

Note

Technically Important: The Essential Role of Technical Corrections and How Congress Can Revive Them

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INTRODUCTION

The tax code can best be conceptualized as an intricately woven web. If you pull on one thread, a whole, seemingly unrelated section may collapse. The CARES Act, passed in response to the COVID-19 pandemic, provides a cogent example. A provision of the CARES Act passed in early 2020 outlined the issuance of Economic Impact Payments (EIP) via the IRS.¹ However, due to a conflict in the way the language was drafted, many survivors of domestic violence were unable to receive the rightful share of their money.² This problem was repeatedly raised to the IRS by advocates and Congress; however, the IRS claimed they did not have the regulatory authority to correct

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1. CARES Act, Pub. L. No. 116-136, § 2201(a), 134 Stat. 281, 335 (2020) (codified as I.R.C. § 6428) (mandating that in early 2020 all eligible individuals will receive a \$1,200 credit, plus an additional \$500 credit per qualifying child). EIPs were meant to defray some of the economic hardship experienced by individuals caused by the COVID-19 pandemic. See Dylan Matthews, *Sending Americans Checks Is an Old Idea That's Finally Going Mainstream*, VOX (Mar. 19, 2020), <https://www.vox.com/future-perfect/2020/3/19/21185572/who-will-get-stimulus-checks-trump> [<https://perma.cc/EL4P-LCS2>] (last visited Mar. 24, 2022).

2. See Anne Branigin, *Stimulus Checks Could Change Survivors' Lives. Some Abusers Are Withholding Them, Advocates Say.*, WASH. POST: THE LILY (Jan. 26, 2021), <https://www.thelily.com/stimulus-checks-could-change-survivors-lives-some-abusers-are-withholding-them-advocates-say> [<https://perma.cc/TAC7-L7CZ>].

the mistake via subregulatory guidance.³ The issue also did not lend itself to judicial correction via scrivener's error doctrine, which is reserved for typo-esque problems.⁴ Correction of the domestic violence EIP glitch requires a legislative solution. The process for this type of solution already exists via the technical correction.⁵ However, due to the perversion of the technical correction beyond its narrowly defined bounds, and congressional gridlock, this essential drafting error remedy is not being utilized as intended.⁶ The inability to effectively utilize technical corrections leaves ineffectual and broken tax legislation in place, with no available remedies for those who are harmed.

Even when tax bills are not rushed because of an emergency, there are often drafting errors or technical glitches that prevent the true purpose of the law from being properly implemented. Sometimes these inconsistencies or problems are not apparent during the drafting stage and only come to the fore once the legislation is being implemented. The legislative process for technical corrections exists in recognition of this reality. But, as Congress becomes more partisan, moving even the most uncontroversial bills through either chamber has become a challenge.⁷ As a result, Con-

3. See *The IRS in the Pandemic: Hearing Before the Subcomm. on Gov't Operations of the H. Comm. on Oversight and Reform*, 116th Cong. 26 (2020) [hereinafter *IRS Pandemic Hearing*] (statement of Charles P. Rettig, Comm'r, IRS). Any guidance that is released by the Treasury or IRS that does not go through notice-and-comment rule-making is considered subregulatory guidance. See MILAN N. BALL, CONG. RSCH. SERV., IF11604, RELIANCE ON TREASURY DEPARTMENT AND IRS TAX GUIDANCE 1 (2020).

4. The scrivener's error doctrine is a method of post-enactment correction typically utilized by the judiciary in recognition that clear typos and misstatements should not be given the effect of law. This doctrine is usually coupled with the absurdity doctrine. See discussion *infra* Part I.B.

5. Technical corrections are a legislative remedy to fix obvious or absurd mistakes that have found their way into the law and ensure that the practical implementation of the law lives up to the spirit of the bill legislators passed. See JOINT COMM. ON TAX'N, JCX-1-05, OVERVIEW OF REVENUE ESTIMATING PROCEDURES AND METHODOLOGIES USED BY THE STAFF OF THE JOINT COMMITTEE ON TAXATION 34 (2005). A silly yet illustrative example would be if as part of a new tax bill Congress declared "all taxpayers will receive free coffee on Thursdays." However, in another part of the tax code that has already been enacted, it states, "no free drinks will be tendered on days that begin with 'T'". Both sentences are law and represent the intent of Congress, as they were both voted on and passed however, they are inherently contradictory. One part of the law impedes the other from being implemented. While this example is largely reductionist, it represents the type of "error" or "glitch" technical corrections are meant to mitigate.

6. See discussion *infra* Part II.

7. See *Partisan Conflict and Congressional Outreach*, PEW RSCH. CTR. (Feb. 23,

gress passes fewer and fewer technical corrections, making the interim between the passage of tax legislation and the ensuing technical corrections so long that practitioners feel they are unable to rely on legislative fixes.⁸ There is a growing sense of contention around what is a technical error versus a substantive policy choice made by Congress that just has unintended consequences.⁹ In this increasingly common scenario there truly is no replacement for the technical correction. Subregulatory guidance and the scrivener's error doctrine cannot act as stand-ins for the technical correction process solely because Congress is unable to properly function. The process for technical corrections must be streamlined and insulated from partisanship if technical corrections are to serve their true purpose.

This Note will examine the unique role technical corrections play in addressing drafting errors post-enactment and why the role of technical corrections cannot be subsumed by other drafting error tools such as subregulatory guidance or scrivener's error doctrine. In Part I, this Note will examine and define the three distinct spheres of post-enactment drafting error correction tools: subregulatory guidance, scrivener's error doctrine, and technical corrections. In Part II, those definitions are then placed into context through application to the CARES Act. Part III reviews the political landscape during three seminal tax reform bills of the recent age: the Tax Reform Act of 1986, the Tax Cuts and Jobs Act, and the CARES Act and the ensuing impact on the passage of technical corrections. These case studies illuminate how technical corrections are often derailed by partisan-

2017), <https://www.pewresearch.org/politics/2017/02/23/partisan-conflict-and-congressional-outreach> [<https://perma.cc/5XLG-3LHG>]; see also Derek Willis & Paul Kane, *How Congress Stopped Working*, PROPUBLICA (Nov. 5, 2018), <https://www.propublica.org/article/how-congress-stopped-working> [<https://perma.cc/7FCU-7YMX>] (examining the rapid decline in Congress's ability to move legislation forward due to deeper entrenchment of polarization and partisanship over time).

8. Compare Marc J. Gerson, *Technically Speaking: The Art of Tax Technical Corrections*, 114 TAX NOTES 927 (2007) (discussing the "frequent" changes to tax legislation via technical corrections since 1986), with Michael Cohn, *Congressional Staff Aims to Finish Technical Corrections to Tax Reform Bill*, ACCT. TODAY (Apr. 25, 2018), <https://www.accountingtoday.com/news/congressional-staff-aims-to-finish-technical-corrections-to-tax-reform-bill> [<https://perma.cc/BD99-KE92>] (citing general expectation among tax practitioners and legislative staff that passage of technical corrections for the Tax Cuts and Jobs Act will be a long and slow-moving process).

9. See Cohn, *supra* note 8 (recalling Thomas Barthold, Chief of Staff of Congress's Joint Committee on Taxation, who when asked for clarification by industry groups, stated that technical corrections cannot "do anything about changing matters pertaining to policy").

ship, delaying necessary fixes to the tax code. Part IV underscores the important role technical corrections play in the post-enactment correction process and how this function could be procedurally insulated. This Note advances the argument that there should be procedures unique to the passage of technical corrections that streamline the process and reduce the significant lag time between identification and enactment. A functioning technical correction process is essential to ensure that the spirit of the law, as intended by Congress, can be faithfully implemented at the agency level.

I. DEFINING DRAFTING ERROR TOOLS: THREE DISTINCT SPHERES

There are three main tools used to address drafting errors post-enactment: subregulatory guidance, scrivener's error doctrine, and technical corrections. Each of these tools operates in its own unique sphere of influence and is designed to address different types of errors or ambiguities. These unique spheres become convoluted in the field of tax, which is a complex minefield littered with different types of subregulatory guidance that, to an outsider, would largely look indistinguishable. While the setup may seem inordinately convoluted, the landscape is less a symptom of an overly enthusiastic bureaucracy or ineffective administration than the reality of the complicated nuances that make up the tax code.¹⁰ The simplified understanding of lawmaking happening in Congress and execution happening at the agency level starts to blur in the world of tax. The Internal Revenue Code (IRC) is more akin to a constant ongoing legislative process, as opposed to the traditional cut and dry legislative enactment, agency enforcement.¹¹ In order to understand this reality, the tools at the

10. See *Key Elements of the U.S. Tax System: Why Are Taxes So Complicated?*, TAX POL'Y CTR.: BRIEFING BOOK (May 2020), <https://www.taxpolicycenter.org/briefing-book/why-are-taxes-so-complicated> [<https://perma.cc/E43C-74NM>] (discussing how the root of much of the U.S. tax regime's complexity is borne out of the multifaceted purposes of the tax system—beyond simply collecting revenue).

11. This is exemplified by the myriad of resources for tax practitioners with tips on how to stay up to date on the ever-evolving taxation landscape. See, e.g., *Staying on Top of Tax Law Changes These Last Few Years Has Been a Full Time Job*, HENRY+HORNE (Nov. 4, 2021), <https://www.hhcpa.com/blogs/income-tax-accountants-cpa/staying-on-top-of-tax-law-changes-these-last-few-years-has-been-a-full-time-job> [<https://perma.cc/72MC-BHZ3>]; Benjamin Alarie, Opinion, *Not Again: Avoid Chaos When New Tax Regulations Kick in*, ACCT. TODAY (July 13, 2021), <https://www.accountingtoday.com/opinion/not-again-avoid-chaos-when-new-tax-regulations-kick-in> [<https://perma.cc/Z95L-GJCY>]; *How to Stay Up-to-Date with Tax Laws*, UWORLD: ROGER CPA REV., <https://accounting.uworld.com/blog/cpa-review/how-stay-date-tax-laws> [<https://perma.cc/FQM5-RYWG>].

government's disposal to address mistakes in that ongoing legislative process must be examined. First, Section A examines how the IRS utilizes subregulatory guidance in response to drafting ambiguities. Next, Section B explores the small, yet important judicial doctrine of scrivener's error. Then, Section C reviews the legislative tool of technical corrections.

A. UNDERSTANDING SUBREGULATORY GUIDANCE WITHIN THE IRS'S ADMINISTRATIVE SCHEME

Subregulatory guidance is a catch-all for describing the many types of informal guidance the Treasury issues outside of formal notice-and-comment rulemaking.¹² First, this Section examines the different types of subregulatory guidance used by the IRS and how tax practitioners use and interpret that guidance. Next, it looks at why tax practice seems to have its own carve-out compared to other legal fields in the confines of administrative law, and the impact of "tax exceptionalism" on how guidance is interpreted and accorded weight. Lastly, it will examine the role of guidance documents and the different methods of interpretation that shape how this guidance is effectuated.

1. Parsing IRS Subregulatory Guidance: Less of a Science, More of an Art

Regulations are the most formal and authoritative type of IRS guidance, subject to notice-and-comment rule making.¹³ Once enacted, regulations carry the force of law.¹⁴ However, due to the sprawling nature of tax law and the multitude of area-specific questions

12. See David J. Kautter & Brent J. McIntosh, *Policy Statement on the Tax Regulatory Process*, DEP'T OF TREASURY 2 (Mar. 5, 2019), <https://home.treasury.gov/system/files/131/Policy-Statement-on-the-Tax-Regulatory-Process.pdf> [<https://perma.cc/7U3V-PADV>] ("In addition to formal regulations that carry the force and effect of law, sound tax administration necessitates less formal guidance to efficiently advise the public about the meaning of the tax laws.").

13. See Tina R. Green & Nikki L. Laing, *IRS Alphabet Soup: Practical and Precedential Value of AODs, IRBs, TAMs and Other Guidance*, 15 J. TAX PRAC. & PROC. 27, 29–30 (2013); see also Ellen P. Aprill, *Muffled Chevron: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51, 53 (1996) ("The Treasury and IRS take the position that almost all tax regulations are interpretive, not legislative, but in promulgating these regulations, they routinely follow the notice and comment procedures that the Administrative Procedure Act requires only for legislative regulations." (footnotes omitted)).

14. See Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 DUQ. L. REV. 323, 330 (2008); Kautter & McIntosh, *supra* note 12.

that naturally arise over the course of implementation, the IRS regularly issues less formal guidance through several different publications. “Subregulatory” guidance is typically used to refer to agency publications issued outside Treasury regulation requirements.¹⁵ Much of this guidance is collected and published in the Internal Revenue Bulletin (IRB).¹⁶

IRB guidance includes revenue rulings, revenue procedures, notices, and announcements.¹⁷ The IRS takes the position that subregulatory guidance should not “modify existing legislative rules or create new legislative rules.”¹⁸ Furthermore, the IRS states the agency will not seek *Chevron* deference for interpretations set forth only in subregulatory guidance.¹⁹ Additionally, the IRS advances a balancing act of a multitude of factors in the determination of when to issue sub-

15. Kautter & McIntosh, *supra* note 12.

16. The IRS defines the IRB the following way on their website: “The Internal Revenue Bulletin (IRB) is the authoritative instrument of the IRS for announcing all substantive rulings necessary to promote a uniform application of tax law.” *IRS Guidance*, IRS (Aug. 30, 2021), <https://www.irs.gov/newsroom/irs-guidance> [<https://perma.cc/68WA-QZSR>]. Previously, there had been a long-standing preconceived notion within the tax community that IRB guidance was a “simple mechanism by which the IRS could provide guidance to taxpayers while avoiding the messy legal and jurisprudential problems of Treasury regulations.” Kristin E. Hickman, *IRB Guidance: The No Man’s Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 241. However, as Professor Kristin Hickman advances in her review of IRB guidance, a closer examination of this guidance raises more doctrinal questions than formal Treasury regulations. *Id.* This noted ambiguity suggests the implications derived from IRB guidance are anything but clear-cut.

17. Kautter & McIntosh, *supra* note 12. Tina Green and Nikki Laing provide an excellent foundational overview and baseline definition of each of these types of guidance in their article *IRS Alphabet Soup*. See Green & Laing, *supra* note 13, at 32–36. Revenue Rulings are “official interpretations” from the IRS of the IRC or other tax laws’ application to hypothetical but highly likely situations; Revenue Procedures are, unsurprisingly, more procedural in nature, and define how certain Treasury or IRS procedures are implicated under certain code sections; Notices are informal statements from the IRS indicating their position on certain issues, these are usually used when there is need for guidance in an expedited timeframe; and Announcements are used to “summarize [a] law or regulation[]” without the IRS making a substantive or procedural analysis of the provision. *Id.*

18. Kautter & McIntosh, *supra* note 12.

19. *Id.*; *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (holding that, so long as the construction is not unreasonable, courts should defer to an agency’s interpretation of a statute when the statute is otherwise silent or ambiguous). By not seeking *Chevron* deference, the IRS telegraphs the message that, while subregulatory guidance expresses the thinking of the agency, Treasury will not rely on that thinking in court. This harks back to what is drilled into every tax student in law school: only the statute is the law.

regulatory guidance, including “the intended effect on taxpayers’ rights or duties, the need for public comments, the form and content of prior positions, the significance of the issues, the statutory framework, and whether the interpretation or position is of short-term or long-term value.”²⁰ Subregulatory guidance is meant to be a method of clarification, not modification.

While the official stance of the IRS seems to downplay the role of subregulatory guidance and the impact it has on the overall administration and implementation of tax policy, there is an array of research that builds on the supposition that many agency interpretations tend to be made informally outside of notice-and-comment rulemaking.²¹ The IRS is no exception to this administrative norm, and it often issues substantive interpretations of the IRC or other tax-related legislation in the IRB.²² While each type of guidance in the IRB is considered distinct by the IRS,²³ Professor Kristin Hickman notes that the distinctions between revenue rulings, revenue procedures, and announcements have become significantly muddled in practice.²⁴ Therefore, when reviewing IRB guidance, it is best to evaluate each guidance document independent of its category.²⁵

The exact edges of IRB guidance are murky, with varying degrees of deference accorded to different IRS subregulatory guidance at varying times. As noted earlier, the official position of the IRS and Treasury firmly states that the IRB does not carry the force and effect of formal Treasury regulations.²⁶ However, Hickman notes that this is somewhat contradicted by the ambiguous standard of judicial re-

20. Kautter & McIntosh, *supra* note 12.

21. See Hickman, *supra* note 16, at 239–42 (discussing the vast landscape of informal tax guidance).

22. See Korb, *supra* note 14, at 339–40 (“The Service often resorts to notice and announcements, rather than other kinds of guidance, when there is need for guidance on an expedited basis.”).

23. See *id.*; *Understanding IRS Guidance—A Brief Primer*, IRS (Sept. 24, 2020), <https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer> [<https://perma.cc/TVA6-2WL7>].

24. See Hickman, *supra* note 16, at 243 (“Changes in usage over time have blurred the distinctions, so that there is now significant overlap among the IRB guidance formats and tremendous variation within each format. Consequently, when evaluating IRB guidance in relation to administrative law doctrine, it is arguably more appropriate to consider what each individual document does, rather than evaluate the formats categorically.”).

25. *Id.*

26. See Treas. Reg. § 601.601(d)(2)(v)(d).

view applied to IRB guidance,²⁷ most notably in *Davis v. United States*, which accorded IRB guidance “considerable weight.”²⁸ Regardless of the weight IRB guidance is accorded, Hickman sums up the practical need for subregulatory guidance via the IRB best, stating, “The tax system needs informal guidance. It is simply not practical for Treasury and the IRS to put all of their interpretations of the I.R.C. into Treasury regulations. Both the IRS and the tax community rely heavily on IRB guidance to understand the IRS’s thinking on innumerable tax issues.”²⁹

A discussion of IRS subregulatory guidance would not be complete without mention of the IRS’s online Frequently Asked Questions (FAQs) page. IRS FAQs occupy an interesting, somewhat opaque space in that they are not published in the IRB, which by the IRS’s own definition would not make them subregulatory guidance.³⁰ And yet, they still communicate the IRS’s positions, often much more quickly than guidance published in the IRB.³¹ While the IRS has made clear that it will not seek deference for subregulatory guidance found in the IRB,³² it has distanced itself even further from FAQs, often including legends at the end of FAQs disclaiming legal authority.³³ The

27. See Hickman, *supra* note 16, at 259–60.

28. *Davis v. United States*, 495 U.S. 472, 484 (1990). While the exact categorization of publications within the IRB may be more in the eye of the beholder than the IRS would likely admit, and while there still may be disagreements among scholars and courts regarding the exact amount of deference that IRS subregulatory guidance should be accorded, it is undeniable that subregulatory guidance is an essential mechanism in tax administration. The question this Note aims to examine has less to do with the classification of this guidance or the deference it should be afforded, but instead to clearly define and understand the sphere subregulatory guidance occupies and how it serves a fundamentally different purpose in comparison to other post-enactment drafting error tools.

29. Hickman, *supra* note 16, at 271.

30. Kautter & McIntosh, *supra* note 12, at 2 n.1 (defining subregulatory guidance as guidance published in the IRB).

31. *IRS Updates Process for Frequently Asked Questions on New Tax Legislation and Addresses Reliance Concerns*, IRS (Nov. 22, 2021), <https://www.irs.gov/newsroom/irs-updates-process-for-frequently-asked-questions-on-new-tax-legislation-and-addresses-reliance-concerns> [https://perma.cc/AD2H-FNYT] (“FAQs are a valuable alternative to guidance published in the Bulletin because they allow the IRS to more quickly communicate information to the public on topics of frequent inquiry and general applicability.”).

32. See *supra* note 19 and accompanying discussion.

33. Erin M. Collins, *Protecting the Rights of Taxpayers Who Rely on IRS “Frequently Asked Questions” (FAQs)*, TAXPAYER ADVOC. SERV.: NTA BLOG (July 7, 2020), <https://www.taxpayeradvocate.irs.gov/news/ntablog-protecting-the-rights-of-taxpayers-who-rely-on-irs-frequently-asked-questions-faqs> [https://perma.cc/NJ2K

precarious treatment of FAQs has vexed tax practitioners as they try to divine the proper weight FAQs should be accorded.³⁴ There is more to IRS subregulatory guidance than meets the eye, and as with many administrative schemes related to tax, the contours are hard to follow.

The tension between agency enactment and legislative intent is present in all fields of the law; however, the historic tendency to “other” tax has wider ranging implications on how tax subregulatory guidance is viewed by practitioners and the courts. The overlay of the tax field’s complex and overlapping types of guidance is further complicated by the legacy of tax exceptionalism.

2. Tax Exceptionalism and Its Continued Impact on the IRS’s Administrative Scheme

The “othering” of tax law is not unique (ask any tax law student) and is rooted in a long history of excepting tax administration from other forms of regulatory interpretation. The phenomenon of “tax exceptionalism” was perpetuated by tax’s complex nature and perceived separation from other types of law, both by practitioners and courts.³⁵ While this differentiation has largely been put to rest by the decision in *Mayo Foundation v. United States*,³⁶ it is an important context for better understanding the current state of tax administration, as the IRS retains many bad habits from the era of strong tax exceptionalism.³⁷

-4CEV] (“On some FAQ pages, the IRS provides this or a similar disclaimer: “This FAQ is not included in the Internal Revenue Bulletin, and therefore may not be relied upon as legal authority. This means that the information cannot be used to support a legal argument in a court case.””).

34. See, e.g., Monte A. Jackel, *The Proper Role of FAQs*, PROCEDURALLY TAXING (May 8, 2020), <https://procedurallytaxing.com/the-proper-role-of-faqs> [<https://perma.cc/E2KG-28GL>]; Alice Abreu & Richard Greenstein, *IRS Recent Guidance on FAQs: Too Little, Too Narrow*, PROCEDURALLY TAXING (Oct. 21, 2021), <https://procedurallytaxing.com/irs-recent-guidance-on-faqs-too-little-too-narrow> [<https://perma.cc/PDE8-GUWF>].

35. See Paul L. Caron, *Tax Myopia, or Mamas Don’t Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517 (1994) (discussing the different factors that contribute to the perception of tax exceptionalism including tax legislative history, tax administration, and tax litigation). But see Karla W. Simon, *Constitutional Implications of the Tax Legislative Process*, 10 AM. J. TAX POL’Y 235 (1992) (refuting this idea).

36. *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 55 (2011).

37. While this Note is solely focused on the Treasury and IRS, it would be remiss not to acknowledge that an overreliance on subregulatory guidance is not unique to tax, and many administrative departments utilize subregulatory guidance as a meth-

Beyond the technical differences that often cause practitioners to other tax practice, the ambiguity in applying either *Chevron*³⁸ or the tax-specific *National Muffler*³⁹ standard to cases involving issues of tax administration added further fuel to the divide. In *National Muffler*, the Supreme Court upheld interpretations of tax regulations so long as “the regulation harmonizes with the plain language of the statute, its origins, and its purpose.”⁴⁰ This created a standard in tax practice of deference to the Treasury over judicial interpretation.⁴¹ *Chevron* changed this calculation for many administrative law practitioners who saw the decision as defining a new age of deference in administrative law.⁴² However, this shift went largely unnoticed in tax practice with little reference to *Chevron* in tax case law, treatises, or scholarly articles.⁴³ Therefore, there was a move (or more accurately a lack of movement) by practitioners, scholars, and judges to continue the othering of tax law, treating it as a carve-out from other types of administrative law.⁴⁴ This alternative treatment created a certain amount of tension in understanding and adjudicating tax administration and the level of deference the IRS and Treasury were owed in practice.

The Supreme Court’s decision in *Mayo Foundation v. United States* seemed to resolve this tension. In the 2011 opinion, the Court made clear its reluctance to “carve out an approach to administrative review good for tax law only,” going on to say that uniformity across

od to avoid notice-and-comment rulemaking.

38. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (holding deference should be given to agencies to determine ambiguous statutes so long as interpretation is reasonable).

39. *Nat’l Muffler Dealers Ass’n v. United States*, 440 U.S. 472 (1979) (holding tax regulations would be upheld so long as they were reasonable interpretations of congressional mandate).

40. *Id.* at 477.

41. Aprill, *supra* note 13, at 59.

42. See KENNETH C. DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 110 (3d ed. 1994) (defining the *Chevron* decision as “one of the most important decisions in the history of administrative law”).

43. See Caron, *supra* note 35, at 556 (discussing how the *Chevron* revolution “has not reached the tax front”).

44. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *YALE L.J.* 969, 983 n.56 (1992) (stating a court is less likely to invoke *Chevron* in the tax context because there is a “rich tradition of pre-*Chevron* precedent on deference” and deference can be framed in terms expressed by courts earlier that related directly to the context of tax).

judicial review of administrative action is necessary.⁴⁵ This was more or less an official rejection of the application of tax exceptionalism to tax regulation and guidance.⁴⁶ However it remains unclear how far the Court's rejection of tax exceptionalism should be extended.⁴⁷ The longstanding othering of tax law contributes to the complexities in tax administration and lack of a clear understanding in how the varying forms of guidance regarding tax legislation should be viewed.

While the evolution from *National Muffler*, to *Chevron*, and most recently to *Mayo Foundation* tells a story of a slow departure from the tax exceptionalism carveouts, the specter of tax exceptionalism continues to hang over the field of tax practice. As courts and scholars move away from this line of thinking, the general idea still seems to pervade tax practitioners' thoughts, as evidenced by the amount of ink spilled declaring a new era or iteration of tax exceptionalism every few years.⁴⁸ In an analysis of tax guidance and the overall landscape of how tax administration is viewed in context, it is important to acknowledge this history and the grasp that it still holds over the practice of tax administration. This history effectuates the methods used to animate subregulatory guidance and how it is interpreted.

3. Guidance Documents in (Too Much) Action

There are conflicting views on the weight "guidance" from administrative agencies should be given. Professor Robert A. Anthony advances that interpretative rules are different from general statements of policy and that interpretive rules fundamentally take a stance on the meaning of a statute.⁴⁹ Professor Ronald Levin on the other hand argues there is no manageable standard to differentiate these two types of guidance.⁵⁰ While this discussion applies broadly

45. *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 55 (2011).

46. Kristin E. Hickman, *Administrative Law's Growing Influence on U.S. Tax Administration*, 3 J. TAX ADMIN. 82, 83 (2017) ("[*Mayo Foundation*] really only resolved a single doctrinal question—that courts should apply the general *Chevron* standard, rather than the tax-specific (and arguably less deferential) *National Muffler* standard, in reviewing whether Treasury regulations interpreting the IRC are consistent with the statute or within the range of discretion." (footnotes omitted)).

47. *Id.*

48. See Christopher J. Walker, *The Stages of Administrative Law Exceptionalism*, SURLY SUBGROUP (Jan. 20, 2017), <https://surlysubgroup.com/2017/01/20/the-stages-of-administrative-law-exceptionalism> [<https://perma.cc/5YJT-R2LV>].

49. See Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: *Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1 (1994).

50. See Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 266–67 (2018) (arguing that scholars should think of interpretive rules and

to issues that all administrative agencies grapple with, the heightened level of deference that the Treasury and the IRS were traditionally given in their administration of tax procedure makes this line even less discernable.

Fitting IRS guidance nicely into one box or the other is seemingly more difficult with the overlay of the varying types of guidance the IRS issues and their ensuing formats.⁵¹ This difficulty is largely due to the sheer amount of guidance that the IRS issues and the lack of a uniform system of classification.⁵² Hickman captured this dissonance in asserting the IRS's use of guidance "demonstrates both considerable functional overlap and routine deviation from tax community understandings of what each format represents."⁵³ The system the IRS uses for creating and reviewing subregulatory guidance, which a large swath of its guidance falls into, is extremely opaque.⁵⁴ While this convoluted landscape may appear at first blush as an occupational hazard, there seems to be little complaint within the tax community.⁵⁵

The overall structure of how IRS guidance is drafted and distributed is deeply rooted in the agency's evolution pre-Administrative Procedure Act (APA) and the lag in adopting APA requirements due to adherence to the tenants of tax exceptionalism.⁵⁶ In an informal study, Hickman probed those working within the IRS close to the drafting process and discovered that in recent decades the drafting of guidance has largely fallen to IRS and Treasury attorneys who are well versed in tax law but have a somewhat looser

general statements of policy as a single exemption, the "guidance exemption").

51. See Stephanie Hunter McMahon, *Classifying Tax Guidance According to End Users*, 73 TAX LAW. 245, 250 (2020) (describing the current landscape of IRS guidance a "mess" and unnavigable to nonlawyers).

52. *Id.* at 266.

53. Hickman, *supra* note 16, at 252.

54. See Stephanie Hunter McMahon, *The Perfect Process Is the Enemy of the Good Tax: Tax's Exceptional Regulatory Process*, 35 VA. TAX REV. 553, 560-61 (2016) ("Only broad outlines of [procedures detailing the drafting of subregulatory guidance] are made public, but it is clear that Treasury Department procedures receive varying amounts of internal and external review.").

55. See Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1800 (2007) ("Most members of the tax community believe that Treasury does a decent job in drafting regulations and instead focus their grumbling on issues where guidance is lacking.").

56. Administrative Procedure Act, 5 U.S.C. § 555; see discussion *supra* Part I.A.2.

grasp on administrative law.⁵⁷

The muddled nature of subregulatory guidance, coupled with the lingering impacts of tax exceptionalism, have allowed the breadth of subregulatory guidance to expand over the years. This expansion has contributed to the decline of technical corrections, as practitioners now more commonly turn to the IRS or Treasury for fixes. However, this undercuts the purpose and unique sphere subregulatory guidance is meant to occupy as a mechanism for clarification, not modification. Subregulatory guidance cannot change the black letter law, but what happens when the change is so obvious it would be absurd to interpret it otherwise? Even in an instance of absurdity, subregulatory guidance cannot contravene the written law, but there is a halfway step between subregulatory guidance and technical corrections for exactly this issue: scrivener's error doctrine.

B. THE SMALL, YET IMPORTANT ROLE OF THE SCRIVENER'S ERROR DOCTRINE

This Section looks at the second sphere of influence in post-enactment correction: scrivener's error. An oft-overlooked doctrine, it bears review when discussing drafting error corrections. First, this Section will define the scrivener's error doctrine and place it into context. Then, it will examine the current role the scrivener's error doctrine plays in administrative law.

The scrivener's error doctrine is best defined as a judicial theory that acknowledges the reality of human institutions in that inadvertent mistakes happen and that laws should be not bound to clear clerical mistakes such as misspellings or typos.⁵⁸ Even strict textualists such as Justice Antonin Scalia concede that laws should not be ruled by the inevitability of small errors, saying "I acknowledge . . . scrivener's error . . . where on the very face of the statute it is clear . . . that a mistake of expression (rather than of legislative wisdom) has been made."⁵⁹ Attorney Michael S. Fried asserts that scrivener's errors differ from other types of mistakes, such as those covered by subregulatory guidance or technical corrections, in

57. Hickman, *supra* note 55, at 1798.

58. See Ryan D. Doerfler, *The Scrivener's Error*, 110 NW. U. L. REV. 811, 812 (2016) ("Speakers occasionally misspeak. Congress is no exception. Like the rest of us, Congress sometimes says 'and' when it means to say 'or,' or 'less' when it means to say 'more.'" (footnotes omitted)).

59. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 20 (Amy Gutmann ed., 1997).

that “the wording or punctuation of the resulting enactment differs from that which the drafters had meant to enact.”⁶⁰ Of the three spheres discussed, the scrivener’s error doctrine is the most rote. It exists to address clear cut typos, misnumbering, and misspellings.

While seemingly straightforward and relatively narrow, there is academic debate over how clear a mistake must be in order for it to be considered a scrivener’s error.⁶¹ There is a general concern that the doctrine could be stretched by judges, leading to legislating from the bench or going beyond sheer statutory interpretation to reading new, unprescribed meaning into statutes under the guise of correcting “obvious” errors.⁶² However, a narrow interpretation of the scrivener’s error doctrine seems to be widely accepted and necessary to the smooth functioning of the governmental system.⁶³ Though Congress could theoretically address scrivener-type errors legislatively via a technical correction, this type of drafting error is typically addressed by judges.⁶⁴

The scrivener’s error doctrine is often paired with the absurdity doctrine.⁶⁵ Justice Scalia’s formulation of the scrivener’s error doctrine can be categorized as simply an extension of the absurdity doctrine in that the identification of a scrivener’s error presupposes an

60. Michael S. Fried, *A Theory of Scrivener’s Error*, 52 RUTGERS L. REV. 589, 594 (2000).

61. See Doerfler, *supra* note 58, at 817–23 (discussing competing conceptions and applications of the scrivener’s error doctrine as “difference in degree” and “difference in kind”).

62. See Fried, *supra* note 60, at 596–97.

63. See Doerfler, *supra* note 58, at 830 (“Thus, if Congress says, ‘No dogs in the parl,’ courts do best to understand Congress as prohibiting dogs from the *park*. To treat the statute as a nullity—as would be the case if courts read the statute as prohibiting dogs from the *parl*, whatever that would mean—would plainly *not* be to give effect to Congress’s specific instruction.”).

64. Even with the courts as the typical arena for this type of correction, the Supreme Court’s use of the scrivener’s error doctrine has been extremely narrow and targeted. See, e.g., *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.* 508 U.S. 439, 454–57, 462 (1993) (applying scrivener’s error to an obvious transcription error); *United States v. Locke*, 471 U.S. 84, 123–26 (1985) (Stevens, J., dissenting) (failing to apply scrivener’s error to an instance in which the statutory language was deemed clear).

65. See *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States*, 115th Cong. 171 (2017) (statement of Hon. Neil M. Gorsuch) (“[T]he absurdity doctrine . . . usually applies in cases where there is a scrivener’s error, not when we just disagree with the policy of the statute.”).

absurd outcome.⁶⁶ With the evolution of modern textualism, the inclination of courts to confidently identify legislative outcomes that are absurd to the point of being unintended has drastically decreased.⁶⁷ It can be inferred that this reluctance has led to a decline in application of the scrivener's errors doctrine to drafting mistakes. Therefore, while the scrivener's error doctrine remains a tool in the toolbox of dealing with drafting errors, it is extremely narrow in its application and not routinely invoked.⁶⁸ The declining use of the scrivener's error doctrine further accentuates the important role of technical correction. With the underutilization of the scrivener's error doctrine, technical corrections are the only mechanism to correct drafting errors post-enactment.

C. THE NECESSARY AND UNDERUTILIZED ROLE OF TECHNICAL CORRECTIONS

This Section will first explore the current understanding and accepted definition of technical corrections. Next, it will examine the purpose that technical corrections serve betwixt the legislative and administrative process and the impact that role has on shaping the tax code. Then it will place technical corrections as a mechanism into context within the political landscape. The evolution and entrenchment of partisan politics has shifted how technical corrections interact with the legislative process and tax administration.

1. Definition and Use of Technical Corrections in Tax Administration

The IRC is a complex and interconnected web of statutes. At times, an existing statute impedes the implementation of a new statute. Or tax legislation, which will often include sprawling subsections, will sometimes contain contradictions impeding itself across those subsections. When tax bills are passed but are unable to enact the changes as lawmakers intended due to this kind of impediment, the issue can be addressed via a legislative technical correction. Typically, following the enactment of major taxation legislation, Con-

66. See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2459 n.265 (2003) ("As presently conceived . . . the scrivener's error doctrine is apparently a form of the absurdity doctrine; it identifies scrivener's errors by asking whether Congress could have intended to adopt the policy that the text clearly suggests."); see also Scalia, *supra* note 59.

67. Manning, *supra* note 66, at 2485–86.

68. In fact, a Lexis search for the exact phrase "scrivener's error" discovered only twenty-six Supreme Court opinions that used this phrase.

gress will collect all of the technical corrections into one bill which will pass one or two years after the initial tax legislation.⁶⁹ These corrections are retroactive to the original date of the bill.⁷⁰ While technical corrections can be proposed by the IRS, practitioners, or even taxpayers; the Joint Committee on Taxation (JCT) ultimately oversees the identification of implementation of technical corrections.⁷¹ The JCT defines technical correction as:

[L]egislation that is designed to correct errors in existing law in order to fully implement the intended policies of previously enacted legislation. The principal factor in determining whether a provision is technical is the original intent of the underlying legislation. Once it is determined that the existing statute does not properly implement legislative intent, and that the proposed change conforms to and does not alter the intent, the provision is deemed to be technical.⁷²

The JCT goes on to clarify in a footnote to the above definition that:

It is not relevant to the determination whether the underlying error is one of commission or omission or whether it is substantive or merely clerical. The determination involves the House Ways and Means Committee and Senate Finance Committee tax staffs, the Joint Committee staff, and the Treasury staff. The IRS staff may also be involved. A simple example of a technical error occurs when the enacted statutory language is in conflict with both the markup document used in committee deliberation and with the committee or conference report that accompanied the passage of the bill.⁷³

JCT's stated conception of technical corrections supports the supposition that the lines defining what a technical correction is and who decides are almost as unclear as the tangled web of different IRS guidance.⁷⁴ Technical corrections are not cabined by a time limit related to the legislation they impact, meaning technical corrections can crop up years after tax legislation has been signed into law.⁷⁵

69. See Michael Livingston, *What's Blue and White and Not Quite as Good as a Committee Report: General Explanations and the Role of "Subsequent" Tax Legislative History*, 11 AM. J. TAX POL'Y 91, 119 (1994).

70. *Id.*

71. See Gerson, *supra* note 8, at 931; see also Cohn, *supra* note 8 (discussing the solicitation of technical corrections to TCJA, saying: "The process is our phone lines, our email lines are open We will solicit anybody's views if they think there are technical errors.").

72. JOINT COMM. ON TAX'N, *supra* note 5.

73. *Id.* at n.28.

74. See discussion *supra* Part I.A.

75. JOINT COMM. ON TAX'N, *supra* note 5.

Therefore, the technical correction process is typically viewed as continuous.⁷⁶

In his article, Attorney Marc Gerson suggests that while typically the dividing line between technical corrections and administrative regulation is intent, there are times that Congress has directed the Treasury to consider whether a proposed technical correction would be better addressed via regulatory or administrative guidance.⁷⁷ His presentation of the difference between a technical correction and administrative guidance seems less rooted in a hardline definition but partially related to political strategy.⁷⁸ Framing guidance as an alternative to technical corrections suggests an interconnectedness between two vastly different processes that do not share common ground other than longstanding practice within the field of tax administration. This contributes to the tendency to find overlaps between the three spheres of drafting error tools, which this Note thoroughly rejects.⁷⁹

The existence of technical corrections is hardly considered controversial amongst practitioners. If anything, they are usually seen as routine.⁸⁰ However, the exact practical definition of what constitutes a technical correction seems elusive at best.⁸¹ The most compelling

76. See Gerson, *supra* note 8, at 935 (“Technical corrections bills are often introduced as stand-alone bills in multiple Congresses as additional provisions are added until they are incorporated in other tax legislation for purposes of enactment.”).

77. *Id.* at 933 (citing Letter from William M. Thomas, Chairman, Comm. on Ways & Means, Charles E. Grassley, Jr., Chairman, Comm. on Fin. & Max Baucus, Ranking Member, Comm. on Fin., to John W. Snow, Sec’y, U.S. Dep’t of the Treasury (July 21, 2005), available at <https://www.taxnotes.com/tax-notes-today-federal/corporate-taxation/Thomas-grassley-baucus-ask-snow-issue-guidance-tax-technical-corrections-act/2005/07/22/ydn1> [<https://perma.cc/AE9Q-8K2P>] (requesting Treasury to consider issuing guidance on a particular tax)).

78. *Id.* (“[R]egulatory or administrative guidance may be particularly attractive alternatives to a technical correction in light of Treasury’s broad regulatory authority, which is often supplemented by explicit statutory grants of regulatory authority for specific matters, and its ability to issue other administrative guidance” (footnote omitted)).

79. See discussion *infra* Part IV.

80. See, e.g., *Observations on Former Chairman Brady’s Technical Corrections Draft Legislation*, ERNST & YOUNG LLP (Jan. 29, 2019), <https://taxnews.ey.com/news/2019-0247-observations-on-former-chairman-bradys-technical-corrections-draft-legislation> [<https://perma.cc/PAK7-CFLS>] (discussing proposed technical corrections for the Tax Cuts and Jobs Act of 2017).

81. Gerson, *supra* note 8, at 928 n.7 (collecting a series of news articles reflecting Congressional discord over tax legislation and the definition of what should be deemed a technical correction).

guidelines, extracted from the definition provided by the JCT, seem to pinpoint a technical correction as a change that “clarifies the operation of an existing tax statute rather than changes its substantive meaning” and is revenue neutral.⁸² This definition leaves quite a bit of space for interpretation, especially when the special case of tax administration is considered, and the willingness to allow the Treasury and IRS more deference in tax administration than is typically afforded other types of agencies.⁸³ The lack of a clear definition allows for the sphere of the technical correction to be encroached upon by the sphere of subregulatory guidance. This results in the unique role technical corrections are meant to play being subsumed by subregulatory guidance.

2. The Unique Role of Technical Corrections

Based on the best definition that can be culled from the JCT and the general understanding of practitioners, the purpose of technical corrections seems deceptively straightforward. When tax legislation is enacted, if the drafted language inhibits the bill from implementing the spirit of what was passed by lawmakers, it should be corrected. This issue strikes at the heart of the tension between traditional Scalia-style textualism⁸⁴ and the more elastic purposivism interpretive method.⁸⁵ Differentiating between subregulatory guidance and technical corrections speaks to the same kind of tension present in all statutory interpretation questions. When determining if something is

82. *Id.* at 928, 930; *see also* JOINT COMM. ON TAX’N, *supra* note 5 (discussing that technical corrections are revenue neutral in that they do not deviate from the budgetary scoring and revenue implications that were already calculated by the JCT when the bill was originally passed).

83. *See* discussion of tax exceptionalism *supra* Part I.A.2.

84. Scalia, *supra* note 59, at 23 (“To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hidebound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.”).

85. This tension is nicely encapsulated in the exchange between Judge Robert A. Katzmann and Justice Brett M. Kavanaugh (serving as Judge for the D.C. Circuit). ROBERT A. KATZMANN, *JUDGING STATUTES* (2014) (advocating looking behind statutes to using different interpretive modes such as legislative history to form a more contextualized understanding of the statute at issue as an aid in navigating ambiguity); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (reviewing KATZMANN, *supra*) (dismissing this kind of “look-behind” and instead suggesting the focus should be squarely on the “best reading of the statute”); Robert A. Katzmann, *Response to Judge Kavanaugh’s Review of Judging Statutes*, 129 HARV. L. REV. F. 388 (2016) (rebutting Judge Kavanaugh’s critique).

a technical correction or a policy choice, should decisionmakers “look behind” the statute? How is legislative intent quantified?

Much like the carveout for tax administration, determining legislative intent in tax statutes is somewhat different than comparable administrative law. In addition to committee reports, which are typically viewed as an authoritative source of legislative history,⁸⁶ the JCT and congressional staff publishes General Explanations (known as the Blue Book) in connection with the passage of any tax legislation.⁸⁷ There has been debate over how much weight to accord the Blue Book when establishing legislative intent in the examination of tax legislation, and the courts have typically had a skeptical approach to how strong of a light Blue Books shine on legislative intent.⁸⁸ One factor that Professor Michael Livingston advances is that tax law, unlike other areas of law, is much more of a continual process, meaning there is almost constant tinkering with tax legislation post-enactment—largely because of the technical correction process.⁸⁹ Since the line between pre- and post-enactment legislative history is not always clear, he advocates that Blue Books should not be dismissed out of hand and can actually hold important insights into the drafting intent of legislators when it comes to tax bills.⁹⁰

While practitioners and judges saw the early iterations of the Blue Book solely as a collected depository for legislative history related to major tax acts, that role began to evolve following the 1986 Tax Act.⁹¹ Following the committee reports related to the debate and passage of the 1986 Act, the Blue Book stated in a footnote that “technical corrections may be necessary so that the statute reflects this intent.”⁹² In his review of the overall legal impact of Blue Books,

86. See *Holy Trinity Church v. United States*, 143 U.S. 457, 464–65 (1892) (using a committee report to determine the intent of Congress); Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000) (examining *Holy Trinity's* use of committee reports and the impact on statutory interpretation). *But see* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998) (rejecting the use of committee reports as a reliable method of determining Congress's intent).

87. Livingston, *supra* note 69, at 92.

88. See *id.* at 104–21 (discussing how the Blue Book has been interpreted by courts in various cases as implicating congressional intent).

89. *Id.*

90. *Id.* at 122–24.

91. See discussion of Tax Reform Act of 1986 *infra* Part III.A.

92. STAFF OF THE JOINT COMM. ON TAX'N, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 920 n.2 (Comm. Print 1987).

Livingston advances that the inclusions of notations regarding technical corrections in the publication of the Blue Books “effectively precluded interpretations inconsistent with the anticipated (but as yet unenacted) corrections; stated differently, staff was using the Blue Book to conform the statute to the committee reports.”⁹³ He goes on to highlight that while the Blue Book is prepared and reviewed by the same staff that writes committee reports for taxation legislation, the Blue Book is *not* approved by committee members, as committee reports are, and is not available to Members when they vote on the ensuing legislation.⁹⁴ Essentially, there is no check Members of Congress can exercise over the Blue Book’s content.⁹⁵

Technical corrections are a legislative mechanism that allow the language of a bill to be brought into alignment with congressional intent post-enactment.⁹⁶ Subregulatory guidance does not have the power to make these types of corrections as they are related to actual drafting errors, not ambiguities in administration of law.⁹⁷ Similarly, the scrivener’s error doctrine does also not allow for these types of corrections to be made if they are not borne from rote typos.⁹⁸ Technical corrections are the only mechanism available to bring glitches in drafting language into line with the original intent on Congress. However, this critical process is hampered by Congress’s inability to function due to partisan gridlock.

3. The Impact of Partisanship and the Evolving Dynamics of Congress on the Use of Technical Corrections

A baseline tenet of how technical corrections are meant to work is that, by their very nature, they should be nonpartisan and uncontroversial.⁹⁹ Technical corrections are *not* supposed to bring new ideas or policies to bear but simply ensure the already debated and agreed upon terms of tax legislation are able to be implemented.¹⁰⁰

93. Livingston, *supra* note 69, at 100.

94. *Id.* at 101.

95. *Id.*

96. See discussion *supra* Part I.C.1.

97. See discussion *supra* Part I.A.

98. See discussion *supra* Part I.B.

99. See text accompanying *supra* notes 72–73.

100. 152 CONG. REC. S10713 (daily ed. Sept. 29, 2006) (statement of Sen. Charles E. Grassley) (“Technical corrections are derived from a deliberative and consultative process among the Congressional and Administration tax staffs. That means the Republican and Democratic staffs of the House Ways and Means and Senate Finance Committees are involved, as is the staff of the Treasury Department. All of this work

Gerson puts a finer point on their politically neutral nature, saying “Technical corrections are unique in that they represent bicameral, nonpartisan legislation that is developed with significant congressional and Treasury staff involvement.”¹⁰¹ And while this definition certainly represents the overall idea of technical corrections, the spirit of that goal does not always seem to prevail.

Just as it has been well documented that the lion’s share of administrative guidance is performed informally,¹⁰² it seems that in practice there is political maneuvering by both parties to “hijack” technical corrections, making them more broad than perhaps their name suggests.¹⁰³ Or, on the other hand, members of Congress may try to block technical corrections for tax legislation that they did not substantively approve of, leaving in place flawed statutes that cannot actually execute the agreed upon actions.¹⁰⁴ Implementation of technical corrections via normal tax legislation faces significant barriers to enactment.¹⁰⁵ This could perhaps explain the tendency for practitioners and experts to turn instead to guidance issued by the Treasury and IRS for answers.

Another consideration is, due to the suspicion with which technical corrections are sometimes viewed and their increasing tendency to fall victim to partisan logjams, administrative guidance becomes more favorable mainly because it is more readily available. Professor Leigh Osofsky remarks that seeking out guidance from the agency while awaiting congressional action may seem like an invert-

is performed with the participation and guidance of the non-partisan staff of the Joint Committee on Taxation. A technical [correction] enters the list only if all staffs agree it is appropriate.”).

101. Gerson, *supra* note 8, at 931.

102. Hickman, *supra* note 16, at 239.

103. See Shu-Yi Oei & Leigh Z. Osofsky, *Constituencies and Control in Statutory Drafting: Interviews with Government Tax Counsels*, 104 IOWA L. REV. 1291, 1322–23 (2019). (“If you introduce a technical corrections bill in the Senate what you have done is you have given every member of the Senate an opportunity to put on his favorite piece of crap. And so it never happens. Technical corrections bills generally ride on the heels of some other piece of tax legislation because nobody—in the House you can control the process, but you can’t control the process in the Senate.” (citing Anonymous Interview Collection, Interviewee 8)).

104. *Id.* at 1323. (“Interviewees noted that Members might even oppose corrective follow-up legislation that is clearly only technical in nature if they did not like the original legislation. Leaving flawed legislation as is, it was suggested, might make future reform more likely.”).

105. *Id.* at 1355 (detailing research focused on interviews with staffers who support the drafting of tax legislation and oversee the implementation of technical corrections).

ed route, but it reflects the reality that practitioners face when attempting to receive clarification on unclear tax legislation and that “legislative fixes and informal dialogue with Congress” is often the strongest motivator in spurring technical correction legislation.¹⁰⁶ This further supports the conception that the sphere of subregulatory guidance is expanding to the point of encroachment on technical corrections. The practical necessity of needing information and guidance more quickly than Congress can produce via a technical correction is perverting the limits of subregulatory guidance.

Technical corrections serve a distinct purpose, as does subregulatory guidance and the doctrine of scrivener’s error. The type of drafting errors each of these tools address cannot be conflated with one another. It would not be appropriate for the Treasury to address a typo in a tax bill’s text via subregulatory guidance, just as it is not appropriate for the courts to address an ambiguity in implementation using scrivener’s error doctrine. The tendency to push drafting errors that fall directly into the definition of technical corrections into the sphere of subregulatory guidance is a misapplication of separation of powers. Leaving these errors unaddressed due to political gridlock is just as unacceptable. The technical correction is a powerful and necessary tool that is currently being underutilized and misapplied, leaving drafting errors in tax legislation to languish unaddressed. The recent CARES Act provides a salient example. Portions of the law feature errors that can be addressed via subregulatory guidance, such as dependent distributions of EIPs to federal benefit recipients. On the other hand, there are errors that require a technical correction via the legislature as the language of the law does not allow the stated intent of Congress to be realized, such as EIP receipt by survivors of domestic violence.

II. DELINEATING THE SPHERES: A CARES ACT CASE STUDY

This Part will take a closer look at the technical issues posed by the passage of the CARES Act’s issuance of economic impact payments (EIPs) and the various responses that are either called for by advocates or have been affected by either the Treasury Department or Congress. First, this Part will examine issues arising out of the delivery of EIPs to individuals receiving certain federal benefits and why this issue does not require a technical correction but could be

106. Leigh Osofsky, *Agency Legislative Fixes*, 105 IOWA L. REV. 2107, 2140–41 (2020).

addressed via subregulatory guidance. This Part will then contrast that issue with problems surrounding the delivery of EIPs to domestic violence survivors, which should be addressed via a technical correction.

The CARES Act codified three exceptions into the eligibility requirements for recipients of EIPs: nonresident aliens, adult-dependents, and estates and trusts.¹⁰⁷ This seemingly straightforward set of eligibility requirements turned out to be much more difficult in practice. As the IRS started distributing payments, problems began to arise. Congress took notice, with Representative James E. Clyburn, Chairman of the House of Representatives Select Subcommittee on the Coronavirus Crisis, sending the Treasury and IRS a letter demanding answers on the slow roll out of the payments.¹⁰⁸ In this letter he emphasized “that the intent of these payments was to swiftly put money in the pockets of struggling Americans to help them meet their essential needs while supporting the nation’s economy”¹⁰⁹ This statement put forth the core legislative mandate for the delivery of EIPs: get the proper amount of money out to the correct people as quickly as possible. A charge much more difficult to achieve in practice than in theory.

A. FEDERAL BENEFIT RECIPIENTS’ DEPENDENTS AND THE EIPs AMOUNT: A PROBLEM OF IMPLEMENTATION NOT LEGISLATIVE DRAFTING

For the delivery of EIPs, the IRS used previous tax filing information from 2018 or 2019.¹¹⁰ For individuals that filed taxes their EIP would be either direct deposited or sent to the address indicated on their most recent tax return.¹¹¹ However, there are a vast number of Americans who, based on the eligibility requirements of the CARES Act, were eligible for EIPs, but did not have recent tax filing information on record.¹¹² A large segment of these eligible non-filers

107. I.R.C. § 6428(d).

108. Letter from James E. Clyburn, Chairman, House Select Subcomm. on the Coronavirus Crisis, to Steven T. Mnuchin, Sec’y, Dep’t of the Treasury & Charles P. Rettig, Comm’r, IRS (July 8, 2020), <https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2020-07-08.Clyburn%20to%20Treasury%20IRS%20re%20Stimulus%20Checks.pdf> [<https://perma.cc/2HQQ-JBGZ>].

109. *Id.*

110. I.R.C. § 6428(f)(1), (f)(5)(A).

111. *Id.* § 6428(f)(3)(B).

112. This was primarily because these individuals’ yearly income fell below the filing requirement for the last two years and thus, they were not required to file a tax return in 2018 or 2019. See Lorie Konish, *Why Some Americans May Have to File Tax*

were federal benefit recipients. First, the IRS took the position that those who received federal benefits but had not filed a return in the last two years would need to file a paper return to receive their EIP.¹¹³ However, advocates pushed back saying that this was an undue burden on an already vulnerable population.¹¹⁴ In response, and in an effort to more effectively reach this population, the IRS tapped into information from the benefit rolls or various federal benefit programs.¹¹⁵

While this sped up the delivery of payments, it also created additional problems. The benefit information for these programs does not contain information regarding a recipient's dependents. Since the EIPs were designed to provide \$1,200 per eligible adult individual *plus* an additional \$500 per eligible dependent, individuals who received their payments via the IRS pulling information from benefit rolls lost out on the additional \$500 per dependent payment and only received \$1,200 for themselves.¹¹⁶ In response, the IRS announced recipients could electronically file an additional form indicating their dependents (the form was due within forty-eight hours of the IRS's announcement, which was then extended by an additional four

Returns Before They See a Coronavirus Stimulus Check, CNBC (Apr. 1, 2020), <https://www.cnbc.com/2020/04/01/some-americans-have-to-file-tax-returns-for-a-coronavirus-relief-check.html> [<https://perma.cc/E7NW-RARU>].

113. *Economic Impact Payments: What You Need to Know*, IRS (Apr. 1, 2020), <https://www.irs.gov/newsroom/economic-impact-payments-what-you-need-to-know> [<https://perma.cc/MC2P-F5VX>].

114. See Konish, *supra* note 112.

115. Press Release, Dep't of the Treasury, Social Security Recipients Will Automatically Receive Economic Impact Payments (Apr. 1, 2020), <https://home.treasury.gov/news/press-releases/sm967> [<https://perma.cc/MXD3-7L62>] (noting the IRS pulled information from social security (SSA) and railroad retirement benefits (RRB) for the purpose of distributing EIPs); *Most Social Security, Veterans, and Railroad Retirement Benefit Recipients Don't Need to File a Return or Provide Information to Get an Economic Impact Payment*, IRS (Apr. 15, 2020), <https://www.irs.gov/newsroom/most-social-security-veterans-and-railroad-retirement-benefit-recipients-dont-need-to-file-a-return-or-provide-information-to-get-an-economic-impact-payment> [<https://perma.cc/3XPK-4J75>] (noting the IRS also pulled information to reach those who receive supplemental security income (SSI) and veteran benefits).

116. See Samantha Jacoby, *IRS Deadlines Threaten Stimulus Payments for 1 Million Dependents*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 21, 2020), <https://www.cbpp.org/blog/irs-deadlines-threaten-stimulus-payments-for-1-million-dependents> [<https://perma.cc/7QGF-KM3X>] (citing that roughly one million supplemental dependent payments could be missed due to the IRS sending EIPs utilizing only benefit rolls information).

days).¹¹⁷ Recipients who failed to file the form would have to wait until 2021 to claim the amount due for any dependent's EIP when they filed their 2020 taxes.¹¹⁸ This type of restriction is contrary to the stated goal of the CARES Act¹¹⁹ however, the IRS was also balancing their statutory mandate to get payments out "as rapidly as possible."¹²⁰

Would this kind of glitch have been better addressed through a technical correction by Congress? Or is this truly an administrative issue that should be left to the discretion and subregulatory guidance of the IRS and Treasury? Statutory interpretation suggests subregulatory guidance. The legislative intent of Congress was clear, and there was nothing in the text of the bill that inhibited the IRS from effectuating the stated intent. The letter from Representative Clyburn suggests that the overarching intent of Congress was to ensure that all those entitled to an EIP receive the proper amount they are due as quickly as possible.¹²¹ How that is done is left up to agency

117. See, e.g., *id.*; Lorie Konish, *Don't Miss This Stimulus Check Deadline if You're a Social Security Beneficiary with Kids*, CNBC (Apr. 21, 2020), <https://www.cnbc.com/2020/04/21/stimulus-check-deadline-for-social-security-beneficiaries-with-kids.html> [<https://perma.cc/H4E6-A9XN>]; Aimee Picchi, *Stimulus Checks: Some Social Security Recipients to Get Checks Starting Today*, CBS NEWS (May 20, 2020), <https://www.cbsnews.com/news/social-security-recipients-stimulus-checks-now> [<https://perma.cc/VQ74-QY9R>].

118. Press Release, IRS, SSA, RRB Recipients with Eligible Children Need to Act by Wednesday to Quickly Add Money to Their Automatic Economic Impact Payments; IRS Asks for Help in the "Plus \$500 Push" (Apr. 20, 2020), <https://www.irs.gov/newsroom/ssa-rrb-recipients-with-eligible-children-need-to-act-by-wednesday-to-quickly-add-money-to-their-automatic-economic-impact-payment-irs-asks-for-help-in-the-plus-500-push> [<https://perma.cc/NPT3-S434>]; Press Release, IRS, VA, SSI Recipients with Eligible Children Need to Act by May 5 to Quickly Add Money to Their Automatic Economic Impact Payments; 'Plus \$500 Push' Continues (Apr. 24, 2020), <https://www.irs.gov/newsroom/va-ssi-recipients-with-eligible-children-need-to-act-by-may-5-to-quickly-add-money-to-their-automatic-economic-impact-payment-plus-500-push-continues> [<https://perma.cc/4EC6-6X32>]; Michelle Singletary, *If You're One of These American Taxpayers, the Deadline to File for a \$500-Per-Child Stimulus Check Has Passed*, WASH. POST (Apr. 22, 2020), <https://perma.cc/Y9BT-RWHW>.

119. Nina Olsen, *Due Process Requires the IRS Make Supplemental Advance Economic Impact Payments for Eligible Children of Recipients of Federal Benefits*, PROCEDURALLY TAXING (June 29, 2020), <https://procedurallytaxing.com/due-process-requires-the-irs-make-supplemental-advance-economic-impact-payments-for-eligible-children-of-recipients-of-federal-benefits> [<https://perma.cc/NQ6A-BZ3B>].

120. I.R.C. § 6428(f)(3)(A).

121. Letter from James E. Clyburn to Steven T. Mnuchin & Charles P. Rettig, *supra* note 108, at 2 (citing *Objectives Report to Congress: Fiscal Year 2021*, NAT'L TAXPAYER ADVOC. 46 (2021), <https://www.taxpayeradvocate.irs.gov/wp-content/uploads/>

discretion. Additionally, there is not an incongruity in the black letter law that is implicated in this issue. In fact, the issue seems to be a product almost entirely of the IRS's choice in implementation of its congressional mandate. This suggests that there is not a legislative fix needed for this issue, as there is no black letter law that inhibits the proper application of this provision of the CARES Act as it is written, just poor and confused administration compounded by a lack of resources and a pandemic-hobbled agency.

This issue perfectly illustrates a "glitch" in tax legislation, but one that was not due to an objective drafting error realized post-enactment. The issues regarding delivery of EIPs to beneficiary recipients conflicted with the stated intent of Congress to get money in people's pockets quickly. However, there was no language in the bill that inhibited this from happening. In essence, beyond writing less ambiguous language, there was nothing for Congress to fix via a technical correction. Some ambiguities, however, must be proactively changed in order to allow for the intended outcome. The next Section examines this exact situation regarding the issuance of EIPs to domestic violence survivors.

B. OBSTACLES TO DOMESTIC VIOLENCE SURVIVORS RECEIVING EIPs: A PROBLEM IN NEED OF A TECHNICAL CORRECTION

Survivors of domestic violence faced especially onerous obstacles to receiving their EIPs, a reality only compounded by the already precarious financial circumstances of most domestic violence survivors.¹²² The monetary assistance the EIPs could provide individuals fleeing domestic violence situations could be life changing.¹²³ However, due to a glitch in the CARES Act this class of individuals struggled to receive their rightful share of EIP. This is because many individuals who are fleeing abuse likely filed a joint return with their abuser in either 2018 or 2019, resulting in the full EIP amount (their \$1,200 share, plus their abuser's \$1,200, plus \$500 for each qualify-

2020/08/JRC21_FullReport.pdf [<https://perma.cc/JR7B-52P8>] (highlighting the issues surrounding individuals who have not received the full amount of the EIP they are entitled to receive).

122. See Robin Bleiweis & Osub Ahmed, *Ensuring Domestic Violence Survivors' Safety*, CTR. FOR AM. PROGRESS (Aug. 10, 2020), <https://www.americanprogress.org/issues/women/reports/2020/08/10/489068/ensuring-domestic-violence-survivors-safety> [<https://perma.cc/8AJ7-DKRG>].

123. Branigin, *supra* note 2 (stating the average amount domestic violence survivors report needing to stay safe from their abusers is \$730, "less than two-thirds," of the \$1,200 stimulus check for an eligible individual).

ing dependent)¹²⁴ being deposited into an account under the control of their abuser or sent as a paper check to their abuser's home they had fled.¹²⁵

Since the enactment of the CARES Act, Congress has repeatedly raised this issue to the IRS and urged the issuance of additional guidance that will ensure victims of domestic violence are given a fair opportunity to receive their rightful share of EIP, or some type recourse.¹²⁶ In response, the IRS expressed sympathy but claimed a lack of statutory authority to take any kind of proactive measure.¹²⁷ This conundrum would suggest the issue is ripe for being addressed via a legislative technical correction.

While the legislative history of the CARES Act is slim, the letters of support from Congress suggests a strong indication of congressional intent to ensure survivors of domestic violence are able to access the fair share of their EIP, regardless of if, based on normal procedures, the money is already considered "paid" in the sense that it was sent to their abusers but they are unable to access the money themselves.¹²⁸ The inability of domestic violence survivors to receive their EIP creates a conflict with the black letter law, in that they are individuals that are statutorily eligible for EIPs who are being deprived of their payment due to the statutory constraint around how

124. I.R.C. § 6428(a).

125. For a full hypothetical illustrating this situation, see Nina Olsen, *Where There Is a Will, There Is a Way: Economic Impact Payments for Victims of Domestic Violence and Abuse—Part I*, PROCEDURALLY TAXING (Nov. 4, 2020), <https://procedurallytaxing.com/where-there-is-a-will-there-is-a-way-economic-impact-payments-for-victims-of-domestic-violence-and-abuse-part-I> [<https://perma.cc/FZ4F-GN7M>].

126. Letter from Jeanne Shaheen, Sen., U.S., to Steven T. Mnuchin, Sec'y, U.S. Dep't of the Treasury & Charles P. Rettig, Comm'r, IRS (June 18, 2020) (on file with author); Letter from Catherine Cortez Masto et al., Sens., U.S., to Steven T. Mnuchin, Sec'y Dep't Treasury & Charles P. Rettig, Comm'r, IRS (June 19, 2020) (on file with author); Letter from Jamie Raskin, Gwen Moore & Brian Fitzpatrick, Members, U.S. Cong., to Steven T. Mnuchin, Sec'y, U.S. Dep't of the Treasury & Charles P. Rettig, Comm'r, IRS (Sept. 30, 2020) (on file with author).

127. Olsen, *supra* note 125 ("In a mid-September meeting with [Nina Olsen, National Taxpayer Advocate], Nancy Rossner, Melina Milazzo of the National Network to End Domestic Violence, and members of Senator Cortez Masto's staff, the IRS Deputy Commissioner for Services and Enforcement said the IRS was very sympathetic but was concerned about documentation and whether the IRS had the authority to do anything."); *see also IRS Pandemic Hearing, supra* note 3 (statement of Charles P. Rettig, Comm'r, IRS) ("The CARES Act does not provide the Internal Revenue Service with discretion to add an additional, say, in this context, \$1,200 to the victim of domestic violence.").

128. *See* sources cited *supra* note 126.

those payments can be delivered.¹²⁹ The CARES Act, as enacted, cannot fulfill Congress's intent due to an internal conflict within the statute.¹³⁰

A technical correction is the only fix available for this problem. The IRS's hands are tied, it cannot enact subregulatory guidance that conflicts with the black letter of the CARES Act, even if the black letter law inhibits the administration of the overarching intent of Congress. Furthermore, this issue is larger than a simple typo that could be attributed to the scrivener's error doctrine. This problem requires a legislative solution. The dire nature of the required aid also emphasizes the harm that is caused by delaying a legislative fix to be folded into a larger bill down the line. Congress has the power and the procedures to address this exact type of drafting error via a technical correction and should utilize the tools at its disposal to do so.

The CARES Act demonstrates how technical corrections are an essential part of the legislative process, even if they take place post-enactment. It is inevitable that mistakes will find their way into the text of legislation. Some of these issues, as demonstrated with beneficiary recipients' dependent EIP amount, can be addressed via subregulatory guidance. Other issues, such as EIPs for domestic violence survivors, require legislative intervention to effectuate the needed correction. But what good is a tool if it is not used? The gridlock of Congress is poisoning technical corrections, resulting in imperfect legislation being left to stand. The increasing partisanship and ineffectiveness of Congress raises the question of if the current procedure for technical corrections truly is the most effective. The next Part examines technical corrections in the context of three very different political environments. Regardless of the political environment, technical corrections always seem to be a painstakingly slow process, if they happen at all.

129. The only statutory exceptions are nonresident aliens, dependents, and an estate or trust. I.R.C. § 6428(d).

130. While conflicts giving rise to technical corrections have largely been conceptualized in this Note as laws that are passed and attempted to be enacted, only to chafe against another seemingly unrelated earlier enacted part of the tax code, a technical correction can equally be required for a flaw within a single piece of tax legislation that is not realized until post-enactment, as demonstrated here with the CARES Act.

III. THE IMPACT OF THE POLITICAL ENVIRONMENT ON TECHNICAL CORRECTIONS: TAX LEGISLATION CASE STUDIES

This Part will examine post-enactment drafting error corrections in action against the backdrop of different eras of tax legislation and illustrate the impact partisanship has on the passage of technical corrections. Section A examines the passage of the Tax Reform Act of 1986 (1986 Act), the glitches that found their way into the bill, and how stakeholders dealt with and viewed them. Next, Section B reviews the Tax Cuts and Jobs Act (TCJA) and the current landscape of glitches and fixes. Lastly, Section C covers the portion of the CARES Act that interacts with the IRC and the issuance of EIPs via the IRS. Although not a tax reform bill by itself, a portion of the CARES Act had large implications for the Treasury Department and tax code. These implications were complicated by glitches that need to be addressed similarly to those created by the Tax Reform Act of 1986 and the TCJA. These three bills provide case studies and are used to illuminate and compare the landscape of technical corrections in tax legislation and examine its evolution and use over the last forty years.

A. THE TAX REFORM ACT OF 1986 AND THE APPROPRIATE USE OF TECHNICAL CORRECTIONS

This Section will examine the landscape and context of the passage of the Tax Reform Act of 1986 (1986 Act) and the use of technical corrections post-implementation. This case study provides a historical perspective on technical corrections during a time when tax legislation was less partisan than today. However, this case study highlights the reality that technical corrections were still politically divisive and delayed due to political maneuvering.

1. A Foundation for Smooth Technical Corrections: Bipartisan Support

When President Ronald Reagan took office for a second term, he called for sweeping tax reform.¹³¹ His call was answered by the

131. Ronald Reagan, President, U.S., Address Before a Joint Session of the Congress on the State of the Union—January 1984 (Jan. 25, 1984), <https://www.reaganlibrary.gov/archives/speech/address-joint-session-congress-state-union-january-1984> [https://perma.cc/2JJ5-MBCX] (“Let us go forward with an historic reform for fairness, simplicity, and incentives for growth. I am asking Secretary Don Regan for a plan for action to simplify the entire tax code, so all taxpayers, big and small, are treated more fairly. And I believe such a plan could result in that underground economy being brought into the sunlight of honest tax compliance. And

Treasury Department with a flurry of reports and research,¹³² ultimately culminating in the 1986 Act.¹³³ The 1986 Act delivered on Reagan's wish, brought about the most far-reaching and comprehensive change to the Code since its inception, and established the Internal Revenue Code of 1986.¹³⁴

The undercurrent of this legislation was a bipartisan desire to achieve three main goals: fairness, efficiency, and simplicity in the tax code.¹³⁵ There was also a prevailing philosophical belief that the government and in turn, the taxation system, should be less intrusive on taxpayers' lives.¹³⁶ Congress's attempt to simplify the tax code was rooted in the idea of drastically cutting rates to "remove or lessen tax considerations in labor, investment, and consumption decisions."¹³⁷ However, even shortly after the bill's passage, both stakeholders and the public felt that the 1986 Act further complicated the

it could make the tax base broader, so personal tax rates could come down, not go up. I've asked that specific recommendations, consistent with those objectives, be presented to me by December 1984.").

132. Two influential studies, known as *Treasury I* and *Treasury II*, underscored Reagan's push for reform and laid the blueprint for the lead up to the legislative process of the 1986 Act. Off. of the Sec'y, *Tax Reform for Fairness, Simplicity, and Economic Growth Vol. 1*, U.S. DEP'T OF THE TREASURY (Nov. 1984), <https://home.treasury.gov/system/files/131/Report-Tax-Reform-v1-1984.pdf> [<https://perma.cc/Z3CY-4C9P>]; Off. of the Sec'y, *Tax Reform for Fairness, Simplicity, and Economic Growth Vol. 2*, U.S. DEP'T OF THE TREASURY (Nov. 1984), <https://home.treasury.gov/system/files/131/Report-Tax-Reform-v2-1984.pdf> [<https://perma.cc/7PTA-4Z73>]. For an in-depth discussion of the research process undertaken by the Treasury and U.S. government prior to the passage of the 1986 Act, see C. EUGENE STEUERLE, *THE TAX DECADE: HOW TAXES CAME TO DOMINATE THE PUBLIC AGENDA* (1992).

133. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085. See generally Samuel C. Ullman, *An Overview of the Tax Reform Act of 1986*, 61 FLA. BAR J. 13, 13-14 (1987) (providing a summarized overview of the legislative and political history leading up to the 1986 Act).

134. JOINT COMM. ON TAX'N, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 6 (Comm. Print 1987).

135. *Id.*; see also Rodger A. Bolling, Surendra P. Agrawal & Thomas G. Hodge, *The Tax Reform Act of 1986: Simplification or Complication?*, 39 TAX EXEC. 235 (1987) (discussing whether the 1986 Act attained Reagan's goals of simplification and fairness).

136. As President Reagan famously stated during his inaugural address, "government is not the solution to our problem; government is the problem." Ronald Reagan, President, U.S., Inaugural Address (Jan. 20, 1981), <https://www.reaganfoundation.org/media/128614/inaguration.pdf> [<https://perma.cc/C9W2-STWY>].

137. JOINT COMM. ON TAX'N, *supra* note 134. Better known as supply-side economics, the "trickle-down theory," or Reaganomics. See generally Charles E. Jacob, *Reaganomics: The Revolution in American Political Economy*, 48 LAW & CONTEMP. PROBS., Autumn 1985, at 7.

tax code as opposed to simplifying it.¹³⁸ This was largely due to Congress's attempt to close different tax loopholes that corporations and wealthy individuals had been exploiting, which fed into the many complaints regarding the pre-reform tax code's fairness.¹³⁹ The 1986 Act relied heavily on transitional rules to achieve this objective, which added greatly to the level of complexity.¹⁴⁰

The groundwork that Congress laid with the goal of simplifying the tax code actually created most of the glitches requiring additional legislative solutions. Professor Rodger Bolling and co-authors set the scene explaining: "Even before President Reagan had signed the 1986 Act into law, lobbyists and others displeased with certain provisions of the new law, were gathering support to push for changes. The opportunity for change could first present itself with the 'Technical Corrections Act' of 1987."¹⁴¹ They sum up the overall feelings by practitioners following the passage of the 1986 Act well, saying: "[T]he need for fairness in the tax code became the unifying theme for tax reform. In its effort to close tax loopholes and limit other special tax breaks, Congress created a complex maze of new rules."¹⁴²

2. Even in the Context of Bipartisanship, Mistakes Still Happen: Glitches in the 1986 Act

The passage of the 1986 Act was frenzied, with a strong desire to meet the President's mandate as soon as possible.¹⁴³ Due to this, the 99th Congress was unable to pass the enrolling resolution before adjourning, which contained many of the technical corrections and enrolling rules to supplement the text of the 1986 Act and ensure a smooth transition to implementation.¹⁴⁴ Some of the issues this resolution sought to correct were purely clerical in nature, such as mis-

138. Bolling et al., *supra* note 135, at 238 ("[M]ost taxpayers agree that the 1986 Act did not result in simplification. One senator had a rather simple solution to determine the issue of simplification, suggesting that all one had to do was to pick up the 2,000-plus page report; nothing that thick and heavy could be simple."); *see also* John A. Lynch, Jr. & Wendy G. Shaller, *Reflections on the Tax Reform Act of 1986*, 18 LAW F. 12 (1988).

139. Bolling et al., *supra* note 135, at 239.

140. *Id.* ("Transition or 'phase-in' rules provide an adjustment period before a new rule is fully implemented.").

141. *Id.* at 243.

142. *Id.* at 244.

143. *See* discussion *supra* notes 131–134 (describing the short timeline and urgent atmosphere the 1986 Act was enacted under).

144. NONNA A. NOTO, CONG. RSCH. SERV., IB87010, TAX REFORM EFFECTS 2 (1987).

spellings or renumbering duplicated section numbers, prime examples of scrivener's errors.¹⁴⁵ However, a large part of the resolution dealt with the transitional rules and special provisions which governed *how* the 1986 Act would actually be implemented and its impact on certain taxpayers.¹⁴⁶ The need for these technical corrections post-enactment was due to the fact that many of the details of the 1986 Act had not been worked out by House and Senate tax writers when the bill was passed.¹⁴⁷

The difficulty Congress faced passing this enrolling resolution is indicative of the entire technical correction process. Congress could not agree on if the proposed changes were substantive or if they were truly *just* technical; after rounds of compromise and back-and-forth, the resolution died before being brought to the House floor for a vote.¹⁴⁸ This left many odd quirks that needed to be addressed following the bill's passage. A March 1987 *New York Times's* piece seemed to suggest a consensus that any technical or substantive changes would likely be put on hold as Congress's attention shifted to other high priority issues.¹⁴⁹ When explaining the difference between technical and substantive corrections to readers, the *New York Time's* description is telling: "What is to be considered 'technical' . . . is what a majority of Congress says is technical"¹⁵⁰—thereby rein-

145. *Id.*

146. *Id.*

147. *Id.* Similar to Nancy Pelosi's infamous "we have to pass it to know what's in it" comment regarding the passage of the Affordable Care Act. See Dan MacGuill, *Did Nancy Pelosi Say Obamacare Must Be Passed to 'Find Out What Is in It'?*, SNOPE (Oct. 17, 2017), <https://www.snopes.com/fact-check/pelosi-healthcare-pass-the-bill-to-see-what-is-in-it> [https://perma.cc/LMJ9-QSEJ].

148. NOTO, *supra* note 144, at 3 ("Both the House and the Senate sought to use the enrolling resolution to add substantive changes. After the House had passed its resolution, the Senate stripped the bill of several provisions and added substantive changes of its own. The House rejected most of the Senate's amendments, and an impasse resulted. Tax writers from both the House and Senate tried to reach a compromise in the closing hours of the 99th Congress. Many differences were worked out, however a compromise proposal failed to reach the House floor, and the resolution died. . . . Subsequently, disagreements on the enrolling resolution arose over which provisions were technical amendments to the tax act and which were substantive additions.").

149. Robert D. Hershey, Jr., *A New Era in American Tax Policy; Congress to Tackle Taxes, Again*, N.Y. TIMES, Mar. 8, 1987, at A13, A14 ("[T]he fear of bogging down in debate over substantive issues has put technical corrections well down on the list of priorities.").

150. *Id.* This statement seems to both reflect the public's understanding of technical corrections as well as Congress's view of the process.

forcing the idea that instead of issues requiring a technical correction falling into a distinct category, a technical correction is an undefined term which can be used at will by Congress. This narrative contributes to the derogation of the sphere of technical corrections.

The first round of technical corrections did not pass until 1988.¹⁵¹ There was an attempt to pass technical corrections in the year directly following the passage of the 1986 Act as an amendment to the Omnibus Budget Reconciliation Act of 1987.¹⁵² While the amendment survived a vote in the House, it was dropped from the Senate-passed version and not readded during conference.¹⁵³ The corrections to the 1986 Act were folded in with corrections for other recently passed tax and budgetary legislation.¹⁵⁴ While these changes were pegged as overwhelmingly technical in scope, the undercurrent seemed to suggest that substantive changes would find their way into the bill.¹⁵⁵

While technical corrections for the 1986 Act faced difficulties on the road to enactment, there was still a largely bipartisan atmosphere in Congress surrounding the passage of the bill. This difficulty highlights that even in politically harmonious times, passing technical corrections can be a herculean task. The product of this struggle, even when seemingly free of partisan jockeying, is incorrect and ineffective law. The Treasury has no power to actively correct these issues if they are enshrined into the statute. Only an act of Congress can authorize these fixes. The lag between enactment and correction

151. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-6647, 102 Stat. 3342.

152. Compare H.R. REP. NO. 100-391, pt. 2, at 1141-507 (1987) (outlining the technical correction provisions to be included in H.R. 3545), with Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987) (revealing that the final version of H.R. 3545 passed without the inclusion of the technical correction provisions).

153. JOINT COMM. ON TAX'N, JCX-10-88, DESCRIPTION OF THE TECHNICAL CORRECTIONS ACT OF 1988 (H.R. 4333 and S. 2238) (1988).

154. *Id.* (including the following acts of legislation: the Superfund Revenue Act of 1986, the Harbor Maintenance Revenue Act of 1986, the Omnibus Budget Reconciliation Act of 1986, and the Omnibus Budget Reconciliation Act of 1987).

155. See, e.g., Gary Klott, *Congress Begins to Correct Mistakes in New Tax Laws*, N.Y. TIMES, Apr. 1, 1988, at D9 ("Although Congressional aides described the bill as largely technical in scope, more substantive changes are likely to be added by representatives and senators as the measure moves through Congress."); Joan C. Szabo, *Welcome to Tax Reform*, NATION'S BUS., Nov. 1986, at 22 ("If past congressional performance is a guide . . . there will be efforts to use the technical correction bill as a vehicle for major changes.").

undermines good governance in tax administration. The two-year gap between the 1986 Act's passage and its technical correction is long; however, when compared to the more partisan nature of the passage of the next big reform bill, the Tax Cuts and Jobs Act, the ability to pass technical corrections at all seems like a major victory.

B. TAX CUTS AND JOBS ACT (TCJA) AND THE HOBbled TECHNICAL CORRECTION PROCESS

This Section examines what is considered to be the next largest tax overhaul since the 1986 Act, P.L. 115-97, commonly referred to as the Tax Cuts and Jobs Act (TCJA) or the Trump Tax Cut, and the ensuing technical corrections to smooth over the inevitable glitches that come with any large-scale tax legislation. This case study examines how the technical correction process has evolved (or perhaps, devolved) since the passage of the 1986 Act.

1. TCJA's Bitter Battle and Partisanship's Impact on the Bill's Post-Enactment Needs

When Trump took office in 2017, he first focused his legislative agenda on health care reform, and when that campaign proved unsuccessful by the summer of 2017,¹⁵⁶ he pivoted to tax reform.¹⁵⁷ In stark contrast to the ultimately bipartisan effort of the 1986 Act, passing the TCJA was a bitter battle, with congressional Democrats and Republicans unable to agree even on the bill's name.¹⁵⁸ The bill was first introduced on November 2, 2017, and was on the President's desk for signature by December 22, 2017.¹⁵⁹ It was carried through Congress on mostly party lines, without a single Democratic

156. Jennifer Steinhauer, Glenn Thrush & Robert Pear, *How the Senate Health Care Bill Failed: G.O.P. Divisions and a Fed-Up President*, N.Y. TIMES (July 18, 2017), <https://www.nytimes.com/2017/07/18/us/politics/trump-health-care-senate-bill.html> [<https://perma.cc/NQ28-SZAJ>].

157. See *Unified Framework for Fixing Our Broken Tax Code*, U.S. DEP'T OF THE TREASURY (Sept. 27, 2017), <https://www.treasury.gov/press-center/press-releases/documents/tax-framework.pdf> [<https://perma.cc/45GV-B4HL>] (outlining the Trump Administration's plan for tax reform).

158. The full title of the legislation is actually *An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018* because agreement could not be reached over the working title: *The Tax Cuts and Jobs Act*.

159. See *H.R.1 - An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018.*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/1/all-actions?overview=closed#tabs> (last visited Mar. 24, 2022).

vote in its favor.¹⁶⁰ The legislative sprint to have the bill signed into law within Trump's first year in office drew ire from commentators and ultimately left numerous glitches that needed to be addressed through additional legislation.¹⁶¹ However, the enacted legislation represented the most sweeping revision to that tax code since the 1986 Act.¹⁶²

Commentators and tax practitioners received the TCJA with mixed emotions. However, the reaction from big business was largely one of unbridled enthusiasm.¹⁶³ While the idea was that the new corporate tax cuts could translate to bonuses and higher salaries for workers, serving to buoy the public's opinion of the law, that perception quickly faded.¹⁶⁴ Republicans shied away from trumpeting the bill's success during the 2018 midterm election cycle, turning instead to focus on other issues.¹⁶⁵ While Trump did deliver on his promise to enact a tax cut during his first year in office, the rushed legislation was so full of glitches that additional legislative work was needed.¹⁶⁶

160. See *Roll Call 699 Bill Number: H. R. 1*, CLERK U.S. HOUSE REPRESENTATIVES (Dec. 20, 2017), <https://clerk.house.gov/Votes/2017699> [<https://perma.cc/CAB4-JJ6Y>] (delineating House vote); *Roll Call Vote 115th Congress - 1st Session*, U.S. SENATE (Dec. 2, 2017), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1151/vote_115_1_00303.htm [<https://perma.cc/47TV-65YZ>] (delineating Senate vote).

161. See, e.g., William Gale, *A Fixable Mistake: The Tax Cuts and Jobs Act*, AEI: AEI IDEAS (Sept. 23, 2019), <https://www.aei.org/economics/a-fixable-mistake-the-tax-cuts-and-jobs-act> [<https://perma.cc/RWZ7-2WYU>] ("Rushed through Congress without adequate hearings and passed by a near-party-line vote, the law is a major legislative blunder badly in need of correction.").

162. See generally Jennifer Bird-Pollan, *Revising the Tax Law: The TCJA and Its Place in the History of Tax Reform*, 45 OHIO N.U. L. REV. 501 (2019) (providing an excellent overview of the history and context of tax reform and how TCJA fits into that history).

163. Jesse Drucker & Jim Tankersley, *How Big Companies Won New Tax Breaks from the Trump Administration*, N.Y. TIMES (Apr. 2, 2021), <https://www.nytimes.com/2019/12/30/business/trump-tax-cuts-beat-gilti.html> [<https://perma.cc/XR5Z-8JE2>] ("Corporate executives, major investors and the wealthiest Americans hailed the tax cuts as a once-in-a-generation boon not only to their own fortunes but also to the United States economy.").

164. Jim Tankersley, *Trump's Tax Cut One Year Later: What Happened?*, N.Y. TIMES (Dec. 27, 2018), <https://www.nytimes.com/2018/12/27/us/politics/trump-tax-cuts-jobs-act.html> [<https://perma.cc/YBV9-8398>].

165. *Id.*

166. Martin J. McMahon, Jr., *2018 Erwin N. Griswold Lecture Before the American College of Tax Counsel: Tax Policy Elegy*, 71 TAX LAW. 421, 422 (2018) ("Tax act after tax act failed to produce a fair, simple, and efficient tax code. The recently enacted Tax Cuts and Jobs Act is simply another failure to enact tax reform that provides a fair, simple, and efficient tax code.").

This made the passage of the TCJA less of the resounding victory Trump had likely envisioned. The partisan environment of Congress created even smaller opportunities for collaboration in passing the needed technical corrections.

2. Technical Corrections as a Nonstarter: How Partisanship Cuts the Legs Out from Under Technical Correction's Key Purpose

As practitioners began wading through TCJA's language post-enactment, the significant number of glitches that would need to be addressed became abundantly clear.¹⁶⁷ Almost a year after the bill's passage, the JCT released the Blue Book for TCJA, indicating more than ninety areas where technical corrections may be needed to align the mechanics of the bill with congressional intent.¹⁶⁸ The painstakingly slow procedure surrounding the enactment of technical corrections that was seen following the bipartisan 1986 Act was complicated even further due to the intense partisan environment that bore the TCJA.

The TCJA was passed without a single Democrat vote in its favor. However, following the 2018 midterm election, Democrats won control of the House, resulting in a Democratically-controlled Ways and Means Committee. Since the Ways and Means Committee, along with the Senate Finance Committee and the JCT, plays a large role in the determination of what is a technical correction, the lack of support for the TCJA from one-third of these supposedly "cooperative" bodies posed potential problems for even uncontroversial changes. The outgoing Republican Committee Chairman Kevin Brady released a draft of technical corrections before Democrats took control;¹⁶⁹ however, the Democratic committee staff did not sign on to the draft as is customary, and while the full committee's consent is not formal-

167. Jasper L. Cummings, Jr., *1986 v. 2017? No Comparison*, 37 ABA TAX TIMES 28, 32 (2018) ("Those of us who are working through the actual language of the 2017 act know without doubt that it lacked the careful drafting that historically had produced major tax bills. We know for a fact that it upends the tax law in ways that the 1986 Code never did. Whatever you thought you knew about international tax planning can be forgotten, and you can start from scratch, like the greenest graduate.").

168. JOINT COMM. ON TAX'N, JCS-1-18, GENERAL EXPLANATION OF PUBLIC LAW 115-97 (2018); see also *Twenty Questions About Possible Technical Corrections to the 2017 Tax Act*, KPMG 9 (Apr. 29, 2019), <https://assets.kpmg/content/dam/kpmg/us/pdf/2019/04/tnf-faqs-technicals-apr29-2019.pdf> [<https://perma.cc/Y63G-9EJL>].

169. Comm. on Ways & Means, *Tax Technical and Clerical Corrections Act Discussion Draft*, U.S. HOUSE OF REPRESENTATIVES (Jan. 2, 2019), https://republicans-waysandmeansforms.house.gov/uploadedfiles/tax_technical_and_clerical_corrections_act_discussion_draft.pdf [<https://perma.cc/S7GR-TYX9>].

ly required for a technical correction bill to move forward, it does raise questions regarding political viability.¹⁷⁰

A 2020 Congressional Research Service (CRS) report on technical corrections to the TCJA cites Representative Brady's draft legislation as the main starting point for TCJA technical corrections, which remain unenacted but a "legislative priority."¹⁷¹ The most recent update from CRS cites that six of the technical corrections first cited by the CRS have since been addressed as part of other legislation.¹⁷² Congress used the CARES Act as a vehicle to enact some desperately needed corrections.¹⁷³ The CRS report seems to draw a murky line between flat out "glitches" that it seems to squarely classify as "technical corrections" and other loopholes or problems that require fixes, which it labels as "potential technical corrections."¹⁷⁴

The combination of the highly partisan and rushed passage of the TCJA resulted in numerous strange and incoherent glitches, beyond those which are typically seen in a large-scale tax bill.¹⁷⁵ Partisanship has created a stalemate in terms of moving technical correction ahead in any meaningful way. This hampers the effectiveness of tax administration as the Treasury is unable to step in and address these issues itself. Technical corrections should be approached with a certain level of urgency, as without them the tax code inflicts harm with no recourse on taxpayers. The timely need for technical corrections is especially salient in emergency contexts, such as the situation that predicated the passage of the CARES Act.

C. THE CARES ACT AND A SITUATION RIPE FOR TECHNICAL CORRECTIONS

While not a tax reform bill, the CARES Act had numerous tax implications. This Section examines the context of the CARES Act's tax provisions. The CARES Act offers an interesting case study, being a piece of emergency legislation. The unexpected nature of the COVID-

170. *Observations on Former Chairman Brady's Technical Corrections Draft Legislation*, *supra* note 80.

171. MOLLY F. SHERLOCK & JANE G. GRAVELLE, CONG. RSCH. SERV., IN11175, "TECHNICAL CORRECTIONS" TO TAX REFORM 1 (2020).

172. *Id.*

173. *Id.* at 2.

174. *Id.*

175. See David Kamin, David Gamage, Ari Glogower, Rebecca Kysar, Darien Shanske, Reuven Avi-Yonah, Lily Batchelder, J. Clifton Fleming, Daniel Hemel, Mitchell Kane, David Miller, Daniel Shaviro & Manoj Viswanathan, *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation*, 103 MINN. L. REV. 1439 (2019).

19 pandemic and the rush to pass some kind of relief bill created a perfect storm of drafting errors recognized post-enactment that require swift response, something Congress has thus far been unable to deliver in the context of tax technical corrections.

1. The Passage of CARES: A Glimmer of Bipartisanship in a Partisan Political Era

As the potentially devastating impact of the COVID-19 pandemic slowly started making itself clear, Congress scrambled to provide much needed relief.¹⁷⁶ This took the form of the CARES Act, a wide-ranging bill focused on providing economic relief to individuals and business in the hope of preserving the U.S. economy.¹⁷⁷ While not a tax reform bill per se, it is the largest aid package in history,¹⁷⁸ with many of the provisions enacted directly through the IRS, relying heavily on the tax code.¹⁷⁹ Notable provisions included economic impact payments (EIPs), colloquially known as stimulus payments; expanded unemployment insurance; aid to small businesses; emergency funding for health care infrastructure; and industry bailouts.¹⁸⁰

The emergency context of the bill's passage created a very different congressional atmosphere from other types of tax bills, including the TCJA just a few years prior.¹⁸¹ The World Health Organization

176. See, e.g., Jim Tankersley & Emily Cochrane, *House Passes Coronavirus Relief After Democrats Strike Deal with White House*, N.Y. TIMES (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/us/politics/trump-coronavirus-relief-congress.html> [<https://perma.cc/9W7V-FLPY>].

177. See generally MOLLY F. SHERLOCK, JANE G. GRAVELLE, MARGOT L. CRANDALL-HOLLIICK, DONALD J. MARPLES & GRANT A. DRIESSEN, CONG. RSCH. SERV., R46279, THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY (CARES) ACT—TAX RELIEF FOR INDIVIDUALS AND BUSINESSES (2020); U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-625, COVID-19: OPPORTUNITIES TO IMPROVE FEDERAL RESPONSE AND RECOVERY EFFORTS 10 (2020).

178. Grace Enda, William G. Gale & Claire Haldeman, *Careful or Careless? Perspectives on the CARES Act*, BROOKINGS (Mar. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/03/27/careful-or-careless-perspectives-on-the-cares-act> [<https://perma.cc/TRC6-J78S>] (citing that the bill appropriates more than \$2 trillion in aid).

179. John G. Crisp, Dmitriy Chelnitsky, Claudia L. Hinsch, Keith R. Gercken & Amy Tranckino, *The CARES Act—Tax Relief*, NAT'L L. REV. (Mar. 30, 2020), <https://www.natlawreview.com/article/cares-act-tax-relief> [<https://perma.cc/A8PJ-CAFC>] (detailing tax-related provisions of the CARES Act).

180. Kelsey Snell, *What's Inside the Senate's \$2 Trillion Coronavirus Aid Package*, NPR (Mar. 26, 2020), <https://www.npr.org/2020/03/26/821457551/whats-inside-the-senate-s-2-trillion-coronavirus-aid-package> [<https://perma.cc/VKG3-EM7Q>].

181. See Amber Phillips, *'Totally Unprecedented in Living Memory': Congress's Bipartisanship on Coronavirus Underscores What a Crisis This Is*, WASH. POST (Mar. 26,

declared the COVID-19 outbreak a global pandemic on March 11, 2020.¹⁸² A little over two weeks later, Trump signed the CARES Act into law. Prior to the passage of the CARES Act two smaller relief bills were passed, but it was quickly deemed these would not provide the breadth of aid that was needed.¹⁸³ During the CARES Act drafting process there was heavy debate over the best vehicle with which to provide people with relief, with Democrats favoring expanded unemployment benefits while Republicans focused on a tax rebate.¹⁸⁴ After the Senate passed the bill unanimously 96-0, the House quickly followed suit.¹⁸⁵

While the reception of the CARES Act was initially bright, with many Americans eagerly awaiting their EIPs, the public quickly began to sour as congressional gridlock seemed to diminish any additional bids for aid.¹⁸⁶ Many commentators and policy analysts saw the CARES Act as just the beginning, with additional aid needed.¹⁸⁷ It seemed Congress agreed, and soon after the CARES Act's passage Senator Mitch McConnell announced further aid and a second round

2020), <https://www.washingtonpost.com/politics/2020/03/26/totally-unprecedented-living-memory-congress-bipartisanship-coronavirus-underscores-what-crisis-this-is> [https://perma.cc/KY94-736S].

182. See Donald G. McNeil, Jr., *Coronavirus Has Become a Pandemic, W.H.O. Says*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/health/coronavirus-pandemic-who.html> [https://perma.cc/NT7A-BM7C].

183. SHERLOCK ET AL., *supra* note 177.

184. See Phil Mattingly, *Stimulus Package Could Top \$2 Trillion as Negotiators Look to Clear Final Major Hurdles*, CNN (Mar. 21, 2020), <https://www.cnn.com/2020/03/21/politics/stimulus-package-negotiations-congress-coronavirus/index.html> [https://perma.cc/R7ML-H5V6].

185. See Carl Hulse, *A Unanimous Senate Vote That Nobody Seemed to Agree on*, N.Y. TIMES (Mar. 28, 2020), <https://www.nytimes.com/2020/03/28/us/senate-coronavirus-stimulus-bill.html> [https://perma.cc/MX82-2YSS]; Jasmine C. Lee, *How Every House Member Voted on the Coronavirus Relief Bill*, N.Y. TIMES (Mar. 14, 2020), <https://www.nytimes.com/interactive/2020/03/14/us/politics/coronavirus-house-vote.html> [https://perma.cc/7DG3-K668].

186. See Lorie Konish, *Second \$1,200 Stimulus Checks Had Bipartisan Support. Now They Could Be a Longshot*, CNBC (Sept. 10, 2020), <https://www.cnbc.com/2020/09/09/second-1200-stimulus-checks-could-be-a-longshot-at-least-for-now-.html> [https://perma.cc/J9CY-FDBN]; Katie Lobosco, *With Congress Stalled, a Second Round of Stimulus Checks Won't Be Coming Anytime Soon*, CNN (Aug. 11, 2020), <https://www.cnn.com/2020/08/11/politics/stimulus-checks-congress-negotiations/index.html> [https://perma.cc/TQ9G-WN7C].

187. See Paul Kiernan, *Mnuchin: Strong Likelihood We'll Need Another Stimulus Package*, WALL ST. J. (May 21, 2020), <https://www.wsj.com/articles/mnuchin-strong-likelihood-well-need-another-stimulus-package-11590080865> [https://perma.cc/282H-QPB6].

of stimulus payments via the HEALS Act.¹⁸⁸ However, after debate reached an impasse, the bill, and hope of additional aid, sputtered out.¹⁸⁹ While many Americans felt more aid was needed,¹⁹⁰ government agencies, especially the IRS, struggled to put into motion many of the CARES Act's provisions due to lack of resources, institutional barriers due to the nature of the pandemic, and the confusing, mistake-riddled drafting of the bill itself.¹⁹¹

2. An Unanswered Call: Glitches in the CARES Act in Desperate Need of Revision

In light of the rushed nature of the CARES Act, unforeseen technical glitches were almost inevitable. However, the CARES Act provides an interesting case study because it is ostensibly not a tax reform bill in the same way as the 1986 Act or TCJA. However, it still enacted several tax provisions that impacted the IRC and required implementation through the IRS and Treasury Department. Therefore, the correction scheme should be somewhat parallel to that of a more traditional tax reform bill. Additionally, the sprint at which CARES was passed in response to the emergency context naturally adds to the opportunity for drafting errors, especially considering the CARES Act's size.

As previously explored,¹⁹² issues with implementation plagued many provisions of the CARES Act almost as soon as the bill was

188. Press Release, Senate Republican Party Caucus, Update on the Coronavirus Response: HEALS Act (July 28, 2020), <https://www.rpc.senate.gov/policy-papers/update-on-the-coronavirus-response-heals-act> [<https://perma.cc/GBR2-3HBN>]; Erica Werner, Seung Min Kim & Tony Romm, *Democrats Block Slimmed-Down GOP Coronavirus Relief Bill as Hopes Fade for Any More Congressional Support*, WASH. POST (Sept. 10, 2020), <https://www.washingtonpost.com/us-policy/2020/09/10/senate-coronavirus-economic-relief-bill> [<https://perma.cc/EH6G-VNZK>].

189. See Erica Werner, *Lots of Talk—But So Far No Action—About Second \$1,200 Stimulus Check for U.S. Households*, WASH. POST (May 14, 2020), <https://www.washingtonpost.com/us-policy/2020/05/14/treasury-coronavirus-second-stimulus-check-1200> [<https://perma.cc/ELV7-GPEA>].

190. Nicole Lyn Pesce, *84% of Americans Say They Need Another Stimulus Check*, MARKETWATCH (Apr. 23, 2020), <https://www.marketwatch.com/story/1-in-3-americans-say-their-stimulus-checks-wont-sustain-them-for-even-a-month-2020-04-08> [<https://perma.cc/YHG2-YHY6>].

191. See, e.g., Heather Long, Jeff Stein, Lisa Rein & Tony Romm, *Stimulus Checks and Other Coronavirus Relief Hindered by Dated Technology and Rocky Government Rollout*, WASH. POST (Apr. 17, 2020), <https://www.washingtonpost.com/business/2020/04/17/stimulus-unemployment-checks-delays-government-delays> [<https://perma.cc/98PM-7WKD>].

192. See discussion *supra* Part II.

passed.¹⁹³ The technical glitches surrounding the EIPs provide an especially salient landscape in which to examine how technical drafting issues are addressed after the legislation has already been enacted.¹⁹⁴ These corrections have a time pressure present that technical corrections for previous reforms bills did not, because the purpose of the CARES Act is to provide *emergency* aid in light of the global pandemic.¹⁹⁵ As the 1986 Act demonstrated, getting technical corrections off the ground in even a less partisan environment can take upwards of two years.¹⁹⁶ Therefore, the desire to address these issues quickly is bringing a kind of pressure to technical corrections that has not previously been seen. This attention further illustrates the broken, ineffectual procedure of technical corrections, as they are currently approached.

The context of a bill's passage can impact the enacted legislation. These three case studies show that no matter the circumstances: bipartisan agreement, partisan contention, and emergency response, drafting errors are inevitable. The type of error discovered post-enactment dictates the correction process. When issues are identified by practitioners that involve the language of the bill inhibiting the spirit of Congress's intent from being realized, a technical correction is the only solution. Agencies and courts do not have the power to correct this language with subregulatory guidance or scrivener's error doctrine.¹⁹⁷ Only Congress has the power via a technical correction.¹⁹⁸ However, without a functioning legislative branch, technical corrections are unable to be adopted. The next Part highlights why technical corrections are vital to the overall implementation and

193. See discussion *supra* Part II; see also Michelle Singletary, *Didn't Get Your Stimulus Payment? Here's How to Find It*, WASH. POST (June 2, 2020), <https://www.washingtonpost.com/business/2020/06/02/didnt-get-your-stimulus-payment-heres-how-find-it> [<https://perma.cc/DZZ7-KDBR>].

194. See generally Renee Morad, *5 Common Stimulus Check Problems—and How to Resolve Them*, FORBES (June 20, 2020), <https://www.forbes.com/sites/reneemorad/2020/06/20/5-common-stimulus-check-problems-and-how-to-resolve-them> [<https://perma.cc/3KFE-7MN7>]; Heather Long & Michelle Singletary, *Glitches Prevent \$1,200 Stimulus Checks from Reaching Millions of Americans*, WASH. POST (Apr. 16, 2020), <https://www.washingtonpost.com/business/2020/04/16/coronavirus-cares-stimulus-check> [<https://perma.cc/6YYY-D8JH>].

195. See I.R.C. § 6428(f)(3)(A) (“The Secretary shall . . . refund or credit any overpayment attributable to this subsection as *rapidly as possible*.” (emphasis added)).

196. See discussion *supra* Part III.A.2.

197. See discussion of subregulatory guidance *supra* Part I.A; discussion of scrivener's error doctrine *supra* Part I.B.

198. See discussion of technical corrections *supra* Part I.C.

administration of tax legislation and how this critical process can be better realized.

IV. RESPECTING THE PROCESS: WHY TECHNICAL CORRECTIONS ARE CRITICAL AND HOW THEY CAN BE MORE EFFECTIVELY ENACTED

The role and purpose of a technical correction is seemingly straightforward. As noted,¹⁹⁹ the JCT defines a technical correction as a misalignment of congressional intent and practical execution of the law once enacted.²⁰⁰ The generally accepted application of this definition essentially boils down to “a provision that is non-controversial, does not affect revenue, applies broadly and reflects the true original intent of the law, as enacted.”²⁰¹ This role cannot be filled by either subregulatory guidance or scrivener’s error doctrine. Problems that arise of this nature must be fixed legislatively via a technical correction.

However, as the foregoing examination of recent tax reform legislation suggests, due to Congress’s crippling inability to act, technical corrections are being left to subregulatory guidance, or often just not pursued at all. The three case studies reviewed here suggest this has two major implications: first, members of Congress attempt to use technical corrections as a backdoor for more substantive change they were unable to effectuate during the original debate, therefore by definition making the change no longer a technical correction; and second, opposing members of Congress attempt to stall implementation of technical corrections meant to enact the goals of the other party’s legislation.²⁰² First, Section A will analyze why technical corrections must be kept in their own sphere and why they are an essential part of responding to drafting errors. Then, Section B advances a revised procedure for technical corrections, insulated from partisanship, which will allow for the critical function of technical correction to be better realized.

199. See text accompanying *supra* notes 72–73.

200. JOINT COMM. ON TAX’N, *supra* note 5.

201. *Observations on Former Chairman Brady’s Technical Corrections Draft Legislation*, *supra* note 80.

202. See discussion *supra* Part III.

A. WHY TECHNICAL CORRECTIONS CANNOT BE SUBSUMED BY ANOTHER PROCESS OR LEFT FORGOTTEN

This Section analyzes the unique role technical corrections play and why that role cannot be subsumed by subregulatory guidance or scrivener's error doctrine. Next, it examines why the role of technical corrections is a critical safety valve in the process of remedying drafting errors post-enactment, further underscored by the on-going legislative nature of the IRC and tax administration.

Subregulatory guidance, the scrivener's error doctrine, and technical corrections each serve a unique purpose in the overarching framework of addressing drafting errors. Their roles are distinct and by definition should not overlap. Subregulatory guidance is used when the overarching thrust of the legislature's intent is clear but there is ambiguity in the implementation of that intent.²⁰³ The scrivener's error doctrine is narrowly applied by courts to discount typos in a bill's text, ensuring the government is not beholden to clear clerical errors.²⁰⁴ Technical corrections are necessary when the language of a bill inhibits the implementation of the legislative intent underpinning the bill.²⁰⁵ These differences are subtle, but distinct.

The question of if a drafting error should be fixed via subregulatory guidance, the scrivener's error doctrine, or a technical correction should be a question of statutory interpretation. However, as this Note's case studies demonstrate, the struggle to pass technical corrections following any type of tax legislation can be a painstaking process that takes years to accomplish, if it is accomplished at all.²⁰⁶ In the meantime, there has been a tendency for subregulatory creep—Treasury making decisions via subregulatory guidance that go beyond the strict bounds of advising on ambiguities—in order to skirt the problem.²⁰⁷ However, subregulatory guidance subsuming the technical correction cannot be the answer to a nonfunctioning Congress. The blending of these two spheres pollutes both processes. If the Treasury or IRS attempts to address an issue through subregulatory guidance that should be addressed via technical correction, it

203. See discussion *supra* Part I.A.

204. See discussion *supra* Part I.B.

205. See discussion *supra* Part I.C.

206. See discussion *supra* Part III.

207. Or there is a tendency for Congress to attempt to push the burden of correction off on to the IRS. See SHERLOCK & GRAVELLE, *supra* note 171 and its accompanying text (discussing Congress's request to the IRS to issue guidance to fix the drafting error preventing domestic violence survivors from obtaining the EIPs).

is an overreach by the executive branch into the domain of the legislature. The alternative is also untenable, leaving drafting errors to languish unaddressed erodes faith in government and good administration.

Drafting errors that result in language that does not properly represent the intent of Congress can only be fixed via a technical correction. Solving the problem via subregulatory guidance poses a separation of powers issue, as agencies cannot break from the letter of the law.²⁰⁸ Drafting errors of this nature can also not be resolved by the courts via the scrivener's error doctrine, because errors of this nature are larger than simple typos in the bill's text. These errors must be addressed by the legislature. However, when technical correction bills are co-opted for nontechnical purposes or are blocked for partisan reasons, there are no alternatives. Incorrect and ineffectual law has no option but to stand.²⁰⁹ In essence, the technical correction process is underutilized, but even when it is properly pursued it is often so weighed down by politics that it becomes ineffective. Changing procedures around the enactment of technical corrections could change that reality.

B. INSULATING TECHNICAL CORRECTIONS FROM POLITICS

This Section reviews the current policies for passing a technical correction and why, based on the foregoing case studies, that procedure is ineffective. Then, this Section advances a possible alternative procedure that will serve to insulate technical corrections from partisanship and better streamline the process, allowing for quicker response by Congress to issues that require a legislative solution.

Technical corrections are given a special name and recognized as a special subset of legislation, and while their creation is often more bipartisan and bicameral, there is nothing procedurally that differentiates a technical correction bill from a "normal" piece of legislation that must pass both chambers of Congress. Technical corrections can be identified by practitioners, taxpayers, the IRS, trade organization, and even the tax policy drafters.²¹⁰ Once they are

208. Parsing separation of powers is a question that makes up an entire field of scholarly work, which is beyond the confines of this Note. This Note simply focuses on calling attention to technical corrections and the need for Congress to utilize the process.

209. See *supra* Part II.B (discussing difficulty in claiming EIPs for domestic violence survivors).

210. See Gerson, *supra* note 8, at 931; Livingston, *supra* note 69.

identified, both the Democratic and Republican staffs of the House Ways and Means Committee and the Senate Finance Committee, along with staff from the JCT and Treasury, work on the details and language.²¹¹ Since these changes are meant to be noncontroversial, ideally there should be broad bipartisan support from the leading tax policy experts of each party and chamber.²¹²

One benefit of classifying a change as a technical correction is that the bill does not have to go through the typical JCT scoring process most tax legislation is subject to,²¹³ because by definition, it should be revenue neutral.²¹⁴ Once a technical correction has been agreed upon and written, it is typically not voted on at an ad hoc basis; instead technical corrections are collected and added to a larger piece of legislation that is seen as a “must-pass.”²¹⁵ The process of attaching technical corrections to larger pieces of legislation appears to operate as a pinch point while also opening technical corrections up to more partisan debates.

It is not uncommon for lobbyists to exploit technical correction bills for partisan political gain. “Lobbyists in particular may view a technical corrections bill as an opportunity to seek substantive changes, often to the frustration of those seeking enactment of the bill on a timely basis.”²¹⁶ This environment, coupled with the fiercely partisan and dysfunctional atmosphere Congress has recently devolved into,²¹⁷ offers little hope for the timely passage of technical

211. Gerson, *supra* note 8, at 935. These bodies arguable make up the most “in the know” regarding tax legislation, with the JCT and Treasury on the front lines of implementation and the Ways and Means Committee and Finance Committee the legislative experts.

212. However, this has been proven to not always be the case. See *Observations on Former Chairman Brady’s Technical Corrections Draft Legislation*, *supra* note 80 and accompanying text.

213. The scoring process is when the JCT and Congressional Budget Office project the budgetary impact of proposed legislation. See MEGAN S. LYNCH & JANE G. GRAVELLE, CONG. RSCH. SERV., R46233, DYNAMIC SCORING IN THE CONGRESSIONAL BUDGET PROCESS (2021).

214. JOINT COMM. ON TAX’N, *supra* note 5. (“The Joint Committee staff does not provide estimates of the revenue effect of technical corrections. This convention stems from the view that the original revenue estimate reflects the intent of the legislation. Therefore, an estimate of the correcting provision would be a double counting of the effect of the original policy.”).

215. *Twenty Questions About Possible Technical Corrections to the 2017 Tax Act*, *supra* note 168, at 4. We saw this with the technical corrections for the TCJA, which were added into the CARES Act for enactment.

216. Gerson, *supra* note 8, at 934 n.75.

217. See sources cited *supra* note 7.

corrections. This Note advances that the practice of passing technical correction on an ad hoc basis should be embraced as opposed to shunned. Waiting to gather a critical mass of technical corrections and then tacking them on to a larger bill perhaps makes logical sense, if Congress was a functional governing body. However, Congress's inability to pass what would traditionally be seen as "must-pass" legislation begs the question of if, in this environment, this process is still the best way. If instead of relying on a larger, more politically divisive bill to shepherd technical corrections through passage, technical corrections could be passed alone using fast track procedures, their timeliness and effectiveness would be greatly increased.

Insulating technical corrections from politics may seem naive. However, the Congressional Review Act (CRA) provides counterpoint to that naivete.²¹⁸ While the CRA has a vastly different purpose, it includes Senate fast-track procedures.²¹⁹ These procedures prevent filibuster and guarantee a final vote on the applicable provision.²²⁰ Additionally, to prevent death by committee, after being referred to committee for twenty days, if thirty senators sign a petition, the committee can be discharged and any senator can make a motion to proceed to a vote.²²¹ Furthermore, amendments are disallowed and floor debate is limited to ten hours.²²² In essence, the fast-track provisions allow a simple majority of the Senate to call up and pass the provision at issue, while tempering the impact of debate and other partisan antics.²²³ A similar procedure should be adopted for technical corrections. By the very nature of being a *technical correction*, any bill that advances as a technical correction should be noncontroversial, and revenue neutral.²²⁴ A streamlined fast track procedure will ensure that these important corrections are passed swiftly and

218. 5 U.S.C. §§ 801–808.

219. *Id.* § 802(c)–(d).

220. Daniel R. Pérez, *Congressional Review Act Fact Sheet*, GEO. WASH. UNIV. REGUL. STUD. CTR. 1–2 (Dec. 9, 2019), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs3306/f/downloads/Insights/GW%20Reg%20Studies%20-%20CRA%20Factsheet%20-%20DPerez_12.9.19.pdf [https://perma.cc/V9JY-RYGT].

221. *Id.*; see also MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 15–17 (2021).

222. Pérez, *supra* note 220, at 2.

223. MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R46690, CONGRESSIONAL REVIEW ACT ISSUES FOR THE 117TH CONGRESS: THE LOOKBACK MECHANISM AND EFFECTS OF DISAPPROVAL i (2021).

224. See text accompanying *supra* notes 72–73.

do not fall victim to partisan gridlock.

To further tamp down the tendency for technical corrections to act as trojan horses for substantive policy change, the bill should originate from either the Treasury or JCT and should seek the early-on involvement of both Republican and Democratic staffs of the Ways and Means Committee, and the Finance Committee. Putting the onus of origination of technical corrections with the administrative and legislative experts that are most closely involved with tax administration's implementation will serve to keep the focus on ensuring the laws function as intended, as opposed to retrofitting new policies into already passed legislation.

Technical corrections should not serve as a backdoor for substantive change but instead should be respected for the important role they serve in ensuring proper administration of tax legislation. Allowing for technical corrections to face a barrage of lobbyists and partisan debate undercuts the core purpose of a technical correction, which is not to create new statutory authority, but to allow what has already been debated on and passed to function correctly. Subjecting technical corrections to extended partisan debate allows lawmakers and lobbyists a second bite at the apple when it comes to tax reform. This is the natural result of waiting to pass technical corrections for when they can be coupled with larger pieces of legislation. Instead of a legislative afterthought, technical corrections would be afforded the streamlined procedure that reflects the urgent problem they solve: untangling the web of the tax code to ensure good governance, clear administration, and the implementation of the intent of Congress.

CONCLUSION

Any type of tax legislation, whether it be wholesale reform or emergency aid, is made more complex by the interconnectedness of the tax code. It is inevitable that in the legislative process mistakes, glitches, and incongruencies make their way into the legislation that result in an impediment to proper enactment. Recognition of this reality is what led to the process of having drafting error correction tools, most notably the underutilized technical correction. Since the passage of technical corrections is not a specialized procedure, these legislative vehicles fall prey to political maneuvering and partisan contortions, the same as any other bill. This results in a long lag time between the passage of tax bills and the ensuing technical corrections. The slow death of technical corrections leaves a gaping hole in

how governmental entities respond to drafting errors. The role of the technical correction cannot be subsumed by either subregulatory guidance or scrivener's error doctrine, as these each operate in their own distinct sphere.

This Note aims to trumpet not only the important role of the technical correction, but also the dire need to bring its use back to life through a fast-track procedure. Subregulatory guidance and the scrivener's error doctrine can only go so far to correct specific types of mistakes. For mistakes that are the result of conflicting legislative language and intent, the only viable fix is a technical correction. However, this process is being pushed further and further aside due to the gridlock technical corrections face when attempting to move through Congress. This leads to either Congress stretching the scope of technical corrections beyond strictly "technical" and thus diluting their meaning or agencies subsuming this process through subregulatory guidance in response to Congress's inability to respond in a timely manner. Creating a more streamlined process for technical corrections to move through Congress, by detaching them from large-scale bills, and passing technical corrections on an individual basis with fast track procedures modeled after the CRA will significantly decrease the delay between the identification of technical corrections and their passage. A statutory scheme that reflects the intent of Congress and works for taxpayers is a foundational aspect of good tax administration. A workable and responsive technical correction process is a key tool in supporting that foundation.