THE STATE OF AMERICA'S TAX INSTITUTIONS

VICTOR FLEISCHER*

I
INTRODUCTION

The rules of the game have changed. More than ever, ideology drives tax policy at the expense of evidence, reason, expert advice, or specialized knowledge. This article examines the performance of American tax institutions in the year leading up to the passage of the Tax Cut and Jobs Act of 2017 (the "TCJA").[1] I conclude that the state of this country's tax institutions is not strong.

The tax legislative process—including both the formal process and the informal "rules of the game"—historically has allowed a variety of institutional players with specialized knowledge and expertise to influence and shape tax legislation. These institutions include the Congressional tax writing committees, the White House, the President, other elected officials, the Treasury Department, the staff of the Joint Committee on Taxation, think tanks, law firms and accounting firms, lobbyists, academia, and the press. The rules of the game made the tax legislative process somewhat inclusive, pluralistic, and politically independent. In 2017, these traditionally strong tax institutions were largely hamstrung, sidelined, or ignored while a handful of elected officials and staff churned out a bill, behind closed doors, in record time.

The lessons of 2017 are less clear. The surprise of President's Trump election, the narrow Republican majority in the Senate, and the last-minute failure of health care "repeal and replace" turned the tax bill into "must pass" legislation and steered the Republican participants towards speed and secrecy and away from careful deliberation. Still, the process failures may have been more than a blip in an otherwise sound process. Ideology increasingly carries the day over the influence of experts and even lobbyists. It seems unlikely that Democratic control of the White House and Congress would reverse the trend toward weaker tax institutions. We may wish to acknowledge that our tax institutions may not be strong enough to promptly, effectively or coherently address complex and

* Victor Fleischer is a law professor at the University of San Diego. From 2016–17, the author served as Chief Tax Counsel (Minority Staff) of the Senate Finance Committee. This article reflects the opinion of the author and does not necessarily reflect the views of the Senate or any of its staff. The author thanks Jordan Barry, Seth Hanlon, Rebecca Kysar, Stephen Shay, Mila Sohoni, George Yin, and Larry Zelenak for comments and suggestions.

1. Tax Cuts and Jobs Act, Pub. L. 115-97, 131 Stat. 2054 (2017) [hereinafter Tax Cuts and Jobs Act].

difficult social problems such as climate change, income inequality, inequality of opportunity, or raising sufficient revenue to pay for government obligations.

II
TAX CUTS

Donald Trump had it right all along. It should have been called "The Cut Cut Cut Act."[2]

In the end, the Tax Cut and Jobs Act of 2017 was about tax cuts, not tax reform. If one evaluates the TCJA as a tax reform measure—compared to the Tax Reform Act of 1986, or to tax reform efforts in other countries—the TCJA is a failure.[3] There were no major changes to the tax base, such as the introduction of a consumption tax or carbon tax, no major base-broadening efforts, no major structural changes to the individual, corporate, or partnership sections of the tax code, and no attempt to modernize the Code or harmonize this system with trading partners' systems.

It is true that the international tax rules have changed significantly. The exemption of active foreign source income and the new Foreign-Derived Intangible Income (FDII), Global Intangible Low Tax Income (GILTI), and Base Erosion Anti-Abuse Tax (BEAT) provisions scramble the international tax system into something new.[4] But unlike the GOP's initial foray in late 2016 and early 2017—the Destination-Based Cash Flow Tax (DBCFT)—the TCJA leaves all the building blocks of a byzantine international system in place.[5] The U.S. system remains a nominally worldwide tax system based on residence, with foreign tax credits to ease offshore investment and Subpart F to address passive income. There is a new "participation exemption" for certain foreign source earnings, but transfer pricing principles continue to police the sourcing of income. Instead of reforming the foundations of international tax, three new floors on top of the structure were added: a minimum tax on deemed intangible income—GILTI, an anti-abuse tax on payments to foreign affiliates—BEAT, and an export subsidy for intangible income—FDII. Tax simplification it is not.

If journalism is the first draft of history, I hope this article may serve as a first draft of economic history. The TCJA is an important piece of tax legislation, and while it has many flaws, the law is not a complete disaster. There is, however, a disaster story to tell—a story that has been mostly obscured by the tweaks, twists and turns of the new law.

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2. Tara Palmeri, *"The Cut Cut Cut Act": Trump, Hill Leaders Differ on Tax Overhaul Bill's Name*, ABC NEWS (Nov. 2, 2017, 9:48 AM), http://abcnews.go.com/Politics/trump-hill-leaders-disagree-upcoming-tax-reform-bill/story?id=50863220 [https://perma.cc/5ACU-KJYP].

3. *Compare* Tax Reform Act, Pub. L. No. 99-514, 100 Stat. 2085 (1986) *with* Tax Cut and Jobs Act.

4. *See id.* §§ 14201–14202, 14401.

5. *Compare* BETTER.GOP, A BETTER WAY: OUR VISION FOR A CONFIDENT AMERICA, TAX 27 (2016), https://abetterway.speaker.gov/_assets/pdf/ABetterWay-Tax-PolicyPaper.pdf [https://perma.cc/2JWH-JBTU], *with* Tax Cuts and Jobs Act.

The story is this: The tax legislative process in 2017, in all its dysfunctional glory, served as a stress test to measure the health of American tax institutions and, perhaps, the country's broader political and economic institutions. Whatever the potential substantive merits of the TCJA—the benefits and detriments of the tax cuts, the passthrough deduction, GILTI, and so on—the stress test of the resilience of the nation's tax institutions did not go well. The patient survives, but its vital signs are poor.

In the tradition of institutional economics, the word "institutions" is used here in the sense of "the rules of the game of a society" and not just a roster of the players involved.[6] Tax policy in the United States has historically been shaped by a broad spectrum of government staff, interest groups, private sector and academic experts, lobbyists, and journalists. The interaction of these various forces is the game, and in this game the scoreboard reflects not just legislative outcomes but also facts and beliefs about tax policy, and the resulting system that dictates how we pay tax and why. The performance and influence of each set of participants can be compared to previous iterations of the game and give readers a sense of the state of our tax world.

The conclusion of this article is that American tax institutions are weak. The role of specialized knowledge in shaping the TCJA was sharply limited and the participation of experts was confined, narrow, and insular. It is no surprise, then, that the process produced a bill that primarily benefits those who are already well-off.[7] The TCJA reflects the triumph of ideology over expertise.

6. Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97, 97 (1991) ("Institutions are the humanly devised constraints that structure political, economic and social interaction. They consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights)."). On the importance of tax institutions to institutional development, see, e.g., Douglass C. North and Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 816 (1989) (discussing Parliament's exclusive authority to raise new taxes following the Glorious Revolution).

7. According to the Tax Policy Center, the top quintile of taxpayers receives about 65% of the benefits of the tax cuts in 2018, 66% in 2025, and 107% in 2027. *See* TAX POLICY CENTER, DISTRIBUTIONAL ANALYSIS OF THE CONFERENCE AGREEMENT FOR THE TAX CUTS AND JOBS ACT 3–5 (Dec. 18, 2017), http://www.taxpolicycenter.org/sites/default/files/publication/150816/2001641_distributional_analysis_of_the_conference_agreement_for_the_tax_cuts_and_jobs_act.pdf [https://perma.cc/C923-QYXE]. *See also* STAFF OF J. COMM. ON TAX'N, JCX 68-17, 115TH CONG., DISTRIBUTIONAL EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, "THE TAX CUTS AND JOBS ACT," 6 (Comm. Print 2017):

Distribution of the Proposal

Change in Federal Taxes ($ millions)

Income Category	2019	2021	2023	2025	2027
Less than $10,000.	-$396	-$60	$278	$314	$383
$10,000 to $20,000.	-$1,792	$1,920	$3,044	$2,847	$6,487
$20,000 to $30,000.	-$2,982	$1,948	$2,416	$2,980	$8,359
$30,000 to $40,000.	-$5,416	-$1,956	-$202	$105	$4,864
$40,000 to $50,000.	-$6,728	-$3,522	-$2,127	-$1,701	$4,317

III

STRONG VS. WEAK TAX INSTITUTIONS

The health of American political and economic institutions is more important, in the long run, than the TCJA's changes to the Internal Revenue Code. Assume that tax cuts bought an additional 0.7% of GDP growth over ten years.[8] Was it worth it? After accounting for this growth, the TCJA still increases the deficit by a trillion dollars, which eventually will require greater tax increases in the future or greater cuts to spending programs compared to prior law. It is true that one or two trillion dollars of additional federal debt is not going to make or break the United States as a country. But the legislative process that led to the enactment of the TCJA may have inflicted lasting damage to the nation's tax institutions. These changed norms—the new normal in tax policy—will make it harder, not easier, to address fiscal needs in the future.

A. How Do We Know What We Know About Tax Policy?

The justification for tax reform—or any piece of legislation—is based on facts and shared beliefs about the world. Partisanship and strategic behavior play a role in the legislative process, but no major bill can become law without some non-laughable way for members to justify their actions to reporters, to donors, and to their constituents.

The strength or weakness of American tax institutions shapes how factual statements are assessed as true or false and how shared beliefs are formed. When tax institutions are strong, the key facts and beliefs are generated by specialized knowledge in an open and inclusive process, guided by experts from government, academia, practice, and industry. When tax institutions are weak, the key facts and beliefs are generated by other institutions, like political parties, campaign donors, the media, or general ideology about the size or role of government. When tax institutions are strong, norms of equity, efficiency, or administrability drive policy, and evidence and reason dominate tax arguments. When tax institutions are weak, party loyalty, ideological faith, rent extraction, and political messaging drive policy. The strength of a country's tax institutions falls on a spectrum; no country's tax institutions are absolutely strong or entirely weak.

The key facts and beliefs range from simple to more technical in nature. Consider some of the facts and beliefs debated in 2017. Simple facts and beliefs

$50,000 to $75,000.	-$23,046	-$18,819	-$14,944	-$14,349	$4,060
$75,000 to $100,000.	-$22,437	-$20,583	-$16,558	-$16,652	-$1,037
$100,000 to $200,000.	-$70,372	-$64,835	-$49,535	-$48,439	-$5,993
$200,000 to $500,000.	-$65,485	-$61,510	-$46,640	-$47,460	-$5,890
$500,000 to $1,000,000.	-$23,947	-$21,661	-$14,015	-$13,623	-$3,099
$1,000,000 and over.	-$36,853	-$29,845	-$9,833	-$9,600	-$8,495
Total, All Taxpayers.	-$259,454	-$218,927	-$148,113	-$145,581	$3,958

8. STAFF OF J. COMM. ON TAX'N, JCX 69-17, 115TH CONG., MACROECONOMIC ANALYSIS OF THE CONFERENCE AGREEMENT FOR H.R. 1, "THE TAX CUT AND JOBS ACT," 3 (Comm. Print 2017).

include: the rich won't benefit from tax reform;[9] the TCJA provides simplification; Americans will be able to file taxes on a postcard;[10] the United States is a high-taxed country. More technical facts and beliefs include: the TCJA is deficit-neutral after accounting for macroeconomic effects; the optimal corporate tax rate is about 20%; passthrough businesses deserve a tax cut; workers, not shareholders, benefit the most when corporate tax rates are reduced; cutting corporate taxes will significantly increase wages; the TCJA eliminates incentives for US multinationals to offshore manufacturing and investment; the new international tax rules will bring back cash, investment, and jobs from overseas. It is hard to see how the TCJA could have passed without most Republicans sincerely believing most of these claims to be true. But are they? Tax experts view all or most of these claims as false.

Where did these facts and beliefs come from? For the most part, these facts and beliefs came from political actors and not from tax experts or specialized tax institutions. Even if one dismisses some of the rhetoric around the tax bill as mere ritual incantation, political messaging, or noise, the tax legislative process is more than a performative exercise. Ideas were debated, even if the debate mostly took place behind closed doors. Decisions were made, fueled by facts and shared beliefs. I find the development of these legislative facts and policy beliefs more troubling than the tax bill itself.

1. An Example of a Failed Tax Institution: Dynamic Scoring

In 2017, GDP growth was viewed as both necessary and sufficient as a justification for the TCJA.[11] For months, Republicans pitched the plan as a free lunch, claiming it would pay for itself in the long run.[12] Even if it was not going to be a perfect bill, the TCJA would provide some benefits (more money for workers and shareholders) and, because of an increase in GDP, no long-term increase in the deficit and, therefore, no real drawbacks.

I would personally prefer using other metrics for evaluation, like simplicity, fairness, and efficiency. The single-minded focus on GDP growth may be justifiable if the boats at the bottom and middle of the income scale benefit in

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9. Also known as the "Mnuchin Rule." *See* Greg Robb, *Mnuchin Concedes He's No Longer a Believer in the Mnuchin Rule*, MARKETWATCH (June 13, 2017, 12:59 PM), https://www.marketwatch.com/story/mnuchin-concedes-hes-no-longer-a-believer-in-the-mnuchin-rule-2017-06-13 [https://perma.cc/AY75-UXC3].

10. Jane C. Timm, *Does the GOP Plan Make Taxes Simple Enough to Fit on a Postcard? Probably Not, Experts Say*, NBC NEWS (Dec. 21, 2017, 4:53 AM), https://www.nbcnews.com/politics/politics-news/does-gop-tax-plan-make-taxes-simple-enough-fit-postcard-n831646 [https://perma.cc/9ASW-DQK2].

11. *See, e.g.*, *Preliminary Details and Analysis of the Tax Cuts and Jobs Act*, TAX FOUND. (Dec. 18, 2017), https://taxfoundation.org/final-tax-cuts-and-jobs-act-details-analysis/ [https://perma.cc/HQ9S-US52].

12. *See, e.g.*, Bob Ryan, *Republicans Are Still Making a Huge Claim About the Tax Bill That Every Independent Analysis Rejects*, BUSINESS INSIDER (Dec. 4, 2017, 10:12 AM), http://www.businessinsider.com/trump-republican-tax-reform-bill-deficit-debt-claims-2017-12 [https://perma.cc/KMJ4-DS7N].

some direct or indirect way from the rising tide. But relying on GDP growth as a reliable metric only makes sense if (1) projections of GDP growth are performed by experts using scholarly methods; and (2) there is some connection between the facts as determined by the experts and the legislative process itself. Without that connection, dynamic scoring is nothing more than fake math.[13] And in 2017, the connection between facts and legislative process was severed. The fact that the official projection from the Joint Committee on Taxation (JCT) came in more than a trillion dollars short of the target was, in the minds of Republican legislators, neither here nor there.[14]

It is worth recalling the role that the Congressional Budget Office (CBO) played in the health care reform process during the summer of 2017. As the Republican health care bill progressed, CBO projections of huge increases in the number of uninsured people damaged the bill's political prospects and helped mobilize protest and turn public opinion against the bill[15]—whether it affected Senator McCain's vote is anyone's guess.[16]

JCT estimates of the revenue impact of the TCJA did not have a similar effect. The CBO's estimates on health care had been mostly accepted as fact, while JCT's revenue estimates were mostly ignored.[17] The difference is perhaps attributable to the salience of the subject matter. Political protest can challenge, constrain, or shape legislative facts and beliefs—but people rarely take to the streets to protest the shifting of tax burdens onto future generations. It may also be that Republican attacks on the competence of the JCT, which began early in the legislative process, did some lasting damage to JCT's credibility and relevance. What began as "working the ref" became something more pernicious, undermining JCT's work and freeing Republican lawmakers to later dismiss the revenue estimates as erroneous, untrustworthy, or irrelevant.

2. Why Institutions?

Process stories and complaints were plentiful in 2017, as a perusal of headlines and tweets shows:

- "This is Not How the Senate is Supposed to Work;"[18]

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13. "Dynamic scoring" is the inexact phrase often used to refer to the macroeconomic effects of changes in tax policy. Even in its "static" scoring, JCT staff tries to account for microeconomic behavioral responses to changes in tax policy, such as induced realizations of appreciated assets from reductions in the capital gains rate.

14. *See, e.g.*, John Bat, *McConnell Insists That Tax Bill Will Be Revenue Neutral*, CBS NEWS (Dec. 4, 2017, 1:46 PM), https://www.cbsnews.com/news/mcconnell-insists-that-tax-bill-will-be-revenue-neutral/ [https://perma.cc/9GVX-T5CR].

15. *See, e.g.*, Jeff Stein, *McCain on CBO Projection of 22 Million Fewer Insured: "Obviously, That's Not Good News*," VOX (Jun. 26, 2017, 6:20 PM), https://www.vox.com/policy-and-politics/2017/6/26/15877038/cbo-mccain-health-care-ambivalent [https://perma.cc/E3KN-5YH3].

16. *See id.*

17. JCT estimates were accepted for purposes of compliance with Senate rules, but mostly disregarded by Republican members.

18. Ezra Klein, *This is Not How the Senate is Supposed to Work*, VOX (Sept. 29, 2017, 8:40 AM),

- "This is not 'tax reform.' This is plunder;"[19]
- "Republicans Exact Their Revenge Through a Tax Bill: Instead of Eliminating Favoritism, the GOP's Reforms Load the Costs of the State Upon Disfavored Persons, Groups, and Regions;"[20]
- "Every reference to the POS Republican tax giveaway as 'tax reform' is a lie. Any reporter using that term should be ashamed of him/herself. You are peddling GOP propaganda;"[21]

Such complaints are easily dismissed as partisan. As Senate Majority Leader Mitch McConnell cynically observed right after passing the bill, "You complain about process when you're losing."[22]

Dismissing process as the keepsake token of whiny losers is a bad way to govern a country. Process reflects the rules of the game, and a change in the rules of the game means that institutions have changed. Not only do institutions matter in the long run; in the long run, institutions are all that matter. Whether the marginal effective tax rate on debt-financed capital expenditures is positive or negative is not a great predictor of future economic health. The nature of a country's political and economic institutions determines its path towards success or failure. Institutions pave the road towards continued prosperity or the decline of empire.

Underlying these ubiquitous process complaints is an implicit belief that the prior rules of the game were better. What makes a process better or worse? The literature on fiscal institutions perhaps lends some support for the view—commonly-held among most tax policy experts—that tax institutions (1) should have some degree of political independence; and (2) should rely on expertise and specialized knowledge even at the expense of more populist, democratic approaches.

Drawing out general lessons from the literature on fiscal institutions is challenging; the complexity and endogeneity of fiscal institutions makes modeling difficult.[23] But one can identify some useful examples. It is taken as canonical, for example, that having an independent central bank is an important factor in determining a country's success. A politically independent central bank

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https://www.vox.com/policy-and-politics/2017/9/29/16373460/senate-budget-reconciliation-filibuster [https://perma.cc/D83H-4KT9].

19. David Kusnet (@DavidKusnet), TWITTER (Jan. 6, 2018, 7:46 AM), https://twitter.com/DavidKusnet/status/949668412640382981 [https://perma.cc/2KPG-XVGS].

20. David Frum, *Republicans Exact Their Revenge Through a Tax Bill*, THE ATLANTIC (Dec. 21, 2017), https://www.theatlantic.com/politics/archive/2017/12/gop-tax-bill/549017/?utm_source=atltw [https://perma.cc/QCU4-BB6K].

21. Bruce Bartlett (@BruceBartlett), TWITTER (Dec. 21, 2017, 7:54 AM), https://twitter.com/BruceBartlett/status/943872251178438656 [https://perma.cc/Y7PW-7PJG].

22. Siobhan Hughes, *McConnell Says "You Complain About Process When You're Losing*," WALL ST. J. (Dec. 2, 2017, 2:20 AM), https://www.wsj.com/livecoverage/tax-bill-2017/card/1512199223.

23. For a thoughtful treatment on the development of tax institutions and the long-run social and economic effects, see Kenneth L. Sokoloff & Eric M. Zolt, *Inequality and Taxation: Evidence from the Americas on How Inequality May Influence Tax Institutions*, 59 TAX L. REV. 167 (2006).

can more easily counteract a government's myopic tendencies and pro-inflationary bias. Similarly, it is generally accepted that people have a tendency to treat funds from a broad-based tax as a common-pool resource. The pain of taxation is dispersed but the benefits to particular parties who manage to extract benefits from that common pool can be high; strong tax institutions can guard the commons against excessive rent extraction.

In the absence of a well-understood method of evaluating tax institutions, perhaps it is valuable to draw on the general framework set forth by Daron Acemoglu and James Robinson in *Why Nations Fail*.[24] Through a series of historical case studies, Acemoglu and Robinson consider the factors that lead some nations to improve and others to deteriorate. Geographic factors and access to natural resources matter less than one might initially think. Cultural factors are also less important, except insofar as they make nations more or less amenable to organizing themselves in a way that is conducive to success. What matters in the long run is the health of a country's political and economic institutions.[25]

Acemoglu and Robinson evaluate political and economic institutions along a spectrum of extractive versus inclusive:[26]

	Extractive	Inclusive
Economic Institutions	• Lack of law and order. • Insecure property rights. • High barriers to entry. • Regulatory playing field tilted towards incumbents.	• Secure property rights. • Law and order. • Public services and regulation support markets. • Enforcement of contracts. • Access to education and opportunity for great majority of citizens.
Political Institutions	• Political power concentrated in the hands of a few. • Fewer checks and balances. • Weak rule of law.	• Broad participation / pluralism. • Strong rule of law. • Sufficient political centralization to promote law and order.

By these measures, American political and economic institutions remain relatively open and inclusive compared to many countries. But there is still

24. *See generally* DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY (2012).

25. *See generally id.*

26. *See id.* at 73–83.

reason to be cautious. One lesson from *Why Nations Fail* is that institutions can shift from inclusive to extractive, with elites consolidating wealth and power at the expense of long-term prosperity.[27]

If one compares American political and economic institutions before and after Trump's election, the direction of change is, perhaps, troubling. Attacks on the regulatory state in many areas, such as antitrust, environmental law, higher education, and securities law have strengthened incumbents. On the other hand, a deregulatory environment can be good for disruptive innovators like Uber, Airbnb, cryptocurrencies, and other entrepreneurial businesses that can benefit from weak law enforcement. Democrats view attacks on Dreamers and cutting taxes for the rich as likely to reduce access to education and opportunity. Republicans look at those same policies as increasing access to education and opportunity for America's "forgotten communities" in the heartland. Still, despite the challenge of evaluating the state of our institutions without viewing through a partisan lens, I hope the reader will proceed on the assumption that institutions matter and that strong tax institutions are better than weak ones.

B. Tax Institutions—The Players, their Traditional Roles, and their Roles in the 2017 Process

What makes tax institutions strong or weak? The academic literature sometimes refers to strong tax institutions to describe a tax system that can raise substantial government revenue in a relatively efficient way.[28] The need to finance war efforts sometimes serves as an exogenous force that triggers or motivates institutional change.[29] Thus, broad-based income, consumption, and property taxes are evidence of strong tax institutions; narrow tax bases, overly high tax rates, and excise taxes are evidence of weaker institutions.

In addition to considering the outcomes of the tax legislative process, however, it is also important to consider the formation of knowledge, the process itself, and the values that the process reflects. The strength of tax institutions compared to other political and economic institutions can be measured in part by considering the extent that specialized knowledge influences the legislative process.

Strong tax institutions cultivate specialized, evidence-based knowledge and share that knowledge effectively with lawmakers. Strong tax institutions are politically independent, pluralistic, and strive to act in the public interest. Strong institutions adhere to the rule of law. Strong tax institutions may also be elitist

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27. *See id.* at 152–81.

28. *See, e.g.*, Ryan Saylor & Nicholas C. Wheeler, *Paying for War and Building States: The Coalitional Politics of Debt Servicing and Tax Institutions*, 69 CAMBRIDGE J. WORLD POL. 366, 369 (2017), https://www.cambridge.org/core/journals/world-politics/article/div-classtitlepaying-for-war-and-building-statesdiv/1847609B1FE9114AE137509C99798644 [https://perma.cc/65ZN-8GHG].

29. *See generally* STEVEN A. BANK, KIRK J. STARK & JOSEPH J. THORNDIKE, WAR AND TAXES (2008).

and less sensitive or responsive to populist, egalitarian, and democratic impulses.

Weak tax institutions, by contrast, are dominated by other political and economic institutions, corrupted by partisan politics or financial bribes, sell policy outcomes to the highest bidder, or are loyal to ideology or faith over reason. Weak tax institutions fail to cultivate a culture of tax compliance, lack accountability, and are distrusted by the people.

The United States government endures lower levels of trust than the governments of many other countries, and anti-tax sentiment has been a more powerful force here than in much of Europe and Asia.[30] Still, American tax institutions gained power and strength in the 1970s, 1980s, and 1990s—alongside the general expansion of the administrative state—including expansion of staffing at Treasury, JCT, and on the tax-writing committees.

During this period the rules of the game looked something like this: A diverse constellation of players—thought leaders, political entrepreneurs, interest groups, donors, academics, government staff and members of Congress themselves—organically build the case for tax reform or significant tax legislation that could change the tax system in some significant way. One might call this the twentieth century model of the tax legislative process. The Tax Reform Act of 1986, for example, was put in motion by the thought leadership of conservative economists, political entrepreneurs like Jack Kemp and Bill Bradley, expert government staff like Ron Pearlman and Charles McClure at Treasury.[31] President Reagan provided adequate leadership by highlighting the need for tax reform in speeches.[32] Despite some near-death experiences, the Tax Reform Act managed to survive the long trek from Treasury to the House to the Senate to Conference to final passage, driven along at key moments by powerful committee chairs Dan Rostenkowski (Ways and Means) and Bob Packwood (Senate Finance).[33] The idea of tax reform gained a momentum of its own and overcame the resistance of incumbent beneficiaries of the status quo.[34]

Based in part on the experience of the 1986 Act and in part on the rules and norms that used to govern the Senate, some legislative process norms came to be widely accepted as the rules of the game for tax reform. Tax reform must be deficit-neutral, creating both winners and losers, so as to force real reform and not just handing out tax cuts. Tax reform must be bipartisan: because tax reform

30. *See* Lori Montgomery, *Among GOP, Anti-Tax Orthodoxy Runs Deep*, WASH. POST (Jun. 5, 2011), https://www.washingtonpost.com/business/economy/among-gop-an-ironclad-anti-tax-orthodoxy/2011/06/02/AG90SgJH_story.html?utm_term=.4781030f4475 [https://perma.cc/B3Y5-VXQL].

31. *See generally* JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM (1987).

32. *See e.g.*, President Ronald Reagan, Address to the Nation on Tax Reform (May 28, 1985), http://www.presidency.ucsb.edu/ws/?pid=38697 [https://perma.cc/XWC9-VNYA] ("We're reducing tax rates by simplifying the complex system of special provisions that favor some at the expense of others. Restoring confidence in our tax system means restoring and respecting the principle of fairness for all.").

33. *See generally* BIRNBAUM, *supra* note 31.

34. *See generally id.*

creates winners and losers, bipartisanship provides the members with cover so blame can't be placed solely on one party or the other. And tax reform must be distributionally neutral, which allows the participants to set aside difficult questions of redistribution and focus more attention on questions of efficiency. Tax reform should strive for base-broadening as well as rate reduction. Tax reform should make the system simpler. It should include expert analysis from Treasury, think tanks, lobbyists and academics. Proposals should be vetted openly in Congressional hearings.

To some extent, these norms survived into the early twenty-first century, even against the backdrop of increased partisanship and centralization of power within Congressional leadership.[35] When President George W. Bush created a panel of experts to provide tax reform options in 2005, everyone seemed to follow the playbook.[36] Even more recent efforts, like those of former Ways and Means Chair Dave Camp and former Senate Finance Chair Max Baucus, followed the playbook. The rules of the game have changed.

1. The Congressional Budget Institutions

The tax legislative process is often interwoven with budget questions. Members often seek tax provisions to "pay for" tax expenditures or non-tax spending programs.

The bond between budget and tax policy became even tighter in the 1990s. Congress changed significantly in the 1990s with the centralization of power in the office of the Speaker of the House and Senate Majority Leader. Congress became more partisan, the Senate filibuster less sacred. Both parties looked to use the process of budget reconciliation, a fast-track process that avoids the threat of a filibuster in the Senate, to move tax legislation.

Reconciliation bills are subject to a series of constraints designed to limit the scope of legislation to deficit-reducing budget bills (these constraints do not work well.) The TCJA, of course, was passed as a reconciliation bill, as were key parts of the 2010 Affordable Care Act. The constraints nonetheless have some bite. Reconciliation bills must adhere to the reconciliation instruction of the budget. Additionally, the Byrd Rule requires that provisions be germane, that each provision have a revenue effect that is not merely incidental to the policy effect, and that no title of the legislation, taken in its entirety, increase the deficit in the years outside the budget window.

In a formal sense, one can view American budget institutions as an area where the rules of the game held strong in 2017. In the Byrd bath, the Senate Parliamentarian sometimes ruled in favor of the Democrats. Senator Mike Enzi, in his capacity as Chair of the Budget Committee, had the legal power to overrule

35. Michael Doran, *Tax Legislation in the Contemporary U.S. Congress*, 67 TAX L. REV. 555, 582–83 (2014).

36. *See* Scott Greenberg, *The Bush Tax Reform Panel Ten Years Later*, TAX FOUND. (Nov. 2, 2015), https://taxfoundation.org/bush-tax-reform-panel-ten-years-later/ [https://perma.cc/GR88-NLUA].

or fire the Parliamentarian, but he did not. Three key budget constraints exerted some influence on the tax legislative process: (1) the TCJA did not increase the deficit by more than $1.5 trillion, as measured by JCT without regard to macroeconomic effects, per the budget reconciliation instruction; (2) the TCJA did not increase the deficit in the out-years, as measured by JCT, per the Byrd Rule; and (3) the Senate majority respected the Parliamentarian's various rulings as binding.

But if one takes a step back from formal Senate procedure, the story of American budget institutions in 2017 is one of weakness, not strength. The administration's Fiscal Year 2018 budget was rolled out despite a results-oriented analysis distorted by a bizarre double-counting of tax revenue and growth. Specifically, in order to reach a politically motivated result, a balanced budget within ten years, the budget projected significant GDP growth from tax cuts and regulatory reform, so that tax cuts lead to new tax revenue. Yet the budget also assumed no actual change in the tax law, and thus applied the fictitiously assumed GDP growth would apply to the existing tax base, not the smaller tax base that would have purportedly driven the selfsame increase in GDP. The Fiscal Year 2018 budget, in other words, did not reflect the work of budget experts. It was a political document where budget specialists were directed to produce the Republican's right answer. They did as they were instructed.

Within the tax legislative process itself, the budget rules have been torqued beyond recognition. The Senate Parliamentarian is nothing if not formalistic, but she set no apparent limits on the gamesmanship allowed to fit the bill into its Byrd-Rule constraints. The games included:

- sunset of all of the individual tax cuts in 2025;[37]
- sunset of the § 199A passthrough deduction;[38]
- implementation of Chained-CPI;[39]
- sunset of Child Tax Credit expansion;[40]
- reducing the penalty for the ACA individual mandate to zero;[41]
- sunset of full expensing;[42]
- sunset of inclusion of depreciation and amortization in calculation of 163(j) interest limitation;[43]
- sunrise of amortization of research and development expenditures.[44]

Members stated outright that while the various sunsets and sunrises should be understood as law for purposes of the Byrd Rule, they expected a future

37. *See, e.g.*, Tax Cuts and Jobs Act, Pub. L. 115-97, § 11001, 131 Stat. 2054 (2017).
38. *See id.* § 11011.
39. *See id.* § 11002.
40. *See id.* §11022(a).
41. *See id.* § 11081(a).
42. *See id.* § 13201(b).
43. *See id.* § 13301.
44. *See id.* § 13206.

Congress to extend the tax cuts.[45] One provision—the amortization of research and development expenditures—is sure to have enough bipartisan opposition that it will never become law. The Better Care Reconciliation Act (BCRA) employed a similar tactic by relying on a delayed Cadillac tax.[46]

If one were to calculate the revenue effect of the TCJA over a twenty-year window without the games, sunrises, and sunsets, for example, the estimate might be closer to $4 trillion on a static basis and $3 trillion on a dynamic basis. It is true that the budget institutions continue to operate, the rule of law still exists, and the budget process imposed *some* constraints on the content of the TCJA. Nevertheless, the product of the 2017 process was a bill that will cost up to twice as much as the formal budget process admits. This result is persuasive evidence that American budget institutions are weak, at least insofar as they impact tax legislation.

2. Tax-Writing Committees

Historically, the tax-writing committees had a great deal of power and influence over the shape of tax legislation. The influence of the tax-writing committees has waned, however, as power became more centralized in Congressional leadership.[47]

In 2017, the tax-writing committees were mostly sidelined. The GOP began the year with a focus on the Destination-Based Cash Flow Tax (DBCFT), an approach that had been outlined in the 2016 Ryan/Brady Blueprint.[48] The Blueprint was a messaging document prepared for the 2016 campaign, and it drew heavily on the academic work of two influential tax economists, Alan Auerbach of the University of California, Berkeley and Michael Devereux of Oxford.

The DBCFT's problems started when Trump won the Presidential election. Few people, Democrats or Republicans, anticipated Trump's victory.[49] But after

45. *See* Lori Robinson, *Fact Check: Democrats are Repeating a Misleading Talking Point About Tax Cuts*, USA TODAY (Jan. 27, 2018, 1:21 PM), https://www.usatoday.com/story/news/politics/2018/01/26/fact-check-democrats-repeating-misleading-talking-point-tax-cuts/1070287001/ [https://perma.cc/EA7K-TT3R] ("Republicans say they expect a future Congress will extend those cuts, rather than allowing taxes for many to increase. But in order to pass their tax bill through budget reconciliation, a process requiring only a majority vote in the Senate, Republican lawmakers could not add more than $1.5 trillion to the deficit over 10 years. Nor could they have a bill that added to the deficit beyond that 10-year window.").

46. *Senate Healthcare Bill Mirrors House Retroactive Repeal of ACA Taxes*, GRANT THORNTON (Jun. 29, 2017), https://www.grantthornton.com/library/alerts/tax/2017/Legislative-Update/Senate-healthcare-bill-mirrors-House-repeal-ACA-taxes.aspx [https://perma.cc/M32N-AVUX].

47. *See* Doran, *supra* note 35, at 561–62.

48. *See* A BETTER WAY, *supra* note 5, at 27.

49. *See e.g.*, *One Reason the GOP Health Bill is a Mess: No One Thought Trump Would Win*, WASH. POST. (July 6, 2017), https://www.washingtonpost.com/powerpost/one-reason-the-gop-health-bill-is-such-a-mess-they-didnt-think-trump-would-win/2017/07/06/bed6a8e0-624a-11e7-8adc-fea80e32bf47_story.html?utm_term=.97d349bb819d [https://perma.cc/AJ34-2LVK] ("Look, I didn't expect Donald Trump to win. I think most of my colleagues didn't, so we didn't expect to be in this

Trump won and the GOP found itself in command of unified government, the Blueprint had to be turned rather quickly into an actual legislative proposal. In the months following the election, it became apparent that, whatever its merits as a tax reform idea, the DBCFT was not ready for prime time.

In theory, the DBCFT is economically sound and represents justifiable tax policy. But it was clear that only economists, not lawyers, had been involved in its design. The DBCFT had not been vetted by the tax-writing committees, Treasury, or outside experts. Critically, lawyers at JCT and Treasury did not have time to engineer a working infrastructure for the plan, leaving even the most basic questions unanswered. Were financial transactions subject to the tax? Would losses be refundable? How would the tax sections related to mergers and acquisitions work? Would full expensing apply to all assets? How would the tax apply to passthrough entities, and what would the rate be? How would the variation in tax rates across entities affect the adjustment of currency rates? Would currency adjustment occur fully and immediately, or over time? As the Republican Ways and Means staff took the heat, the White House and Senate Finance Republican staff stayed quiet and kept their options open, continuing to explore corporate integration and other ideas that seemed inconsistent with the House approach.

By late spring, the DBCFT was mostly dead, and Congress focused its attention on health care. The 2017 budget resolution had provided a reconciliation instruction as a vehicle for fast-track legislation on health care reform. When the BCRA failed at the last minute, the GOP quickly pivoted to tax cuts. Without the DBCFT providing a framework for business tax reform, the GOP committed to a few desired policy outcomes rather than following the old rules of the tax reform game. These outcomes were fairly simple:

1. Reduce the corporate rate to about 20%, and implement a territorial[50] tax system;
2. Do something for passthroughs;
3. Do something for the middle class.

The only process rules were dictated by Republican leadership, following the same playbook on tax reform that they had unsuccessfully pursued on health care: (1) strictly partisan; (2) keep the legislation secret as long as possible; and (3) once legislation is public, move as fast as possible to minimize the effectiveness of opposition from Democrats and industry.

The decision to pursue tax reform through budget reconciliation was inconsistent with what many would consider "true" tax reform. Under regular order in the Senate, members can offer amendments, giving committee members

situation.") (quoting Senator Patrick J. Toomey, R-PA).

50. A "territorial" tax system is one that taxes residents on active business income only if sourced in that country; active foreign business income is exempt. The United States nominally taxes U.S. citizens and residents on income earned worldwide; the TCJA introduced a new participation exemption for active foreign source income.

power to influence the shape of the legislation. Under reconciliation, legislation can bypass the committee altogether, as the BCRA did.

The TCJA did go through the Senate Finance Committee for a conceptual markup, but it failed to offer Democratic members an opportunity to shape the legislation. Republican members and staff had some opportunity to weigh in behind closed doors. But the process was further hampered by the Senate Finance Committee's practice of holding "conceptual markups" based on JCT's description of the bill rather than actual legislative language. The legislative language of the bill was not released until the bill was on the floor.

The legislative process was not inclusive or pluralistic. The tax benefits of the TCJA flow mostly to business owners. The pain is mostly centralized on income earners, not investors, in blue states with high state and local taxes. Limiting the deduction for state and local taxes is potentially justifiable as good tax policy—opinions differ. What was most startling was the brazenness of the tactic: some Republican members conceded that they were targeting blue states, which is not normally accepted as a valid policy justification.

Neither the House nor the Senate held hearings on the bill. At the markups, JCT and staff witnesses were available to answer questions, but there were no hearings about the bill with expert witnesses from Treasury, industry, think tanks, or academia. Nor, given the pace at which the legislation was barreling through the committees, would witnesses have had adequate time to prepare an analysis. In contrast, when the Democrats pushed through the Affordable Care Act, they held numerous hearings, and the text of the Affordable Care Act was available for review for 35 weeks.[51]

In sum, the TCJA was a Congress-driven bill, but not a committee-driven one. The legislation drew on the expertise of some staff, particularly the Republican Senate Finance staff. But it mostly sidestepped the bipartisan, pluralistic, and dynamic process that had marked prior efforts to advance tax legislation.

3. The Joint Committee on Taxation

JCT performed well in 2017. The problem was that no one cared.

The Joint Committee on Taxation is a bicameral committee that consists of ten members, five from each tax committee, three from the majority and two from the minority.[52] The real significance of the JCT, however, is the work of its staff of lawyers and economists. JCT lawyers help committee staff and member staff conceptualize, write "specs"—bulletpoint specifications of policy objectives and legislative proposals, attend drafting sessions with legislative counsel, and

51. Ryan Sit, *GOP Rushed Tax Bill for the Rich after Years of Saying Obamacare was Rammed through Congress*, NEWSWEEK (Dec. 4, 2017), http://www.newsweek.com/obamacare-tax-bill-republicans-democrats-congress-730829 [https://perma.cc/62PX-UFVV] ("By comparison, the text for the Affordable Care Act was available for review for 35 weeks, debated for 169 hours and went through at least 161 GOP amendments in the Senate before passing.").

52. Internal Revenue Code, 26 U.S.C. § 8002(a) (2018).

write technical descriptions of current and proposed legislation. JCT economists, meanwhile, help policymakers understand the economic effect of different proposals and estimate the revenue effects of proposed legislation. JCT is an assiduously nonpartisan institution.

JCT performed well in 2017 under impossible conditions. While the TCJA contains some technical drafting errors, causes some unintended consequences and reflects some questionable policy decisions, many problems were fixed as the bill proceeded from introduction in the House to the final Conference Report, and in general JCT's fingerprints are all over the bill. JCT's ability to generate descriptions of proposed changes promptly was amazing; only some of this work could have been performed before the fall. JCT's economists performed well also, generating the revenue estimates promptly and revising as needed.

JCT's role in shaping policy is less powerful than it used to be. JCT lawyers tend to view their role as assisting the members and their staffs, not creating policy on their own. While this helps JCT maintain its nonpartisan reputation, it also reduces the influence of its specialized expertise.

But the bigger institutional problem was that Republicans were moving ahead regardless of what JCT said. Republicans cared about revenue estimates, but only insofar as the Byrd Rule required. After years of pushing JCT to generate estimates of the macroeconomic effects of major tax legislation, known as dynamic scoring, Republicans ignored the dynamic score and continued to claim, falsely, that the tax cuts would pay for themselves.

For months GOP members had been attacking the legitimacy of JCT estimates, suggesting that they would turn instead to estimates from Treasury—whose economists are less insulated politically compared to JCT—or estimates from the Tax Foundation, a conservative think tank, which uses a methodology that is more favorable to deficit-fueled investment.

Senator Bob Corker (R-TN) was a critical figure. As a purported deficit hawk, Corker was the swing vote on the Budget Committee, he agreed to a budget reconciliation instruction limiting the revenue loss to $1.5 trillion (scored on a static basis), informally clarifying that he expected the bill to be revenue neutral compared to a then-current policy baseline. Implicitly, Corker expected about $1 to $1.1 trillion of macroeconomic growth effect.

JCT's estimate of $451 billion was less than half of what Corker hadbeen expecting. He could have met with JCT to discuss and better understand their revenue projections. Instead, Corker turned to Douglas Holtz-Eakin of the American Action Fund, a Republican think tank. Holtz-Eakin, an economist who once served as head of the CBO, is now an advocate for the Republican agenda. Corker wanted to get to yes, and Holtz-Eakin helped him get there, despite what the experts said. Corker then announced that he would vote for the bill.[53]

53. Seung Min Kim, *Why Corker Flipped on the Tax Bill*, POLITICO (Dec. 18, 2017), https://www.politico.com/story/2017/12/18/bob-corker-tax-bill-kickback-republicans-respond-302482 [https://perma.cc/CF9S-7EPU].

The problem lies not with JCT as such but rather what happened to the work product it produced. Republicans chose not to rely on the facts and estimates generated by the experts at JCT, so the final bill was instead supported only by ideology, intuition, and armchair economics.

4. Treasury

The Treasury Department traditionally introduces legislative proposals in connection with the President's budget in a document known as the Green Book. As noted previously, President Trump's Fiscal Year 2018 Budget included no tax proposals, instead simply assuming that Congress would produce a bill that would increase economic growth and magically increase tax receipts by several trillion dollars.

The expertise at Treasury was mostly sidelined during tax reform. For months Secretary Mnuchin claimed that dozens of Treasury officials were "running the numbers," but there was no evidence of this work on Capitol Hill.[54] While there was probably some work taking place behind the scenes, there were also reports that Treasury staffers were sitting around sharpening their pencils while awaiting guidance from political appointees. The Assistant Secretary for Tax Policy, David Kautter, was not nominated until May 2017 and not confirmed until July, shortly before the August recess. As the tax legislative process intensified in October, Kautter was appointed to serve as the Acting Commissioner of the Internal Revenue Service on top of his duties at Treasury. In the end, Treasury never produced an analysis of the tax bill, despite continued promises by Secretary Mnuchin.

Political appointees at Treasury accomplished very little, yet they still managed to damage the integrity of the institution. Following Secretary Mnuchin's dubious claims that workers bear 80% of the incidence of the corporate tax, Treasury removed one of its own research papers from 2012 on the topic.[55] That paper had found the incidence of the corporate tax borne by workers was about 18%, much more in line with the findings of other economic studies, and closer to JCT's assumption of 25%. Suppression of research is not the sign of a strong, politically independent institution.

5. White House

Power has shifted from Treasury to the White House in recent years as the executive branch has leaned on the staff of the National Economic Council to

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54. *See, e.g.*, Andrew Soergel, *Treasury Analysis Throws Latest Wrench into Tax Talks*, U.S. NEWS (Dec. 11, 2017, 4:29 PM), https://www.usnews.com/news/economy/articles/2017-12-11/treasury-analysis-throws-latest-wrench-into-tax-talks; *White House Appears to be One Step Closer to First Legislative Victory*, NPR (Dec. 1, 2017), https://www.npr.org/2017/12/01/567845811/white-house-appears-to-be-one-step-closer-to-first-legislative-victory [https://perma.cc/WK8Z-EMPK].

55. Richard Rubin, *Treasury Removes Paper at Odds With Mnuchin's Take on Corporate-Tax Cut's Winners*, WALL ST. J. (Sept. 28, 2017, 6:41 PM), https://www.wsj.com/articles/treasury-removes-paper-at-odds-with-mnuchins-take-on-corporate-tax-cuts-winners-1506638463.

drive domestic policy. In the case of the Trump Administration, Gary Cohn, the Director of the National Economic Council, and his top tax staffer, Shahira Knight, led the charge on tax reform.[56]

As with Treasury, however, it is unclear whether the White House exerted much influence on the shape of the bill. Cohn and Mnuchin and, by extension, their top staffers, were included in the so-called Big Six tasked with developing a unified framework. The unified framework, however, was short on detail once it was finally released. In the end, the TCJA was very much a Congress-driven bill. Senate Finance, working closely with Senate leadership, seemed to do most of the serious work. Meanwhile, the various White House promises about not funneling tax cuts to the rich and taxing carried interest as ordinary income quietly disappeared from the agenda.

6. Lobbyists

The tax lobbying community in D.C. is large but still fairly close-knit. Many lobbyists have experience on Capitol Hill, and Hill staffers spend a great deal of time meeting with companies and their lobbyists who wish to influence legislation. The benefits flow in both directions; lobbyists and industry professionals can provide staffers with information about the impact of different provisions and, it is said, even help draft legislative language.

Because of the accelerated timeline in 2017, lobbyists had limited ability to influence the TCJA. Republican staff kept the contents of the bill secret as long as possible. Lobbyists were able to see previews of policies before the public or Democrats, and it would be naive to say that lobbying had no influence.

However, I do not think the TCJA fits cleanly into a simple “public choice” narrative where legislation is auctioned off to the highest bidder. Yes, many industries do very well under the TCJA. But the bill has few of the sort of earmarks one might expect if campaign donations dictated the content of the legislation. Rather, I think the interests of most companies happened to align with the ideological priors of the Republican party.

7. Tax Practitioners

Tax lawyers often play an important role in shaping tax regulations. In particular, the tax section of the New York State Bar Association has historically been known for providing useful analysis, thoughtfully balancing the interests of their clients with the public interest and the integrity of the tax system. Accounting firms, of course, also have a tremendous stock of tax expertise, but they usually tread carefully, as they often have clients on both sides of many issues.

56. Julie Hirschfeld Davis & Kate Kelly, *Two Bankers are Selling Trump’s Tax Plan. Is Congress Buying?*, N.Y. TIMES (Aug. 28, 2017), https://www.nytimes.com/2017/08/28/us/politics/trump-tax-plan-cohn-mnuchin.html [https://perma.cc/7STZ-SEYJ].

The practice community was disappointingly silent in 2017. While many lawyers privately shared concerns about both the substance and the process, few were willing to voice these concerns publicly. Their clients, after all, were generally pleased with tax cuts, and the new bill—any new bill, but especially this one with gaps, mistakes, and new concepts—would generate lots of billable hours.

8. Academia

Academics were also mostly sidelined. Many of us spent as much time as possible talking to staffers, reporters, and practitioners about different problems with the bill. A group of tax law professors published a paper on SSRN that quickly accumulated a record number of downloads[57]—a number that speaks not to the scholarly impact of the piece, perhaps, but the fact that there was so little analysis of the bill available from traditional sources like Treasury and the practice community. Academics like David Kamin and Daniel Hemel identified some important flaws in the bill which were subsequently fixed. A well-functioning tax legislative process would not leave it to academics to help perfect the bill.

9. Think Tanks

The Center on Budget and Policy Priorities, the Center for American Progress, the Tax Policy Center, and the Tax Foundation were all able to put out an impressive amount of policy analysis in a short period of time. But, like academics, policy professionals at think-tanks had a limited amount of time to dive deep into the bill.

The most troubling aspect of the process was the Republican attacks on the nonpartisan Tax Policy Center. While Tax Policy Center staffers tend to be somewhat left-leaning, its work product tends to be centrist and professional rather than partisan. When every fact and belief is treated as merely partisan, then everyone's facts and beliefs are equally valid and merely a matter of opinion or political taste, like whether one should order chocolate or vanilla ice cream.

10. Press

Tax reporters similarly did a good job under difficult circumstances. In particular, the Wall Street Journal coverage, led by Rich Rubin, was terrific.[58] More broadly, however, the press focused on the horse race, not the substance of the bill. And tax coverage was understandably overshadowed by other Trump-related stories. To the extent that the media shaped our facts and beliefs about the TCJA, it was shaped mainly by non-tax political reporters with limited

57. David Kamin et al., *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the New Legislation* (Dec. 7, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084187 [https://perma.cc/Y495-ANYR].

58. Richard Rubin, *GOP Tax Bill Would Set Up Years of Challenges*, WALL ST. J. (Dec. 17, 2017, 7:42 PM), https://www.wsj.com/articles/gop-tax-bill-would-set-up-years-of-challenges-1513557742.

expertise and insight.

IV
SILVER LININGS

American tax institutions are frail. The country's facts and beliefs about the tax system are increasingly determined by non-experts with myopic and short-term political and ideological agendas. It is time to consider institutional change, and perhaps even to establish a more politically independent structure for our fiscal institutions—the tax and budget institution equivalents of an independent central bank. While the political chances of such a change seem remote, the fiscal path we are on is unsustainable, and perhaps at some point the country will again seek the guidance of specialized experts from within and outside the government.

The case for strengthening American tax institutions goes beyond tax policy. If the nation's political and economic institutions continue to become more extractive, with the rich and powerful benefiting at the expense of declining economic and social mobility, then the best days of the United States are behind us.

Obviously I am no optimist. But I can at least offer up two silver linings to come out of the tax legislative process in 2017. First, despite the dysfunctional process, the TCJA is not an unmitigated disaster. The TCJA is not a good bill, and I disagree with many of its policy choices. Nonetheless, its international provisions *may* reduce the incentive to offshore jobs compared to current law. Cutting the corporate tax rate to 21% will not cause a huge increase in wages, but there are other valid reasons to support the reduction in the corporate tax rate. The new passthrough rate is pretty much an unmitigated disaster. We will soldier on. In sum, it could have been worse, and but for the professionalism of a handful of Republican Hill staffers, it would have been worse.

The second silver lining is that, for all its process failures, the 2017 tax legislative process might make things easier for tax policy moving forward.

In July 2017, the Senate Finance Committee held a hearing on tax reform with four former Assistant Secretaries for Tax Policy. Pam Olson and Eric Solomon testified for the Republicans; Jon Talisman and Mark Mazur for the Democrats. There was a remarkable degree of consensus on many points. One point of consensus stuck with me: incremental progress is the best way forward.

With "TAX REFORM" now behind us, it's possible that the political desire to swing for the fences will diminish, and the technocratic push for incremental progress may find more space in which to operate. With the ideological spotlights pointed now at immigration, health care, and infrastructure, we may have a chance to rebuild our tax institutions and see more significant tax legislation in the years ahead. If so, we may be moving from the era of "never tax reform" into the era of "always tax reform" or, at least, "always tax legislation."