Fixing the Tax Cuts and Jobs Act: Managing the Supremacy Tradeoff

As enacted, the recent, monumental 2017 tax reform, often referred to as the Tax Cuts and Jobs Act ("TCJA"), was replete with mistakes. A provision that was designed to put an end to the so-called "carried interest" loophole itself contained an inadvertent loophole, which, if applied literally, could undermine the entire reform. Shoddy drafting of a new deduction for pass-through businesses threatened to provide many farmers an unintended potential elimination of their tax liability, significantly distort the farming industry, and possibly create a new tax shelter that could be abused in many different areas of the income tax. And careless modification of the depreciation rules arbitrarily left certain types of property subject to a less favorable set of rules than most other properties. These are just a few of the many mistakes that surfaced in the immediate aftermath of Congress passing the law, many of which continue to persist today.

The existence of such mistakes is no surprise. As was widely publicized in the news media, the legislation was drafted at a frantic pace, sometimes under cover of night, and with very little opportunity for careful consideration of the inordinately complex provisions. As a result, drafting errors are not only an understandable, but also a predictable, product of the process.

And the existence of drafting errors is far from isolated to the tax context or to the recent TCJA. In 2015, the fate of the Affordable Care Act ("ACA"), President Obama's signature legislative achievement, famously hung in the balance, turning on whether the Supreme Court would fix four words of the voluminous statute. If read verbatim, the four words, which pretty clearly seemed like a simple legislative drafting mistake, [1] threatened to unravel the insurance markets that were essential to the entire legislative scheme.[2] Major environmental issues, such as whether California can set the standard for certain emissions for all other states,[3] have turned on whether or not the statute omitted words. And the functionality of the Dodd-Frank whistleblower regime has turned on a potential, failed cross reference in the statute.[4] A list of similar examples could go on and on.[5]

The explanation for such drafting errors is quite similar to the one found in the recent construction of the TCJA. Not only is a beleaguered Congress trying to legislate in increasingly complex areas, but the way that Congress is doing so is also increasingly problematic. As political scientists and legal scholars have observed, Congress has turned to "unorthodox legislation," or the use of a variety of innovative congressional procedures to get legislation passed. These procedures, while a potentially useful way to break through gridlock in increasingly partisan times, have, in any event, eroded the traditional order of legislation, control

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[1] Robert Pear, *Four Words that Imperil Health Care Law Were All A Mistake, Writers Now Say*, N.Y. TIMES, at A1 (May 26, 2015) (describing accounts of Congress Members and professional drafters that the four words in question were a mere drafting mistake); ___.

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[3] Engine Mfrs. Ass'n. v. EPA, 88 F.3d 1075, 1085-95 (D.C. Cir. 2007) (examining and rejecting claims that the word "new" should be read into a statutory provision regulating omissions of off-road vehicles, resulting in the consequence that California would be the sole government establishing such regulation for all states).

[4] Digital Realty Trust v. Somers, 138 S.Ct. 767 (2018) (rejecting SEC rule that would have allowed whistleblower retaliation protection without report to the Commission because such a rule would conflict with the statute).

[5] *See, e.g.*, NRDC v. EPA, 489 F.3d 1364, 1371-73 (D.C. Cir. 2007) (examining whether Congress used the word "category" as a stand-in for "category of subcategory" in the in a way that would allow EPA to delist subcategories of carcinogens, and concluding that that EPA did not show that Congress did not mean what it said).

of subject matter experts, and, in some ways, the quality of the legislative product. The upshot is that today's legislation is highly vulnerable to errors in drafting as a result of passing through an oftentimes chaotic legislative process.

So, what should be done about such mistakes? In the case of the TCJA, for instance, can the Treasury Department correct such mistakes through guidance? Should it? What boundaries, if any, should apply to what constitutes a "mistake"? Should courts respect such guidance if challenged? Or must Congress bestir itself to correct any errors? And will it?

The existing approach to legislative drafting mistakes, in both law and scholarship, is clear – agencies and courts should tread very carefully in attempting to fix any such mistakes. Indeed, as an illustration of this phenomenon, in two of the three cases mentioned above – the case regarding preemption of state emission standards,[6] and the case regarding the Dodd-Frank whistleblower regime[7] - the courts ultimately rejected the agencies' attempts to correct what they viewed to be errors, or omissions, in the statute, despite some strong arguments to the contrary.[8] In the case of the ACA, the Supreme Court famously saved the ACA by essentially reading the mistake out of the statute, although, in doing so, the Court refused to defer to the agency's interpretation of the statute or acknowledge that it was correcting a mistake.[9] The lengths to which the Court went to avoid acknowledging that it was essentially correcting a legislative mistake, or, perhaps even worse in the Court's mind, allowing an agency to do so, underscores the reticence of courts to correct mistakes themselves or defer to agencies that have done so.[10]

The explanation for this reticence is as foundational as it is straightforward. The bedrock constitutional principle of legislative supremacy provides that Congress makes the law. If courts or agencies attempted to fix legislative drafting errors, it would appear to violate this principle of legislative supremacy. This leaves even supporters of fixing mistakes gingerly trying to explain how doing so remains consistent with legislative supremacy, and, as in the case of the ACA, leads even courts that are correcting mistakes to profess they are doing something else.

In this Article, we argue that this concern about legislative supremacy is misguided because it fails to contend with the realities of the legislative process and the choices that drafters in the legislative process actually face. As an initial matter, legislative drafting mistakes are almost always made by professional drafters of legislation, not Congress Members themselves. And Congress's vote for the legislation does not indicate a desire to sign off on the mistakes. Rather, Congress is almost never involved enough in the actual drafting of the mistakes to appreciate that they exist or how they might interact with the broader legislative scheme. As a result, refusing to

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[6] Engine Mfrs. Ass'n., 88 F.3d 1075.

[7] Digital Realty Trust v. Somers, 138 S.Ct. 767 (2018) (rejecting SEC rule that would have allowed whistleblower retaliation protection without report to the Commission because such a rule would conflict with the statute).

[8] *See, e.g.*, Engine Mfrs. Ass'n., 88 F.3d at 1100-05 (Tatel, J. dissenting) (rejecting majority approach and instead arguing that the Court should recognize that Congress made a "clerical error" in drafting the statute); Somers v. Digital Realty Trust, 850 F.3d 1045, 1049 (2017) (*rev'd and remanded*, 138 S. Ct. 767 (2018)) (reasoning that hewing to the narrow reading of the statute (or, in other words, refusing to allow the SEC to correct the potential drafting error) would be "illogical" and lead to "absurdity," and citing *King* in support of its reasoning.

[9] King v. Burwell, 135 S.Ct. 2480, 2489-29 (2015) (explaining that the ACA case was "not a case for the IRS" and concluding for itself that "an Exchange established by the State" refers to both State and Federal exchanges for the purposes of tax credits, in part because the statute would not make sense absent such a reading).

[10] *See, e.g.*, King v. Burwell, 135 S.Ct 2480, 2497 (Scalia, J. dissenting) (arguing that, "Words no longer have meaning if an Exchange that is *not* established by a State is 'established by the State.'"); Ryan D. Doerfler, *The Scrivener's Error*, 110 NW. U. L. REV. 811, 843-57 (2016) (arguing that reticence to openly correct legislative drafting errors led litigants to make and the Court to adopt "deeply distortive interpretive rationales in *King* and other cases).

fix the mistakes can thwart, rather than promote, Congress' will. More worrisome, refusing to fix legislative drafting mistakes imposes greater risk on professional legislative drafters if they try to elaborate the statutory scheme in detail. When they elaborate the scheme in detail, the likelihood increases that they will make a mistake. Refusing to fix mistakes thus encourages professional legislative drafters to delegate more of the details of the statutory scheme to administrative agencies, resulting in less law being made at the congressional level.

These dynamics yield what we call the "supremacy tradeoff": refusing to fix legislative drafting mistakes in the name of legislative supremacy may paradoxically reduce Congress's role as the supreme lawmaker of the land. The supremacy tradeoff has a variety of problematic effects. In addition to potentially undermining, rather than supporting, Congress's role as the supreme lawmaker of the land, the tradeoff can result in less timely guidance for regulated parties. Refusing to fix Congress's mistakes can thus exacerbate inadequate legislative product.

We explore how to manage the supremacy tradeoff using the case study of the TCJA. We argue that, as a default, the applicable agency (here, the Treasury Department, aided by the IRS) should fix legislative drafting mistakes, which we define as inadvertent drafting that fails to accomplish what the drafters intended. Applying these principles, we illustrate which problems with the TCJA the Treasury Department should have leeway to correct and which problems it should not. We also examine how courts can appropriately serve as a check on Treasury's administrative discretion through application of either *Chevron* or *Skidmore* review.

We also address important counterarguments. First, our approach may appear to pose problems for the rule of law. Under some versions of this bedrock principle, the meaning of the law should be clear and publicly available. Suggesting that statutes should be interpreted to mean something different that they say may appear to pose some problems for rule of law.

But we argue that this rule of law concern is overstated. Many times, refusing to fix legislative drafting mistakes means reading statutes in a nonintuitive way, and that nonintuitive reading may itself violate public expectations about the law. Likewise, it is often clear exactly what the drafters meant to draft. The uncertainty is thus not what the law should be, but whether a fix will be created, by whom, and whether such fix will be upheld. Having a clearer default about fixing legislative drafting mistakes can thus create more certainty about the law.

Another important concern is that fixing legislative drafting mistakes may necessitate a purposivist interpretive approach, and perhaps even a particularly egregious form of purposivism, which may offend textualists or even non-textualists who nonetheless believe in the primacy of legislative text. But this is a red herring. As we explore, the default of fixing legislative drafting mistakes is a decision that can be compatible with a variety of judicial approaches. The judicial approach can affect the type of evidence used to make a decision about whether a mistake was made. But mistakes can be fixed under any judicial approach.

At bottom, by setting forth the supremacy tradeoff, and examining how to manage it in the context of the TCJA, we seek to undermine the persistent legislative supremacy pillar that continues to stand in the way of fixing legislative drafting mistakes. Rather than perseverating about how fixing legislative drafting mistake can affront legislative supremacy, we should recognize how *failing* to fix them can paradoxically move more lawmaking authority out of Congress and to agencies, resulting in *less* legislative supremacy. Legislative drafting mistakes are both increasingly common and problematic to the functioning of modern legislation. Having a default approach of fixing such mistakes best enables Congress, agencies, and courts to realistically work together to effectuate what Congress means to be the law of the land.