Zen and the Art of Statutory Construction: A Tax Lawyer's Account of Enlightenment

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Our reason, which is supposed to make things more intelligible, seems to be making them less intelligible.¹

INTRODUCTION

Newly arrived in academe from practice, I came across a problem posed in a casebook² that shattered the illusion of crystal clarity of the terms of Internal Revenue Code ("Code") section 1015(d)(6),³ a provision that affects the calculation of taxable gain on the disposition of property acquired by gift.⁴ Language that had guided me firmly in prior calculations became equivocal when applied to a transaction apparently not contemplated by the drafters. Although I wondered if any well-advised client would engage in such a trans-

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¹ "What follows . . . should in no way be associated with that great body of factual information relating to orthodox Zen Buddhist practice." R. Pirsig, ZEN AND THE ART OF MOTORCYCLE MAINTENANCE (1989) (author's note).

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So many people were involved in the development of this Article that the process had something of the character of a barn raising. I began to labor on resolving the ambiguity of Internal Revenue Code § 1015(d)(6) with my tax students. Then my colleagues joined in the endeavor in a faculty colloquium. As I gathered my thoughts in writing, colleagues and students offered comments on drafts. All advanced the clarity of my expression and challenged my reasoning while encouraging my pursuit. I owe special thanks to Mary Lou Fellows, Roger Groot, Mark Grunewald, John Handelman, Lash LaRue, David Millon, David Saltzman, and Becky Womeldorf. I also wish to express my appreciation to the Frances Lewis Law Center for financial support.


4. Gain or loss on the sale of property generally is determined by deducting the taxpayer's "basis" in property from the proceeds on sale. Id. § 1001. Section 1015(a) generally assigns to the donee a basis in property acquired by gift equal to the basis in the hands of the donor; subsection (d) allows an increase to the donee's basis for gift tax paid on the gift; and paragraph (6) of subsection (d) limits the increase. Id. § 1015. Discussion of the implications of § 1015(d)(6) for depreciation is beyond the scope of this paper. For such a discussion, see Collins, Basis of Property Transferred at Death Under the Tax Reform Act of 1976, 28 MERCER L. REV. 917, 950-52 (1977) (providing a hypothetical numerical example which explores a situation involving depreciable basis calculated under § 1015(d)(6)).
action, I set out to solve my own masochistic variation on the hypothetical for
sport. Practitioners likely would regard such an exercise as academic. I sus-
pect that academics, on the other hand, would view my concern with clarifying
the terms of a technical tax provision as practice-bound. My struggles with
this problem suggested to me, however, the interdependency of the practi-
tioner's and academic's spheres of inquiry, which appear increasingly
alienated.

I began this exercise with my feet still quite firmly planted on the paths I
had followed in practice. The "plain meaning" of the words having evaporated
upon application to the hypothetical transaction, and no judicial or administra-
tive ruling having defined the words with the precision required to resolve the
ambiguity, I attempted to interpret the words by reconstructing "legislative
intent." My reconstruction relied principally on inferences of purpose drawn
from application of the words in a context where the meaning was "plain."
But jurisprudential poltergeists leapt at me from the pages of law reviews: Is
legislative intent a myth? Is interpretation inescapably subjective? Is lan-
guage hopelessly indeterminate? I found myself grappling with competing
concepts of law and the limits of human understanding, calling to mind the
title of a book that I had never read, Zen and the Art of Motorcycle Main-
tenance, which captured my sense of absurdly juxtaposing the sublime and the
mundane.

Despite some vertigo, I felt compelled to address these questions because, if
I am to continue to train tax lawyers, the statutory construction skills I hope
to impart should follow from propositions about law and life, which, if not
demonstrably valid, I can propose comfortably, albeit tentatively. This Arti-

5. See Osgood, Carryover Basis Repeal and Reform of the Transfer Tax System, 66 COR-
NELL L. REV. 297, 300-01 (1981) (analyzing potential tax implications of the transfer of a vaca-
tion home from a wealthy man to his children).

6. The authors of the casebook stop short of suggesting how one might choose among alterna-
tive readings. See J. FREELAND, S. LIND & R. STEPHENS, TEACHER'S MANUAL TO ACCOMPANY
THE FIFTH EDITION OF CASES AND MATERIALS ON FUNDAMENTALS OF FEDERAL INCOME TAXA-
TION 54-56 (1985).

7. I quote from an undated memo addressed to me by my research assistant, David Saltzman,
who spent the summer of 1989 reading articles relevant to this paper: "I frequently wonder what
is the goal of reviewing these obscure law periodical articles. Some are directed at such a narrow
audience that one must be a member of the author's personal cabal to make sense of his/her

8. See, e.g., Radin, Statutory Interpretation, 43 HARV. L. REV. 863, 870-72 (1930) (arguing
that the idea of a single will for a collective body of legislators is incoherent).

9. See, e.g., Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. REV.
204, 207-08 (1980) (noting that one's experience, values, and understanding of social norms neces-
sarily color interpretation).

10. See, e.g., Levinson, Law as Literature, 60 TEX. L. REV. 373, 391 (1982) (stating that
"[t]here are as many plausible readings of the United States Constitution as there are versions of
Hamlet").

11. R. PIRSIG, supra note 1.

12. "All interpretive theories must ultimately be grounded in a political theory and a theory of
law, even if the interpreter is unwilling to recognize or state the underlying premises." Aleinikoff,
Article begins by sketching a framework of propositions that satisfy that modest criterion. Tentativeness is appropriate given the massive bodies of learning, including linguistics and philosophy, in which neither I nor most of us in the legal profession have been more than minimally schooled. Nevertheless, we must proceed with our daily tasks, and, within the limits of our understanding, proceed in accordance with propositions that make sense to us.

Part I of this Article offers my view that a tax adviser resolving statutory construction issues unaddressed by administrative or judicial authority is bound to conform the interpretation to legislative intent if the interpretation is to be advanced on a tax return as “law.” I distinguish positions reported as law from arguments as to what a judge might or should decide the law to be, which may be reported pursuant to a taxpayer’s right to litigate liability before payment but, I believe, should be disclosed as litigating positions. For present purposes, I need not explore how modest or brazen the courts—or lawyers proposing interpretations for consideration by courts—should be in deviating from legislative intent. My view of the tax adviser’s duty is premised on a definition of law as politically authorized decisions. Lacking political authority in our own right, tax advisers construing the “law” should be obligated to bind ourselves to the legislatively authorized meaning. Thus, we should undertake a good faith review of the evidence of legislative intent. This includes the language employed and the structural and historical context as suggested by the available sources, including legislative records.

I believe that many have overstated the difficulty of ascertaining the legislatively intended meaning of statutes in an effort to demonstrate the logical necessity of, as opposed to normative justification for, judicial discretion in statutory interpretation. Often, what is really at stake is whether judicial interpretation should be constrained by legislative intent. I distinguish intentionalist technique from intentionalist legal theory. The problem with overstating the indeterminacy of language and intentionalist analysis is that such arguments provide equal justification for judges, who are politically authorized to render legally binding judgments, and private practitioners, who are not politically authorized decisionmakers but whose interpretation of statutes may have the practical effect of determining the incidence of government benefits and burdens. For example, when a lawyer advises a client to take a position on a tax return without disclosing that there is doubt as to the application of the statute to the client’s circumstances, under the self-assessment system of tax-

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13. *Handelman, Constraining Aggressive Return Advice,* 9 Va. Tax Rev. 77 (1989); *see infra* notes 36-45 and accompanying text (discussing the role of the lawyer as tax adviser).

14. *Sunstein, Interpreting Statutes in the Regulatory State,* 103 Harv. L. Rev. 407, 438 (1989) (distinguishing his “conceptual or logical” argument from evaluation of “the appropriate distribution of power”); *see D’Amato, Can Legislatures Constrain Judicial Interpretation of Statutes?*, 75 Va. L. Rev. 561, 595 (1989) (recognizing that “it is invariably more persuasive to argue that something ‘is’ the case rather than to argue that something ‘ought to be’ the case”).
tion, the lawyer's judgment generally becomes the law applied.

I believe that there are convincing normative arguments which justify judicial discretion in statutory interpretation, as well as practical constraints on a judge's public decisions that do not extend to a lawyer's private lawmaking. The dangers posed by an absence of constraints on lawyers defining civic rights and obligations range from anarchy at one extreme to dictatorship of the privileged at the other. Therefore, my aim is to find a way to ascertain the legislatively intended meaning of statutes in order to prevent lawyers from substituting their own version of legislation. Even if the tax adviser's practical power is unique, the magnitude of the benefits and burdens allocated under the federal tax system and the extent to which that system defines the relationship between the citizen and the federal government justify inquiry into how that power may be exercised responsibly—that is, made accountable to the public. I suspect, however, that most lawyers from time to time exercise similar practical power advising clients with respect to the requirements of state and federal statutes in circumstances where review of the lawyer's interpretation by a politically authorized decisionmaker is either unlikely or long delayed.

As explained in Part II, I equate legislative intent with the legislatively authorized meaning of the words of a statute. Despite pervasive linguistic ambiguity, I conclude that "plain meaning" analysis has a place in statutory interpretation when, despite a diversity of culturally plausible associations, a word has a single plausible application in a particular context. However, in a con-

15. I see the latter as the most real. Lawyers can serve an essential function by shielding clients from government power. However, it seems that those best represented by lawyers are those who exercise the greatest degree of private power, perhaps because public power is most threatening to those who have the most to lose. But private power threatens those without it. Cf. Fiss, The Law Regained, 74 CORNELL L. REV. 245, 254 (1989) (observing that "[l]aw is important, indeed indispensable, but perhaps not as important and not as indispensable as it was for blacks during the civil rights movement (or as it is today for the movement to secure the rights of gays and lesbians)"). My colleague, David Millon, observes that the constraints offered by the norms and practices of interpretive communities may address the threat of anarchy but do not address the specter of oligarchy. Cf. S. FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 338-55 (1980) (recognizing that "an interpretive community ... is interested rather than neutral"). Moreover, conventionalist constraints may preclude general anarchy, but do not bind interpretation sufficiently to allow for the degree of certainty and uniformity required to administer the federal income tax consistent with the principle that similarly situated individuals (calibrated generally by ability to pay) should be treated similarly. See Topolnicki, The Pros Flub Our Third Annual Tax-Return Test, MONEY, Mar. 1990, at 90, 90 (reporting that 50 accountants produced 50 conflicting bottom lines for the same return). Thus, our tax system becomes increasingly anarchical.

16. Due to my limited familiarity with practice in other substantive areas, I will not venture a definition of other circumstances in which a lawyer's advice would be subject to similar constraints.

17. Cf. Dascal & Wroblewski, Transparency and Doubt: Understanding and Interpretation in Pragmatics and in Law, 7 L. & PHIL. 203, 218 (1988) (observing that there "are cases in which the combination of linguistic and factual knowledge is such that pragmatically there is no doubt"
text where a word has more than one culturally plausible application, the practical effects of a statute may differ depending upon whether reader or author supplies meaning. Whether the drafter employed a word in a specific sense is an issue of historical fact, and the extent to which the drafter's intent has been accorded legislative authority is also an historical fact.

Often, legislative intent will not be ascertainable, but I posit that, realistically defined, legislative intent is not a myth; and, more often than is generally acknowledged, sufficient probative evidence is available for legislative intent to be reliably identified. The legislative intent "identified" necessarily will be a construct of the interpreter's perceptions, and so it will be "subjective." I concede that the reader's values and context will inevitably shape interpretation. However, I hope to sensitize lawyers to our responsibility to examine critically our own perceptions. I propose a more disciplined inquiry into legislative intent than that offered by analysis that takes the form of speculating on how, given a statute's purpose, the drafter would have wanted the statute to apply in uncontemplated circumstances. Framing the endeavor as an inquiry into the meaning of words to the drafter as an historical fact refers the interpreter to a relevant "other's" experience, an external—and in that sense, objective—point of reference to constrain definition of meaning.

I offer as illustration my construction of section 1015(d)(6), a statutory provision that appears to be clearly articulated, but that is revealed to be ambiguous in particular circumstances. I propose that these circumstances present a case where "the text alone will produce doubt, but a careful consideration of the context, structure, purpose and legislative history...will lead to a single conclusion." I think that, for lack of care, circumstances that reveal the ambiguity of language generally are too readily assigned to the class of "hard cases"—that is, where contextual considerations are inadequate to elucidate the drafter's meaning.

Part III examines section 1015(d)(6) first in the context of an easy case, a factual context in which "plain meaning analysis" is appropriate because the reader's and the author's application of the words can be presumed to coincide because of the absence of a plausible alternative. I then posit a part-gift, part-sale transaction, which raises to the surface the ambiguity of the terms of section 1015(d)(6). Part IV claims to reconstruct an historic "legislative intent" with sufficient precision and reliability to resolve the ambiguity of the

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as to meaning); Sunstein, supra note 14, at 423 (observing that when interpretive norms are widely shared, they are "invisible" and not an object of controversy, and meaning can be said to be "plain").


19. Sunstein, supra note 14, at 460 (differentiating both those instances where "the text, together with widely shared [invisible] background norms, will be unambiguous"—classic easy cases—and those instances where text and "contextual considerations will be unhelpful" and the interpreter "must resort to more conspicuous background norms"—hard cases).

terms of the statute in the context of a part-gift, part-sale transaction. To so conclude, I must dispute the existence of conditions that make hard cases hard and so necessarily dispute that these conditions are inevitable.

I. THE INTERPRETIVE ROLE OF THE TAX ADVISER

While the great debates in legal academia tend to focus on judicial interpretation, I wish to address the interpretive role of the practicing lawyer, and the tax lawyer in particular, who is a primary consumer of statutory material. A lawyer may undertake to interpret tax statutes for a variety of reasons, but the tax lawyer's principle preoccupation is ascertaining positions to be reported (sooner or later) on a return. Under the self-assessment system, this amounts to deciding “law” if the position is not disclosed as questionable. Thus, the mundane task of interpreting a technical tax provision necessarily requires adopting a definition of law.

My definition of law is unabashedly positivist: I know law when I see it, not by its content, but by its source. My interpretation of section 1015(d)(6) rests on a definition of law as the product of a politically authorized decisionmaker. The object of my endeavor to construe section 1015(d)(6) was to determine legal responsibilities and entitlements. Any authority that the words of the statute possess to bind us to a course of conduct or afford legal protection is attributable to the authority of their source. The statute itself cannot be “law” because words have no meaning apart from human agents. Words can have meaning only with reference to the sense in which they are employed by the author, the sense in which they are understood by the audience to which they are addressed.

21. Cf. J. Locke, An Essay Concerning the True Original, Extent, and End of Civil Government, in Two Treatises of Government § 141, at 380-81 (P. Laslett ed. 1960) (arguing that people cannot “be bound by any Laws but such as are Enacted by those, whom they have Chosen, and Authorised to make Laws for them” (emphasis in original)); Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 Nw. U.L. Rev. 226, 246 (1988) (observing that “only certain people have the authority to make law”).

22. I would concur that “[t]he words represent the law.” Sunstein, supra note 14, at 427 (emphasis added). However, that is not to say that the words are the law, which is the textualist’s view. See Starr, Observations About the Use of Legislative History, 1987 Duke L.J. 371, 375 (discussing the concerns implicated by the use of legislative history rather than the words of the statute itself). Professor Sunstein implies elsewhere that he endorses textualism to a certain extent. He states, for example, that legislative “purposes are expressed through and have no life independent of statutory words.” Sunstein, supra note 14, at 427. Sunstein also states that “the words rather than the intent survived the procedures of article I.” Id. at 430. Lastly, Sunstein argues that “Congress enacts statutes rather than its own views about what those statutes mean; those views, while relevant, are not controlling unless they are in the statute. The words, not the ‘intent’ represent the law.” Id. at 431. In view of Professor Sunstein’s recognition that the words have no acontextual or preinterpretive meaning, id. at 416-18, he must recognize that some human agent’s intention as to meaning is controlling, that is, must be “in the statute,” but that not every legislator’s subjective purpose is part of the context that defines the relevant meaning.

23. I do not understand Professor Sunstein’s assertion that “statutory terms . . . have no meaning before or without interpretation” to mean that he excludes the speaker from the communication. Sunstein, supra note 14, at 416. Rather, I understand him to recognize that both the speaker’s and the reader’s meaning are functions of culture and context. Others, however, do
they are directed, or the sense in which they are understood by a detached observer of the attempt at communication between the two. Thus, the issue becomes whose meaning, author's or reader's, is "law"; that question can only be resolved by a positivist with reference to who (one, neither, or both) has authority to decide law.\textsuperscript{24}

The issues that logically follow from this definition of law are whether, and to what extent, an interpreter defining law can and should allow legislative intent to constrain statutory interpretation. I conclude that the answer to the normative issue depends upon the purpose and political status of the interpreter; the answer to the conceptual issue depends upon the probity of the available evidence and the abilities and attitude of the interpreter. Because there is no point to considering whether legislative intent can constrain interpretation unless it should, I consider the latter first.

Whatever content might be poured into the words of a statute, what makes the product of an interpretation "law" is that it represents a politically authorized judgment.\textsuperscript{25} Leaving aside questions of the legitimacy of our political sys-

\textsuperscript{24} Some would accord the status of "law" to the reader's meaning when the meaning is "clear." See Maltz, Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach, 63 Tul. L. Rev. 1, 22 (1988) ("When the message conveyed by [statutory] words is sufficiently clear, citizens should have a right to rely on that message—even if the message deviates from the actual understanding of the legislature."). If the meaning is clear, presumably the author and reader assign the same meaning to the words, and thus the author's meaning can govern. If there is a diversity of meanings, then the meaning cannot qualify as "clear," and some political theory must be found for allowing the reader to supply content to "law."

\textsuperscript{25} Cf. Aleinikoff, supra note 12, at 35 (attributing to Hart and Sacks the view that interpreting statutes with reference to legislative intent is the "only way for the result of interpretation to be called 'law'"); D'Amato, supra note 14, at 562 & n.6 ("positivism tells us that law is a command" of legislatures and the judiciary); Maltz, supra note 24, at 7 (objecting to public choice theory on the ground that "interest groups themselves have no legal authority to enact legislation"); White, Law as Language: Reading Law and Reading Literature, 60 Tex. L. Rev. 415, 441 (1982) (stating that interpretation of a legal text "always requires that the interpreter answer the question . . . [w]ho are you when you claim this meaning for the text?"). But see D'Amato, Legal Uncertainty, 71 Calif. L. Rev. 1, 1 (1983) (defining law with reference to "what the law means to the average person: a prediction of official behavioral reaction to what she plans to do (or avoid doing)"). This is not, of course, the average person's definition of law, as anyone who has ever taught a first-year law school class can attest.

It is a lawyer's definition, based on Justice Holmes' "bad man's" view of law. Holmes' definition seems to look to predicting the incidence of state force, or the incidence of government benefits and burdens. But Holmes does not concern himself with predicting actual enforcement because his bad man is highly risk averse, taking as the guide to conduct what judges, politically authorized decisionmakers, are likely to decide, without taking into account the prospects of getting caught. Thus, Holmes' definition is ultimately consistent with a definition of law as the product of the judgment of politically authorized decisionmakers. Holmes' point was that what the courts will
tem for purposes of addressing lawyers (for most of whom, presumably, this is not an issue), it is hardly controversial to posit that Congress is politically authorized to make tax rules. Therefore, the content supplied to the words of a statute by legislative will—"legislative intent"—is law. But I reject the proposition that only the content supplied by legislative will is law. In sum, under certain circumstances, the reader also has political authority to define law.

Contrary to those who espouse a hierarchical model of the relationship among the branches of the federal government based on legislative supremacy, I have found persuasive the arguments of those who recognize the judiciary as a coequal branch of government, engaging in lawmaking jointly with Congress. I share the view that Congress and the federal courts properly exercise not independent, but cooperative, lawmaking authority: roles
decide cannot be determined by mechanical application of doctrine, and in that sense he was concerned with practical consequences.

Handelman, Counseling Ordered Liberty: Reply to a Commentary, 9 VA. TAX REV. 781, 784 n.11 (1990) (citation omitted). For further discussion of Holmes' view of law, see Holmes, The Path of the Law, 10 HARV. L. REV. 61 (1897); Grey, Holmes and Legal Pragmatism, 41 STAN. L. REV. 787, 826-36 (1989).

The solipsistic view of law (what will happen to me if I do this?) ignores that law is a social product, necessary to social existence, as well as the political theory that is conventionally considered to undergird our system of government, under which law incorporates collective judgments about the conduct of collective life through collectively authorized decisionmakers. See Cornell, Two Lectures on the Normative Dimensions of Community in Law, 54 TENN. L. REV. 327, 330 (1987) (concluding that "the deep problem of modernity is to reconcile the rise of modern individuality (including the formal, legal recognition of the person separate from social role) with a new 'higher' form of Sittlichkeit" (community)).


Some of these writings include statements that implicitly endorse the hierarchical view, such as that courts should follow legislative will when statutory language is clear. See, e.g., Aleinikoff, supra note 12, at 22 (stating that "[i]n our system of government . . . an interpreter’s job is to be faithful to the legislative will"); Eskridge, supra, at 1483 (stating that "[w]hen the statutory text clearly answers the question . . . it normally will be the most important consideration"); Moore, supra, at 321 (stating that the best evidence of legislative intent is a statute’s ordinary meaning).

However, all note instances when obeying legislative will would be wrong in some sense, such as when circumstances have changed, and provide justifications for judicial discretion to deviate from historic legislative intent, whether or not it can be ascertained.
that follow from a division of labor that assigns to Congress the task of enactment and to courts the task of interpretation. If judges themselves have authority to contribute content to law, legislative intent may be a factor in judicial interpretation of statutes, but need not determine the interpretation. I would not bind courts to the proposition that only interpretations that conform to historic legislative intent are entitled to be called "law."

While few defend the authority of judges to impose their private views as law to the extent accorded legislators, many recognize that judicial interpretation may rest on "public values" (of which there seem sufficient variety to cover every private view) drawn from sources beyond the text (or historical context) of the statute at issue, whether in the guise of assumptions of reasonable legislators, constitutional constraints, or traditional or evolving social norms. In any event, those who do not accept the legitimacy of judicial reliance on extratextual values will be the first to argue that judges routinely act as if they possess independent lawmaking authority, and thus interpret statutes in a way that would be appropriate only if they were politically authorized to incorporate extraneous values. For present purposes, agreement on this point is sufficient because I believe I can safely retreat to uncontroversial ground in asserting that lawyers lack independent political authority and, thus, that a lawyer's definition of "law" should be constrained to content supplied by an authorized decisionmaker.

Lawyers perform many functions other than defining law, including propos-

28. See Eskridge, Public Values in Statutory Interpretation, 137 U. PA. L. REV. 1007, 1011 (1989) (observing that "Blackstone's Commentaries, a leading source of legal theory when the Constitution was drafted and adopted, presented a multifaceted approach to statutory interpretation that had little to do with legislative intent").

29. See Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 865 (1984) (stating that courts must reconcile competing political interests in some cases, but not on the basis of the judge's personal policy preferences); see also Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739, 763 (1982) (arguing that "adjudication requires that there exist constitutional values to interpret," and condemning imposition "by the current winners in the processes prescribed by the Constitution" of "individual morality, or even worse . . . individual interests"). But see Dworkin, supra note 27, at 545 (arguing that judges approach legal interpretation with their own "legal philosophy" which includes "structural features," such as doctrinal history, and "substantive claims about social goals and principles of justice"; since goals and principles vary, judges may interpret law differently).

30. Cf. Llewelyn, supra note 27, at 401 (noting that canons of construction represent value judgments and that each has an opposite).

31. See H. Hart & A. Sacks, supra note 27, at 1415-16 (stating that a statute may be interpreted by inferring its purpose from the context of its enactment).

32. See Eskridge, supra note 27, at 1497-1538 (exploring the substantial role public values play in "dynamic" statutory interpretation and discussing constitutional constraints).

33. See Sunstein, supra note 14, at 408-10 (discussing the traditional statutory interpretation "camps").

34. See Aleinikoff, supra note 12, at 47-61 (proposing that statutes be read as if they "had been enacted yesterday" and an attempt to make sense of statutes should take into account social values and mores of today rather than at the time of enactment).

35. Easterbrook, supra note 26, at 544-51.
ing candidates for the status of law to authorized decisionmakers. In this role, lawyers need not conform interpretations of legal texts to a source of authoritative will. Indeed, a primary function of lawyers is to employ our skill to question authority. If a return position is to be advanced pursuant to a taxpayer's right to litigate tax liability before payment and identified as such, the advised position is proposed as a candidate for the status of law. Lawyers may also be asked to anticipate official reaction to certain conduct. Lawyers participating in a predictive endeavor bring to the task whatever considerations we think may influence an authorized decisionmaker. However, a lawyer defining with a client a return position to be routinely reported (that is, without disclosure that there is an issue as to whether the reported position is in accordance with law) is serving in neither of these capacities. Rather, both the taxpayer and the lawyer are engaged in determining the existing rights and duties of the client under the Internal Revenue Code without the benefit of an authoritative dispute resolution process.

Ordinarily, neither a client nor a lawyer need distinguish the task of predicting consequences from the task of determining existing requirements, because their individual judgments can be expected to be tested against actual official reaction before they will determine the incidence of government benefits and burdens. Legal enforcement normally follows from the decision of an authorized decisionmaker. But the self-assessment system contemplates that positions reported on a tax return will be reported in accordance with the terms of the Internal Revenue Code. Consistent with this presupposition, premised on the legal obligations imposed by the Internal Revenue Code, return positions are not routinely reviewed and so generally will determine the incidence of government benefits and burdens. Thus, articulating a routinely reported return position requires defining law rather than predicting official reaction because, generally, none is expected (or the reaction is expected to be ministerial only). A lawyer advising return positions to be reported without disclosure is rendering decisions that generally will be enforced under the self-assessment system. Because our political system does not designate private individuals as authorized lawmakers, tax advisers are bound, in defining law, to conform interpretation of the terms of a statute to the meaning assigned by a politically authorized decisionmaker. A tax adviser can only legitimate a definition of the scope of a client's civic obligations and entitlements under a tax provision with reference to a politically authorized judgment.

Thus, I would describe the task of statutory interpretation as undertaken by

36. As Professor Hazard has stated:
A judge can resolve an issue of law only by reference, implicit or explicit, to something more than the text of the law itself; if the issue was plain, there would be nothing for the judge to decide. . . . And the lawyer has to go along with the judge's path of thought, arriving at the destination before the judge does whenever possible.
a tax adviser as different from that undertaken by the lawyer predicting practical consequences and from the judge who is authorized to render legally binding judgments. Lawyers lack the authority to import extraneous values into interpretation, and so the tax adviser cannot satisfy the obligation to conform interpretation to a politically authorized judgment by hypothesizing judicial results. That would necessarily require undertaking to duplicate judicial interpretation: "giving meaning to the law, that it does not already have by recourse to some normative reservoir beyond the law itself." I cannot justify the authority of lawyers acting within a confidential relationship, whose work product goes routinely unreviewed by other interested parties or a disinterested tribunal, to enjoy the discretion exercised by the judiciary in circumstances where the lawyer's word becomes "law"—the circumstances of a self-assessment system. In the absence of judicial or administrative authority, legislative will is the sole source of politically authorized judgment in which to ground interpretation and should, therefore, determine which of the alternative meanings of the statutory terms counts as law. The lawyer's task in interpreting words that neither judges nor administrators have defined is to identify the legislatively authorized meaning, unless the taxpayer is prepared to disclose on the return that the reported interpretation is a litigating position.

Thus, I question the prevailing definition of the nature of a lawyer's proper function when advising return positions. The ethical guidelines of the American Bar Association ("ABA") direct the tax adviser to predict likelihood of success in litigation—in other words, to construe a statute as the lawyer contemplates a court would. Congress has recently agreed to define minimum standards of return advice in these terms. I agree with the implicit premise

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38. Hazard, supra note 36, at 724.
39. To the extent that Professor Fish suggests that the circumstances of judicial decisionmaking operate as constraints, I am in full accord. See Fish, Working on the Chain Gang: Interpretation in Law and Literature, 60 Tex. L. Rev. 551, 562 (1982); see also Eskridge & Frickey, supra note 12, at 384 (commenting that Justices display the ability "to rise above their personal prejudgments").
40. Thus, I employ the concept of "speaker's meaning," which is central for the pragmatics of conversation." Dascal & Wroblewski, supra note 17, at 214. An interpretive approach that focuses on speaker's meaning asks the interpreter to look for common ground between the interpreter and speaker (through the text), not "search for common ground between interpreter and text." Eskridge & Frickey, supra note 12, at 323 (emphasis added) (citing Hans-Georg Gadamer, Philosophical Hermeneutics (D. Linge trans. 1976); Hans-Georg Gadamer, The Idea of the Good in Platonico-Aristotelian Philosophy (C. Smith trans. 1986); Hans-Georg Gadamer, Truth and Method (G. Barden & J. Cumming trans. 2d ed. 1975)).
41. See Handelman, supra note 13, at 80-93.
43. The prevailing definition of the tax adviser's task as predicting judicial outcomes appears to be based on Holmes' definition of law. See supra note 25. "[B]ut it is quite a stretch to use his views to support the notion that the incidence of government benefits and burdens are or should be within the discretion of private practitioners." Handelman, supra note 25, at 784 n.11.
44. These standards have been defined in penalty legislation. I.R.C. § 6694 (West Supp. 1990) (imposing penalty on adviser if understatement of a client's tax liability is attributable to an ad-
that judges are politically authorized decisionmakers and, therefore, that their
decisions are law. I do not believe that lawyers can arrive at law by imitating
actual judicial decisionmaking. It is likely, however, that the ABA's articula-
tion of the lawyer's role, reflected in the preparer penalty provisions,46 is pre-
mised on a vision of the judicial role that incorporates the hierarchical view of
the relationship between Congress and the courts. In that case, current profes-
sional standards presume deference to legislative intent in statutory interpreta-
tion, and my interpretive approach may not be substantially more demanding
than that required to satisfy minimum ethical obligations and avoid preparer
penalties.

II. INTENTIONALIST TECHNIQUE

The equipment traditionally recommended for excavating legislative intent
is the analytical framework prescribed by Lord Coke46 and popularized in An-
glo-American legal thought by the likes of Blackstone47 and Hart and Sacks.48
Lord Coke's advice can be divided into two parts. First, an interpreter should
apply a statute so as to promote its "reason"49 (recast as "purpose" by Hart
and Sacks).50 Second, to discern the statute's reason (or purpose), the inter-
preter should consider four historical matters: (1) the law before the statute,
(2) the "mischief" not provided for under prior law, (3) the remedy provided
(the statutory provision), and (4) why the legislators thought that the particu-
lar remedy was responsive to the mischief.51 Lord Coke beckons to an analysis
that focuses on what can be learned about the thinking of the drafter as an
historical fact.52 It has been observed that Lord Coke's framework for ascer-
taining statutory purpose calls upon the interpreter to attend to con-
text—implicitly taken into account in everyday conversation and often essen-
tial to effective communication.53 For purposes of employing the legislative
context to assign meaning to the words of section 1015(d)(6), I found Lord
Coke's legacy essential when attendance to linguistic and cultural context
proved inadequate.

45. Id.
47. See 1 W. BLACKSTONE, COMMENTARIES *87.
48. See H. HART & A. SACKS, supra note 27, at 1411.
50. H. HART & A. SACKS, supra note 27, at 1411.
51. LaRue, supra note 27, at 745-49.
52. Professor LaRue has characterized Lord Coke's advice as directed to answering questions
about the use of legislative history: "how do we use this rich body of evidence? what questions do
we pose to the records?" Id. at 739.
53. Id.; cf. Sunstein, supra note 14, at 426 (stating that sometimes "reliance on purpose will be
a valuable way of providing a context within which to understand statutory terms"); Wald, Some
Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L.
REV. 195, 199 (1983) (noting that "words mean different things in different contexts").
Equally useful is the presupposition, implicit in Lord Coke’s prescription, of a genuine effort to understand the statutory purpose from the drafter’s perspective. This calls upon the interpreter to assume a cooperative attitude that might be described as good faith. Cooperation entails distinguishing one’s own preconceptions and attempting to adopt the drafter’s point of view, so that “the message [will be] less susceptible to radical reinterpretation.” An other-directed attitude is essential to accurate reconstruction, namely, communication. The preconceptions that must be abandoned include one’s own associations with words read to have a “plain meaning,” as well as one’s own views of good policy or the interest of a client. The interpreter must both attend to context, including the circumstances in which the drafter functioned, and identify with the drafter to reconstruct the associations of words to the drafter. The accuracy of the reconstruction depends in part upon the quantity and probity of the available evidence. If the meaning of a legal text is the “will-content [voluntas legis] of the historical lawmaker . . . the search for the

54. LaRue, supra note 27, at 753 (interpreting Lord Coke to have instructed interpreters “to look at the problem from the point of view of the legislator” and “examine the pre-existing law from the point of view of the legislator and not from [the interpreter’s] own point of view”). Professor LaRue’s interpretation recognizes limitations on the extent to which Lord Coke advises judges to adopt the legislative perspective, but neither addresses nonjudicial interpretations.

55. D’Amato, supra note 14, at 592; see Burton, Judge Posner’s Jurisprudence of Skepticism, 87 Mich. L. Rev. 710, 716 (1988) (advocating impartiality in the form of the exclusion of ad hominem considerations). Professor D’Amato focuses on how legislatures might attend to the jurisprudential assumptions of the audience to frame a statute to “fall on ‘friendly’ ears (‘friendly’ in the sense of likely to adhere to the intent of the legislators who enacted the statute).” D’Amato, supra note 14, at 593-94. I focus on how the theory of legislative sovereignty is logically inconsistent with the notorious unfriendliness of the audience to which tax statutes are addressed. My approach could properly be described as “disinterested,” but hardly “impersonal.” See Levinson, supra note 10, at 383 (describing the Harvard Law School approach to interpretation). The object of the enterprise is to establish a connection with something outside myself, and the product of my interpretation will depend on with what or whom I make that connection. See Cornell, supra note 25, at 330 (advocating an “understanding of law as the nomos of the community that is ‘other’ to the individual”). Different interpreters applying themselves to the task of connecting with the same “other” are much more likely to agree than if they look inward. Cf. Eskridge & Frickey, supra note 12, at 382 (noting that “it is striking how much common ground differently situated interpreters can find, if they genuinely throw themselves into the interpretive process”).

56. According to the Oxford English Dictionary, the words “communicate” and “community” are both derived from the same stem as the Latin verb, communicare: to make common to many, to share, to impart, and to divide. 3 Oxford English Dictionary 577, 581-82 (Clarendon Press 2d ed. 1989). “Communicate” evolved toward meanings of giving, sharing, imparting, and transmitting. Id. at 577. “Community” came to denote a recognizable group of individuals with certain common characteristics, such as shared ideas. Id. at 581-82. Completing a communication requires focusing on commonness. As Levinson has noted, “What is at stake is a conception of the possibility of a shared moral life.” Levinson, supra note 10, at 401.


58. Cf. Posner, Statutory Interpretation—In the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 817-22 (1983) (proposing an approach to statutory construction in which judges would imagine how legislators would apply the statute to an individual case).
meaning in question ought to use all means relevant for reconstructing that will." No evidence should be ignored, but all should be evaluated. The quality of the evaluation will depend upon the acumen and attitude of the interpreter in drawing inferences. There's the rub. Although I am without political authority to define law, I am an indispensable party to interpretation. "[T]he author's 'intention' seems to constitute another text." Whatever I "reconstruct" will be the product of my own mind. However I might wish to harmonize my perception with that of politically authorized decisionmakers, I am limited by my separateness. On the other hand, however I might wish to resist sharing the drafter's perspective, I am bound by the irresistible force of shared linguistic, cultural, and professional conventions.

In all my experiences with communication, I function somewhere between perfect harmony and total resistance, but experience affords me some confidence that I can distinguish with considerable reliability between perceptions (of harmony or the reverse) that I can trust and those I cannot. Because "good faith" is a prerequisite to communication, I attempt a type of reality testing of the harmony of my interpretation with the drafter's meaning by defining the interpretive task as a variety of fact-finding, attentive to the available evidence.

In defining the interpretive role of the lawyer, I break with Lord Coke's advice to judges to the extent that he prescribed that the evidence of purpose serve as the basis for an analogy to the case at hand. When purpose analysis is formulated as an endeavor to "think [one's] way as best [one] can into the minds of the enacting legislators and imagine how they would have wanted the statute applied," the discipline of a fact-finding endeavor is abandoned. This approach may be faithful to Lord Coke's advice and appropriate

59. Dascal & Wroblewski, supra note 17, at 205.
60. Graff, "Keep Off the Grass," "Drop Dead," and Other Indeterminacies: A Response to Sanford Levinson, 60 Tex. L. Rev. 405, 408 (1982) (stating that "the degree to which we can be confident about our inferences [of meaning] depends upon the amount of evidence available, evidence which is itself open to criticism and may well be fallible"); Note, Philosophy, History, and Judging, 30 Wm. & Mary L. Rev. 181, 184 (1988) (defining the historian's role as making a "critical choice" about "facts," including treating statements of historical figures not as true or false accounts of facts but as "evidence").

61. Note, supra note 60, at 189-92 (describing philosophers' views of history as subjective).
62. D'Amato, supra note 14, at 561; see Schanck, An Essay on the Role of Legislative Histories in Statutory Interpretation, 80 L. Libr. J. 391, 398 (1988) (observing that in many circumstances "it will become necessary to infer a purpose from circumstantial evidence").
63. S. Fish, supra note 15, at 94, 338-55 (observing that the extent to which people are capable of separate identity is limited by membership in communities); Fish, Fish v. Fiss, 36 Stan. L. Rev. 1325, 1345 (1984) (concluding that "the condition of free subjectivity ... could never obtain").
64. See Nelson, History and Neutrality in Constitutional Adjudication, 72 Va. L. Rev. 1237, 1246 (1986) (stating that the "fundamental assumption of the model of history as description is that good history can accurately portray past reality").
65. See LaRue, supra note 27, at 748-49.
67. See Sunstein, supra note 14, at 433 (distinguishing between "backward-looking" and "forward-looking" reconstruction, the latter involving a process of attempting to "bring forward" the
for politically authorized decisionmakers, but such an approach to characterizing legislative intent is, indeed, "an act of creation rather than discovery." I define the endeavor as employing the evidence of reason as context that will contribute to my understanding of the words of the statute as used by the drafter and applying that meaning to the case at hand. Unanticipated cases can be resolved if the drafter's use of the words was relatively precise. I cannot be as certain of the accuracy of my reconstruction of the drafter's meaning as I am that the object that I think I perceive behind my desk supports my weight, but the process I engage in to come to each conclusion is much the same. If the drafter's intent is relevant to interpretation, I believe that I am more justified in proceeding on the assumption of the correctness of sensory and cognitive data that have acquired a reputation for reliability in my experience than I am in ignoring the evidence.

Due to the impossibility of reconstructing the mental states of the multiplicity of legislators responsible for enactment of any given statute, legislative intent has been labeled a fiction and purpose analysis a fraud by a variety of strange bedfellows. But this critique ignores the historical fact that the words were written and written purposively. The words of a statute may have been the product of one mind or several, but certainly of some mind(s) and certainly not the minds of all the members of Congress who voted to enact them. The author is not the "aggregate mind"; the author is one or more individuals who, as a matter of historical fact, chose to employ particular language. When a small group works in concert, agreement on the meaning of the words to which they are directing their attention is not only possible, but likely, and "the intent of the drafter," whether a single individual or a group, is an histor-
ical fact. The individuals who chose the statutory language may not have been elected representatives, but a realistic definition of "legislative intent" must begin with recognition of the role of the drafter, although a drafter without political authority cannot define law. Enactment by majority vote of elected members of Congress is prerequisite to a constitutionally valid statute. Therefore, ratification of the drafter's intent by the enacting legislators would be necessary for the drafter's intent to represent a politically authorized judgment.

Plain meaning analysis frequently seems to proceed on the assumption that legislators can be presumed to have understood, and thus enacted, words with reference to their plain meaning. But I must introduce, in addition to the views set forth below on the limitations of plain meaning analysis, the observation that legislators frequently do not read the words of a statute at all, and this is most particularly true of technical legislation. Realistically, legislators likely understand most tax legislation as bearing the meaning that the drafter ascribes to the words. It is to that person or that person's supervisor that

74. J. Harrigan, Politics and the American Future 241 (1984); R. Pynn, American Politics: Changing Expectations 541, 2d ed. 1984); cf. T. Conlan, M. Wrightson & D. Beam, Taxing Choices: The Politics of Tax Reform 244 (1990) (quoting Ways and Means Committee member remarking, "If I had really wanted to influence the way the actual law was written, I would have applied for a job on the Joint Tax or Ways and Means staff."). See generally M. Malbin, Unelected Representatives: Congressional Staff and the Future of Representative Government (1980).

75. Cf. Eskridge & Frickey, supra note 12, at 327 (noting that views expressed in committee reports and floor statements of sponsors or floor managers represent legislative intent "only if legislators in general agree with, or at least acquiesce in, the views of the few actively involved in the passage of the legislation").


77. See Eskridge, The New Textualism, 37 UCLA L. Rev. 621, 679-81 (1990) (commenting on fictions underlying Justice Scalia's textualist approach); Wald, supra note 53, at 200 (observing, based on her experience as a legislative liaison, that "many proponents will not have read or understood the bill"). Publicly available evidence on this point is scarce, but an unusual example was recounted by the Joint Committee on Taxation staff director from 1964-76. He recalled explaining the 1976 tax legislation to Senator Packwood prior to the Senator's cataract surgery when "[r]eady amendments to the Internal Revenue Code was out of the question." M. Malbin, supra note 74, at 171. My experience suggests that even the vast majority of lawyers consider reading Code provisions "out of the question" as a general proposition.

78. Cf. T. Conlan, M. Wrightson & D. Beam, supra note 74, at 244 (noting that "the vast scope and comprehensive structure of the [1986 tax] reform plan overwhelmed legislators and left enormous numbers of issues to be decided by staff"); J. Harrigan, supra note 74, at 241 (discussing tension between necessity of reliance on experienced staff with respect to "technically complicated" matters and responsibility of members to electorate); Wald, supra note 76, at 307 (observing that "the typical representative votes on a complex statutory scheme without reading either the full bill or the legislative history, such as committee reports; and that in voting 'yes' he or she intends to give approval to and put imprimatur on both the language of the statute and the process that produced it" (emphasis in original)).

79. As Judge Wald has noted:
legislators turn to clarify the terms of a measure in the relatively rare instances in which there are questions as to whether or to what extent to defer.80 As a practical matter, committee reports, which translate legislation into more readily accessible English (but may serve other, less public-spirited functions as well81), are likely to be more widely read.82 Even so, I suspect that committee explanations are more probative of the drafter's thinking than that of the enactors.

In view of the realities of the legislative process, I define "legislative intent" as the meaning the drafter(s) of the statute assigned to the words to the extent that members of Congress acquiesced in that meaning, and so accorded legislative authority to the drafter's meaning. Ascertaining whether and to what extent the enacting legislators ratified the sense in which the drafter(s) employed the terms of a statute must be the subject of a separate factual inquiry.

Some balk at recognizing that a legislative subgroup, congressional staff, administration officials, and even lobbyists may enjoy legislative authority.

The committee is the "work place" of the Congress. Members of the committee, to whom the bills are referred and to whom the task of sifting the dross from the gold is delegated, act as "agents" of the rest of the members; they are supposed to put the legislation in shape, take care of the details of draftsmanship, and be familiar enough with the technicalities and policies to explain it to the rest of the body.

Wald, supra note 53, at 200 n.48; see also T. Conlan, M. Wrightson & D. Beam, supra note 74, at 244 (suggesting that the 1986 "tax reform was enacted because a majority of participants wanted to do what was right, and they relied on the experts to define 'right' for them"); S. MacManus, C. Bullock & D. Freeman, Governing a Changing America 312 (1984) (stating that "Congress ratifies more than 90 percent of the recommendations of its committees"); R. Pynn, supra note 74, at 541 (quoting senator acknowledging that "[i]n all legislation, [staff are] the ones that lay out the options"); Maltz, supra note 24, at 26 (stating that committee reports are "strong evidence" of legislative intent and preplanned statements by a bill's floor manager should be "almost equally authoritative"); Mikva, A Reply to Judge Starr's Observations, 1987 Duke L.J. 380, 385 (noting that generally the only meaningful discussion of legislation occurs in committee). But see Eskridge & Frickey, supra note 12, at 327 (arguing that "any theory of interpretation that formally gives conclusive weight to the views of a legislative subgroup is in tension with the bicameralism and presentment requirements of article I") (citing INS v. Chadha, 462 U.S. 919 (1983)). These observations either are inapplicable if the enacting legislators acquiesced in the views of the subgroup or lead to the conclusion that the committee system has resulted in a substantial body of invalid legislation. Chadha does not come "close" to this conclusion. See Wald, supra note 76, at 307 (warning that "to second-guess Congress' chosen form of organization and delegation of authority, and to doubt its ability to oversee its own constitutional functions effectively . . . runs the risk of violating the spirit if not the letter of the separation of powers principle").

80. See R. Davidson & W. Oleszek, Congress and Its Members 254 (2d ed. 1985) (noting that "[s]taff aides commonly accompany committee members to the floor to give advice [and] draft amendments").

81. Eskridge & Frickey, supra note 12, at 327 (noting practice of inserting explanations in committee reports to relieve pressure from interest groups); Mikva, supra note 79, at 385 (referring to use of "committee reports to engage in horse trading and logrolling"); Wald, supra note 76, at 284 (observing that Justice Scalia's mistrust of explanations in reports not "altogether unfounded"). The practice of manufacturing legislative history is a factor in considering the probity of explanations in ascertaining legislative intent.

82. Maltz, supra note 24, at 26.
However, to banish realities of the legislative process from interpretive methodology is to abandon intentionalism and concede to interpreters, even those with no claim to political authority nor pretense of serving the public interest, discretion to adopt the fiction that best serves their purposes. The realities of the legislative process may suggest a justification for judges, who are politically authorized decisionmakers, to substitute their own views for the product of the legislative process. However, that justification does not extend to individual lawyers serving individual interests in the privacy of a confidential relationship removed from politically authorized decisionmaking processes. If it is disturbing that I acknowledge that political power may be wielded by unelected participants in the legislative process, it should be more disturbing to contemplate usurpation of that power by lawyers without congressional authorization.83

My identification of the legislatively authorized meaning of section 1015(d)(6) begins with the “plain meaning” of the words and rests on inferences drawn from the plain meaning as applied in certain contexts. Therefore, I must meet the objection that language is indeterminate. An example of this genre of objection is provided by a response to the suggestion that the constitutional provision requiring that the president have attained age thirty-five does not suffer from the malady of open texture that afflicts such expressions as due process.84 Sanford Levinson observes that age requirements may refer not only to chronological age, but also, for example, to a level of intellectual maturity associated with those who have attained that chronological age.85 Thus, the

83. I am indebted to Professor Farber for engaging me on this point. Letter from Daniel A. Farber to Gwen T. Handelman (Mar. 12, 1990) (commenting on earlier draft of this paper) (copy on file with author).

84. See Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 404-06 (1985) (suggesting that the nature of language is an important factor in separating easy cases from hard cases); accord Hegland, Goodbye to Deconstruction, 58 S. Cal. L. Rev. 1203, 1207 (1985). Professor Schauer illustrates the point by substituting a hypothetical clause specifying only that officeholders must “have reached an age representing sufficient maturity to perform the duties requisite to the office,” for the existing language articulating the age requirement. Schauer, supra, at 405. He notes that, while the hypothetical clause substantially alters the words of the existing clause, the hypothetical clause does not necessarily represent a substantially different intent. Id. However, Professor Schauer observes that the relatively vague language of the hypothetical clause would encourage litigation, while the relatively precise language of the existing clause has excluded the age requirement from debates over constitutional theory. Id. at 404. Professor Schauer concedes that the “open texture” of language, which he describes not as vagueness but as the possibility of future vagueness, is not eliminable. Id. at 423. Even so, Schauer maintains that in easy cases, such as the constitutional age requirement, language is sufficiently precise and determinant, considering what we know about the world. Id. Thus Professor Schauer concludes that “language can and frequently does speak with a sufficiently clear voice such that linguistically articulated norms themselves leave little doubt as to which results are consistent with that command.” Id. at 416.

85. Levinson, What Do Lawyers Know (And What Do They Do With Their Knowledge)? Comments on Schauer and Moore, 58 S. Cal. L. Rev. 441, 450 (1985); see Peller, The Metaphysics of American Law, 73 Cal. L. Rev. 1151, 1174 (1985); Spann, Deconstructing the Legislative Veto, 68 Minn. L. Rev. 473, 532-33 (1984); see also Easterbrook, supra note 26, at 536 (acknowledging that “we cannot be certain whether [the constitutional age requirement] means
meaning of the words is not “plain” because their meaning might be called into question in determining the eligibility of an individual who had attained the chronological age of thirty-five but has a pre-adolescent mental age. However, Levinson has eschewed the argument that the words are indeterminate because the sounds and marks that comprise them mean nothing in themselves (and, thus, potentially anything). He accepts that words have meaning because of culturally transmitted understandings and limits his exploration of the meaning of the words of the Constitution to culturally plausible alternatives. His point is that “equally competent speakers of the native language” sometimes disagree.

Words serve to distinguish particular elements of human experience from the rest, to carve out a portion and present it for consideration. The complexity of human experience, however, undercuts the efficacy of words in particularizing, and words can be more or less effective in limiting their experiential referents depending upon the context. To cast the discussion in terms that are minimally value laden, I refer to the television game show “The $100,000 Pyramid,” where contestants are asked to identify the category that includes all the examples the contestant’s partner offers to suggest the category. The program demonstrates that people conceptually subdivide experience this way. For example, we can separate any number of “Things That Have Attained Age Thirty-Five” from other “things” in our experience. Our judgment would not be acontextual, but the context is expansive. The things we classify as having attained age thirty-five are likely to have chronological age in common, but may be associated with vastly different additional attributes. A thirty-five-year-old office building is one thing, a thirty-five-year-old horse quite another. As we limit the context, the portion of experience carved out by

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86. Professor Levinson rejects the idea that because language is indeterminate, words cannot communicate meaning. He observes that he would not write an article if he did not have a “belief that [his words] would help to communicate something to an audience.” Levinson, supra note 85, at 442.

87. While Professor Levinson believes that one can read statutory language in any possible number of ways, he identifies the task of statutory interpretation as discussing only readings that are possible given the present legal culture. Id.

88. Levinson, supra note 10, at 395.

89. Graff, supra note 60, at 405.

90. LaRue, supra note 27, at 734-36 (identifying four contexts to which an interpreter might refer to narrow the meanings of words in a statute: linguistic context, context of daily practice and custom, context of preexisting common law, and legislative context).

91. Psychological research with infants shows that the tendency to categorize is “very powerful.” Gilbert, Research Challenges Established Views of Cognitive Development, LSA Magazine (University of Michigan), Fall 1989, at 31 (quoting Assistant Professor of Psychology Susan A. Gelman).

92. There are cases in which the combination of linguistic and factual knowledge is such that pragmatically there is no reasonable doubt that x belongs to A or that x does not belong to A, as well as cases in which such a question is undecidable by any amount of combined linguistic and factual knowledge. Dascal & Wroblewski, supra note 17, at 218.
the words "age thirty-five" may shift radically. The contestant asked to guess
the category that includes thirty-five-year-old horses may well focus on as-
sociations—"accessory" ideas—other than chronological age, such as extreme
physical frailty. The words identifying the chronological age of the horse
refer to a multiplicity of other associations, perhaps more salient. Those of us
who might find ourselves at a racetrack would likely readily wager against an
entrant described as a thirty-five-year-old horse and would be mightily sur-
prised to find the animal in prime physical condition. Despite our precise com-
prehension of the reference to chronological age, such an animal would not
correspond to the mental image the words evoked. Such an animal is not what
we mean when we refer to thirty-five-year-old horses, no matter what its
birthdate. So, "age thirty-five," as applied to human beings, is a concept that
carries multiple cultural associations: physical, emotional, and intellectual at-
tributes associated with that chronological age in our
culture.

The specification of age thirty-five as a minimum age requirement, as a matter of cultural
association, refers to a variety of attributes, which for purposes of illustration,
I shall limit to chronological age and intellectual maturity today associated
with age thirty-five. The language initially appears determinate because in
our experience those attributes normally coincide. The distinction between
chronological age and intellectual maturity is blurred when considering the
eligibility of a thirty-five-year-old individual who has the intellectual capacity
our culture normally has associated with that age. The circumstances to

93. Id. at 207.
94. See H. Waring, Horse Behavior 144 (1983).
95. "[S]ometimes the best interpretation ... is one that runs counter to its apparent literal
meaning—even if the author did not have in mind the case at issue, or make a judgment about
how the case should be resolved." Sunstein, supra note 14, at 419 (citing example of whether a
World War II tank on display is a "vehicle" that is not allowed in a park and Ludwig Wittgen-
stein's example of whether "gaming with dice" was included in a request to teach children a
"game"); see D'Amato, supra note 14, at 568-70 (discussing the "folly" of "literal interpreta-
tion"); Wald, supra note 53, at 199 (noting that "the literal meaning [of a statute] may be inap-
plicable or nonsensical").

By age two, children understand that "if a thing is a member of a category, it shares important
characteristics with other members" and, "more startling ... that the important characteristics
of a category may not be on the surface—that they might include an underlying 'essence' or
hidden characteristic." Gilbert, supra note 91, at 31.

96. Moreover, the content of these associations in American culture today may vary from their
content 200 years ago. Cf. Levinson, supra note 10, at 375 n.9 (noting differences between British
and American uses of the same words).

97. In the context of "The $100,000 Pyramid," age was not value laden, but as a minimum age
requirement for eligibility for public office, the associations with age 35 do assume value signifi-
cance; and thus, more visible background norms are included in the context and ambiguity is
increased. "Context-dependency ... is one of the features of language which can either restrict
or enhance the doubts that can arise in concrete situations and lead to an interpretive process." Dascal & Wroblewski, supra note 17, at 217.

98. See Schauer, supra note 84, at 405 (describing the language of the constitutional age provi-
sion as sufficiently determinate to call interpretation of language an easy case).

99. But see Posner, supra note 58, at 818 (stating that the constitutional age requirement does
not invite judicial construction "to recast the provision so that it reads, the President must be
which the words are applied do not require choosing between, or even recognizing, the culturally plausible alternatives. It is as applied in such contexts that the words can appear to have a "plain meaning" even when, as in this instance, the words "literally" refer to but one, and perhaps the less salient, attribute of the image they evoke. This is an "easy case," not because the meaning of the words is clear, but because there is a coincidence of culturally plausible associations with the concept "age thirty-five" in these circumstances. Words can be simultaneously indeterminate, in the sense of carrying multiple meanings, and determinate, in the sense of achieving in specific circumstances community accord on a referent. Thus, it is possible for members of a community to communicate with one another without a precise understanding of what the other "really" means.

Although I obviously consider the term a misnomer, I use the term "plain meaning analysis" to refer to interpretation that ignores culturally plausible alternative meanings of words. Because meaning is not inherent in the marks and sounds that make up words but is culturally assigned, any reading of a text, including a "plain meaning" approach, necessarily involves a variety of interpretive acts to situate the marks and sounds in a cultural context. Interpreting a tax statute includes resort to a mental dictionary that comprehends tax terminology and identification of the tax meaning as appropriate. Plain meaning analysis does not address whether these interpretive moves are made in the interests of understanding the speaker's meaning or the reader's. Is resort to professional conventions appropriate because they provide a window on authorial intent since the context (a tax statute) suggests that words are employed in that sense by the author? Adoption of common professional usage as meaning may instead establish content from the perspective of the professional community of readers and risk excluding the speaker from the communication. These interpretive acts, however, cannot meaningfully be described as exercises of the reader's subjective discretion. Given the force of professional

either thirty-five or mature"). According to Judge Posner, a court could not justify such an interpretation based on the framers' intent, but would be limited to the "obvious" meaning, not because the words are plain but because, read in context, the words yield one meaning. Id. at 819.

100. "The notion of 'literal' meaning is a crude one. It usually refers to the meaning of words in 'most' contexts, but because meaning is a function of context, it is wrong to suggest, as the concept of 'literal meaning' does, that words have context-independent meanings." Sunstein, supra note 14, at 419 n.41.

101. See Dascal & Wroblewski, supra note 17, at 219 (observing that one cannot decide a priori whether a term is clear or not); White, Law as Language: Reading Law and Reading Literature, 60 Tex. L. Rev. 415, 417 n.3 (same). For example, the term "man" "has not been traditionally considered fuzzy. Fuzziness, however, appeared with the technological capability of keeping human organisms 'alive' with no cerebral activity." Dascal & Wroblewski, supra note 17, at 219.

102. See Dascal & Wroblewski, supra note 17, at 211-12 (recognizing "clarity . . . as a pragmatic feature of a legal text used in a concrete situation rather than an absolute property of the text itself"). Words that appear inherently ambiguous, such as "due process," have a visibly "rich variety of connotations." Eskridge & Frickey, supra note 12, at 342.

103. S. Fish, supra note 15, at 14 (observing that assignment of meaning by members of an
conventions that likely operate on both author and reader, this process is analogous to speaking a dialect in a locale where that is the native tongue.104

Plain meaning analysis has considerable utility in facilitating coordination of social activity. It is indeed easier to ignore alternative meanings when nothing of any practical significance turns on the distinction. "At some point of the process an interpretation is produced that does fit the case at hand, i.e., that is no longer contextually inadequate. Such an interpretation is then "clear enough" in so far as the particular use of the text is concerned, and no further search is reasonably needed."108 Due to shared cultural assumptions, author and reader can be presumed to agree on the practical application of words in such circumstances.108 Statutes are written to communicate directions to the populace and their legal advisers. Plain meaning analysis avoids time consuming and controversial inquiries into whether the sense in which the words were written can be ascertained and whether that meaning can or should control interpretation. The length and complexity of my construction of section 1015(d)(6) suggests the impracticality of such inquiries where there is agreement on the application of the words despite a diversity of views on the associations carried by the words.

I begin my construction of section 1015(d)(6) with a plain meaning analysis, understanding the plain meaning in the context of a professional culture. The tax practitioner likely observes professional conventions without conscious awareness, but for the benefit of the reader for whom tax English is a foreign language, I offer an introduction.

III. SECTION 1015: AN INTRODUCTION

Perhaps the most titillating description of "basis" is as the amount that a taxpayer can receive tax-free on the sale of property (conversely, the amount over which proceeds from sale of the property constitute taxable gain).107 Code section 1012108 assigns the cost of property as its basis; other Code sections prescribe different basis rules for property transferred without consideration in money or money's worth or, to call upon the ancient formulation, in considera-

interpretive community does not "proceed from an isolated individual but from a public and conventional point of view").

104. See Sunstein, supra note 14, at 414 n.24 (commenting that "[p]articipation in the set of practices that make ordinary words intelligible is probably best conceived of not as interpretation but as understanding").

105. Dascal & Wroblewski, supra note 17, at 215-16 (emphasis in original).

106. As Judge Wald has observed, the Supreme Court has been inclined to test the presumption of agreement between author and reader against evidence of intent in the legislative record, and at least a cursory review suggests that the presumption is warranted by experience. Wald, supra note 53, at 195-99; cf. Kay, supra note 21, at 242 (observing that practical experience demonstrates that "most of the time our confidence [that speaker and listener have understood the practical application of words to be the same] is justified").


108. Id. § 1012.
tion of love and affection, which does not count. However the basis of property is initially determined, section 1016 authorizes assorted adjustments, to account for certain post-acquisition events, such as increases for improvements and decreases for depreciation deductions taken.

Code section 1015 offers a complex of rules to govern the calculation of a recipient's basis in property acquired by inter vivos gift. Generally, section 1015(a) assigns to the recipient a "carryover" basis equal to the transferor's adjusted basis, and section 1015(d)(1) directs the recipient to increase the carryover basis by any gift tax paid on the transfer. Section 1015(d)(6)(A) limits the increase, for gifts after 1976, to the amount of gift tax that is proportionate to "net appreciation," defined under subparagraph (B) as the value of the gift in excess of the donor's adjusted basis.

Neither section 1012 nor section 1015 specifically addresses transactions with both gift and sale characteristics (a transfer for less than full consideration), but the regulations under section 1015 fill the gap. Those regulations provide that the transferee in a part-gift, part-sale transaction assumes a basis equal to the greater of cost or carryover, to which is added "the amount of increase, if any, authorized by section 1015(d) for the gift tax paid." For transfers after 1976, the increase is limited by section 1015(d)(6). As Internal Revenue Code provisions go, section 1015(d)(6) appears to be a clearly

109. Id. §§ 1014, 1015.
110. Id. § 1016 (West Supp. 1990).
111. Id. § 1015(a) (1988). Before enactment of the predecessor to § 1015(a), the donee's basis in property acquired by gift was equal to its market value at the time of the transfer. This was consistent with the policy, reflected by § 102, to exclude the value of gifts from gross income. However, because the transfer of property acquired by gift ordinarily did not trigger realization of the appreciation to the donor, the effect of assigning a market value basis to the donee was to exclude permanently the appreciation from taxation either to the donor or the donee. Section 1015, by assigning a carryover basis to the transferee, reflects a congressional judgment to subject the appreciation to tax, but, for better or worse, to permit the tax liability to be shifted from the donor to the donee upon the donee's disposition of the property rather than tax appreciation to the donor at the time of the gift. See Taft v. Bowers, 278 U.S. 470 (1929); M. Graetz, Federal Income Taxation: Principles and Policies 185 (1988); S. Surrey, P. McDaniel, H. Ault & S. Koppelman, Federal Income Taxation: Cases and Materials 169 (succ. ed. 1986) [hereinafter S. Surrey, Federal Income Taxation]; Wurzel, The Tax Basis for Assorted Bargain Purchases, or: The Inordinate Cost of "Ersatz" Legislation, 20 Tax L. Rev. 165, 178 & n.45 (1964).
112. Section 1015(d)(1)(A) reads, in relevant part:
[For property] acquired by gift on or after September 2, 1958, the basis shall be the basis determined under subsection (a), increased (but not above the fair market value of the property at the time of the gift) by the amount of gift tax paid with respect to such gift[.]
113. Id. § 1015(d)(6); see infra note 118 (providing the text of § 1015(d)(6)).
114. See Wurzel, supra note 111, at 177-80 (discussing congressional lack of attention to this issue).
116. Id. § 1.1015-4(a)(2).
communicated direction. In an arithmetic format, section 1015(d)(6)(A) translates into the following:

\[
\frac{\text{increase in basis}}{\text{gift tax paid}} = \frac{\text{net appreciation}}{\text{amount of gift}}
\]

Substituting the 1015(d)(6)(B) definition for the term "net appreciation" yields:

\[
\frac{\text{amount by which fair market value of gift exceeds donor's basis immediately before gift}}{\text{gift tax paid}} = \frac{\text{basis immediately before gift}}{\text{amount of gift}}
\]

Consider the application of the statute to the following circumstances which do not challenge the clarity of the statute:

**Problem I:** A father owns property with an adjusted basis of $100,000, and makes a gift of the property to his son. The property has been valued at $200,000 for purposes of assessing gift tax, which is levied on the entire value at a rate of 39%, yielding a $78,000 gift tax liability, which the father pays.

On these facts, $200,000 is both "the fair market value of the gift" and the "amount of the gift," despite any distinction between "amount" and "fair market value" that might be suggested in a different context. The donor's ba-

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118. See id. Section 1015(d)(6) provides, in relevant part:

(A) In general.—In the case of any gift made after December 31, 1976, the increase in basis provided by this subsection with respect to any gift for the gift tax paid under chapter 12 shall be an amount (not in excess of the amount of tax so paid) which bears the same ratio to the amount of tax so paid as—
   (i) the net appreciation in value of the gift, bears to
   (ii) the amount of the gift.

(B) Net appreciation.—For purposes of paragraph (i), the net appreciation in value of any gift is the amount by which the fair market value of the gift exceeds the donor's adjusted basis immediately before the gift.

Id.

119. Section 1015(d)(6)(B) states that "the net appreciation in value of any gift is the amount by which the fair market of the gift exceeds the donor's adjusted basis immediately before the gift." Id. § 1015(d)(6)(B).

120. There is a unified rate schedule for estate and gift taxes. The rates are progressive on the basis of cumulative lifetime and testamentary gifts. Generally, a unified credit of $192,800 is allowed, the practical effect of which is that no tax liability will attach unless aggregate gifts exceed $600,000. Id. § 2010. The marginal rate on cumulative gifts between $600,000 and $750,000 is 37%; between $750,000 and $1,000,000, the rate is 39%; between $1,000,000 and $1,250,000, the rate is 41%, etc., to a maximum marginal rate of 55% on cumulative gifts in excess of $3,000,000. Id. §§ 2001(c), 2502(a). The first $10,000 of lifetime gifts of present interests made to any person in a calendar year is excluded from the amount subject to gift tax. Id. § 2503(b). The amount of a gift is first reduced by the $10,000 annual exclusion to the extent it has not been exhausted by prior gifts in that year, and the amount of the tax is reduced by the available unified credit. Id. §§ 2504-2505. Problem I assumes that the annual exclusion and the unified credit have been exhausted.
sis has been established at $100,000 for purposes of determining the carryover basis under section 1015(a) and that definition is imported into the 1015(d)(6) calculation. Members of the relevant "interpretive community" would agree on the referents of the terms in this context. The tax professional readily, even automatically, identifies, consistent with internalized professional conventions, the referents of "basis," "value," and "appreciation" that are appropriate in the factual and statutory context. Tax professionals would recognize no plausible alternatives to assigning figures to the terms of the formula, as follows:

\[
\frac{\text{increase in basis}}{\text{gift tax paid}} = \frac{\text{amount by which fair market value of gift exceeds donor's basis immediately before gift}}{\text{amount of gift}}
\]

\[
\frac{\text{increase in basis}}{\text{gift tax paid}} = \frac{\$200,000 - \$100,000}{\$200,000} = \frac{\$78,000}{\$78,000} = 1/2
\]

Once these figures are supplied, the formula is solved by multiplying the appreciation ratio (the right side of the equation) by the amount of gift tax paid (to solve for the unknown, both sides of the equation are multiplied by $78,000).

\[
\text{increase in basis} = 1/2 \cdot \$78,000
\]

\[
\text{increase in basis} = \$39,000
\]

The son’s basis in the property is $139,000: the carryover basis of $100,000 plus the 1015(d) increase of $39,000.

In the context of Problem I, only one figure is associated with each term of the formula. However, when section 1015(d)(6) is applied to a transfer that is part-gift and part-sale, plausible alternatives are revealed. Consider the following hypothetical case:122

**Problem II:** An aging multimillionaire mother wishes to move to Florida...
and give her condominium to her daughter, on the condition that the daughter pay the gift tax on the transfer. The condo originally cost $50,000, which is the mother's adjusted basis. The condo is now valued at $280,000. Gift tax is assessed on the net amount of the gift, that is, the fair market value of the condominium minus the gift tax paid by the daughter. The amount of the gift tax and the amount subject to gift tax are interdependent variables determined under an algebraic formula, yielding $80,000 gift tax liability (and establishing the amount subject to gift tax at $200,000). The average gift tax rate is 40%. However, the highest marginal gift tax rate applicable to the transfer is 41%.

The court in Diedrich v. Commissioner held that such a conditional gift is a part-gift, part-sale and that the donor is taxable to the extent that the gift tax paid by the donee exceeds the donor's adjusted basis (allocating the donor's basis entirely to the sale portion of the transaction). This tax treatment is consistent with Treasury regulations under Code section 1001, which govern the amount of gain taxable to the transferor in a part-gift, part-sale transaction. These regulations have been criticized for failing to apportion the transferor's basis ratably between the sale and gift portions of the transaction, but exploration of this interpretive issue is beyond the scope of this

124. See supra note 120.
126. Id. at 194-200. Because the donor bears primary liability for gift tax under § 2502(c) of the Code, the theory is that the mother receives an economic benefit in the form of relief from her obligation to pay tax, as if the daughter paid cash to the mother, and then the mother paid the gift tax. The Court regarded the donee's gift tax payment as taxable consideration for the property rather than as an excludable gift made out of disinterested generosity. Id. On the facts of Problem II, however, the mother can avoid taxation on the payment either under I.R.C. § 121 (one-time exclusion of gain from sale of principal residence) or under I.R.C. § 1034 (nonrecognition of gain from sale of principal residence applied to purchase of new principal residence).
127. Treas. Reg. § 1.1001-1(e) (as amended in 1972). This tax treatment also corresponds with the symmetrical basis provisions of Treasury regulations under § 1015 of the Code, which assigns to the transferee in a part-gift, part-sale transaction the greater of cost or carryover basis. Id. § 1.1015-4.
128. See, e.g., S. Surrey, Federal Income Taxation, supra note 111, at 716 (stating that the regulations allocate all of the basis in a mixed familial transfer to the sale); Warren, The Income Tax Effects of Partially Donative Transfers, Tr. & Est., Sept. 1971, at 712, 714-15 (suggesting that the statute could be interpreted to allocate the donor's basis pro rata between the sale and gift portions). But see Gen. Couns. Mem. 36,642 (Mar. 23, 1976) (recounting unsuccessful I.R.S. attempts to obtain judicial approval of apportioned basis); Wurzel, supra note 111, at 187 (same). Treasury Regulation § 1.1001-1(e) provides, on the facts of Problem II, that the mother has $30,000 gain ($80,000 consideration paid minus her $50,000 cost basis). The critics would allocate to the sale portion of the transaction only that portion of the mother's basis in the home that bears the same ratio to the entire basis as the consideration received bears to the fair market value of the property, determined as follows, where "x" equals the portion of the mother's basis allocable to the sale portion of the transaction:
Article. Under the section 1015 regulations, the daughter is entitled to her cost basis of $80,000 plus the adjustment for gift tax paid under section 1015(d), “if any [is] authorized.” Section 1015(d)(1) authorizes an adjustment “for gift tax paid” without reference to the identity of the payor, so the words of section 1015(d)(1) could be read to permit the daughter the benefit of the adjustment even though her gift tax payment would serve double duty in calculating her basis: first, as establishing her cost, and then, as the measure of the total gift tax paid. Such a result may be counterintuitive, but under Diedrich, the daughter’s payment of gift tax is treated as if cash were paid to the mother and the mother paid the tax, and all the other tax consequences of the transaction are premised on this account of the transaction.

But Problem II raises three questions under section 1015(d)(6), unaddressed by judicial or administrative ruling, that interfere with calculating the limitation under the statutory formula. First, what is the fair market value of

\[
\begin{align*}
\frac{x}{50,000} &= \frac{80,000}{280,000} \\
\frac{x}{280,000} &= \frac{80,000 - 50,000}{280,000} \\
x &= 0.29(50,000) \\
x &= 14,286
\end{align*}
\]

Thus, $14,286 of the mother’s $50,000 basis would be allocated to the sale and the remaining $35,714 to the gift. The symmetrical basis calculation for the daughter would be $80,000 (cost of portion of property purchased) plus $35,714 (carryover basis in portion of property acquired by gift), for a basis in the entire property of $115,714. This approach to calculation of a donor’s gain and the donee’s basis is followed in the case of a bargain sale to a charitable organization. I.R.C. §1011(b) (1988); Treas. Reg. §§1.170A-4(c)(2), (4) & 1.1011-2(b) (1988).

129. Neither the critics’ views of good policy, nor my own, should influence my interpretation of § 1015(d)(6). See supra text accompanying notes 52-55. The regulations under §§1001 and 1015 were part of the legislative context in which § 1015(d)(6) was drafted. It is arguable, however, that these regulations governing part-gift, part-sale transactions between individuals direct a result more consistent with the result contemplated by § 1015: assumption by the donee of the income tax liability on the appreciation of property in the hands of the donor. See supra note 111.

By assigning to the donee the greater of cost or carryover basis, the § 1015 regulations provide, on the facts of Problem II, both that the daughter’s basis will reflect her investment and that the daughter will assume tax liability on the appreciation prior to the transfer that remains after the mother is taxed on her $30,000 gain. Cf. Note, Income Tax Consequences of Encumbered Gifts: The Advent of Crane, 28 U. Fla. L. Rev. 935, 938 n.21 (1976).


131. See Turner v. Commissioner, 49 T.C. 356, 361 (1968), aff’d. 410 F.2d 752 (6th Cir. 1969). But see Warren, supra note 128, at 715, 793 (stating that the “Turner court simply overlooked the ability of the income tax provisions to reach the transferor’s gain, and in so doing came to the wrong result”); Note, supra note 129, at 943 n.61 (stating that the Turner court “failed to realize that the donee’s cost basis is actually the grantor’s basis increased by the gain recognized by the transfer”).

132. See supra text accompanying notes 122-27. In addition, the report of the Senate Finance Committee, where §1015(d) originated, contemplates that the donee might bear the gift tax liability and states that “it is immaterial whether the gift tax is paid by the donor or donee.” S. Rep. No. 1983, 85th Cong., 2d Sess. 199 (1958).
the "gift"? The $280,000 gross value of the property (an amount that would
reflect the donor's cost plus the full increase in value of the property in the
hands of the donor) or the $200,000 net value transferred without considera-
tion? Although the statutory definition of "net appreciation" might more natu-
really be read to refer to the full increase in value in the hands of the donor
(full fair market value of the property in excess of the donor's cost basis), the
statutory language is ambiguous due to the reference to the fair market value
of the "gift" (which would seem to refer to the amount received without con-
sideration). Second, is the "donor's [mother's] adjusted basis immediately
before the gift" $50,000 (the mother's cost basis), or, since the mother's basis
was allocated entirely to the sale portion of the transaction (rather than appor-
tioned between the gift and sale portions) for purposes of determining her tax-
able gain, does the donor have an adjusted basis of zero in the "gift"?
Third, does "fair market value of the gift" here have the same meaning as
"amount of the gift"?

The left side of the equation, unaffected by these issues, is:

\[
\frac{\text{increase in basis}}{\$80,000}
\]

However, depending on the answer to these questions, the right side of the
equation could be any one of seven different numbers, calculated eight differ-
ent ways:

1. $280,000 - 50,000 = \frac{230,000}{280,000} = .82$
2. $200,000 - 50,000 = \frac{150,000}{200,000} = .75$
3. $280,000 - 50,000 = \frac{230,000}{200,000} = 1.15$
4. $200,000 - 50,000 = \frac{150,000}{280,000} = .54$
5. $280,000 - 0 = \frac{280,000}{280,000} = 1.0$
6. $200,000 - 0 = \frac{200,000}{200,000} = 1.0$
7. $280,000 - 0 = \frac{280,000}{200,000} = 1.4$
8. $200,000 - 0 = \frac{200,000}{280,000} = .71$

133. See supra text accompanying notes 125-28.
The solution to the equation, thus, could be any of the seven different amounts set forth above, multiplied by the gift tax. However, section 1015(d)(6) limits the increase in basis to the amount of tax paid, so any solution yielding a greater amount (options 3 and 7) would be reduced to the amount of tax paid. Thus, there are five different candidates suggested by the words of the statute for the amount permitted to be added to the daughter's cost basis. Could the daughter's basis equal twice her cost (the result under options 3, 5, 6, and 7)? Yes, but I have some explaining to do.

IV. RECONSTRUCTING LEGISLATIVE MEANING

Before section 1015(d) was enacted, a donee's basis in property acquired by gift was equal to the donor's basis ("carryover" basis). Section 1015(d) originally allowed a donee to increase the carryover basis of property by the full amount of gift tax paid on the transfer. In 1976, subsection (d)(6) was enacted to limit the amount of the increase to a fraction of the gift tax paid. There is little discussion of section 1015(d)(6) in the legislative history; a single committee report documents the amendment of section 1015(d). There is no record, of course, as to whether the statute and the explanation in the report were drafted by the same author(s), but because the provision and the report were released roughly contemporaneously and from the same committee, it is likely that the authors were at least working closely with one another. Thus, the explanation provided in the committee report is somewhat probative of the drafter's intent. But reports are summaries. They are accessible in part because they are simplifications, and thus, it is not surprising that the report fails to provide a precise definition of the statutory terms that might be attributed to the drafter, let alone Congress.

The House Ways and Means Committee Report accompanying proposed subsection (d)(6) offered rationales both for the subsection (d)(1) increase to carryover basis and for the proposed limitation:

134. I.R.C. § 1015(d)(6)(A) (1988); see supra note 118 (providing text of §1015(d)(6)).
139. Sunstein, supra note 14, at 430. Judge (and former Congressman) Abner Mikva strongly recommends review of committee reports:

Most of the time—not always, and not for every committee—the committee report represents the synthesis of the last meaningful discussion and debate on the issue. The committee report is usually drafted by the majority staff, more often than not with substantial input from the minority on the committee.

Mikva, supra note 79, at 385.
140. Cf. Wald, supra note 53, at 200 (observing that much "pertinent legislative discussion is unrecorded or inadequately recorded").
The purpose of the increase in basis for gift taxes paid on the gift is to prevent a portion of the appreciation in the gift (equal to the gift tax imposed on the appreciation) from also being subject to income tax, that is, to prevent the imposition of a tax on a tax. However, existing law is too generous in that it permits the basis of the gift property to be increased by the full amount of the gift tax paid on the gift and not just the gift tax attributable to the appreciation at the time of the gift.141

According to the House Report, then, an addition to basis was appropriate to relieve the donee of a “tax on a tax,” but allowing an increase equal to the full gift tax paid was “too generous.”142 Section 1015(d)(6) addressed the excessive generosity by limiting the increase in basis to the portion of “the gift tax attributable to the appreciation at the time of the gift.”143

While this explanation raises more questions than it answers, it does reveal that the increase was to equal the gift tax paid on appreciation, and thus that “amount of the gift” is intended as a factor in calculating the gift tax rate. The mechanism by which section 1015(d)(6) determines the gift tax attributable to the appreciation is prescribed by the formula:

$$\frac{\text{increase in basis}}{\text{gift tax paid}} = \frac{\text{net appreciation}}{\text{amount of the gift}}$$

The formula can be recast as:

$$\text{increase in basis} = \frac{\text{gift tax paid}}{\text{amount of the gift}} \cdot \text{net appreciation}$$

Instead of referring to the gift tax return figures and the actual rate used to calculate the gift tax liability, the section 1015(d)(6) formula prescribes that “net appreciation” be multiplied by a gift tax rate determined by dividing the gift tax paid on the transfer by the “amount of the gift” (yielding the average gift tax rate).144 Therefore, the “amount of the gift” must be intended to refer to the amount subject to gift tax.

The report, however, provides no such obvious answer to the meaning of the statutory definition of net appreciation (“the amount by which the fair market value of the gift exceeds the donor’s adjusted basis immediately before the gift”145). Nor does the report explain why adding the gift tax paid on the appreciation to the donee’s basis remedies the perceived mischief of a “tax on a tax,” on the one hand, and corrects the overgenerous remedy of prior law, on the other. Indeed, the description of the mischief is more puzzling than illuminating. Left unexplained is in what sense a “tax on a tax” (for income tax to be levied on amounts equal to gift tax paid) was regarded as problematic. Since neither gift tax nor income taxes paid are deductible from the income

142. Id.
143. Id.
tax base,\textsuperscript{146} income tax routinely is assessed on amounts applied to pay gift
tax. If, however, in this context, a “tax on a tax” is inappropriate for some reason, why only as to the gift tax paid on the appreciation, rather than as to the full amount of gift tax paid?\textsuperscript{147}

The explanation can be clarified by examining historical data, which can be reconstructed by applying section 1015 in contexts where the meaning of the terms is not controversial. Answers to the questions the report raises can be inferred from a comparison of the tax consequences to the donor and donee of gifts of property before enactment of section 1015(d), between enactment of section 1015(d) and section 1015(d)(6), and after enactment of section 1015(d)(6).\textsuperscript{148}

Before section 1015(d) was enacted, the combined gift and income taxes levied on a donor and donee would vary depending on whether (1) an owner of property first sold the property, paid the income tax on the gain, gave the after-tax proceeds\textsuperscript{149} to the donee, and paid the gift tax on the gift of cash;\textsuperscript{150} or (2) the owner gave the property to the donee and paid gift tax on the gift of property, and the donee sold the property and paid the income tax on the gain.\textsuperscript{151} A discrepancy caused by differential income tax rates between the donor and donee was to be expected under a progressive tax system. However, a discrepancy between the combined gift and income taxes levied on the donor and the donee existed even where the donor and donee were subject to the same income tax rate, and the donee was left with the same amount of cash in the end. In these circumstances, the two forms of the transaction resulted in transfer of equivalent economic value:

<table>
<thead>
<tr>
<th>Form A</th>
<th>Form B</th>
</tr>
</thead>
<tbody>
<tr>
<td>(sale, followed by a gift)</td>
<td>(gift, followed by a sale)</td>
</tr>
<tr>
<td>1. Donor sells property for x.</td>
<td>1. Donor gives property with fair market value = x.</td>
</tr>
<tr>
<td>2. Donor pays income tax, y.</td>
<td>2. Donee sells property for x.</td>
</tr>
<tr>
<td>3. Donor transfers x-y to donee.</td>
<td>3. Donee pays income tax, y.</td>
</tr>
<tr>
<td>4. Donee keeps x-y.</td>
<td>4. Donee keeps x-y.</td>
</tr>
</tbody>
</table>

The discrepancy in total taxes paid was attributable to differential amounts of gift tax paid. Greater gift tax was paid when the property itself was transferred (and gift tax was assessed on x) than when the after-tax proceeds were transferred (and gift tax was assessed on x-y).\textsuperscript{152} A sale, followed by a gift of

\textsuperscript{146} Id. § 275 (1988).
\textsuperscript{147} See Osgood, supra note 5, at 298 n.3.
\textsuperscript{148} See M. Graetz, supra note 111, at 185 n.1.
\textsuperscript{149} Here and elsewhere, the term “after-tax proceeds” refers to proceeds on sale less the income tax paid on the sale.
\textsuperscript{150} I occasionally refer to this series of transactions as a “sale, followed by a gift.”
\textsuperscript{151} I occasionally refer to this series of transactions as a “gift, followed by a sale.”
\textsuperscript{152} The tax consequences before the enactment of § 1015(d) can be illustrated using the facts of Problem 1, and positing that the son sells the property for its fair market value at the time of
the after-tax proceeds thus resulted in lower total taxes and created an incentive to prefer that form of transaction over a gift, followed by a sale. This appears to be the mischief that section 1015(d) was designed to remedy. The section 1015(d)(6) limitation on the adjustment can equalize the amount of total taxes paid, whether the donor first sells the property and gives the donee the after-tax proceeds or gives the property to the donee who bears income tax liability on the appreciation. That section 1015(d)(6) has this effect raises an inference that eliminating the disparity was its intended function.

The extra gift tax paid on the gift of property was attributable to valuing the property at fair market value, ignoring the potential income tax liability transferred with the property. If the property were transferred subject to a gift tax liability, calculation of the value subject to gift tax would reflect that liability. However, when the liability is for income taxes in an (as yet) unascertained amount, payable at an (as yet) unascertained date, and never paya-

the transfer (to eliminate differential tax consequences caused by postacquisition appreciation) and that both father and son are subject to income tax at the 28% marginal rate (to eliminate differential tax consequences caused by different rates). Under these circumstances, the father and son's combined federal tax is $106,000. The father pays $78,000 gift tax at the time of the transfer, and the son pays $28,000 income tax (28% multiplied by the $100,000 proceeds in excess of the son's carryover basis). In essence, the son pays the tax from funds provided by the father (from the proceeds on sale of the gift) and is left with $172,000 cash. If, instead, the father sold the property, paid the income tax at a 28% rate ($28,000) from the proceeds and transferred to his son the $172,000 after-tax proceeds, the gift tax would be $67,080 (39% multiplied by $172,000), and the total federal tax liability only $95,080. Although the form of the transactions varies, equal value is transferred in both cases (the son is left with $172,000). But the variation in form results in a $10,920 greater gift tax liability when the gift is made in the form of property rather than cash.

153. As the donor could avoid the tax on a tax by selling the property, paying any tax due on the gain, and then making a gift of the after-tax proceeds, and as the making of a gift is not treated as requiring the realization of appreciation on the property, it follows that the donor should be able to make a gift of the whole property without the imposition of a tax on a tax. Collins, supra note 4, at 949.

154. Professor Collins explains:

Section 1015(d)(6) . . . achieves this by providing a basis increase equal to the gift tax on appreciation. The effect of the increase is to reduce income from a sale by an amount equal to the increase. The tax reduction effect of the increase is equal to the amount of the increase times the effective income tax rate applicable to the gain arising at the time of sale. The amount of the increase is the gift tax on appreciation. The effect of the increase, then, is to reduce income tax arising from the sale by an amount equal to the effective income tax rate times the appreciation existing at the time of the gift. The gift tax on the income tax ultimately due is also equal to the effective gift tax rate . . . times the appreciation existing at the time of the gift. Thus, the basis increase results in a reduction of income taxes from the sale by an amount equal to the gift tax that falls on that part of the property that becomes income tax.

Id.; see supra text immediately following note 121. The section 1015(d) adjustment, as limited by subsection (d)(6), allows an addition to the son's basis equal to $39,000, which results in an income tax saving equal to $10,920 (28% multiplied by $39,000). This exactly equals the differential in gift tax paid on the two forms of transaction discussed supra at note 152.

155. See supra note 123 and accompanying text.
ble at all if the donee holds the property until death, the potential liability is ignored. Therefore, the cause of the "mischief" under pre-1015(d) law—differential tax consequences on transfers of equal value in different forms—was an excessive gift tax levy on the transfer of appreciated property because valuation of the gift failed to take account of the encumbrance on the property equal to the income tax liability. However, the remedy took the form of reducing the donee's income tax (by increasing the amount the donee could receive tax-free on sale of the property).

Section 1015(d), by allowing an increase to the donee's basis, reduces the donee's income tax liability by reducing the donee's taxable gain. The original section 1015(d) increase, equal to the full amount of gift tax paid, reduced the taxable gain to the donee by an amount that resulted in income tax savings greater than the differential in gift tax. Greater gift tax continued to be payable when the donor transferred the property itself rather than the after-tax proceeds, but a gift of the property, followed by sale by the donee, resulted in lower total taxes because the income tax savings exceeded the differential in gift tax between the two forms of transaction. This sheds light on the House report's explanation that immediately prior law provided too generous an adjustment. Completely eliminating the "tax on a tax" (excluding the full amount of the gift tax payment from income tax) had failed. Yet partially eliminating the "tax on a tax" achieved the desired end of yielding an income tax saving to the donee equal to the differential in gift tax paid on the transfer of the property compared with the transfer of the after-tax proceeds. That differential is equal to the gift tax paid on the donee's assumed income tax liability.

156. The heirs or devisees of the donor will be relieved of income tax liability on accrued gains because they will be assigned a basis in the property equal to its fair market value at the time of the donee's death. See I.R.C. § 1014 (West Supp. 1990).

157. As an illustration, the property was valued at $200,000, without regard to the "hidden" income tax liability of $28,000 that was transferred with the property. At a 39% gift tax rate, that resulted in excessive gift tax of $10,920. By providing for an increase in basis, § 1015(d)(6) saves the donee this amount in income tax (by reducing the amount of gain subject to income tax). Section 1015(d)(6) increases the basis of the son to $139,000, and upon sale of the property the son is subject only to $17,080 income tax (28% multiplied by the $61,000 proceeds in excess of basis adjusted under § 1015(d)(6)), rather than $28,000. The result is a savings of $10,920 in income tax. The combined federal taxes equal $95,080 ($78,000 gift tax paid by the father and $17,080 income tax paid by the son), the same total amount of federal taxes paid when the father sells the property and transfers the after-tax proceeds to the son.

The compensation does not take account of the time value of money, however. The present value of the income tax savings may be substantially less than the $10,920 gift tax overpayment, depending upon the interval between payment of the gift tax and payment of the income tax and the interest rates during that period.

On the other hand, under certain circumstances, an overcompensation will result. See Collins, supra note 4, at 950.

158. W. KLEIN, B. BITTKER & L. STONE, FEDERAL INCOME TAXATION 162 (7th ed. 1987); Collins, supra note 4, at 948-49.

159. Collins, supra note 4, at 948 & n.156.

160. See supra notes 141-42 and accompanying text.
The donee's ultimate income tax liability on sale of the property will equal the donee's income tax rate multiplied by the difference between the amount realized on the sale and the donee's adjusted basis in the property. The portion of that liability assumed from the donor generally will equal the donee's income tax rate multiplied by the difference between the fair market value of the gift at the time of the transfer and the donor's basis. In other words, the amount on which the donee assumes income tax liability can be described by the same words used in the statutory definition of "net appreciation." Indeed, understanding "net appreciation" as a synonym for taxable gain assumed by the donee (calculated without the 1015(d) adjustment) explains how the statutory formula achieves its end. The donee's income tax savings equals the donee's income tax rate multiplied by the gift tax rate multiplied by the assumed gain. Rearranging the factors, the income tax savings equals the gift tax rate multiplied by the donee's income tax rate multiplied by the assumed gain; in other words, the gift tax paid on the assumed income tax liability—namely, the excess gift tax paid.

The drafter's reasoning can be inferred as follows. On transfer of appreciated property, the donee assumes potential income tax liability on an amount equal to the difference between the sale price that could be commanded (fair market value ("FMV") of the property) at the time of the transfer and the donor's transferred basis (FMV - basis). If the donor and donee are subject to the same income tax rate, the donee's assumed income tax liability will equal the income tax the donor would have paid if the donor had sold the property and transferred the after-tax proceeds, and thus, the value transferred will be the same as if the donor had transferred the after-tax proceeds. Because valuation of property for gift tax purposes fails to take account of the income tax liability the donee assumes on transfer, the property is overvalued for gift tax purposes by an amount equal to the donee's income tax rate multiplied by the excess of fair market value over basis, which results in an overpayment of gift tax equal to the gift tax rate multiplied by the donee's assumed income tax liability (gift tax rate • income tax rate • (FMV - basis)).

The drafter's reasoning continues. The donee should be compensated for the overpayment of gift tax through a reduction in income tax liability. Therefore, an amount equal to the gift tax paid on the donee's assumed income tax liability should be subtracted from the donee's income tax liability. The desired result (postadjustment income tax liability of the donee) can be stated arithmetically as follows:

161. *But see* Collins, supra note 4, at 950 (noting that, if the property declines in value after the transfer, the donee's assumed income tax liability is less than the tax liability the donor would have incurred if the donor had sold the property and transferred the proceeds).

162. See supra text immediately following note 151.

163. I have found no evidence of the drafter's reasoning to explain why compensation to the donee was considered an appropriate remedy even when the gift tax was paid by the donor.
income tax rate • (FMV - basis) - gift tax rate • income tax rate • (FMV - basis)
                   income tax liability

Tax liability can be reduced by reducing taxable gain. The donee's income tax liability can be reduced by an amount equal to the overpayment of gift tax by subtracting from assumed taxable gain an amount equal to the gift tax paid on the assumed gain. This can be demonstrated arithmetically by simplifying the arithmetic statement of the desired result by dividing both terms by the income tax rate, as follows:

\[
\frac{FMV - basis - gift tax rate \cdot (FMV - basis)}{income tax liability}
\]

That is, for income tax liability to be reduced by an amount equal to the overpayment of gift tax (gift tax rate • income tax rate • (FMV - basis)), income tax should be levied on the assumed gain (FMV - basis) minus the gift tax paid on the assumed gain (gift tax rate • (FMV - basis)).

Continuing the drafter's reasoning, taxable gain can be reduced by increasing basis. Therefore, the donee's basis should be increased by adding the product of the gift tax rate multiplied by the assumed taxable gain, that is, increase in basis = gift tax rate • (FMV - basis). The gift tax rate applicable to the gift as a whole can be calculated by dividing the total gift tax paid on the transfer by the amount subject to gift tax:

\[
\frac{gift tax paid}{amount of gift}
\]

Thus, the increase in basis can be calculated as follows:

\[
\frac{gift tax paid \cdot (FMV - basis)}{amount of gift}
\]

This formula can be recast, by dividing each side of the equation by "total gift tax paid," as:

\[
\frac{increase in basis}{gift tax paid} = \frac{FMV - basis}{amount of gift}
\]

This reconstruction of the drafter's reasoning is, of course, the product of my perceptions. However, to dispute the substantial accuracy of this historical account, one must find more plausible that individuals with responsibility for drafting tax provisions (1) were ignorant of (or simply ignored) basic and longstanding elements of the income tax structure, such as that tax on appreciation in a donor's property is transferred to the donee; and/or (2) fortuitously adopted a mechanism effective for the drafter's purposes. I find it more plausible that section 1015(d)(6) was the product of a conscious and informed design. It strains credulity to attribute the precise effect of the words to chance.

My reconstruction of the reasoning that lay behind the words of section
1015(d)(6) illustrates that the "plain meaning" of the words was an illusion. The richness of the words, revealed by the study of the circumstances of their enactment, demonstrates that even when the meaning seemed apparent, there were relevant dimensions that I had not understood. In a transfer without any consideration, different attributes of appreciation (increase in value in the hands of the donor and amount of taxable gain assumed by the donee) are merged in a single figure; the one is equal to the other, and the essentiality of the one could be overlooked. In such a case, the meaning of the words is not clear to the reader, but the same figure will satisfy either professionally plausible definition of appreciation. The factual context does not require identification of the "real" meaning because no practical consequences flow from the differences. The meaning is "plain" and uncontroversial because the words are ambiguous, that is, a choice between competing definitions is unnecessary. The facts do not prompt inquiry as to precise meaning and so it is unnecessary to discuss which alternative is accurate and by what measure accuracy is to be determined. However, the statutory purpose (saving the donee in income tax the amount overpaid in gift tax) could be accomplished by the prescribed calculations because appreciation is the measure of the gain on which the donee assumes income tax liability, not because appreciation is the measure of the increase in value of the property in the hands of the donor.

I have tried to identify how the drafter would have resolved a part-gift, part-sale problem if it had been contemplated, but it is irrelevant whether anyone involved in the drafting of section 1015(d)(6) had contemplated the type of transaction postulated in Problem II. It is, in fact, unlikely. Although the committee report accompanying section 1015(d) as originally enacted contemplated payment of gift taxes by the donee, conditional gifts were not acknowledged in any discussion of section 1015(d)(6). Moreover, at the time that the limitation was enacted, the Supreme Court had not yet resolved the intercircuit conflict in favor of characterizing a conditional gift as a part-gift, part-sale. However, the problem raises issues that the evidence indicates were considered, namely, the assumption of income tax liability by the donee, which liability was ignored in valuing the gift for gift tax purposes. Inquiring into how these issues were addressed reveals how the drafter intended the words to apply to a situation such as Problem II, and renders unnecessary speculation on what provision might have been drafted had the drafter contemplated these particular circumstances.

Thus understood, section 1015(d)(6) can now be applied to Problem II. Having inferred the drafter's purpose, I might proceed directly to adding to the donee's basis an amount that would effect an income tax savings exactly equal to the gift tax overpayment. However, inferring a purpose to compensate for excess gift tax with income tax savings does not authorize me to adopt my

164. See supra note 132.
own formula to effect an income tax savings exactly equal to the gift tax over-

payment. Such is the distinction between construing a statute to promote its

purpose and inferring from the evidence of purpose the communicative content

of the words. The "plain meaning" of the words that prescribe the statutory

method of calculating the gift tax rate to be applied to the donee's taxable

gain (to determine the amount of the increase) has the effect of calculating the

overpayment of gift tax at the average, rather than marginal, gift tax rate.

The words employed and their arrangement are evidence that the average rate

was intended to substitute for actual marginal rate. As a result, the income

tax savings will fall short of compensating the donee for the overpayment of
gift tax when the average rate of gift tax is lower than the highest marginal

rate at which gift tax was paid. 166

One might imagine that, if confronted with a choice between providing for

exact compensation (using the actual marginal rate) or providing less than

exact compensation, the drafter might have preferred the former. Perhaps the

drafter intended the statutory formula as a proxy for applying the actual mar-
ginal rate. To effectuate the inferred purpose to provide exact compensation, I
could substitute the actual gift tax rate for the quotient of "gift tax paid"
divided by "amount of the gift." However, the drafter did not employ the
words "gift tax rate," so I could hardly be said to be assigning the drafter's
meaning to those words, and I would be ignoring the words that were used,
"gift tax paid" and "amount of the gift," and the arrangement in which they
are presented. Absent more probative evidence than an extension of the infer-
ence that the function of the section 1015(d)(6) adjustment was to compensate
a donee for excess gift tax paid, I rely on the words employed and their ar-
range ment to conclude that rough justice (using the average gift tax rate)
rather than exact compensation (using the actual marginal gift tax rate) was

166. Once again referring to Problem 1 as an illustration, and positing that the full $200,000
fair market value of the gift was subject to gift tax but that gift tax assessed was $80,000, with
the 39% rate applicable to the first $100,000 and the 41% rate applicable to the rest, the gift
would be overvalued by $28,000 (28% income tax rate, multiplied by $100,000 taxable gain).
However, the overvaluation of the gift would cause an excessive gift tax liability of $11,480 (41%
x $28,000). Section 1015(d)(6) would authorize an addition of $40,000 to the son's $100,000
carryover basis, calculated as follows:

\[
\text{increase in basis} = \frac{\$200,000 - 100,000}{\$80,000} = \frac{1}{2}
\]

\[
\text{increase in basis} = \frac{1}{2} \times \$80,000
\]

Because the formula has the effect of allowing an increase based on an average rate and not at the
rate the gift tax was actually imposed, the increase in basis of $40,000 under § 1015(d)(6) will
not allow sufficient income tax savings to compensate for the excess gift tax. The son's basis will
be $140,000 ($100,000 carryover basis, plus $40,000 increase). Gain on the sale of the property
will be $60,000 ($200,000 proceeds from sale at fair market value, minus $140,000 basis), result-
ing in an income tax liability of $16,800 (28% multiplied by $60,000). Section 1015(d)(6) thus
saves the son only $11,200 (28% income tax liability without adjustment, minus $16,800 with
adjustment), rather than the full $11,480 overpayment of gift tax.
intended. The words used suggest that simplicity was valued over precision.

Because the remedy substantially accomplishes the purpose, the fact that the remedy is imprecise in some cases does not negate the inference from standard cases and the committee explanation that the object of section 1015(d)(6) is to increase the donee’s basis by the gift tax paid on the assumed taxable gain to compensate in income tax savings the overpayment of gift tax. However, Problem II must be approached with respect for the remedy provided as well as for the reason for the remedy.

In Problem II, the daughter assumed income tax liability on $200,000, calculated without the section 1015(d)(6) adjustment. All of the assumed gain represents increase in the value of the property in the hands of the donor because the mother has fully recovered her cost basis (and then some), although $200,000 is less than the full increase (which would be the difference between the mother’s basis and the full fair market value of the property). “Net appreciation,” as the measure of the taxable gain assumed by the daughter, can be understood to equal the $200,000 value transferred without consideration (“fair market value of the gift”), less the donor’s zero basis allocated to the gift (“donor’s adjusted basis immediately before the gift”). “Amount of the gift,” that is, the amount subject to gift tax, and “fair market value of the gift” serve different functions in the statutory formula, and the amount subject to gift tax does not always equal the full value transferred without consideration due to the annual exclusion. Here, however, the “amount of the gift”

167. There is some authority on this point. See, e.g., Priv. Ltr. Rul. 81-17-141 (Jan. 30, 1981) (explaining that the gift tax “attributable to the net appreciation is determined by multiplying the gift tax paid with respect to the gift by the net appreciation in value of the gift and dividing the result by the amount of the gift”).
168. Collins, supra note 4, at 950.
169. My colleague, Lash LaRue, made the following helpful comments on an earlier draft of this paper:

To put this in Lord Coke’s terms, the “remedy” chosen never perfectly matches the “mischief.” In Heydon’s Case, the mischief was “long and unreasonable leases.” . . . Parliament did not void such leases [but instead] declared void those leases which were made “when a prior life interest was then in being.” By analogy, most statutes pick off a part, not the whole of the mischief.

Letter from Lash LaRue to Gwen T. Handleman (March, 1990) (copy on file with author).
170. The distinction can be illustrated by altering the facts of Problem I slightly. As originally posited, the entire $200,000 value of the property transferred was subject to gift tax. However, due to the annual exclusion, the fair market value of the property and the amount subject to gift tax may vary. If the property were valued at $210,000, and $10,000 were excluded from value subject to gift tax under § 2503(b), net appreciation should be measured with reference to the full fair market value ($210,000 - 100,000) because the role of “net appreciation” in the statutory scheme is as a measure of the taxable gain that would be assumed by the donee subject to income tax (absent the compensating adjustment). The “amount of the gift,” as the figure used to determine the gift tax rate, must be set at the $200,000 value subject to gift tax. The son’s income tax liability on sale of the property at its fair market value ($210,000) would result in taxable gain of $110,000 and an income tax liability of $30,800 (28% multiplied by $110,000), absent § 1015(d)(6). The gift would thus be overvalued by $30,800, resulting in an excess gift tax assess-
also equals $200,000 because it is the amount that was subject to gift tax. The section 1015(d)(6) adjustment, therefore, should be calculated as follows:

\[
\frac{\text{increase in basis}}{\$80,000} = \frac{$200,000 - 0}{\$200,000} = 1
\]

The daughter's basis equals her $80,000 cost basis, plus the $80,000 section 1015(d)(6) increase, or $160,000. Upon sale of the property for its $280,000 fair market value, she will have taxable gain of $120,000 ($280,000 - $160,000). At a 28% income tax rate, she has income tax liability of $33,600. Absent the adjustment, her income tax liability would have been $56,000 (28% \cdot ($280,000 - $80,000)). Thus, section 1015(d)(6) saved her $22,400 ($56,000 - $33,600). However, the 1015(d)(6) adjustment yields an income tax savings equal to less than the excess gift tax paid. The property was overvalued for gift tax purposes by $56,000, the income tax liability the daughter would bear on $200,000 gain at the 28% rate. That excess value was subjected to gift tax at a rate of 41%, yielding an excess gift tax liability of $22,960. Nonetheless, she is allowed a reduction in income tax equal only to the average rate on the gift (40%) multiplied by the $56,000 overvaluation, or $22,400 ($56,000 - $33,600).

By examining the result directed by the statutory terms in easy cases, together with contemporaneous explanations, I claim to have demonstrated that (1) the object of the statute was to equalize the federal tax consequences between gifts of cash and gifts of property regarded as of equal after-tax value, (2) the means employed to equalize the tax consequences was to effect an income tax savings to the donee of property equal to the "overpayment" of gift tax (the difference in the gift tax liability incurred on a transfer of cash compared with a transfer of property of equal after-tax value), and (3) the reasoning that explains the efficacy of the words used in directing an adjustment that
achieves the contemplated income tax savings reveals that the drafter employed the words with reference to particular dimensions of the concepts designated by the words. These dimensions are the key to defining the terms with the precision required to address the part-gift, part-sale transaction.

However, the drafter’s reasoning cannot be attributed to an entire body of legislators. It is not plausible that more than a handful of individuals could actually have read the words of section 1015(d)(6) with the precision that I argue represents their communicative content, and there is no evidence that the legislators were supplied with a coherent explanation. Nevertheless, inferences can be drawn from the record of the enactment of section 1015(d)(6) that the drafter’s intent was accorded legislative authority. Section 1015(d)(6), along with another provision, was added to the Tax Reform Act of 1976 in conference, with the following explanation: “the conferees agree with and incorporate the explanation of those provisions contained in House Report 94-1380 (the Ways and Means Committee Report on H.R. 14844), except as modified by this statement.” No modifying statement referred to section 1015(d)(6). A majority of both houses of Congress voted in favor of enactment of the Tax Reform Act of 1976. The provision was mentioned only briefly in the House Ways and Means Report incorporated into the conference report, and, as noted above, the explanation was unenlightening. I have found no evidence in the records of the proceedings that any legislator read the statutory language or even the report, let alone posed an objection. Contrary to the assumptions of those who take the view that the words of the statute in their plain meaning are what the legislators enacted, I find it implausible to assume that the words of this particular provision were read by many. Under such circumstances, a vote in favor of a provision can only be a vote to allow the drafter to speak for the legislative body. Thus, in addition to the inferences already drawn, I add the inference that a vote for this provision, incorporated into a massive act including a multiplicity of controversial provisions (of which this was assuredly not one), however motivated, was a vote to defer to the judgment of the intellect that had designed the scheme.

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172. Maltz, supra note 24, at 7 (commenting that “agreement among the legislators themselves should be the critical factor in statutory analysis”).
173. See supra notes 141-47 and accompanying text.
174. Professor Daniel Farber, commenting on an earlier draft of this paper, asked whether I meant to say that “lawyers or judges should discount [my] perfectly sensible interpretation” of § 1015(d)(6) if new evidence showed that my views conflicted with the hitherto “unknown secret wishes of an unidentified scrivener.” See Letter, supra note 83. I must answer that, while my interpretation may be “sensible,” no private practitioner would be entitled to decide that it is the “law” in the face of evidence of the contrary view of a drafter delegated authority to frame the terms offered for and accorded legislative approval.

I hold a reasoned belief (and that is the best I can say) that my interpretation is faithful to the drafter’s intent, and that is the only basis on which I can advance the interpretation as law. I do not necessarily hold the view that it is the interpretation that best, in Professor Farber’s terms, “furthers the sensible and just administration of the tax system.” That is not for me to decide on a tax return submitted with my pledge that the return reports tax liability in accordance with law.
My enlightenment, however, admittedly rests on an understanding of the "reason of the statute," and that understanding is a tissue of inferences. No one can know with certainty what any author's intent or strategy might have been; we can only invoke probabilities.\textsuperscript{176} Although my conclusions rest principally on circumstantial evidence, I believe my inferences are more probable than the alternatives. My assertion that I have identified the communicative content of section 1015(d)(6) rests on no more nor less certain grounds than any conclusion about life experiences: the evidence supporting my conclusions has the character of data that experience has taught is a reliable basis on which to proceed. My conclusions have more the character of truth in that sense (reliable evidence) than possessed by the alternative propositions (for example, that there was no conscious awareness or that I have not identified it). This does not make my conclusions true, but it does provide appropriate grounds to proceed, when the alternatives are not to proceed or to proceed without regard to what those with political authority might will. Regard is due because I have no authority independently to supply answers to a client's questions about the scope of a taxpayer's obligations and entitlements, to impose my policy vision, or to author statutory terms.

V. Conclusion

In an effort to justify appropriating the title to my own purposes, I read \textit{Zen and the Art of Motorcycle Maintenance},\textsuperscript{176} and I found that there was a certain similarity in the impressions we drew from the experience of attempting to harmonize the lofty and the plebeian. The author recounts a nightmarish series of incidents with motorcycle mechanics who not only failed to remedy the problem for which he sought their assistance, but caused further damage. Later, the author himself discovered that the malfunction was attributable to a "little twenty-five-cent pin" that had broken.\textsuperscript{177} Reflecting on why the mechanics had so "butchered" the job,\textsuperscript{178} he concluded that it was their lack of involvement and care,\textsuperscript{179} an attitude he also found pervaded computer manuals, which he edited for a living. The manuals seemed to say: "Here is the machine, isolated in time and in space from everything else in the universe. It has no relationship to you, you have no relationship to it, other than to turn certain switches, maintain voltage levels, check for error conditions communicated [etc.]."\textsuperscript{180} In contrast, \textit{he} really cared about fixing the motorcycle, get-

\begin{flushleft}
\textsuperscript{175} D'Amato, \textit{supra} note 14, at 576.

\textsuperscript{176} R. Pirsig, \textit{supra} note 1.

\textsuperscript{177} \textit{Id.} at 23.

\textsuperscript{178} \textit{Id.}

\textsuperscript{179} \textit{Id.} at 14.

\textsuperscript{180} \textit{Id.} at 24-25.
\end{flushleft}
Bingo. I know that feeling. I have not always known it. I did not have it in law school when I first encountered section 1015(d)(6) and was satisfied to plug in numbers from a simple hypothetical and reach an uncontentious result. I was mildly curious as to why anyone should want to prescribe these particular calculations, but I did not really care. Not enough to find it. Happily, a caring attitude was nurtured in me by those with whom I practiced, and I value our association now more than ever. That is not to say that my law school teachers did not try to inspire that ethic. Now I realize that at least some of them did. But it is a gift that must be accepted to be complete.