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Structural Impediments to Tax Reform: The Environment as Case Study

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STRUCTURAL IMPEDIMENTS TO TAX REFORM: THE ENVIRONMENT AS CASE STUDY

by

Leo P. Martinez*

“Things shouldn’t be so hard.”¹

ABSTRACT

While the goal of any system of taxation is to be fair, however elusive the concept of fairness, there are two kinds of obstacles that impede or affect our ability to be fair. I categorize these two kinds of obstacles as those that resound in politics and those that are structural. This article deals with the structural aspects of how we go about taxing ourselves. The politics of taxation I leave for another day.

Because the United States Internal Revenue Code (the Code) is vast and complicated, I examine the structural problems of taxation in the single context of the Code — the environment — as the vehicle to evaluate the prospects for reform. This focus on a single area is undertaken with two underlying observations. First, the Code is necessarily complex. A focus on a

*Albert Abramson Professor of Law, University of California, Hastings College of the Law. Special thanks to Professor Roberta Mann whose guidance and expertise influenced the shape of this piece. I am grateful to Professor Lawrence Zelenak and to my colleague Professor Darien Shanske for their constructive criticisms of early drafts. Thanks are also due for the insights provided by the participants in the April 2011 Critical Tax Conference hosted at the Santa Clara University School of Law by Professors Pat Cain and David Hasen. I am finally grateful to Andrey Gabets and Katelyn Keegan whose diligent and able research made this paper a better product. Early versions of this paper were presented at the 12th Global Conference on Environmental Taxation in October 2011 in Madrid and at the University of Southern California 2012 Conference of the International Society for New Institutional Economics in June 2012 in Los Angeles.

I am not a close student of environmental law. At the same time, even a cursory review of the subject reveals that the title of this paper could be reversed without changing the substance. That is, it could be entitled *The Structural Impediments to Environmental Policy: Tax Reform as Case Study*.

1. Kay Ryan, *Things Shouldn’t Be So Hard*, THE NEW YORKER, June 4, 2001, at 48 [hereinafter Ryan, *Things Shouldn’t Be So Hard*].

single area is manageable and serves as a useful case study. Second, the problems we all face from a degraded environment allow for the possibility that attention will be paid. The paper will move from the general to the specific, first highlighting the strengths and the weaknesses of the Code, and second, highlighting structural problems that affect tax policy. The aim will be to guide legislators and policymakers toward a sane tax policy.

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I. INTRODUCTION

Our constitutional democracy can be defined by the way in which we tax ourselves in order to fund the essential functions of government. In Kenneth R. Feinberg's recent book, he recounts his experiences in connection with determining suitable compensation to victims and their survivors of this country's most spectacular events, ranging from the terrorist attacks of September 11, 2001, to the British Petroleum oil spill disaster to the Vietnam veterans who were exposed to Agent Orange.² He muses about the knotty problems of distributing compensation to those who are similarly situated, at least in the sense that they have endured the same experience, but who, for various and justified reasons, are nonetheless compensated

2. Kenneth R. Feinberg, WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL (2012).

differently.³ In the very same way, the way we tax ourselves presents exactly the same sort of knotty problems.

While the goal of any system of taxation is fairness, however elusive the concept,⁴ there are two kinds of obstacles that impede or affect fairness in taxation. I categorize these two kinds of obstacles as those that resound in politics and those that are structural.⁵ This article deals with the structural aspects of how we go about taxing ourselves. The politics of taxation — a not-so-trivial aspect of how we go about taxing ourselves and the grim prospects for meaningful tax reform — I leave for another day. However it is worth briefly mentioning the underlying political issues.

Since 1986, Americans for Tax Reform, a conservative tax lobby, has sponsored the “Taxpayer Protection Pledge,” in which lawmakers and candidates promise to oppose any and all tax increases.⁶ In the 112th Congress, serving from 2011-2012, all but 6 of the 242 Republican members of the U.S. House of Representatives, as well as all but 7 of the 47 Republican members of the U.S. Senate have signed the pledge.⁷ The pledge, and the lobby’s president Grover Norquist, are often blamed for the stalemate in Congressional efforts to reduce the deficit. Then Senator John Kerry, a member of the Congressional super committee charged with deficit reduction, stated: “[The] most significant block to our doing something right now, tomorrow, is [Republicans’] insistence, insistence, insistence on the Grover Norquist pledge and extending the Bush tax cuts.”⁸ Some Republicans similarly acknowledge the pressure added by Norquist’s pledge and its contribution to the challenges in tax reform. Representative Frank

3. *Id.* at xix–xx.

4. See Leo P. Martinez, *The Trouble with Taxes: Fairness, Tax Policy, and the Constitution*, 31 HASTINGS CONST. L.Q. 413 (2004).

5. In making this distinction, it is not my intent to suggest that the two categories are mutually exclusive, and I recognize that there is likely a significant overlap between the two.

6. *About Americans for Tax Reform*, AMERICANS FOR TAX REFORM, <http://atr.org/about> (last visited Feb. 10, 2013). The text of the pledge for the House of Representatives reads:

“ONE, oppose any and all efforts to increase the marginal income tax rates for individuals and/or businesses; and TWO, oppose any net reduction or elimination of deductions and credits, unless matched dollar for dollar by further reducing tax rates.” See *Taxpayer Protection Pledge*, AMERICANS FOR TAX REFORM, [http://www.atr.org/userfiles/Congressional_pledge\(1\).pdf](http://www.atr.org/userfiles/Congressional_pledge(1).pdf) (last visited February 10, 2013).

7. *Current List of Taxpayer Protection Pledge Signers for the 112th Congress*, AMERICANS FOR TAX REFORM, <http://atr.org/current-list-taxpayer-protection-pledge-signers-a5597> (last visited Feb. 10, 2013) (listing 238 Representatives and 41 Senators as signatories of the Pledge).

8. Senator John Kerry, *Meet the Press*, (NBC television broadcast Nov. 20, 2011) (transcript http://www.msnbc.msn.com/id/45355107/ns/meet_the_press-transcripts/t/meet-press-transcript-november/#.UEYtkqRSS_Y).

Wolf, a Republican from Virginia, noted in a speech before the House: “I believe how the pledge is interpreted and enforced by Mr. Norquist is a roadblock to realistically reforming our tax code.”⁹

Professor Edward McCaffery makes the perceptive and perhaps perverse observation that despite this deadlock exemplified in tax reform, such inaction is actually in Congressional members’ interests.¹⁰ He uses tax reform to illustrate this point: “Congress has shown an appetite for keeping the issue of estate tax repeal alive through a never-ending series of brinksmanship votes; it never does anything fundamental or, for that matter, principled, but rakes in cash year in and year out for just considering the matter.”¹¹ Professor McCaffery explains that in our capitalist democracy, wealthy minorities rule over big groups with smaller stakes, that is, the majority of American taxpayers.¹² Congress maintains this power through what Professor McCaffery calls the “Shakedown” game, which consists of:

- (1) an issue of high stakes to small groups . . . ;
- (2) two or more sides, to prevent Congress from coalescing (Lord forbid) on one side and actually doing something permanent;
- (3) plausible action, for rational actors will not pay for extreme improbabilities; and
- (4) action that would be long-lived or at least valuable enough to be worth paying for.¹³

Accordingly, it is the American public that ultimately loses because “they cannot even get a seat at the table.”¹⁴ Moreover, the prospects for any substantial change in tax policy remain bleak.¹⁵

Politics, exemplified by both Norquist’s pledge and the “Shakedown” game theory, undoubtedly affect (and largely inhibit) governmental action to reform tax policy. However, this article deliberately focuses on other aspects of tax policy to assess the outlook. Sad to say, the conclusion may very well be the same — the prospects for tax reform that improve the current situation are dim.

9. Congressman Frank R. Wolf, *Grover Norquist’s Relationships Should Give People Pause*, (C-SPAN television broadcast, Floor Speech, House of Representatives, Oct. 4, 2011) (<http://wolf.house.gov/index.cfm?sectionid=34&itemid=1805>).

10. Edward J. McCaffery, *The Dirty Little Secret of (Estate) Tax Reform*, 65 STAN. L. REV. ONLINE 21, 21 (2012).

11. *Id.*

12. *Id.* at 22.

13. *Id.* at 22–23.

14. *Id.* at 22.

15. McCaffery, *supra* note 10, at 26.

II. BACKGROUND

A. *Taxation and the Environment — an Overview*

The United States Internal Revenue Code (the “Code”) is vast, complicated, and often internally inconsistent. This inconsistency plagues tax policy and does little to further legitimate government objectives or inspire confidence in the Code. The Code is also an instrument, at times crude and blunt, by which public policy is implemented. The effect of the Code’s inconsistency is thus doubly lamentable.

Nowhere is the Code’s inconsistency and crudity more apparent than in its application to the environment. Many Code provisions are explicitly environmentally flavored, but many other Code provisions are at odds with a sound environmental policy. This results in a Code that incentivizes the use of hybrid and electric plug-in vehicles and encourages commuters to use public transportation and bicycles, while simultaneously promoting the use of motor vehicles with internal combustion engines, rewarding oil exploration and depletion of natural resources, and indirectly promoting urban sprawl. The reality is that the Code is a complex stew of sound and unsound public policy, special interests, and situational pressures.

This paper uses the environment as a case study to explore the reasons for the Code’s schizophrenia and seeks to highlight the areas that impede legislators and policymakers in achieving a cohesive policy. My modest hope is to affect change in an arena where it might do some good.

B. *Taxation and Taxpayer Behavior*

Through the power to tax, governments are able to collect revenue for necessary government functions.¹⁶ Taxation’s core function is to raise revenue, but it is also used as a tool to influence taxpayer behavior.¹⁷ Governments are able to affect behavior through the tax system by subsidizing activities they wish to promote and penalizing activities they wish to discourage.

16. Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 3 (2007) [hereinafter Avi-Yonah, *Three Goals*]. (“What are taxes for? The obvious answer is that taxes are needed to raise revenue for necessary governmental functions, such as the provision of public goods.”)

17. See Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 654–57 (2003) (explaining the ways in which tax laws shape behavior); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 972–82, 1027 (2004) [hereinafter Weisbach & Nussim, *The Integration of Tax and Spending Programs*] (arguing that program implementation ought to be done by the agency with the necessary expertise and not through the tax system).

This “carrot and stick” approach permeates the Code. For example, in order to discourage activities, the government imposes targeted taxes, like those imposed on the purchase (and presumably consumption and use) of alcohol¹⁸ and tobacco.¹⁹ Conversely, in order to promote social goals, the government provides tax incentives that favor certain industries, activities, or persons.²⁰ Tax incentives reward taxpayers by reducing their tax liability. These types of provisions, commonly referred to as “tax expenditures,” can take many forms, including exclusions, deductions, credits, preferential tax rates, exemptions, and deferrals of tax.²¹ Whatever their form, they are a type of government spending because the government takes in less revenue to the benefit of the taxpayer who owes less in taxes.²² In a sense, tax expenditures diverge from the primary revenue collection goal of the Code and instead act as spending provisions designed to achieve various social and economic objectives.²³

18. I.R.C. § 5051 (imposing an excise tax on “all beer brewed or produced, and removed for consumption or sale, within the United States, or imported into the United States”).

19. I.R.C. § 5701 (imposing an excise tax on cigars, cigarettes, and other tobacco products).

20. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1452 n.1 (2011) (Kagan, J., dissenting) (defining tax expenditures); Yair Listokin, *Equity, Efficiency, and Stability: The Importance of Macroeconomics for Evaluating Income Tax Policy*, 29 *YALE J. ON REG.* 45, 60 (2012) [hereinafter Listokin, *Equity, Efficiency, and Stability*] (“tax expenditures represent reductions for the revenue that would be collected from a comprehensive income tax”); Stanley S. Surrey, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 *B.C. INDUS. & COM. L. REV.* 679, 680 (1976) [hereinafter Surrey, *The Tax Expenditure Concept*] (“These special preferences, often called tax incentives or tax subsidies, are departures from the normal tax structure and are designed to favor a particular industry, activity, or class of persons.”).

21. Surrey, *The Tax Expenditure Concept*, *supra* note 20, at 680 (“They [capital expenditures] partake of many forms, such as permanent exclusions from income, deductions, deferrals of tax liabilities, credits against tax, or special rates.”).

22. *See generally* Gregory Mankiw, *The Blur Between Spending and Taxes*, *N.Y. TIMES*, Nov. 21, 2010, at B5.

23. Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 *HARV. L. REV.* 705, 706 (1970) (“The term ‘tax expenditure’ has been used to describe those special provisions of the federal income tax system which represent government expenditures made through that system to achieve various social and economic objectives.”); Surrey, *The Tax Expenditure Concept*, *supra* note 20, at 680 (“Whatever their form, these departures from the ‘normative’ income tax structure essentially represent government spending for the favored activities or groups made through the tax system.”); *see* Weisbach & Nussim, *The Integration of Tax and Spending Programs*, *supra* note 17, at 972–82.

III. THE TAX LEGISLATIVE PROCESS

An overview of the process by which tax legislation is enacted is instructive in order to better understand the relationship between tax provisions and their effect on behavior. I begin with a high-minded overview of the process by which tax legislation is enacted. I then continue the discussion with a précis of the related regulatory process.

A. *The Sanitized Version of the Legislative Process*

The Constitution provides that “Congress shall have power to lay and collect taxes, duties, imposts and excises.”²⁴ To further that goal, the Constitution directs that tax legislation must begin in the House of Representatives.²⁵ The Committee on Ways and Means has jurisdiction over tax legislation in the House, while a parallel Committee on Finance has jurisdiction in the Senate.²⁶ After the House Ways and Means Committee proposes a tax law, it goes to the House floor where it is reviewed, debated, possibly rewritten, and eventually approved or disapproved.²⁷ The tax bill then undergoes a similar process in the Senate — first referred to the Committee on Finance and then debated on the Senate floor. If the House and Senate pass differing versions of the legislation, it is referred to a joint committee consisting of both House and Senate members who try to negotiate a uniform version of the tax bill.²⁸ Only after the final version is

24. U.S. CONST. art. I, § 8, cl. 1.

25. U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”).

26. H.R. COMM. ON RULES, RULE X: ORGANIZATION OF COMMITTEES, <http://www.rules.house.gov/singlepages.aspx?NewsID=131&rsbd=165> (last visited February 10, 2013); S. COMM. ON RULES AND ADMIN., RULES OF THE SENATE, RULE XXV: STANDING COMMITTEES, <http://rules.senate.gov/public/index.cfm?p=RuleXXV> (last visited February 10, 2013).

27. For an understanding of how our tax legislative process works, see INTERNAL REVENUE SERVICE, *Understanding Taxes – Activity 2: Formal Tax Legislative Process*, http://apps.irs.gov/app/understandingTaxes/whys/thm01/les02/media/is1_thm01_les02.pdf (illustrating the fundamental process for how a tax bill becomes law). See also JOHN V. SULLIVAN, HOW OUR LAWS ARE MADE, H.R. DOC. NO. 110–49 (2007), <http://www.gpo.gov/fdsys/pkg/CDOC-110hdoc49/pdf/CDOC-110hdoc49.pdf> [hereinafter SULLIVAN, HOW OUR LAWS ARE MADE]; Michael J. Graetz, *Reflections on the Tax Legislative Process*, 58 VA. L. REV. 1389, 1395–97 (1972).

28. Stephen W. Mazza & Tracy A. Kaye, *Restricting the Legislative Power to Tax in the United States*, 54 AM. J. COMP. L. 641, 645 (2006).

separately approved by both the House and the Senate, and the President thereafter signs the bill, does a tax bill finally become law.²⁹

Many tax experts participate in the tax legislative process.³⁰ Both the House Committee on Ways and Means and the Senate Committee on Finance have an expert staff at hand.³¹ The Joint Committee on Taxation (“JCT”), with their professional staff of attorneys, accountants, and economists, also works to assist members of Congress on tax legislation.³² The JCT is a nonpartisan Congressional committee established under the 1926 Revenue Act that alternates chairmanship between the House Ways and Means Committee and Senate Finance Committee.³³ The JCT prepares revenue estimates for all tax legislation considered in Congress, analyzes (and sometimes even drafts the statutory language) of tax proposals, investigates relevant issues in the federal tax system, and reports back to each committee the results of their findings.³⁴ Additionally, congressional committees can seek input from relevant departments and agencies, including the Government Accountability Office, who can provide a report on the efficiency or desirability of enacting a given tax bill into law.³⁵

Despite the input of all the legislators, tax experts, and governmental agencies, “nowhere in the system does a particular official, committee, or other entity have the assignment to evaluate tax legislation from an environmental perspective.”³⁶ While a comprehensive analysis should incorporate environmental implications, it is telling that the word “environment” and related terms are not found in any source materials. Moreover, as is made plain below, the unsanitized version of the tax legislative process relegates the lack of environmental input to a minor role in the incoherence of the process.

29. As with all other legislation, if the President vetoes the tax law, Congress can override it with a two-thirds vote in both the House and the Senate.

30. Richard A. Westin & Sanford E. Gaines, *The Relationship of Federal Income Taxes to Toxic Wastes: A Selective Study*, 16 B.C. ENVTL. AFF. L. REV. 753, 758 (1989) [hereinafter Westin & Gaines, *A Selective Study*] (“An army of experts interacts with any tax legislation.”).

31. *Id.*

32. THE JOINT COMMITTEE ON TAXATION, *Overview*, <http://www.jct.gov/about-us/overview.html> (last visited Feb. 10, 2013).

33. *Id.*

34. THE JOINT COMMITTEE ON TAXATION, *Joint Committee Role in the Tax Legislative Process*, <http://www.jct.gov/about-us/role-of-jct.html> (last visited Feb. 10, 2013); THE JOINT COMMITTEE ON TAXATION, *Statutory Basis for the Joint Committee on Taxation*, <http://www.jct.gov/about-us/statutory-basis.html> (last visited Feb. 10, 2013).

35. SULLIVAN, *HOW OUR LAWS ARE MADE*, *supra* note 27, at 11.

36. Westin & Gaines, *A Selective Study*, *supra* note 30, at 758.

B. Alternative Processes for the Creation of Tax Law: Treasury Regulations

Law is sometimes derived from sources beyond Congressional enactments. One alternative source of binding legal authority is administrative agency regulation under the executive branch. The Department of the Treasury creates regulations that guide the Tax Code's interpretation, enforcement, and litigation.³⁷

There is recognition, however, that regulation has the potential to be inconsistent. Accordingly, beginning with Executive Order 12,291 issued by President Reagan in 1981, executive agencies were required to engage in a cost-benefit analysis for all proposed regulations.³⁸ Major regulations had to be submitted with a "regulatory impact analysis" to the Office of Information and Regulatory Affairs ("OIRA") for review and approval before they were to take effect.³⁹ With Reagan's Executive Order 12,498, administrative agencies also had to submit an "annual regulatory plan" to OIRA, seeking approval for all their proposals in the following year.⁴⁰ These executive orders were enacted to effect improvement on perceived inefficiencies in the expanding regulatory framework.⁴¹ While the cost-benefit monitoring function of OIRA was deemphasized by the Clinton administration,⁴² the Obama administration has recently affirmed this general arrangement in Executive Order 13,563.⁴³

OIRA oversight operates to coordinate all proposed regulations to avoid redundancy, economic burdens, and inefficiency.⁴⁴ Notwithstanding the salutary purpose of OIRA, it is not the Environmental Protection

37. Section 7805(a) delegates to the Treasury Department the task of "prescrib[ing] all needful rules and regulations for the enforcement of . . . law in relation to internal revenue." I.R.C. § 7805(a).

38. Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

39. *Id.*

40. Exec. Order No. 12,498, 3 C.F.R. 323 (1985).

41. See generally Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3–6 (1995) [hereinafter Pildes & Sunstein, *Reinventing the Regulatory State*] (discussing the developments of administrative law in the 1980s).

42. Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 757 (1999).

43. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011); see also Memorandum from Cass R. Sunstein, Adm'r Office of Info. & Regulatory Affairs, to the Heads of Exec. Dep't & Agencies, & of Indep. Regulatory Agencies (Feb. 2, 2011) ("Executive Order 13563 is designed to affirm and to supplement Executive Order 12866.") http://www.va.gov/ORPM/docs/EO_OIRA_Guidance_M11-10.pdf (last visited Feb. 10, 2013).

44. See Pildes & Sunstein, *Reinventing the Regulatory State*, *supra* note 41, at 3–6.

Agency.⁴⁵ Rather than focus on environmental concerns, OIRA has a larger charge of the national interest.⁴⁶ Moreover, Executive Order 12,866, issued by President Clinton in 1993, limited OIRA's centralized review of regulation to those that were "significant."⁴⁷ While such limitation is undoubtedly necessary to manage the workload,⁴⁸ it also makes clear that OIRA review is neither comprehensive nor is it the sole answer to environmental concerns that may be raised by tax regulation.

C. A Misplaced Focus

In 1972, Christopher Stone famously asked, "Should trees have standing?" and he suggested that it was time to assign legal rights to nature.⁴⁹ He argued that by granting trees and other "natural objects" legal standing, lawsuits could be initiated on their behalf whenever a wrong was committed against the environment.⁵⁰ That same year, Justice Douglas argued the same point in his dissent in the environmental hallmark case, *Sierra Club v. Morton*:

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole — a creature of ecclesiastical law — is an acceptable adversary and large fortunes ride on its cases So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes — fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its

45. While the consideration of environmental concerns is one of the goals of the OIRA oversight process, greater emphasis is placed on more traditional economic factors. Roberta S. Karmel, *The Controversy Over Systemic Risk Regulation*, 35 BROOK J. INT'L L. 823, 840 (2010).

46. Sally Katzen, *A Reality Check on an Empirical Study: Comments on "Inside the Administrative State,"* 105 MICH. L. REV. 1497, 1505 (2007).

47. *Id.* at 1509.

48. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1325 (2010) (discussing the problem of information capture — "the excessive use of information and related information costs as a means of gaining control over regulatory decisionmaking in informal rulemakings.").

49. Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

50. *Id.*

life. The river as plaintiff speaks for the ecological unit of life that is part of it.⁵¹

The preceding is based on the tacit assumption that litigation and resort to the courts is the solution to environmental problems. As is shown below, inattention to the legislative process can effectively undermine and render inconsequential the use of impact litigation as a tool to solve environmental concerns.

D. Tax Legislation and the Environment

With the foregoing, we can analyze environmentally flavored tax legislation — a task simplified by Professor Roberta Mann who has well catalogued these provisions.⁵²

Congress has for a long time attempted to influence taxpayers to be more environmentally minded with Code provisions that encourage conservation and renewable energy. Tax credits are available for the purchase of solar energy systems, fuel cells, geothermal heat pumps, and small wind-energy systems.⁵³ To promote energy efficiency, tax credits are allocated for the installation of energy-efficient doors, roofs, windows, as well as for cooling and heating equipment.⁵⁴ Automobile industry incentives are also provided by way of credits available for the purchase of hybrid, plug-in, and other alternative fuel vehicles.⁵⁵ Commuting is endorsed with benefits available for those who take public transportation or ride bicycles to work.⁵⁶ Tax benefits are available for forest landowners who preserve their private forest land rather than develop it.⁵⁷ The Congressional message seems to be clear — “green” is good.

However, the Code also rewards behaviors that are at apparent odds with these environmentally flavored provisions. While the tax system provides incentives for renewable energy, fossil fuels remain heavily

51. *Sierra Club v. Morton*, 405 U.S. 727, 742–43 (1972) (Douglas, J., dissenting).

52. See Roberta F. Mann, *Back to the Future: Recommendations and Predictions for Greener Tax Policy*, 88 OR. L. REV. 355 (2009) [hereinafter Mann, *Back to the Future*].

53. I.R.C. § 25D.

54. I.R.C. § 25C.

55. See I.R.C. §§ 30, 30B, 30C, 30D.

56. Mann, *Back to the Future*, *supra* note 52, at 366–79 (discussing the federal tax system’s stance on transportation and the resulting environmental effect).

57. See Francine J. Lipman, *No More Parking Lots: How the Tax Code Keeps Trees Out of a Tree Museum and Paradise Unpaved*, 27 HARV. ENVTL. L. REV. 471, 476–507 (2003) (describing the tax benefits available to forest landowners).

subsidized. One study revealed that from 2002 to 2008, the federal government provided \$72 billion in subsidies to fossil fuels and only \$29 billion for renewable energy.⁵⁸ More recently, largely because of the enactment of the Energy Policy Act of 2005, it has been found that the available subsidies for fossil fuels have decreased to less than 50 percent, and the available subsidies for renewable energy and conservation have increased to more than 50 percent.⁵⁹ While that might suggest a victory for the environment, renewable energy still represents a tiny share of the country's energy consumption. In 2009, renewable energy provided only 7.7 percent of our country's energy supply.⁶⁰ By contrast, petroleum (35.3 percent), natural gas (23.4 percent), and coal (19.7 percent) dominated the energy sector.⁶¹ If the goal is to reverse the trend in favor of non-renewable energy using the tax system, then providing balanced incentives to both fossil fuels and renewable energy is not the prudent solution.⁶²

The Code's subsidy to fossil fuels is extensive.⁶³ There is a tax credit available under Code section 45K for producing unconventional fuels like oil from shale, gas from depressurized brine, and coal-based fuels.⁶⁴ Code section 263(c) allows intangible drilling costs to be deducted as business expenses rather than be subject to amortization.⁶⁵ Under section 613, independent producers and royalty owners can deduct percentage-depletion equal to 15 percent of gross income from the property with respect to oil and

58. *Estimating U.S. Gov't Subsidies to Energy Sources: 2002-2008*, ENVTL. LAW INST., at 3 (2009), http://www.elistore.org/Data/products/d19_07.pdf (last visited Feb. 10, 2013).

59. Gilbert E. Metcalf, *Energy Policy & the Environment Report No. 13, Taxing Energy in the United States: Which Fuels Does the Tax Code Favor?*, MANHATTAN INST. FOR POLICY RESEARCH, at 13 (2009), http://www.manhattan-institute.org/html/eper_04.htm (last visited Feb. 10, 2013).

60. *Annual Energy Review 2008*, U.S. ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, at 37 (2009), <http://www.eia.doe.gov/emeu/aer/pdf/aer.pdf> (last visited February 10, 2013).

61. *Id.*

62. Mann, *Back to the Future*, *supra* note 52, at 376 ("Repealing these subsidies would raise about \$26 billion over the next decade, as well as help stimulate use of renewable energy sources."). However, Professor John Bogdanski questions "whether an increase in income taxes on production would have the salutary effect of increasing investor interest in greener energy or decreasing consumer demand for petroleum-related products." John A. Bogdanski, *Reflections on the Environmental Impacts of Federal Tax Subsidies for Oil, Gas, and Timber Production*, 15 LEWIS & CLARK L. REV. 323, 332 (2011) [hereinafter Bogdanski, *Reflections*].

63. *See* Bogdanski, *Reflections*, *supra* note 62, at 325-28 (describing the major subsidies given to the gas and oil industry).

64. I.R.C. § 45K.

65. I.R.C. § 263(c); Regs. § 1.612-4; *see also* I.R.C. § 263A(c)(3).

gas deposits.⁶⁶ (Section 613A denies percentage-depletion to large producers, including all major oil companies).⁶⁷ Under Code section 631(c), royalty payments from coal sales are characterized as capital gains rather than ordinary income.⁶⁸ These examples illustrate that the Code may not necessarily be purely green.

IV. MAKING SENSE OF IT ALL

Legislation should be reasoned and consistent with governmental goals. While the preceding version of the legislative process describes a rational and dispassionate approach, the reality is often incoherent and full of contradiction. We find ourselves with a structural tendency toward incoherence within the tax system. At least five factors drive this tendency. These include (1) the influence of lobbying; (2) the effect of parochial interests; (3) simple inertia; (4) external considerations; and (5) the universal problem of unintended consequences. (Each is discussed in turn below). The inescapable conclusion is that the legislative process is more sordid, lower-minded, and intensely political than the sanitized version of the process would lead us to believe.

A. Lobbying Influence

First, perhaps being an obvious point, lobbying influences legislation. Corporations and individuals spend billions of dollars every year to get their voices heard. Joseph Pechman, the late dean of American tax policy once stated: “Tax law is always a compromise among the view of powerful individuals and groups.”⁶⁹ Although the environmental lobby and the alternative energy lobby have been picking up steam the last decade, the energy lobby overshadows them. Pechman’s unstated assumption is that compromise involves parties of near equal power. Where one party is vastly more powerful than the other, compromise means little. Legislation is skewed in favor of the powerful even if it detracts from an efficient or green government.

As an industry, the energy sector is uncommonly effective at influencing government policy through lobbying.⁷⁰ Coincidentally, the top

66. I.R.C. §§ 613, 613(A)(c).

67. I.R.C. § 613A.

68. I.R.C. § 631(c).

69. JOSEPH A. PECHMAN, FEDERAL TAX POLICY 38 (5th ed. 1987).

70. Fossil fuels and electric utilities are some of the biggest spenders across all industries. In 2010, for example, the top ten 10 lobbying spenders included PG&E Corp., General Electric, and ConocoPhillips. *Top Spenders: Lobbying, 2010*,

contributors in the energy sector are often the biggest polluters.⁷¹ In 2010, the electric utilities industry spent \$191 million on lobbying; Pacific Gas & Electric (PG&E) led the way (\$45 million).⁷² The gas and oil industry spent \$145 million: ConocoPhillips (\$19 million), Chevron (\$12 million), and ExxonMobil (\$12 million).⁷³ These corporations are just a few of the many energy companies with the capacity to contribute millions of dollars every year to the energy lobby.

Despite the pro-environmental rhetoric in politics, the energy lobby severely outmatches environmental groups.⁷⁴ Environmental groups as a whole spent only \$20 million,⁷⁵ and alternative energy groups spent only \$31 million.⁷⁶ When all the dust settles, earmarks, campaign contributions, and lobbying all work to influence government decision-making. In the context of environmental policy, the salient inquiry becomes whether the natural

CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/top.php?showYear=2010&indexType=s> (last visited Feb. 10, 2013).

71. According to the Political Economy Research Institute, the top twenty corporate polluters in the United States include prominent corporations from the energy sector, such as ConocoPhillips, General Electric, Koch Industries, Duke Energy, Valero Energy, and ExxonMobil. Press Release, *Toxic 100 Names Top Corporate Air Polluters*, POLITICAL ECON. RESEARCH INST. (Mar. 31, 2010), http://www.peri.umass.edu/toxic_index/ (last visited Feb. 10, 2013).

72. *Electric Utilities: Lobbying Spending Database, Open Secrets, 2010*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/industries.php?id=E08&year=2010> (last visited Feb. 10, 2013).

73. *Oil & Gas: Lobbying, 2010, Open Secrets*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/industries/lobbying.php?cycle=2010&ind=e01> (last visited Feb. 10, 2013).

74. Similarly, records from the 2008 election cycle demonstrate that \$78 million worth of campaign contributions came from the energy and natural resources sector. *Totals by Sector Over Time, Open Secrets, Election Cycle 2008*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/bigpicture/sectors.php?cycle=2008> (last visited Feb. 10, 2013).

Specifically, the oil and gas industry donated \$36 million. *Top Industries, Open Secrets, Election Cycle 2008*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/bigpicture/industries.php?cycle=2008> (last visited Feb. 10, 2013).

75. *Environment: Lobbying, 2010, Open Secrets*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/industries/lobbying.php?cycle=2010&ind=> (last visited Feb. 10, 2013).

76. *Alternative Energy Production & Services: Lobbying, 2010, Open Secrets*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/industries/lobbying.php?cycle=2010&ind=E1500> (last visited Feb. 10, 2013).

treasures described by Justice Douglas realistically have effective lobbyists working on their behalf.⁷⁷

B. Parochial Interests

The parochial interests of individual members of Congress matter. The infamous “bridge to nowhere” and the SunRail commuter train both highlight the influence that individual legislators can exert over legislation.

The Gravina Island “bridge to nowhere” is a prime example of how easily legislation goes awry. The proposed \$398 million-dollar bridge was supposed to connect the Alaskan town of Ketchikan (population 8,900) to Gravina Island (population 50).⁷⁸ Even though a fifteen-minute ferry route existed between the ports, the project contemplated the construction of a structure “[eighty] feet higher than the Brooklyn Bridge and just [twenty] feet short of the Golden Gate Bridge.”⁷⁹ The local reasons behind the project were to advance the infrastructure and improve transportation to the airport. The obvious question was whether solving these problems by building a monumental bridge between two remote areas made any common sense. The support for the legislation can be better explained by the political phenomenon of “earmarking.”

Although definitions vary, *Merriam-Webster* defines an earmark as a “provision in congressional legislation that allocates a specified amount of money for a specific project, program or organization.”⁸⁰ Earmarks are often slipped into unrelated pieces of legislation allowing lawmakers to pass specific spending allocations without attracting attention from the public or media. The term is synonymous with “pork spending,” to refer to representatives’ pet projects that may be approved without debate or hearing.⁸¹ In the Gravina Island example, it was Senator Ted Stevens and Representative Don Young, both from Alaska, who pushed for the project.⁸² Fortunately, Congress rescinded the money after the project’s exposure

77. One is reminded of the need for Dr. Seuss’ fabled “Lorax,” who proclaims he “speak[s] for the trees, for the trees have no tongues . . .” DR. SEUSS, *THE LORAX* 23 (1971).

78. See Erika Hayasaki, *Palin Said Yes to a Road to Nowhere*, L.A. TIMES, Sept. 19, 2008, at A1 (hereinafter Hayasaki, *Palin Said Yes*).

79. Timothy Egan, *Built With Steel, Perhaps, but Greased with Pork*, N.Y. TIMES, Apr. 10, 2004, at A1.

80. *Earmark Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/earmark> (last visited June 18, 2011).

81. See Andrew Woellner, *Spending on an Empty Wallet: A Critique of Tax Expenditures and the Current Fiscal Policy*, 7 HOUS. BUS. & TAX L.J. 201 (2006); Richard Simon, *Earmark, n., Gets an Updated Definition*, L.A. TIMES, July 18, 2009, at A11.

82. See Hayasaki, *Palin Said Yes*, *supra* note 78.

generated national public outcry.⁸³ The failed project nevertheless became a symbol for wasteful spending and excessive earmarking.

The problem with earmarks is that they leave little room for analysis of legislation. Some recent examples of earmark controversies include a \$500,000 grant for a teapot museum,⁸⁴ over \$200 million for a highway running through a representative's own property,⁸⁵ and former Congressman Duke Cunningham who was sentenced to prison after accepting \$2.4 million in bribes to insert earmarks for military spending.⁸⁶ Rather than passing these enactments based on the merits and public policy, our representatives often base their decisions on ulterior motives including profit, re-election, and political advancement.

Tax legislation is not immune from earmarking. However, instead of allocating *funds* to specific groups, tax earmarks allocate *tax benefits*. For example, the Emergency Economic Stabilization Act (EESA),⁸⁷ enacted in 2008 to "bailout" the U.S. financial system from the mortgage crisis, contained numerous tax sweeteners, including a rebate of excise taxes for the rum industry in Puerto Rico and Virgin Islands worth \$192 million, tax relief to plaintiffs involved in the Exxon Valdez oil spill litigation worth \$49 million, tax credits for corporations operating in American Samoa worth \$33 million, and fringe benefits related to bicycle commuting worth \$10 million.⁸⁸ (The last example shows that even earmarks can be green).

The difficulty is parsing through legislation to identify lobbying and earmarking to ensure that the purposes of new enactments are meritorious in their own right and further national public policy instead of personal or political gain for a small few. For example, the Florida Department of

83. *Id.*

84. In 2006, \$500,000 was allocated for a Sparta Teapot Museum in North Carolina in order to "expose its visitors to an unexpected art form — the teapot." CITIZENS AGAINST GOV'T WASTE, 2006 CONGRESSIONAL PIG BOOK SUMMARY 47 (2006), <http://www.cagw.org/assets/pig-book-files/2006/2006pigbooksummary.pdf>.

85. Matthew Mosk, *Lawmakers Cashing in on Real Estate, Financial Reports Reveal*, WASH. POST, June 15, 2007, at A4.

86. Colbert I. King, *From the Hill, Lessons in High-Stepping Hypocrisy*, WASH. POST, Dec. 17, 2005, at A23.

87. See Emergency Economic Stabilization Act of 2008, H.R. 1424, 110th Cong. (2008).

88. These numbers must be kept in perspective. First, some of these earmarks extended tax benefits rather than creating new ones. Second, the monetary value of the enactments span multiple years for the length of time that the particular legislation is enacted. *Top 10 Tax Sweeteners in the Bailout Bill*, TAXPAYERS FOR COMMON SENSE, <http://www.taxpayer.net/library/article/top-10-tax-sweeteners-in-the-bailout-bill> (last visited July 2, 2011); Zachary Coile, *Billions in Earmarks in Senate's Bailout Bill*, SFGATE (Oct. 3, 2008), <http://www.sfgate.com/politics/article/Billions-in-earmarks-in-Senate-s-bailout-bill-3192435.php>.

Transportation is on course to build a SunRail commuter train in central Florida that is 50 percent funded with federal dollars.⁸⁹ Although commuter trains are synonymous with green policy and energy conservation, this project is the perfect combination of pork, rewarding political contributors, and providing false green rhetoric. With a \$1.2 billion price tag, the 61-mile rail is expected to benefit only 2,125 commuters per day when it begins operating.⁹⁰ It might well be more cost-effective to buy each of the commuters a fleet of hybrid vehicles.⁹¹ The SunRail system was actually a pet project of Representative John L. Mica and ranked as “one of the least cost-effective mass transit efforts in the nation.”⁹² According to the *New York Times*, Mica “has spent years badgering federal agencies, bullying state officials, blocking Amtrak naysayers and trying to bypass federal restrictions to build support and squash opposition to the commuter line.”⁹³ Financial records show that many of Mica’s campaign contributors would benefit from the deal, including CSX, a Florida rail corporation that stands to gain \$432 million.⁹⁴ Although such evidence does not establish a causal link between campaign contributors and their influence on decision-making, one cannot help but suspect the relationship in our political system.

Tax legislation, as the examples illustrate, is not always rational and reasoned. Aside from governmental policy goals, external forces are at play. Legislators act to further their self-interest and the interests of their constituents. To be sure, a legislator’s agenda is often the byproduct of personal commitment to a specific tax policy.⁹⁵ At other times, their actions

89. See *FAQ*, SunRail, <http://sunrail.com/faqs> (follow “How much will SunRail cost to Build?” hyperlink).

90. Eric Lipton, *A Congressman’s Pet Project; a Railroad’s Boon*, N.Y. TIMES, June 28, 2011, at A1 (hereinafter Lipton, *Congressman’s Pet Project*).

91. The math is simple — spending \$1.2 billion on slightly more than 2000 daily commuters works out to about \$600,000 for each commuter. To be fair, such a solution would not solve the problem of congestion, which is often cited as the major reason for backing the SunRail. According to the SunRail website, “Traffic congestion is a growing concern for those who live, work and visit Central Florida . . . That’s why the Florida Department of Transportation (FDOT) . . . is advancing SunRail.” *About SunRail*, SunRail, <http://www.sunrail.com/welcome/page/aboutsunrail> (last visited Mar. 4, 2013).

92. Lipton, *Congressman’s Pet Project*, *supra* note 90; see Lloyd Dunkelberger, *Scott Approves Orland’s SunRail System*, THELEDGER.COM (July 1, 2011), <http://www.theledger.com/article/20110701/NEWS/110709988?p=1&tc=pg>.

93. *Id.*

94. *Id.*

95. Michael Doran, *Legislative Compromise and Tax Transition Policy*, 74 U. CHI. L. REV. 545, 567 (2007) [hereinafter Doran, *Legislative Compromise*] (“Many legislators—probably most of those who serve on the Ways and Means Committee (the tax writing committee in the House) or the Finance Committee (the

are merely attempting to win votes or campaign contributions. Well-organized interests groups attempt to influence the tax legislative process by lobbying, and legislators often help advance those very interests.⁹⁶ Legislation can often be the final result of representatives' attempt to win votes, receive campaign contributions, get reelected, advance their political careers, or even make a profit in some cases.⁹⁷ These motivations, whether legitimate or not, tend to undermine the ability of the Congress to act in a focused and cohesive fashion. The final tax legislation that takes effect is often a compromise between "competing ideologies, competing interests, and competing groups."⁹⁸ This often results in tax policy full of contradiction and incoherence, disconnected from reason and utility.

It does not help that tax expenditures are relatively easy to create. Professor Roberta Mann notes that "[t]ax incentives do not require specific appropriation of funds, and tend to be less politically contentious."⁹⁹ The result is that parochial interests cannot help but trump national policy. It then comes as little surprise that at least one member of Congress has observed that the Code's tax expenditures now approach total federal discretionary spending.¹⁰⁰ It is estimated that tax expenditures amount to about \$1 trillion and account for approximately a quarter of total expenditures.¹⁰¹ In 2010, discretionary spending accounted for 39 percent of total government spending.¹⁰² The United States Government Accountability Office stated: "On an outlay-equivalent basis, the sum of tax expenditures estimates exceeded discretionary spending for most years in the last decade."¹⁰³ This

tax writing committee in the Senate)--and many presidents have strong commitments to a particular vision of tax policy.").

96. *Id.* at 567–68 (discussing the influence of interest group politics in the tax legislative process).

97. See generally Ron Nixon, *Cost-Cutters, Except When the Spending is Back Home*, N.Y. TIMES, July 20, 2011, at A16.

98. Doran, *Legislative Compromise*, *supra* note 95, at 570 (citing MICHAEL J. GRAETZ, THE U.S. INCOME TAX: WHAT IT IS, HOW IT GOT THAT WAY, AND WHERE WE GO FROM HERE 184 (Norton 1999)).

99. Roberta F. Mann, *Federal, State, and Local Tax Policies for Climate Change: Coordination or Cross-Purpose?*, 15 LEWIS & CLARK L. REV. 369, 391 (2011) [hereinafter Mann, *Federal, State, and Local Tax Policies*].

100. Earl Blumenauer, *Business Law Forum Taxation and the Environment: Introduction*, 15 LEWIS & CLARK L. REV. 315, 319 (2011).

101. THOMAS L. HUNGERFORD, CONG. RESEARCH SERV., RL 34622, TAX EXPENDITURES AND THE FEDERAL BUDGET 2 (2011); Listokin, *Equity, Efficiency, and Stability*, *supra* note 20, at 89.

102. THOMAS L. HUNGERFORD, CONG. RESEARCH SERV., RL 34622, TAX EXPENDITURES AND THE FEDERAL BUDGET 2 (2011).

103. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-690, GOVERNMENT PERFORMANCE AND ACCOUNTABILITY: TAX EXPENDITURES REPRESENT A

seemingly uncontrollable increase of tax expenditures presents yet another issue for the prospects for tax reform: the challenge of stopping or changing long-standing policies and practices.

C. Inertia

Third, the inertia of existing Code provisions makes environmental reform more difficult. This phenomenon is well illustrated by the Code's treatment of the production of ethanol. In 1826, Samuel Morey created an engine that was powered by ethanol and turpentine.¹⁰⁴ Ethanol is an alternative fuel made from starch grains, generally corn, which is then turned into alcohol.¹⁰⁵ Nearly a century later, in 1908, Henry Ford manufactured his world famous Model T that ran on both ethanol and gasoline.¹⁰⁶

Although ethanol has been available as an energy source since before the Model T, oil was the favored fuel because of its relatively lower price.¹⁰⁷ The United States only began subsidizing ethanol after domestic oil production began to decline in the 1970s.¹⁰⁸ Perhaps the threshold for tolerance was reached when the oil-producing nations in the Middle East imposed an oil embargo on the United States after which there was a policy shift to support alternative fuel sources.¹⁰⁹ President Nixon expressed this sentiment when he declared that “[o]ur independence will depend on maintaining and achieving self-sufficiency in energy.”¹¹⁰

SUBSTANTIAL FEDERAL COMMITMENT AND NEED TO BE REEXAMINED HIGHLIGHTS (2005).

104. *Ethanol Fuel History*, FUEL-TESTERS, http://www.fuel-testers.com/ethanol_fuel_history.html (last visited July 14, 2011) [hereinafter *Ethanol Fuel History*].

105. *See Ethanol*, ST. ENERGY CONSERVATION OFF., <http://seco.cpa.state.tx.us/energy-sources/biomass/ethanol.php> (last visited July 14, 2011).

106. *Ethanol Fuel History*, *supra* note 104.

107. Zachary M. Wallen, *Far From a Can of Corn: A Case for Reforming Ethanol Policy*, 52 ARIZ. L. REV. 129, 134 (2010).

108. *Id.* For a more comprehensive overview about the history of ethanol and the development of energy policy in the United States, see MICHAEL J. GRAETZ, *THE END OF ENERGY: THE UNMAKING OF AMERICA'S ENVIRONMENT, SECURITY, AND INDEPENDENCE* (2011). While Professor Graetz's book is not tax-centered, it is a useful background for understanding energy politics as it traces back the history of U.S. energy policy since the 1970s.

109. Brian R. Farrell, *Fill 'Er Up with Corn: The Future of Ethanol Legislation in America*, 23 J. CORP. L. 373, 375 (1998) [hereinafter Farrell, *Fill 'Er Up with Corn*].

110. Ctr. for Pub. Integrity, *Foreign Oil Dependence Has Grown* (Dec. 10, 2008, 12:00 AM), <http://www.publicintegrity.org/2008/12/10/6211/foreign-oil-dependence-has-grown>.

In line with that goal, President Carter promoted ethanol as an alternative to foreign fossil fuels when he became president.¹¹¹ As foreign oil dependency grew,¹¹² he made a promise that “this Nation will never use more foreign oil than we did in 1977 — never.”¹¹³ Ethanol was an option to help foster that energy independence.

As we have witnessed, the road to energy independence is not an easy one. Part of the difficulty is that, in the beginning, ethanol production was less efficient than the production of established fossil fuels.¹¹⁴ To help ethanol compete in the free market, Congress decided to subsidize the industry.¹¹⁵ With the passage of The Energy Tax Act of 1978, ethanol alcohol fuels were allowed an exemption from the motor fuel excise tax in the amount of forty cents per gallon.¹¹⁶ The purpose of the Act was “to provide tax incentives for the production and conservation of energy.”¹¹⁷ Congress better summarized its policy goals with respect to ethanol fuel when it reconsidered the legislative act in 1987:

Congress finds that — (1) the United States is dependent for a large and growing share of its energy needs on the Middle East at a time when world petroleum reserves are dwindling; (2) the burning of gasoline causes pollution; (3) ethanol can be blended with gasoline to produce a cleaner source of fuel; (4) ethanol can be produced from grain, a renewable resource that is in considerable surplus in the United States; (5) the conversion of grain into ethanol would reduce farm program costs and grain surpluses; and (6) increasing the quantity of motor fuels that contain at least 10 percent ethanol from current levels to 50 percent by 1992 would create thousands of new jobs in ethanol production facilities.¹¹⁸

111. Farrell, *Fill 'Er Up with Corn*, *supra* note 109, at 375.

112. In 1977, foreign oil accounted for 48 percent of the United States oil supply. Robert D. Hershey, Jr., *U.S. Urges Cut in Dependence on Foreign Oil*, N.Y. TIMES, Mar. 16, 1987, at A1.

113. Jimmy Carter, President, *Crisis of Confidence* (July 15, 1979) (transcript http://www.cartercenter.org/news/editorials_speeches/crisis_of_confidence.html).

114. Farrell, *Fill 'Er Up with Corn*, *supra* note 109, at 375.

115. *Id.*

116. Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174 (1978).

117. *Id.*

118. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 1508(a), 101 Stat. 1330-29 (1987).

The favorable policy goals articulated by Congress made it difficult to oppose the legislation for political reasons.¹¹⁹ No legislator wanted to be seen as opposing energy independence, agricultural production, and environmental policy. As a result, ethanol subsidies originally received bipartisan political support.¹²⁰

Between 1978 and 2004, the amount of the ethanol subsidy ranged from 40 to 60 cents per gallon.¹²¹ With the passage of the Energy Act of 2005,¹²² the ethanol subsidies were restructured so that the alcohol fuel tax credit under Code section 40 was enacted to include: (1) the alcohol mixture credit (also known as the blender's credit), (2) the alcohol credit, and (3) the small ethanol producer credit.¹²³ The three income tax credits were to be part of the general business credit under Code section 38.¹²⁴ Additionally, Code section 30C was enacted for taxpayers investing in vehicles that dispensed at least 85 percent ethanol.¹²⁵ These statutes are modern-day codifications of the ethanol subsidies.¹²⁶

While ethanol subsidies enjoyed political support in its early years, the political game has changed. First, ethanol subsidies no longer appear necessary to help ethanol to compete with oil in the free market. In 2009, for example, the ethanol industry increased the nation's gross domestic product by \$53.3 billion and produced 10.6 billion gallons of ethanol.¹²⁷ With oil prices sky high, the ethanol industry is healthy enough to operate without government assistance.¹²⁸ Second, new data has since come out undermining ethanol as a viable alternative to oil; ethanol has been linked to higher food prices, inefficient energy use, and smog production.¹²⁹ Even with a new

119. Farrell, *Fill 'Er Up with Corn*, *supra* note 109, at 377.

120. *Id.*

121. WALLACE E. TYNER, U.S. ETHANOL POLICY — POSSIBILITIES FOR THE FUTURE, PURDUE U. 1 (2007), <http://www.extension.purdue.edu/extmedia/ID/ID-342-W.pdf> [hereinafter TYNER, U.S. ETHANOL POLICY].

122. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat 594 (2005).

123. I.R.C. § 40(a); see Roberta F. Mann & Mona L. Hymel, *Moonshine to Motorfuel: Tax Incentives for Fuel Ethanol*, 19 DUKE ENVTL. L. & POL'Y F. 43, 47–51 (2008).

124. I.R.C. § 38(b)(3).

125. I.R.C. § 30C.

126. In 2006, it was estimated that ethanol subsidies varied between \$1.05 and \$1.38 per gallon of ethanol and between \$1.42 and \$1.87 per gallon of gasoline equivalent. TYNER, U.S. ETHANOL POLICY, *supra* note 121, at 2.

127. Renewable Fuels Ass'n, *Climate of Opportunity: 2010 Ethanol Industry Outlook 2*, http://ethanolrfa.3cdn.net/32b7ed69bd366321cb_r1m6261b0.pdf.

128. See Clifford Krauss, *Ethanol Subsidies Besieged*, N.Y. TIMES, July 8, 2011, at B1 [hereinafter Krauss, *Subsidies Besieged*].

129. Steve Ratner, *The Great Corn Con*, N.Y. TIMES, Jan. 25, 2011, at A19 [hereinafter Ratner, *Corn Con*]. Moreover, the Congressional Budget Office has

political climate where ethanol subsidies create little political support,¹³⁰ the ethanol industry has continued to receive hefty government subsidies. This situation leaves us with an interesting inquiry.

Lobbying by itself cannot explain this development. Biofuel companies spent \$7.3 million on lobbying in 2009 alone,¹³¹ and ethanol has been actively opposed by the oil industry, livestock interests, and environmental groups.¹³² To put it into context, the American Petroleum Institute spent \$7.3 million in 2009, as much as the whole biofuel industry combined.¹³³ The environmental lobby nearly tripled the amount spent by the biofuel lobby that same year.¹³⁴ The lobbying differential between ethanol supporters and their opposition suggests that the success of the ethanol industry cannot be wholly explained by monetary influence. Perhaps that is because ethanol interests cleverly, and somewhat deceitfully, stand behind a political platform of environmental concern and the movement toward cleaner alternative fuels, making it easier for a politician to support ethanol subsidies.¹³⁵

found that reducing CO₂ emissions with ethanol cost at least \$750 per ton of CO₂, much more than by other methods. *Id.*

130. *See id.* (describing the ethanol subsidy as “government policy run amok”).

131. KATE MCMAHON, FRIENDS OF THE EARTH, BUYING BILLS: HOW THE BIOFUELS INDUSTRY INFLUENCES CONGRESS TO WASTE YOUR TAXPAYER DOLLARS 6 (2010).

132. *See* Dan Eggen, *The Influence Industry: Ethanol Lobby Running Low on Fuel in Washington*, WASH. POST (June 14, 2011), http://www.washingtonpost.com/politics/the-influence-industry-ethanol-lobby-running-low-on-fuel-in-washington/2011/06/14/AG7SrPWH_story.html; *see* Farrell, *Fill ‘Er Up with Corn*, *supra* note 109, at 377–80.

133. *Oil & Gas: Lobbying, 2009, Open Secrets*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/indusclient.php?id=E01&year=2009> (last visited July 16, 2011).

134. *See Environment: Lobbying, 2009, Open Secrets*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/industries/lobbying.php?cycle=2009&ind=Q11> (last visited July 16, 2011).

135. A complementary explanation is that politicians — presidential candidates in particular — support ethanol because they want the votes of Iowans, one of the primary beneficiaries of ethanol subsidies. Krauss, *Subsidies Besieged*, *supra* note 128, at B1 (“Federal subsidies for corn ethanol have long been considered untouchable in Washington — not least because politicians want the votes of Iowans, who have traditionally held the first nominating caucuses in the contest for the presidency.”); Ratner, *Corn Con*, *supra* note 129, at A19 (“Almost since Iowa — our biggest corn-producing state — grabbed the lead position in the presidential sweepstakes four decades ago, support for the biofuel has been nearly a prerequisite for politicians seeking the presidency.”).

Moving away from this cynical view of our political system, the support for ethanol can be alternatively explained based on public policy concerns outside of the environmental realm. Behind all the shortcomings of ethanol, there are legitimate policy goals (for example, energy independence) that are supposedly being carried out. While it is easy to criticize the Code by isolating environmental problems, those concerns should be weighed against other governmental goals that are at stake. The pros and cons of ethanol are difficult to measure against each other but as one prominent commentator notes, “we have incurred — and will incur — far greater costs than benefits by continuing to subsidize ethanol.”¹³⁶

Recently, Professor Lawrence Zelenak undertook a comprehensive analysis of one of the most anti-environmental provisions in the Code — the so called “SUV loophole” or “Hummer deduction.”¹³⁷ With the government subsidizing hybrid, electric, and other alternative fuel vehicles, it is remarkable that taxpayers are currently allowed a deduction of up to \$25,000 for the purchase of a sport utility vehicle (“SUV”).¹³⁸ Tracing the deduction to its roots reveals that the purpose of the original provision was not to subsidize SUVs.¹³⁹ When enacting the provision back in 1984, Congress assumed that the “use of a vehicle weighing more than 6,000 pounds would be based on business needs, rather than on personal preferences.”¹⁴⁰ The American driving culture has since changed; the heavy SUV is now a popular alternative to regular cars. Thus, while the original provision did not intend for SUV consumers to benefit, societal effects have since emerged to provide that very benefit for the business use of SUVs.

Even though the shortcomings of the ethanol tax break and the “SUV loophole” have long been exposed, they still find their respective places in the Code. Just this past summer, however, the Senate overwhelmingly approved a bill amendment to repeal the Volumetric Ethanol Energy Tax Credit (VEETC), which is supposed to have the effect of eliminating tax

136. MICHAEL J. GRAETZ, *THE END OF ENERGY: THE UNMAKING OF AMERICA’S ENVIRONMENT, SECURITY, AND INDEPENDENCE* 131 (2011).

137. See Lawrence Zelenak, *The Loophole That Would Not Die: A Case Study in the Difficulty of Greening the Internal Revenue Code*, 15 *LEWIS & CLARK L. REV.* 469 (2011) [hereinafter Zelenak, *Loophole That Would Not Die*] (presenting the “SUV loophole” as a case study in order to show the difficulty of greening the Code).

138. I.R.C. § 179.

139. Congress assumed that “taxpayer’s choice of a vehicle weighing more than three tons would be based solely on business concerns; no one would derive personal consumption benefits from such a behemoth.” Zelenak, *Loophole That Would Not Die*, *supra* note 137, at 473.

140. *Id.*

credits for ethanol.¹⁴¹ The vote was viewed as largely symbolic for two reasons. First, it was part of the Economic Development and Revitalization Act, which was given little chance of winning final approval.¹⁴² Second, even without the tax credits, the 2005 federal mandate requiring corn-ethanol producers to blend their ethanol with conventional gasoline would remain.¹⁴³ Because the senators in favor of ethanol tend to be from high-volume corn producing states, the vote represented a triumph of geography over ideology.¹⁴⁴ Nonetheless, the negative vote represents progress of sorts.

Still, as Professor Lawrence Zelenak observes, it is difficult to hope for progress when even the hidden tax subsidy for large SUVs — which he describes as “the most transparent and the most outrageous [of tax loopholes]” — still exists despite almost universal condemnation.¹⁴⁵ The point is that the ethanol subsidy and the SUV subsidy despite explicit recognition that each is deeply flawed nonetheless persist. The inertia possessed by existing legislation is very difficult to overcome.

D. Unintended Consequences

Fourth, the environmental effects of various Code provisions can come about unintentionally, and the policy inconsistencies that plague the Code are not readily apparent upon enactment. Over a decade ago, Professor Christine Klein observed that tax policy does not always consider the whole picture when enacting legislation.¹⁴⁶ She suggested that the now-repealed capital gain rollover rule in Code section 1034 had a negative unintended

141. The bill was Ethanol Subsidy and Tariff Repeal Act, S. 871, 112th Cong. (2011). The final vote was 73 votes in favor of repeal with 27 against. Lauren Gardner & Niels Lesniewski, *House, Senate Show Some Support For Ending Federal Ethanol Subsidies*, CQ TODAY, June 16, 2011. The “carried interest” tax benefit has shown similar inertia in the face of criticism. *See generally* Victor Fleischer, *The Missing Preferred Return*, 31 J. CORP. L. 77 (2005); Laura Sanders, “Carried Interest” in the Crosshairs, THE WALL STREET J. Aug. 6-7, 2011, at B9.

142. Stephen Mufson & Lori Montgomery, *Senate Votes to End Ethanol Tax Credits*, WASH. POST, June 17, 2011, at A15 [hereinafter Mufson & Montgomery, *Senate Votes to End Ethanol*].

143. David Shaffer, *Ethanol-Subsidy Fight Affects Towns: An Era of Nearly Unwavering Federal Support for the Industry is Ending*, L.A. TIMES, June 25, 2011, at B3.

144. Mufson & Montgomery, *Senate Votes to End Ethanol*, *supra* note 142 (“Among ethanol supporters, geography trumped party.”).

145. Zelenak, *Loophole That Would Not Die*, *supra* note 137, at 471.

146. *See generally* Christine A. Klein, *A Requiem for the Rollover Rule: Capital Gains, Farmland Loss, and the Law of Unintended Consequences*, 55 WASH. & LEE L. REV. 403 (1998).

consequence of promoting the purchase of more expensive housing.¹⁴⁷ By deferring capital gain on the sale of a personal residence when a subsequent home was of equal or greater value, the section effectively discouraged investment in older residences and encouraged the purchase of more expensive housing.¹⁴⁸ This illustrates that while tax legislation generally shapes taxpayer behavior in its intended manner, sometimes the full effect is not evident until its application.

Similarly, the current home mortgage interest deduction, in its promotion of home ownership, indirectly encourages energy use. By allowing a deduction for interest paid on the mortgages of up to \$1 million,¹⁴⁹ the provision encourages unnecessary borrowing to purchase expensive homes.¹⁵⁰ Instead of encouraging home ownership, the deduction gives an incentive for the already wealthy to acquire larger, grander, and more expensive housing.¹⁵¹ This effectively encourages low-density development in the suburbs and increases dependence on automobiles.¹⁵²

Both of these examples, in light of Professor Klein's observation, show that tax policy is not always pointed and calculated. Adverse environmental effects are often the result of unforeseen circumstances. While this can potentially explain *some* of the inconsistencies in the Code regarding the environment, it does not ultimately explain why those very same Code provisions remain unaltered even after its negative environmental effects are unveiled. Inaction can be partially explained by the influence gap between the energy sector and environmental interests in the tax legislative process.

As the home mortgage interest deduction has encouraged urban sprawl and as the "SUV loophole" has encouraged the purchase of gas-guzzling behemoths, we can plainly see how environmentally harmful effects can be the byproduct of unforeseeable consequences. In some situations, the environmental dichotomy can be explained, in part, by unexpected developments, societal changes, or pure chance.

147. *Id.* at 434–37.

148. *See* I.R.C. § 1034 (1994) (repealed 1997).

149. I.R.C. § 163(h)(3) (describing qualified residence interest).

150. Mann, *Back to the Future*, *supra* note 52, at 363.

151. *Id.* at 364–65.

152. *See id.* at 361–66 (discussing the process by which the home mortgage interest deductions encourages sprawl and excess energy use); *see generally* Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347 (2000) (arguing for a repeal of the home mortgage interest deduction by focusing on the hidden effects of the provision).

E. External Considerations

Finally, the ethanol case study introduces yet another variable — policy concerns other than the environment that can influence environmental legislation. In the case of ethanol, the external policy goal was energy independence to be achieved by reducing fossil fuel consumption. Although the environmental benefits might be negligible, the provisions nevertheless helped the nation move away from oil consumption. Isolating environmental concerns may not always reveal a complete picture. Tax legislation is often a mesh of different policy goals that must be kept in perspective before a proper environmental analysis can be made.

A variety of policy concerns influence legislation that ultimately benefits environmental causes. Indeed, “[t]he most common purpose of state environmental legislation is to protect public health.”¹⁵³ Aligning the goals of public health and environmental legislation can “create market-based, regulatory incentives that promote sustainable commerce initiatives, and in doing so, position the U.S. local and state economy to aggressively compete against global competitors in global markets.”¹⁵⁴ The international trend toward sustainable business has served external national purposes including reducing reliance on foreign energy sources and expanding markets for U.S. goods while having incidental benefits to the environment through reducing the impacts of American industrial operations and accelerating the use of sustainable technologies and practices.¹⁵⁵

The *New York Times* recently reported that Americans are pumping significantly less gasoline, partly as a result of the recession and higher gasoline prices, but also because more Americans are driving fewer miles and replacing older cars with hybrid or fuel-efficient vehicles.¹⁵⁶ While there is some environmental benefit to the decreased consumption of fossil fuel, the main effect of this trend is increased independence from foreign energy, which relates directly to the policy considerations of foreign policy, national security, and the economy.¹⁵⁷ The policies, including domestic drilling on federal lands and waters, leading to this state of independence were often

153. Norman J. Singer and J.D. Shambie Singer, *Conservation Laws — Environmental Protection in the States*, 3B SUTHERLAND STATUTORY CONSTRUCTION § 77:6 (7th ed.).

154. T. Rick Irvin and Peter A. Appel, *Sustainable Commerce: Public Health Law and Environmental Law Provide Tools for Industry and Government to Construct Globally-Competitive Green Economies*, 33 S. ILL. U. L.J. 367, 368 (2009).

155. *Id.* at 372.

156. Clifford Krauss and Eric Lipton, *U.S. Inches Toward Goal of Energy Independence*, N.Y. Times, Mar. 23, 2012, at A1.

157. *Id.*

“industry-friendly” pieces of legislation fought by environmental groups.¹⁵⁸ Unfortunately, although these conditions could provide an opportunity to incentivize the decreased use of gasoline, instead the government is passing more legislation to expand drilling and similar technologies to develop domestic oil sources.¹⁵⁹

In the future, it has been suggested that U.S. energy policies will need to continue to address the political and economic security threat posed by a dependence on oil, as well as the issue of poverty and the gap between the rich and the poor in access to energy.¹⁶⁰ Further, the global demand and market for energy could provide a venue for the government to further economic, national security, and environmental goals.¹⁶¹ As one article articulated: “Energy is a common thread weaving through the fabric of critical American interests and global challenges.”¹⁶²

All of this is emblematic of a much larger concern. The traditional goals of tax policy are “equity, efficiency, and simplicity.”¹⁶³ As one commentator has suggested, these goals may be too myopic by not accounting for economic stability.¹⁶⁴ If tax policy does not account for fiscal concerns, there is less hope that it would account for environmental concerns. Extrapolating still further, the prospects for accounting for external considerations — a “big picture” sort of analysis is truly missing. The sum is that when all of these five points — lobbying influence, parochial interests, inertia, unintended consequences, and external considerations — are taken together, we are left with the inconsistent approach to environmental concerns that we have today. Using the environment as a microcosm of what plagues tax policy today, the inescapable observation is that more, not less, incoherence and inconsistency is in our future.

158. *Id.*

159. *Id.* (noting that in March 2012, President Obama opened 38 million more acres in the gulf for oil and gas exploration. “If there is a loser in this boom, it is the environment.”)

160. Timothy E. Wirth, C. Boyden Gray & John D. Podesta, *The Future of Energy Policy*, FOREIGN AFFAIRS, Vol. 82, No. 4 at 133 (2003) (“the lack of access by the world’s poor to modern energy services, agricultural opportunities, and other basics needed for economic advancement is a deep concern”).

161. *Id.* (“Market mechanisms can help address the various economic, environmental, and security interests at stake.”).

162. *Id.* at 139.

163. Listokin, *Equity, Efficiency, and Stability*, *supra* note 20, at 47; *see generally* Avi-Yonah, *Three Goals*, *supra* note 16 (discussing the merits of a tax in terms of equity, efficiency, and simplicity); Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567, 568 (1965).

164. *See* Listokin, *Equity, Efficiency, and Stability*, *supra* note 20, at 48; Richard Musgrave, *The Theory of Public Finance: A Study in Political Economy* 5 (1959).

V. CONCLUSION

Inconsistent environmental legislation is a public policy problem that we in the United States cannot ignore. The Code, in its attempt to shape taxpayer behavior within the environmental realm, is often at cross-purposes. Such conflicts cannot be overlooked as they lead astray tax legislation from governmental goals. Not only does this undermine the execution of a cohesive public policy, it wastes government resources. If the federal government is foregoing revenue with the enactment of tax expenditures, whose effects are being undermined by its own doing, taxpayer money is wasted. In such circumstances, a better tax policy is needed, first, to formulate consistent goals and second, to ensure that the effects following the application of the enactments are in sync with the original objectives.

One is tempted to suggest that independent commissions or advisory bodies can inject reason into the equation. However, history has shown that this approach may very well represent the triumph of hope over reality. A few examples illustrate the problem. President Obama created the National Commission on Fiscal Responsibility and Reform via an executive order in 2010.¹⁶⁵ The purpose of the commission was to provide recommendations to the President on how to balance the budget and how to best improve the long-term fiscal outlook of the United States.¹⁶⁶ When the co-chairs, former Republican Senator Simpson and former Clinton Chief-of-Staff Bowles, proposed overhauling the Code by cutting \$100 billion per year in popular tax breaks,¹⁶⁷ they faced heavy opposition and eventually fell short.¹⁶⁸ It is difficult to enact change when the approval of a final report requires a supermajority — the vote of at least fourteen of the eighteen bipartisan members of the commission.¹⁶⁹ Although supporters of the commission had hoped that President Obama would nevertheless back the recommendations, the President offered no support.¹⁷⁰

165. Exec. Order No. 13,531, 75 Fed. Reg. 7927 (Feb. 18, 2010).

166. About the National Commission on Fiscal Responsibility and Reform, FiscalCommission.gov, <http://www.fiscalcommission.gov/about> (last visited July 21, 2011).

167. For the final version of the proposal *see* Nat'l Comm'n on Fiscal Responsibility and Reform, *The Moment of Truth: Report of the National Commission on Fiscal Responsibility and Reform* (2010), http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12_1_2010.pdf.

168. *See* Lori Montgomery, *Deficit Panelists Offer Bold Moves on Taxes, Outlays*, WASH. POST, Nov. 11, 2010, at A1; Lori Montgomery, *Budget Panel's Unsteady Balancing Act*, WASH. POST, Nov. 17, 2010, at A12.

169. *See* Exec. Order No. 13,531, 75 Fed. Reg. 7927 (Feb. 18, 2010).

170. David Brooks, *Moment of Truth*, N.Y. TIMES, Apr. 5, 2011, at A23 (“The polls suggested that voters were still unwilling to accept tax increases or

Congress has fared no better in this regard. In 2010, Congress ordered the National Academy of Sciences (NAS) to “undertake a comprehensive review of the Internal Revenue Code of 1986 to identify the types of and specific tax provisions that have the largest effects on carbon and other greenhouse gas emissions and to estimate the magnitude of those effects.”¹⁷¹ The hope was that Congress would begin “greening” the Code once the carbon footprint of the various Code provisions were identified.¹⁷² The NAS report, when issued, will suffer from a fundamental flaw — the approach will be retrospective. Because NAS will only analyze the Code provisions already in existence, the possibility of new Code provisions will not be part of the report. Consequently, highlighting the anti-environmental provisions will not necessarily lead to beneficial reform without first pointing out viable alternatives. Although affecting future provisions is not the point of the NAS study, a prospective approach could forestall future environmentally unsound Code provisions.

While the NAS has yet to issue its report, its review may well follow the fate of the Advisory Commission on Intergovernmental Relations (“ACIR”) established by Congress in 1959 and created to provide technical assistance to legislators and to promote efficiency with respect to resources, notably revenue.¹⁷³ While the idea was sound and the ACIR issued a number of worthy papers, there is little to show for the effort. Indeed, ACIR was disbanded in 1995.¹⁷⁴ Even if the NAS report is issued, it may very well get lost in the wrangle over the debt limit or suffer the fate of the Simpson-Bowles Commission.

Ultimately the solution has to be a call for responsible government that is the result of competent legislators who are single-minded about the good of the nation. Professor Lawrence Zelenak recently expressed pessimism over this possibility, but he is not the first to have such reservations.¹⁷⁵ Over two hundred years ago, James Madison’s concern about

benefit cuts. Smart Washington insiders like Mitch McConnell and President Obama decided that any party that actually tried to implement these ideas would be committing political suicide. The president walked away from the Simpson-Bowles package. Far from addressing the fiscal problems, the president’s budget would double the nation’s debt over the next decade, according to the Congressional Budget Office.”).

171. Energy Improvement and Extension Act of 2008, Pub. L. No. 110-343, §117, 122 Stat. 3807, 3831 (2008).

172. Zelenak, *Loophole That Would Not Die*, *supra* note 137, at 469–70.

173. Mann, *Federal, State, and Local Tax Policies*, *supra* note 99, at 389–901.

174. *Id.* at 391.

175. Professor Lawrence Zelenak uses the long-established “SUV loophole” of section 179 in order to illustrate the difficulty of enacting environmental change in the Code. Zelenak, *Loophole That Would Not Die*, *supra*

the domination by the majority over the minority led him to observe that men were not angels. He wrote:

But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.¹⁷⁶

My own hope notwithstanding, I fear that Zelenak and Madison may be right. The mechanisms viewed as necessary by Madison are not in place or do not exist to inject environmentally flavored reason into the Code. This is not surprising. Partisan dispute and not harmony is what has characterized the legislative and political process throughout our history.¹⁷⁷ Indeed, one of Madison's first observations of politics in this country was "two fixed and violent parties" standing "invariably contrasted on the opposite columns," governed by "*passion, not reason.*"¹⁷⁸ Despite the partisan challenges facing the government throughout America's past, in the end, the result has been accomplishment. The Golden Gate Bridge exists, Hoover Dam was built, and the transcontinental railroad united the country from coast to coast — all done in spite of partisan bickering.¹⁷⁹ In that sense there is some hope. At the same time there is probably a significant difference between large infrastructure projects, which can attract support because of their tangible nature, and the more elusive and less tangible, but just as important notions of economic stability and big picture analysis. We as responsible citizens must make sure legislators and policymakers understand this simple proposition.

Until such occurs or until angels are elected to Congress, we in the United States are faced with the prospect of a Code that is hostile to or at

note 137. He concludes his analysis by exclaiming that "the prospects for the greening of the Internal Revenue Code are not good." *Id.* at 481.

176. The Federalist No. 51 (James Madison).

177. Adam Goodheart & Peter Manseau, *American History Hits the Campaign Trail*, NY TIMES, July 8, 2012, at 5 [hereinafter Goodheart & Manseau, *American History*].

178. The Federalist No. 50 (James Madison) (emphasis in original).

179. See Goodheart & Manseau, *American History*, *supra* note 177, at 5.

least indifferent to environmental concerns. By extension we are faced with the prospect of a Code that is hostile to or at least indifferent to larger social concerns. As Kay Ryan might say, “things shouldn’t be so hard.”¹⁸⁰

180. Ryan, *Things Shouldn’t Be So Hard*, *supra* note 1, at 48.