



The Promise and Limits of Fundamental Tax Reform: Contrasting the 1986 Tax Reform Act with the 2017 Tax Cuts and Jobs Act

Ajay K. Mehrotra^{†*} & Dominic Bayer^{**}

In December 2017, the Trump administration and its congressional allies enacted the Tax Cuts and Jobs Act, hailing it as the twenty-first century successor to the “landmark” Reagan-era Tax Reform Act of 1986. Indeed, the ’86 Act has long been celebrated by scholars and lawmakers alike as the apex of fundamental tax reform. The ’86 Act’s commitment to broadening the income tax base by eliminating numerous tax benefits and reducing marginal tax rates was seen in 1986 as the culmination of a nearly century-long intellectual movement toward conceptual tax reform.

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^{*} Executive Director & Research Professor, American Bar Foundation; Professor of Law & History, Northwestern University Pritzker School of Law. An earlier version of this Essay was presented at the 2019 American Association of Law School’s Annual Conference. Many thanks to the participants at that conference for useful feedback, with special thanks for specific comments to Reuven Avi-Yonah, Isaac Martin, Shuyi Oei, Monica Prasad, Dan Shaviro, and Joe Thorndike. And thanks to Clare Gaynor Willis and Robert Owoo for their research assistance and to the editors of the *UC Davis Law Review Online*, especially Louis Gabriel, for all their help and editorial guidance.

^{**} Leopold Fellow, Nicholas D. Chabreja Center for Historical Studies, Northwestern University Class of 2020.

While the '86 Act may have been landmark legislation at its inception, it gradually unraveled over time. Within the course of the decade after the adoption of the '86 Act, tax rates increased and many of the base-narrowing tax benefits were reinstated into the Internal Revenue Code. While the tax code did not return to its pre-1980s form, the '86 Act did not live up to its initial acclaim. What appeared, at first blush, to be a hallmark accomplishment soon became an aspirational touchstone for future fiscal reformers — including 2017 lawmakers.

In light of this history, is the '86 Act a reasonable and accurate point of comparison for the 2017 Act, as some commentators have proclaimed? If so, what were the broader circumstances that led to the origins and ultimate enactment of the '86 Act? Does the earlier environment match the conditions that gave rise to the 2017 Act? If the two laws do share some similarities, what can we learn about the future of the 2017 Act by examining the gradual undoing of the '86 Act? This Essay seeks to address these critical questions about the promise and limits of fundamental tax reform.

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INTRODUCTION

It has been nearly two years since the enactment of the 2017 Tax Cuts and Jobs Act (“2017 Act”).¹ When the 2017 Act was adopted, many commentators hailed it as the Trump administration’s “most significant legislative accomplishment,”² and “the most consequential tax legislation in three decades.”³ Although two years is hardly enough time to reflect rigorously on the impact or future of any piece of legislation, one can turn to previous attempts at “pathbreaking” tax reform to get a sense of the 2017 Act’s future possibilities and potential durability. There is perhaps no better point of reference for such a comparison than the “landmark” Tax Reform Act of 1986 (“’86 Act”).⁴ Indeed, during much of the run up to the 2017 Act, proponents of the emerging tax bill were making direct and explicit associations between the evolving legislation and the ’86 Act.⁵

These comparisons might be an ominous sign. For while the ’86 Act may have been a landmark law at its inception, it gradually unraveled over time.⁶ A tax bill that was hailed initially as a bipartisan achievement for lowering tax rates and eliminating numerous tax benefits eventually crumbled. Within a decade after the adoption of the ’86 Act, rates increased and many of the base-narrowing tax benefits were reinstated into the Internal Revenue Code. While the tax code did not return to its pre-1980s form, the ’86 Act did not live up to its initial acclaim. It was not an example of sustained, fundamental tax reform. What appeared at first blush as a hallmark accomplishment soon became an aspirational touchstone for future fiscal reformers — including 2017 lawmakers.

¹ Pub. L. No. 115-97, 131 Stat. 2054 (2017).

² John Wagner, *Trump Signs Sweeping Tax Bill into Law*, WASH. POST (Dec. 22, 2017, 11:32 AM), <https://www.washingtonpost.com/news/post-politics/wp/2017/12/22/trump-signs-sweeping-tax-bill-into-law>.

³ Eileen Sullivan & Michael Tackett, *In Signing Sweeping Tax Bill, Trump Questions Whether He Is Getting Enough Credit*, N.Y. TIMES (Dec. 22, 2017), <https://www.nytimes.com/2017/12/22/us/politics/trump-tax-bill.html>.

⁴ Pub. L. No. 99-514, 100 Stat. 2085 (1986).

⁵ See, e.g., Charles Benson, *Paul Ryan Discusses the Benefits of New Tax Plan*, WTMJ MILWAUKEE (Dec. 21, 2017, 9:34 AM), <https://www.tmj4.com/news/local-news/paul-ryan-discusses-the-benefits-of-new-tax-plan>; *How the New GOP Tax Reform Plan Compares to Reagan’s*, FOX BUS. (Nov. 4, 2017), <https://www.foxbusiness.com/politics/how-the-new-gop-tax-reform-plan-compares-to-reagans>; Editorial, *Tax Reform, at Last*, WKLY. STANDARD (Sept. 29, 2017), <https://www.weeklystandard.com/the-editors/tax-reform-at-last>.

⁶ By “unraveling” we do not mean to suggest that the ’86 Act’s reforms have been completely overturned in the years since. Rather, our contention is that the ’86 Act’s advances in both broadening the income tax base and reducing marginal tax rates have been generally pushed back by a substantial degree.

In light of this history, is the '86 Act a reasonable and accurate point of comparison for the 2017 Act, as some commentators have proclaimed? If so, what were the broader circumstances that led to the origins and ultimate enactment of the '86 Act? Does the earlier environment match the conditions that gave rise to the 2017 Act? If the two laws do share some similarities, what can we learn about the future of the 2017 Act by examining the gradual undoing of the '86 Act? This Essay seeks to address these critical questions about the promise and limits of fundamental tax reform.

To be sure, there is already an abundance of scholarship meticulously detailing and analyzing the origins, development, and ultimate and partial demise of the '86 Act.⁷ For obvious reasons, the same is not true about the 2017 Act. Still, there is a growing literature on the origins and early development of the new law, with some modest speculation about its future durability.⁸ Unlike the existing literature, however, this Essay contrasts both pieces of legislation in greater detail to examine what the '86 Act's gradual and partial disintegration can teach us about the more recent law's likely future.

Thus, in this Essay, we conduct a more careful comparison of the two tax laws. We do so in three parts. In Part I, we investigate whether the '86 Act is, in fact, a useful historical parallel. Part II then identifies and examines the broader political, economic, and social conditions that led

⁷ See, e.g., JEFFREY H. BIRNBAUM & ALAN S. MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM (1987); Michael Graetz, *Tax Reform 1986: A Silver Anniversary, Not a Jubilee*, 133 TAX NOTES 313 (2011) [hereinafter *Tax Reform 1986*]; Michael Graetz, *Tax Reform Unraveling*, 21 J. ECON. PERSP. 69 (2007) [hereinafter *Tax Reform Unraveling*]; Randall Weiss, *The Tax Reform Act of 1986: Did Congress Love it or Leave it?*, 49 NAT'L TAX J. 447 (1996).

⁸ For a sampling of the recent literature evaluating the 2017 Act, see generally, WILLIAM GALE ET AL., URB.-BROOKINGS TAX POL'Y CTR., EFFECTS OF THE TAX CUTS AND JOBS ACT: A PRELIMINARY ANALYSIS (2018), https://www.taxpolicycenter.org/sites/default/files/publication/155349/2018.06.08_tcja_summary_paper_final_0.pdf; Nigel A. Chalk, Michael Keen, & Victoria J. Perry, *The Tax Cuts and Jobs Act: An Appraisal* (Int'l Monetary Fund, Working Paper No. 18/175, 2018); Philipp Lieberknecht & Volker Wieland, *On the Macroeconomic and Fiscal Effects of the Tax Cuts and Jobs Act* (Inst. for Fin. & Monetary Stability, Working Paper No. 131, 2019); Kimberly A. Clausung, *Fixing the Five Flaws of the Tax Cuts and Jobs Act* (June 13, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3397387. On the future durability of the 2017 Act, see, e.g., Michael Graetz, *The 2017 Tax Cuts: How Polarized Politics Produced Precarious Policy*, 128 YALE L.J. F. 315 (2018); Joseph Thorndike, *Tax History: Tax Reform Failed After 1986 and It Will Fail Again*, 159 TAX NOTES 607 (2018). Similarly, other, more detailed, studies of the stability of tax reform do not address the application of the lessons derived from the '86 Act to the particular circumstances of the 2017 Act. See, e.g., Jason S. Oh, *Will Tax Reform Be Stable?*, 165 U. PA. L. REV. 1159 (2017).

to the enactment of the '86 Act and, perhaps more importantly, to its subsequent undoing. Parts III and IV draw comparisons between the two laws and the time periods and historical contexts from which they emerged to see what such a parallel might suggest about the future of the 2017 Act. We conclude with some reflections on what this analysis may teach us about the past, present, and future durability of fundamental tax reform.

I. THE '86 ACT AS A POINT OF COMPARISON

There are at least two reasons why one might want to compare the 2017 Act with the '86 Act. First, and perhaps most importantly, the comparison was and remains an integral part of the political discourse surrounding the recent law, and tax policy more generally. Nearly all Republican lawmakers backing the bill in 2017 evoked the '86 Act as a historical model. They often did so to try to claim a connection with President Ronald Reagan's leadership of the '86 Act. In the run-up to passage of the law, the powerful House Ways & Means Chair Kevin Brady (R-TX) even traveled to the Ronald Reagan Ranch to make a speech comparing the new bill to President Reagan's "game-changing, bold tax reform."⁹ Then-Speaker of the House of Representatives Paul Ryan (R-WI), reflecting on the passage of the 2017 Act, tweeted: "For the first time since President Reagan in 1986, we came together to overhaul our tax code."¹⁰ Even less partisan experts such as White House Economic Advisor Gary Cohn referred to the meandering 2017 legislation as a throwback to the '86 Act.¹¹ And, of course, President Donald Trump himself underscored Ronald Reagan's leadership in 1986, particularly with regards to cutting the corporate tax rate.¹² Thus, many proponents of the new law sought to grab the mantle of the '86

⁹ John S. Marshall, *U.S. Rep. Brady Invokes Reagan in Tax Talk Gathering*, COURIER (Aug. 15, 2017, 6:12 PM), <https://www.yourconronews.com/news/article/U-S-Rep-Brady-invokes-Reagan-in-tax-talk-11821701.php>.

¹⁰ Paul Ryan (@SpeakerRyan), TWITTER (Sept. 13, 2018, 11:38 AM), <https://twitter.com/SpeakerRyan/status/1040308798945091584> [<https://perma.cc/42LR-LEAL>].

¹¹ The White House, *Briefing with Secretary of the Treasury Steven Mnuchin and National Economic Director Gary Cohn*, YOUTUBE (Apr. 26, 2017), <https://www.youtube.com/watch?v=EMFiXhsX9Mk>.

¹² Donald Trump, Opinion, *Trump: We Must Fix Our Self-Destructive Tax Code*, MILWAUKEE J. SENTINEL (Sep. 3, 2017, 10:13 AM), <https://www.jsonline.com/story/opinion/contributors/2017/09/03/trump-we-must-fix-our-self-destructive-tax-code/629158001>.

Act and, more importantly, the legacy of Ronald Reagan by making the clear and direct comparison.

A second and more principled reason for the comparison today is that the passing of time has provided an opportunity to more clearly and accurately reflect on the '86 Act. Because over 30 years have passed since the adoption of that legislation, we have the temporal distance necessary to afford some sense of historical objectivity.¹³ The passing of time has also led to increased access to new types of primary source historical evidence, namely greater use of the Ronald Reagan archives. Although Reagan's personal papers have been available for well over a decade, the nearly 60 million pages of documents archived at the Simi Valley presidential library are still being mined and explored.¹⁴

Meanwhile, recent scholarly research has begun to reexamine the political perspective on the Reagan Era, including the tax cuts that helped define that time period.¹⁵ Because there has recently been a relative explosion in the historical analysis of the Reagan presidency and the '86 Act,¹⁶ we refrain in this Essay from examining the overwhelming amount of primary and archival sources from the time period. Instead we seek to provide a brief synthesis of the existing secondary literature, elaborating on the extensive research and analysis done by leading scholars such as Monica Prasad, Michael Graetz, Joseph Thorndike, Bruce Bartlett, and many others.¹⁷

Much of the existing literature suggests that the Economic Recovery Tax Act of 1981 ("81 Act") might be an equally good point of

¹³ On the importance of temporal distance to historical objectivity, see generally PETER NOVICK, *THAT NOBLE DREAM: THE 'OBJECTIVITY QUESTION' AND THE AMERICAN HISTORICAL PROFESSION* (1988); MARK SALBER PHILLIPS, *ON HISTORICAL DISTANCE* (2013).

¹⁴ See, e.g., *Library & Museum*, RONALD REAGAN PRESIDENTIAL FOUND. & INST., <https://www.reaganfoundation.org/library-museum> (last visited Oct. 12, 2019); see also Robert Reinhold, *4 Presidents Join Reagan in Dedicating His Library*, N.Y. TIMES (Nov. 5, 1991), <https://www.nytimes.com/1991/11/05/us/4-presidents-join-reagan-in-dedicating-his-library.html>.

¹⁵ See, e.g., MONICA PRASAD, *STARVING THE BEAST: RONALD REAGAN AND THE TAX CUT REVOLUTION* (2018); SEAN WILENTZ, *THE AGE OF REAGAN: A HISTORY, 1974-2008* (2008); DOUG ROSSINOW, *THE REAGAN ERA: A HISTORY OF THE 1980s* (2015).

¹⁶ For more on the recent historical interest in the Reagan Presidency, see generally DAVID T. BYRNE, *RONALD REAGAN: AN INTELLECTUAL BIOGRAPHY* (2018); BOB SPITZ, *REAGAN: AN AMERICAN JOURNEY* (2018).

¹⁷ See PRASAD, *supra* note 15, at 3-4; Graetz, *Tax Reform 1986*, *supra* note 7, at 313; Graetz, *Tax Reform Unraveling*, *supra* note 7, at 69; Thorndike, *supra* note 8, at 607; Bruce Bartlett, *Reagan's Forgotten Tax Record*, 130 TAX NOTES 965, 966 (2011); Bruce Bartlett, *TRA 1986: Much Ado About Nothing?*, 133 TAX NOTES 359, 359 (2011); see also ERIC PATASHNIK, *REFORMS AT RISK: WHAT HAPPENS AFTER MAJOR POLICY CHANGES ARE ENACTED 2* (2008).

comparison for understanding the possible future of the 2017 Act.¹⁸ The '81 Act was similarly evoked by both champions¹⁹ and critics²⁰ of the 2017 Act. Likewise, a plethora of scholarly works on the '81 Act have flourished with the passage of time.²¹ Furthermore, some of the 2017 Act's features resemble the '81 Act more than the '86 Act. For instance, the '81 Act reduced tax rates, decreased the tax code's progressivity²² and resulted in a significant drop in federal tax revenue.²³

Nevertheless, we have chosen to use the '86 Act as our point of comparison since it presents a better case study for an examination of the durability of tax reform in a context relevant to the political, historical, and economic environment surrounding the enactment of the 2017 Act. The '86 Act represented a genuine effort to pursue *fundamental tax reform* (an attempt to make the tax code simpler and more efficient), whereas the '81 Act adopted substantial tax *reduction* (a lowering of tax rates with no effort to broaden the income tax base). Moreover, examining the '86 Act better serves our focus on the durability of tax reform by permitting a two-dimensional analysis (i.e., one examining both the development of tax rates and tax expenditures),

¹⁸ Economic Recovery Tax Act of 1981, Pub. L. 97-34, 95 Stat. 172.

¹⁹ See, e.g., Steve Forbes, *Skeptics Are Wrong: A Big — But Different — Tax Cut Is Coming*, FORBES (Sept. 17, 2017), <https://www.forbes.com/sites/steveforbes/2017/09/17/skeptics-are-wrong-a-big-but-different-tax-cut-is-coming>; Phil Gramm & Michael Solon, *Reagan Cut Taxes, Revenue Boomed*, WALL ST. J. (Aug. 3, 2017, 6:51 PM), <https://www.wsj.com/articles/reagan-cut-taxes-revenue-boomed-1501800678>; *Press Briefing by Press Secretary Sarah Sanders*, WHITE HOUSE (Oct. 31, 2017, 2:37 PM), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-103117>.

²⁰ See, e.g., William G. Gale, *Tax Cuts Won't Make America Great Again*, URB.-BROOKINGS TAX POL'Y CTR. (Oct. 20, 2017), <https://www.taxpolicycenter.org/taxvox/tax-cuts-wont-make-america-great-again>; Seth Hanlon & Alexandra Thornton, *Trickle-Down Tax Cuts Don't Create Jobs*, CTR. FOR AM. PROGRESS (Aug. 24, 2017, 12:01 AM), <https://www.americanprogress.org/issues/economy/reports/2017/08/24/437625/trickle-tax-cuts-dont-create-jobs>; David Wessel, *What We Learned from Reagan's Tax Cuts*, BROOKINGS INST. (Dec. 8, 2017), <https://www.brookings.edu/blog/up-front/2017/12/08/what-we-learned-from-reagans-tax-cuts>.

²¹ Reinhold, *supra* note 14.

²² ERIC TODER, ROSEMARIE NIELSEN & FRANK SAMMARTINO, CONG. BUDGET OFFICE, *EFFECTS OF THE 1981 TAX ACT ON THE DISTRIBUTION OF INCOME AND TAXES PAID* 1, 11 (1986), <https://www.cbo.gov/sites/default/files/99th-congress-1985-1986/reports/doc20a-entire.pdf>.

²³ A Treasury Department Report estimates that the '81 Act resulted in an average annualized revenue loss of \$143.7 billion for the four years following its enactment. Jerry Tempalski, *Revenue Effects of Major Tax Bills* 16 (Office of Tax Analysis, Working Paper No. 81, 2006), <https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-81.pdf>. All figures are in 1992 dollars.

rather than a single-minded focus on chronicling the reversal of the '81 Act's rate cuts.²⁴ Finally, the financial and economic environment in 2017 more closely resembles that in 1986 than in 1981: one of strong GDP growth, yet a gaping federal budget deficit.²⁵ Thus, we have chosen to juxtapose the 2017 Act with the '86 Tax Reform Act rather than with the '81 Act.

At first blush, it might seem like the 2017 Act has followed directly in the footsteps of the '86 Act — at least from the political rhetoric supporting the new law. Both statutes, most obviously, lowered marginal tax rates on individual and corporate incomes. The '86 Act dramatically reduced the top individual income tax rate from 50% to 28%²⁶ and cut the corporate rate from 50% to 34%,²⁷ pushing down rates that had already been slashed earlier by '81 Act.²⁸

By comparison, the 2017 Act also cut income tax rates across the board. It modestly reduced the top individual rate from 39.6% to 37% (at least until 2025),²⁹ and lowered the statutory corporate tax rate from 35% to 21%.³⁰ By cutting the corporate rate, the United States moved from having one of the world's highest corporate tax rates to near the average for most advanced, industrialized nations.³¹ As a result, some commentators have hailed the corporate tax cut as one of the 2017 Act's greatest achievements.³²

²⁴ See, e.g., Justin Fox, Opinion, *The Mostly Forgotten Tax Increases of 1982-1993*, BLOOMBERG (Dec. 15, 2017, 10:36 AM), <https://www.bloomberg.com/opinion/articles/2017-12-15/the-mostly-forgotten-tax-increases-of-1982-1993>.

²⁵ See *Federal Surplus or Deficit*, FED. RES. BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/FYFSD> (last visited Oct. 12, 2019); *Real Gross Domestic Product: Percentage Change from Preceding Period, Seasonally Adjusted Annual Rate*, FED. RES. BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/A191RL1Q225SBEA> (last visited Oct. 12, 2019).

²⁶ Tax Reform Act of 1986, Pub. L. 99-514, § 101, 100 Stat. 2085, 2096.

²⁷ *Id.* § 601, 100 Stat. at 2249.

²⁸ The Economic Recovery Tax Act of 1981, Pub. L. 97-34, 95 Stat. 172, 176-82, reduced marginal rates across the board including cutting the top individual rate from 70 to 50%. See also *Historical Highest Marginal Income Tax Rates*, URB.-BROOKINGS TAX POL'Y CTR. (Jan. 18, 2019), <https://www.taxpolicycenter.org/statistics/historical-highest-marginal-income-tax-rates>.

²⁹ Tax Cuts and Jobs Act, Pub. L. 115-97, § 11001, 131 Stat. 2054, 2055 (2017).

³⁰ *Id.* §13001, 131 Stat. at 2096 (2017).

³¹ See CONG. BUDGET OFF., INTERNATIONAL COMPARISONS OF CORPORATE INCOME TAX RATES (2017), <https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52419-internationaltaxratecomp.pdf>.

³² See Erica York, *The Benefits of Cutting the Corporate Income Tax Rate*, TAX FOUND. (Aug. 14, 2018), <https://taxfoundation.org/benefits-of-a-corporate-tax-cut>.

Similarly, both laws represented efforts to simplify the tax code, albeit with questionable success. The '86 Act reduced the number of income tax brackets from fourteen to two and eliminated numerous tax expenditures: jettisoning, for instance, the deductibility of consumer interest and state and local sales taxes, eliminating the capital gains tax preference, and abolishing the investment tax credit. It also restricted numerous other deductions, such as those for business meals and entertainment, Individual Retirement Accounts ("IRA") contributions, and medical expenses.³³ Such measures to simplify the U.S. tax code were, however, counterbalanced by new provisions in the '86 Act that increased tax complexity, such as the special treatment of "passive activity losses" and interest expenses. These measures may have helped reduce tax avoidance schemes orchestrated via tax shelters, but they came at the cost of increased legal complexity.³⁴

In a similar vein, the 2017 Act sought to streamline the tax code in theory by increasing the standard deduction and eliminating several tax benefits. By doubling the standard deduction while eliminating personal exemptions the new law may have simplified tax filing by decreasing the incentives for taxpayers to use itemized deductions. Other changes such as increasing the threshold for the estate tax, and eliminating or limiting various minor tax credits and deductions may have also led to tax simplification.³⁵

Ultimately, however, it seems that the progress the 2017 Act achieved towards simplification is dubious at best.³⁶ Indeed, some of the new law's provisions, most notoriously the deduction for pass-through income, are likely to hinder the goal of simplification via increased

³³ See BIRNBAUM & MURRAY, *supra* note 7, at apps. A & B; Graetz, *Tax Reform Unraveling*, *supra* note 7, at 69. For more on the history of the capital gains tax preference, see generally Ajay K. Mehrotra & Julia C. Ott, *The Curious Beginnings of the Capital Gains Tax Preference*, 84 *FORDHAM L. REV.* 2517 (2016); Jeffrey H. Birnbaum, *Historic Tax Code Changes Eroded in Years Since 1986*, *WASH. POST* (June 7, 2004), <https://www.washingtonpost.com/archive/politics/2004/06/07/historic-tax-code-changes-eroded-in-years-since-1986/f6cb7a49-113d-4b99-bdff-fbea25a59a6b>.

³⁴ Joel Slemrod, *Did the Tax Reform Act of 1986 Simplify Tax Matters?*, 6 *J. ECON. PERSP.* 45, 48 (1992).

³⁵ Erica York & Alex Muresianu, *The Tax Cuts and Jobs Act Simplified the Tax Filing Process for Millions of Households*, *TAX FOUND.* (Aug. 7, 2018), <https://taxfoundation.org/the-tax-cuts-and-jobs-act-simplified-the-tax-filing-process-for-millions-of-americans>.

³⁶ See, e.g., Jim Tankersley, *File Your Taxes on a Postcard? A G.O.P. Promise Marked Undeliverable*, *N.Y. TIMES* (Dec. 16, 2017), <https://www.nytimes.com/2017/12/16/us/politics/repUBLICAN-tax-plan-simple-tax-returns.html>.

complexity and compliance costs.³⁷ In addition, the 2017 Act also significantly revamped the United States' system of international taxation: among other changes, the Act eliminated the repatriation tax and created a temporary transition tax for the accumulated profits of foreign subsidiaries of U.S. corporations.³⁸

Despite these superficial similarities, the origins, development and revenue impact of the 2017 Act differed more than it emulated the '86 Act. First, the laws differed immensely in the level of thought and preparation that occurred prior to enactment. The '86 Act was the product of nearly a decade of careful consideration and multiple plans, including two comprehensive reports by the U.S. Treasury Department (released in 1984 and 1985 respectively).³⁹ In sharp contrast to this meticulous and deliberative process, the final 2017 Act was based on a few pages of bullet points and a flurry of hasty congressional changes.⁴⁰ Among other procedural anomalies, the U.S. House of Representatives voted on the 2017 bill without a full analysis by the Congressional Budget Office ("CBO"),⁴¹ while Senate Republican leadership continued to make changes to the bill in the hours leading up to the final vote (including via handwritten notes on the proposal's margins).⁴² Afterwards, former Republican Senator Judd Gregg described the whole process as nothing short of "chaos."⁴³

³⁷ C. Eugene Steuerle, *The TCJA Will Create More Complexity For Taxpayers Than It Claims*, URB.-BROOKINGS TAX POL'Y CTR. (Jan. 5, 2018), <https://www.taxpolicycenter.org/taxvox/tcja-will-create-more-complexity-taxpayers-it-claims>.

³⁸ Eric Toder, *Explaining the TCJA's International Reforms*, URB.-BROOKINGS TAX POL'Y CTR. (Feb. 2, 2018), <https://www.taxpolicycenter.org/taxvox/explaining-tcjais-international-reforms>.

³⁹ BIRNBAUM & MURRAY, *supra* note 7, at xxi-xxii.

⁴⁰ See Lauren Thomas, *Read the White House Memo on President Trump's Proposed Tax Plan*, CNBC (Apr. 26, 2017, 1:55 PM), <https://www.cnbc.com/2017/04/26/heres-the-white-house-memo-on-president-trumps-proposed-tax-plan.html>; White House 2017 Tax Reform for Economic Growth and American Jobs, <https://taxprof.typepad.com/files/trump-tax-plan.pdf> [<https://perma.cc/HGM7-7NAQ>].

⁴¹ Niv Elis, *CBO Says It Can't Do Full Score of Tax Bill Before House Vote*, HILL (Nov. 13, 2017, 5:54 PM), <https://thehill.com/policy/finance/360188-cbo-says-it-cant-do-full-score-of-tax-bill-before-house-vote>.

⁴² Tara Golshan, *Republicans Are Handwriting Their Tax Bill at the Last Minute*, CNBC (Dec. 1, 2017, 8:02 PM), <https://www.cnbc.com/2017/12/01/republicans-are-handwriting-their-tax-bill-at-the-last-minute.html>; Seung Min Kim & Colin Wilhelm, *Republicans Rewriting Tax Bill Hours Before Possible Vote*, POLITICO (Nov. 30, 2017, 10:59 AM), <https://www.politico.com/story/2017/11/30/mccain-to-vote-for-gop-tax-bill-270511>.

⁴³ Matthew J. Belvedere, *GOP Ex-Senator: Republicans Pushing Chaotic Individual Tax Cuts Just to Win Points with Voters*, CNBC (Dec. 8, 2017, 9:39 AM), <https://www.cnbc.com/2017/12/08/gop-ex-senator-republicans-pushing-chaotic-individual-tax-cuts.html>.

Second, the political support for the two laws differed dramatically. Whereas, in a rare moment of unity, both political parties backed the '86 Act, the 2017 law was a purely partisan piece of legislation. The '86 Act was adopted with overwhelming bipartisan support at a time of divided political control, with a Republican President, the House of Representatives controlled by Democrats, and a Senate with a majority of Republicans. In fact, the final vote on the 1986 bill in the Democrat-controlled House of Representatives was 292 to 136, and the law easily sailed through the Senate on a bipartisan 74 to 23 vote.⁴⁴ By contrast, the 2017 Act was enacted on wholly partisan lines: it was approved by a vote of 224 to 201 in the House, and by 51 to 48 in the Senate. In the end, the 2017 law lacked a single Democratic vote in favor — in either the House or Senate.⁴⁵ This unusually partisan voting alignment made the 2017 Act the first significant piece of tax legislation to be enacted without a single vote from the opposing party since the Clinton-era Omnibus Budget Reconciliation Act of 1993.⁴⁶

Third, the two pieces of legislation also differed profoundly in their impact on government revenues. From the start, the '86 Act was designed and enacted as revenue-neutral tax legislation, despite growing concerns at the time about increasing budget deficits.⁴⁷ Its framers and supporters took great pains to ensure that any amendments or modifications to the bill maintained its revenue-neutral impact, and thus did not exacerbate growing deficits.⁴⁸ The commitment to a revenue-neutral reform bill was so strong that the '86 Act's designers were willing to ditch one of the 1981 tax cut's central features — the Accelerated Cost Recovery System ("ACRS") for depreciation — in order to keep the '86 bill from adding to the deficit.⁴⁹

⁴⁴ *House Vote #818 in 1986 (99th Congress)*, GOVTRACK, <https://www.govtrack.us/congress/votes/99-1986/h818> (last visited Oct. 12, 2019); *Senate Vote #677 in 1986 (99th Congress)*, GOVTRACK, <https://www.govtrack.us/congress/votes/99-1986/s677> (last visited Oct. 12, 2019).

⁴⁵ *Final Vote Results for Roll Call 699*, U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/evs/2017/roll699.xml> (last visited Oct. 12, 2019); *Roll Call Vote 115th Congress - 1st Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00323 (last visited Oct. 12, 2019).

⁴⁶ Pub. L. 103-66, 107 Stat. 312 (1993); *Senate Vote #190 in 1993 (103rd Congress)*, GOVTRACK, <https://www.govtrack.us/congress/votes/103-1993/s190> (last visited Oct. 12, 2019).

⁴⁷ See *Tax Reform Act of 1986, Part IV: Hearings Before the Comm. on Fin.*, 99th Cong. 28 (1986) (statement of Harvey Galper, Senior Fellow, Brookings Institution).

⁴⁸ BIRNBAUM & MURRAY, *supra* note 7, at 59.

⁴⁹ *Id.* at 48-51.

By contrast, the 2017 Act was neither envisioned nor designed to be revenue-neutral, even though deficit concerns have once again risen to the fore.⁵⁰ Indeed, from the start, the overwhelming desire for tax cuts, without any serious base-broadening measures, indicated that lawmakers in 2017 did not care much about growing deficits. During much of the legislative process, few proponents of the bill spoke up about its negative budgetary impact. And, in the end, the 2017 Act is anticipated to greatly add to the federal budget deficit. According to the most recent CBO projections, the 2017 Act will increase the federal budget deficit by approximately \$1.85 trillion in the 10-year period between 2018 and 2028.⁵¹

Fourth, in addition to being revenue-neutral, the '86 Act was also roughly neutral (or potentially even slightly progressive) in terms of its effect on economic distribution.⁵² From the very start, the mid-1980s tax reformers carefully sought to ensure that a new tax bill would not result in substantial shifts in the distribution of tax burdens among income classes; the final bill would reflect this concern.⁵³ One assessment of the '86 Act's distributional implications found that it increased after-tax income for the lowest decile by 0.22% and the second lowest by 0.54%, compared to 0.06% and 0.08% for the second highest and highest respectively.⁵⁴ Another estimate found that the '86 Act had reduced total federal tax liability for the lowest and second lowest deciles by 16% and 11% respectively, while *increasing* tax liability for the top decile by 2% and for the top 1 percent of earners by 5%.⁵⁵

By contrast, the 2017 Act is expected to result in a larger percentage boost in after-tax income for high-income households than low-income ones. According to some estimates, the increase in after-tax income is 0.4% for households in the lowest quintile, compared with 2.9% for

⁵⁰ See ALAN J. AUERBACH, WILLIAM G. GALE, & AARON KRUPKIN, URB.-BROOKINGS TAX POL'Y CTR., THE FEDERAL BUDGET OUTLOOK: EVEN CRAZIER AFTER ALL THESE YEARS (2018), https://www.taxpolicycenter.org/sites/default/files/publication/154816/the_federal_budget_outlook.pdf; see also WILLIAM G. GALE, FISCAL THERAPY: CURING AMERICA'S DEBT ADDICTION AND INVESTING IN THE FUTURE 56-57 (2019).

⁵¹ CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: 2018 TO 2028, at 128 (2018), <https://www.cbo.gov/system/files/2019-04/53651-outlook-2.pdf>.

⁵² See Alan J. Auerbach & Joel Slemrod, *The Economic Effects of the Tax Reform Act of 1986*, 35 J. ECON. LITERATURE 589, 620-22 (1997).

⁵³ Daniel H. Weinberg, *The Distributional Implications of Tax Expenditures and Comprehensive Income Taxation*, 40 NAT'L TAX J. 237, 249-50 (1987).

⁵⁴ Jane G. Gravelle, *Equity Effects of the Tax Reform Act of 1986*, 6 J. ECON. PERSP. 27, 34 (1992).

⁵⁵ Joseph A. Pechman, *Tax Reform: Theory and Practice*, 1 J. ECON. PERSP. 11, 20 (1987); see also Auerbach & Slemrod, *supra* note 52, at 620-22.

those in the top quintile, more than 4% for those in the 95th-99th percentile, and 3.4% for taxpayers in the top 1 percent.⁵⁶ Other studies predict benefits similarly skewed towards higher income groups.⁵⁷ The following tables illustrate the contrasting distributional impact of the two laws.

Table 1. Distributional Impact: '86 Act v. 2017 Act Effect on After-Tax Income by Decile⁵⁸

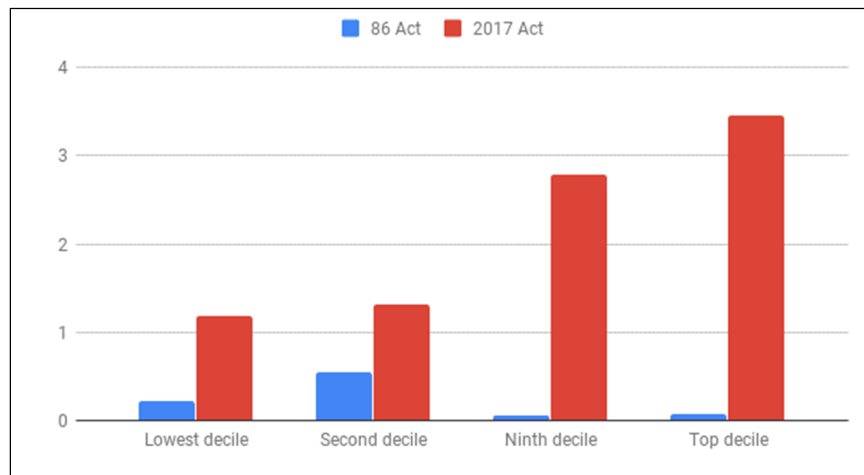
Percentage Change in After-Tax Income	'86 Act	2017 Act
Lowest decile	0.22	1.19
Second decile	0.54	1.32
Ninth decile	0.06	2.79
Top decile	0.08	3.46

⁵⁶ URB.-BROOKINGS TAX POL'Y CTR., DISTRIBUTIONAL ANALYSIS OF THE CONFERENCE AGREEMENT FOR THE TAX CUTS AND JOBS ACT 3 (2017), https://www.taxpolicycenter.org/sites/default/files/publication/150816/2001641_distributional_analysis_of_the_conference_agreement_for_the_tax_cuts_and_jobs_act_0.pdf [hereinafter DISTRIBUTIONAL ANALYSIS].

⁵⁷ See, e.g., *Analysis of the Tax Cuts and Jobs Act*, URB.-BROOKINGS TAX POL'Y CTR. (May 3, 2019), <https://www.taxpolicycenter.org/feature/analysis-tax-cuts-and-jobs-act>.

⁵⁸ URB.-BROOKINGS TAX POL'Y CTR., DISTRIBUTIONAL ANALYSIS, *supra* note 56; Cody Kallen & Aparna Mathur, *Estimating the Distributional Implications of the Tax Cuts and Jobs Act* (Am. Enter. Inst., Working Paper 2019-07, 2019).

Table 2. Distributional Impact: Percentage Change in After-Tax Income



The regressive distribution of the 2017 Act's benefits is only heightened by the fact that many of the Act's individual rate cuts (as well as the increase in the standard deduction) will expire in 2025.⁵⁹ Once these provisions expire, the tax code will become even more regressive. One study predicts that in 2027, the changes wrought by the 2017 Act will lead to *decreases* in the after-tax income for the two lowest quintiles.⁶⁰ Indeed, only members of the very top quintile would see their after-tax incomes rise as a consequence of its enactment.⁶¹ Thus, the 2017 Act clearly fails when it comes to distributive neutrality. Not only are its immediate post-enactment benefits skewed towards upper-income households, the expiration of particular provisions will also make the Act a boon principally (and perhaps even solely) for the affluent and well-to-do.

In addition to the many substantive differences between the two laws, the overall magnitude of the changes made to the tax system by the '86 Act and the 2017 Act are miles apart. While the 2017 Act merely made changes at the margins of the tax system, the '86 Act was, at the time, the last great overhaul of the U.S. tax code. Still, because proponents of the recent law continue to make comparisons to the '86 Act, it may be instructive to further analyze the origins, early development, and gradual disintegration of the '86 Act. A deeper understanding of the

⁵⁹ JOINT COMM. ON TAXATION, JCX-1-18, LIST OF EXPIRING FEDERAL TAX PROVISIONS: 2016-2027, at 15-17 (2018).

⁶⁰ *Analysis of the Tax Cuts and Jobs Act*, *supra* note 57.

⁶¹ *Id.*

potential revolutionary nature of the '86 Act and what sets it apart from the 2017 Act requires an evaluation of the unique circumstances leading to its enactment.

II. THE ORIGINS OF THE '86 ACT

The '86 Act was the result of the confluence of three fundamental forces. First among them was a longstanding conceptual push for comprehensive tax reform that traced its lineage back to the early twentieth century. Beginning in the 1920s and '30s, prominent economic and legal experts, such as Robert Murray Haig and Henry Simons, laid the intellectual foundations for a comprehensive income tax based on an economic conception of income — one that matched the constitutional notion of defining income “from whatever source derived.”⁶²

Haig had begun the process of developing a broad conceptual, economic definition of income in a groundbreaking 1921 essay. Relying primarily on the notion that income ought to measure a taxpayer’s “ability to pay,” Haig defined income as “the money value of the net accretion to economic power between two points in time.”⁶³ Nearly two decades later, University of Chicago economist Simons refined the economic definition “as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and the end of the period in question.”⁶⁴ Over the course of the twentieth century, the Haig-Simons definition of income became the touchstone for the base-broadening goals of conceptual tax reform.

Although Haig and Simons may have provided tax experts and lawmakers with an ideal comprehensive tax base, they had little to say about rates. Indeed, during much of the 1920s and '30s the top marginal rates on individual income were quite low, at least as compared to their World War I highs. It was, thus, during the interwar period that tax theorists, policy analysts, and lawmakers came to realize that the combination of low rates and a broad and comprehensive income tax base could provide stable and effective revenue, at least until the

⁶² U.S. CONST. amend. XVI.

⁶³ Robert Murray Haig, *The Concept of Income — Economic and Legal Aspects*, in *THE FEDERAL INCOME TAX 1*, 7 (Robert Murray Haig ed., 1921). For more on the historical importance of the “ability to pay” rationale to the origins of U.S. progressive taxation, see generally AJAY K. MEHROTRA, *MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877-1929*, at 9-10 (2013).

⁶⁴ HENRY C. SIMONS, *PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY* 50 (1938).

economic shock of the Great Depression transformed American economy and society.

During the 1920s, U.S. Treasury Secretary Andrew Mellon was one of the key lawmakers behind the conceptual push for lower rates and a broader income tax base.⁶⁵ Under the auspices of what Mellon referred to as “scientific taxation,” he persuaded the three presidents whom he served that a combination of lowering top marginal tax rates and eliminating certain investment-distorting tax benefits could help grow the economy.⁶⁶ Although the exigencies of the Great Depression and World War II altered the fiscal landscape and required the adoption of a mass-based income tax, the concept of an ideal comprehensive income tax base continued. In fact, many of the tax experts who came of age during the New Deal and World War II carried this message with them into the postwar era, into the “golden age” of American capitalism and economic growth. Tax law academics and economists, such as Stanley Surrey and Joseph Pechman, focused on the combination of a broad income tax base with lower marginal tax rates as the conceptual foundation or holy grail of fundamental tax reform.⁶⁷

During the Reagan Era, lawmakers who were serious students of tax policy and political history, such as Senators Bill Bradley (D-NJ) and Richard Gephardt (D-MO), were the intellectual heirs of the conceptual notion of fundamental tax reform. They had been actively championing the cause of comprehensive tax reform even before President Reagan commissioned the Treasury Department reports. Indeed, Bradley and Gephardt proposed a tax reform plan (the “Fair Tax Act”) in August of 1982, more than four years before the enactment of the ’86 Act.⁶⁸ Many of their ideas about lower rates and a broader income tax base would eventually be incorporated into the latter proposal; for example, reducing marginal income tax rates across the board, eliminating the capital gains tax preference, and repealing the Investment Tax Credit.⁶⁹

⁶⁵ See DAVID CANNADINE, *MELLON: AN AMERICAN LIFE* 287-88 (2008); Joseph Thorndike, *Peas in a Pod: Mellon, Coolidge, and the Revenue Act of 1924*, 139 TAX NOTES 117, 117 (2013).

⁶⁶ See M. Susan Murnane, *Selling Scientific Taxation: The Treasury Department’s Campaign for Tax Reform in the 1920s*, 29 L. & SOC. INQUIRY 819, 820 (2004). Mellon’s long tenure as Treasury Secretary was so dominant that, upon his departure from the Treasury to serve as Ambassador to the United Kingdom, Senator George Norris described Mellon as possessing “the honor of having three Presidents serve under him.” 75 CONG. REC. 3678 (1932).

⁶⁷ See STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* vii-ix (1973); JOSEPH A. PECHMAN, *FEDERAL TAX POLICY* 4 (1971).

⁶⁸ BIRNBAUM & MURRAY, *supra* note 7, at xxi, 23-41.

⁶⁹ *Id.* at apps. A & B.

The second factor behind the enactment of the '86 Act was presidential leadership.⁷⁰ From start to end, President Reagan played a vital role. In the lead up to the '86 Act's success, Reagan took decisive steps ranging from commissioning the Treasury I Report during the 1984 State of the Union Address to visiting the House GOP conference to shore up Republican support for the bill.⁷¹ Most importantly, Reagan's popularity with the public (evinced by his electoral sweep in the 1984 presidential election) provided the political capital necessary to ensure congressional action and approval of tax reform.⁷² Without the president's dedication to tax reform, it seems quite unlikely that the '86 Act (or any other tax reform bill for that matter) would have been enacted into law.

Third, bipartisan compromise and support led to enactment in a divided Congress. In particular, the political deal-making acumen of Representative Dan Rostenkowski (the Democratic House Ways and Means Committee Chairman) and Senator Bob Packwood (the Republican Senate Finance Committee Chairman) was crucial in ensuring the bill's ultimate passage. Rostenkowski's decision to retain the State and Local Tax Deduction was essential in preventing the bill's early demise in the House Ways and Means Committee. Packwood similarly averted a failure in the Senate Finance Committee by proposing a radical plan lowering the top marginal rate to 25% (funded by eliminating most deductions).⁷³ In the end, Rostenkowski and Packwood would painstakingly negotiate the final, compromise bill during the congressional conference committee, smoothing over the differences between both versions to garner approval by both chambers.⁷⁴

Eventually, the '86 Act followed through on the longstanding conceptual aims of fundamental tax reform. As we've seen, it lowered the top marginal tax rate from 50% to 28% and reduced the number of tax brackets from fourteen to two.⁷⁵ In order to recoup the revenue loss from the rate cuts, the '86 Act broadened the income tax base by paring back or even completely eliminating numerous tax benefits. Some of the changes with the greatest estimated savings included: (1) the elimination of the Investment Tax Credit (est. savings: \$25.6 billion);

⁷⁰ Robert Leonard & Kenneth Kies, *Tax Reform's Challenge: Lessons from the 1986 Act*, 131 TAX NOTES 973, 973 (2011).

⁷¹ BIRNBAUM & MURRAY, *supra* note 7, at 40-41, 169-73.

⁷² *Id.* at 286.

⁷³ *Id.* at 150, 207.

⁷⁴ *Id.* at 253-83.

⁷⁵ Birnbaum, *supra* note 33.

(2) establishment of passive loss limitation (est. savings: \$10.9 billion); (3) repeal of the second-earner deduction (est. savings: \$8.6 billion); (4) limitations on interest deductions (est. savings: \$8.4 billion); (5) limitations on IRA Deductions (est. savings: \$6.0 billion), and elimination of the capital gains tax preference (est. savings: \$2.6-\$5.9 billion).⁷⁶ Indeed, the '86 Act's efforts to broaden the income tax base succeeded in reducing the overall size of tax expenditures from 8.7% of GDP in 1985 (\$362.3 billion) to 6% in 1988 (\$300.6 billion).⁷⁷

At a Rose Garden signing ceremony, President Reagan celebrated this legislative success as “the most sweeping overhaul of the tax code” in U.S. history, and one which would give the country the “lowest marginal tax rates and the most modern tax code among major industrialized nations.”⁷⁸ Little did he know that, despite all the fanfare and the statute's sweeping reforms, the '86 Act would score relatively low on durability, slowly and partially disintegrating in the decades to come.

III. THE UNRAVELING OF THE '86 ACT

When the 1986 Tax Reform Act was signed into law, it was hailed as a “landmark” achievement.⁷⁹ The longstanding conceptual goal of broadening the base and lowering rates was realized through a rare moment of bipartisan lawmaking. The success, however, was short lived. The twin accomplishments of lower rates and a broader tax base were both undermined in the years to come.

⁷⁶ Auerbach & Slemrod, *supra* note 52, at 596. All figures are in 1990 dollars. Estimating the revenue effects of the elimination of the capital gains tax preference is particularly challenging given the behavioral responses. See CONG. BUDGET OFFICE, HOW CAPITAL GAINS TAX RATES AFFECT REVENUE: THE HISTORICAL EVIDENCE, at xvii (1988), <https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/84xx/doc8449/88-cbo-007.pdf>.

⁷⁷ ALLISON ROGERS & ERIC TODER, URB.-BROOKINGS TAX POL'Y CTR., TRENDS IN TAX EXPENDITURES, 1985-2016, at 9 (2011), <https://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/412404-Trends-in-Tax-Expenditures---.PDF>.

⁷⁸ President Ronald Reagan, Remarks Before Signing the Tax Reform Act of 1986 (Oct. 22, 1986), <https://www.americanrhetoric.com/speeches/ronaldreagantaxreformactof1986.html>.

⁷⁹ Editorial, *The Tax-Reform Rollback*, WALL ST. J., Oct. 23, 1986; see also David E. Rosenbaum, *The Tax Reform Act of 1986: Political Implications; President Signs New Tax Bill*, N.Y. TIMES (Oct. 23, 1986), <https://www.nytimes.com/1986/10/23/business/tax-reform-act-1986-measure-came-together-tax-bill-for-textbooks.html>; Dale Russakoff, *In Taxes, the Impossible Became the Inevitable*, WASH. POST (June 29, 1986), <https://www.washingtonpost.com/archive/politics/1986/06/29/in-taxer-the-impossible-became-the-inevitable/ff419dfd-8d1e-4260-b60b-e940b1b41902>.

The ink had barely dried on the '86 Act when political figures began clamoring for rate increases to address the gaping budget deficit. As early as January 1987, just a few months after the law had been enacted, Democratic Speaker of the House Jim Wright suggested postponing some of the '86 Act's individual tax cuts.⁸⁰ Although lawmakers were able to hold back Wright's calls for higher rates, the questioning of historically low rates in the face of rising deficits began to gain momentum. Almost as soon as President Reagan left the White House, his successor President George H.W. Bush pursued rate increases to address the deficit.

Despite his (in)famous campaign pledge not to increase Americans' tax burden ("read my lips: no new taxes"), President Bush raised taxes to address a growing budget deficit and increased spending needs. Bush signed the Revenue Reconciliation Act of 1990 into law, which increased the highest marginal rate from 28% to 31%.⁸¹ At the same time, the tax rate on capital gains remained 28%; thus, reinstating the capital gains tax preference. Rate increases would rise further during the Clinton administration, when the Omnibus Budget Reconciliation Act of 1993 increased the top rate to 39.6%.⁸² These developments meant that, in less than a decade after its passage, a significant portion of the '86 Act's marginal income tax rate decreases had been reversed.

Meanwhile, a proliferation of tax expenditures began to erode the tax base. Even before the '86 Act became law, economist Milton Friedman had predicted that any fundamental reform of tax benefits would only be temporary. Writing in the *Wall Street Journal* in the summer of 1986, months before the new law would be passed, Friedman warned that "[a]s lobbyists get back into action, and as members of Congress try to raise campaign funds, old loopholes will be reintroduced and new ones invented."⁸³

It did not take lawmakers long to vindicate Friedman's predictions. Starting in 1990, Democrats and Republicans alike returned to using the tax code as a means of advancing their particular social, political, and economic policy ideas. As more and more of these tax benefits became embedded in the code, Congress seemed to be implicitly rejecting the

⁸⁰ Jim Wright, Opinion, *The Subversive Federal Debt*, N.Y. TIMES (Jan. 22, 1987), <https://www.nytimes.com/1987/01/22/opinion/the-subversive-federal-debt.html>.

⁸¹ Revenue Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388-400, -403 to -404; Weiss, *supra* note 7, at 456-57.

⁸² Graetz, *Tax Reform Unraveling*, *supra* note 7, at 77.

⁸³ Milton Friedman, *Tax Reform Lets Politicians Look for New Donors*, WALL ST. J., July 7, 1986.

'86 Act's base-broadening principle, and in the process the conceptual notion of comprehensive or fundamental tax reform.

The trend began with President George H.W. Bush, whose 1991 budget proposed a number of new tax expenditures (as well as the renewal of expiring provisions), including: the renewal of the research and experimentation tax credit (estimated to add \$5.5 billion to the deficit during the period between 1990 and 1995); the creation of a new family savings account with untaxed interest (estimated cost: \$4.7 billion between 1990-1995); the extension of the low-income housing tax credit (estimated cost: \$1.6 billion between 1990-1995); a provision permitting first-time homeowners to withdraw funds from their IRA accounts with no fee (estimated cost: \$0.4 billion between 1990-1995); implicit reinstatement of the capital gains tax preference, and a new child care tax credit and refundable child and dependent care tax credit (expected cost: \$0.2 billion between 1990-1995).⁸⁴

Similarly, President Bill Clinton would embrace tax expenditures as a way to advance his own policy priorities while gaining the support of congressional Republicans. Clinton saw the creation of new tax expenditures (or the expansion of old ones) as a politically safe way of using the tax code to advance a particular social policy agenda.⁸⁵ Simultaneously, Republican tax proposals would increasingly abandon the goals of the '86 Act in favor of promoting a more favorable treatment of investment and families.⁸⁶ The embrace of tax benefits by both parties would ultimately reverse the '86 Act's achievements in reducing tax expenditures. While the '86 Act had led to a reduction in tax expenditures from \$500 billion in 1986 (8.7% of GDP) to \$360 billion in 1988 (6% of GDP), expenditures had once again risen to \$685 billion by 2002 (7.5% of GDP).⁸⁷

Why did the '86 Act eventually unravel? Several significant factors provide the key to understanding its gradual and partial deterioration. First, the '86 Act never truly enjoyed substantial public support. At the time of its enactment, less than a third of Americans expected it to significantly improve economic conditions, simplify the tax code, or ensure a fairer economic distribution. As historian and journalist Joe Thorndike has observed, in 1990 "37 percent thought the ['86 Act] had

⁸⁴ JOINT COMM. ON TAXATION, JCS-3-90, SUMMARY OF REVENUE PROVISIONS IN THE PRESIDENT'S FISCAL YEAR 1991 BUDGET PROPOSAL 33-35 (1990). All figures are in 1990 dollars.

⁸⁵ Thorndike, *supra* note 8, at 608.

⁸⁶ Weiss, *supra* note 7, at 458.

⁸⁷ Graetz, *Tax Reform Unraveling*, *supra* note 7, at 74; Rogers & Toder, *supra* note 77. All figures are in 2004 dollars.

actually made the tax system less fair in distributional terms — not exactly a ringing endorsement and perhaps a signal giving lawmakers a license to proceed with dismantling the reform.”⁸⁸

Second, the '86 Act failed to address the pressing issue of ballooning budget deficits.⁸⁹ In the years following the '86 Act's passage, the deficit would continue to grow from \$150 billion in 1987 to \$221 billion in 1990, with the gross federal debt jumping from \$2.3 trillion to \$3.2 trillion over the same period.⁹⁰ Contemporary economists expressed concern over the record budget deficits, contending that such deficits would depress future economic growth.⁹¹ Even Rostenkowski — one of the crucial congressional leaders behind the '86 Act — acknowledged the seriousness of budget deficits when he called tax reform a “noble cause,” but said deficit reduction was a “demand.”⁹²

To be sure, budget hawks in Congress likely exploited the skyrocketing deficit as a political opportunity to make their case for balanced budgets.⁹³ Some had been making the point throughout the 1980s tax cuts. Others opposed the revenue neutral stance of the '86 Act. Still, by the 1990s, growing empirical evidence and economic commentary indicated that deficit concerns had reached an apparent tipping point. The unprecedented size of the deficit and the negative economic effects appeared to be too much for many lawmakers.⁹⁴ Thus, while the salience of addressing budget deficits likely was influenced by political considerations, the issue itself was pressing enough to pose a serious threat to the durability of the '86 Act.

Third, as Friedman had foreseen, the political popularity of tax expenditures enhanced the incentives for both parties to eschew principled, conceptual tax reform in favor of doling out tax benefits to garner political support and campaign contributions. Reflecting back on the unraveling of the '86 Act, some scholars have even challenged the

⁸⁸ Thorndike, *supra* note 8, at 609.

⁸⁹ Graetz, *Tax Reform Unraveling*, *supra* note 7, at 71.

⁹⁰ *Office of Management and Budget: Historical Tables*, WHITE HOUSE, <https://www.whitehouse.gov/omb/historical-tables> (last visited Oct. 12, 2019). All figures are in 2012 dollars.

⁹¹ See Judith Havemann, *Federal Budget Deficit Hit Record of \$220.7 Billion in Fiscal 1986*, WASH. POST (Oct. 24, 1986), <https://www.washingtonpost.com/archive/politics/1986/10/24/federal-budget-deficit-hit-record-of-2207-billion-in-fiscal-1986/d40ef743-fac0-4be8-ad8f-11d16db0bc64>.

⁹² BIRNBAUM & MURRAY, *supra* note 7, at 100.

⁹³ See, e.g., James Campen, *Understanding the Reagan Deficits*, 44 EDUC. LEADERSHIP 76 (1986).

⁹⁴ Graetz, *Tax Reform Unraveling*, *supra* note 7, at 71; see also Benjamin Friedman, *Learning from the Reagan Deficits*, 82 AM. ECON. REV. 299, 299 (1992).

very idea that the '86 Act was a serious attempt at reform, critiquing mainstream rosy depictions of the Act and the lionization of the political figures behind the endeavor. Relying on an extension of Mancur Olson's famed special-interest model of legislation, scholars have posited an *ex ante* rent-extraction model for legislative action (or inaction).⁹⁵ According to this model, lawmakers face incentives to exploit the high value of certain issues for particular special-interest groups by dedicating time and attention to such issues. By keeping such issues at the forefront, legislators on both sides of the aisle can reap the rewards of financial contributions from the organized (and oftentimes deep-pocketed) special-interest groups with a stake in the issue.

According to this view, statutes such as the '86 Act are part of a legislative "auction" of tax benefits, serving both to redistribute resources to politically influential actors and to maintain the continued relevance of tax expenditures for the various special-interest groups.⁹⁶ Thus, rather than serving as a genuine attempt to ensure the durability of tax reform, the '86 Act might well have been a shrewd political move by rational legislators seeking to maximize their political support and campaign contributions. By highlighting Congress's power over taxation in general, and tax expenditures in particular, the '86 Act ensured continued lobbying efforts and financial contributions by special-interest groups standing to gain (or lose out from) future tax legislation.

In the end, the '86 Act failed to alter the policymaking process to hinder legislators' ability to grant special interests the tax benefits they sought. As political scientist Eric Patashnik pointed out in his study of the durability of legislative reforms, the survival of such reforms is dependent on whether they are able to "recast institutions to constrain future rent-seekers."⁹⁷ On this front, the '86 Act failed miserably. Tax policymaking remained principally in the hands of the few members of select congressional committees, who retained the political incentive (and ability) to hand out tax benefits. The '86 Act sowed the seed of its own destruction, Patashnik has argued, by failing to "raise the political transaction costs to the government of creating or expanding tax

⁹⁵ See Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159, 1165 (2006); see also MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 141-47 (5th ed. 1975).

⁹⁶ See, e.g., Richard Doernberg & Fred McChesney, *Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986*, 62 N.Y.U. L. REV. 891, 896-99 (1987) (reviewing BIRNBAUM & MURRAY, *supra* note 7).

⁹⁷ PATASHNIK, *supra* note 17, at 35.

loopholes” via the enactment of “institutional or procedural reforms.”⁹⁸ Given that the incentives to seek tax expenditures (and legislators’ ability to grant them) remained intact, it seems quite unsurprising that the Act’s base-broadening accomplishments rapidly eroded.

The fourth reason why the ’86 Act unraveled is because it failed to address the U.S. tax code’s fundamental reliance on income taxation as the base source of federal revenues. Income taxation, at least as currently levied in the United States, is complex, motivates tax avoidance and evasion, and results in routine violations of the principle of horizontal equity.⁹⁹ These negative features foster resentment about the tax code’s perceived unfairness and further spur the decline of faith in the system. Some scholars and activists have proposed adopting a federal value-added tax (“VAT”), which would tax consumption rather than income, as a means of redressing these inefficiencies. As tax law scholar Michael Graetz has proposed, combining a broad-based, national VAT with a limited system of income taxation on the wealthy would reduce the number of income tax filers by an estimated 100 million, greatly simplifying America’s byzantine taxation system, and removing disincentives to saving, while being revenue and distributionally neutral.¹⁰⁰ These changes would also reduce many of the current tax system’s inefficiencies and distortionary effects.

Of course, it is completely possible, perhaps even likely, that moving to a national consumption tax base with a VAT would nevertheless have failed to prevent the narrowing of the tax base post-enactment. If scholars are correct about the structural pressure for the emergence and revival of tax benefits, it is certainly possible that even with a national VAT, lawmakers would subsequently adopt all types of tax benefits eroding a federal consumption tax base. A fundamental change in the federal government’s tax base may not have solved the problem of re-emerging tax expenditures, but it might have delayed the return of rising income tax rates. All of this is counterfactual speculation, but it does buttress the point that, at the end of the day, the ’86 Act was not quite the landmark tax reform its supporters had hoped.

Ultimately, for all the trumpeting of its dramatic changes, the ’86 Act proved to be a temporary reform at best. Crushed under the weight of its dismal approval ratings, unparalleled budget deficits, the political popularity of tax expenditures, and its failure to drastically alter the American tax system, the ’86 Act succumbed to a combination of rate

⁹⁸ *Id.* at 54.

⁹⁹ Michael J. Graetz, *100 Million Unnecessary Returns: A Fresh Start for the U.S. Tax System*, 112 *YALE L.J.* 261, 278-81 (2002).

¹⁰⁰ *Id.*

hikes and an ever-narrowing income tax base. Its collapse would set the stage for another go at tax reform: the 2017 Tax Cuts and Jobs Act.

IV. IMPLICATIONS FOR THE 2017 ACT

What lessons does the '86 Act hold for the 2017 Act? The main takeaway appears to be that the changes made by the 2017 Act are unlikely to be stable in the long run. Given the similarities between the challenges facing the recent law and those that confronted the '86 Act, it's quite possible that the 2017 will be a blip in the long durée of American tax history.

Like the '86 Act, the 2017 Act does not enjoy considerable public support. Three recent polls have given the 2017 Act middling approval ratings. A poll by the *Economist* found that only 34% of respondents supported the Act, as compared to the 39% opposed to it.¹⁰¹ A second poll by Fox News similarly found 34% of respondents held a favorable, and 36% an unfavorable view of the 2017 Act.¹⁰² Finally, a CNN/SSRS poll found 48% of respondents supported and 40% opposed the Act.¹⁰³

The threat posed to the Act's durability by its relative unpopularity is only further compounded by the fact that it was enacted on wholly partisan lines. All congressional Democrats voted against the bill in 2017, and many of the leading contenders for the Democratic presidential nomination in 2020 have vowed to undo the Act's rate cuts.¹⁰⁴ While mere political opposition from a major political party is insufficient to guarantee the overturning of a policy reform (as evidenced by the Republican failure to overturn the Affordable Care Act), Democrats' fervent vows to reverse the 2017 Act's tax cuts provide a sharp contrast with the general bipartisan celebration of the '86 Act.

¹⁰¹ YOUGOV, THE ECONOMIST/YOUGOV POLL: MARCH 17-19, 2019 — 1500 U.S. ADULT CITIZENS 63 (2019), https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/civrx2u2zk/econTabReport.pdf.

¹⁰² FOX NEWS, FOX NEWS POLL 2/13/19, at 3 (2019), <https://www.foxnews.com/politics/fox-news-poll-2-13-19>.

¹⁰³ CNN, CNN/SSRS POLL, JAN. 30-FEB. 2, 2019 (2019), <http://cdn.cnn.com/cnn/2019/images/02/03/rel2a-.trump.pdf>.

¹⁰⁴ See, e.g., John Harwood, *Sen. Elizabeth Warren Wants to Roll Back the GOP Tax Cuts*, CNBC (July 24, 2018, 5:45 AM), <https://www.cnn.com/2018/07/23/sen-elizabeth-warren-wants-to-roll-back-the-gop-tax-cuts.html>; Yuval Rosenberg, *Pete Buttigieg Slams GOP Tax Cuts, Proposes Tax Hikes in Fox News Town Hall*, YAHOO! FIN. (May 20, 2019), <https://finance.yahoo.com/news/pete-buttigieg-slams-gop-tax-223637273.html>; Americans for Tax Reform, *Joe Biden: "First thing I'd do is repeal those Trump tax cuts."*, YOUTUBE (May 6, 2019), <https://www.youtube.com/watch?v=BaWym5mHKak&>; Americans for Tax Reform, *Kamala Harris: "On day one, we gonna repeal that tax bill."*, YOUTUBE (May 16, 2019), <https://www.youtube.com/watch?v=PjKkeNuAc2Y>.

Thus, it seems likely that the 2017 Act's partisan enactment will only further enhance the fragility of its reforms.

Likewise, the 2017 Act was passed in the midst of budget deficits that dwarf even those present at the time of the '86 Act. A recent CBO report predicted that the 2017 Act would increase the deficit by almost \$1.9 trillion in the 10-year period between 2018 and 2028 at a time when the 2018 deficit is already estimated to total \$804 billion.¹⁰⁵ These revenue pressures may one day triumph over the current policy obsession with tax cuts. Just as the '86 Act's lower rates slowly gave way to tax increases, future years may bring with them tax hikes to address growing budget deficits. Indeed, in light of the dire fiscal situation, some tax scholars have observed the gradual abandonment of the aspirational goal of "broader base, lower rates." Daniel Shaviro has boldly proclaimed that the 1986 type of conceptual tax reform, anchored by base broadening and lower rates, may have run its course. Given the growing and anticipated need for more revenue, future fundamental tax reform may mean eliminating tax expenditures and raising marginal tax rates.¹⁰⁶

Additionally, it seems unlikely that the political appetite for doling out tax giveaways will cease anytime soon. Such an appetite can be confirmed by the retreat from proposed drastic limitations on the State and Local Tax ("SALT") deduction during the 2017 Act's legislative process. Under pressure from Maine Senator Susan Collins, Senate Republican leadership retreated from eliminating the deductibility of local property taxes under a limited SALT deduction. Instead, they simply capped the annual amount of the SALT deduction at \$10,000.¹⁰⁷ If the 2017 Act is likely to unravel in a fashion similar to the '86 Act, this SALT deduction cap may be the first base-broadening casualty.

Finally, the 2017 Act refused once again to consider the possibility of shifting to a consumption-based taxation system such as a VAT. Interestingly, pre-2017 reform proposals, including one floated by Kevin Brady and Paul Ryan, contained provisions that may have led to

¹⁰⁵ CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: 2018 TO 2028, at 106 (2018), <https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53651-outlook.pdf>. All figures are in 2018 dollars.

¹⁰⁶ See Daniel Shaviro, *1986-Style Tax Reform: A Good Idea Whose Time Has Passed*, 131 TAX NOTES 817, 817-19 (2011).

¹⁰⁷ Susan Cornwell, *Senator Collins Says Not Committed to Tax Bill, Concerned about SALT*, REUTERS (Nov. 30, 2017, 6:54 AM), <https://www.reuters.com/article/us-usa-tax-collins/sen-collins-says-not-committed-to-tax-bill-concerned-about-salt-idUSKBN1DU221?il=0>; Naomi Jagoda, *Collins: Senate Bill Will Include Property-Tax Deduction*, HILL (Dec. 1, 2017, 12:39 PM), <https://thehill.com/policy/finance/362791-collins-senate-bill-will-include-property-tax-deduction>.

the adoption of a quasi-VAT, but those earlier proposals were resoundingly rejected as part of the hasty consideration of the 2017 Act.¹⁰⁸ As a result, the U.S. tax system will continue to rely on an inefficient and distortionary system that more than half of Americans view as unfair.¹⁰⁹ Unless and until the United States adapts a national consumption-based tax, the resolution to this problem may continue to elude policymakers.¹¹⁰

CONCLUSION

More than thirty years have passed since the '86 Act attempted to achieve meaningful reform of the U.S. tax code by lowering marginal rates and broadening the income tax base. Unique historical and political conditions in 1986 paved the way for this landmark legislation. The combination of a long-running intellectual movement for comprehensive tax reform, President Reagan's energetic support, and meaningful bipartisan deliberation and compromise created ideal conditions for what appeared initially to be true fundamental tax reform.

Despite its bold reforms, however, the '86 Act mainly unraveled in the decade or so after its enactment. Individual rates crept back up and tax expenditures returned and flourished. Many, though not all, of the law's substantial achievements were reversed because of what the statute failed to accomplish, namely garnering significant public support, providing a solution to gaping budget shortfalls, eliminating the structural political incentives for tax expenditures, and correcting the United States' fundamental overreliance on income taxation.

The passage of time — and the consequent increase in the availability of historical sources — enables us to use the history of the '86 Act to examine the durability of the recently-enacted 2017 Act, whose proponents repeatedly invoked the former statute to urge the latter's adoption. Although both pieces of legislation differ dramatically, in terms of significance, partisan support, and revenue and distributional impact, their common goals of tax simplification and lower marginal rates permit a potentially useful, albeit cautious, comparison.

¹⁰⁸ See Mark J. Mazur, *What is a Border-Adjusted Tax?*, URB.-BROOKINGS TAX POL'Y CTR. (Apr. 26, 2017), <https://www.taxpolicycenter.org/publications/what-border-adjusted-tax/full>; Robert C. Posen, *Paul Ryan Preps Bold Corporate Tax Plan*, BROOKINGS INST. (Jan. 4, 2017), <https://www.brookings.edu/opinions/paul-ryan-preps-bold-corporate-tax-plan>.

¹⁰⁹ See *Growing Partisan Divide Over Fairness of the Nation's Tax System*, PEW RES. CTR. (Apr. 4, 2019), <https://www.people-press.org/2019/04/04/growing-partisan-divide-over-fairness-of-the-nations-tax-system>.

¹¹⁰ See Graetz, *Tax Reform 1986*, *supra* note 7, at 337.

The 2017 Act shares the aforementioned failures (some to an even greater degree) that led to the demise of the '86 Act's reforms. The 2017 Act's popularity is tepid at best. Current deficits are even greater than those of the late '80s and early '90s. Little has been done to extinguish either the political rewards for tax expenditures or Congress' institutional capacity to grant such tax expenditures. And the U.S. still lacks an alternative tax base such as a national consumption tax. As such, it seems quite likely that the 2017 Act's (admittedly limited) reforms will erode as quickly as did the '86 Act's. Indeed, the rise and fall of the 2017 Act may ultimately signal the death knell of conceptual tax reform.¹¹¹

These historical and prospective developments have important implications for the durability of future tax reforms. Until and unless lawmakers find a way to address structural political and economic pressures, the reforms these legislative enactments achieve are unlikely to last for long. It remains to be seen if and how this conclusion applies to other legal reforms — a topic best reserved for future research.

¹¹¹ See Shaviro, *supra* note 106, at 842.