FOREWORD: THE PAST, PRESENT, AND FUTURE OF THE FEDERAL TAX LEGISLATIVE PROCESS

The Tax Cuts and Jobs Act of 2017[1] is—for better or worse—the most significant piece of federal tax legislation since the Tax Reform Act of 1986.[2] Despite the comparable significance of the two tax acts, they could scarcely have been more different in terms of the legislative processes that produced them. The 1986 Act grew out of not one, but two, lengthy Executive Branch tax reform studies—the multi-volume "Treasury I" of November 1984, and President Reagan's nearly 500-page proposal of May 1985 (often referred to as "Treasury II").[3] In response to the proposals from the Treasury and the White House, the congressional tax writing committees each convened over forty days of hearings and conducted markups lasting seventeen and twenty-six days.[4] Following the release of Treasury II, more than sixteen months passed between the first hearings of the House Ways and Means Committee in June 1985 and President Reagan's signing of the bill in October 1986,[5] and almost two years separated the release of Treasury I from the presidential signing.

In 2017, the role of the multi-volume Treasury I was played by a one-page collection of bullet points released by the White House in late April.[6] In place of

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1. Pub. L. No. 115-97, 131 Stat. 2054 (2017). The proponents of the legislation intended to name it the Tax Cuts and Jobs Act of 2017, but at the last minute the Senate parliamentarian struck the name of the bill from the legislation as being (oddly enough) in violation of budget reconciliation rules. Thomas Kaplan & Alan Rappeport, *Republican Tax Bill Passes Senate in 51-48 Vote*, N.Y. TIMES, Dec. 19, 2017, at A1. Despite the official status of the legislation as the no-name tax act of 2017, in the text we honor the wishes of the proponents. President Trump had hoped that Congress would title the legislation the "Cut, Cut, Cut Act," possibly a more appropriate name since in some ways the new law suggests a mindless tearing of the tax policy fabric. Josh Dawsey, *"Twenty is a Pretty Number." In Tax Debate, Trump Played the Role of Marketer in Chief*, WASH. POST (Dec. 20, 2017), https://www.washingtonpost.com/politics/twenty-is-a-pretty-number-in-tax-debate-trump-saw-himself-as-marketer-in-chief/2017/12/20/b6781062-e5ad-11e7-9ec2-518810e7d44d_story.html?noredirect=on&utm_term=.893ee39a67f1 [https://perma.cc/5DYE-FYQM].

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

3. *See generally* U.S. TREAS. DEP'T, TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH (1984); RONALD REAGAN, THE PRESIDENT'S TAX PROPOSALS TO CONGRESS FOR FAIRNESS, GROWTH, AND SIMPLICITY (1985), https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Reform-Proposal-1985.pdf [https://perma.cc/BXD9-5RZK].

4. *See* STAFF OF J. COMM. ON TAX'N, JCS-10-87, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 1–4 (Comm. Print 1987) [hereinafter GENERAL EXPLANATION]. For a now-classic journalistic account of the process leading to the passage of the 1986 legislation, see JEFFREY A. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM (1988).

5. *See* GENERAL EXPLANATION, supra note 4.

6. Neil Irwin, *Who Wins, Who Loses in Details of the Plan*, N.Y. TIMES, Apr. 27, 2017, at A16.

the hundreds of pages of Treasury II, in late September the Trump White House offered a nine-page (counting the title page and some pages featuring mostly white space) *Unified Framework for Fixing Our Broken Tax Code*.[7] Following the introduction of the House bill reflecting the Administration's tax reform proposal, neither tax committee held a single hearing and each conducted a largely pro-forma markup of only four days. The entire legislative process—from the House bill's introduction on November 2 to the presidential signing on December 22—took barely seven weeks.

The truncated legislative process of 2017 did not suddenly appear last year out of nowhere; rather, it was the culmination of trends in the tax legislative process over the past several decades. Nevertheless, it was an extraordinary manner of proceeding for legislation of such breadth and complexity. In the aftermath of the 2017 whirlwind, it is extremely timely to present this special issue on the past, present, and future of the federal tax legislative process.

Each of the eight articles in this issue features both historical background and forward-looking perspectives. We introduce them here in the order in which they appear in the issue, beginning with the articles focused primarily on the events of 2017 and concluding with the more historically-oriented contributions that provide insights into how we arrived at the tax legislative process of 2017.

In the first article, Victor Fleischer describes how passage of the 2017 tax bill revealed weaknesses in the institutions supporting the formation of tax legislation in this country.[8] By "institutions," he refers not only to the rules and norms of the legislative process, but also to the manner in which key players—including elected officials, government staff, interest groups and lobbyists, experts from the private sector and academia, and journalists—have traditionally interacted within that process. Fleischer served as the Democratic Chief Tax Counsel for the Senate Finance Committee until midway through 2017, and is therefore especially well situated to comment on the current state of these institutions. According to Fleischer, when the tax institutions are strong, "norms of equity, efficiency, or administrability drive policy, and evidence and reason dominate tax arguments."[9] In contrast, when the traditional institutions are weak, "party loyalty, ideological faith, rent extraction, and political messaging drive policy."[10] He claims that many of the usual participants in the legislative process, such as the tax committees, the Joint Committee on Taxation, Treasury, lobbyists, tax practitioners, academics, and think tanks, played diminished roles in 2017, reducing the openness and inclusiveness of the process. Fleischer concludes that the fragility of the tax institutions shown in 2017 was more troubling than the

7. DONALD J. TRUMP, UNIFIED FRAMEWORK FOR FIXING OUR BROKEN TAX CODE (Sept. 27, 2017), https://www.treasury.gov/press-center/press-releases/Documents/Tax-Framework.pdf [https://perma.cc/2WQV-FCGJ].

8. Victor Fleischer, *The State of Our Tax Institutions*, 81 LAW & CONTEMP. PROBS., no. 2, 2018, at 7.

9. *Id.* at 10.

10. *Id.*

substantive consequences of the bill.

In his article, Michael Doran argues that continuation of some of the institutions that Fleischer would like to see preserved involves a trade-off.[11] According to Doran, structures that require legislative proposals to flow through standing committees, chamber floors, and conference committees may improve the quality of legislative information by giving legislators incentives to invest in policy expertise. But by creating a series of veto gates controlled by legislative actors who may have an interest in maintaining the status quo, these structures also protect and entrench the decisions of earlier Congresses. The structures may thus be counterproductive if maintaining policy flexibility is a principal legislative objective. Doran's observation may explain some of what occurred in 2017. Proponents of the tax bill were under intense pressure to achieve a major legislative change because of its anticipated policy and political advantages. Proponents may therefore have decided to weaken some tax institutions—for example, by proceeding without full involvement of some traditional players—in order to overcome the status quo bias. Fleischer decries this weakening, but the ultimate judgment may depend upon one's view of the merits of the bill.

Doran focuses more generally on the various ways in which one Congress may deliberately or incidentally try to impose its preferences on a subsequent one. In addition to the congressional organizational structure, Doran describes how the federal budget process "is thick with institutional obstacles that frustrate changes to the policy status quo."[12] But, as discussed by Rebecca Kysar in her contribution, budget process rules may also be used to *overcome* obstacles to change.[13] In 2017, Congress passed the tax bill using a special budget procedure known as reconciliation. Reconciliation bills cannot be filibustered in the Senate; they may therefore be approved with support of a bare majority of Senators. Since the tax bill's only support in the Senate was from its fifty-two Republican members, use of the reconciliation procedure was crucial.

Kysar criticizes the use of reconciliation for major tax reform legislation on several grounds. First, it may undermine the stability of the legislation. Because it was passed with the votes of only one party, the 2017 tax bill incorporated some extreme policies "that would have looked much different [if included] in bipartisan legislation."[14] This feature may make portions of the new law—potentially affecting every taxpayer in the country—vulnerable to reversal if the political tides shift. Second, reconciliation may be one reason the reform elements of the bill, such as base-broadening measures, were quite limited. Such measures are typically unpopular and therefore easier to adopt if there is widespread, bipartisan support to share the responsibility. Finally, an arcane

11. Michael Doran, *Legislative Entrenchment and Federal Fiscal Policy*, 81 LAW & CONTEMP. PROBS., no. 2, 2018, at 31.

12. *Id.*

13. Rebecca M. Kysar, *Tax Law and the Eroding Budget Process*, 81 LAW & CONTEMP. PROBS., no. 2, 2018, at 61.

14. *Id.* at 94.

reconciliation requirement known as the Byrd Rule resulted in the sunsetting of many provisions—an especially unattractive outcome for legislation intended to have significant long-term effects. Kysar describes strategies contemplated by tax bill proponents in 2017—including changes to the budget period, the budget baseline, and the identity of scorekeepers—in order to satisfy the Byrd Rule and other reconciliation-specific requirements. Although Congress did not ultimately adopt any of the strategies, Kysar anticipates continued pressure in those areas and suggests possible reforms to avoid undesirable modifications in the future.

Ellen Aprill and Daniel Hemel dovetail Kysar's contribution by providing a deep dive into the background and history of the Byrd Rule and showing how it profoundly influenced both the substance and form of the 2017 legislation.[15] They especially focus on two aspects of the rule that prohibit provisions in a reconciliation bill if the provisions either increase the deficit in years after the budget period or have "merely incidental" budgetary effects. The first prohibition led to the sunsetting of tax cuts; it is the reason the individual income and estate tax reductions in the 2017 bill almost all expire after 2025. The second prohibition was frequently invoked in 2017; among other things, it contributed to the demise of a controversial proposal that would have permitted nonprofits to retain their tax exemption even if they engaged in some level of political activity. (It also was the reason the name of the new law was removed from the bill.[16]) Aprill and Hemel explain that both aspects of the rule have sound origins. The first was included to promote fiscal responsibility, and the second preserved the Senate's norm of unlimited debate on all non-budget-related matters. In practice, however, the opaque manner in which Byrd objections are adjudicated has undermined the utility of the rule, produced some perverse consequences (such as scuttling provisions intended to achieve fiscal discipline), and added to the complexity of the law. If the Byrd Rule remains important in the future, they urge greater transparency to help "legitimize a process that now seems both capricious and consequential."[17]

Lawrence Zelenak's contribution examines the surprising extent to which, during the first decade or so of the modern income tax, Congress adopted a high-delegation model of tax legislation requiring the Treasury Department to resolve many basic structural issues unaddressed by Congress.[18] Treasury, rather than Congress, made the initial calls on (among other things) the tax treatment of capital gains, the basis of appreciated property acquired from a decedent, and the income tax status of the imputed rental value of owner-occupied housing. Treasury has never again played so prominent a role in the development of the income tax as it did in that first decade. Eventually it became practical for

15. Ellen P. Aprill & Daniel J. Hemel, *The Tax Legislative Process: A Byrd's Eye View*, 81 LAW & CONTEMP. PROBS., no. 2, 2018, at 99.

16. *See supra* note 1.

17. Aprill & Hemel, *supra* note 15, at 136.

18. Lawrence A. Zelenak, *Leaving it up to Treasury: Congressional Abdication on Major Policy Issues in the Early Years of the Income Tax,* 81 LAW & CONTEMP. PROBS., no. 2, 2018, at 137.

Congress to write highly detailed tax legislation leaving only interstitial questions to be resolved by Treasury—partly because Congress no longer had to write an entire income tax from scratch (as in 1913), and partly because members of Congress and their staffs gradually developed income tax expertise (including the legislative drafting expertise of what are now the House and Senate Offices of Legislative Counsel). As soon as it was able to do so, Congress opted for the highly detailed approach. Some commentators in later decades—including the great Stanley Surrey—have urged Congress to return to the early high-delegation model of tax legislation, but Congress has never looked back.

It would be easy to suppose that grassroots lobbying of the general public on federal income tax issues is a development of recent decades. In her contribution, however, Marjorie Kornhauser entertainingly details the grassroots anti-tax lobbying efforts of two conservative groups in the mid-1930s—the Sentinels of the Republic and the American Liberty League.[19] Most remarkable was the Sentinels' use of animated cartoon films, including *The Amateur Fire Brigade*. Kornhauser quotes a description of that film from the *New York Times*:

> The picture depicts the efforts of the fire company, with leaking buckets and a pump that needs priming with $1,000,000 in taxes every minute, to put out a fire in the home of Uncle Sam and Ma Liberty. The fire has spread after the Democratic donkey, entering the kitchen to eat from the pork barrel, upsets a "pan of recovery" on the stove.[20]

Kornhauser concludes with reflections on the state of grassroots lobbying today, and with a call for a "multimedia tax literacy campaign [to] help break through the rhetoric, misinformation, and apathy that permeate much of what passes for current tax policy debates."[21]

Lobbying of a very different sort is the subject of the article by Ajay Mehrotra and Joseph Thorndike.[22] For many decades tax lawyers—acting largely through the Tax Section of the American Bar Association—have attempted to influence Congress on tax legislative issues. Organizing their article around a 1961 speech by the ubiquitous Stanley Surrey, Mehrotra and Thorndike describe the conflicting loyalties of the organized tax bar as lobbyist. On the one hand, the tax bar may offer Congress its expertise in a public-spirited effort to improve the tax laws and defend the fisc. On the other hand, the tax bar may wrap itself in the cloak of public interest in order to promote the private interests of the clients of its members. As Mehrotra and Thorndike explain, this "tension is not susceptible to resolution, since it arises from fundamental elements of our modern legal and revenue systems."[23] Precisely because the tension cannot be resolved, there are

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19. Marjorie E. Kornhauser, *The "Invisible Government" and Conservative Tax Lobbying 1935–1936*, 81 LAW & CONTEMP. PROBS., no. 2, 2018, at 167.

20. *To Satirize New Deal by Animated Movies*, N.Y. TIMES, Oct. 14, 1935, at 5.

21. Kornhauser, *supra* note 19, at 201.

22. Joseph J. Thorndike & Ajay K. Mehrotra, *"Who Speaks for Tax Equity and Tax Fairness?" The Emergence of the Organized Tax Bar and the Dilemmas of Professional Responsibility*, 81 LAW & CONTEMP. PROBS., no. 2, 2018, at 203.

23. *Id.* at 205.

many twists in their story of how the tax bar struggled with the conflict between its civic and client responsibilities during the formative decades of the federal income tax.

In our final article, George Yin attempts to connect trends in the tax legislative process with the specific tax legislation produced by that process.[24] He argues that shifts in the organizational structure of Congress, its increased partisanship, and especially the growing involvement of partisan professional staffers in developing legislation, have diminished the enactment of structural tax legislation that is not part of a major reform. By "structural legislation," he refers to law that "potentially improves the execution of current policies by advancing the efficiency, equity, or administrability of existing law,"[25] such as amendments to the partnership tax rules of subchapter K or the corporate tax rules of subchapters S and C. Compared to other forms of tax legislation, Yin suggests that reforms that merely repair existing structures may be unappealing to partisan staffers because of the high cost (in terms of time and effort required) and low reward (in terms of the policy and political payoff) of the legislation. Since the reforms tend to be complex and technical, the lack of interest on the part of staffers may be determinative. Their disinclination towards structural legislation may also help to explain the absence of reform initiatives by private-sector groups—including the ones discussed by Mehrotra and Thorndike—that have traditionally taken the lead in such efforts.

As is evident, each of the articles in this symposium issue touches on one or more of the legislative process institutions initially described by Victor Fleischer. Some readers may attribute defects in the 2017 tax bill to recent or longstanding flaws in the tax institutions or simply to misuse of otherwise sound institutions by those presently controlling Congress. Whatever one's views, it seems clear that there are almost boundless opportunities for improvement. We hope the articles in this issue will contribute to that end.

24. George K. Yin, *Crafting Structural Tax Legislation in a Highly Polarized Congress*, 81 LAW & CONTEMP. PROBS., no. 2, 2018, at 241.

25. *Id.* at 276.