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## The New Tax Law in Context

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## The New Tax Law in Context

### Abstract

"Efforts must be undertaken to foster stability, even with the likely ongoing reality of substantial policy disagreement, and we absolutely have to face the hard realities of the challenges of debt in our current economic system."

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# The New Tax Law in Context

 [inallthings.org/the-new-tax-law-in-context/](http://inallthings.org/the-new-tax-law-in-context/)

Donald Roth

April 13, 2018



If I spent the first few articles alienating my more progressive readers because I see the Tax Cut and Jobs Act of 2017 as a net positive, then this is the article where I alienate my more conservative readers by criticizing the means used and the context in which the new tax law was passed. However, if I'm attempting anything approaching a fair reading of the law, I cannot ignore this broader context, and I don't think any analysis of the broader context can fairly render a positive judgment. The new tax law is part of an erosion of the rule of law in society brought about by both the dysfunction of our current system and a growing instability in the transition of power. Further, it is paired with a federal budget that puts the entire system only further on the road to disaster, and these all raise genuine fears for the future of America.

## **Legislative Dysfunction: The Rise of the Filibuster (and loopholes to avoid it)**

When I lived in Washington, D.C., I remember several staffers and law professors describing the Senate as functioning by “gentleman’s agreement.” That is, the Senate is generally much more flexible about rules of debate and policy than the House of Representatives. This is most clearly seen in the fact that Senators can prolong debate on a bill indefinitely through a lack of time limit on most debates and the absence of a requirement that debates remain relevant to the bill at hand—that is, filibustering. Since the 1970s, filibusters have become increasingly common, and while deals are sometimes made to avoid them, the threat of a filibuster has become increasingly necessary in order for the Senate to gather the 60 votes needed to end debate. In fact, an average of 123 votes to end debate were required in the last five sessions of Congress compared with an average of 22 back when the move became more common in 1971.

As the 60-vote threshold has become more of a norm, the party that controls the Senate (who often lacks this supermajority) has increasingly turned to the budget reconciliation process, another child of the 1970s, which allows the Senate to pass one budget-related bill a year without fear of a filibuster. While this process is limited to budget-related issues and cannot increase the deficit beyond a ten-year window, both of those restrictions have been eroding. Democrats relied on this process to make revisions to the Affordable Care Act after they lost their 60-vote majority following the first passage of the bill in the Senate. Republicans then

tried to use the process in their bid to repeal and replace the Affordable Care Act, but when that bill didn't pass, they switched over and used reconciliation to pass the Tax Cuts and Jobs Act of 2017 (which we have been considering in this series).

The problem with this whole development is a growing sense that Congress gets to use reconciliation to try to force through one major policy initiative a year in one great big bill that no one has time to read thoroughly. The filibuster is a quirk of procedure in the Senate that actually allows the minority party to have an important voice in policymaking (one of the traditional reasons why the Senate has been a more moderate body than the House).

However, the filibuster is only meant to be an option to resort to when negotiation collapses, and its increasing use as a regular tool by both sides has helped to normalize the rhetoric of political extremes—making the modern filibuster an agent of polarization, not moderation. Getting around the filibuster through reconciliation is, then, just an escalation in an arms race of polarization that is setting aside ordinary procedure and the spirit of the law in pursuit of political gain.

### **Legislative Dysfunction: The Rise of Mega-Legislation**

The polarization caused by the reconciliation/filibuster arms race is magnified by the size of legislation that now regularly comes before Congress. People often criticize Congress for failing to get anything done, pointing to the decrease in the number of bills passed in a given year as proof of legislative inactivity. However, while the 89<sup>th</sup> Congress passed 800 bills in 1959-60 compared to the 383 passed by the 111<sup>th</sup> Congress in 2009-10, the bills passed in 2009-10 made up 7,617 pages compared to the 1,774 of 50 years prior. While the trend has leveled off some, it has become normal for significant legislation to run well over 100,000 words (about the same as the average great novel).

While it might seem nice that the new tax law comes in at around 72,000 words, making sense of it requires reading the appended committee reports, bumping the total to over 300,000 words and more than 1,000 pages. Of course, this is less than even the statutory text of the Affordable Care Act, but my criticism here isn't partisan: it's systemic. A political world where the norm is to pass fewer, larger bills is a world that favors drafting errors and increasing polarization.

The longer a document gets, the more likely that there will be a few errors in it, especially if the review period for that document is abbreviated. With the Tax Cuts and Jobs Act of 2017 meeting both of these conditions, it shouldn't be surprising that there are a number of drafting errors in the new tax law. (The Affordable Care Act had similar problems.) Since this deficiency of large bills is often a selling point for political opposition to them, it can be politically advantageous to make the winners live with the consequences of their errors, meaning that opposition to even technical corrections can be as contentious as the original bill. This either

feeds the reconciliation workaround that I previously mentioned or it leaves us with broken parts of these new laws, inviting questionably legal regulatory workarounds. Neither outcome is desirable.

Of course, minor errors would be one thing, but the other effect of having fewer, larger bills to fight over is that both sides can more effectively line up their respective armies on one extreme or the other. The stakes of even minor deviations from the party line become higher, and every bill is high political drama. In other words, mega-legislation may feed increasing political polarization as we start to have just a handful of big political sparring matches in a year, instead of a bunch of smaller ones. Whether or not it can be traced to causes like the growth in bill size or the increase in filibustering, research shows voting in both houses of Congress has been collapsing into a strict, polarized party line to a greater degree than ever before in American history. The parties have disagreed this strongly before, but the lines have almost never been this clearly drawn.

### **Politics of Instability: Undoing the Obama Legacy**

At the same time that the legislature slips into dysfunction due to polarization, it has also been teetering into instability. It's nothing new for an incoming president to vow to undo the work of his predecessor. Obama pledged to roll back many Bush-era laws and policies, but he ultimately took a light hand on the “Bush Tax Cuts,” ended up increasing troop deployments in Afghanistan, and never closed Guantanamo Bay. (Just as Eisenhower never undid the New Deal, and Nixon never dismantled the Great Society.) With some exceptions, American politicians talk a big game but tend to toe a more moderate line.

This administration has been one of those exceptions. President Trump has undone a large number of the trade deals, diplomatic negotiations, and environmental orders that President Obama worked to put in place. At a regulatory level, the impact has been even larger. After the failure of the plan to repeal and replace the Affordable Care Act, the Tax Cuts and Jobs Act of 2017 settled for just kicking the legs out of one of the major economic pillars of the reform effort by revoking the tax penalty on individuals who fail to purchase minimum insurance (the “individual mandate”). For all the chaos of President Trump’s policymaking initiatives (let alone his Twitter feed), one unifying factor is a burning desire to undo anything Obama put in place, even if nothing is offered as a replacement.

It shouldn’t be shocking that I think this is a bad thing. I tend to lean Conservative, so I had plenty of criticisms of Obama-era policies, but the peaceful transition of power is a cornerstone of the success of democracies. While the transition was peaceful this time, some of the fervency of the Republican desire to undo the Obama-era leftward swing threatens to put into motion a pendulum effect that calls for an equal and opposite reaction once the Republican stranglehold on power is broken.

In some ways, the polarization of modern politics is reminiscent of the first major transition of power in the United States, wherein the excesses of the Federalists in actions like the Alien and Sedition Acts paved the way for the ascendancy of the Democrat-Republicans. This led to a remarkable effort to undo the actions of the previous party that would have threatened a significant Constitutional crisis except for some deft maneuvering by the federalists on the Supreme Court and the simple fact that the Federalist party was dying out.

Unfortunately, what goes around comes around in the political world, and despite current Republican ascendancy, the Democrats are no dying Federalist party. Let us all hope we're not headed for a political system where we rubber-band back and forth between regimes genuinely committed to undoing their predecessors—or else the American system is in for some rough years.

### **Politics of Instability: Don't Tax, Still Spend**

I've gone on at enough length about my more abstract concerns that I have little space left for the most dire and concrete one. That's fine, though, because this issue is the most straightforward: as I mentioned last April, cutting taxes by a significant amount while failing to make at least equal cuts to the federal budget is a recipe for disaster. On the one hand, tax cuts are political winners while cutting government benefits are the opposite, but the spoonful of sugar is meant to help the medicine go down; otherwise, you just look like a crazy person who eats sugar straight out of the container.

The thing is, this issue doesn't all lie at President Trump's door, as the approved 2018 budget is higher than anyone actually asked for going in. The longer the nation fails to face facts with the realities of skyrocketing deficits, the harsher the political realities will be when the bill finally comes due. While President Trump has pushed a number of policies that prioritize domestic industries, and while the new tax law is generally good for American businesses and individuals, none of this will matter if we're facing crippling debt-servicing requirements which derail most of our other policy priorities within the next few decades.

### **Conclusion**

Overall, then, the new tax law itself was a modestly good thing, but it was achieved in a broader political climate which is seriously challenged by polarization and destabilization, and the new law is feeding rather than fighting that problem. While America is far from beyond hope, it is time to take serious action. Efforts must be undertaken to foster stability, even with the likely ongoing reality of substantial policy disagreement, and we absolutely have to face the hard realities of the challenges of debt in our current economic system. Neither of these are easy things to tackle, and I've spent too many words in this series already to launch into detailed plans for reform, but a number of voices like John Inazu speak powerfully to the former issue, while groups like the Committee for a Responsible Federal Budget do important work around the latter. So, while you may enjoy a little extra money in your pocket in 2018, pay attention to these underlying issues and think about what you can do to contribute to the common good in the challenging days ahead.