineffective. Points of order are often respected.²²⁴

Consider a supermajority proposal requiring two-thirds supermajorities in both chambers of Congress for any change to the tax code. Such requirement specifies new pivots. Any rightward change in policy must make the 34th most liberal Senator and the 146th most liberal member of the House better off. Similarly, any leftward shift in policy must make the 34th most conservative Senator and the 146th most conservative member of the House better off. These legislators are pivots under this supermajority rule.

Figure 7A plots the stability of policies in Congresses over the past half century. Figure 7B does the same for Congresses since 1994. The solid black and the gray lines are the same as in Figures 6A and 6B.²²⁵ The dotted black line shows the stability of policies under the supermajority rule.

Note that the dotted black line and the gray line are quite similar. Imposing a supermajority requirement increases the stability of moderate policies. The dotted black line is higher than the gray line for those policies. Under the default legislative process, policies that map onto DW-NOMINATE scores between -0.32 and $+0.06$ are predicted to have been stable in at least 80% of Congresses over the past half century. By contrast, under the supermajority rule, policies that map onto DW-NOMINATE scores between -0.32 and $+0.17$ are predicted to have been stable in at least 80% of Congresses. There is also a larger range of policies that are predicted to be stable in *all* Congresses.

In contrast, the supermajority requirement does very little to increase the stability of extreme policies. The dotted black line and the gray line are

²²² For example, a recent proposal, the Simplified, Manageable, and Responsible Tax (SMART) Act, would require a three-fifths supermajority in order to (1) increase any federal income tax rate; (2) create any additional federal income tax rate; (3) reduce the standard deduction; or (4) provide any exclusion, deduction, credit, or other benefit which results in a reduction in federal revenues. Simplified, Manageable, and Responsible Tax (SMART) Act, S. 173, 113th Cong. § 201 (2013).

²²³ See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 252-54 (1997) (arguing that requiring a two-thirds majority to change the Senate's rules is unconstitutional).

²²⁴ Note that the filibuster rule is itself a Senate rule. STANDING RULES OF THE SENATE r. XXII, reprinted in S. DOC. NO. 113-18 (2013). There is speculation that the filibuster rule may be repealed. Carl Hulse, *Hard Choice for Mitch McConnell: End the Filibuster or Preserve Tradition*, N.Y. TIMES (Nov. 11, 2016), <https://www.nytimes.com/2016/11/12/us/politics/republicans-house-senate.html> [<https://perma.cc/W52T-QMNE>]. The filibuster has already been limited in the confirmation of presidential appointees and Supreme Court Justices. See *supra* note 122.

²²⁵ The gray line shows the percentage of time a policy would have fallen within the *soft* gridlock zone. The black line shows the percentage of time a policy would have fallen within the *hard* gridlock zone. See *supra* text accompanying notes 120-22.

virtually identical for these policies. Recall that under the default legislative process, policies more liberal than -0.34 or more conservative than $+0.42$ are predicted to have been stable in less than 20% of Congresses over the past half century. Under the supermajority rule, the same policies are still stable in less than 20% of Congresses over that same time period. Moving to a supermajority rule *does not* generally make otherwise unstable policies stable. It simply reinforces the stability of otherwise stable policies.

**Figure 7A: Policy Stability Under a Supermajority Rule
(Congresses over the Past Half Century)**

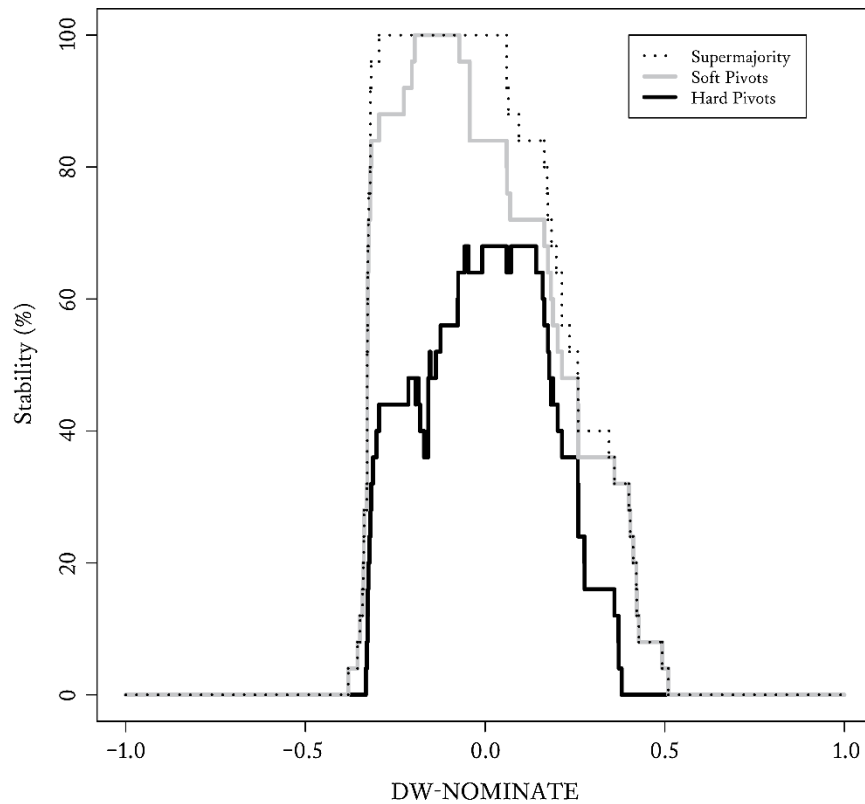
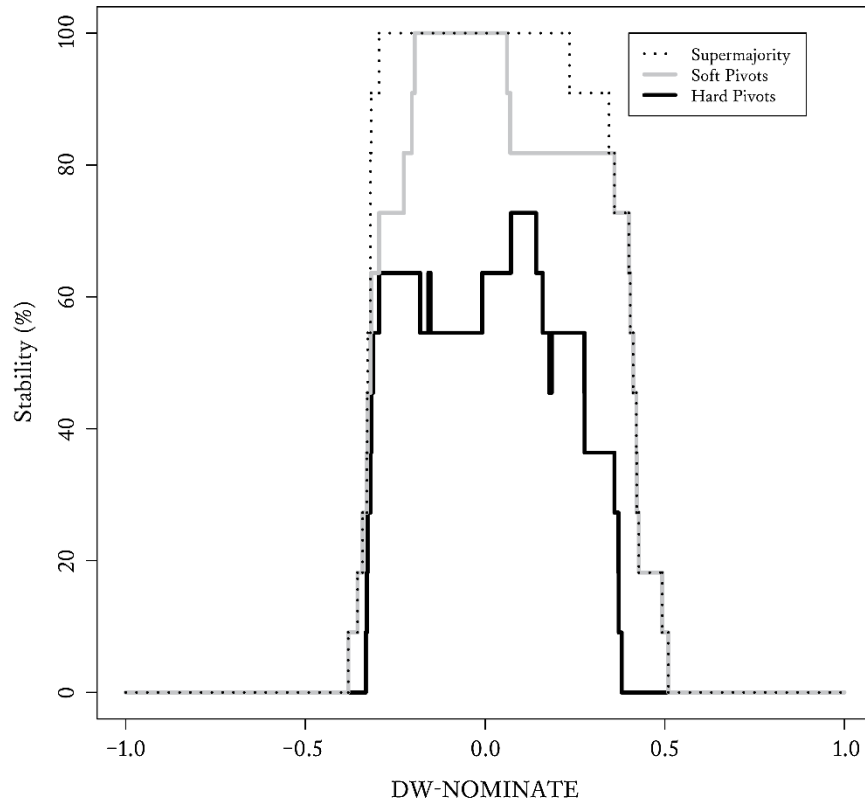


Figure 7B: Policy Stability Under a Supermajority Rule
(Congresses Since 1994)



The same result holds when focusing only on more recent Congresses. Under the regular legislative process, policies that have DW-NOMINATE scores between -0.23 and $+0.35$ are predicted to be stable in at least 80% of Congresses since 1996. Imposing a supermajority requirement only slightly increases that range, stretching it from -0.33 to $+0.35$. A larger range of policies is predicted to be stable in *all* Congresses.

Once again, however, there is little effect on extreme policies. Under the regular legislative process, policies that were more liberal than -0.36 or more conservative than $+0.41$ are predicted to be stable 20% or less of the time. Imposing a supermajority requirement does not change this result at all. Those same policies are still predicted to be stable 20% or less of the time.

Supermajority requirements make stable policies more stable, but those requirements do very little to stabilize otherwise unstable policies. In other words, imposing a supermajority requirement is not a cure-all for reform

stability. Even with a constitutional supermajority requirement, it is still important to think about where policies fall on the liberal–conservative spectrum. Reform will still be unstable if some of its constituent pieces are politically extreme.

Why is this the case? As noted earlier, the default U.S. legislative process already has a variety of supermajoritarian features. A two-thirds supermajority rule is therefore not as big a shift as it may first appear. A two-thirds supermajority requirement allows one-third of Senators or one-third of Representatives to block proposed legislation. In the Senate, the filibuster rule generally allows forty-one Senators to prevent a bill from coming to a vote. A two-thirds supermajority rule would allow thirty-four Senators to prevent a bill from being passed. The difference between the thirty-fourth and the forty-first Senator on a given issue is often quite small.²²⁶ In the House, the supermajority requirement would give the minority party the ability to block legislation, but it would not enhance the power of the majority party to block legislation.²²⁷

So far, this Part has focused on comparing the stability of policies under a supermajority requirement with the stability of policies under the default legislative process (one in which the House majority controls the legislative agenda and Senators can filibuster). Figures 7A and 7B compared the dotted black line (the stability of policies under the supermajority rule) to the gray line (the stability of policies under the regular legislative process). However, the gray line may overestimate the stability of policies. The gray line incorporates a number of pivots whose relevance to the legislative process is based in the rules of the House and Senate rather than in the Constitution.

Under most circumstances, the filibuster pivot and the House majority median pivot are relevant to whether legislation can be enacted. Forty-one Senators can generally maintain a filibuster and thereby impede a bill. The House majority party can generally prevent bills from coming to a vote that shifts policy away from the median preference of the party. However, there are situations in which these pivots should be ignored. In the Senate, when a bill is considered under the reconciliation process, debate is limited, and the filibuster pivot is not relevant.²²⁸ In the House, there have been instances of

²²⁶ For example, the thirty-fourth most liberal Senator in the 114th Congress has a DW-NOMINATE score of -0.25. See Carroll et al., *supra* note 33. The forty-first most liberal Senator has a DW-NOMINATE score of -0.18. *Id.* This is a small difference.

²²⁷ The majority party can already exercise an effective veto through its agenda control. See *supra* notes 51–52 and accompanying text.

²²⁸ See BRADY & VOLDEN, *supra* note 50, at 58 (“Given the complexity of the omnibus budget packages and the reconciliation process, Senators agreed that no filibusters would be allowed during reconciliation.”).

the majority party being rolled—legislation has passed the House that moved policy away from the median member of the controlling party.²²⁹

The solid black line in Figures 7A and 7B shows the stability of policies if only the hard pivots are considered.²³⁰ From this baseline the supermajority requirement unsurprisingly increases the predicted stability of moderate policies.

However, it is notable that a supermajority requirement does not substantially increase the stability of extreme policies. Focusing just on the hard pivots, policies more liberal than -0.33 or more conservative than $+0.36$ are predicted to be unstable 80% or more of the time. Adding a supermajority requirement only slightly moves these cutoffs. With a supermajority requirement, policies more liberal than -0.36 or more conservative than $+0.41$ are predicted to be unstable 80% or more of the time. Unstable policies remain unstable even if backstopped with a supermajority requirement.

Supermajority requirements may not have as large of an effect on stability as some hope. With respect to moderate policies, the default legislative process already provides a level of stability that is quite high. If the goal is more stability for moderate policies, a supermajority rule is overkill. Moderate policies can be made more stable by simply eliminating the use of reconciliation in passing tax legislation. With respect to extreme policies, a supermajority rule would do little to reduce instability.

B. Reform Outside of the Income Tax Context

This Article has focused on the design of reform within the existing income tax framework. The United States has had an income tax for over a century, and there is extensive evidence regarding legislators' preferences on income tax policies. This allows stability to be analyzed for various proposals to reform the income tax.

But what about reform outside of the income tax? For example, how should stability be incorporated into the design of a value-added tax? A VAT is a tax on consumption and is therefore similar to a retail sales tax.²³¹ The primary difference between a VAT and a retail sales tax is that the VAT is collected at every stage of production instead of only at the point of

²²⁹ A roll of the majority party occurs when a bill passes even though more than half of the majority party votes against it. Rolls of the majority party are rare. See Cox & McCubbins, *supra* note 52, at 162.

²³⁰ The hard pivots are the President, the median member of the House, the median Senator, and the veto-override pivots.

²³¹ Federal consumption taxes can take several different forms. See CONG. RESEARCH SERV., 113TH CONG., *supra* note 3, at 4 (listing value-added taxes, retail sales taxes, and flat taxes as three types of broad-based consumption taxes).

consumption.²³² Businesses collect and remit VAT on their sales, taking a credit for any VAT paid on their inputs.²³³ Thus, the VAT is collected piecemeal and is therefore more difficult to evade. The VAT is widely touted as being politically robust relative to other consumption tax alternatives.²³⁴ The United States is currently the only OECD country that does not have a federal VAT.²³⁵ Many policy analysts and academics predict that the United States will eventually adopt a VAT as well,²³⁶ usually as a partial replacement of the income tax.²³⁷

How stable would a VAT be in the United States? First, it should be noted that current statements regarding the VAT are almost uniformly negative.²³⁸ In 2010, a significant bipartisan majority approved a nonbinding

²³² *Id.* This Section will focus on the credit-invoice VAT, which has been widely adopted internationally.

²³³ See Martin A. Sullivan, *Introduction: Getting Acquainted with VAT* (discussing the credit-invoice system used to implement most VATs around the world), in *THE VAT READER: WHAT A FEDERAL CONSUMPTION TAX WOULD MEAN FOR AMERICA* 7, 13 (2011).

²³⁴ Pre-retail firms have a limited incentive to lobby because they generally do not benefit from exemptions that prevent them from passing on a VAT from their suppliers to their customers. Sijbren Cnossen, *A VAT Primer for Lawyers, Economists, and Accountants*, in *THE VAT READER: WHAT A FEDERAL CONSUMPTION TAX WOULD MEAN FOR AMERICA*, *supra* note 233, at 23, 31.

²³⁵ See Reuven S. Avi-Yonah, *Summary and Recommendations*, 63 *TAX L. REV.* 285, 286-88 (2010) (explaining that “every other OECD member country” has chosen to enact a VAT in circumstances similar to those the United States experienced following the 2008 economic crisis).

²³⁶ See, e.g., *id.* at 285-89 (predicting that the United States will adopt a VAT to combat the growing national debt and increasing cost of social security and other entitlement programs); see also Michael J. Graetz, *Taxes That Work: A Simple American Plan*, 58 *FLA. L. REV.* 1043, 1052-62 (2006) (advocating for the implementation of a VAT to replace most of the current income tax system); Daniel Shaviro, *Tax Reform Implications of the Risk of a U.S. Budget Catastrophe*, 50 *U. LOUISVILLE L. REV.* 577, 592-93 (2012) (identifying a VAT as a potential solution for long-term U.S. fiscal gap difficulties). *But see* Omri Y. Marian, *Meaningless Comparisons: Corporate Tax Reform Discourse in the United States*, 32 *VA. TAX. REV.* 133, 168 (2012) (“VAT has been considered in the United States for the past four decades. However, these considerations never culminated in the United States joining the rest of the world in adopting such a system.” (footnote omitted)).

²³⁷ See, e.g., MICHAEL J. GRAETZ, 100 MILLION UNNECESSARY RETURNS: A SIMPLE, FAIR, AND COMPETITIVE TAX PLAN FOR THE UNITED STATES 200 (2010) (proposing a \$100,000 income tax exemption for families paired with a VAT rate between 10% and 14%); ERIC TODER, JIM NUNNS & JOSEPH ROSENBERG, TAX POLICY CTR. & PEW CHARITABLE TRS., USING A VAT TO REFORM THE INCOME TAX 2-3 (2012) (assessing Graetz’s proposal and its effects on federal revenues, spending and the deficit, marginal tax rates, and a number of other measures). There have also been proposals to replace the income tax with a national sales tax. See, e.g., Fair Tax Act of 2013, H.R. 25, 113th Cong. (2013) (proposing to repeal the income, payroll, estate and gift taxes and institute a 23% national retail sales tax).

²³⁸ Supporting a federal VAT is considered politically dangerous. In 1979 and 1980, Al Ullman (then–Chair of the House Ways and Means Committee) proposed a VAT. Alan Schenk, *Prior U.S. Flirtations with VAT*, in *THE VAT READER: WHAT A FEDERAL CONSUMPTION TAX WOULD MEAN FOR AMERICA*, *supra* note 233, at 57-58. His failure to win reelection in 1980 is often attributed to his VAT proposal. See *id.* at 58 (“The political lore is that Ullman lost his seat because of his VAT proposal.”). *But see id.* (offering other explanations for Ullman’s failure to achieve reelection).

Senate resolution expressing opposition to a VAT.²³⁹ There are only a few legislators who have publicly supported a federal VAT.²⁴⁰ Before a VAT could be enacted, legislative preferences would have to change substantially. Current preferences are clearly not a useful guide for studying the hypothetical stability of a reform that has little legislative support at the moment.

These issues are unavoidable when dealing with the design of a new tax system, like a VAT. But the tools developed in this Article suggest several fruitful avenues of inquiry. Like the income tax, a VAT involves many different policy decisions. Most experts agree that the ideal VAT should cover as broad a consumption base as possible and apply a single rate.²⁴¹ The VATs observed in other countries depart substantially from this ideal.²⁴² In most countries, the VAT has a number of different rates that apply to certain types of consumption and a variety of preferential rules.²⁴³ Like an income tax, VATs can be decomposed into individual policies—rates, definitions of the base, etc.²⁴⁴ The stability of each constituent policy has important consequences for the overall stability of a VAT.

Consider an example. Imagine that the United States plans to enact an 8% VAT,²⁴⁵ but there is significant concern about its regressivity. Since a VAT taxes consumption, the burden falls relatively more heavily on low-income

²³⁹ The resolution passed by an 85 to 13 vote. Peter Cohn, *Senate Overwhelmingly Signals Displeasure with VAT*, NAT'L J. (Apr. 15, 2010, 8:00 PM), <https://www.nationaljournal.com/s/556273/senate-overwhelmingly-signals-displeasure-with-vat> [<https://perma.cc/C8H4-YHVT>].

²⁴⁰ Democratic Senator Ben Cardin supports a VAT. Jonathan Weisman, *A Year of Tax-Code Reckoning*, N.Y. TIMES, Feb. 12, 2012, at BU-8. Nancy Pelosi has also expressed some support for a VAT. *See id.*; Michael O'Brien, *Pelosi Says New Tax Is 'On the Table,' HILL: BLOG BRIEFING ROOM* (Oct. 6, 2009, 2:59 PM), <http://thehill.com/blogs/blog-briefing-room/news/61783-pelosi-says-new-tax-is-on-the-table> [<https://perma.cc/V2XZ-M6XZ>].

²⁴¹ *See, e.g.*, Kathryn James, *Exploring the Origins and Global Rise of VAT* (stating an ideal VAT would apply a flat rate to a broad consumption base with minimal exceptions), in THE VAT READER: WHAT A FEDERAL CONSUMPTION TAX WOULD MEAN FOR AMERICA, *supra* note 233, at 15, 17.

²⁴² *See id.* at 18 (identifying New Zealand as the only country that has a VAT that approaches the broad-base, single-rate ideal).

²⁴³ *See* William G. Gale & Benjamin H. Harris, *A VAT for the United States: Part of the Solution* (identifying examples of preferences such as zero-rating certain types of consumption and exempting certain businesses from VAT reporting), in THE VAT READER: WHAT A FEDERAL CONSUMPTION TAX WOULD MEAN FOR AMERICA, *supra* note 233, at 64, 66-67, 72.

²⁴⁴ In an income tax, there can be different rates that apply to ordinary income, capital gains, dividends, and corporate income, and tax expenditures can change the effective rates that apply to particular types of income. In a VAT, there can be different rates that apply to different baskets of consumption. *See* Ine Lejeune, *The EU VAT Experience: What Are the Lessons?* (noting the different rates for luxury goods versus necessities), in THE VAT READER: WHAT A FEDERAL CONSUMPTION TAX WOULD MEAN FOR AMERICA, *supra* note 233, at 257, 276.

²⁴⁵ The Tax Foundation estimates that a VAT of roughly 7% to 11% would be required to close the current fiscal gap. Scott A. Hodge, *VAT Rates Needed to Erase Obama Deficits*, TAX FOUND. (Feb. 16, 2011), <http://taxfoundation.org/blog/vat-rates-needed-erase-Obama-deficits> [<https://perma.cc/DH33-XZK8>].

taxpayers.²⁴⁶ This result is a consequence of consumption not rising proportionally to income, and the VAT burden as a percentage of income is higher for low-income taxpayers.²⁴⁷

Legislators are considering two different approaches to address the VAT's regressivity. VAT Proposal A would enact a VAT with two rates: (1) a lower rate (0%) that applies to necessities (e.g., food, clothing, and housing); and (2) a higher rate (8%) that applies to all other consumption. VAT Proposal B would enact a VAT with a single 8% rate and then provide a refundable income tax credit for the average VAT paid by low-income taxpayers on necessities.

Most policy analysts favor Proposal B because it would both cost less (as no benefits reach higher-income taxpayers) and lower administrative costs.²⁴⁸ But is there a reason to think that one of these two reforms would be more stable? The key question is, if Congress were to address the VAT treatment of necessities separately, what would legislators prefer? What VAT rate range on necessities would be stable?

Proposal A would apply a 0% rate on necessities. This policy is likely to be very stable. Most OECD countries currently zero-rate necessities.²⁴⁹ As the Australians found out when they were implementing their VAT, the rate that applies to necessities has its own political salience.²⁵⁰ There is also no clear interest group to lobby for a higher VAT rate on necessities.²⁵¹ Although it seems like a progressive policy, it actually benefits higher-income taxpayers, who generally consume more expensive and types of food, clothing, and shelter.²⁵²

²⁴⁶ See Sullivan, *supra* note 233, at 12-13 (discussing how politicians attempt to alleviate the burden on low-income families through preferential treatments for various necessities to promote access to home-prepared food and medical care).

²⁴⁷ *Id.* As Richard Bird and Eric Zolt have argued, it is important to consider the overall distributional effect of government taxing and spending. See Richard M. Bird & Eric M. Zolt, *Redistribution via Taxation: The Limited Role of the Personal Income Tax in Developing Countries*, 52 UCLA L. REV. 1627, 1637-50 (2005) (arguing that regressive taxes can fund progressive spending). Nevertheless, the distributional effect of particular tax instruments still has a strong political salience.

²⁴⁸ If there is a single rate, there is no need to police the boundaries between types of consumption. Administering VATs with multiple rates often requires arbitrary distinctions between goods. For example, in Britain, canned and frozen food other than ice cream is zero-rated, but ice cream and sorbets are subject to the VAT. Her Majesty's Revenue & Customs, VAT Notice 701/14: Food §§ 3.3, 3.5 (updated Dec. 15, 2015) (UK), <https://www.gov.uk/government/publications/vat-notice-70114-food/vat-notice-70114-food> [<https://perma.cc/LH7L-PGUC>].

²⁴⁹ ORG. FOR ECON. CO-OPERATION & DEV., CONSUMPTION TAX TRENDS 2012: VAT/GST AND EXCISE RATES, TRENDS AND ADMINISTRATION ISSUES 67-68 tbl.3.8, 71 (2012).

²⁵⁰ Susan C. Morse, *How Australia Got a VAT*, in THE VAT READER: WHAT A FEDERAL CONSUMPTION TAX WOULD MEAN FOR AMERICA, *supra* note 233, at 291, 306-07.

²⁵¹ Zero-rating necessities is a tax expenditure. As with an income tax expenditure, the cost of zero-rating necessities is borne broadly by (current and future) taxpayers who have to pay tax at a higher rate.

²⁵² See ORG. FOR ECON. CO-OPERATION & DEV., OECD ECONOMIC SURVEYS: AUSTRALIA 2014, at 64 (2014) ("At best, high-income households receive as much benefit from a reduced rate as

The stability of Proposal B is much more uncertain. Each constituent policy—the 8% rate on the necessities and the tax credit for low-income taxpayers—is potentially unstable. There are very few countries that subject food and clothing to the standard VAT rate. One can imagine a legislative entrepreneur arguing that necessities should be zero-rated in the future notwithstanding the original legislative compromise.²⁵³ The income offsets may also be unstable. For example, New Zealand took the second approach to addressing the regressivity of the VAT—necessities were taxed at the normal VAT rate, but transfer payments were made to offset that VAT liability. Subsequently, transfer payments were cut.²⁵⁴

Consumers and legislators may temporarily associate the income tax credit with the lack of zero-rating for necessities. However, that link may become attenuated over time as various other changes are made to the income tax and to the VAT. This is precisely what happened in New Zealand, and in order to avoid a similar result, the Australians decided that a food exclusion would be stable while transfers would be more vulnerable.²⁵⁵ One of the explicit reasons that Australian legislators adopted a version of Proposal A is that it was deemed to be more politically stable.

This does not settle the decision as to how the United States should treat necessities in a VAT. Australia is an interesting example of how stability analysis might be incorporated into the design of reform even where a tax system is completely new to a country. It is important to keep in mind that the stability of the VAT (indeed any tax policy change) is powerfully shaped by idiosyncratic factors like history, culture, and political institutions. However, it is still suggestive that most countries do not apply their VATs to necessities.²⁵⁶

those on low incomes, and at worst they benefit vastly more than poor households . . .”). Zero-rating all food would exempt a can of beans and beluga caviar. Zero-rating all clothing would exempt a \$10 shirt from American Apparel and a \$2500 dress from Diane von Furstenberg.

²⁵³ If that happens, the outcome would be “double” correction of the VAT’s regressivity. Depending on one’s preferences regarding the distribution of the tax burden, this may be desirable. But this does not change the fact that this would be a temporally unstable reform. The deficit reduction achieved through the VAT would be significantly compromised.

²⁵⁴ See Commonwealth, *Hearing Before the Australian Select Committee on a New Tax System*, Senate, 4 Aug. 1999 (Michael Raper, President, Australian Council of Social Service (ACOSS)) (stating that after the initial enactment of the GST in New Zealand, GST rates went up and transfer payments were cut); Peter Davidson, *Tax Reform: A Retrospective*, 23 U. NEW S. WALES L.J. 264, 267-78 (2000) (noting ACOSS’s concern with the durability of compensation given the rollback of regressivity offsets in New Zealand); Morse, *supra* note 250, at 307.

²⁵⁵ See *Hearing Before the Australian Select Committee on a New Tax System*, *supra* note 254 (Michael Raper, President, ACOSS) (“We have always argued that no government can guarantee the security of the compensation package . . .”); Morse, *supra* note 250, at 307.

²⁵⁶ One can see this playing out today in the U.S. with the furor over “tampon taxes.” Consumption taxes on necessities are difficult to defend politically even when they are arguably good tax policy. From an economic point of view, a consumption tax would apply to as broad a base as possible to avoid distorting taxpayer decisions.

It might also be possible to identify extreme (and therefore unstable) policies during the amendment process. If a VAT bill were being debated, the House and Senate could subject narrow amendments to a supermajority vote. This could be an effective way to weed out extreme policies from any potential reform. Any amendment (regardless of whether it raises or loses revenue) could be submitted for a vote and adopted only if a supermajority of legislators (say, two-thirds) votes in favor. If two-thirds of legislators vote in favor of a narrow amendment, it suggests that the policy in question is perhaps too extreme and likely to be unstable.²⁵⁷

CONCLUSION

Tax reform is important. It has the potential to make the tax system more efficient, fair, and simple while also addressing the significant federal deficit. Reform proposals achieve these goals by having pieces that are designed to fit and work together. However, future legislatures are not required to respect that coherence. Policies that were linked in the past can be uncoupled by future legislation. Some policies will be stable and others may not be. This Article identifies the key steps to analyzing the stability of any reform proposal.

First, how might reform be decomposed in the future? Past U.S. tax legislation hints that the income tax will continue to be changed in atomized fashion. At various times, each major rate has been changed independent of the others. Tax expenditures are enacted and modified in an ad hoc manner. Outside of the income tax context, the experience of other countries may be suggestive. The evolution of the VAT in other OECD countries can be instructive of the political degrees of freedom in shaping a VAT.²⁵⁸

²⁵⁷ That approach contrasts with the one taken during the Tax Reform Act of 1986, in which only revenue-neutral amendments were permitted. *See* BIRNBAUM & MURRAY, *supra* note 9, at 237 (explaining that the “spirit” behind the Gramm–Rudman budget law—a law that had been enacted a year earlier—put pressure on Senators “to keep all amendments revenue neutral”). This had the benefit of preventing tax reform from falling apart. With the 1986 approach to amendments, it is relatively more likely that extreme policies imbedded in the original proposal will survive. One can imagine combining these two approaches—revenue-neutral amendments requiring majority approval and revenue-losing amendments requiring supermajority approval.

²⁵⁸ For example, VATs in OECD countries tend to feature special rates that apply to food, clothing, and other necessities like medicine. For the European approach, see generally COPENHAGEN ECON., STUDY ON REDUCED VAT APPLIED TO GOODS AND SERVICES IN THE MEMBER STATES OF THE EUROPEAN UNION (2007), https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_info/economic_analysis/tax_papers/taxation_paper_13_en.pdf [<https://perma.cc/V2SG-8L2C>]. A U.S. VAT will not necessarily evolve in the same manner as VATs in other countries. The United States is unique in many ways. Indeed, these differences help explain why the United States remains the only OECD country without a VAT. Politically, the U.S. legislative system tends to favor stability compared to parliamentary-style governments because the U.S. constitutional structure has more pivots. *See* GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL

Second, how stable is each of those separate policies likely to be? This Article has offered one approach to analyzing the stability of individual policies. How moderate or extreme a policy is relative to legislators' preferences is indicative of its likely stability going forward. This approach focuses on legislators' preferences with respect to a specific policy *outside of the context of the current reform*. The stability of individual policies allows an analysis of whether reform will stick together or fall apart.

Finally, how does the likely coherence of a proposed reform affect its normative desirability? Where possible, stability should be incorporated into the normative analysis of tax reform. Efficiency and fairness arguments must be appropriately discounted for the likely stability of reform. The overall revenue effect of a proposal depends on the stability of its constituent parts. The argument is not that the stability of a proposal is its most important characteristic. The totems of tax reform are still efficiency, fairness, simplicity, and revenue. However, any instability of reform meaningfully touches each of these pillars and can limit the extent to which the goals of reform will be achieved.

INSTITUTIONS WORK 67-75 (2002). The United States also has a stronger commitment to federalism than many other OECD countries. See Jefferey M. Sellers & Anders Lindstrom, *Decentralization, Local Government, and the Welfare State*, 20 GOVERNANCE 609, 614 tbl.2 (2007) (classifying the United States as a highly federal and decentralized nation when compared to other OECD nations); *OECD Fiscal Decentralisation Database*, OECD http://www.oecd.org/ctp/federalism/oecdiscaldecentralisationdatabase.htm#A_Title [<https://perma.cc/Y66E-X4K3>] (select the "A: Tax autonomy of state and local government" hyperlink; then select "Tax Autonomy Indicators") (showing that subfederal governments in the United States collect a higher percentage of the nation's total tax revenue than most other OECD countries).