SHAKEDOWN AT GUCCI GULCH: THE NEW LOGIC OF COLLECTIVE ACTION

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Ever since Mancur Olson's 1965 classic The Logic of Collective Action, *the dominant view of politics has featured the special-interest model. Small groups with high stakes in legislative outcomes solve their coordination and free-rider problems and then descend on Washington and other bastions of power, seeking rents. In this model, the special interests are the predators, legislators the prey. In this Article, we argue that in an important set of cases the process works in reverse. Legislators proactively solve the coordination and free-riding problems identified by Olson so that they can then shake down the groups so formed for campaign contributions. We illustrate this model of a reverse Mancur Olson phenomenon with the extended example of estate tax repeal/non-repeal over the last two decades, and suggest further extensions such as tort reform, military spending, and regulation of the broadcast spectrum. The key properties of the phenomenon are small groups with high stakes that Congress has helped to frame or set up; two or*

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more sides to the issue; plausible legislative action; and plausible longevity for any legislative action. The key predictions are that, once Congress has found rich territory for the game, it will string matters along, frequently voting, rarely acting, and avoiding sensible compromises at every turn. We conclude by suggesting it is time to invert our gaze, and to better watch the legislative watchdogs.

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I. INTRODUCTION: THE TRADITIONAL VIEW OF POLITICS, AND BEYOND

Special-interest groups dominate politics in the United States today. They are the predators, Congress the prey; or so says the traditional view of politics.[1] In this Article, we mean to reverse that usual view of things. We argue that Congress, not special-interest groups, is the predator, and special-interest groups are the prey—at least a good deal of the time, and in some very important cases. We believe that it is time to invert our gaze, and to start better watching the watchdogs.

Let's back up.

Ever since Mancur Olson's classic text, *The Logic of Collective Action*, was published in 1965[2]—if not before—the dominant view of legislative action has given pride of place to "special-interest groups."[3] In the now-standard view of politics, these small groups with high stakes arise independently, motivated by common interests and able to solve the "free-rider" problem[4] of collective action on account of their small size. Special interests then descend on Washington and other bastions of power, in the guise of corporate lobbyists, and seek the non-market returns—goodies—that contemporary politics so amply provides.

This special-interest conception of politics pervades the academy, the press, and even politicians' own self-awareness of politics, such as it is. In the 2004 presidential election, both George W. Bush and John Kerry lamented the role of special interests in American

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1. STEPHEN MILLER, SPECIAL INTEREST GROUPS IN AMERICAN POLITICS 1–8 (1983).

2. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

3. For statements and analyses employing the standard special-interest conception, see DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE 1–46 (1969); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5–6, 13–17, 36–39 (1974); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 371–72, 392 (1983); Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15, 18 (1984); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 713–15 (1984); Kevin B. Grier & Michael C. Munger, *Comparing Interest Group PAC Contributions to House and Senate Incumbents, 1980–1986*, 55 J. POL. 615, 615–16, 637–40 (1993); Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 45–50 (1988); and James M. Snyder, Jr., *Campaign Contributions as Investments: The U.S. House of Representatives, 1980–1986*, 98 J. POL. ECON. 1195, 1196–97 (1990); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 682 (5th ed. 1998).

4. "Free-riding" refers to receiving the benefits of an action or state of affairs without bearing commensurate burdens. *See infra* text accompanying note 11.

politics[5] while each took more money from special-interest groups than ever before.[6] Four years prior, attacks on the power of special-interest groups had formed the basis of campaigns by Senator John McCain, on the right, and Ralph Nader, on the left.[7] On a (slightly) sub-national level, Arnold Schwarzenegger rose to populist power as the governor of California, America's most populous state, promising to terminate special-interest politics, and has continued to make the attack on special interests the lynchpin of his governorship.[8] While no candidate has yet been successful in actually mitigating the power and influence of special interests, the various campaigns gave voice, as Ross Perot had years earlier,[9] to the widespread public perception that special interests, through their campaign contributions and other efforts, dictate and corrupt public policy.

It is not just the people who think this way. Both tracking and shaping popular political perceptions, an extensive literature in economics and political science analyzes public policy under the special-interest-group model. The analysis typically begins by noting the conditions under which an interest group can be politically effective. Here, Olson, roughly four decades ago, seminally identified two crucial barriers to the formation of a political interest group.[10] The first is a coordination problem. Benefits from political action

5. David M. Halbfinger, *The Massachusetts Senator: Shedding Populist Tone, Kerry Starts Move to the Middle*, N.Y. TIMES, May 8, 2004, at A14; Adam Nagourney, *Tightening Race Increases Stakes of Final Debate*, N.Y. TIMES, Oct. 13, 2004, at A1; Jim Rutenberg, *Republicans Attack Kerry in Video and E-Mail*, N.Y. TIMES, Feb. 13, 2004, at A20; *see also* Richard L. Berke, *Bush and Gore, in Last Debate, Stage Vigorous Give and Take*, N.Y. TIMES, Oct. 18, 2000, at A1.

6. *See* The Center for Responsive Politics, President George W. Bush – 2004 Election: Introduction, http://www.opensecrets.org/bush/index.asp (last visited Apr. 17, 2006); The Center for Responsive Politics, 2004 Presidential Election, http://www.opensecrets.org/presidential/index.asp (last visited Apr. 17, 2006).

7. *See* James Dao, *10,000 Turn Out To Hear Nader Urge 'Shift in Power,'* N.Y. TIMES, Nov. 6, 2000, at A28; Stephen LaBaton, *As Commerce Chairman, McCain is Hard to Define*, N.Y. TIMES, Feb. 18, 2000, at A1; Ralph Nader, *Why I'm Running*, N.Y. TIMES, Oct. 29, 2000, § 4, at 16; Richard A. Oppel, Jr., *McCain and Perot Stealing Glances, Some Say*, N.Y. TIMES, Feb. 26, 2000, at A1; Sam Howe Verhovek, *What Makes Ralph (and Pat) Run?*, N.Y. TIMES, Oct. 29, 2000, § 4, at 5; Press Release, John McCain, Remarks by U.S. Senator John McCain (Dec. 15, 1999), *available at* http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=791.

8. *See* Dean E. Murphy, *Schwarzenegger Lays Foundation for a Transition*, N.Y. TIMES, Oct. 9, 2003, at A1; Rene Sanchez & Kimberly Edds, *Schwarzenegger to Run for Governor*, WASH. POST, Aug. 7, 2003, at A1.

9. R.W. Apple, Jr., *Why Perot Could Pose a Threat with $100 Million: It's His Own*, N.Y. TIMES, Apr. 24, 1992, at A1; Peter Applebome, *Perot, the 'Simple' Billionaire, Says Voters Can Force His Presidential Bid*, N.Y. TIMES, Mar. 29, 1992, § 1, at 14; Kevin Phillips, *The Politics of Frustration*, N.Y. TIMES, Apr. 12, 1992, § 6, at 38.

10. OLSON, *supra* note 2, at 9–16.

give each group member reason to participate in the group effort once the group is formed, but the formation costs—including identifying the group members, organizing the group, and agreeing on a political strategy—are high. While the actual cost of the political campaign—how much it takes in campaign contributions or whatever to get something done—may be largely independent of the group size, the coordination costs are not; these increase, sometimes exponentially, with the number of members in the group. The second and related problem involves free-riding. Political action yields a public (or at least a group) good: a bill or policy that affects the entire population whether or not a particular individual participates in the lobbying effort.[11] Beneficiaries benefit even if they do not bear any of the burdens, and this gives rational people an incentive to free-ride, or opt out of the group without paying their dues. A political action group will have trouble keeping its members from defecting.

These two Mancur Olson problems help predict both what politically effective interest groups will emerge and what policies they will support. Critical to success is not just the extent of benefits—more, of course, is better than less—but also their distribution: the larger the per capita benefits, the smaller the group need be to cover the costs of political participation.[12] The smaller the group, the smaller the coordination problems. Further lessening the free-rider problem is the extent to which the small group exclusively benefits from the policy. Non-member beneficiaries, through their free-riding, impose a negative externality on the conscientious participants. Hence small groups with high stakes tightly fitting a potential policy objective are the most likely special-interest groups to flourish.

In this now-familiar story, politicians enter at a relatively late stage. Special-interest groups form on their own, out somewhere in the hustings, spontaneously generating themselves as the occasions—small group/high stakes—arise. The groups then come to legislators. Political theory in this special-interest vein divides into two branches, following the two basic goods—money and votes—that the interest groups offer to legislators. The money side helps to illuminate many commercially-oriented public policies, such as the regulation of business[13] and foreign trade,[14] where a "capture" or "rent-seeking"

11. *See id.*

12. *See id.* at 22–36.

13. For seminal works in the area, see Becker, *supra* note 3, at 376–81 (developing a model of interest group competition that may lead to more efficient government tax and spending policies); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3–7 (1971) (modeling how policies benefit regulated firms).

model of politics flourishes. The vote side plays out when interest groups with geographic concentration help shape congressional support for public works bills, some spending "earmarks," and other traditional "pork barrel" legislation.[15]

So goes the traditional tale. To be clear, we accept this story as far as it goes: special-interest groups are undeniably a major part of the American political landscape. But we do not think that the traditional tale goes far enough—specifically, far enough back in time.

In this Article, we push the standard view of special-interest politics back to a stage prior to the formation of the groups. We argue that in a wide and important set of cases, lawmakers themselves, addicted to the money that special interests provide, actually proactively solve the problems of group formation. Lawmakers give birth to the very special interests that later "plague" them. Congress, our primary focus, through its powers—importantly including its taxing and agenda-setting powers—helps to create small interest groups with high stakes in the first instance, which it can then "shake down" for campaign contributions in the second instance. We sometimes call this the "reverse Mancur Olson" phenomenon—reverse because, in our conception, the politicians come first and the special-interest groups second. Ironically, the groups thereby become the victims of the political process, the prey and not the predators. At first blush, this phenomenon is simply an analytic possibility, a prediction easily derived on the chalkboard or from an armchair. We set out in Part II how and why the reverse Mancur Olson phenomenon occurs, and also term it "ex ante rent extraction," for reasons made clearer below.

An extended example helps illustrate the possibility of—and to confirm the real world occurrence of—ex ante rent extraction. We believe that the estate tax, and the recent legislation to repeal—or not—this tax, is a perfect case study.[16] Here is a tax falling on a very few people, but at high stakes. The tax is largely avoided through

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Summaries and interpretations of the literature are contained in Roger G. Noll, *Economic Perspectives on the Politics of Regulation*, *in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1254, 1254–81 (Richard Schmalensee & Robert D. Willig eds., 1989) and Sam Peltzman, *The Economic Theory of Regulation After a Decade of Deregulation*, BROOKINGS PAPERS ON ECON. ACTIVITY—MICROECONOMICS 1, 1 (1989).

14. *See* Gene Grossman & Elhanan Helpman, *Protection for Sale*, 84 AM. ECON. REV. 833, 833–49 (1994).

15. JOHN A. FEREJOHN, PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947–1968, at 1–24 (1974).

16. *See* Jonathan Weisman, *Erosion of Estate Tax Is a Lesson in Politics*, WASH. POST, Apr. 13, 2005, at E1.

private planning: transactions that generate large financial returns to a small, highly remunerated group of "players." Thus there are two Mancur Olson groups, counterpoised on both sides of the issue. Repeal of the estate or so-called death tax has an important and plausible asymmetry to it: if the tax ever dies, it is unlikely to be revived. Thus, private parties harmed by the presence of the tax—the putative taxpayers—would rationally pay to kill the tax. On the other side, parties benefited by the existence of the tax—financiers such as insurance companies, lawyers, accountants, and sophisticated nonprofits—would rationally pay to keep the tax. Congress has perfect shakedown territory. The ex ante rent-extraction phenomenon suggests that Congress will milk this lucrative cow for all it is worth (to add another metaphor to the fray), voting over and over and coming up short—just short—of permanent repeal. And so they have. In spades.[17]

But ours is not just a tale of taxing. Congress has monopolistic power over many acts of benefit and coercion. Whenever Congress can help set the stage for a pitched battle between two or more small groups with high stakes, we predict that it will do so, and will string matters along, avoiding sensible compromise, while seeing its coffers lined. We extend the model to help explain medical malpractice and

17. *See House Votes To Repeal Federal Estate Taxes: Republicans Hope To Prevail in Senate After Past Losses*, CNN.COM, Apr. 13, 2005, http://edition.cnn.com/2005/POLITICS/04/13/house.estatetax.ap/ (subscription service) [hereinafter *House Votes To Repeal*]; David E. Rosenbaum, *True to Ritual, House Votes for Full Repeal of Estate Tax*, N.Y. TIMES, Apr. 13, 2005, at A23; Weisman, *supra* note 16. It is important to understand that the reverse Mancur Olson phenomenon does not suggest that Congress will never act; indeed, action must be plausible to drive the dynamic, and must therefore sometimes come. *See, e.g.*, discussion *infra* Part V.A (explaining how Congress must sometimes act, if only in piecemeal fashion, to perpetuate ex ante rent extraction in the context of medical malpractice and tort reform). But action typically will be a long time, and many dollars, in coming.

Note that our analysis stands in contrast to that found in the recent book by Michael Graetz and Ian Shapiro, written after earlier versions of our thesis were circulated. *See* MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH (2005). Although it is difficult at times to pin down Graetz and Shapiro's precise thesis, they argue that conservative political forces, through skillful political and rhetorical manipulation, were able to bring about the end to the estate tax. This thesis sounds in the traditional special-interest conception of politics. Our thesis is that the Senate, in particular, deliberately strung along the issue of estate tax repeal, signaling that it had the power to kill the tax without really doing so, resisting principled compromises along the way, and staging multiple votes on the issue before resolving it in a way that could have been done ab initio—all in order to keep alive an issue of value in generating campaign contributions. Our thesis sounds in the "new logic of collective action," emphasizing as it does the centrality of lawmakers' actions (and inactions). We discuss Graetz and Shapiro's book and our differences with it further below. *See infra* notes 113–23 and accompanying text.

tort reform, military spending policies, and regulation of the broadcast spectrum.[18] And we invite readers to come up with their own versions of the new story.

Anticipating here at the start the two most likely objections, we emphasize, first, that nothing in the ex ante rent-extraction phenomenon depends on Herculean acts of foresight, prescience, or, for that matter, literal and overt ex ante coordination. Congress may not have known what a good thing it had, in estate tax repeal/non-repeal, for example, until history dumped the issue in its collective lap. But once it stumbled onto the example, like the proverbial drunken sailor, the conception predicts what it would—and did—do. In general, the ex ante rent-extraction technique predicts that Congress will generally avoid "ballot box" issues, preferring instead to devote its time to issues of high stakes to small groups. When it finds such issues, it will often string matters along. It will avoid sensible, good-faith compromises, and often produce laws unintelligible except as signals of its power to help, harm—or help to form—special-interest groups. Indeed, it is the "stringing along" or "milking" of issues lucrative from a campaign-contribution generating perspective that is our principal prediction and our most general finding. Whether Congress or any other lawmaking body acts first or second, and whether lawmakers know in advance what they are doing or not, we predict that politicians ultimately will recognize a "good" issue when they see it—with "good" specifically and exclusively meaning "good for generating campaign contributions"—and will prolong their consideration of the issue as long as possible.[19] Ex ante rent extraction, in which Congress creates the very special interests from whom it will later extract campaign contributions, is simply an interesting, and in a certain sense limiting (because it covers the full range of the transactional spectrum, beginning with special-interest group formation), case of this more general propensity of legislative bodies.

Second, we do not suggest that the ex ante rent-extraction effect explains all or even any specifically quantifiable part of politics today. American politics are complex. Sometimes lawmakers do indeed respond reactively to special-interest pressure; sometimes they respond to popular sentiment; sometimes they even act on principle. We mean merely to suggest, and to illustrate with one extended and several short examples, that in at least some very important cases,

18. *See infra* Part V.

19. We thank Nina Mendelson for pressing this point on us.

Congress is acting to create and/or perpetuate special interests, in order to extract money from them.

Part II sets out the ex ante rent-extraction phenomenon in broad outline. Part III gives background about the estate tax and recent legislation affecting it. Part IV connects the dots by arguing that the contemporary estate tax story is best explained by the ex ante rent-extraction model of politics. Part V offers extensions of the model. Part VI offers brief conclusions—hoping, perhaps against hope, to suggest some way to stop the insanity.

II. THE NEW LOGIC OF COLLECTIVE ACTION

A. *The Basics: Two Facts*

The ex ante rent-extraction phenomenon places the legislator front and center, and makes special-interest groups themselves the creatures of the political process. At the outset, this phenomenon is simply an analytic possibility, one that follows from emphasizing two factual aspects of contemporary politics.

1. Fact No. 1: Money Matters

The first fact is that politicians care about money. A lot.[20]

The traditional conception of special-interest-group politics still often emphasizes the centrality of legislators getting votes: the re-election motive. Clearly, politicians care about getting votes, and they might even attempt to form groups to help them garner votes. But the centrality of vote-oriented behavior in theoretical models has endured long past the point where votes have centrally mattered in real-world politics. Today, most congressional seats are safe: incumbents not only are overwhelmingly re-elected, but do so with large majorities and only token opposition.[21] In 2004, 98% of House members who sought re-election were re-elected (up from 96% in 2002 and equal to the re-election rates in 2000 and 1998), and 96% of

20. *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, 797–99 (1990); Laura I. Langbein, *Money and Access: Some Empirical Evidence*, 48 J. POL. 1052, 1060–61 (1986).

21. *See* JEFFREY MILYO, CITIZENS' RESEARCH FOUND. REPORT, THE ELECTORAL EFFECTS OF CAMPAIGN SPENDING IN HOUSE ELECTIONS 26 (1998); Stephen Ansolabehere & James M. Snyder, *Campaign War Chests in Congressional Elections*, 2 BUS. & POL. 9, 9–20 (2000); Jay Goodliffe, *The Effect of War Chests on Challenger Entry in U.S. House Elections*, 45 AM. J. POL. SCI. 830, 830 (2001); Jonathan S. Krasno & Donald Philip Green, *Preempting Quality Challengers in House Elections*, 50 J. POL. 920, 920–21 (1988).

Senate incumbents seeking a new term were re-elected as well (up from 86% in 2002 and 79% in 2000).[22] The high degree of electoral security of most legislators provides them with wide latitude to support interest groups whose goals might be inimical to a narrowly vote-centric re-election model. Indeed most bills and issues promoted by interest groups simply have no ballot box implications for a large majority of legislators, because these issues are low-salience ones in crude, multi-issue, winner-take-all election contests.[23]

At the same time, and perhaps counter-intuitively, money still matters. Legislators still care deeply about the financial benefits provided by special-interest groups. Representatives from the safest districts almost always devote enormous time and effort to fundraising. Politics today is much more the story of getting money

22. *See* Carl Hulse & David E. Rosenbaum, *The 2004 Elections: In the States – The House; With Texas Redistricting as a Backdrop, Republicans Retain Their Majority in the House*, N.Y. TIMES, Nov. 3, 2004, at P11; The Center for Responsive Politics, The Big Picture: Re-Election Rates over the Years – The House, http://www.opensecrets.org/bigpicture/reelect.asp?cycle=2002 (last visited Apr. 17, 2006); The Center for Responsive Politics, The Big Picture: Re-Election Rates over the Years – The Senate, http://www.opensecrets.org/bigpicture/reelect.asp?Cycle=2002&chamb=S (last visited Apr. 17, 2006); The Center for Responsive Politics, Get Local!, http://www.opensecrets.org/states/index.asp (last visited Apr. 17, 2006); *cf.* The Center for Responsive Politics, 2004 Election Overview: 108th Congress Casualty List, http://www.opensecrets.org/overview/casualties.asp (last visited Apr. 17, 2006); The Center for Responsive Politics, 2004 Election Overview: Stats at a Glance, http://www.opensecrets.org/overview/stats.asp?cycle=2004&display=T&type=R (last visited Apr. 17, 2006) (allows for comparison between incumbents and challengers as to campaign contributions and spending). The sole Senate re-election casualty out of twenty-six incumbents was Senate Minority Leader Tom Daschle (D-S.D.). Only six House incumbents out of a total of 401 were denied re-election.

23. For example, when it comes to taxes in general and the estate tax in particular—our principal example or case study in this Article—most voters care very little. It is hard to see that this issue would swing many voters one way or another, especially as most Republicans vote for estate tax repeal, and most Democrats vote against repeal; but even the "flippers" who change sides on the issue, as Appendix I, *infra*, shows and as we discuss extensively below, did not pay a price at the polls for their changing positions. *See* OMB Watch, Estate Tax Polling Data (June 11, 2002), http://www.ombwatch.org/article/articleview/813/1/125?TopicID=1 (showing that cutting estate taxes was a low priority for most respondents in relation to other tax cut proposals and also showing that tax cuts are not a strong priority in relation to the federal budget). There were five states, Minnesota, South Dakota, Missouri, Iowa, and Arkansas, where Republicans tried to push the estate tax issue into the forefront of the 2002 Senate elections. *See* Carl Hulse, *Ads Push Estate Tax as Issue in Campaigns*, N.Y. TIMES, July 14, 2002, § 1, at 22. In those states, only one Democratic incumbent, Missouri Senator Jean Carnahan, lost re-election. *Id.* In Arkansas, a Democratic challenger, Mark Pryor, won the Senate seat. *Id.* In South Dakota and Iowa, the Democratic incumbents, Tim Johnson and Tom Harkin, kept their seats. *Id.* In Minnesota, the Republican challenger, Norm Coleman, won after the unexpected death of Senator Paul Wellstone several days before the election. *Id.*

than of getting votes.[24] Money's importance, as claimed by Perot, Nader, McCain, Schwarzenegger, and countless others, and as verified by a plethora of statistics, has intensified over time.[25] Well over one billion dollars was raised by Democrats and Republicans in the 2001–2002 election cycle, with slightly more than one-half of the total coming from "hard" money (relatively small donations to individual candidates) as opposed to "soft" money, which at the time came in the form of unlimited contributions to political parties.[26] The 2004 presidential campaign was easily the most costly ever, with both major party candidates, George W. Bush and John Kerry, swearing off federal matching funds during the primary, thus freeing themselves to spend all that they could raise.[27] And they raised a

24. *See* Norman Ornstein, *Lobbyists Often Get More Shakedowns than They Give*, ROLL CALL, Feb. 25, 2004, *available at* 2004 WLNR 4022396.

25. Ansolabehere et al. dispute this conclusion in their important paper, Stephen Ansolabehere et al., *Why Is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105 (2003). The authors point out that, whereas the absolute level of real campaign contributions has increased substantially over the past one hundred years, the share of gross national product or income (contributions divided by gross national product) has been essentially constant. *Id.* at 120, 125. The paper concludes witb three puzzles. The first, formulated by Gordon Tullock over thirty years ago, is why contributions are not larger, given the importance of government to business. *Id.* at 110. The second is why contributions appear ineffective, as the link between contributions and votes appears so tenuous. *Id.* at 116. The third is why anyone gives at all, when it appears useless to do so. *Id.* at 126. We cannot address these puzzles or conclusions fully at this time, but we do note that the combination of the puzzles preserves the importance of our analysis even if Ansolabehere's and his coauthors' conclusions are accepted. People do still make campaign contributions, and the apparent lack of effect of these transfers is consistent with our story, wherein nothing, more often than not, happens. Our basic hypothesis is that Congress can force special interests to "pay to play" where the risks of not "playing" are great enough, even if the odds against any action transpiring are long.

26. The Center for Responsive Politics, Democratic Party: 2001–2002 Election Cycle, http://www.opensecrets.org/parties/total.asp?Cmte=DPC&Cycle=2002 (last visited Apr. 17, 2006); The Center for Responsive Politics, Republican Party: 2001–2002 Election Cycle, http://www.opensecrets.org/parties/total.asp?Cmte=RPC&Cycle=2002 (last visited Apr. 17, 2006). So-called soft money is now limited to some extent by the Bipartisan Campaign Reform Act (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified at scattered sections of 2, 28, and 47 U.S.C. (Supp. 2002)), popularly known as "McCain-Feingold." The Act was largely upheld in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), where the Court acknowledged the practical limitations of the Act. *McConnell*, 540 U.S. at 224 ("We are under no illusion that BCRA will be the last Congressional statement on the matter. Money, like water, will always find an outlet."). For a discussion of the limits of the law and the jurisprudence of campaign finance reform, see generally John de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591 (2005).

27. Glen Justice, *Irrelevance Stalks a Post-Watergate Invention*, N.Y. TIMES, Nov. 16, 2003, § 4, at 3; The Center for Responsive Politics, 2004 Presidential Election, http://www.opensecrets.org/presidential/index.asp (last visited Apr. 17, 2006).

lot—over $300 million for each Bush and Kerry when all was said and done (with over $2 billion spent by all candidates for federal office).[28]

Why do legislators, at lower levels in the government hierarchy in particular, continue to seek ever-higher amounts of money, when their own re-elections are rarely at stake? A complete answer to this question is complex, and beyond the scope of this Article. For our purposes, we need only be concerned with the observed facts that Congresspersons do indeed raise and spend large amounts of money. But we can speculate on some reasons for the continued addiction to cash. One, there is a partly irrational "arms race,"[29] whereby all Congresspersons attempt to keep up with their peers, and, in the process, create large entry barriers to any outsiders ever challenging them;[30] the high re-election rate is related in part to the continued amassing of funds by elected officials. Two, having sums of money available helps to fuel Congresspersons' own ambitions for higher, or different, offices, beyond their presently "safe" seat; Senators in particular often amass sums for their own presidential campaigns. Three, individual lawmakers raise money to help out their parties; the role of money is connected to the rise of party politics.[31] The two main political parties, Democrats and Republicans, act as large, coercive coordinating devices. They require their members to raise sizable sums of money. They police this requirement in various ways: by allocating scarce and prized committee chairpersonships—committee and subcommittee chairs literally have quotas for the

28. $2,052,751,282 was raised in the 2004 election cycle for the Presidential, House, and Senate campaigns by both parties. Glen Justice, *Both Parties Say Fund-Raising Was Big and Nearly Equal*, N.Y. TIMES, Dec. 3, 2004, at A20; The Center for Responsive Politics, 2004 Presidential Election, http://www.opensecrets.org/presidential/index.asp (last visited Apr. 17, 2006). Bush raised $367,228,801, and Kerry raised $326,236,288. The Center for Responsive Politics, 2004 Presidential Election, http://www.opensecrets.org/presidential/index.asp (last visited Apr. 17, 2006).

29. *See generally* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT (1960) (discussing rational actors acting irrationally).

30. *See* tutor2u™, http://www.tutor2u.net/economics/content/topics/monopoly/barriers_to_entry.htm (last visited Apr. 17, 2006) ("Barriers to entry are designed to block potential entrants from entering a market profitably. They seek to protect the monopoly power of existing (incumbent) firms in an industry and therefore maintain supernormal (monopoly) profits in the long run. Barriers to entry have the effect of making a market less contestable."). In the political context, the large campaign "war-chest" of any incumbent gives her an advantage against any potential competitor, deterring challengers ex ante.

31. JOHN H. ALDRICH, WHY PARTIES?: THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 48–50 (1995); PAUL ALLEN BECK, PARTY POLITICS IN AMERICA 92–95, (8th ed. 1997); V.O. KEY, JR., POLITICS, PARTIES, AND PRESSURE GROUPS 488–89 (1995); *see also* Mark Z. Barabak, *No Rest for the Elected*, L.A. TIMES, Apr. 4, 2005, at A1.

funds that they must raise, we have been told[32]—by supporting (or not) intra-party challenges in political primaries, by helping (or not) with ambitions for higher electoral office, by assisting in post-elective office career placements, and so on. In turn, the parties use the money that they compel members to provide to wage pitched battles in those surprisingly few marginal contests there are to gain control of the chambers of Congress, and to throw into the increasingly expensive presidential campaigns every four years.[33]

This is the modern game of politics in a nutshell, and there is solid reason to believe that perfectly rational individuals would form parties to effect these ends. The increasingly expensive elections of the last decade have underscored how partisan control of the houses of Congress and the executive branch of government are still up for grabs—and with them the power each of the Members of Congress can wield. The 2002 midterm elections were fought in a few districts and a few states, with parties redistributing campaign funds and dispatching important players to campaign for a handful of candidates in marginal races; the 2004 presidential election similarly turned into intense electoral trench warfare in a small number of hotspots across the country. In sum, even with far more than ninety percent of legislative seats safe, money still matters. A lot.

2. Fact No. 2: Legislators Are (Rational) People

The second fact is even more elemental than the first: legislators are rational, in the simple sense of acting consistently on the basis of a

32. Interview with Rep. William Archer (R-Tex.) in L.A., Cal. (Jan. 29, 2003).

33. According to the watchdog organization The Center for Responsive Politics, redistribution of campaign contributions grew from essentially zero in 1992 to over ten percent of the total raised by incumbent Congresspersons in the 2002 election cycle. *See* The Center for Responsive Politics, The Big Picture: Spreading the Wealth – 2002 Cycle, http://www.opensecrets.org/bigpicture/wealth.asp?cycle=2002 (last visited Apr. 17, 2006). The money is distributed from one candidate to another in one of two ways—through either a Congressperson's candidate committee or a so-called leadership Political Action Committee ("PAC"). The Center for Responsive Politics, 2004 Election Overview: Candidate to Candidate Giving, http://www.opensecrets.org/overview/cand2cand.asp?cycle=2004 (last visited Apr. 17, 2006); The Center for Responsive Politics, Candidate Committees, Long Term Contribution Trends, http://www.opensecrets.org/industries/indus.asp?Ind=Q16 (last visited Apr. 17, 2006). Note that prior to this time period, the rules regarding disposition of campaign contributions—in particular, the ability of Representatives to convert funds to personal use on retirement—had changed. *See* Ethics Reform Act of 1989, Pub L. No. 101-194, 103 Stat. 1716 (codified as amended at 5 U.S.C. app. § 107 (2000)).

well-defined utility function. As rational persons, they will seek out what they want, measuring marginal costs against marginal benefits.[34]

The central role of money in modern politics, combined with this further fact of legislative rationality, leads to a change in emphasis from the traditional special-interest conception of politics. In the usual setup, the legislator is passive: she simply sits, waiting for the special-interest groups to come to her. Indeed, more often than not, the politician laments this sorry state of affairs: she complains that she must spend all her time dealing with lobbyists and yearns for some higher path of enlightenment. Thus the Perot-McCain-Nader-Schwarzenegger line of critique places blame at the feet of the special-interest groups themselves, who must be reined in or exposed for what they are: corrupt predators on the socio-economic landscape.

Yet given the political addiction to campaign contributions, it would be surprising indeed if legislators simply sat around and waited to be approached by special-interest groups in search of a policy favor. We do not believe that they do. Applying the second fact, a rational person who needs money and has power will use that power—fully within the confines of the law, mind you—to obtain money. Of these simple premises, the ex ante rent-extraction phenomenon arises.

B. A New Beginning: Rent Seeking and Rent Extraction

Political theorists refer to lobbying activities initiated by special-interest groups as "rent seeking," the term "rent" referring to non-market economic returns. An alternative perspective posits an activist legislator who threatens to take rent away from a relevant interest group.[35] This model is one of "rent extraction." Rent seeking is to rent extraction as bribery is to extortion. In a rent-seeking/bribery game, potential beneficiaries from political action pay politicians for their gains. In a rent-extraction/extortion game, potential victims pay politicians not to have losses imposed on them. Of course, gains and losses are but opposite sides of a single coin: not

34. Gary S. Becker, *Irrational Behavior and Economic Theory*, 70 J. POL. ECON. 1, 1 (1962) ("[N]ow everyone more or less agrees that rational behavior simply implies consistent maximization of a well-ordered function, such as a utility or profit function."); *see also* Edward J. McCaffery, *Why People Play Lotteries and Why It Matters*, 1994 WIS. L. REV. 71, 72–73 ("Most economic theory presumes that individuals are rational, in the rather weak sense that they act consistently with their own perceived self-interest . . . .").

35. *See* FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 45 (1997) ("[I]ndividuals are made to pay, rather than suffer welfare (wealth) losses.").

to get a gain is a loss, not to suffer a loss is a gain.[36] What matters more to a deeper understanding of the political story is who initiates the action. The traditional special-interest conception is a rent-seeking model, because the groups come first, offering bribes. The reverse Mancur Olson phenomenon is a rent-extracting model, because the politicians come first, establishing the groups and then asking them to pay or be harmed/not benefited.[37]

The importance of rent extraction emerges from studies of legislative responses to campaign contributions. The idea behind rent seeking—that money buys votes—is surprisingly difficult to prove.[38] The empirical literature on campaign contributions has in fact established such a link, but the results are highly qualified, depending on such factors as the tenure of the legislator, and typically require sophisticated econometrics to perceive small effects.[39] At the core of the econometric difficulty is a simultaneous equations problem: we know that money flows from interest groups to politicians who support them, but which came first, the money or the support? Compounding the difficulty is the complexity of the political process. Logrolling among members of Congress, the mediating effects of parties, and rules limiting campaign contributions from individual interest groups to individual legislators all muddy the trail of rent seeking.[40] Rent extraction only complicates the link between money

36. People do not always understand matters this way. The behavioral economist Richard Thaler relates a real-world observation under which consumers will pay cash when a gas station advertises a "penalty" for using credit cards (e.g., $1.90 cash versus $2.00 credit card price) but will use credit cards when a station advertises a "bonus" for using cash (e.g., $2.00 credit card versus $1.90 cash). *See* Richard H. Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 45 (1980). Of course the two differing descriptions match the same underlying facts. So deep is the confusion that the law often reflects it; for example, CAL. CIV. CODE § 1748.1(a) (West 2006) actually makes it wrongful to charge a penalty for using a credit card but permits a bonus for using cash. It is all a matter of how one understands the baseline or default condition. In politics, if one thinks that she will get a benefit—say that a favored program will be funded—and then that benefit is taken away, a loss is perceived; if, in contrast, one expects to incur a loss, say a tax increase set to take effect, and then that loss or tax increase is canceled, a gain is perceived.

37. *See* Ornstein, *supra* note 24.

38. Ansolabehere et al., *supra* note 25, at 112–16, provide an excellent summary and critique of this literature.

39. *Id.* at 125.

40. *Id.* Logrolling refers to the common practice of trading votes across issues; member A votes for member B's favored project, on the (typically implicit) condition that member B will vote for member A's favorite project. *See* Thomas Stramann, *The Effects of Logrolling on Congressional Voting*, 82 AM. ECON. REV. 1162, 1162–63 (1992); American Politics 101B, Notes on Logrolling, http://www.artsci.wustl.edu/~polisci/miller/american/lecture/logrolling.html (last visited Apr. 17, 2006).

and legislative outcomes further, as the "payoff" from campaign contributions might not be a vote at all, but rather the absence of any vote, and indeed any bill, to change a current policy: stringing along becomes a norm of congressional business-as-usual under a rent-extraction model. All of these facts and activities make it difficult to see a precise connection between money and action.

But now we can see that many of the usual questions are mistaken. The point is not to prove that money buys influence. Indeed, the ex ante rent-extraction model suggests that payments to politicians might be needed simply to maintain the status quo, and to preserve the possibility of action for a later day. Our goal instead is to explore further the implications of the two basic facts noted above: that legislators need money and that they are rational. These two facts alone suggest the possibility of ex ante rent extraction: a lawmaking individual or body such as Congress can use its agenda-setting powers to create or perpetuate (or create and perpetuate) the conditions under which special-interest groups arise and flourish. In technical terms we argue that the formation of interest groups is or can be *endogenous* to the political process; in the traditional view, the groups had arisen *exogenously* to that process. In less formal terms, we argue that Congress first helps to create the groups that it can later shake down to elicit campaign contributions. Rational actors who have the power to do so make their own market.

The taxing power creates a prototype for rent extraction. Congress has the constitutional power to tax.[41] This ability to tax necessarily entails the ability *not* to tax, that is, to propose taxation but then not levy the tax threatened. Proposing onerous legislation and then—for a price—agreeing not to push or even withdrawing the legislation is a paradigm for rent extraction. (Note how the threat to tax helps change the baseline, so that not taxing can come to look like a "bonus.") Rent-extracting games are observed routinely as part of tax legislation proposals: private individuals pay, not for affirmative special favors, but to avoid disfavor.[42]

41. U.S. CONST. art. I, § 8; Eisner v. Macomber, 252 U.S. 189, 204 (1920). In the principal case under consideration here, the estate tax, Congress's constitutional power to tax makes it the central player. Further, the different rules for House and Senate action, in particular the super-majority rules of the Senate, discussed in Part IV.B, *infra*, make the Senate pivotal. We hypothesize that the President and House use other areas to perpetuate their own rent extraction. This is a topic for further research.

42. For various examples, see Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 946 (1987); Jeffrey H. Birnbaum, *When Higher Taxes Loom, Lobbyists Realize Profit Potential*, WASH. POST, Mar. 2, 2005, at E1.

Both rent-seeking and rent-extraction activities can only come after the Mancur Olson problems have been solved. Special-interest groups need to form themselves in order to seek rents (except in those rare cases where an individual alone can command the resources to play the game, but we can think of this as a special case where the group number is one). Similarly, Congress will typically need a group to extort in a rent-extraction game. This is where ex ante rent extraction comes into play.

Here then is our new beginning in the analysis of legislative behavior. In the traditional version of special-interest politics, the groups arise independently, exogenous to the political process on which they hold such sway.[43] Politicians are mere "pawns" of special interests, as the saying goes. In an ex ante rent-extraction game, in contrast, Congress creates the occasions for the special interests to form in the first place. That is, Congress proactively "solves" the collective action problem for political groups through its power over the political agenda and the economy, importantly including its taxing authority. Congress's actions allow groups to be small enough—and with large enough stakes—to organize into effective advocacy units. Congress then proceeds to shake down the groups. Special interests become the victims of politicians.

Once again, the taxing power is especially illustrative. The traditional Mancur Olson-style approach, as applied for example by Gary Becker,[44] suggests the likely nature of tax bills. A tax that is evenly distributed—so that its per capita incidence is small—has clear political benefits, for it may raise money without promoting interest group outcry.[45] The interest group in question becomes all taxpayers, a large number, and each member has small stakes: precisely a framework that promotes free-riding and non-cooperation. This perspective does indeed help explain the two major taxes in America, the personal income and payroll taxes, which impose broadly diffuse taxes at (relatively) low marginal rates, and account for over eighty percent of all federal revenues.[46] The ex ante rent-extraction

43. This is true by stipulation in Becker's classic 1983 text. Becker, *supra* note 3, at 375.

44. *Id.*; *see also* Gary S. Becker & Casey B. Mulligan, *Deadweight Costs and the Size of Government*, 46 J.L. & ECON. 293 *passim* (2003) (analyzing the relationships between tax systems and the size of government).

45. Jonathan Baron & Edward J. McCaffery, *Masking Redistribution (or Its Absence)*, *in* BEHAVORIAL PUBLIC FINANCE 85, 85–112 (Edward J. McCaffery & Joel Slemrod eds., 2006).

46. *See* SOC. SEC. ADMIN., PUBL'N NO. 05-10024, UNDERSTANDING THE BENEFITS 8 (2006), *available at* http://www.ssa.gov/pubs/10024.html; Andrew Mitrusi & James Poterba,

phenomenon, in contrast, suggests that the precise *opposite* form of tax may also be attractive: taxes that fall heavily (not lightly) on a small (not large) group, most likely to organize and be politically active. These are groups with rent-extraction potential. The estate tax is a perfect example of such a tax. Regulations that fall heavily on a small group, such as the tort reform and other proposals we discuss briefly in Part V, act in much the same way as a tax for the affected group.[47] These, too, are prime territory for ex ante rent extraction. In these cases, the purpose of the tax or regulation is not to raise general revenues—it is hard for the government to raise money from small groups, even with high stakes—but to create occasions for congressional fundraising.

There can be many shades of the congressional fundraising game. Sometimes legislators may start the process in motion, by helping to create the special-interest groups vital to success, in the purest instantiation of the game, the reverse Mancur Olson phenomenon. Other times, Congress may react to preexisting groups or issues. In all cases, Congress will string the issue along, milking it for what it is worth. Our point, in the end, is not to replace the simple Mancur Olson story with any equally simple reverse Mancur Olson story, so much as it is to complexify our understanding of special interests and the role of money in politics. We see a two-way street where others have seen only a one-way one; we aim to view the legislative or demand-side of campaign finance as well as the special interest or supply side, as part of a dynamic, multi-faceted systemic process.[48]

C. *Properties*

We argue for the existence of the reverse Mancur Olson phenomenon on the basis of one extended and several suggested examples, rather than by presenting a formal analytic model. There are good reasons for this expository strategy. It is difficult to model the actual activities of large, complex political institutions such as Congress and special-interest groups writ large. The "game" almost

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The Distribution of Payroll and Income Tax Burdens, 1979–99, 53 NAT'L TAX J. 765, 769–80 (2000). Up-to-date tax rate tables can be found at http://www.irs.gov. Note that this fact suggests that Becker was right, at least in large part: most revenues come from large, broad-based taxes, where the groups affected are big and the costs of the tax to each individual rather small.

47. *See* MARK KELMAN, STRATEGY OR PRINCIPLE? THE CHOICE BETWEEN REGULATION AND TAXATION 2 (1999).

48. *See* Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 2–3 (1994) (aiming to complexify and view dynamically the relationship between lawmakers, courts, and regulators).

certainly does not have a stable, predictable equilibrium outcome—if it did, then the principle of backwards induction would lead rational actors not to play in the first place, because they could see the end in sight.[49] The game looks rather more like an irrational arms race that Congress helps to initiate, or, as our title suggests, a shakedown scheme or protection racket.[50] Imagine being told by some powerful actor (Congress/the police/organized crime) that you must "pay to play" a round of a certain game. If you do not ante up this round, something bad might happen (or, conversely, but equivalently, something good might happen if, but only if, you have paid up). If the something bad/good was bad/good enough, and if the likelihood of action/inaction in the next round was high enough, you would indeed, quite rationally, pay to play this round. And you would pay over and over again, up to the point at which it was no longer profitable to keep doing whatever it was you were doing to avoid the harm/seek the good. Although the phenomenon may not lend itself to simple axiomatic presentation, we believe that it occurs in the real world and in a wide range of important cases. We can sketch the general properties that will accompany the phenomenon.

One, there will be an issue of high stakes to a small, well-focused group, with a tight-fitting policy option capable of inflicting pain or gain on the identifiable group. These are simply the Mancur Olson conditions.[51] In a classic, reverse Mancur Olson phenomenon, Congress will have played a role in creating and/or perpetuating these conditions; in variants, Congress may have acted later in the process, stumbling onto the lucrative landscape.

Two, the issue will likely have low salience for most voters and so have little or no ballot box significance, aside from its effect on lawmakers' abilities to raise money (which can of course affect electability). Lawmakers will feel little pressure to cease the rent-extracting activities on account of any narrow re-election motive.

Three, the issue had best be at least two-sided: there will be small, well-funded positions on two (or more) sides of the policy issues. This allows lawmakers to reap financial benefits regardless of where they stand on the issue; it prevents a "tipping" phenomenon

49. *See* DAVID M. KREPS, GAME THEORY AND ECONOMIC MODELING 120–21 (1990); ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY 88 (1989); David Austen-Smith, *Interest Groups, Campaign Contributions, and Probabilistic Voting*, 54 PUB. CHOICE 123–39 (1987). *See generally* ROBERT GIBBONS, GAME THEORY FOR APPLIED ECONOMISTS 57–61 (1992); DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990).

50. *See generally* SCHELLING, *supra* note 29.

51. OLSON, *supra* note 2, at 166–67.

wherein legislators would cluster together and actually do something.[52]

Four, action on one or the other side of the issue must be plausible. Rational people will not pay—or not pay much—for long-shots. There must be a good chance that Congress will act, as in obtaining the typically requisite sixty votes in the Senate and having the President sign the bill into law, for anyone to pay to see the legislation enacted or blocked.

Five, there ought to be something in the nature of the issue such that any legislative action will be plausibly long-lived. This feature is needed for lawmakers to "capitalize" the rents.[53] If Congress could easily undo in one term what it had done in the prior one, why would any individual or group pay a large amount of money to effect the initial result? Thus the stakes must be high and likely to persist for some time; short-term, small-dollar appropriations bills will not get the game started.

On the final two conditions—plausibility and plausible longevity—the phenomenon is spectral, not binary. The bigger the stakes, the lower the odds and the shorter the time horizon need be to generate the preconditions for the game. It is all a matter of math.[54]

Our primary example, the estate tax repeal/non-repeal efforts over the last decade or so, satisfies all these conditions. The tax itself, on account of its high marginal rates and exemption levels, is of intense interest to a small group of real or putative taxpayers. Congress has clearly played a role in creating and perpetuating this state of affairs: the estate tax continues to feature a high exemption

52. As with "irrational arms races" and so much else, the recent Nobel Laureate Thomas Schelling was instrumental in furthering the understanding of the "tipping" phenomenon, whereby people cluster on one side of an outcome or policy choice. *See* Thomas Schelling, *Dynamic Models of Segregation*, 1 J. MATHEMATICAL SOC. 143, *passim* (1972). The idea was recently popularized in MALCOLM GLADWELL, THE TIPPING POINT (2002).

53. *See* Doernberg & McChesney, *supra* note 42, at 946 (noting that in negotiations between legislators and lobbyists, long-term legislation or "deals" between the parties hold higher value because they reduce transaction costs and risks).

54. Simply put, rationality dictates incurring marginal costs up to but not exceeding marginal benefits. We can assume that the relevant marginal cost is a campaign contribution. The marginal benefit is the change in probability of effecting the positive outcome occasioned by the marginal contribution, multiplied by the capitalized rent or benefit of the action. An expenditure that moves the likelihood of a favorable outcome worth $100 million by one percent is worth $1 million, and so on. Of course there are various tipping points clustered around obtaining the required number of votes; this is entailed in the plausibility condition and plays into the discussion of the required number of votes to effect action, which we discuss at length below. Again, we are not presenting an axiomatic model in this Article.

level and rate structure, meaning that small groups pay high stakes under it, all in contrast to Congress's enacting a lower rate tax on a broader base, an option that at critical junctures lawmakers neglected even to consider. The estate tax issue, narrow and technical and of immediate concern to a mere handful of persons, is highly unlikely to be a decisive one in many voters' ballot box decisions. The issue is two-sided: there are small, specific, well-financed groups opposed to repeal as well as those for it. Action, in the form of repeal, has become highly plausible over the last several years. Finally, there is a strong case to be made that any ultimate, final repeal of the estate tax would be unlikely to be reversed by any subsequent Congress, on account of several factors we discuss below. The conditions also obtain in the other examples we canvass briefly in the final Part: tort reform, defense spending programs, and broadcast spectrum sales and licensing. These issues feature big stakes, small groups, low salience, two (or more) sides, plausible action, and long-term effects. And everywhere—in each of these cases—Congress continually perpetuates the state of affairs, stringing along votes and action on matters of high stakes to small groups. In essence, Congress sets in motion bidding wars among a small number of small groups with high stakes. Such issues take up a good deal of the legislative agenda, often with nothing—apparently—really happening.

With some or all of the conditions in place, the stage is set for a rent-extraction game. The game will have at least two salient features. One, Congress is likely to string the issue along, often voting, rarely finally resolving the issue. This allows for multiple bites at the apple, with no effect on electability, given the "no ballot box significance" condition. Note, incidentally, that campaign finance laws, by limiting the amounts that special interests can give to lawmakers in any one year, may actually exacerbate this tendency to prolong matters; Congress wants to get paid over many years. Two, and clearly related to the stringing-along, sensible compromises will be ignored or defeated. A pitched, all-or-nothing battle will ensue, seemingly partisan, but in fact reflecting the common interest of *all* insiders, Democrats and Republicans, against any potential invaders at the gate. The rapacious need for cash fuels the game, and matters go on and on, all the while appearing to the outside as if nothing of any great importance is ever finally happening.

III. SETTING THE STAGE: THE FACTS OF THE ESTATE TAX

The saga of estate tax "reform" over the last decade or so provides an excellent case study for the reverse Mancur Olson

phenomenon. In this Part, we give the background facts and information to understand that story.

A. *Estate Tax Basics*

The estate tax began in 1916, at a now modest sounding top marginal rate of ten percent.[55] We have little doubt that the initial motivation for the tax was public-spirited. The tax was designed both to raise revenue and, in the progressive spirit of the times, to break up large concentrations of wealth.[56] To close an obvious loophole—the ability to give everything away on death—Congress added the gift tax in 1924.[57] The two taxes were unified in 1976, although they have been somewhat torn asunder by recent law, discussed below. We shall refer to the unified gift and estate tax as the "estate tax" for convenience.

The estate tax is a wealth *transfer* tax, as opposed to a wealth tax per se or an accessions tax that would fall on the recipients of gratuitously transferred wealth. The estate tax is levied on the transferor of wealth: the giver in the case of inter vivos transfers or the estate in the case of a decedent. Three major—and very many minor (in scope, not in economic significance)—exceptions and exclusions whittle down the number of people subject to the tax.

One is the marital deduction.[58] Either spouse can transfer to the other, in life or upon death, an unlimited *amount*—there are limits on the *forms* of transfer—of wealth. The marital deduction means that

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55. For background on the history of and reasons for the estate tax, see generally Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223 (1956) (discussing at length the history of and reasons for the estate tax); Debra Silberstein, *A History of the Death Tax – A Source of Revenue or a Vehicle for Wealth Redistribution*, http://www.debrasilberstein.com/deathtax.htm (last visited Apr. 17, 2006); Financial Planners Index, The History of the Estate Tax, Estate Tax History, Tax Act of 2001 – Effecting 2010 and 2011, http://www.plannersindex.com/estate_tax_history (last visited Apr. 17, 2006).

56. *See* Eisenstein, *supra* note 55, at 224 (noting that the estate tax is most often seen as motivated by a single purpose, "the confiscation of excessive accumulations of wealth"); *see also* John E. Donaldson, *The Future of Transfer Taxation: Repeal, Restructuring and Refinement, or Replacement*, 50 WASH. & LEE L. REV. 539, 563–564 (1993) (advocating abandonment of present estate and gift tax system and proposing two alternative models focusing on transferee); David M. Hudson, *Tax Policy and the Federal Taxation of the Transfer of Wealth*, 19 WILLAMETTE L. REV. 1, 9–32 (1983) (discussing history of federal wealth transfer taxation); Edward A. Zelinsky, *The Estate and Gift Tax Changes of 1981: A Brief Essay on Historical Perspective*, 60 N.C. L. REV. 821, 821–30 (1982) (using historical context to review actions by the 97th Congress to reform transfer taxes).

57. Revenue Act of 1924, Pub. L. No. 68-176, § 204(a)(2)(4), 43 Stat. 253; Gary Robbins, Estate Taxes: A Historical Perspective (Jan. 16, 2004), http://www.heritage.org/research/Taxes/bg1719.cfm.

58. I.R.C. § 2056 (2000).

the estate tax usually falls on the second-to-die in the case of a married couple, giving more time and ability to plan for its ultimate incidence—or avoidance. Proper use of the marital deduction also means that the next two features of the tax, the annual gift exclusion and the unified credit or exemption level, can easily be doubled for a married couple, with planning.

Two is the annual gift exclusion.[59] This is a per donor, per donee, per year exemption from the tax. The amount (in cash or fair market value of non-cash gifts) was raised to $10,000 in 1981; it has since been indexed for inflation, and is currently set at $12,000 beginning in 2006.[60] Under the annual gift exclusion, therefore, two parents can transfer $24,000 a year to each of their children, on and on. The amount of wealth that can be removed from one's estate through sophisticated use of the annual exclusion is significant. Consider a married couple, age forty, with three young children. Were the couple to give each child $24,000, cash, on January 1 of each year for forty years, and were the cash invested in a vehicle yielding six per cent, compounded daily—about the inflation-free rate of return on the stock market over the past seventy years, the inflation adjustment allowing us to keep the example simple in current dollar terms[61]—*each* child would have approximately $3.7 million by their parents' eightieth birthdays. The couple would have extracted over $11 million from their combined estates, altogether tax-free.[62]

Nor does the annual exclusion story end there. By now-longstanding administrative practice, the Internal Revenue Service ("IRS") allows a "discount" to be given to fractional shares of certain entities, such as a "family limited partnership" ("FLP"), which might even be a vehicle simply holding the family's investment portfolio.[63]

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59. *Id.* § 2503.

60. For general background see INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUBL'N NO. 950, INTRODUCTION TO ESTATE AND GIFT TAXES (2004), http://www.irs.gov/pub/irs-pdf/p950.pdf. For the 2006 dollar amounts, see Internal Revenue Service, Tax Law Changes for Gifts and Estates and Trusts, http://www.irs.gov/formspubs/article/0,,id=112782,00.html#gift_excl_2006 (last modified Nov. 19, 2005).

61. *See* Roger G. Ibbotson & Peng Chen, *Long-Run Stock Returns: Participating in the Real Economy*, 59 FIN. ANALYSTS J. 88, 95 (2003).

62. *See* GEORGE COOPER, A VOLUNTARY TAX? PERSPECTIVES ON SOPHISTICATED ESTATE TAX AVOIDANCE 38 (1979) ("The most important technique for avoiding high taxation of extant wealth has traditionally been the making of lifetime gifts"); EDWARD J. MCCAFFERY, FAIR NOT FLAT: HOW TO MAKE THE TAX SYSTEM BETTER AND SIMPLER 68–69 (2002) (discussing a similar example with advice to give early, often and in trust).

63. *See* Martin A. Sullivan, *Estate Tax Compromise or Repeal: The Rich Versus the Super Rich*, 88 TAX NOTES 298, 298–300 (2000) (stating how, as a result of planning, only a small percentage of family businesses and family farms pay the estate tax); *see also*

Assuming a generous but not unheard of discount of fifty percent, for simplicity of exposition, a family could in effect double the wealth-transmission values countenanced above. By putting assets into an FLP, and giving each child a fractional share of assets with an underlying, undiscounted value of $48,000 each January 1, the couple in the running example can double their transfer-tax-free wealth transmission, getting more than $22 million out of their estates, altogether gift and estate tax-free, and also income tax-free to the children.[64] The outlines of the estate tax as a "voluntary" one ought to be becoming clear. But note that the more ambitious strategies require some planning piper to be paid: we shall hear more on this, below.

Three, over and above the annual exclusion, there is an exemption level, set out in a so-called unified credit, from the combined gift and estate tax regime.[65] This is the "zero bracket" of the tax. The amount was increased to $600,000 in 1981 and gradually raised again starting in the late 1990s. It was initially set at $1 million by the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"),[66] of which we shall hear much more before we are through. The exemption became $1.5 million by 2004, and $2 million in 2006, on its way to $3.5 million in 2009 and, in effect, to infinity in 2010.[67] During this gradual weakening of the estate tax via a higher exemption level, the gift tax exemption stays at $1 million per donor,

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MCCAFFERY, *supra* note 62, at 148–49 (mentioning some benefits of the FLP); Martin A. Sullivan, *For Richest Americans, Two-Thirds of Wealth Escapes Estate Tax*, 87 TAX NOTES 328, 332 (2000) [hereinafter Sullivan, *Richest Americans*] (explaining how FLPs can cut the value of included or taxable assets by one-quarter or one-half). Recent cases, such as *Estate of Strangi v. Commissioner*, 115 T.C. 478 (2000), *aff'd in part, rev'd in part sub nom. Gulig v. Commissioner*, 293 F.3d 279 (5th Cir. 2002), *remanded sub nom. Estate of Strangi v. Commissioner*, 85 T.C.M. (CCH) 1331 (2003), *aff'd*, 417 F.3d 468 (5th Cir. 2005), and *Kimbell v. United States*, 371 F.3d 257 (5th Cir. 2004), have injected some uncertainty into the FLP field, but the device, as well as similar devices, continues to be used. For articles discussing the *Strangi* cases and how to properly form an FLP, see, for example, Michael E. Mares, Est. of Strangi *Finally Settled*, TAX ADVISER, Nov. 1, 2005, at 661; Michael E. Kitces, *Knockout Blow? The Strangi Case May Finally Be Lost, but Family Limited Partnerships Remain a Viable Estate Planning Tool*, FIN. PLAN., Oct. 1, 2005, http://www.financial-planning.com/pubs/fp/20051001024.html.

64. *See* Edward J. McCaffery, *A Voluntary Tax? Revisited*, NAT'L TAX ASS'N PROCEEDINGS 268–69 (2000) (explaining current annual exclusion amounts); *see also* MCCAFFERY, *supra* note 62, ch. 4.

65. *See* I.R.C. § 2505 (2000) (unified credit against gift tax); *id.* § 2010 (unified credit against estate tax); *see also* INTERNAL REVENUE SERV., *supra* note 60 (explaining in more depth the credits available).

66. Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. No. 107-16, 115 Stat. 38.

67. *See infra* Part IV.C for more detail on EGTRRA.

meaning that the gift and estate taxes are no longer fully unified.[68] A large effect of EGTRRA's keeping the gift tax exemption frozen at $1 million was to assure that one must, in fact, die to take advantage of the higher estate tax exemptions. Indeed, 2010, the year that the estate tax is scheduled for repeal, quickly got dubbed the "throw Momma from the train" year by the usually not-so-witty estate tax profession.[69]

A husband and wife with proper planning can once again double any of the numbers noted in the prior paragraph. By using the gift exemption early on in their lives, taxpayers can obtain significant leveraging. Suppose, for example, that the couple in the running example gives each of their three children fractional shares of an FLP valued for tax purposes at a fifty percent discount, to one-half of its underlying asset value, using their combined lifetime gift exemptions when they, the parents, are forty, in addition to commencing the program of annual gift exclusions described above. Under the $1 million per person exemption, each child's fortune would increase by an additional $7 million or more, to an excess of $15 million per child, by their parents' eightieth birthday parties.

Summing this all up, the way the estate tax works is as follows. Once a donor has gone over the annual exclusion amount (more than $12,000 to one particular person in one particular year), she fills out a gift tax form and begins to subtract from her $1 million lifetime exemption. On her death, the government adds up the value of her estate and then subtracts debt to get at a net financial figure for her estate. Qualified transfers to a surviving spouse are further subtracted. Finally, the government takes off $2,000,000, or the then-prevailing death-time exemption level, less any taxable gifts that have diminished the exemption level during the decedent's life. Any value left in the estate is then taxed at a rate that starts at approximately forty percent and quickly reaches a maximum of nearly fifty percent.[70]

68. *See* John Buckley, *Estate and Gift Taxes: What Will Congress Do Next?*, 91 TAX NOTES 2069, 2069 n.1 (2001).

69. *See* Michael J. Graetz, *100 Million Unnecessary Returns: A Fresh Start for the U.S. Tax System*, 112 YALE L.J. 261, 262 (2002) (noting that the phrase was first used by Paul Krugman, *Bad Heir Day*, N.Y. TIMES, May 30, 2001, at A23).

70. EGTRRA, as with so many other matters, made these numbers a moving target throughout the decade. *See infra* note 166, Table 4, and related discussion.

B. *Revenue and Rates*

Rather few decedents leave an estate large enough ever to actually pay the estate tax: one to two percent of decedents a year, to be more precise.[71] In total, the tax does not raise much revenue, and never really has, as Table 1 illustrates. Note that this pattern of a high

Table 1. Gift and Estate Tax Revenues, 1950–2000

Year	Gift and Estate Tax Revenues (in billions of dollars)	Percent of Federal Revenues
1950	0.7	1.8
1955	0.9	1.4
1960	1.6	1.7
1965	2.7	2.3
1970	3.6	1.9
1975	4.6	1.7
1980	6.4	1.2
1985	6.4	0.9
1990	11.5	1.1
1995	14.7	1.1
2000	29	1.4
2005*	23.8	1.2

Source: U.S. Office of Management and Budget.
*estimated.

tax rate falling on a few is inconsistent with Gary Becker's general model of taxation but consistent with a tax used for other, non-revenue-raising purposes, such as rent extraction. There is a heated dispute over the administrative costs of the tax, and also over its effects on equilibrium. Opponents of the tax claim that it costs money because of its impact on work, savings, and investment behaviors; proponents tend to dismiss these ideas.[72] Another claim of

71. *See, e.g.*, Paul Taylor, *Reasons To Keep the "Death Tax" Alive*, FIN. TIMES (U.K.), Aug. 14, 2003, at 21, *available at* 2003 WLNR 8156719.

72. *See* Douglas A. Shackelford, *The Tax Environment Facing the Wealthy*, *in* DOES ATLAS SHRUG? THE ECONOMIC CONSEQUENCES OF TAXING THE RICH 114, 135 (Joel B. Slemrod ed., 2000) (discussing the uncertain effects that would follow the elimination of the tax); *see also Comments on the 2003 Economic Report of the President: Testimony Before the J. Economic Comm.*, 108th Cong. 2–3 (2003) (statement of Daniel Mitchell, McKenna Senior Fellow in Political Economy, The Heritage Foundation), *available at* http://jec.senate.gov/_files/Mitchell02262003.pdf (commenting on reasons why the tax

interest is that the estate tax as now constituted even *loses* money in a static sense for the federal Treasury, because the types of complex planning it helps to induce—especially the sophisticated insurance and charitable trusts we discuss below—generate greater *income* tax losses than the estate tax brings in.[73] Whatever one thinks of these diverse claims, it is hard to argue under just about any light that the revenue effects of the estate tax are highly significant in a budget of some two trillion dollars.

These revenue figures are hardly critical to the Treasury. But they are central to the political story. The low yield of the tax is due to the confluence of three factors: high exemption levels, high marginal tax rates, and the very structure of the tax. The first factor keeps low the numbers of persons and estates even possibly subject to the tax: it makes the group small. The second factor makes those persons in the shadows of the tax potentially liable for large sums: it makes the stakes high. Here we have the classic Mancur Olson conditions: small group/high stakes. The third factor makes the stakes, or the tax, largely avoidable, thereby creating a second set of players in the ex ante rent-extraction phenomenon. The key element of the structure of the tax is that it is a back-ended wealth transfer tax—it applies to wealth that is left over after a taxpayer's life—and hence it is a tax that is easily anticipated. The high marginal tax rates give wealthy persons living in the shadows of the tax every incentive to plan to avoid it. From a traditional public finance perspective, this combination of structural elements is puzzling.

Basic principles of optimal taxation—supplemented with common sense and recent political economic history—suggest that *lowering* both the exemption and the marginal tax rate levels would most likely increase the revenue yield while enhancing efficiency and diminishing incentives to evade or avoid the tax.[74] This lowering of

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should be repealed); WILLIAM G. GALE ET AL., RETHINKING ESTATE AND GIFT TAXATION 1–2 (2001).

73. *See* B. Douglas Bernheim, *Does the Estate Tax Raise Revenue?*, *in* 1 TAX POL'Y & ECON. 113, 124–32 (Lawrence H. Summers ed., 1987) (discussing ways in which the estate tax is mitigated by various estate planning tools that lead to fewer income tax revenues for the government).

74. J.A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 REV. ECON. STUD. 175, 206–08 (1971); *see also* A.B. ATKINSON, PUBLIC ECONOMICS IN ACTION: THE BASIC INCOME FLAT TAX PROPOSAL 46–61 (1997); EDWARD J. MCCAFFERY, TAXING WOMEN 170–78 (1997); C. EUGENE STEUERLE, CONTEMPORARY U.S. TAX POLICY 136 (2004) (noting that "lower marginal tax rates encourage better use of both time and money"); A.B. Atkinson, *Optimal Taxation and the Direct Versus Indirect Tax Controversy*, 10 CANADIAN J. ECON. 590, 602–03 (1976); F.P. Ramsey, *A Contribution to the Theory of Taxation*, 37 ECON. J. 47, 58–61 (1927); Joel Slemrod,

rates and broadening of bases has in fact been a motif in basic comprehensive tax policy since Ronald Reagan.[75] A fundamental principle of public finance, the Ramsey inverse elasticity rule, maintains that the deadweight loss associated with a tax is proportional to its tax rate *squared*.[76] All things being equal, a tax at a fifty percent rate is more than four times as inefficient as one at a twenty-five percent rate. It is thus no surprise that many academics and other tax reformers have proposed lowering the estate tax's rate and broadening its base.[77] Congress, however, has moved in almost precisely the opposite direction. The exemption level of the estate tax has continually increased over time—with proposals afoot to raise it further[78]—constricting the tax's base, while its marginal tax rates have remained stubbornly higher than the parallel income tax rates, as Figure 1 in the notes reveals.[79]

Optimal Taxation and Optimal Tax Systems, 4 J. ECON. PERSP. 157, 168–70 (1990) (noting how lowering the marginal tax rate in fact lowers the marginal administration cost and "thus minimizes the total resource cost of raising revenue").

75. *See generally* Edward J. McCaffery, *The Missing Links in Tax Reform*, 2 CHAP. L. REV. 233 (2000) (discussing tax reform attempts since President Reagan's overhaul in the 1980s). The recently-released report of the President's Advisory Panel on Federal Tax Reform, *Simple, Fair and Pro-Growth: Proposals To Fix America's Tax System* (2005), *available at* http://www.taxreformpanel.gov, followed precisely this strategy, recommending broadening the base by repealing or restricting the benefits of various deductions or exclusions, then lowering the tax rates and repealing the alternative minimum tax.

76. *See* Atkinson, *supra* note 74, at 596–99; Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1957 (1987); Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 658 n.216 (1993); *see also* MCCAFFERY, *supra* note 74, at 170–71.

77. *See, e.g.*, Graetz, *supra* note 69, at 263 (discussing the need to increase exemptions and lower and flatten the rates).

78. *See* Barry W. Johnson et al., *Elements of Federal Estate Taxation*, *in* RETHINKING ESTATE AND GIFT TAXATION 65, 67–106 (William G. Gale et al. eds., 2001) (discussing changes in the tax, including exemptions and proposed exemptions in the Bush administration). *See generally* Donald Kiefer et al., *The Economic Growth and Tax Relief Reconciliation Act of 2001: Overview and Assessment of Effects on Taxpayers*, 55 NAT'L TAX J. 89 (2002).

79. See Figure 1 on next page.

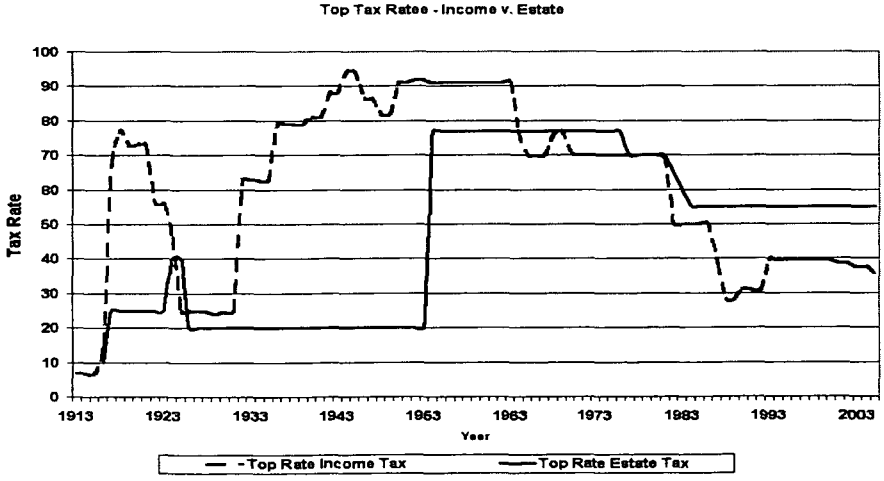
C. *The Players*

The government and the public writ large might in good faith care generally about the revenue yield and other effects, good and bad, from the estate tax. In this Section we look at actors who might have a more direct, narrow economic stake in the outcome of the estate tax repeal/non-repeal saga: groups who might be players in a reverse Mancur Olson, ex ante rent-extraction game. We set aside legislators, for now. Discussed here are players who might supply campaign contributions to Congresspersons. In the next Part of the Article, we shall see what, exactly, Congress was able to do on the demand side of the political equation, to make sure that there were suitable occasions for the players described here to pay the piper. There are several groups with a direct, monetary stake in the outcome of the estate tax repeal saga, all comparatively small, each of which plays an important role in the story.

1. Putative Taxpayers

One group, of course, is the individuals, or their families, whose estates would pay up to one-half of their net worth to the federal government absent some planning. There are not many such people, as we have just seen: the size of the group is inversely related to the size of the exemption level under the tax, and this level is and has

Figure 1. Marginal Tax Rates Under Income and Estate Taxes



This Figure reflects the state of the law pre-EGTRRA, discussed below in the text. EGTRRA slowly lowers the top rate of the estate tax to forty-five percent, still well above the thirty-three percent rate scheduled to apply to the highest income tax bracket under the law and then eliminates the estate tax for the single year 2010.

always been high, compared to typical American wealth levels.[80] Few Americans have net wealth in excess of $2 million per person, $4 million per married couple. But those that do have such estates, or reasonably expect to, live in the shadows of the estate tax.

Not all wealthy individuals necessarily care about avoiding or minimizing the estate tax, of course. George Cooper anecdotally found that wealthy people fell into three distinct, roughly equal groups.[81] One group was unconcerned about the tax, whether out of unease with considering their own mortality, a belief that the tax was just, or a desire not to leave their personal heirs excess wealth. Andrew Carnegie actually thought the latter, at least insofar as his *male* heirs went; today prominent spokespersons for retention of the estate tax include Warren Buffett and Bill Gates, Sr.[82] The second group includes people willing to engage in moderate planning to minimize the tax. In the third group are people who, in the words of one quoted by Cooper, "would stand on one ear, wiggle their four toes, and disavow their families to save $20 in tax."[83] The latter two groups—especially the last—generate a pool of what we call *putative* taxpayers, waiting to be saved from the tax's dreaded effect by the next groups of players. It is a putative tax because few of the wealthy pay it in full; estimates are that the effective yield of the estate tax is close to one-half or less of its nominal yield of approximately fifty percent.[84] This means that something closer to twenty-five percent of the value of taxable estates is paid out in actual taxes. Even this figure far overstates the true yield of the tax as a percent of its potential yield, however, because many—probably most—wealthy people living in its shadows have engaged in years of planning to avoid being caught with too much loot on their deathbeds. We have already seen, for example, how a married couple that begins planning at age forty could—fairly easily—get some $40 million or more of wealth out of their estates by their eightieth birthdays.[85] Cooper

80. In fact, the estate tax only affects about two percent of households. *See* Taylor, *supra* note 71.

81. *See* COOPER, *supra* note 62, at 6–7.

82. *See, e.g.*, WILLIAM H. GATES, SR. & CHUCK COLLINS, WEALTH AND OUR COMMONWEALTH: WHY AMERICA SHOULD TAX ACCUMULATED FORTUNES 1–2 (2002); GRAETZ & SHAPIRO, *supra* note 17, at 169–70; Douglas Holtz-Eakin, *The Carnegie Conjecture: Some Empirical Evidence*, 108 Q.J. ECON. 413, 413 (1993).

83. *See* COOPER, *supra* note 62, at 7.

84. *See* Sullivan, *Richest Americans*, *supra* note 63, at 331.

85. Note that, in this running example, it make no difference what wealth the parents started with, as long as they had enough money to fund the transfers, or what they ended with; the idea is that parents who would have had, without any planning, an estate of $40 million, leading to an estate tax bill of $20 million, could altogether avoid that tax.

devoted a chapter of his study to explaining—in the context of the DuPont family, no less—that " 'zero-based budgeting' is a reasonable starting point for any person with serious estate tax avoidance designs."[86] And the record shows that the gift and estate tax has been weakened in significant ways since Cooper wrote this study in the mid-1970s.[87]

Very wealthy people with bequest motives form a narrow pool of people who care enough to engage in some lobbying or other tax avoidance/minimization activity. Groups of taxpayers in this category have indeed organized and lobbied against the estate tax; examples include the National Association of Realtors, the National Federation of Independent Businesses ("NFIB"), the National Beer Wholesaler Association, the National Restaurant Association, and the National Cattlemen's Beef Association. We mention these five organizations in particular because each had a PAC that identified on its official Web site "permanent repeal of the estate tax" as one of its highest lobbying priorities, during the period we study, from 1998 to 2004. Appendices II through IV chronicle the nearly $3.5 million given by these five PACs alone to Senators over that six-year period, sorted by the Senator's pattern of voting on key estate tax repeal legislation, as presented in Appendix I. A summary of this data is included in the notes.[88] The money we set forth in the Appendices is but a small part

86. *See* COOPER, *supra* note 62, at 77.

87. *See* McCaffery, *supra* note 64, at 268.

88.

Table 2. Summary of Donations to Senators by Pro-Repeal PACs, 1998–2004 (sorted by Senators' voting history on estate tax repeal)

Senators' Voting History	Average Amount of Donations (per Senator)	Total Donations
Consistently pro-repeal Senators	$34,521	$2,485,512
Senators that would be consistently pro-repeal if not for not voting one or more times	$27,116	$162,696
Senators with flipping votes on repeal	$24,920	$323,960
Senators that would be consistently anti-repeal if not for not voting one or more times	$15,700	$31,400
Consistently anti-repeal Senators	$9,454	$425,430
All Senators (Total)	**$24,848**	**$3,428,998**

See infra Appendix I (vote histories); *infra* Appendices II–IV (campaign contribution data). This Table evinces a clear pattern with the average dollars going to the most consistently pro-repeal Senators.

We emphasize that, as with other data we have unearthed on campaign contributions, this is not a scientific survey. It is virtually impossible precisely to trace all the money there is in politics, let alone to understand the cause or the effects of any particular expenditure. The PACs we examine were concerned about other issues, after all, and so the dollars reported cannot be linked to the estate tax issue alone. But, on the

of the whole. It simply illustrates the fact that private groups of putative estate taxpayers are concerned about the estate tax, enough to pay Senators to consider repealing it.

The cash flow to Congress indicates the putative taxpayers' concern. The extent of the concern is rather easily mapped out:

putative tax = tax rate (intended bequest – exempt level)

With a nominal tax rate of roughly fifty percent, this putative tax is quite high, indeed, for the very wealthiest Americans. For a rational person in this situation concerned only with making a bequest, the decision metric is simple enough. Such a person will spend one dollar in estate tax avoidance or minimization in order to save at least one dollar in tax. In fact, estate tax avoidance expenditures are far more efficient than that. The actual private cost of the tax, which consists of the sum of taxes paid plus the transaction costs of avoiding the tax, is much smaller than the putative tax that sets an upper bound to the range. But these costs are hardly trivial. The fees paid over to estate tax experts, plus the taxes paid and other transaction costs, combine to create the "rent" of the estate tax as it exists: the non-market economic impact. Eliminating the tax completely would save wealthy individuals this much money. Some of this money goes to the government: the rather small, in relative terms, dollars in Table 1. Some of this money goes to the next three groups of players we discuss. Because a rational bequest-minded donor would pay one dollar to a politician for a chance worth more than one dollar of potentially avoided private costs, some of this money can also go to Congress—or to lobbyists—as we shall develop later on.[89]

2. Estate Tax Specialists

Some portion of the dollars that would otherwise go to the government in estate taxes gets paid out in fees to estate tax practitioners: lawyers, accountants, financial planners who specialize in whole or in part in estate tax mimimization, trust companies, and other fiduciaries. In theory, the rational bequest-motivated individual or family would pay out almost as much in fees as she would

other hand, there were many more groups and individuals in this category of seeking estate tax repeal, some of whose expenditures have been chronicled elsewhere. *See, e.g.*, GRAETZ & SHAPIRO, *supra* note 17, at 239–52 (chapter titled "Money, Money, Money"); *id. passim*.

89. Graetz and Shapiro, while curiously denying that money played a dominant role in the estate tax saga, also detail that wealthy families spent a lot of money lobbying for repeal. *See generally* GRAETZ & SHAPIRO, *supra* note 17, at 239–52 (detailing the lobbying efforts of the "ultra-wealthy" in the estate tax battle).

otherwise pay to the government: the fees would approach the putative tax. Aside from the obvious fact that individuals may not be so bequest-motivated (that is, they might be willing to leave their wealth to heirs if it could all pass through, but not if one-half of it would be taken by the government),[90] the forces of competition on the supply side of the estate tax minimizing market drive down the costs of estate tax reduction. Yet these costs do not fall all the way to approach zero. There are several reasons for this.

One, estate tax specialists serve a relatively small market, on the demand side, as we have just sketched out. Since there are not many rich persons or families seeking sophisticated estate tax reducing advice, there are also not many people or firms supplying it.

Two, there are significant entry barriers to becoming an estate tax specialist: not only need most specialists obtain some advanced professional degree (juris doctor, certified public accountant, certified financial planner), but they must also invest a significant amount of human capital to master the techniques of estate tax minimization. These techniques change frequently and remain complex, on account of legislative and administrative developments, insuring that the pool of estate tax specialists remains small. A looming cloud of repeal further suppresses the numbers, deterring young practitioners from entering the field.[91]

Three, there is considerable inelasticity on the demand side of the estate tax advising market. Wealthy individuals in the shadows of the estate tax are unlikely to trust their intimate family and financial details to anonymous firms. The estate tax specialist does not simply dispense relatively simple advice, such as to use the annual exclusion gift amounts each year or to take advantage of the lifetime exemption level as soon as possible. Most sophisticated wealthy donors do not want to pass unfettered control of significant economic assets to their children when the kids are young, and so the simplest forms of wealth transfer (outright gifts) are rarely used by the very wealthy. Various forms of complex ownership structures, such as the FLPs alluded to above or popular *Crummey* trusts, operate to use the donor's exemptions and exclusions while keeping present control out of the

90. In other words, the very existence of the estate tax might push some wealthy taxpayers to consume more of their wealth and give less to their heirs. *See, e.g.*, Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 312–22 (1994).

91. Alan F. Rothschild, *Seven Habits of Highly Effective Estate Planners*, PROB. & PROP., Jan.–Feb. 2002, at 58; Scott C. Fithian, *Is Your Career About To Be Repealed? – Part I*, PLANNED GIVING DESIGN CENTER, May 17, 2001, http://www.pgdc.com/usa/item/?itemID=27339&g11n.enc=ISO-8859-1.

hands of young beneficiaries.[92] Hence the advice becomes more and more complex, and ever-changing. At the same time, the estate tax specialist must be acquainted with the personal and psychological relationships within the family, for she will be crafting documents about passing on large amounts of wealth, perhaps including a family business. Many wealthy, bequest-minded persons are reluctant to fully trust such details to associates in large anonymous firms; as a result, the world of the estate tax specialist is small and intimate, with relatively little turnover. Estate tax specialists are well-compensated for their time and loyalties.[93]

3. Insurance Industry

The insurance industry plays a large and important role in estate tax minimization. The reasons sound in three interconnected provisions of the tax laws. One, the proceeds of life insurance are not included in the beneficiary's (recipient's) income tax.[94] Two, by longstanding legislative exemption, the "inside buildup" of a cash-value, whole life, or (all synonymously) universal life insurance policy is not income to the policyholder.[95] Three, as long as an individual is not the "owner" of an insurance policy on her own life—once again, sophisticated planning is needed to ensure this result obtains, as by having a life insurance trust "own" the policy—the policy's value is not includible in her estate.[96]

Put this all together and this is what you get: A wealthy individual can use her annual exclusion gifts and/or all or part of her lifetime exemption level to set up an irrevocable life insurance trust

92. *See generally* Crummey v. Comm'r, 397 F.2d 82 (9th Cir. 1968); Estate of Cristofani v. Comm'r, 97 T.C. 74, 84–85 (1991); Dora Arash, *Crummey Trusts: An Exploitation of the Annual Exclusion*, 21 PEPP. L. REV. 83 (1993) (describing the *Crummey* line of cases and mechanisms for controlling access to trusts).

93. Estate tax specialists, who were widely opposed to repeal, also seem to have benefited economically from the uncertainty surrounding repeal. *See* Sandra Block, *Estate Tax Chaos Lingers: Financial Pros Needed Now More than Ever*, USA TODAY, June 15, 2001, at B3. This article argues that EGTRRA actually created a windfall for estate tax specialists because of the complexity of its provisions. Stephen McDaniel, an estate attorney in Memphis, commented about the law: "It's a lawyer relief act .... We've got a 10-year estate-planning attorney windfall." *Id.* For some sense of the dollars involved in estate tax-savvy trusts, see Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359 (2005), finding that there was over $100 billion in "Dynasty Trusts" by the year 2003.

94. I.R.C. § 101 (2000).

95. Andrew D. Pike, *Reflections on the Meaning of Life: An Analysis of Section 7702 and the Taxation of Cash Value Life Insurance*, 43 TAX L. REV. 491, 493 n.2 (1988).

96. I.R.C. §§ 2038, 2042.

for her children.[97] The gifts to the children are sent to the insurance company as policy premia, via the trust. After deducting the current period mortality premium to compensate for the pure (term) risk component of the insurance, the excess is held by the insurance company, on the trust's account, and invested. When the donor dies, the proceeds go to the trust without being brought within the decedent's estate. The money is then distributed, altogether tax-free, to the heirs as beneficiaries of the trust, or used to buy assets from the estate to give it the liquidity with which to pay any remaining tax.[98]

There are even more complex means of estate tax minimization using insurance, including the now-notorious "split-dollar" arrangements. Under these plans, a wealthy donor purchases an insurance policy with a high face value and gifts away the cash value component (the complement of the pure risk one) to a beneficiary. A large portion of the initial, large premium is allocated to the actuarial risk component, leaving a small value to be placed on the gift of the residual interest. The dollars here can be staggering.[99]

It is thus not surprising that there is growing evidence that insurance companies have lobbied extensively to *retain* the estate tax.[100] As with most special interests, it is difficult to pin down exactly the flows of funds from insurance companies inside the Beltway. And like the other groups with a specific interest in keeping the estate tax—estate tax specialists, discussed above, and large nonprofits, discussed below—insurance companies had to be subtle, in part because it is a delicate matter to explain to one's clients that you are lobbying to keep in place a tax that you are getting paid to help a

97. *See* CCH Business Owners Toolkit: The Irrevocable Life Trust, http://www.toolkit.cch.com/text/P12_3595.asp (last visited Apr. 17, 2006) (providing a brief overview of irrevocable life insurance trusts).

98. The need for liquidity is a large theme in estate planning. Because the tax comes due shortly after a death, and is based on the decedent's total assets, whether liquid or not, it is often difficult to come up with cash to pay the tax bill. Some limited statutory provisions ameliorate this issue in certain cases. *See, e.g.*, I.R.C. § 6166 (installment method of paying estate taxes in certain cases). Life insurance trusts, coupled with "buy/sell" agreements from the family business or trust, are a common technique for practitioners to address the concern.

99. *See, e.g.*, David Cay Johnston, *Death Still Certain, but Taxes May Be Subject to a Loophole*, N.Y. TIMES, July 28, 2002, at A1 (featuring New York lawyer Jonathan Blattmachr describing the multimillion dollar insurance policies used by his estate tax planning clients).

100. *See* Michael Forsythe, *'Death Tax' Death Knell? Insurers' Opposition, Deficit Politics Threaten Permanent Repeal of Estate Tax*, PITT. POST-GAZETTE, Mar. 17, 2005, at C8. For a comparison of Senate contributions by anti-repeal life insurance PACs and individual Senatorial voting patterns on estate tax repeal, see *infra* Appendices V–VII.

client avoid.[101] Nonetheless, insurance companies have given money to Senators in the relevant periods; Appendices V through VII, parallel to the pro-repeal analyses in Appendices II through IV, present the Senatorial campaign contributions of the PACs for Metropolitan Life, New York Life, and Northwestern Life Mutual, three major insurance companies. With the qualifications as noted above—namely that an anti-estate tax repeal focus cannot explain all this money, but, on the other hand, these snippets do not capture all of the anti-estate tax repeal money, either—a quick summary of these figures, which totaled over $1 million in the six year period 1998–2004, is presented in the notes.[102] Professors Michael Graetz and Ian Shapiro unearthed the fact that the Association of Advanced Life Underwriting formed a lobbying coalition and spent $2 million to hire former Senator Alan Simpson, Republican of Wyoming, to lead their charge against death to the death tax.[103] So far, this anti-repeal money has worked perfectly well—although the Senate has made sure that the pro-repeal money continues to flow, as well.

101. In the case of insurance companies, there was another reason for subtlety: we were told by insiders "off the record" that the Republican leadership, largely and nominally pro-estate tax repeal, was threatening to take away many of the insurance company's longstanding tax breaks, such as the non-taxation of the "inside build-up" of insurance reserves, if they lobbied too vigorously against repeal. Like many other pieces of information helping to develop and confirm our basic thesis, we were told this by a prominent lobbyist who asked to remain anonymous (we were also given supporting data by Congresspersons and congressional aides). Insurers did publicly support certain "reform/don't repeal" options for the tax. *See, e.g.*, JOANNE WOJCIK, BETWEEN THE LINES: DEATH, TAXES, AND LIFE INSURERS 12 (2005); Arthur D. Postal, *Vital Issues for Life Insurers Are on the Table*, NAT'L UNDERWRITER, LIFE & HEALTH (Fin. Servs. Ed.), Sept. 5, 2005, at 6, *available at* 2005 WLNR 14500942.

102.

Table 3. Summary of Donations to Senators by Anti-Repeal Insurance PACs, 1998–2004 (sorted by Senators' voting history on estate tax repeal)

Senators' Voting History	Average Amount of Donations (per Senator)	Total Donations
Senators that would be consistently anti-repeal if not for not voting one or more times	$19,750	$39,500
Senators with flipping votes on repeal	$14,423	$43,269
Consistently pro-repeal Senators	$8,892	$640,249
Consistently anti-repeal Senators	$7,158	$322,099
Senators that would be consistently pro-repeal if not for not voting one or more times	$5,167	$31,002
All Senators (Total)	**$7,798**	**$1,076,119**

103. GRAETZ & SHAPIRO, *supra* note 17, at 246–47.

4. Large Nonprofits

Much sophisticated estate tax minimization involves charitable giving, typically to large nonprofit organizations, through devices such as charitable lead and remainder trusts and private foundations.[104] Absent fraud,[105] one needs *some* charitable inclination to give to charity, but the combined income and estate tax savings of structured charitable giving can mean that one does not need all that much altruism. Under today's tax rates, a fairly simple gift to charity by a wealthy person living in the shadows of the estate tax will cost the donor approximately thirty-five cents on the dollar, the rest coming from her distant Uncle Sam. One dollar given to charity generates thirty-five cents in income tax savings to a high bracket taxpayer; the remaining sixty-five cents would have generated some thirty cents in estate tax. A sophisticated use of trusts and future interests can leverage charitable propensity even further. Thus, Ted Turner's $1 billion contribution to the United Nations, for example, was estimated to cost Turner, after taxes, somewhere between $100 and $300 million.[106] The rest was in effect borne by the federal Treasury, as foregone revenue. Large nonprofits, acutely aware of this math and the effects that it has on their donor base,[107] are serious opponents of estate tax repeal.[108]

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104. *See* Don R. Weigandt, *Charitable Giving Without Fear of Death*, 54 MAJOR TAX PLAN. 2002, § 1100, at 11-3 to -4 (2002); *see also* Edward J. McCaffery & Don R. Weigandt, *Lobbying For Life: Protecting Charitable Giving Without a Death Tax*, 98 TAX NOTES 97, 98 (2003).

105. *See, e.g.*, Richard Lezin Jones, *A Violin's Value and What To Pay the I.R.S. Fiddler*, N.Y. TIMES, May 2, 2004, at A11 (describing the possible inflation of the value of a set of violins sold to an orchestra for the tax benefits of the transaction).

106. David Rohde, *Ted Turner Plans a $1 Billion Gift for U.N. Agencies*, N.Y. TIMES, Sept. 19, 1997, at A1. Given an income tax rate of approximately forty percent, the $1 billion would save $400 million on income taxes, netting $600 million. Since this $600 million would have stayed in Turner's estate, growing at the discounted rate, it would have generated another $300 million in estate taxes, at present value, costing Turner a net $300 million. Additional reductions would occur because of the timing of the gift, and various valuation rules not relevant here.

107. *See* Jon M. Bakija & William G. Gale, *Effects of Estate Tax Reform on Charitable Giving*, TAX POL'Y ISSUES & OPTIONS (Urban Inst.-Brookings Inst. Tax Policy Ctr., Wash., D.C.), July 2003, at 1, 1, *available at* http://brookings.edu/views/articles/gale/20030617.pdf (estimating, with economic tools, that estate tax repeal would reduce charitable giving by $10 billion in the United States); *see also* Michael J. Brunetti, *The Estate Tax and Charitable Bequests: Elasticity Estimates Using Probate Records*, 58 NAT'L TAX J. 165, 186–87 (2005) (predicting that, based on empirical evidence of the relationship between charitable contributions and the estate tax, "repeal of the federal estate tax ... [will] decrease charitable bequests from 7.74 to 1.98 percent of after-tax wealth for [federal estate tax return] filers").

108. Nonetheless, many large charitable organizations have not been vocal about their stance on estate tax repeal for fear of antagonizing their wealthy benefactors that favor

5. Lobbyists

Lobbyists form a final group of players in the battle over estate tax repeal or reform. They represent groups of putative taxpayers (including, for example, the NFIB, the Newspaper Association of America, beer manufacturers, and farmers) and those on the other side (large nonprofits, insurance companies, gift and estate tax advisers and financial intermediaries such as trust companies).[109] Lobbyists play a complex and multi-faceted role in the traditional special-interest conception of politics as well as under the ex ante rent-extraction phenomenon. They help form the very groups that they will later help to shake down—all for a fee, of course. Not surprisingly, tax is by far the most common specialty listed by registered lobbyists.[110] And also not surprisingly, there is credible evidence that lobbyists often feel the brunt of a shakedown scheme themselves, as politicians repeatedly demand, personally, that lobbyists pay to play the game.[111] In the shakedown game, lobbyists help Congress shake down the special-interest groups, whom they also shake down—and then they get shaken down themselves by legislators. Play with fire, and get burned, as they say. Lobbyists are the quintessential players in the fire-filled game of politics and money.

D. Ex Ante Rent Extraction: A Synthesis

The roster of players in the estate tax drama begins with the taxpayers subject to the tax. These putative taxpayers do not avoid the estate tax for free. They must pay estate tax specialists, insurance companies and other financial intermediaries, and, sometimes, charities, in order to avoid the tax. Economists call the sums paid over to these groups on account of estate tax avoidance motives "transaction costs."[112] Thus, in simple terms, the putative taxpayers

estate tax repeal. *See* GRAETZ & SHAPIRO, *supra* note 17, at 246–47; Stephanie Strom, *Charities Are Silent on Loss of Estate Tax*, N.Y. TIMES, Apr. 24, 2005, at A28.

109. For a comparison of Senate contributions from pro- and anti-repeal PACs and individual Senators' voting patterns on repeal of the estate tax, see *infra* Appendices I–VII.

110. The Center for Responsive Politics, Top Issue Areas, http://www.opensecrets.org/pubs/lobby00/issueareas.asp (last visited Apr. 17, 2006). There are seventy-six different specialties for congressional lobbyists, and tax is the most common one. Nearly a quarter of Washington's 12,113 lobbyists listed tax as one of their specialties.

111. Ornstein, *supra* note 24.

112. *See* Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691, 692 (1986); Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119, 1120

stand on one side, and beneficiaries of transaction costs of the tax stand on the other. Lobbyists are a transaction cost of interacting with Congress, which both sides have been paying—a lot—lately. Our basic story is that Congress has been stringing along the saga of estate tax repeal/non-repeal, which is an issue of high stakes to several small groups, in order to reap the benefits of multiple bites at the campaign contribution apple. In passing in this Part and in the Appendices, we have chronicled some of the money—some $4.5 million over a six-year period—involved in the game. We believe that this is just the tip of an iceberg, but nailing down the precise role of money in politics is hard.

Instead of searching for more signs of dollars devoted to estate tax repeal/non-repeal inside the Beltway, we move the story along in the next Part to Congress's, especially the Senate's, actions during critical periods during the story. Here we shall see multiple votes with no final action; unprincipled legislative resolutions that are clearly temporary and hence require later votes; powerful actors such as the President and the Republican leadership unable to get their self-proclaimed desired outcome even when literally nothing seems to stand in their way; Senators "flipping" their votes or switching back and forth between repeal and non-repeal, with nary an explanation of their inconsistency, such that, at critical times, more than sixty sitting Senators had voted for repeal, and more than forty had voted against it; and so on. All the while money keeps flowing in to help fight these legislative battles, which turn on no new data or analysis of the underlying facts, and which resist obvious, sensible compromises at all turns. We believe that the sketch of the background, presented in this Part, shows that the preconditions for a reverse Mancur Olson game were in place—small groups/high stakes, no ballot box significance, two sides, and plausible, long-lived action—and that there is ample evidence, as presented in the next Part, that Congress in fact played its role, by stringing the issue along and avoiding sensible compromises. That is our story, and we see no reason not to stick to it.

We do note that others see a different story. In their recent book-length account of the estate tax saga, Professors Graetz and Shapiro give a contrasting account, both in general and in specific terms regarding the importance of money.[113] Graetz and Shapiro chronicle at some length the various players giving large sums to

(1990); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233, 240–41 (1979).

113. *See generally* GRAETZ & SHAPIRO, *supra* note 17.

effect permanent repeal. But the authors curiously back off from any implication that this money played an important role in Congress's actions and inaction. They claim, in the end, that "while money was an essential ingredient of the repeal movement's success, campaign contributions were a comparatively small part of the story."[114] Graetz and Shapiro want instead to lay the blame for repeal of the estate tax on the concerted, organized, and rhetorically adept moves of a comparative handful of "true believers," combined with the fact that opponents of repeal were asleep at the switch.

This explanation sounds in the traditional special-interest conception of politics, looking throughout at the role of the outside interests. There are, however, several serious questions about the Graetz-Shapiro explanation of the estate tax repeal. One, it does not quite explain why the estate tax was not in fact quite repealed.[115] Two, it also does not explain why the particular idea to repeal the estate tax got as far as it did, given that there are many issues now supported by a comparative handful of true believers (such as gun control, the protection of endangered species, prevention of global warming to name but a few). Finally, it does not explain the particular pattern of particular Senate votes, as we present in the next Part. If the true believers were so adept, why didn't the estate tax actually get repealed? And why did the Senate vote so often with no apparent effect? It seems implausible that rhetoric aimed at changing public opinion would lead to the precise, present—and bizarre—state of the law, with the odd one-year repeal of EGTRRA, and so on.

Focusing more narrowly on the role of money in the story, Graetz and Shapiro appear to have two reasons for seeing campaign contributions as limited in importance. One, they point out that the sums given to individual Congresspersons were small in relationship to the total amounts spent on campaigns.[116] Similarly, we concede that the $4.5 million we point to in the various Appendices is but a drop in the bucket of political campaign contributions these days; recall that over $2 billion was spent by candidates for federal office in 2004 alone.[117] But, of course, the sums noted by us and by Graetz and

114. *Id.*

115. Graetz and Shapiro did add a three-and-a-half-page Epilogue to their book; the main part of the text had taken the story through 2001 and EGTRRA's one-year "repeal" of the estate tax. *See id.* at 279–82. Graetz and Shapiro seem to believe that repeal is still imminent. *See id.*

116. *Id.* at 250.

117. *See supra* note 28 and accompanying text.

Shapiro were still large in the aggregate;[118] and contributions were repeated year in and year out, as we have argued, even outside the temporal ranges that both we and Graetz and Shapiro study. The story of estate tax repeal/non-repeal has been a major one inside the Beltway for well over ten years by now, as we detail in the next Part. Further, much of the money was likely well-hidden from view, as the careful researchers Graetz and Shapiro note: they point out that it is especially hard to find money supporting the tax, as from life insurance companies.[119] Also worth bearing in mind is the fact that there were other shakedown schemes going on at the same time, as we note in Part V. The estate tax story is but a part of a broader theme. Graetz and Shapiro also argue that lobbyists (not Congresspersons) collected much of the money, as an argument against any central role for campaign contributions in the story.[120] But, of course, lobbyists are an essential part of our tale, not an exception to it: they are critically important lubricants for the transactions, on all sides. Finally, and most important, the fact that the estate tax story does not explain all—or even possibly a great deal—of the money going to Congress simply does not mean that the converse is false: Money can still explain all (or possibly a great deal) of the estate tax story as it played out in Congress.

Two, Graetz and Shapiro, citing the views of lobbyists, assert that money, while it helps to explain *elections*, does not so much help to explain *legislation*.[121] But aside from the facts that one would expect

118. *See* The Center for Public Integrity, LobbyWatch: Policy & Taxation Group, http://www.publicintegrity.org/lobby/profile.aspx?act=clients&year=2003&cl=L002521 (last visited Apr. 17, 2006); The Center for Responsive Politics, Lobbying Database: Policy & Taxation Group: Client Summary, 2000, http://www.opensecrets.org/lobbyists/clientsum.asp?year=2000&txtname=Policy+%26+Taxation+Group; The Center for Responsive Politics, Lobbying Database: Policy & Taxation Group: Client Summary, 1999, http://www.opensecrets.org/lobbyists/clientsum.asp?year=1999&txtname=Policy+%26+Taxation+Group; The Center for Responsive Politics, Lobbying Database: Policy & Taxation Group: Client Summary, 1998, http://www.opensecrets.org/lobbyists/clientsum.asp?year=1998&txtname=Policy+%26+Taxation+Group. For general information about the estate tax repeal agenda advocated by the Policy and Taxation Group, see Policy & Taxation Group, http://www.policyandtaxationgroup.com/htm/repeal.html; *see also* Mayling Birney & Ian Shapiro, Death and Taxes: The Estate Tax Repeal and American Democracy 16–20 (Oct. 5, 2003) (unpublished manuscript, on file with the North Carolina Law Review), *available at* http://www.princeton.edu/~csdp/events/pdfs/BirneyShapiro.pdf (describing the large expenditures of several wealthy Americans over a span of many years to lobby for estate tax repeal).

119. GRAETZ & SHAPIRO, *supra* note 17, at 114–16.

120. *Id.* at 249–51.

121. *Id.* at 251 ("Many lobbyists echoed the view that campaign contributions might be important to getting politicians elected, but they are greatly overrated when it comes to getting legislation enacted, or halting it.").

lobbyists to say such a thing, and that elections are connected to legislation, we emphasize, again, that *not* explaining legislation is a critical aspect of the ex ante rent-extraction story.[122] In the traditional special-interest view of politics, groups buy results. And here, indeed, there would be a puzzle—largely omitted from Graetz's and Shapiro's book, which is about the death of the death tax[123]—as to why, in point of fact, the estate tax has *not* died, notwithstanding the large sums of money spent to kill it. Of course, in the ex ante rent-extraction/reverse Mancur Olson model, Congress, given a lucrative issue, does not want to do anything permanent. They want to string the issue along. The story lies, that is, in the dog's not barking—in nothing apparent happening. The proof in our particular pudding comes in the range of money given, as Graetz and Shapiro note, and in the continued voting on repeal of the estate tax *without ever obtaining permanent repeal*, a fact on which Graetz and Shapiro do not dwell.

IV. SHAKEDOWN AT GUCCI GULCH: A TALE OF DEATH AND TAXES

We now connect the dots of the prior two Parts by showing how the story of the estate tax, particularly the recent saga of attempts to repeal it (or not), illustrate the ex ante rent-extraction model of politics.

A. The Road to EGTRRA

The story as we tell it begins in the early 1990s, after the Reagan years made tax-cutting both possible and fashionable again.[124]

122. Jack Abramoff, a once-powerful lobbyist, is at the center of a large-scale public corruption investigation. In January 2006, he pled guilty to fraud, tax evasion and conspiracy to bribe public officials, as part of an agreement that requires him to cooperate with government investigators. Susan Schmidt & James V. Grimaldi, *Abramoff Pleads Guilty to 3 Counts: Lobbyist To Testify About Lawmakers in Corruption Probe*, WASH. POST, Jan. 4, 2006, at A1. In congressional hearings, a former Abramoff associate, Michael Scanlon, was questioned about the $4.2 million the Tigua, or Yselta del Sur Pueblo tribe of Texas, paid him to help it reclaim a license to operate a casino. Witnesses testified before the Senate that Scanlon and his business partners falsely promised, after taking money from the tribe, that they had been assured the license would be slipped into congressional legislation. However, in the same year, these lobbyists were working with former Christian Coalition head Ralph Reed to lobby the Texas legislature to close the Tigua's El Paso casino. *Consultant Accused of Cheating Indian Tribes: Advisor Takes the Fifth in Senate Casino Lobbying Hearing*, MSNBC.COM, Nov. 17, 2004, http://msnbc.msn.com/id/6516189/. This particular instance is an example of a prominent lobbyist being on both sides of the same issue, hence clearly wanting to string the issue along.

123. *But see supra* note 115 (discussing Graetz and Shapiro's Epilogue to their book).

124. *See* MCCAFFERY, *supra* note 62, at 22.

Representative Philip Crane (R-Ill.) and Senator Jesse Helms (R-N.C.) tried in 1991 and again in 1993 to introduce legislation to kill the estate tax.[125] Various versions of bills combined a repeal of the gift and estate taxes with repeal or deep cuts of all corporate income taxes and a ten percent cap on the individual income tax. Not surprisingly, these efforts were seen as a fringe cause and the bills were killed in committee.[126]

The tale picked up intensity starting in July 1993, however, when Christopher Cox, a conservative Republican Congressman (and now Commissioner of the Securities and Exchange Commission) from Orange County, California, a bastion of tax aversion, introduced H.R. 2717, the Family Heritage Preservation Act ("FHPA"). FHPA was a simple, clean bill—its dedicated purpose, in its own words, was "to repeal the federal estate and gift taxes and the tax on generation-skipping transfers."[127] Cox initially flew solo, with no cosponsors. FHPA lingered in Congress.[128] But by 1994 the bill began attracting support, mainly conservative Republicans, largely from Cox's tax-hating home base of California and the South. Dick Armey of Texas, a rising power in Republican legislative circles, signed on in July 1994, nearly a year after Cox's initial submission.[129] By the time FHPA died on the legislative vine, in the fall of 1994, it had twenty-nine cosponsors,[130] including three Democrats: still a small drop in the House's 435 total-Member bucket, but enough to cause a ripple or two. The tide was beginning to turn; plausibility, a critical condition in the ex ante rent-extraction game, was beginning to rear its head.

Meantime, out in the real world, Americans were getting richer. Throughout the boom time of the 1990s, America spawned thousands

125. To see Crane's proposals, see Crane Tithe Tax Act of 1991, H.R. 313, 102nd Cong. (1991) and Crane Tithe Act of 1993, H.R. 1190, 103rd Cong. (1993). To see Helms's proposals, see Tithe Tax Act of 1991, S. 1900, 102nd Cong. (1991) and Flat Tax Act of 1993, S. 193, 103rd Cong. (1993).

126. The bills introduced by Crane were referred to the House Committee on Ways and Means where there was no further action taken. More information on the Crane Tithe Act of 1991 and the Crane Title Act of 1993 is available at http://thomas.loc.gov/cgi-bin/bdquery/z?d102:h.r.00313: (last visited Apr. 17, 2006) and http://thomas.loc.gov/cgi-bin/bdquery/z?d102:h.r.01190: (last visited Apr. 17, 2006). More information on the Tithe Tax Act of 1991 and Flat Tax Act of 1993 is available at http://thomas.loc.gov/cgi-bin/bdquery/z?d102:s.01900: (last visited Apr. 17, 2006) and http://thomas.loc.gov/cgi-bin/bdquery/z?d103:s.00188: (last visited Apr. 17, 2006).

127. Family Heritage Preservation Act, H.R. 902, 105th Cong. (1997).

128. FHPA was introduced by Cox on July 23, 1993, but did not attract another cosponsor until June 22, 1994. Further background on FHPA is available at http://thomas.loc.gov/cgi-bin/bdquery/z?d103:h.r.02717: (last visited Apr. 17, 2006).

129. *Id.*

130. *Id.*

of new millionaires.[131] Looking back over time, a pattern emerges, as Table 1 suggested. Whenever a suitably large percentage of decedents became subject to the estate tax, change—in the form of weakening—was imminent.[132] As many individuals got involved in tax planning, tax avoidance, and even paying estate taxes, pressure for change reform mounted. The typical way for lawmakers to offer relief was to raise the exemption level, while maintaining high marginal tax rates—backwards from an optimal tax policy perspective, but consistent with an ex ante rent-extraction play.[133] Conditions were ripe for the game in the mid 1990s.[134]

Back inside the Beltway, while academics and commentators continued to fiddle, Congress seemed ready to burn, showing sympathy for killing the estate tax in toto. Representative Cox kept introducing bills to deliver the fatal blow. By 1996, Cox had enlisted 102 fellow Members as cosponsors (up from 0 in 1993 and 29 in 1994), and, by 1998, 204, including the entire Republican leadership.[135] As the tide tipped tax repeal solidly into the domain of the plausible, other Representatives started spearheading their own legislation. In February 1999, in the 106th Congress, Representatives Jennifer Dunn (R-Wash.) and John Tanner (D-Tenn.) introduced H.R. 8, the Death Tax Elimination Act, a bill to phase out and ultimately eliminate the gift and estate tax over a ten-year period.[136] Unlike Cox's bills, Dunn and Tanner's bill took off all the way to the legislative floors. It was put up for a vote in the House on June 9, 2000, and passed by the

131. *See* David Leonhardt, *Top Drawer; Defining the Rich in the World's Wealthiest Nation*, N.Y. TIMES, Jan. 12, 2003, § 4, at 1 (citing a near doubling or more of millionaires in the United States between 1980 and 2000).

132. The legislative response can be seen with the continuing rise of estate tax exemption levels under current law, I.R.C. § 2010 (2000), from $60,000 in 1976 to $500,000 in 1986 and then to $600,000 in 1996. The Taxpayer Relief Act of 1997 increased the effective exemption to $625,000 in 1998, $650,000 in 1999, $675,000 in 2000 and 2001, $700,000 in 2002 and 2003, $850,000 in 2004, $950,000 in 2005, and $1 million in 2006 and thereafter. Pub. L. No. 105-34, 111 Stat. 788 (codified as amended at I.R.C. § 530 (2000)). This constant rise kept the number of people who were subject to the estate tax small. David Joulfaian, *A Quarter Century of Estate Tax Reforms*, 53 NAT'L TAX J. 343, 352 (2000). The additional increases made by EGTRRA are discussed *infra* notes 164–66 and accompanying text.

133. Joulfaian, *supra* note 132, at 355.

134. *See* Leonhardt, *supra* note 131.

135. *See* The Library of Congress, Thomas, H.R. 784, http://thomas.loc.gov/cgi-bin/bdquery/z?d104:h.r.00784:. The FHPA, introduced by Representive Christopher Cox (R-Cal.), attracted substantial bipartisan support each year it was filed. WILLIAM W. BEACH, THE HERITAGE FOUNDATION, TIME TO REPEAL FEDERAL DEATH TAXES: THE NIGHTMARE OF THE AMERICAN DREAM (2001), http://www.heritage.org/Research/Taxes/BG1428.cfm#pgfId=1128712; *see also supra* notes 127–30 and accompanying text.

136. Death Tax Elimination Act, H.R. 8, 106th Cong. (2000).

overwhelming margin of 279 to 136, including the votes of sixty-five Democratic representatives.[137] The Senate followed suit a month later, passing the bill 59 to 39; this is the first of several Senate votes for which we set out roll calls in Appendix I. Note that there was broad bipartisan support, with nine Democrats, including several prominent "liberals," voting for repeal.[138] President Bill Clinton, as he had said he would do all along, vetoed the bill in August 2000, and the House just barely failed to override the veto.[139] The estate tax lived to die another day.[140] But plausibility had arrived, and, with it, both sides—pro-death and pro-life, as it were, vis-à-vis the death tax—had arisen, awoken, and formed.

B. Senate Rules[141]

We pause at this point in the running story, after the 106th Congress and before George W. Bush ascended into the Presidency along with the start of the 107th Congress, to discuss certain procedural aspects of tax and budget legislation that play a major role in the ongoing tale. The popular press and many scholarly accounts have tended to blame the odd status quo that EGTRRA wrought, as discussed more fully in the next Section—weakening the tax gradually through 2009, killing it in 2010, bringing it back to life in full force in 2011—on the constraints imposed by Senate budgeting and voting rules.[142] We believe that this blame is misplaced, for two broad reasons.

One, the rules are *endogenous*, that is, almost exclusively of legislators' own making, and subject to their change.[143] Indeed, the

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137. 146 CONG. REC. H4163 (daily ed. June 9, 2000).

138. 146 CONG. REC. S6781 (daily ed. July 14, 2000). The nine Democrats who voted for the Senate bill were John Breaux (La.), Max Cleland (Ga.), Diane Feinstein (Cal.), Mary Landrieu (La.), Blanche Lincoln (Ark.), Patricia Murray (Wash.), Charles Robb (Va.), Robert Torricelli (N.J.), and Ronald Wyden (Or.).

139. 146 CONG. REC. H7335 (daily ed. Sept. 7, 2000). The veto override vote was 274 to 157. With two-thirds of those voting needed to override a veto, the vote came up short by thirteen votes.

140. With sincere apologies to James Bond.

141. We are very grateful to Elizabeth Garrett for her help on this Section.

142. *See, e.g.*, GRAETZ & SHAPIRO, *supra* note 17, at 190–91; Karen C. Burke & Grayson M.P. McCouch, *Estate Tax Repeal and the Budget Process*, 104 TAX NOTES 1049, 1050 (2001) (examining the "budgetary impact" and "procedural obstacles to repeal" of the estate tax).

143. To draw a close parallel, consider the recent controversy over the use of the filibuster in the judicial confirmation process. Here Republicans, frustrated by the Democrats' use of filibusters to block judicial confirmations, considered invoking the "nuclear option" of eliminating, by rule, the potential to filibuster. In the end a tacit agreement was reached, and the use of the filibuster endures. But the point is that the

alleged pathologies may at least arguably have been chosen by the Senate, the pivotal actor in the game, to produce the end result—that is, to foster better rent-extraction potential. We do not press this particularly dark interpretation. We remain agnostic on the original motivation for the relevant rules: they may indeed have been put in place for other, "legitimate" reasons, such as to control runaway deficit spending, but then later became features in ex ante rent-extraction games, which we consider to be business as too often usual in contemporary politics. But in any case, blaming these rules for specific legislative outcomes is like Ulysses blaming the mast for his confinement. As the story unfolds, we will see critical times when the rules could have allowed for real action—permanent repeal for example—but lawmakers chose instead to hide behind the rules, prolonging the game.

Two, even accepting the budgeting and voting rules as being somehow fixed, at least in the short term, these rules by no means dictated the specific legislative outcomes that emerged. They certainly do not explain EGTRRA's bizarre resolution of the estate tax issue. There were choices throughout. Congress chose an unprincipled route that guaranteed future votes and legislative actions over sensible compromises that could have laid the matter to rest; the compromises would have been far fairer and more efficient to boot.

In any event, the federal budgeting process, and especially the Senate rules for budgeting bills, is an enormously complex topic, well beyond the scope of this Article.[144] A quick sketch, however, establishes the main themes just noted.

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sixty-vote rule *could* have changed. *See generally* Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331 (2005) (defending the filibuster as a valuable part of the judicial confirmation process); Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803 (recommending a "sliding scale approach" to reform filibuster); *Nuclear Nonsense*, NEW REPUBLIC, May 23, 2005, at 7 (arguing that Democrats should use the filibuster to block appointment of "conservative extremist judges"); James Werrell, Op-Ed., *Republicans Contemplate the 'Nuclear Option'*, HERALD (Rock Hill, S.C.), Apr. 29, 2005, at 4A, *available at* 2005 WLNR 6714123 (opining that if Republicans use the nuclear option to end filibuster, they will later regret it).

144. For good general sources on the federal budgeting process and rules, see generally WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (3d ed. 2001); WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 41–74 (5th ed. 2001); Michael W. Evans, *The Budget Process and the "Sunset" Provision of the 2001 Tax Law*, 99 TAX NOTES 405 (2003); Elizabeth Garrett, *Accounting for the Federal Budget and its Reform*, 41 HARV. J. ON LEGIS. 189 (2004); Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717 (2005); Elizabeth Garrett, *Rethinking the*

The House, by and large, acts by simple majority vote, and for this reason—and the fact that the membership in the House throughout the relevant time period was suitably anti-tax (that is, largely Republican)—that chamber became a minor player in the particular story of estate tax repeal/non-repeal.[145] The Senate, in contrast, largely acts as a super-majority institution because of the possibility of a filibuster, which can only be broken by a sixty-vote "cloture" motion, on almost all bills.[146] Making the situation more acute—more prone to inertia—is the fact that almost any amendment can be added to almost any bill.[147] Thus it is fairly easy to sink legislation that might otherwise get enacted by more than sixty votes simply by adding amendments that drive the support for the bill below sixty Senators, at which point the proposed legislation can be effectively filibustered.

To help obviate these difficulties, especially in passing acts aimed at reducing a deficit—that is, that entail tax increases and/or spending cuts—the Senate developed a "reconciliation process," whose roots lay in the Budget Act of 1974.[148] As it ultimately evolved over the next decade or two, reconciliation is a process that allows the Senate to limit debate and pass budget legislation with fifty votes (fifty-one in the case of a tie), provided that the total cost of the reconciliation bill stays within the confines of a budget resolution sanctioned by the Congressional Budget Office ("CBO"). The so-called Byrd Rule is now an integral part of the reconciliation process.[149] A matter of Senate rules and procedures, this "rule" is actually a series of provisions designed to keep "extraneous" matters out of a

Structures of Decisionmaking in the Federal Budget Process, 35 HARV. J. ON LEGIS. 387 (1998).

145. Subsequent work can address how the House, with its rules, can play variants of the ex ante rent-extraction game.

146. *See* Evans, *supra* note 144, at 406.

147. *See id.*

148. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974); *see also* ESKRIDGE ET AL., *supra* note 144, at 433–37 (discussing the reconciliation process); GRAETZ & SHAPIRO, *supra* note 17, at 180 (same); Evans, *supra* note 144, at 406–07 (discussing effect of the 1974 Budget Act on Senate procedure).

149. ROBERT KEITH, THE LIBRARY OF CONGRESS, THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" 1 (2005), *available at* http://opencrs.cdt.org/rpts/RL30862_20050407.pdf (Apr. 7, 2005); David Baumann, *The Octopus That Might Eat Congress*, 37 NAT'L J. 1470, 1473–75 (2005); *Byrd's Rule*, CONG. DAILY, Mar. 29, 2001, *available at* 2001 WLNR 4209145; Ryan Lizza, *White House Watch: Hardball 101*, NEW REPUBLIC, Jan. 24, 2005, at 15, 16.

reconciliation bill.[150] Any Senator can raise a "point of order" to a proposed amendment to a reconciliation bill.[151] If the point of order is sustained by the Senate parliamentarian—meaning that the substance of the amendment is found to be "extraneous" within the terms of the Byrd Rule—it requires sixty votes to reinstate the offending amendment. This mechanism keeps unrelated amendments, which would generally be subject to the usual sixty-vote procedures, from sneaking into a fifty-vote reconciliation bill process.

Of course, the whole rub then becomes what is and is not "related," that is, what potential amendments are and are not subject to the Byrd Rule. Perhaps the best known provision of the rule by now is subparagraph (E), added in 1987, and defining any amendment that "leads to a net increase in outlays or decrease in revenues beyond the years covered by the bill" as extraneous.[152] This rule was designed to prevent timing tricks—such as paying for an expenditure provision enacted now in an out year—from undermining the goal of deficit reduction.[153] There was much debate following 1974 and into the 1980s as to whether or not the reconciliation process even applied to tax *cutting* measures—recall that an initial goal of the process was to make it easier to *raise* taxes as a means of reducing the deficit.[154] This dispute was resolved in favor of the application of the rule,[155] and subparagraph (E) of the Byrd Rule led to the many "sunset" provisions in EGTRRA, which play a large role in the story to which we shall soon return. To still qualify within the fifty-vote process, amendments could not decrease revenues beyond the ten-year period of the reconciliation bill unless offset by a specific spending cut or other revenue increase.[156] Hence EGTRRA simply expires after 2010, and, with its expiration, the estate tax will be revived.

The panoply of rules mean that sometimes fifty or fifty-one, and other times sixty, votes would be needed to deal a final or near-final

150. *See* ESKRIDGE ET AL., *supra* note 144, at 443–46 (discussing the Byrd Rule); George Hager, *The Byrd Rule: Not an Easy Call*, 51 CONG. Q. WKLY. REP. 2027 (1993); Evans, *supra* note 144, at 409–10.

151. Keith, *supra* note 149, at 4.

152. Hager, *supra* note 150, at 2027; *see also* Evans, *supra* note 144, at 410 (discussing subparagraph (E)).

153. *See* Evans, *supra* note 144, at 410.

154. *Id.* at 407.

155. *See id.* at 410.

156. But another possibility, it appears, is that the Senate could simply agree to ignore the Byrd Rule. *See* Brody Mullins, *Move To Extend Lower Tax Rates on Capital Gains, Dividends Stalls*, WALL ST. J., Feb. 8, 2006, at A5 (referring to a possible compromise on the extension of capital gains preference under which Democrats would agree not to raise a Byrd Rule objection).

death blow to the estate tax. Fifty votes would suffice to kill the tax for the entire ten-year period, and longer with a specific spending cut to offset it; and fifty votes would also be enough once the Byrd Rule expired, as it was set to do in the fall of 2002. Otherwise, sixty votes would be needed for a permanent tax cut not offset by a spending cut. In order to maintain plausibility, one of the conditions for ex ante rent extraction, the Senate thus had to approach sixty votes on occasion, as it repeatedly has. But in order to maintain and prolong the shakedown scheme—one of the principal predictions of the phenomenon—the same Senate must then find a way *not* to act when but fifty votes would be needed. This it did, perfectly.

C. *EGTRRA: The Case Gets Curious*

With the election of George W. Bush in 2000, the estate tax seemed dead for sure. Candidate Bush had been clear and consistent in campaigning for a total abolition of the tax: a veto was inconceivable.[157] A majority of the Members of the 107th Congress were on record as having voted to repeal it as well under H.R. 8. In the Senate, fifty-one of the fifty-nine Senators who had voted to repeal the estate tax in the summer of 2000, in the 106th Congress, were still in office, and only fifty-one votes would be needed to include estate tax repeal in a reconciliation bill. On December 16, 2000, Speaker of the House Dennis Hastert was thus both speaking from a position of power and stating the then-reigning conventional wisdom when he said:

> Because we had such success in passing bipartisan measures to end the marriage penalty and the death tax in this session of Congress, I believe that these two bills could quickly be enacted in the law at the beginning of next year. That is why I advocate that we start with these two bills in the 107th Congress.[158]

President-elect Bush showed no signs of disagreeing. By January 2001, the media was reporting the death of the estate tax as an "easy" first step in Bush's tax-cutting plans.[159] On March 14, 2001, Representatives Dunn and Tanner, with 224 cosponsors, reintroduced

157. *See* GRAETZ & SHAPIRO, *supra* note 17, at 135–36.

158. Lizette Alvarez, *Congress; Speaker Clarifies Stand on Bush's Tax Plan*, N.Y. TIMES, Dec. 16, 2000, at A16 (quoting Representative Hastert).

159. Glenn Kessler, *Bush's Hand Greatly Strengthened*, WASH. POST, Jan. 26, 2001, at A1; Francine Kiefer & Abraham McLaughlin, *Bush Starts on Clear, Simple Plan*, CHRISTIAN SCI. MONITOR, Jan. 22, 2001, at 1.

H.R. 8, the Death Tax Elimination Act; within weeks, on April 4, the House overwhelmingly approved it by a vote of 274 to 154.[160]

The estate tax seemed dead at last.

But a funny thing happened on the way to the wake. The Senate never voted on stand-alone death tax repeal. Not this time—not, that is, at the first point in the story when they could have actually done something final.

Even as H.R. 8 was making its way through Congress, the nascent Bush administration was preparing its own general tax reduction bill, in consultation with prominent legislators. The administration's bill became 2001 H.R. 1836, the Economic Growth and Tax Relief Reconciliation Act of 2001.[161] EGTRRA was introduced into the House on May 15 and passed the next day.[162] The Senate amended the bill and passed it as such on May 23, 2001; conference reconciliation followed, with both chambers approving the ultimate act on May 26. President Bush signed Public Law 107-16, his first major legislative coup, on June 7, 2001.[163]

As noted, EGTRRA also killed the estate tax—sort of. More particularly, EGTRRA did indeed repeal the estate tax—but only for one year, 2010. Over the nine prior years, from 2001 to 2009, the law gradually raises the estate tax's exemption level and reduces its rates. Prior law had set the exemption level at $675,000 per person in the year 2000, set to increase to $1 million by 2006.[164] EGTRRA accelerated the increase to $1 million, to take effect in 2002. The exemption was set to increase to $1.5 million in 2004, $2 million in 2006, and $3.5 million in 2009. The top rate was to be cut—"slashed" would not be accurate—from 55% to 50% in 2002, then by 1% a year for the next five years, until it reached 45% in 2007, where it stays until 2009. The year 2010 sees total repeal of the estate tax.[165] And

160. Final Vote Results for Roll Call 84, http://clerk.house.gov/evs/2001/roll084.xml (last visited Apr. 17, 2006).

161. Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. No. 107-16, 115 Stat. 38.

162. For an overview on the legislative and executive actions taken with this bill, see http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR01836:@@@X.

163. EGTRRA, Pub. L. No. 107-16, 115 Stat. 38.

164. I.R.C. § 2010 (1986) (amended); *see also supra* note 128.

165. One "price" of total repeal is a repeal of the long-standing rule of the stepped-up basis for assets acquired on death. I.R.C. § 1014 (2000); *see* MCCAFFERY, *supra* note 62, at 31–32. EGTRRA replaces this role with a "carryover" basis rule akin to I.R.C. § 1015, for gifts. EGTRRA §§ 541–542, 115 Stat. 38, 76–86. *See generally* Roby B. Sawyers & Dennis I. Belcher, *Reform or Repeal the Transfer Tax System?*, TAX ADVISER, Oct. 2004, *available at* http://www.allbusiness.com/periodicals/article/231654-1.html.

2011 sees a total reinstatement, all the way back to 2001 levels. Table 4, in the notes, sets out these curious facts.[166]

Throughout the whole period, the gift tax remains intact, with a $1 million per person exemption level.[167] This assures that wealthy citizens cannot gift away their wealth in the years in which the estate tax has a higher exemption level or is altogether eliminated in 2010. An often-stated rationale for these provisions of EGTRRA was that the dollars involved fit within the $1.3 trillion tax cut budget resolution, and thus came within the reconciliation process, thereby requiring only fifty votes. A complete repeal of the estate tax throughout the ten-year period of the reconciliation bill would have required paring back on other tax cuts, cutting spending, or even raising some taxes. A permanent repeal of the estate tax would have had budget impacts beyond the ten-year period, triggering subparagraph (E) of the Byrd Rule, and hence requiring sixty votes. Thus, the story goes, the Senate's hands were tied, and Table 4 reflects the best that could have been done.

We do not buy that story.

It is true that the reconciliation process constrained the total budget impacts of EGTRRA. But EGTRRA's bizarre outcome vis-à-vis the estate tax was not *dictated* in any sense by those constraints. Consider four basic questions.

One, given the strong support for the Death Tax Elimination Act, H.R. 8, including the endorsement of the President and its overwhelming passage in the House, why not vote on it first, outside of EGTRRA? It seemed quite possible to get the requisite sixty votes simply to make this happen. Appendix I details the roll call votes of the Senators on H.R. 8 in the 106th Congress, three (of many) relevant votes in the 107th Congress, and one in the 108th Congress, a span of less than three years. Analysis (which is made

166.

Table 4. Estate Tax Exemption Level and Rates Under EGTRRA

Year	Exemption Level	Tax Rate
2002	$1,000,000	50%
2003	$1,000,000	49%
2004	$1,500,000	48%
2005	$1,500,000	47%
2006	$2,000,000	46%
2007	$2,000,000	45%
2008	$2,000,000	45%
2009	$3,500,000	45%
2010	Infinite	n/a
2011	$1,000,000	55%

167. *See* Buckley, *supra* note 68, at 2070.

easier by looking to Appendix II, which sets out the "flippers," or Senators who changed votes on repeal issues) reveals that, throughout these latter two Congresses, measured against the H.R. 8 baseline, there were *more than sixty Senators who had voted for repeal of the estate tax at one time or another.* Of course, the rub—and a central piece of evidence in the rent-extraction story—is that there were also *more than forty Senators who had voted against repeal of the estate tax at one time or another.* Consider, for example, the Kyl (R-Ariz.) Amendment of February 13, 2002, to get a "sense of the Senate" on permanent estate tax repeal. This vote passed 56 to 42, with two abstentions: not enough to signal a possible sixty-vote passage. But four Senators (McCain (R-Ariz.) plus Democrats Breaux (La.), Murray (Wash.), and Torricelli (N.J.)) had flipped their votes, from pro-repeal on H.R. 8 in 2000 to anti-repeal on the Kyl Amendment in 2002, and the two Senators not voting (Bennett (R-Utah) and Domenici (R-N.M.)) were consistently pro-repeal when they did vote. With the two nonvoters and any two of the four flippers, and but for the nonbinding nature of the vote, repeal would have happened in February 2002. The math shows enough play with the flippers and nonvoters that, at any point in time, the Senate in the 107th Congress could have gotten sixty votes for estate tax repeal—or not.

Two, why not allocate some of the funds within the budget bill's scope, $1.3 trillion, to repeal of the estate tax? Based on estimates by the independent Urban Institute-Brookings Tax Policy Center, less than $350 billion would have been lost by a total repeal of the estate tax for the ten-year period, 2002–2012.[168] If the traditional special-interest conception of politics were in play, simply repealing the tax for all of the ten-year period would seem to make sense (as would a stand-alone vote, as in the first question). After all, there were more small, targeted, well-financed interest groups concerned with total repeal of the estate tax than there were with the (comparatively) small rate reductions in the income tax—the latter being just the kind of broad-based tax relief *not* predicted by the traditional special-interest model. Indeed, a recurring theme in the story of estate tax

168. *See* Tax Policy Center, Estate Tax Returns and Liability, 2001–2015 (July 6, 2005), http://www.taxpolicycenter.org/TaxModel/tmdb/TMTemplate.cfm?TTN=T05-0119. Based on the most recent simulation by the Urban Institute-Brookings Institution Tax Policy Center, only $333.4 billion would have been lost by complete estate tax repeal for the ten-year period from 2002 to 2012. This is well within the $1.3 trillion available for allocation under EGTRRA for the 2001–2011 period.

repeal/non-repeal is of Congress's spending money in the form of broad-based tax relief *without* permanently repealing the estate tax.

Three, why was there no serious attempt to get a sixty-vote majority to override any possible point of order and repeal the estate tax anyway, with EGTRRA? During the reconciliation process, various amendments fell short—just short—of enactment. Yet a simple vote-counting, as noted above, indicates that sixty votes were well within reach.

Four—and most disturbing—why did EGTRRA do what it did vis-à-vis the estate tax: why did Congress take the funds used for estate tax relief and allocate them so oddly to the years 2002–2009 and, especially, 2010? Why not use these monies to lower the estate tax rates, and raise the exemption level, evenly throughout the decade?

We believe that there are no compelling answers to these questions outside the ex ante rent-extraction model. Principle cannot do the trick. It is hard to overstate how bizarre EGTRRA's "resolution" of the estate tax debate looks from the perspective of normatively appropriate lawmaking. Even before the ink was dry on Bush's signature, columnists and letter writers across the country had begun to complain about the fundamental unfairness and arbitrariness of the law's phase-in-out-down-and-up provisions.[169] As we have noted, the year 2010 was already being referred to by estate tax practitioners as the "throw Momma from the train" year.[170] EGTRRA's "compromise" on estate tax repeal could hardly withstand minimal scrutiny under more principled areas of American law. Consider the noted jurisprudential and constitutional scholar Ronald Dworkin's defense of the principle of integrity, or "principled consistency," in the law. We aspire to get the law right, Dworkin argues, to help the "law work itself pure."[171] And so we abstain from "checkerboard" legislation, where a given government benefit or right is handed out arbitrarily to citizens. Dworkin illustrates this idea with a proposed law to make abortions criminal for those women born in even, but not in odd years.[172] The intended rhetorical effect is powerful: readers respond in horror and see the obvious

169. *See, e.g.*, *Estate-Tax Reform Adds to Financial Planning Confusion, Experts Say*, BESTWIRE, May 31, 2001, *available at* LEXIS News & Business Library; John Hall, *Resurrection Possible for "Death Tax"*, RICH. TIMES-DISPATCH, May 31, 2001, at A11; Krugman, *supra* note 69.

170. *See* Krugman, *supra* note 69.

171. RONALD DWORKIN, LAW'S EMPIRE 47 (1986).

172. *Id.* at 178.

unattractiveness of such an approach to law. Yet consider the fate of a widow with an estate of $10 million under EGTRRA. Rather roughly, if she were to die on December 31, 2009, her estate's tax bill would be $3,000,000; hold on for one more second, into January 1, 2010, and the bill would be $0. The end-of-year drama would be even more dramatic at the close of 2010; die before the stroke of midnight, and die tax-free; survive into the first minutes of 2011, and owe $5,000,000. And these numbers could all be multiplied by ten, or one hundred, and so on. This pattern, where very large tax consequences turn on the year, indeed, the moment, of death, is strangely close to Dworkin's deliberately absurd example of abortion laws. The outcome is suitably inane, even by the standards of contemporary tax law, that few might expect EGTRRA to remain intact throughout the subsequent decade. But therein lies the rub: the impermanence of EGTRRA, bad for tax planning, was good for the business of Congress.

D. Curiouser Still: Life After EGTRRA

EGTRRA all but guaranteed further legislative action on the estate tax as the first decade of the new millennium wore on, and the country grew closer to the bizarre state of the law just discussed. Thus EGTRRA, in and of itself, gives reason to suspect that the ex ante rent-extraction game was in play. Congress had, in this one act of legislation, signaled that it had the power *both* to kill the estate tax, as it had been signaling with its votes on H.R. 8 and as it in fact did in EGTRRA for the year 2010, *and* to bring the tax back, as it did in EGTRRA for the year 2011 and as the failures to actually enact H.R. 8 had already suggested. Viewed through the admittedly cynical lens of this public choice model, EGTRRA's estate tax provisions were a thing of genius. But how else can the Act's estate tax provisions be interpreted? From the traditional special-interest group perspective, the only "winner" from the 2001 legislation was the set of putative estate taxpayers who knew with some certainty that they would die in 2010—no sooner, and certainly no later.

A contemporaneous journalistic account of the matter in the influential weekly *Tax Notes* set out how EGTRRA's estate tax provisions appeared to the cognoscenti at the time:

> It is difficult to understand exactly what proponents of repeal have accomplished after several years of bitter debate on this issue. With a sunset provision, the proponents of repeal will find themselves in the same position that they were in before the enactment of the new bill. Once again, they will have to

> push for new legislation that the president will have to sign. In effect, Congress has done little more than promise to return to the issue of estate and gift taxes in the future.[173]

What this account misses—as the rent-extraction conception does not—is that this result might have been *exactly* what Congress desired. It is precisely the "return to the issue . . . in the future" that Congress wanted, for each return to the issue further filled its coffers.

Like all rent-extraction games, the story of estate tax repeal/non-repeal has a timing dimension. There is good reason to believe that there is a fundamental asymmetry in estate tax legislation. As long as the tax exists, there can be frequent votes to reform or repeal it. Moreover, as long as the tax exists, there are the Mancur Olson groups that seek to keep or repeal it, the putative taxpayers with their organizations on the one hand, the estate tax avoidance industries and charitable organizations on the other. All of them are involved in the debate. But once the tax is repealed, it would be hard, as a practical and political matter, to bring it back. The tax raises little net revenue. Re-instituting it would raise howls of alarm from the putative taxpayers, but many of the current beneficiaries will have disbanded. The lawyers, accountants, and insurers will move on to other specialties, charitable foundations to alternate targets. The tightly organized special-interest groups will dissolve or lose focus on the narrow issue.

What EGTRRA did, then, was signal that Congress was serious about killing the estate tax, *without really doing so*. Plausibility had finally arrived. Every wealthy person concerned about estate tax minimization or avoidance—with the exception of those who knew with certainty that they would die in 2010—was given a reason to lobby Congress for permanent repeal. But the opponents of repeal—the estate tax specialists, insurance and nonprofit interests—had reason to hope, too. For the repeal was suitably off in the future—set to transpire after the conclusion of George W. Bush's second term, should it come to that—such that there could be no assurance that it would in fact obtain.[174]

EGTRRA did more than that. The unprincipled state of the 2009/2010/2011 years guaranteed some further votes as the decade

173. Buckley, *supra* note 68, at 2069.

174. Indeed, most practitioners viewed repeal as unlikely and saw uncertainty as good for business. *See* David Cay Johnston, *Lawyers and Accountants Expect Windfall from Estate Tax Repeal*, N.Y. TIMES, June 14, 2001, at C1.

wore on and the people began to complain, rightfully, about the arbitrariness and perversity of the law.

Congress was soon to learn what a golden goose it had created, indeed. As it happened, there was little need to wait. In early 2002, permanent estate tax repeal, in the guise of H.R. 8 (the Dunn-Tanner Death Tax Elimination Act, again), reappeared.[175] In February 2002, roughly half a year after EGTRRA was signed, the Senate agreed to the Kyl Amendment, as discussed above, which expressed the sense of the Chamber that estate tax repeal should be made permanent, by a vote of 56 to 42.[176] Why even bother having a "sense of the Senate" vote so soon after EGTRRA—when the sixty votes to permanently repeal the estate tax were presumably lacking (see our queries above)—and so long before the odd 2009/2010/2011 state of affairs was to come into play? Presumably, it was to show yet again that permanent repeal was indeed on the table, and was plausible, and this the Kyl Amendment did perfectly well—by getting sixty-two Senators, adding the flippers and nonvoters into the mix, on record as supporting repeal. Of course, the Kyl Amendment vote *also* revealed that forty-two Senators, at least, were prepared to vote against repeal. Here again was perfect, and perfectly plausible, two-sided shakedown territory. After briefly neglecting H.R. 8, which had been passed yet again by the House a year earlier, in 2001,[177] the Senate opened the floodgates by voting to have a vote on the bill: several months removed.[178] Opponents of repeal admitted to "being caught off guard" by the seriousness and rapidity of the move to make repeal permanent. The bidding window was open, so to speak, and newspapers reported that lobbyists flooded to Washington.[179] The Senate wavered. With a veto from President Bush inconceivable, projections consistently fell into the fifty-vote range, short—just short—of the sixty needed to prevent filibuster. In the end, after then-Senate Majority Leader Daschle (the Senate having switched party affiliation after Senator Jeffords of Vermont left the Republican

175. For a summary of action taken on H.R. 8, see http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR0008:@@@x.

176. 148 CONG. REC. S676–77 (daily ed. Feb. 13, 2002) (debate and Roll Call Vote No. 27 on S. 2850). See *infra* Appendix I for the full Senate's voting record on the Kyl Amendment.

177. 147 CONG. REC. H1457–58 (daily ed. Apr. 4, 2001) (Roll Call Vote No. 84).

178. For the list of votes taken on H.R. 8, see http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR0008:@@@x.

179. *See, e.g.*, Carl Hulse, *Battle on Estate Tax: How Two Well-Organized Lobbies Sprang into Action*, N.Y. TIMES, June 14, 2002, at A34.

party)[180] accelerated the vote, it indeed came up short, with fifty-four votes to kill the estate tax, and two abstentions.[181] But yet again, as Appendix I shows, there were five flippers from the 2000 H.R. 8 vote, with Feinstein (D-Cal.) joining the four who had flipped on the Kyl Amendment (McCain, Murray, Torricelli, and Breaux), and the two nonvoters (Crapo (R-Idaho) and Helms (R-N.C.)) were otherwise consistently pro-repeal. Senator Johnson (D-S.D.), who had flipped for anti-repeal on H.R. 8 to pro-repeal on the Kyl Amendment, now flipped back to anti-repeal. With the nonvoters voting, any four of the flippers staying on the repeal side of the fence would have made for permanent repeal.

The failure to kill the estate tax in the middle of 2002 did not end matters. Not by a long shot; not for a week. On the day of the vote, as reported on the front page of *The New York Times* and other national newspapers, Senator Phil Gramm (R-Tex.), a leading opponent of the tax, told his followers not to worry.[182] We could vote again on estate tax repeal, Gramm was quoted as saying, later in the year, after October, when but fifty votes would be needed.[183] Gramm even floated a date for the next vote on permanent repeal: November 5, 2002. That is, Election Day.[184] What did Gramm mean? He could have been referring to two alternatives for a simple majority vote on repeal. Either the provision could be attached to an autumn reconciliation bill, or it could be voted on after expiration of the Byrd Rule, set to expire in October 2002, such that the ten-year rule of subparagraph (E) could be avoided.[185]

Gramm's confident prognostication raised a troubling question, however. If the Senate could have killed the estate tax with fifty votes in October 2002, as Gramm knew, why did they even bother to vote under the sixty-vote rule in place in June (and to vote to have this vote, and so on)?

An even stranger question followed: When it got to October, with the midterm elections looming and Republicans firmly committed to killing the estate tax—or so they said, over and over—

180. *See id.*; Katherine Q. Seelye & Adam Clymer, *Balance of Power: The Power Shift: Senate Republicans Step Out and Democrats Jump In*, N.Y. TIMES, May 25, 2001, at A1.

181. 148 CONG. REC. S5434 (daily ed. June 12, 2002) (Roll Call Vote No. 151).

182. *See* Stephen Dinan, *Senate Republicans Unable to End Estate Tax Before 2010*, WASH. TIMES, June 13, 2002, at A06, *available at* 2002 WLNR 389028; Carl Hulse, *Effort to Repeal Estate Tax Ends in Senate Defeat*, N.Y. TIMES, June 13, 2002, at A1.

183. *As Estate Tax Repeal Dies, Supporters Vow To Fight On*, CONG. DAILY, June 13, 2002, *available at* 2002 WLNR 11726368.

184. *Id.*

185. *See id.*

why was there in fact no vote to kill the estate tax? In its place, there was a vote—to extend the sixty-vote Byrd Rule! This vote passed *unanimously*.[186] No one even proposed, in public at least, taking advantage of the window after the expiration of the rule to kill the estate tax. Once again, at a moment in the story when they could have dealt a death blow to the estate tax, Congress not only did not do so, but they also made it more difficult to *ever* do so.

The calendar year 2002 would not end until there was one more bizarre twist of fate. Republicans scored important victories in the midterm elections of 2002, regaining control of the Senate that they had lost after the Jeffords defection.[187] Some pundits and Republican politicos opined that tax cutting had much to do with this victory.[188] Making EGTRRA's tax cuts permanent became a mantra, of sorts, and legislation was introduced to do just that. Within weeks, however, the talk had changed from making *all* of EGTRRA's cuts permanent to making its *individual income tax* rate cuts permanent.[189] A popular President in control of both chambers of Congress somehow, some way, could not go all the way in killing the estate tax, even when more than sixty Senators seemingly could be found to support the move. Once again, the action seems backwards to a traditional special-interest group conception: broad stretches of taxpayers were being helped, a little bit each, where the small groups with high stakes were being relegated to the back burner, again.

The story continued into 2003 and the 108th Congress. Early in the year, Senator Kyl (R-Ariz.) proposed an amendment to the Budget Resolution for Fiscal Year 2004 that called for permanent repeal of the estate tax. The Senate agreed to Kyl's amendment by a

186. The extension of the Byrd Rule passed on October 16, 2002, by unanimous consent in the Senate. *See* DEMOCRATIC STAFF OF S. BUDGET COMM., SUMMARY OF THE FY 2004 REPUBLICAN BUDGET CONFERENCE REPORT 70 (Comm. Print 2003), *available at* http://budget.senate.gov/democratic/budgetresfy04/fy04_gopbudgetsummary.pdf. Apparently, the Byrd Rule continues to be extended. *Id.* (indicating that the rule was extended through September 30, 2008).

187. Mitch Frank, *Why the Senate Is Now Back in G.O.P. Hands: Credit Democratic Apathy and a Hustling Campaigner-in-Chief*, TIME, Nov. 18, 2002 at 48; *Moderate, Conservative GOP Factions Win New Troops*, CONG. DAILY, Nov. 6, 2002, *available at* LEXIS News & Business Library.

188. Frank, *supra* note 187.

189. This retreat can be seen in President Bush's State of the Union speech given on January 28, 2003, where he talked about making income tax cuts permanent but did not mention estate taxes. *See* President George W. Bush, The State of the Union Address (Jan. 28, 2003) (transcript available at 149 CONG. REC. H212–15 (daily ed. Jan. 28, 2003) (statement of Pres. Bush)).

slim majority, 51 to 48,[190] with one abstainer, Zell Miller, a then-Democrat of Georgia, a predictable pro-repeal vote. By now, there were no fewer than nine flippers.[191] But permanent repeal never materialized in 2003. The year 2003 also once again saw significant tax legislation, in the form of a major reconciliation bill, the Jobs and Economic Growth Tax Relief Reconciliation Act ("JGTRRA").[192] This Act accelerated various income tax provisions of EGTRRA, forming a further feature of George W. Bush's pattern of deep tax reductions, and leading to projections of massive deficits in the near and longer terms.[193] The money spent on non-estate tax reduction made ultimate repeal of the tax less likely ever to happen. Yet JGTRRA did not touch the estate tax, although the very existence of major tax legislation on the agenda kept the issue of estate tax repeal in play.[194]

As the presidential election year of 2004 bloomed into view, President Bush once again hit the stump, calling for permanent repeal of the estate tax in his State of the Union speech and out on the campaign trail—seemingly unembarrassed that this at-times highly popular President had been unable to orchestrate an event deemed inevitable by his allies just four years before. The many "flippers" (who changed votes) and "skippers" (who missed critical votes) seemed to pay no price whatsoever at the polls, nor, from what we

190. 149 CONG. REC. S4109 (daily ed. Mar. 20, 2003) (Roll Call Vote No. 62). See *infra* Appendix I for the full Senate voting record on this amendment.

191. These nine flippers were Breaux (D-La.), Collins (R-Me.), Feinstein (D-Cal.), McCain (R-Ariz.), Murray (D-Wash.), Snowe (R-Me.), Landrieu (D-La.), Baucus (D-Mont.), Bayh (D-Ind.), and Johnson (D-S.D.).

192. Jobs and Growth Tax Relief and Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752 (codified as amended in scattered sections of 26 U.S.C.). And in fact, by 2003 those seeking to kill the estate tax had begun to reconcile themselves to the notion of a less-than-complete victory, content to hew away at the tax, rather than eliminate it entirely. Representative Kyl, notable for his virulent opposition to the tax, began sub rosa efforts to raise the exemption level and lower the tax rate on inherited assets. Lobbyist Mark Bloomfield, president of the American Council for Capital Formation, also saw increased support for his less-than-full repeal efforts, which had in the past been rebuffed by the full-repeal constituency. *See* Jonathan Weisman, *Estate Tax Opponents May Be Forced To Compromise*, WASH. POST, Oct. 22, 2003, at E01.

193. *See* Daniel N. Shaviro, *Can Tax Cuts Increase the Size of Government?*, 18 CAN. J. OF LAW & JURIS. 135, 135 (2005).

194. "I've consistently been for full repeal, but I don't think the votes exist here in the Senate for it," said Sen. Blanche Lincoln, an Arkansas Democrat and a member of the Senate Finance Committee. Tom Herman, *Tax Report: Gridlock Likely on Estate-Tax Plans*, WALL ST. J., June 26, 2003, at D2. Lincoln pined for, and did not find, " 'a common-sense solution that can work now instead of just talking about this for eons.' " Jonathan Weisman, *Estate Tax Compromise Sought; House Set To Pass Repeal, but Supporters Know Senate Votes Aren't There*, WASH. POST, June 18, 2003, at E01.

can tell, even to have been seriously questioned about their differing votes. In April, the House was again readying to vote on permanent repeal, as they frequently had done throughout the period. And the Democrats, for their part, were hardly making hay with opposition to repeal—no serious proposal was ever raised to strengthen the tax, and John Kerry, by early spring the presumptive Democratic nominee, took no strong stand one way or another. Later, Kerry would float the idea of a $4 million exemption for families, and $10 million for farms and family-owned businesses, hardly restoring any meaningful redistribution of wealth to the landscape, but, once again, keeping the two-sided rent-extraction game in full play.[195]

And so it did not surprise us—although it seemed once more to catch commentators off guard—that the House of Representatives in the 109th Congress again voted, in the spring of 2005, for estate tax repeal.[196] By this time, things had begun to look stranger in the Senate. At a time in the story, yet again, where they seemed to have the votes and the popular support, Republican Senate leaders, such as John Kyl, long a point person for the repeal movement, began to back off their attempts at total repeal, now claiming that they lacked the votes, or that the new budget situation made total repeal difficult.[197] Estate tax opponents began openly discussing compromises, such as a higher exemption level, perhaps $10 million per person, or even the $3.5 million set for 2009, and a lower tax rate, such as fifteen percent, as the influential Stephen Moore, of the conservative anti-tax group Club for Growth, had started to discuss.[198]

The story continued into the summer of 2005. After so much talk of compromise, the votes needed for complete repeal finally seemed to be missing in the Senate.[199] Yet Senate Majority Leader Bill Frist (R-Tenn.) still pushed for a high-stakes vote on complete repeal of the estate tax.[200] Before the Senate's month long summer break,

195. *John Kerry's Framework to Cut the Deficit in Half and Invest in Affordable Health Care and Better Schools*, U.S. NEWSWIRE, Apr. 7, 2004, http://releases.usnewswire.com/GetRelease.asp?id=28532.

196. Mary Dalrymple, *Estate Tax Repeal Vote May Doom Deal*, SFGATE.COM, July 25, 2005, http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/07/25/national/w163228D66.DTL.

197. *See House Votes To Repeal*, *supra* note 17; Rosenbaum, *supra* note 17; Weisman, *supra* note 16; *see also* GRAETZ & SHAPIRO, *supra* note 17, at 280 (reporting the rumor that Kyl was seeking a compromise and Kyl's denial thereof). This is another point in the story inconsistent with the Graetz and Shapiro analysis.

198. *See* Jill Smallen & Charlie Mitchell, *The Week on the Hill*, 37 NAT'L J. 1154, 1154 (2005).

199. Dalrymple, *supra* note 196.

200. *Id.*

however, no vote occurred,[201] and the estate tax issue was further prolonged. With the idea of repeal seemingly effectively dead in the Senate, the focus shifted once again to compromise. Senator Kyl reinvented himself as a man for reforming, without repealing, the estate tax[202]: Kyl's plan tracked the Moore proposal, to raise the exemption level to $3.5 million and cut the tax rate to fifteen percent, while restoring a stepped-up basis for assets acquired on death.[203]

The careful reader might be tempted to ask at this point why that particular compromise proposal had not been floated before, as for example during consideration of EGTRRA's strange structure. After all, it has the simple appeal of effectively taxing capital gains at death as, for example, Canada now does, in lieu of an estate tax. But an even more careful reader might note that this "compromise" proposal was little more than repeal in drag, a tax so weakened that opponents soon began to think that outright repeal (with a carryover basis) would be a better outcome—for themselves, that is, for opponents of repeal![204] Hence this late stage shift to a compromise was, in fact, the opening of another round of pitched all-or-nothing votes, and more shakedown schemes.

While this reform option was gaining momentum, and with permanent repeal seeming dead at last, the Senate nonetheless scheduled a vote on estate tax repeal to be the first order of business upon reconvening after their month-long summer recess.[205] After the devastation caused by Hurricane Katrina, however, and the resulting financial burden on the federal government, more pressing matters flooded the Senate's agenda and it became politically unattractive to move ahead with the vote.[206] As a result, the estate tax's death was delayed yet again.[207] A vote on repeal during the 109th Congress is still theoretically possible, but if it does not pass, there is some speculation by pundits that Congress could pass a compromise to cut estate tax rates by two-thirds.[208] Senator Charles Grassley (R-Iowa), like Kyl, long a stalwart in the anti-estate tax movement and

201. Editorial, *The State of the Estate Tax*, N.Y. TIMES, Aug. 8, 2005, at A14.
202. *Id.*
203. *Id.* On basis discussion, see *supra* note 165.
204. *See* Leonard E. Burman et al., *Tax Break: Options for Reforming the Estate Tax*, 107 TAX NOTES 379, 381 (2005).
205. *Circumstances Force Frist To Postpone Estate Tax Vote*, OMB WATCHER, Sept. 6, 2005, http://www.ombwatch.org/article/articleview/3082/1/382.
206. Floyd Norris, *How To Assure the Very Rich Stay that Way*, N.Y. TIMES, Sept. 9. 2005, at C1.
207. *Id.*
208. *Id.*

Chairperson of the Senate Finance Committee, was quoted in January 2006 as saying:

> If we could get to a $5 million exemption with a 15 percent rate, I think that would be a decent compromise. That's not going to satisfy the President, but I think that that's the best I can do in the United States Senate in order to get the votes to get it passed.[209]

Pardon our skepticism, but we suspect that, if anything happens at all, a higher exemption level is more likely to occur than a significantly reduced rate, the higher rate/high exemption level being a feature of the reverse Mancur Olson phenomenon throughout its long, and growing, life span. This is also something that could have been done yesterday, as it happens.

E. Roads Not Taken

Two aspects of the legislative status quo as we write this stand out as especially odd. One, as just noted, the estate tax continues to have high exemption levels and high marginal tax rates: a combination that seems perverse from a sensible policy or revenue-raising perspective, and one counter to the trend in tax policy since at least Ronald Reagan in the 1980s (individual income tax rates had actually begun their descent under John F. Kennedy in 1963).[210] Two, EGTRRA left the law with that high exemption level/high marginal rate structure until 2010, when the tax is altogether repealed, only to be brought back, high marginal tax rates and all, in 2011. The combination of these aspects makes things even more bizarre. The estate tax reductions/repeal in EGTRRA were costly, under the revenue-scoring provisions in effect in Washington. Congress could have taken the money it in fact used in estate tax reduction and used it instead to lower the rates across the ten-year period. It did not do so.

The status quo did not arise from lack of more logical alternatives. Like most major legislation, EGTRRA was subject to many amendments on the Senate floor. Among the more than thirty substantive amendments (that included thinly-veiled spending

209. Interview by Ryan Donmayer & Mike McKee, Bloomberg News, with Senator Charles Grassley (Jan. 26, 2006), *available at* http://taxprof.typepad.com/taxprof_blog/2006/01/grassley_lowrat.html.

210. *See, e.g.*, Jerry Tempalski, *Revenue Effects of Major Tax Bills* 9–14 (Office of Tax Analysis, U.S. Dep't of the Treasury, Working Paper No. 81, 2003), *available at* http://www.ustreas.gov/offices/tax-policy/library/ota81.pdf.

proposals for education, vaccine research, and other pet projects) were alternative proposals to reform the estate tax.[211] Votes to leave the estate tax out of EGTRRA entirely failed by a vote of 42 to 57—that is, not by the sixty-vote margin needed for a permanent repeal.[212]

Compromise reform proposals failed as well. Senator Dorgan (D-N.D.) offered an amendment that would have sped up to 2003 and made permanent the increase in the exemption level and the reduction in the top rate that the bill allowed in 2009, but eliminated the temporary repeal.[213] This "reform, don't repeal" amendment was rejected on a vote of 43 to 56, with essentially the same supporters as for the Conrad amendment, to eliminate estate tax repeal.[214] Senator Feingold (D-Wis.), who by 2002 found himself the only member of the Senate to support neither reform nor repeal, proposed an amendment to retain estate taxes *only* for estates in excess of $100 million.[215] Was this a joke? If so, it was a joke that nearly became law: forty-eight Senators, mostly Democrats, voted for it.[216] The game was replayed in 2002, with Senators Dorgan and Conrad (D-N.D.) again offering amendments to H.R. 8 that would similarly have modified but not repealed the estate tax, allowing higher exemption levels and a lower marginal rate.[217] The Conrad Amendment, which would have essentially restored the 2003 version of the estate tax, was

211. 147 CONG. REC. 6, 8666–67, 8698 (2001) (Roll Call Vote No. 123) (text of Amendment 695); 147 CONG. REC. 6, 8665–66, 8700 (2001) (Roll Call Vote No. 122) (text of Amendment 703); 147 CONG. REC. 6, 8667, 8703 (2001) (Roll Call Vote No. 124) (text of Amendment 713); 147 CONG. REC. 6, 8760, 9035 (2001) (Roll Call Vote No. 135) (text of Amendment 726); 147 CONG. REC. 6, 8806, 9048–49 (2001) (Roll Call Vote No. 150) (text of Amendment 748); 147 CONG. REC. 7, 9049, 9050 (2001) (Roll Call Vote No. 151) (text of Amendment 770); 147 CONG. REC. 7, 9055–56 (2001) (Roll Call Vote No. 158) (text of Amendment 781).

212. The Conrad Amendment (#158), which proposed a clean elimination of repeal, failed in a bipartisan vote of 42 to 57, with six Democrats voting against eliminating repeal. The Dodd Amendment (#123), which proposed greater spending by both eliminating the estate tax repeal and raising income tax rates, failed by a vote of 39 to 60. 147 CONG. REC. 7, 9055-56 (2001) (Roll Call Vote No. 158) (text of Amendment 781).

213. 147 CONG. REC. 6, 8703 (2001).

214. *Id.*

215. 147 CONG. REC. 6, 8760 (2001).

216. Six Republicans voted in favor of Feingold's amendment, barely balanced by the eight Democrats who voted against—including four (Baucus, Cleland, Lincoln, and Wyden) on record as supporting elimination of the repeal. The switch in votes suggests that the close vote was close in number only, that is, that the leadership ensured that at most forty-nine votes would be cast in favor of the amendment. *See* 147 CONG. REC. 7, 9035 (2001).

217. A summary of the Conrad Amendment is available at http://thomas.loc.gov/cgi-bin/bdquery/D?d107:3:SPO3831. A summary of the Reid Amendment is available at http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SP03832:.

defeated by a vote of 38 to 60.[218] The Reid Amendment, essentially making permanent the 2009 version of the tax, failed by a vote of 44 to 54.[219]

Logic suggests that all or at least most Senators—with the possible exception of Senator Feingold—should support the reform proposals. The proposals sped up the schedule imposed by EGTTRA to increase the exemption level and reduce marginal rates, going to a simpler, higher exemption level across the board. Aside from being far more principled than EGTRRA, these bills offered significant estate tax reduction for the interim years 2003–2008, and thus would be expected to be popular with opponents of the tax. Recall that fifty-nine Senators had voted for permanent repeal in 2000, prior to Clinton's veto; over sixty voted for EGTRRA with its unprincipled one-year repeal; fifty-four voted in June 2002, for permanent repeal. And flippers abounded—making the 108th Senate one with enough votes to kill, or not, the death tax. Yet repeal supporters consistently voted against those reform efforts.

Of course, there are reasons why some repeal supporters may vote against the reform proposals: they may believe that they will eventually succeed in obtaining their first best choice of a permanent repeal, and that an interim reform would lower the likelihood of a total victory.[220] But the overall pattern of votes suggests that this attitude would have to be suspiciously rampant to explain the outcome. Consider the three policy options on the table in 2002 and later:

(1) Permanent repeal (H.R. 8);

(2) Higher exemption levels, lower tax rates without permanent repeal (Amendments 3832 and 3831, for example, would raise exemption levels to $3.5 to $4 million, while providing additional exemptions for family farms and businesses); and

218. *See* 148 CONG. REC. S5344–46 (daily ed. June 12, 2002).

219. The Conrad Amendment, # 3831, allowed an individual exclusion of $3.5 million and featured a fifty-percent maximum rate. The Dorgan Amendment, # 3832, allowed an individual deduction of $4 million, the rates specified in EGTRRA for 2009, and extra deductions for family businesses. Both amendments were introduced on June 12, 2002. 148 CONG. REC. 77, S5433–34 (2002) (text of Amendment 3831); 148 CONG. REC. 77, S5407, S5412, S5462 (2002) (text of Amendment 3832).

220. *See* Meade Emory, Letter to the Editor, *Another Take on the Estate Tax Situation in Congress*, 105 TAX NOTES 1705, 1706 (2004). *But cf.* Edward J. McCaffery, *The Estate Tax Stalemate Debate Continues*, 106 TAX NOTES 373, 373 (2005) (responding to Emory, *supra*).

(3) Nothing (keep EGTRRA status quo).

Policy Option 2 is, in a sense, a logical subset of Policy Option 1, as we have suggested. But the actual outcome of the Senate votes, taken at their face value, suggests, with the exception of Senator Feingold (who preferred Option 3 and possibly even an invigoration of the estate tax that was never on the legislative table), that *every Senator ranked Policy Option 3 as his or her second best outcome.* This made compromises impossible. Repeal supporters (including some Democrats) ranked matters as:

1 > 3 > 2

whereas repeal opponents (including some Republicans) ranked matters as:

2 > 3 > 1

Only this policy preference ordering explains the visible votes. Now in neoclassical economic theory, there is no disputing tastes, or preferences, as a general matter,[221] but we suggest that the ex ante rent-extraction phenomenon—in which Congress is milking a lucrative issue for itself—is the most parsimonious explanation of this pattern of suspiciously prevalent revealed preferences.

A second reason for the persistence of the troubling status quo may be that both parties, Republicans and Democrats, felt that they had a good election issue, and so were happy to take their votes to the people, as Senator Gramm seems to have thought.[222] In fact, this argument simply gives a rhetorical reason for the seemingly odd revealed preferences just described. But as such it is not compelling. It is highly doubtful that many voters had deep, well-formed preferences on the issue. The particular positions left standing after the spring 2002 votes were especially unlikely to sway many voters. Democrats would have to believe that constituents would support their attempts to weaken but not kill the estate tax, even though this hardly betrayed a commitment to meaningful redistribution of wealth; Republicans would have to believe that they would score votes by holding fast to a "repeal or bust" strategy, even though this strategy hurt people who might die before 2010, and left matters highly uncertain for all. (It is also the case that Republicans had to believe—quite plausibly, we think—that the average voter would not

221. George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76, 76–77 (1977).

222. Hulse, *supra* note 182.

figure out that the majority party almost certainly could have repealed the tax in toto, on its own, and certainly could have eliminated the problem for all but a handful of taxpayers, had it, alone, made different choices.)[223] It is simply hard to believe that very many voters had the preferences sketched out above, and would not prefer a sensible compromise and getting on with other issues to the continued preoccupation with the issue and unprincipled status quo. Finally, the prevalence of flippers, with seemingly no price paid at the polls, confirms the conviction that estate tax repeal is not a ballot box issue.[224]

Now it is true that in both major election cycles after EGTRRA, 2002 and 2004, Republican candidates and President Bush prominently featured their support for repealing the death tax, and the inadequacy of the alternatives offered by Democrats, in campaign speeches.[225] In the presidential campaign of 2004, Bush repeatedly advocated permanent repeal of the estate tax, as he had in 2000;[226] Kerry, not unlike Gore, made no strong argument to retain it. Similarly, some Democrats in what were thought to be the most competitive races, such as Senator Jean Carnahan of Missouri, promoted their reform proposals at every campaign opportunity.[227] But we suspect that these campaign pledges were meant for a different audience than the average voter: these were messages going

223. As Stephen Moore of the tax-cutting Club for Growth noted, " 'There are Republicans who want this debate to last forever, keep the [campaign] money flowing in, keep the Democrats off guard.' " Weisman, *supra* note 16.

224. Consider the results of the flippers and skippers in the various election years. In 2002, the flipper Landrieu (D-La.) was re-elected; the flipper Torricelli (D-N.J.) withdrew from the race amid unrelated allegations of bribery and corruption. The skipper Domenici (R-N.M.) was re-elected. In 2004, the flippers McCain (R-Ariz.) and Murray (D-Wash.) were re-elected; Breaux (D-La.) did not seek re-election, and the skippers Bennett (R-Utah) and Crapo (R-Idaho) were re-elected; Helms (R-N.C.) retired from the Senate in 2003. In 2006, the skipper Feinstein (D-Cal.) is up for re-election; we are betting that she makes it. In sum, no flipper or skipper has yet to lose a re-election bid, and the situation is unlikely to change any time soon.

225. Heading up to the 2004 election, Congress passed the American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418. The Act did not affect estate tax repeal, and was estimated by the CBO to cost the federal government $4.9 billion in 2005 and $10.1 billion from 2005–2009. CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE, H.R. 4520: AMERICAN JOBS CREATION ACT OF 2004, at 1 (2004), *available at* http://www.cbo.gov/ftpdocs/60xx/doc6007/hr4520pgoR.pdf (last visited Apr. 17, 2006). Thus, Republicans in taking credit for tax reductions while continuing to call for estate tax repeal ought to have been queried on why they had not been able to repeal the tax, or at least to have enacted some compromise reduction in it.

226. *The Issues: Estate Tax*, CBSNEWS.COM, Oct. 12, 2004, http://www.cbsnews.com/stories/2004/10/12/eveningnews/main648814.shtml.

227. John Berlau, *Message Received*, INSIGHT ON NEWS, Nov. 26, 2002, at 18, *available at* 2002 WLNR 5520916.

out to the groups with money and a stake in the small but monetarily significant game.[228] Yet more proof in the pudding obtains as we write: the 2004 Republican gains in the House and Senate, which were said to have brought permanent repeal closer, have seemingly set things back to the same compromise discussions that were *avoided* when Republicans had *less* power.[229] Elections aside, the spigot continues to flow; *sic transit gloria mundi*, in politics these days.

F. Summing Up

We believe that an ex ante rent-extraction phenomenon alone explains what Congress has and has not done with regards to estate tax repeal. Perhaps the best proof of this lies in the lack of persuasiveness of alternative explanations. Consider the three leading candidates.

A traditional special-interest model cannot explain the curious twists of fate because no group—except for lobbyists—really wins in the story. EGTRRA only rewarded those who knew with certainty that they would die in 2010; it left things uncertain for everyone else. The very uncertainty may have been good for those who do estate planning, except for the not unrealistic fear of total repeal. Once again, EGTRRA kept all special interests on the edge of their seats, or wallets, poised to give more as the decade unfolded.

Second, ballot box analysis does not carry much weight. Because there has been no strong popular outcry one way or another, estate tax repeal remains a marginal issue to most voters at best, and virtually all lawmakers have signaled a willingness to at least weaken the tax.[230] The politically popular position seems to be against the tax, and would certainly not seem to support the inane compromise reached by EGTRRA and maintained since. Various flippers paid no apparent price at the polls.[231]

Finally, it is extremely hard to see what Congress has done as being in the public interest, either from an efficiency perspective (where the better policy of lowering the rates and broadening the

228. A recent editorial contends that misguided Democrats, propping up the estate tax for the ostensible revenues it generates from the most wealthy, ought to submit to the reality of an ill-timed tax that collects little revenue and argues that for the sake of turning off the spigot, they ought simply to support repeal. Editorial, *Turn Off the Spigot*, SEATTLE TIMES, Mar. 16, 2005, at B6, *available at* 2005 WLNR 4106740.

229. Editorial, *Not So Permanent*, WALL ST. J., Feb. 11, 2005, at A10 (noting that the back-and-forth, without permanent repeal, persists, despite GOP advantage and Democratic election promises).

230. *See* McCaffery, *supra* note 220, at 373.

231. *See infra* Appendix I.

base was never even proposed) or from an equity one (because the particular compromise reached is unprincipled, whatever one thinks of the estate tax, and sensible compromises were consistently rejected).

What is left standing is the ex ante rent-extraction story. The estate tax issue over these pivotal years was an issue of high stakes to small, well-organized groups. It was two-sided, with money for all. By the late 1990s, repeal had become plausible, and plausibly long-lived. And Congress strung the issue along, repeatedly voting, rejecting sensible compromises, and finding a way at every turn to keep the issue alive—to keep the spigot open, as it were.

V. EXTENSIONS

What we have called the reverse Mancur Olson model or ex ante rent extraction is a simple, armchair prediction following from two facts: that politicians care about money and that they are rational. These facts alone suggest that politicians will use their powers where and when they can to generate special-interest groups—to lobby them or to be lobbied by them. Tax is an obvious subject of congressional power, fertile ground for rent-extraction possibilities, a general phenomenon of which the reverse Mancur Olson game is an instance. And hence it should not be a surprise that we found a strong, extended example of the syndrome in the estate tax repeal/non-repeal story—though we must admit that some of the rich details surprised even us, hardened cynics by now.

We further believe, moreover, that ex ante rent-extraction games are common, though we reiterate that we have no interest in claiming that it explains all or even any specifically quantifiable part of legislative action. But it is not just a tax story. Consider, quickly, three further tales.

A. Medical Malpractice and Tort Reform

The 2004 presidential election, featuring Democratic Vice-Presidential candidate John Edwards, a former plaintiff's attorney, cast a spotlight on the issue of tort reform.[232] The apparent flash point belied a simple truth: in virtually every session of Congress

232. Antony Collins, *U.S. Plaintiff Bar Set for a Fresh Assault*, LEGAL WK., Nov. 24, 2004, *available at* 2004 WLNR 18649099; Lawrence R. Jacobs & Michael Illuzzi, *In the Shadow of 9/11: Healthcare Reform in the 2004 Presidential Election*, 32 J.L. MED. & ETHICS 454, 457 (2004); *see also* Kathryn Zeiler, *Turning from Damage Caps to Information Disclosure: An Alternative to Tort Reform*, 5 YALE J. HEALTH POL'Y, L. & ETHICS 385, 385 (2005).

over the last decade, lawmakers have considered some bill to cap punitive damages, medical malpractice awards, or other settlements.[233] Additionally, mass torts—such as asbestos—have been the subject of particular legislative debate.[234] The issue has been "hot" for quite some time, largely because of the underlying dynamics. Democrats—for whom lawyers, especially trial lawyers, are the leading campaign contributors[235]—consistently oppose any such caps. Republicans, for whom doctors and insurers are major donors,[236] typically propose excessively restrictive caps, like $250,000 or less for non-pecuniary damages such as pain and suffering.[237]

Here again we have an issue of high stakes to small groups; it is of low salience for most voters and hence unlikely to affect many elections;[238] action is plausible; and the issue is two-sided and potentially long-lived. Once damage caps are in place, they become part of the landscape, are hard to change, and the special-interest groups in the economy reconfigure themselves. With these conditions in place, our predicted outcomes obtain: votes happen over and over, with obvious compromises—midrange caps—never obtaining support.[239] The ineluctable back-and-forth is such that even Congress

233. For a chronicle of the past two legislative sessions, see, for example, Andrea D. Stailey, Note, *The Health Act's Same Old Story, Different Congress Dilemma: Overhauling the Health Act and Unifying Congress as a Remedy for Tort Reform*, 40 TULSA L. REV. 187 (2004).

234. The Senate has had six hearings specifically on asbestos litigation over the last three years. *See* United States Senate Committee on the Judiciary, http://judiciary.senate.gov/search_notice.cfm?description=asbestos&Submit=Submit (last visited Apr. 17, 2006). This focus on particular types of torts is also strangely reminiscent of Dworkin's "checkerboard" legislation parody; Dworkin mocks the idea of treating accidents caused by different machines differently. DWORKIN, *supra* note 171, at 167.

235. Throughout the course of the 2004 election, lawyers and law firms comprised the second-highest campaign contribution group, sending nearly $167 million to political candidates. Seventy-four percent of their contributions were to Democrats. *See* Center for Responsive Politics, Lawyers/Law Firms: Long-Term Contribution Trends, http://www.opensecrets.org/industries/indus.asp?Ind=K01 (last visited Apr. 17, 2006).

236. In the 2004 election cycle, the health industry ranked fifth overall, with total donations of over $67 million, sixty-two percent of which were directed to Republicans. *See id.*

237. *See* Lou Dobbs, *Tort Reform Important to U.S. Future*, CNN.COM, Jan. 6, 2005, http://www.cnn.com/2005/US/01/06/tort.reform/.

238. Matthew C. Quinn, *Election 2004: Tort Reform Galvanizes Donors Not Voters*, ATLANTA J.-CONST., July 18, 2004, at A7.

239. In 2004, a Republican Senator proposed a bill that would, among other things, cap non-economic damages at $250,000. The bill stalled in the Senate and other piecemeal medical liability legislation was advanced. None of these matters passed. In 2005, a House Democrat proposed a bill that would cap non-economic damages at $878,000. *See* Tort Law: Medical Professional Liability, http://www.abanet.org/poladv/priorities/mpl.html (last visited Apr. 17, 2006).

has a sense of humor about the stillborn proposals. Representative Rahm Emanuel (D-Ill.) jokes, "We take up legislation that we have taken up before that is going nowhere and going nowhere fast. It is Groundhog Day here in this Congress."[240]

With President Bush's 2004 re-election and the Republican gains of seats in both houses of Congress, intuition suggested that passage of some tort reform package was imminent.[241] And, indeed, on at least one front, Bush appeared to have gained a victory in the war over legal reform, signing the Class Action Fairness Act of 2005—an act that attempts to curb excessive fees collected by class action lawyers and better protect the interests of individual class action plaintiffs—on February 24, 2005.[242] And yet both sides—with the obvious and expected absence of a congressional middle ground—are still steeling for further battle. The posturing is pronounced, with lawyers, doctors, and their attendant groups claiming early victory.[243]

Contested piecemeal actions remind the groups that their lobbyists and Congress can sometimes pass legislation: note that it is critical to the reverse Mancur Olson phenomenon that things sometimes do happen, because otherwise rational interest groups would stop playing. This means, of course, that estate tax repeal may one day come—or not—but only after decades of seemingly futile votes. Plausibility underscores loyalties and defeats the onset of futility. But it's still Groundhog Day, all over again.

B. Military Spending

Currently, the United States defense budget exceeds $400 billion.[244] It has been well-noted that the defense budget is slanted

240. 150 CONG. REC. H4141 (daily ed. June 15, 2004) (statement of Rep. Rahm Emanuel).

241. Robert G. Seidenstein, *Torts: The System Under Fire*, 13 N.J. LAW. 2493, 2493 (2004) (noting that even though the Republicans gained seats in both houses, the legislation is not a fait accompli); *The War on Tort*, ECONOMIST.COM, Jan. 26, 2006, http://www.economist.com/agenda/displayStory.cfm?story_id=3598225.

242. The Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4. For a description of the practical effects of the Act, see Ruth Bahe-Jachna et al., *New Federal Legislation: The Class Action Fairness Act of 2005*, GREENBERG TRAURIG ALERT, http://www.gtlaw.com/pub/alerts/2005/0302.pdf (last visited Apr. 17, 2006). This was a bill that had previously looked unlikely, and found great support from financial services companies. *See* Sheryl Fred, *Vying For Votes: Class Action Reform Backers Give Generously to Key Democrats*, CAPITAL EYE, http://www.capitaleye.org/inside.asp?ID=118 (last visited Apr. 17, 2006).

243. Correy E. Stephenson, *Doctors, Lawyers Claim Victory in Tort Reform Battle*, KAN. CITY DAILY REC., Nov. 25, 2004, *available at* 2004 WLNR 13184042.

244. Esther Schrader, *Bush to Boost Military Budget by 4.8%*, L.A. TIMES, Feb. 5, 2005, at A22.

towards "big weapons" programs at the expense of more ordinary matters, such as routine increases of troop salaries.[245] Large defense and other programs, such as NASA, create "bidding wars" among the handful of players able to deliver such programs. Here again, high-stakes, small groups, multiple sides, plausibility, and lengthy terms (because of the scale of the contracts) obtain. The best-case scenario, for Congress, is to propose a small number of high-stakes weapons programs, a few more than can realistically be enacted. This they do, even when they—that is, Congress—are asking for systems that the armed forces are *not* requesting.[246]

In his valedictory address, President Dwight Eisenhower famously decried the military-industrial complex.[247] At present, despite the incoming broadsides from commentators and the popular media, particularly in this age of terrorism,[248] big-ticket defense contractors continue to occupy positions of preeminence in the military budget.[249] The exigencies of wars in Iraq and Afghanistan led the Pentagon to muse openly about potential cuts to the weapons-technology portion of the budget.[250] Commentators considered a possible sea change from vast spending on technology to personnel, a

245. *See, e.g.*, BRIAN J. FINEGAN, THE FEDERAL SUBSIDY BEAST 17 (2000) ("[O]ne-third to one-half of all defense expenditures are nothing more than handouts to favored interests with no real military purpose . . . ."). In a current incarnation, ongoing trillion-dollar efforts to upgrade the Army's technology have begun to interfere with the workaday demands of the defense forces. All the while, transparency is lacking. Boeing, one of the primary contractors of future technology, specifically for work on the vaunted Future Combat Systems is taking in $21 billion. The company benefits from an exemption from disclosures required under the Federal Truth in Negotiations Act, despite having been embroiled in a number of contracting scandals in the past few years. Tim Weiner, *Drive to Build High-Tech Army Hits Cost Snags*, N.Y. TIMES, Mar. 28, 2005, at A1.

246. Weiner, *supra* note 245.

247. Dwight D. Eisenhower, Farewell Radio and Television Address to the American People, 21 PUB. PAPERS 1035 (Jan. 17, 1961) ("In the councils of government, we must guard against the acquisition of unwanted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.").

248. *See, e.g.*, Robert L. Borosage, Editorial, *Budget Offends Values of Working Americans*, SUN-SENTINEL (Ft. Lauderdale), Feb. 10, 2005, at 19A, *available at* LEXIS News & Business Library ("The military is also the largest cesspool of waste, fraud and abuse in the federal government."); Matthew Miller, Editorial, *Something Smells Rotten in Pentagon Budget*, SUN-SENTINEL (Ft. Lauderdale), Dec. 19, 2004, at 29A, *available at* LEXIS News & Business Library.

249. Sheryl Fred, Ctr. for Responsive Pol., The Best Defense: A Guide to the Interests Driving the FY2004 Defense Budget, http://www.opensecrets.org/news/defensebudget/index1.asp (last modified Oct. 1, 2003).

250. James Flanigan, *Troop Costs Take Bigger Bite Out of Defense-Contract Pie*, L.A. TIMES, Jan. 2, 2005, at C1; Fred Kaplan, *Rumsfeld's Dubious Deficit Cutting*, SLATE, Dec. 31, 2004, http://slate.msn.com/id/2111611/.

shift that would fundamentally alter the nature of the defense industry.[251] President Bush's proffered budgets, however, tell a different story. While troops see increases in both numbers and salary, the high-tech industry does not face the feared chopping block.[252] In fact, even though the White House has sought to reduce the rate of military growth in the 2006 budget, astute observers have noted the future increases in the picture. Loren Thompson, an expert on military affairs for the Lexington Institute, notes that the Pentagon is "proposing to increase weapons purchases by huge amounts in future years in order to obscure the fact that they are backing away from their investment plan in the near term."[253] Any downshift in spending also comes from a higher baseline, as Pentagon research and development costs have spiked forty percent between the fiscal years 2002 and 2005.[254]

Perhaps the recently-proposed military budget by President Bush incorporates a concession to congressional control of the military purse,[255] and thus aims for measured progress rather than dramatic savings. After all, congressional military spending so profligate that it sometimes exceeds the requests of the Pentagon indicates the type of close ties between the defense industry and Congress,[256] a murky relationship at best brought into some light by the recent travails of Representative Randy "Duke" Cunningham.[257] Small wonder, then, with Congress and defense contractors so intertwined, that the legislators jealously guard the industry that provides sustenance. Explaining the relationship from the congressional point of view, Representative William Moorhead (D-Pa.) analogized Lockheed's possible bankruptcy to "an 80-ton dinosaur who comes to your door

251. Flanigan, *supra* note 250.

252. *Id.*

253. *See* Schrader, *supra* note 244.

254. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1115 n.73 (2003) ("[M]ilitary spending means more influence for military contractors, which may lead to political pressure for more spending."); Kaplan, *supra* note 250.

255. *See* U.S. CONST. art. I, § 8, cls. 12–13.

256. *See* BARRY M. BLECHMAN, THE POLITICS OF NATIONAL SECURITY: CONGRESS AND U.S. DEFENSE POLICY 56 (1990) (noting that "every defense secretary since McNamara has wanted to reduce the department's overhead, but has been prevented from doing so by Congressional resistance").

257. *See* Charles R. Babcock & Jonathan Weisman, *Congressman Admits Taking Bribes, Resigns*, WASH. POST, Nov. 29, 2005, at A01. Cunningham (R-Cal.) admitted to taking $2.4 million in bribes, "including a Rolls-Royce, a yacht and a 19th-century Louis-Phillippe commode." *Id.* Cunningham, an eight-term House Member was a member of the influential House Appropriations Defense subcommittee and the Intelligence committee. He "demanded, sought and received" bribes from four co-conspirators, including two defense contractors over the past five years. *Id.*

and says, 'If you don't feed me, I will die.' And what are you going to do with 80 tons of dead, stinking dinosaur in your yard?"[258] A common practice in congressional budgeting for military matters is the "follow-on imperative," or the sequential provision of weapons systems contracts to different large companies, outside normal bidding processes, in order to keep them well-fed and alive.[259] Maintaining a sufficient number of groups as well as the plausibility of favorable action demands attentive legislation. In the District of Columbia, at least, dinosaurs never die.

C. *Regulation of the Broadcast Spectrum*

Finally—though we could happily go on—consider congressional action on the broadcast spectrum. When Congress auctioned this off, it could have allowed a large number of players to bid on bandwidth. Congress instead divided the spectrum into large, discrete chunks, artificially generating bidding wars among small groups with high stakes.[260] These groups then lobby—or, in our worldview, get forced to lobby—to get or keep the goods.

While commentators have often criticized Congress and the Federal Communications Commission ("FCC") for poor management, they typically consider current policy a function of regulatory ineptitude.[261] Observers seem simply to think that the FCC is "merely" miscorrecting the market.[262] Former FCC Chief

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258. *Id.*

259. *Id.* (citing Joel Yudken, *Economic Development, Technology, and Defense Conversion: A National Policy Perspective*, *in* THE OBSTACLES TO REAL SECURITY: MILITARY CORPORATISM AND THE COLD WAR STATE, IN REAL SECURITY: CONVERTING THE DEFENSE ECONOMY AND BUILDING PEACE 141, 149 (Kevin J. Cassidy & Gregory A. Bischak eds., 1993)).

260. Ronald Coase began the discussion of the Federal Communication Commission's ("FCC") misallocation, an idea subsequently taken up by many scholars. *See* R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 12–27 (1959) (explaining the rationale for the present FCC methodology); *see, e.g.*, ROGER NOLL ET AL., ECONOMIC ASPECTS OF TELEVISION COMMERCIAL REGULATION 112–20 (1973) (outlining the FCC's practices in television licensing); Douglas W. Webbink, *How Not To Measure the Value of a Scarce Resource: The Land-Mobile Controversy*, 23 FED. COMM. BAR J. 202, 204–08 (1969).

261. *See* John C. Roberts, *The Sources of Statutory Meaning: An Archaeological Case Study of the 1996 Telecommunications Act*, 53 SMU L. REV. 143, 145–47 (2000) (discussing the FCC as the "poster child" for regulatory ineptitude).

262. *See* Red Lion Broad. Co. v. Fed. Commc'ns Comm'n, 395 U.S. 367, 376 (1969) ("Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.").

Economist Thomas Hazlett sees the matter differently. Hazlett asserts that the political economy of the broadcast spectrum reflects a considered policy of rent extraction, rather than congressional or FCC incompetence.[263] The system ends up being mutually beneficial to regulators and licensees, both of whom receive higher rents as a result of the artificial scarcity generated by government control. Agents for organized broadcasting interests favor the licensing regime. But Congress prospers as well.

As a pacifier to consumers, lawmakers have imposed limited "public interest" requirements on broadcasters to create the illusion of responsible stewardship of a limited resource.[264] However, only in 1993 did Congress permit the FCC—not Congress—to hold auctions for spectrum licenses, and even then it did so only on a limited basis.[265] Recently, the rent-extraction policy has been extended to the digital television transition as well.[266] As the technologies change, Congress continues a relationship with broadcasters under which the market positions of a select few broadcasters depend on continued favorable legislative action. As Ken Johnson, spokesman for W.J. "Billy" Tauzin, former Democrat and former Republican from Louisiana and now a highly paid lobbyist for the pharmaceutical industry,[267] dutifully noted: "This is very valuable real estate, prime space, and broadcasters aren't going to get it for free. There's going to be a quid pro quo, and broadcasters are delusional if they think that quid pro quo is going to be minimal."[268]

We couldn't have put it better ourselves.

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263. Thomas W. Hazlett, *The Rationality of the Regulation of the Broadcast Spectrum*, 33 J. LAW & ECON. 133, 137–43 (1990).

264. Thomas W. Hazlett, *All Broadcast Regulation Politics Are Local: A Response to Christopher Yoo's Model of Broadcast Regulation*, 53 EMORY L.J. 233, 234–37 (2004).

265. *See* 47 U.S.C. § 309(j)(1) (1993) (explaining "competitive bidding"); Daniel Barnes, *Market Reforms in Telecommunications Licensing*, 48 ADMIN. L. REV. 439, 445–46 (1996). For an argument that the public trust doctrine that governs environmental law should apply to the electromagnetic spectrum, see Patrick S. Ryan, *Application of the Public-Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum*, 10 MICH. TELECOMM. TECH. L. REV. 285, 334–47 (2004), *available at* http://www.mttlr.org/volten/Ryan.pdf.

266. Thomas W. Hazlett & Matthew L. Spitzer, *Digital Television and the Quid Pro Quo*, 2 BUS. & POL. 115, 121 (2000).

267. *See* Frank Ahrens, *Tauzin Quits Chairmanship, Will Retire from House*, WASH. POST, Feb. 4, 2004, at A09, *available at* 2004 WLNR 16681382 (describing Tauzin as one of the most powerful Republicans in the House).

268. Sharon Schmickle, *Legislators, Broadcasters Hope To Clear the Air over TV Technology*, STAR TRIBUNE (Minneapolis), Sept. 17. 1997, at A10.

VI. CONCLUSION

The traditional view of politics features the special-interest model, given full academic dress in 1965 by Mancur Olson in his classic work, *The Logic of Collective Action*. Contrary to a primitive intuition that majorities may tyrannize minorities as Madison had feared,[269] this now-standard view maintains that small groups with high stakes in political action get formed and come to the power centers, relentlessly lobbying legislators to get their way. Special-interest groups are the "bad actors" in the political process, corrupt predators preying on innocent and well-meaning lawmakers.

While we do not deny that this characterization sometimes, maybe even many times, happens in the real world, we do not think it is the whole story. Legislators are rational people, and they want and need money. Rational people who want and need money and who have power will use that power to get money. Congress has extremely important powers over taxing, spending, and regulating. Rather than wait for special interests to come to them, we suspected that rational legislators would proactively solve the Mancur Olson problems, using their agenda-setting abilities and other tools to create and perpetuate issues of high stakes to small groups.

We found a prime example in the saga of estate tax repeal/non-repeal. Here was an issue of very high stakes to a very small group. Although Congress may not have initially sensed that it had a golden goose on its hands, once repeal of the tax in toto became plausible, they woke up and smelled the coffee, to use another metaphor. Here was an issue with small groups, high stakes, two sides, and plausible long-lived action. Sure enough, Congress has strung the issue along, repeatedly voting before resolving anything, and showing that it could kill, or not, the tax. All the while, money has poured into its coffers. Further examples abound. We mentioned briefly tort reform, with its pitched battles over damage caps; defense spending, with the high-stakes frenzy for big weapons programs; broadcast spectrum sales, with large and lumpy auctions. The telltale signs are repeated votes over issues without sensible compromise ever obtaining. It looks like partisan bickering, but it is not. To those who know how to look for it—it can be well-hidden, at the source—there is money, money everywhere.

So much is, we think, descriptive. Ex ante rent extraction can happen in theory; we believe we have shown it happens in practice as well. What to do about the matter, from a normative point of view, is

269. THE FEDERALIST NO. 10 (James Madison).

less clear. Here, we fear, our answers are less readily forthcoming. Ours has been a project in positive or descriptive social science: a hypothesis drawn out on a chalkboard, and tested in the laboratory of practical politics. No part of this project has involved claiming that ex ante rent extraction is good, bad, or indifferent. But we cannot avoid the deep-seated instinct that something is awry. The estate tax story illustrates this. Why is Congress voting over and over again on such a limited issue, leaving the law with a clearly unprincipled compromise, unable even to vote on obviously principled ones? At the same time, the perpetuation of the game gives a large reason why money persists in politics, and favors insiders—all insiders—against outsiders—any outsiders. Resources are diverted to unproductive games and sensible democratic resolutions to public policy problems are not even considered.

For the time being, our best and brightest hope lies in the light shone by the story itself. There is something unseemly about rent extraction, after all. Congress can take comfort in the traditional version of politics, blaming special-interest groups while claiming to try to do the right thing. It is harder to carry on once the people invert their gaze and start watching the watchdogs. We note, with some pride, that awareness of our theory seems to have come to the estate tax repeal debate.[270] But light alone may not go far enough. As many of the quotations above have suggested, Congress can be quite brazen about the games it is playing. We must thus consider more structural reform, aimed at curtailing and limiting the agenda-setting powers of legislators.

Reform will not be easy; getting money out of politics never really is. At a minimum, our analysis suggests inverting our gaze, away from the special interests currying favor with legislators, and over to the legislators who, like Dr. Frankenstein, may have created their own monster. Structural reforms to budgeting rules and vote protocols may be more central to campaign finance reform than campaign finance reform itself; we need to pay better attention to the reasons parties give money to politicians rather than just to the fact that they do. We do not yet have answers to this challenge; we hope that our analysis has helped to better pose the questions.

270. *See* Editorial, *supra* note 228 (quoting views of Edward J. McCaffery that the GOP may be just play-acting at killing the tax "because any permanent solution would turn off the spigot").

We conclude with the thought and hope that, in the end, it is time to better watch the watchdogs—before they help to "organize" all of us.

APPENDICES

These Appendices include several tables that present Senators' estate tax-related voting records and data on campaign contributions to them. In each of the tables, boxes shaded in gray signify "anti-repeal" votes. Boxes shaded in black signify "pro-repeal" votes. A blank white box indicates that the Senator was not in office at the time of the vote.

Vote histories on the following estate tax repeal measures from the 106th through the 108th Congress are included in each appendix table: (1) H.R. 8 pre-veto (7/14/00, 106th Congress): a bill to phase-out the estate and gift taxes over a ten-year period;[271] (2) Conrad Amendment #781 (5/22/01, 107th Congress): an amendment to H.R.1836, to eliminate the repeal of the estate tax;[272] (3) Kyl Amendment #2850 (2/13/02, 107th Congress): an amendment to express the sense of the Senate that the repeal of the estate tax should be made permanent by eliminating the sunset provisions;[273] (4) Waive Gramm Amendment #3833 (6/12/02, 107th Congress): a motion to permanently repeal the estate tax;[274] and (5) Kyl Amendment #288 (3/20/03, 108th Congress): an amendment to permanently repeal the estate tax.[275]

All data on voting records and campaign contributions presented can be found, respectively, on the U.S. Senate's Web site[276] and the Center for Responsive Politics Web site.[277]

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271. *See* U.S. Senate, Roll Call Vote No. 197, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=106&session=2&vote=00197 (last visited Apr. 17, 2006).

272. *See* U.S. Senate, Roll Call Vote No. 158, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00158 (last visited Apr. 17, 2006).

273. *See* U.S. Senate, Roll Call Vote No. 28, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=2&vote=00028 (last visited Apr. 17, 2006).

274. *See* U.S. Senate, Roll Call Vote No. 151, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=2&vote=00151 (last visited Apr. 17, 2006).

275. *See* U.S. Senate, Roll Call Vote No. 62, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00062 (last visited Apr. 17, 2006).

276. *See* U.S. Senate, Legislation and Records, Recent Votes, http://www.senate.gov/pagelayout/legislative/a_three_sections_with_teasers/votes.htm (last visited Apr. 17, 2006).

277. *See* The Center for Responsive Politics, Political Action Committees, http://www.opensecrets.org/pacs/index.asp?cycle=20048party=A (last visited Apr. 17, 2006). *See generally* The Center for Responsive Politics, http://www.opensecrets.org (last visited Apr. 17, 2006).

Appendix I. Senate Votes on Estate Tax Repeal in the 106th–108th Congress

Appendix I.A. Individual Senators' Votes on Estate Tax Repeal

		106th Congress	107th Congress			108th Congress
	Senator	H.R. 8 pre-veto	Conrad Amdt #781	Kyl Amdt #2850	Gramm Amdt #3833	Kyl Amdt #288
1	Abraham (R-MI)	Yea				
2	Akaka (D-HI)	Nay	Yea	Nay	Nay	Nay
3	Alexander (R-TN)					Yea
4	Allard (R-CO)	Yea	Nay	Yea	Yea	Yea
5	Allen (R-VA)		Nay	Yea	Yea	Yea
6	Ashcroft (R-MO)	Yea				
7	Baucus (D-MT)	Nay	Yea	Yea	Yea	Nay
8	Bayh (D-IN)	Nay	Nay	Yea	Yea	Nay
9	Bennett (R-UT)	Yea	Nay	Not Voting	Yea	Yea
10	Biden (D-DE)	Nay	Yea	Nay	Nay	Nay
11	Bingaman (D-NM)	Nay	Yea	Nay	Nay	Nay
12	Bond (R-MO)	Yea	Nay	Yea	Yea	Yea
13	Boxer (D-CA)	Nay	Yea	Nay	Nay	Nay
14	Breaux (D-LA)	Yea	Yea	Nay	Nay	Nay
15	Brownback (R-KS)	Yea	Nay	Yea	Yea	Yea
16	Bryan (D-NV)	Nay				
17	Bunning (R-KY)	Yea	Nay	Yea	Yea	Yea
18	Burns (R-MT)	Yea	Nay	Yea	Yea	Yea
19	Byrd (D-WV)	Nay	Yea	Nay	Nay	Nay
20	Campbell (R-CO)	Yea	Nay	Yea	Yea	Yea
21	Cantwell (D-WA)		Yea	Nay	Nay	Nay
22	Carnahan (D-MO)		Yea	Nay	Nay	
23	Carper (D-DE)		Yea	Nay	Nay	Nay
24	Chafee, L. (R-RI)	Nay	Yea	Nay	Nay	Nay
25	Cleland (D-GA)	Yea	Nay	Yea	Yea	
26	Chambliss (R-GA)					Yea
27	Clinton (D-NY)		Yea	Nay	Nay	Nay
28	Cochran (R-MS)	Yea	Nay	Yea	Yea	Yea
26	Coleman (R-MN)					Yea
30	Collins (R-ME)	Yea	Nay	Yea	Yea	Nay
31	Conrad (D-ND)	Nay	Yea	Nay	Nay	Nay
32	Cornyn (R-TX)					Yea
33	Corzine (D-NJ)		Yea	Nay	Nay	Nay
34	Coverdell (R-GA)	Yea				
35	Craig (R-ID)	Yea	Nay	Yea	Yea	Yea
36	Crapo (R-ID)	Yea	Nay	Yea	Not Voting	Yea
37	Daschle (D-SD)	Not Voting	Yea	Nay	Nay	Nay
38	Dayton (D-MN)		Yea	Nay	Nay	Nay
39	DeWine (R-OH)	Yea	Nay	Yea	Yea	Yea

		106th Congress	107th Congress			108th Congress
	Senator	H.R. 8 pre-veto	Conrad Amdt #781	Kyl Amdt #2850	Gramm Amdt #3833	Kyl Amdt #288
40	Dodd (D-CT)	Nay	Yea	Nay	Nay	Nay
41	Dole (R-NC)					Yea
42	Domenici (R-NM)	Yea	Nay	Not Voting	Yea	Yea
43	Dorgan (D-ND)	Nay	Yea	Nay	Nay	Nay
44	Durbin (D-IL)	Nay	Yea	Nay	Nay	Nay
45	Edwards (D-NC)	Nay	Yea	Nay	Nay	Nay
46	Ensign (R-NV)		Nay	Yea	Yea	Yea
47	Enzi (R-WY)	Yea	Nay	Yea	Yea	Yea
48	Feingold (D-WI)	Nay	Yea	Nay	Nay	Nay
49	Feinstein (D-CA)	Yea	Nay	Yea	Nay	Nay
50	Fitzgerald (R-IL)	Yea	Nay	Yea	Yea	Yea
51	Frist (R-TN)	Yea	Nay	Yea	Yea	Yea
52	Gorton (R-WA)	Yea				
53	Graham (D-FL)	Nay	Yea	Nay	Nay	Nay
54	Graham (R-SC)					Yea
55	Gramm (R-TX)	Yea	Nay	Yea	Yea	
56	Grams (R-MN)	Yea				
57	Grassley (R-IA)	Yea	Nay	Yea	Yea	Yea
58	Gregg (R-NH)	Yea	Nay	Yea	Yea	Yea
59	Hagel (R-NE)	Yea	Nay	Yea	Yea	Yea
60	Harkin (D-IA)	Nay	Yea	Nay	Nay	Nay
61	Hatch (R-UT)	Yea	Nay	Yea	Yea	Yea
62	Helms (R-NC)	Yea	Nay	Yea	Not Voting	
63	Hollings (D-SC)	Nay	Yea	Nay	Nay	Nay
64	Hutchinson (R-AR)	Not Voting	Nay	Yea	Yea	
65	Hutchison (R-TX)	Yea	Nay	Yea	Yea	Yea
66	Inhofe (R-OK)	Yea	Nay	Yea	Yea	Yea
67	Inouye (D-HI)	Nay	Yea	Nay	Nay	Nay
68	Jeffords (R-VT)	Nay	Yea	Nay	Nay	Nay
69	Johnson (D-SD)	Nay	Yea	Yea	Nay	Nay
70	Kennedy (D-MA)	Nay	Yea	Nay	Nay	Nay
71	Kerrey (D-NE)	Nay				
72	Kerry (D-MA)	Nay	Yea	Nay	Nay	Nay
73	Kohl (D-WI)	Nay	Not Voting	Nay	Nay	Nay
74	Kyl (R-AZ)	Yea	Nay	Yea	Yea	Yea
75	Landrieu	Yea	Yea	Yea	Yea	Nay
76	Lautenberg (D-NJ)	Nay				Nay
77	Leahy (D-VT)	Nay	Yea	Nay	Nay	Nay
78	Levin (D-MI)	Nay	Yea	Nay	Nay	Nay
79	Lieberman (D-CT)	Nay	Yea	Nay	Nay	Nay
80	Lincoln (D-AR)	Yea	Nay	Yea	Yea	Yea
81	Lott (R-MS)	Yea	Nay	Yea	Yea	Yea
82	Lugar (R-IN)	Yea	Nay	Yea	Yea	Yea
83	Mack (R-FL)	Yea				
84	McCain (R-AZ)	Yea	Nay	Nay	Nay	Nay
85	McConnell (R-KY)	Yea	Nay	Yea	Yea	Yea
86	Mikulski (D-MD)	Nay	Yea	Nay	Nay	Nay
87	Miller (D-GA)		Nay	Yea	Yea	Not Voting
88	Moynihan (D-NY)	Nay				

		106th Congress	107th Congress			108th Congress
	Senator	H.R. 8 pre-veto	Conrad Amdt #781	Kyl Amdt #2850	Gramm Amdt #3833	Kyl Amdt #288
89	Murkowski, F (R-AK)	Yea	Nay	Nay	Yea	
90	Murkowski, L (R-AK)					Yea
91	Murray (D-WA)	Yea	Nay	Nay	Nay	Nay
92	Nelson (D-FL)		Nay	Yea	Yea	Yea
93	Nelson (D-NE)		Nay	Yea	Yea	Yea
94	Nickles (R-OK)	Yea	Nay	Yea	Yea	Yea
95	Pryor (D-AR)					Nay
96	Reed (D-RI)	Nay	Yea	Nay	Nay	Nay
97	Reid (D-NV)	Nay	Yea	Nay	Nay	Nay
98	Robb (D-VA)	Yea				
99	Roberts (R-KS)	Yea	Nay	Yea	Yea	Yea
100	Rockefeller (D-WV)	Nay	Yea	Nay	Nay	Nay
101	Roth (R-DE)	Yea				
102	Santorum (R-PA)	Yea	Nay	Yea	Yea	Yea
103	Sarbanes (D-MD)	Nay	Yea	Nay	Nay	Nay
104	Schumer (D-NY)	Nay	Yea	Nay	Nay	Nay
105	Sessions (R-AL)	Yea	Nay	Yea	Yea	Yea
106	Shelby (R-AL)	Yea	Nay	Yea	Yea	Yea
107	Smith (R-NH)	Yea	Nay	Yea	Yea	
108	Smith (R-OR)	Yea	Nay	Yea	Yea	Yea
109	Snowe (R-ME)	Yea	Nay	Yea	Yea	Nay
110	Specter (R-PA)	Nay	Nay	Yea	Yea	Yea
111	Stabenow (D-MI)		Yea	Nay	Nay	Nay
112	Stevens (R-AK)	Yea	Nay	Yea	Yea	Yea
113	Sununu (R-NH)					Yea
114	Talent (R-MO)					Yea
115	Thomas (R-WY)	Yea	Nay	Yea	Yea	Yea
116	Thompson (R-TN)	Yea	Nay	Yea	Yea	
117	Thurmond (R-SC)	Yea	Nay	Yea	Yea	
118	Torricelli (D-NJ)	Yea	Yea	Nay	Nay	
119	Voinovich (R-OH)	Nay	Nay	Yea	Yea	Yea
120	Warner (R-VA)	Yea	Nay	Yea	Yea	Yea
121	Wellstone (D-MN)	Nay	Yea	Nay	Nay	
122	Wyden (D-OR)	Yea	Nay	Yea	Yea	Yea

Appendix I.B. Summary of Senators' Pro- and Anti-Repeal Votes

106th Congress		107th Congress				108th Congress	
	7/14/00, HR 8 pre-veto		5/22/01, Conrad Amdt #781	2/13/02, Kyl Amdt #2850	6/12/02, Gramm Amdt #3833		3/20/03, Kyl Amdt #288
Pro-Repeal	59	Pro-Repeal	57	56	54	Pro-Repeal	51
Anti-Repeal	39	Anti-Repeal	42	42	44	Anti-Repeal	48
Not Voting	2	Not Voting	1	2	2	Not Voting	1

Appendix II. Money Contributed to Flipping and Skipping Senators by Pro-Repeal PACs, 1998–2004

		106th Cong	107th Congress			108th Cong	Pro-Repeal PACs					
	Senator [Bold = Current Senator]	H.R. 8 pre-veto	Conrad Amdt #781	Kyl Amdt #2850	Gramm Amdt #3833	Kyl Amdt #288	Nat'l Assn of Realtors	Nat'l Fed of Indie Biz	Nat'l Beer Wh'saler Assn	Nat'l Rest. Assn	Nat'l Cat'men Beef Assn	TOTALS
Senators Who Flipped from PRO-REPEAL to ANTI-REPEAL												
1	Breaux (D-LA)	Y	Y	N	N	N	$ 6,000	$ -	$ 3,000	$ 6,000	$ -	$ 15,000
2	**Collins (R-ME)**	Y	N	Y	Y	N	$ 8,000	$ 9,749	$ 10,000	$ 9,000	$ -	$ 36,749
3	**Feinstein (D-CA)**	Y	N	Y	N	N	$ 11,000	$ -	$ -	$ -	$ 2,000	$ 13,000
4	**McCain (R-AZ)**	Y	N	N	N	N	$ 13,000	$ 4,000	$ 6,000	$ 1,000	$ 1,000	$ 25,000
5	**Murray (D-WA)**	Y	N	N	N	N	$ 1,000	$ -	$ -	$ -	$ -	$ 1,000
6	**Snowe (R-ME)**	Y	N	Y	Y	N	$ 10,000	$ 3,607	$ 9,500	$ 3,000	$ -	$ 26,107
7	Torricelli (D-NJ)	Y	Y	N	N		$ 5,000	$ -	$ 5,000	$ -	$ -	$ 10,000
Senator Who Flipped from PRO-REPEAL to ANTI-REPEAL to PRO-REPEAL to ANTI-REPEAL												
1	**Landrieu (D-LA)**	Y	Y	Y	Y	N	$ 22,000	$ -	$ 15,000	$ -	$ -	$ 37,000
Senators Who Flipped from ANTI-REPEAL to PRO-REPEAL												
1	**Specter (R-PA)**	N	N	Y	Y	Y	$ 14,000	$ -	$ 10,000	$ 9,500	$ -	$ 33,500
2	**Voinovich (R-OH)**	N	N	Y	Y	Y	$ 20,000	$ 16,500	$ 15,000	$ 11,000	$ -	$ 62,500
Senators Who Flipped from ANTI-REPEAL to PRO-REPEAL to ANTI-REPEAL												
1	**Baucus (D-MT)**	N	Y	Y	Y	N	$ 10,100	$ -	$ 1,000	$ -	$ 5,500	$ 16,600
2	**Bayh (D-IN)**	N	N	Y	Y	N	$ 19,000	$ -	$ 5,000	$ 5,500	$ -	$ 29,500
3	**Johnson (D-SD)**	N	Y	Y	N	N	$ 13,000	$ -	$ 1,000	$ 2,000	$ 2,000	$ 18,000

Average Amt. Given to Flipping Senators	**$ 11,700**	**$ 2,604**	**$ 6,192**	**$ 3,615**	**$ 808**	**$ 24,920**
Standard Deviation	$ 6,113	$ 5,067	$ 5,313	$ 4,109	$ 1,601	$ 15,670
Total Amount	$152,100	$33,852	$80,496	$46,995	$10,504	$323,960

	106th Cong	107th Congress			108th Cong	Pro-Repeal PACs					
Senator [Bold = Current Senator]	H.R. 8 pre-veto	Conrad Amdt #781	Kyl Amdt #2850	Gramm Amdt #3833	Kyl Amdt #288	Nat'l Assn of Realtors	Nat'l Fed of Indie Biz	Nat'l Beer Wh'saler Assn	Nat'l Rest. Assn	Nat'l Cat'men Beef Assn	TOTALS

Senators Who Would Be Consistently PRO-REPEAL if Not for Skipping One or More Votes

1	**Bennett (R-UT)**	Y	N	N/V	Y	Y	$ 14,000	$ 5,000	$ -	$ 8,500	$ -	$ 27,500
2	**Crapo (R-ID)**	Y	N	Y	N/V	Y	$ 12,000	$ 8,500	$ 20,000	$ 10,000	$ 2,199	$ 52,699
3	**Domenici (R-NM)**	Y	N	N/V	Y	Y	$ 10,000	$ -	$ 5,000	$ 4,000	$ 8,000	$ 27,000
4	Helms (R-NC)	Y	N	Y	N/V		$ 500	$ -	$ -	$ 2,000	$ -	$ 2,500
5	Hutchinson (R-AR)	N/V	N	Y	Y		$ 7,000	$ 10,000	$ 7,500	$ 9,999	$ 4,000	$ 38,499
6	Miller (D-GA)		N	Y	Y	N/V	$ 6,000	$ -	$ 5,000	$ 2,500	$ 1,000	$ 14,500

Average Amt. Given to Pro-Repeal Skipping Senators	$ 8,250	$ 3,917	$ 6,250	$ 6,167	$ 2,533	**$ 27,116**
Standard Deviation	$ 4,414	$ 4,187	$ 6,731	$ 3,424	$ 2,809	$ 16,069
Total Amount	$ 49,500	$ 23,502	$ 37,500	$ 37,002	$ 15,198	$ 162,696

Senators Who Would Be Consistently ANTI-REPEAL if Not for Skipping One or More Votes

1	Daschle (D-SD)	N/V	Y	N	N	N	$ 22,400	$ -	$ 3,500	$ 3,500	$ 2,000	$ 31,400
2	**Kohl (D-WI)**	N	N/V	N	N	N	$ -	$ -	$ -	$ -	$ -	$ -

Average Amt. Given to Anti-Repeal Skipping Senators	**$ 11,200**	**$ -**	**$ 1,750**	**$ 1,750**	**$ 1,000**	**$ 15,700**
Standard Deviation	$ 11,200	$ -	$ 1,750	$ 1,750	$ 1,000	$ 15,700
Total Amount	$ 22,400	$ -	$ 3,500	$ 3,500	$ 2,000	$ 31,400

Appendix III. Money Contributed to Consistent Pro-Repeal Senators by Pro-Repeal PACs, 1998–2004

		106th Cong	107th Congress			108th Cong	Pro-Repeal PACs					
	Senator [Bold = Current Senator]	H.R. 8 pre-veto	Conrad Amdt #781	Kyl Amdt #2850	Gramm Amdt #3833	Kyl Amdt #288	Nat'l Assn of Realtors	Nat'l Fed of Indie Biz	Nat'l Beer Wh'saler Assn	Nat'l Rest. Assn	Nat'l Cat'men Beef Assn	TOTALS
1	Abraham (R-MI)	Y					$ 10,000	$ 10,000	$ 10,000	$ 10,000	$ 4,000	**$ 44,000**
2	**Alexander (R-TN)**					Y	$ 10,000	$ 7,500	$ 12,000	$ 5,000	$ 5,000	**$ 39,500**
3	**Allard (R-CO)**	Y	N	Y	Y	Y	$ 11,000	$ 10,000	$ 10,000	$ 10,000	$ 10,000	**$ 51,000**
4	**Allen (R-VA)**		N	Y	Y	Y	$ 6,000	$ 10,000	$ 10,000	$ 10,000	$ 3,000	**$ 39,000**
5	Ashcroft (R-MO)	Y					$ 10,000	$ 10,000	$ 10,000	$ 10,000	$ -	**$ 40,000**
6	**Bennett (R-UT)**	Y	N	N/V	Y	Y	$ 14,000	$ 5,000	$ -	$ 8,500	$ -	**$ 27,500**
7	**Bond (R-MO)**	Y	N	Y	Y	Y	$ 17,000	$ 19,500	$ 19,000	$ 17,500	$ 1,000	**$ 74,000**
8	**Brownback (R-KS)**	Y	N	Y	Y	Y	$ 20,000	$ 14,000	$ 30,000	$ 15,000	$ 1,000	**$ 80,000**
9	**Bunning (R-KY)**	Y	N	Y	Y	Y	$ 8,500	$ 13,500	$ 20,000	$ 15,000	$ 1,500	**$ 58,500**
10	**Burns (R-MT)**	Y	N	Y	Y	Y	$ 10,000	$ 9,000	$ 10,000	$ 9,000	$ 8,500	**$ 46,500**
11	Campbell (R-CO)	Y	N	Y	Y	Y	$ 15,000	$ 11,928	$ 15,000	$ 9,000	$ -	**$ 50,928**
12	Cleland (D-GA)	Y	N	Y	Y		$ 15,000	$ -	$ -	$ 1,000	$ -	**$ 16,000**
13	**Chambliss (R-GA)**					Y	$ 6,000	$ 10,000	$ 10,000	$ 10,000	$ 10,000	**$ 46,000**
14	**Coburn (R-OK)**						$ -	$ 5,000	$ 5,000	$ -	$ -	**$ 10,000**
15	**Cochran (R-MS)**	Y	N	Y	Y	Y	$ 7,000	$ 2,000	$ 7,500	$ 1,000	$ 5,000	**$ 22,500**
16	**Coleman (R-MN)**					Y	$ 1,000	$ 10,000	$ 10,000	$ 10,000	$ 10,000	**$ 41,000**
17	**Cornyn (R-TX)**					Y	$ 5,000	$ 5,000	$ 10,000	$ 5,000	$ 5,000	**$ 30,000**
18	Coverdell (R-GA)	Y					$ 8,998	$ 6,500	$ -	$ 5,505	$ 1,000	**$ 22,003**
19	**Craig (R-ID)**	Y	N	Y	Y	Y	$ 11,000	$ 1,000	$ 7,500	$ 1,000	$ 7,250	**$ 27,750**
20	**Crapo (R-ID)**	Y	N	Y	N/V	Y	$ 12,000	$ 8,500	$ 20,000	$ 10,000	$ 2,199	**$ 52,699**
21	**DeMint (R-SC)**						$ 15,000	$ 10,000	$ 15,000	$ 15,000	$ 15,000	**$ 70,000**
22	**DeWine (R-OH)**	Y	N	Y	Y	Y	$ 10,500	$ 4,500	$ 1,000	$ 1,000	$ -	**$ 17,000**
23	**Dole (R-NC)**					Y	$ 5,250	$ 9,999	$ -	$ 10,000	$ 10,000	**$ 35,249**
24	**Domenici (R-NM)**	Y	N	N/V	Y	Y	$ 10,000	$ -	$ 5,000	$ 4,000	$ 8,000	**$ 27,000**
25	**Ensign (R-NV)**		N	Y	Y	Y	$ 20,000	$ 23,000	$ 15,000	$ 20,000	$ 5,000	**$ 83,000**

		106th Cong	107th Congress			108th Cong	Pro-Repeal PACs					
	Senator [Bold = Current Senator]	H.R. 8 pre-veto	Conrad Amdt #781	Kyl Amdt #2850	Gramm Amdt #3833	Kyl Amdt #288	Nat'l Assn of Realtors	Nat'l Fed of Indie Biz	Nat'l Beer Wh'saler Assn	Nat'l Rest. Assn	Nat'l Cat'men Beef Assn	TOTALS
26	**Enzi (R-WY)**	Y	N	Y	Y	Y	$ 13,000	$ 6,000	$ 7,500	$ 4,500	$ 6,000	**$ 37,000**
27	Fitzgerald (R-IL)	Y	N	Y	Y	Y	$ 6,000	$ 10,000	$ 10,000	$ (1,000)	$ 2,000	**$ 27,000**
28	**Frist (R-TN)**	Y	N	Y	Y	Y	$ 7,000	$ 10,000	$ 10,000	$ 1,000	$ 3,000	**$ 31,000**
29	Gorton (R-WA)	Y					$ 9,400	$ 10,000	$ 10,000	$ 10,000	$ 6,000	**$ 45,400**
30	**Graham (R-SC)**					Y	$ 6,000	$ -	$ 10,000	$ 10,000	$ 6,000	**$ 32,000**
31	Gramm (R-TX)	Y	N	Y	Y		$ 4,000	$ 2,119	$ -	$ -	$ -	**$ 6,119**
32	Grams (R-MN)	Y					$ 7,500	$ 10,000	$ 10,000	$ 9,000	$ 4,000	**$ 40,500**
33	**Grassley (R-IA)**	Y	N	Y	Y	Y	$ 19,000	$ 9,000	$ 20,000	$ 8,834	$ -	**$ 56,834**
34	**Gregg (R-NH)**	Y	N	Y	Y	Y	$ 17,000	$ 15,000	$ 19,000	$ 11,000	$ -	**$ 62,000**
35	**Hagel (R-NE)**	Y	N	Y	Y	Y	$ 15,000	$ 7,000	$ 15,000	$ 4,500	$ 4,511	**$ 46,011**
36	**Hatch (R-UT)**	Y	N	Y	Y	Y	$ 10,000	$ 2,500	$ 8,500	$ 9,000	$ 3,000	**$ 33,000**
37	Helms (R-NC)	Y	N	Y	N/V		$ 500	$ -	$ -	$ 2,000	$ -	**$ 2,500**
38	Hutchinson (R-AR)	N/V	N	Y	Y		$ 7,000	$ 10,000	$ 7,500	$ 9,999	$ 4,000	**$ 38,499**
39	**Hutchison (R-TX)**	Y	N	Y	Y	Y	$ 8,000	$ 2,000	$ 5,000	$ 5,000	$ -	**$ 20,000**
40	**Inhofe (R-OK)**	Y	N	Y	Y	Y	$ 8,000	$ (1,000)	$ 10,000	$ -	$ 4,000	**$ 21,000**
41	**Isakson (R-GA)**						$ 10,000	$ 5,000	$ 5,000	$ 8,500	$ 8,500	**$ 37,000**
42	**Kyl (R-AZ)**	Y	N	Y	Y	Y	$ 11,000	$ 2,000	$ 10,000	$ 6,000	$ 2,000	**$ 31,000**
43	**Lincoln (D-AR)**	Y	N	Y	Y	Y	$ 17,000	$ -	$ 17,000	$ 16,500	$ 2,000	**$ 52,500**
44	**Lott (R-MS)**	Y	N	Y	Y	Y	$ 6,000	$ 10,000	$ 10,000	$ 4,000	$ 2,000	**$ 32,000**
45	**Lugar (R-IN)**	Y	N	Y	Y	Y	$ 12,000	$ 1,500	$ 5,000	$ 10,000	$ 3,000	**$ 31,500**
46	Mack (R-FL)	Y					$ 750	$ -	$ -	$ -	$ -	**$ 750**
47	**Martinez (R-FL)**						$ 5,000	$ -	$ 10,000	$ 5,000	$ 5,000	**$ 25,000**
48	**McConnell (R-KY)**	Y	N	Y	Y	Y	$ 11,000	$ 5,000	$ 10,000	$ 10,000	$ 4,000	**$ 40,000**
49	Miller (D-GA)		N	Y	Y	N/V	$ 6,000	$ -	$ 5,000	$ 2,500	$ 1,000	**$ 14,500**
50	Murkowski, F (R-AK)	Y	N	Y	Y		$ 8,000	$ 3,000	$ 5,000	$ -	$ -	**$ 16,000**
51	**Murkowski, L (R-AK)**					Y	$ 10,000	$ 10,000	$ 10,000	$ 10,000	$ 10,000	**$ 50,000**
52	**Nelson (D-FL)**		N	Y	Y	Y	$ 6,000	$ -	$ 5,000	$ 5,000	$ 2,000	**$ 18,000**
53	**Nelson (D-NE)**		N	Y	Y	Y	$ 6,000	$ -	$ 10,000	$ 4,500	$ 4,000	**$ 24,500**

		106th Cong	107th Congress			108th Cong	Pro-Repeal PACs					
	Senator [Bold = Current Senator]	H.R. 8 pre-veto	Conrad Amdt #781	Kyl Amdt #2850	Gramm Amdt #3833	Kyl Amdt #288	Nat'l Assn of Realtors	Nat'l Fed of Indie Biz	Nat'l Beer Wh'saler Assn	Nat'l Rest. Assn	Nat'l Cat'men Beef Assn	TOTALS
54	Nickles (R-OK)	Y	N	Y	Y	Y	$ 13,000	$ 5,000	$ 15,000	$ 6,500	$ 2,000	**$ 41,500**
55	Robb (D-VA)	Y					$ 3,000	$ -	$ -	$ -	$ -	**$ 3,000**
56	**Roberts (R-KS)**	Y	N	Y	Y	Y	$ 9,000	$ 2,000	$ 7,500	$ 3,000	$ 8,250	**$ 29,750**
57	Roth (R-DE)	Y					$ 5,000	$ 11,000	$ 10,000	$ 10,000	$ 3,000	**$ 39,000**
58	**Santorum (R-PA)**	Y	N	Y	Y	Y	$ 11,500	$ -	$ 11,000	$ 10,999	$ 7,000	**$ 40,499**
59	**Sessions (R-AL)**	Y	N	Y	Y	Y	$ 11,000	$ 6,000	$ 10,000	$ 3,500	$ 5,000	**$ 35,500**
60	**Shelby (R-AL)**	Y	N	Y	Y	Y	$ 17,000	$ 6,000	$ 3,000	$ -	$ (1,000)	**$ 25,000**
61	Smith (R-NH)	Y	N	Y	Y		$ 12,000	$ 1,000	$ 4,000	$ 2,500	$ -	**$ 19,500**
62	**Smith (R-OR)**	Y	N	Y	Y	Y	$ 7,000	$ 10,000	$ 10,000	$ 10,000	$ 5,000	**$ 42,000**
63	**Stevens (R-AK)**	Y	N	Y	Y	Y	$ 11,000	$ 1,000	$ 1,000	$ 1,000	$ 1,000	**$ 15,000**
64	**Sununu (R-NH)**					Y	$ 5,500	$ 7,500	$ 10,000	$ 8,500	$ 8,500	**$ 40,000**
65	**Talent (R-MO)**					Y	$ 7,000	$ 10,000	$ 10,000	$ 11,000	$ 11,000	**$ 49,000**
66	**Thomas (R-WY)**	Y	N	Y	Y	Y	$ 10,000	$ 2,000	$ 10,000	$ 2,000	$ 5,000	**$ 29,000**
67	Thompson (R-TN)	Y	N	Y	Y		$ -	$ -	$ -	$ 1,000	$ -	**$ 1,000**
68	**Thune (R-SD)**						$ 1,000	$ 20,000	$ 10,000	$ 20,000	$ 20,000	**$ 71,000**
69	Thurmond (R-SC)	Y	N	Y	Y		$ -	$ -	$ -	$ -	$ -	**$ -**
70	**Vitter (R-LA)**						$ 10,000	$ -	$ 10,000	$ 5,000	$ 5,000	**$ 30,000**
71	**Warner (R-VA)**	Y	N	Y	Y	Y	$ 8,000	$ 1,500	$ 5,000	$ 3,000	$ 2,000	**$ 19,500**
72	**Wyden (D-OR)**	Y	N	Y	Y	Y	$ 14,000	$ -	$ 16,500	$ 2,000	$ -	**$ 32,500**
						Average Contribution	**$ 9,158**	**$ 5,945**	**$ 8,882**	**$ 6,644**	**$ 3,892**	**$ 34,521**
						Standard Deviation	**$ 4,802**	**$ 5,433**	**$ 5,932**	**$ 5,134**	**$ 4,009**	**$ 18,297**
						Total	**$659,376**	**$428,040**	**$639,504**	**$478,368**	**$280,224**	**$2,485,512**

Appendix IV. Money Contributed to Consistent Anti-Repeal Senators by Pro-Repeal PACs, 1998–2004

		106th Cong	107th Congress			108th Cong	Pro-Repeal PACs					
	Senator [Bold = Current Senator]	H.R. 8 pre-veto	Conrad Amdt #781	Kyl Amdt #2850	Gramm Amdt #3833	Kyl Amdt #288	Nat'l Assn of Realtors	Nat'l Fed of Indie Biz	Nat'l Beer Wh'saler Assn	Nat'l Rest. Assn	Nat'l Cat'men Beef Assn	TOTALS
1	**Akaka (D-HI)**	N	Y	N	N	N	$ 10,000	$ -	$ -	$ -	$ -	**$ 10,000**
2	**Biden (D-DE)**	N	Y	N	N	N	$ -	$ -	$ -	$ -	$ -	**$ -**
3	**Bingaman (D-NM)**	N	Y	N	N	N	$ 10,000	$ -	$ -	$ -	$ 1,000	**$ 11,000**
4	**Boxer (D-CA)**	N	Y	N	N	N	$ 14,000	$ -	$ -	$ -	$ -	**$ 14,000**
5	Bryan (D-NV)	N					$ 1,000	$ -	$ -	$ 1,000	$ -	**$ 2,000**
6	**Byrd (D-WV)**	N	Y	N	N	N	$ 7,000	$ -	$ 2,000	$ -	$ -	**$ 9,000**
7	**Cantwell (D-WA)**		Y	N	N	N	$ -	$ -	$ -	$ -	$ -	**$ -**
8	Carnahan (D-MO)		Y	N	N		$ 2,500	$ -	$ -	$ -	$ -	**$ 2,500**
9	**Carper (D-DE)**		Y	N	N	N	$ 3,050	$ -	$ -	$ -	$ -	**$ 3,050**
10	**Chafee, L. (R-RI)**	N	Y	N	N	N	$ 12,000	$ -	$ 10,000	$ 10,000	$ -	**$ 32,000**
11	**Clinton (D-NY)**		Y	N	N	N	$ 2,000	$ -	$ -	$ -	$ -	**$ 2,000**
12	**Conrad (D-ND)**	N	Y	N	N	N	$ 10,500	$ -	$ 10,000	$ 5,500	$ 5,000	**$ 31,000**
13	**Corzine (D-NJ)**		Y	N	N	N	$ -	$ -	$ -	$ -	$ -	**$ -**
14	Daschle (D-SD)	N/V	Y	N	N	N	$ 22,400	$ -	$ 3,500	$ 3,500	$ 2,000	**$ 31,400**
15	**Dayton (D-MN)**		Y	N	N	N	$ -	$ -	$ -	$ -	$ -	**$ -**
16	**Dodd (D-CT)**	N	Y	N	N	N	$ 12,000	$ -	$ -	$ -	$ -	**$ 12,000**
17	**Dorgan (D-ND)**	N	Y	N	N	N	$ 12,000	$ -	$ -	$ 6,000	$ -	**$ 18,000**
18	**Durbin (D-IL)**	N	Y	N	N	N	$ 7,000	$ -	$ -	$ -	$ -	**$ 7,000**
19	Edwards (D-NC)	N	Y	N	N	N	$ -	$ -	$ -	$ -	$ -	**$ -**
20	**Feingold (D-WI)**	N	Y	N	N	N	$ 10,000	$ -	$ 10,000	$ -	$ -	**$ 20,000**
21	Graham (D-FL)	N	Y	N	N	N	$ 9,000	$ -	$ -	$ 4,000	$ -	**$ 13,000**
22	**Harkin (D-IA)**	N	Y	N	N	N	$ 9,000	$ -	$ -	$ -	$ -	**$ 9,000**
23	Hollings (D-SC)	N	Y	N	N	N	$ 5,000	$ -	$ 7,000	$ -	$ -	**$ 12,000**
24	**Inouye (D-HI)**	N	Y	N	N	N	$ 18,000	$ -	$ -	$ -	$ -	**$ 18,000**
25	**Jeffords (R-VT)**	N	Y	N	N	N	$ 10,000	$ 6,000	$ 6,000	$ 7,000	$ -	**$ 29,000**

		106th Cong	107th Congress			108th Cong	Pro-Repeal PACs					
	Senator [Bold = Current Senator]	H.R. 8 pre-veto	Conrad Amdt #781	Kyl Amdt #2850	Gramm Amdt #3833	Kyl Amdt #288	Nat'l Assn of Realtors	Nat'l Fed of Indie Biz	Nat'l Beer Wh'saler Assn	Nat'l Rest. Assn	Nat'l Cat'men Beef Assn	TOTALS
26	**Kennedy (D-MA)**	N	Y	N	N	N	$ 7,000	$ -	$ -	$ -	$ -	**$ 7,000**
27	Kerrey (D-NE)	N					$ 5,000	$ -	$ 5,000	$ 1,000	$ 2,000	**$ 13,000**
28	**Kerry (D-MA)**	N	Y	N	N	N	$ -	$ -	$ -	$ -	$ -	**$ -**
29	**Kohl (D-WI)**	N	N/V	N	N	N	$ -	$ -	$ -	$ -	$ -	**$ -**
30	**Lautenberg (D-NJ)**	N				N	$ 2,000	$ -	$ -	$ -	$ -	**$ 2,000**
31	**Leahy (D-VT)**	N	Y	N	N	N	$ -	$ -	$ -	$ -	$ -	**$ -**
32	**Levin (D-MI)**	N	Y	N	N	N	$ 9,000	$ -	$ -	$ -	$ -	**$ 9,000**
33	**Lieberman (D-CT)**	N	Y	N	N	N	$ 11,000	$ -	$ 5,000	$ 5,000	$ -	**$ 21,000**
34	**Mikulski (D-MD)**	N	Y	N	N	N	$ 14,986	$ -	$ -	$ -	$ -	**$ 14,986**
35	Moynihan (D-NY)	N					$ -	$ -	$ -	$ -	$ -	**$ -**
36	**Obama (D-IL)**	Projected to Vote Anti-Repeal					$ 5,000	$ -	$ 5,000	$ -	$ -	**$ 10,000**
37	**Pryor (D-AR)**					N	$ 1,000	$ -	$ -	$ -	$ -	**$ 1,000**
38	**Reed (D-RI)**	N	Y	N	N	N	$ 10,000	$ -	$ -	$ -	$ -	**$ 10,000**
39	**Reid (D-NV)**	N	Y	N	N	N	$ 10,000	$ -	$ 5,000	$ 3,000	$ -	**$ 18,000**
40	**Rockefeller (D-WV)**	N	Y	N	N	N	$ 5,000	$ -	$ -	$ -	$ -	**$ 5,000**
41	**Salazar (D-CO)**	Projected to Vote Anti-Repeal					$ -	$ -	$ -	$ -	$ -	**$ -**
42	**Sarbanes (D-MD)**	N	Y	N	N	N	$ 9,999	$ -	$ -	$ -	$ -	**$ 9,999**
43	**Schumer (D-NY)**	N	Y	N	N	N	$ 13,500	$ -	$ 5,000	$ -	$ -	**$ 18,500**
44	**Stabenow (D-MI)**		Y	N	N	N	$ -	$ -	$ -	$ -	$ -	**$ -**
45	Wellstone (D-MN)	N	Y	N	N		$ -	$ -	$ -	$ -	$ -	**$ -**
					Average Contribution		$ 6,443	$ 133	$ 1,633	$ 1,022	$ 222	**$ 9,454**
					Standard Deviation		$ 5,719	$ 894	$ 3,038	$ 2,299	$ 850	$ 9,423
					Total		$289,935	$5,985	$73,485	$45,990	$9,990	$425,430

Appendix V. Money Contributed to Flipping and Skipping Senators by Anti-Repeal Insurance PACs, 1998–2004

		106th Cong	107th Congress			108th Cong	Anti-Repeal Insurance PACs			
	Senator [Bold = Current Senator]	H.R. 8 pre-veto	Conrad Amdt #781	Kyl Amdt #2850	Gramm Amdt #3833	Kyl Amdt #288	MetLife	New York Life	NW Life Mutual	TOTALS
Senators Who Flipped from PRO-REPEAL to ANTI-REPEAL										
1	Breaux (D-LA)	Y	Y	N	N	N	$ 2,000	$ 4,000	$ 2,000	$ 8,000
2	**Collins (R-ME)**	Y	N	Y	Y	N	$ 6,500	$ 4,000	$ 2,000	$ 12,500
3	**Feinstein (D-CA)**	Y	N	Y	N	N	$ 7,000	$ 1,000	$ -	$ 8,000
4	**McCain (R-AZ)**	Y	N	N	N	N	$ 7,000	$ -	$ -	$ 7,000
5	**Murray (D-WA)**	Y	N	N	N	N	$ 4,000	$ 1,000	$ -	$ 5,000
6	**Snowe (R-ME)**	Y	N	Y	Y	N	$ 5,000	$ 5,000	$ 2,000	$ 12,000
7	Torricelli (D-NJ)	Y	Y	N	N		$ 7,000	$ 9,000	$ 1,000	$ 17,000
Senator Who Flipped from PRO-REPEAL to ANTI-REPEAL to PRO-REPEAL to ANTI-REPEAL										
1	**Landrieu (D-LA)**	Y	Y	Y	Y	N	$ 5,000	$ -	$ -	$ 5,000
Senators Who Flipped from ANTI-REPEAL to PRO-REPEAL										
1	**Specter (R-PA)**	N	N	Y	Y	Y	$ 7,500	$ 10,000	$ -	$ 17,500
2	**Voinovich (R-OH)**	N	N	Y	Y	Y	$ 5,000	$ 7,500	$ 2,000	$ 14,500
Senators Who Flipped from ANTI-REPEAL to PRO-REPEAL to ANTI-REPEAL										
1	**Baucus (D-MT)**	N	Y	Y	Y	N	$ 11,000	$ 19,000	$ 16,500	$ 46,500
2	**Bayh (D-IN)**	N	N	Y	Y	N	$ 6,000	$ 3,000	$ 6,500	$ 15,500
3	**Johnson (D-SD)**	N	Y	Y	N	N	$ 5,000	$ 11,000	$ 3,000	$ 19,000
	Average Amount Given to Flipping Senators						$6,000	$5,731	$2,692	$14,423
	Standard Deviation						$2,131	$5,480	$4,530	$10,770
	Total Amount						$18,000	$17,193	$8,076	$43,269
Senators Who Would Be Consistently PRO-REPEAL if Not for Skipping One or More Votes										
1	**Bennett (R-UT)**	Y	N	N/V	Y	Y	$ 1,000	$ 6,000	$ 5,000	$ 12,000
2	**Crapo (R-ID)**	Y	N	Y	N/V	Y	$ 3,000	$ 2,000	$ 5,000	$ 10,000
3	**Domenici (R-NM)**	Y	N	N/V	Y	Y	$ 2,000	$ 1,000	$ 2,000	$ 5,000
4	Helms (R-NC)	Y	N	Y	N/V		$ -	$ -	$ -	$ -
5	Hutchinson (R-AR)	N/V	N	Y	Y		$ 2,000	$ -	$ 1,000	$ 3,000
6	Miller (D-GA)		N	Y	Y	N/V	$ 1,000	$ -	$ -	$ 1,000
	Average Amount Given to Pro-Repeal Skipping Senators						$1,500	$1,500	$2,167	$5,167
	Standard Deviation						$957	$2,141	$2,115	$4,450
	Total Amount						$9,000	$9,000	$13,002	$4,450

Senators Who Would Be Consistently ANTI-REPEAL if Not for Skipping One Vote

1	Daschle (D-SD)	N/V	Y	N	N	N	$ 14,500	$ 13,000	$ 12,000	$ 39,500
2	**Kohl (D-WI)**	N	N/V	N	N	N	$ -	$ -	$ -	$ -

Average Amount Given to Anti-Repeal Skipping Senators	$7,250	$6,500	$6,000	$19,750
Standard Deviation	$7,250	$6,500	$6,000	$19,750
Total Amount	$ 14,500	$ 13,000	$ 12,000	$ 39,500

Appendix VI. Money Contributed to Consistent Pro-Repeal Senators by Anti-Repeal Insurance PACs, 1998–2004

		106th Cong	107th Congress			108th Cong	Anti-Repeal Insurance PACs			
	Senator [Bold = Current Senator]	H.R. 8 pre-veto	Conrad Amdt #781	Kyl Amdt #2850	Gramm Amdt #3833	Kyl Amdt #288	MetLife	New York Life	NW Life Mutual	TOTALS
1	Abraham (R-MI)	Y					$ 6,000	$ 1,000	$ 2,500	$ 9,500
2	**Alexander (R-TN)**					Y	$ -	$ 1,000	$ -	$ 1,000
3	**Allard (R-CO)**	Y	N	Y	Y	Y	$ 4,000	$ 2,000	$ 6,000	$ 12,000
4	**Allen (R-VA)**		N	Y	Y	Y	$ -	$ -	$ 2,500	$ 2,500
5	Ashcroft (R-MO)	Y					$ 2,000	$ 3,000	$ 1,000	$ 6,000
6	**Bennett (R-UT)**	Y	N	N/V	Y	Y	$ 1,000	$ 6,000	$ 5,000	$ 12,000
7	**Bond (R-MO)**	Y	N	Y	Y	Y	$ 5,000	$ 3,000	$ 3,000	$ 11,000
8	**Brownback (R-KS)**	Y	N	Y	Y	Y	$ 3,000	$ 1,000	$ 3,000	$ 7,000
9	**Bunning (R-KY)**	Y	N	Y	Y	Y	$ 8,000	$ 9,000	$ 7,000	$ 24,000
10	**Burns (R-MT)**	Y	N	Y	Y	Y	$ 1,000	$ 4,000	$ 3,000	$ 8,000
11	Campbell (R-CO)	Y	N	Y	Y	Y	$ 3,000	$ -	$ -	$ 3,000
12	Cleland (D-GA)	Y	N	Y	Y		$ -	$ -	$ -	$ -
13	**Chambliss (R-GA)**					Y	$ 8,000	$ 3,000	$ -	$ 11,000
14	**Coburn (R-OK)**	Projected to Vote Pro-Repeal					$ 2,500	$ -	$ -	$ 2,500
15	**Cochran (R-MS)**	Y	N	Y	Y	Y	$ 3,000	$ 2,000	$ -	$ 5,000
16	**Coleman (R-MN)**					Y	$ -	$ 3,000	$ 4,500	$ 7,500
17	**Cornyn (R-TX)**					Y	$ 2,000	$ -	$ 3,000	$ 5,000
18	Coverdell (R-GA)	Y					$ 3,000	$ 4,000	$ 1,000	$ 8,000
19	**Craig (R-ID)**	Y	N	Y	Y	Y	$ 4,000	$ -	$ 2,000	$ 6,000
20	**Crapo (R-ID)**	Y	N	Y	N/V	Y	$ 3,000	$ 2,000	$ 5,000	$ 10,000
21	**DeMint (R-SC)**	Projected to Vote Pro-Repeal					$ 10,000	$ -	$ -	$ 10,000
22	**DeWine (R-OH)**	Y	N	Y	Y	Y	$ 3,000	$ 1,000	$ 1,000	$ 5,000
23	**Dole (R-NC)**					Y	$ 2,000	$ -	$ 5,000	$ 7,000
24	**Domenici (R-NM)**	Y	N	N/V	Y	Y	$ 2,000	$ 1,000	$ 2,000	$ 5,000
25	**Ensign (R-NV)**		N	Y	Y	Y	$ 10,000	$ 6,500	$ 1,000	$ 17,500
26	**Enzi (R-WY)**	Y	N	Y	Y	Y	$ 4,000	$ -	$ 6,500	$ 10,500
27	Fitzgerald (R-IL)	Y	N	Y	Y	Y	$ 3,000	$ -	$ -	$ 3,000
28	**Frist (R-TN)**	Y	N	Y	Y	Y	$ 4,500	$ 4,000	$ 3,000	$ 11,500
29	Gorton (R-WA)	Y					$ 2,000	$ 500	$ 4,000	$ 6,500
30	**Graham (R-SC)**					Y	$ 6,000	$ 6,000	$ 6,000	$ 18,000
31	Gramm (R-TX)	Y	N	Y	Y		$ 3,000	$ 5,000	$ 4,000	$ 12,000
32	Grams (R-MN)	Y					$ 2,500	$ 1,000	$ 4,000	$ 7,500
33	**Grassley (R-IA)**	Y	N	Y	Y	Y	$ 9,500	$ 15,000	$ 13,000	$ 37,500
34	**Gregg (R-NH)**	Y	N	Y	Y	Y	$ 11,000	$ -	$ 2,000	$ 13,000
35	**Hagel (R-NE)**	Y	N	Y	Y	Y	$ 6,500	$ 7,000	$ 4,000	$ 17,500
36	**Hatch (R-UT)**	Y	N	Y	Y	Y	$ 15,000	$ 7,000	$ 6,000	$ 28,000
37	Helms (R-NC)	Y	N	Y	N/V		$ -	$ -	$ -	$ -
38	Hutchinson (R-AR)	N/V	N	Y	Y		$ 2,000	$ -	$ 1,000	$ 3,000
39	**Hutchison (R-TX)**	Y	N	Y	Y	Y	$ 1,000	$ 2,000	$ 1,000	$ 4,000
40	**Inhofe (R-OK)**	Y	N	Y	Y	Y	$ 2,000	$ -	$ -	$ 2,000
41	**Isakson (R-GA)**	Projected to Vote Pro-Repeal					$ 10,000	$ -	$ -	$ 10,000
42	**Kyl (R-AZ)**	Y	N	Y	Y	Y	$ 11,500	$ 1,000	$ 1,000	$ 13,500
43	**Lincoln (D-AR)**	Y	N	Y	Y	Y	$ 10,500	$ 10,000	$ 4,000	$ 24,500
44	**Lott (R-MS)**	Y	N	Y	Y	Y	$ 2,000	$ 11,000	$ 2,000	$ 15,000
45	**Lugar (R-IN)**	Y	N	Y	Y	Y	$ 2,000	$ 4,000	$ 5,000	$ 11,000

		106th Cong	107th Congress			108th Cong	Anti-Repeal Insurance PACs			
	Senator [Bold = Current Senator]	H.R. 8 pre-veto	Conrad Amdt #781	Kyl Amdt #2850	Gramm Amdt #3833	Kyl Amdt #288	MetLife	New York Life	NW Life Mutual	TOTALS
46	Mack (R-FL)	Y					$ -	$ -	$ -	$ -
47	**Martinez (R-FL)**	Projected to Vote Pro-Repeal					$ 5,000	$ -	$ 3,500	$ 8,500
48	**McConnell (R-KY)**	Y	N	Y	Y	Y	$ 4,000	$ 5,000	$ 5,000	$ 14,000
49	Miller (D-GA)		N	Y	Y	N/V	$ 1,000	$ -	$ -	$ 1,000
50	Murkowski, F (R-AK)	Y	N	Y	Y		$ 1,000	$ -	$ 2,000	$ 3,000
51	**Murkowski, L (R-AK)**					Y	$ 2,000	$ -	$ 1,000	$ 3,000
52	**Nelson (D-FL)**		N	Y	Y	Y	$ 2,000	$ 4,500	$ -	$ 6,500
53	**Nelson (D-NE)**		N	Y	Y	Y	$ 20,000	$ 1,000	$ 11,500	$ 32,500
54	**Nickles (R-OK)**	Y	N	Y	Y	Y	$ 2,000	$ 7,000	$ 3,000	$ 12,000
55	**Robb (D-VA)**	Y					$ 5,000	$ -	$ 2,000	$ 7,000
56	**Roberts (R-KS)**	Y	N	Y	Y	Y	$ 2,000	$ -	$ -	$ 2,000
57	**Roth (R-DE)**	Y					$ 9,999	$ 10,000	$ 10,000	$ 29,999
58	**Santorum (R-PA)**	Y	N	Y	Y	Y	$ 7,000	$ 6,250	$ -	$ 13,250
59	**Sessions (R-AL)**	Y	N	Y	Y	Y	$ 7,000	$ 3,000	$ 3,000	$ 13,000
60	**Shelby (R-AL)**	Y	N	Y	Y	Y	$ 5,000	$ -	$ 6,000	$ 11,000
61	Smith (R-NH)	Y	N	Y	Y		$ 1,000	$ -	$ -	$ 1,000
62	**Smith (R-OR)**	Y	N	Y	Y	Y	$ 11,000	$ 6,000	$ 7,000	$ 24,000
63	**Stevens (R-AK)**	Y	N	Y	Y	Y	$ 2,000	$ -	$ 1,000	$ 3,000
64	**Sununu (R-NH)**					Y	$ 4,000	$ -	$ -	$ 4,000
65	**Talent (R-MO)**					Y	$ -	$ -	$ 1,000	$ 1,000
66	**Thomas (R-WY)**	Y	N	Y	Y	Y	$ 3,000	$ -	$ -	$ 3,000
67	Thompson (R-TN)	Y	N	Y	Y		$ 2,000	$ -	$ (1,000)	$ 1,000
68	**Thune (R-SD)**	Projected to Vote Pro-Repeal					$ -	$ -	$ -	$ -
69	Thurmond (R-SC)	Y	N	Y	Y		$ -	$ -	$ -	$ -
70	**Vitter (R-LA)**	Projected to Vote Pro-Repeal					$ -	$ -	$ -	$ -
71	**Warner (R-VA)**	Y	N	Y	Y	Y	$ 1,000	$ -	$ 1,000	$ 2,000
72	**Wyden (D-OR)**	Y	N	Y	Y	Y	$ 1,000	$ -	$ -	$ 1,000
						Average Contribution	$ 4,049	$ 2,344	$ 2,500	**$ 8,892**
						Standard Deviation	$ 3,975	$ 3,296	$ 2,869	$ 8,216
						Total	$ 291,499	$ 168,750	$ 180,000	$ 640,249

Appendix VII. Money Contributed to Consistent Anti-Repeal Senators by Anti-Repeal Insurance PACs, 1998–2004

		106th Cong	107th Congress			108th Cong	Anti-Repeal Insurance PACs			
	Senator [Bold = Current Senator]	H.R. 8 pre-veto	Conrad Amdt #781	Kyl Amdt #2850	Gramm Amdt #3833	Kyl Amdt #288	MetLife	New York Life	NW Life Mutual	TOTALS
1	**Akaka (D-HI)**	N	Y	N	N	N	$ 1,000	$ -	$ -	$ 1,000
2	**Biden (D-DE)**	N	Y	N	N	N	$ -	$ -	$ -	$ -
3	**Bingaman (D-NM)**	N	Y	N	N	N	$ 1,000	$ -	$ -	$ 1,000
4	**Boxer (D-CA)**	N	Y	N	N	N	$ 3,000	$ -	$ -	$ 3,000
5	Bryan (D-NV)	N					$ -	$ -	$ -	$ -
6	**Byrd (D-WV)**	N	Y	N	N	N	$ -	$ -	$ -	$ -
7	**Cantwell (D-WA)**		Y	N	N	N	$ -	$ -	$ -	$ -
8	Carnahan (D-MO)		Y	N	N		$ -	$ -	$ -	$ -
9	**Carper (D-DE)**		Y	N	N	N	$ 5,000	$ 5,500	$ 1,000	$ 11,500
10	**Chafee, L. (R-RI)**	N	Y	N	N	N	$ 1,750	$ 1,000	$ -	$ 2,750
11	**Clinton (D-NY)**		Y	N	N	N	$ 10,000	$ 3,500	$ -	$ 13,500
12	**Conrad (D-ND)**	N	Y	N	N	N	$ 17,500	$ 18,000	$ 12,000	$ 47,500
13	**Corzine (D-NJ)**		Y	N	N	N	$ 1,000	$ -	$ -	$ 1,000
14	Daschle (D-SD)	N/V	Y	N	N	N	$ 14,500	$ 13,000	$ 12,000	$ 39,500
15	**Dayton (D-MN)**		Y	N	N	N	$ -	$ -	$ -	$ -
16	**Dodd (D-CT)**	N	Y	N	N	N	$ 18,000	$ 14,000	$ 9,000	$ 41,000
17	**Dorgan (D-ND)**	N	Y	N	N	N	$ 12,000	$ 10,000	$ 4,000	$ 26,000
18	**Durbin (D-IL)**	N	Y	N	N	N	$ 10,500	$ 1,000	$ 6,000	$ 17,500
19	Edwards (D-NC)	N	Y	N	N	N	$ -	$ -	$ -	$ -
20	**Feingold (D-WI)**	N	Y	N	N	N	$ 1,000	$ -	$ -	$ 1,000
21	Graham (D-FL)	N	Y	N	N	N	$ 2,000	$ 2,000	$ 1,000	$ 5,000
22	**Harkin (D-IA)**	N	Y	N	N	N	$ 2,000	$ -	$ -	$ 2,000
23	Hollings (D-SC)	N	Y	N	N	N	$ -	$ -	$ -	$ -
24	**Inouye (D-HI)**	N	Y	N	N	N	$ -	$ -	$ -	$ -
25	**Jeffords (R-VT)**	N	Y	N	N	N	$ 4,000	$ -	$ 4,000	$ 8,000
26	**Kennedy (D-MA)**	N	Y	N	N	N	$ 2,000	$ -	$ -	$ 2,000
27	Kerrey (D-NE)	N					$ 4,000	$ -	$ -	$ 4,000
28	**Kerry (D-MA)**	N	Y	N	N	N	$ -	$ -	$ -	$ -
29	**Kohl (D-WI)**	N	N/V	N	N	N	$ -	$ -	$ -	$ -
30	**Lautenberg (D-NJ)**	N				N	$ -	$ 4,000	$ -	$ 4,000
31	**Leahy (D-VT)**	N	Y	N	N	N	$ -	$ -	$ -	$ -
32	**Levin (D-MI)**	N	Y	N	N	N	$ -	$ -	$ -	$ -
33	**Lieberman (D-CT)**	N	Y	N	N	N	$ 2,500	$ 6,000	$ -	$ 8,500
34	**Mikulski (D-MD)**	N	Y	N	N	N	$ 2,000	$ 500	$ -	$ 2,500
35	Moynihan (D-NY)	N					$4,850	$5,000	$ -	$9,850
36	**Obama (D-IL)**	Projected to Vote Anti-Repeal					$2,000	$ -	$10,000	$12,000
37	**Pryor (D-AR)**					N	$5,000	$ -	$ -	$5,000
38	**Reed (D-RI)**	N	Y	N	N	N	$7,000	$ -	$2,000	$9,000
39	**Reid (D-NV)**	N	Y	N	N	N	$5,000	$2,000	$1,500	$8,500
40	**Rockefeller (D-WV)**	N	Y	N	N	N	$2,000	$1,000	$1,000	$4,000

41	**Salazar (D-CO)**	Projected to Vote Anti-Repeal					$2,500	$ -	$ -	$2,500
42	**Sarbanes (D-MD)**	N	Y	N	N	N	$1,000	$ -	$,1000	$2,000
43	**Schumer (D-NY)**	N	Y	N	N	N	$10,499	$13,000	$3,000	$26,499
44	**Stabenow (D-MI)**		Y	N	N	N	$1,000	$ -	$,1000	$2,000
45	Wellstone (D-MN)	N	Y	N	N		$ -	$ -	$ -	$ -
						Average Contribution	**$3,447**	**$2,211**	**$1,500**	**$7,158**
						Standard Deviation	**$4,776**	**$4,443**	**$3,126**	**$11,545**
						Total	**$155,099**	**$99,500**	**$67,500**	**$322,099**