

# THE TAX LEGISLATIVE PROCESS: A BYRD'S EYE VIEW

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## I

### INTRODUCTION

The year 2017 was, among other distinctions, the year of the Byrd rule. This once-obscure Senate procedural provision—on the books since 1985 but only recently the stuff of page one news<sup>1</sup>— featured prominently in several failed attempts to repeal the Affordable Care Act in the spring and summer. Then again at year's end, the Byrd rule played a central role in the successful effort to rewrite large swaths of the Internal Revenue Code. While the Byrd rule has influenced the legislative process in the past, never before has it drawn so much attention from the mainstream and trade press, and never before has it shaped so consequential a law in such a significant way.

One theme that runs throughout this article is that when it comes to the budget math mandated by the Byrd rule, numbers can obscure the truth. But in other respects, numbers accurately illustrate the Byrd rule's trajectory. Figure 1 tracks the number of articles referencing the Byrd rule in the archives of the *New York Times* and the tax trade publication *Tax Notes Weekly* over the last three decades. According to both metrics, interest in the Byrd rule soared to new heights in the first year of the Trump presidency.

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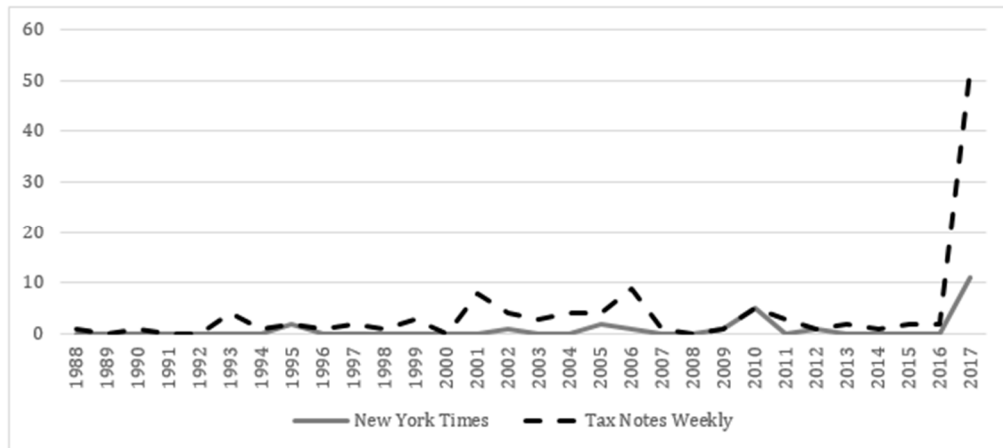
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1. The first reference to the Byrd rule in an article beginning on page one of the *New York Times* came in March 2010, in the run-up to the passage of the Affordable Care Act. See Sheryl Gay Stolberg, *Going From Under the Radar to Under a Capitol Microscope*, N.Y. TIMES, Mar. 14, 2010, at A1.

Figure 1. Articles Referencing “Byrd Rule” in *New York Times* and *Tax Notes Weekly*, 1988-2017



The Byrd rule’s impact can be seen all throughout the new tax law, starting from the top. It was the Byrd rule that blocked the “Tax Cuts and Jobs Act” from becoming the bill’s short title. As a result, the most important tax legislation in more than thirty years will go down in history unmelodiously as “An act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018.” The Byrd rule also is the reason that key elements of the new tax law—including the reduction in individual income tax rates, the expansion of the child tax credit, the increase in the standard deduction, the new deduction for pass-through income, and the increase in the estate and gift tax exemption—are set to expire at the end of 2025. And the Byrd rule is the reason why a number of provisions that appeared in earlier versions of the bill—including a measure that would have allowed 501(c)(3) organizations to participate in political campaigns, several significant changes to the Low Income Housing Tax Credit, and the repeal of the tax-exempt status of professional sports leagues—all were eliminated from the final legislation.

Some of these consequences were predictable from the outset. Even before details of the tax bill emerged, many commentators drew attention<sup>2</sup> to the

2. See, e.g., Jennifer Rubin, Opinion, *Republicans’ Tax-Cut Myth Is About to Crumble*, WASH. POST (Sept. 12, 2017), [https://www.washingtonpost.com/blogs/right-turn/wp/2017/09/12/republicans-tax-cut-myth-is-about-to-crumble/?utm\\_term=.e37a01f8705e](https://www.washingtonpost.com/blogs/right-turn/wp/2017/09/12/republicans-tax-cut-myth-is-about-to-crumble/?utm_term=.e37a01f8705e) [<https://perma.cc/WJQ6-QL3K>]; Todd Simmens, *Will We Get Tax Reform? It’s a Matter of Debate*, FORBES (Sept. 15, 2017), <https://www.forbes.com/sites/kellyphillipsrb/2017/09/15/will-we-get-tax-reform-its-a-matter-of-congressional-debate/#4864dd6c64d2> [<https://perma.cc/3VBK-PFP7>]. For insightful discussions of this feature of the Byrd rule, see generally Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007 (2011); Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L.

provision of the Byrd rule barring budget reconciliation bills that add to the deficit beyond the budget window, which in this case was ten years.<sup>3</sup> Informed observers thus expected—correctly, as it turned out—that the Byrd rule would compel Congress to phase out important elements of the bill, just as the Byrd rule resulted in the sunset of the 2001 and 2003 Bush tax cuts.<sup>4</sup> In other cases, even seasoned Senators were blindsided by the Byrd rule's ramifications. Indeed, the Byrd rule's little-understood requirement that every provision in a reconciliation bill must produce revenue effects that are more than “merely incidental” to the non-budgetary consequences caused a minor crisis in the moments leading up to final passage of the 2017 tax legislation, with the House of Representatives ultimately having to pass the conference report twice before leaving Washington for the winter holiday.<sup>5</sup>

In all likelihood, this is not the last time that the Byrd rule will play a conspicuous and consequential role in the tax legislative process. Increasing political polarization, combined with the reality that neither party appears poised to capture a filibuster-proof Senate majority in the foreseeable future, will lead to greater reliance on budget reconciliation to enact tax legislation. Congressional contentiousness—which is unlikely to abate any time soon—will cause Senators to invoke the Byrd rule against potential violations that went unchallenged in past reconciliation efforts. The party in power can preempt some Byrd rule challenges by adopting a longer budget window or setting a higher ceiling on the allowable deficit impact. Yet as long as the Byrd rule remains binding, the rule's restrictions will influence the procedure and substance of federal tax law.

Some of the Byrd rule's results are—at least arguably—quite welcome. Not only does the Byrd rule impose a measure of fiscal discipline on Congress, but it also stands in the way of some provisions that do little more than reward politically well-connected special interests. Moreover, by narrowing the set of issues that can be the subject of budget negotiations, the Byrd rule may reduce the risk of holdup and hasten arrival at compromise. And at least as compared to the alternative of a budget reconciliation process without any limitations as to

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REV. 335 (2006); George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174 (2009).

3. See H.R. Con. Res. 71, 115th Cong. (2017) (establishing the congressional budget for the U.S. Government for fiscal year 2018 and setting forth the appropriate budgetary levels for fiscal years 2019–2027).

4. Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752 (2003); Economic Growth & Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001); see also Elizabeth Garrett, *Accounting for the Federal Budget and Its Reform*, 41 HARV. J. ON LEGIS. 187, 194–98 (2004); Kysar, *Lasting Legislation*, *supra* note 2, at 2010–21; Kysar, *Sun Also Rises*, *supra* note 2, at 376–78, 380–82; Yin, *supra* note 2, at 189–92. Yin, uniquely, sees this effect of the Byrd rule as potentially positive. See Yin, *supra* note 2, at 180 (“[A]doption of temporary-effect legislation increases political accountability and may enhance fiscal restraint.”).

5. See Thomas Kaplan, *House Gives Final Approval to Sweeping Tax Overhaul*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/us/politics/tax-bill-republicans.html> [https://perma.cc/5CTS-TLCV].

scope, the Byrd rule preserves a role for the minority party in the Senate, potentially promoting a more consensus-oriented approach to lawmaking.

In other respects, the Byrd rule's ramifications are more disconcerting. The song and dance of setting deficit targets and then complying with those targets through sunset provisions arguably allows lawmakers to maintain the appearance of fiscal discipline without exercising such discipline in fact. And ironically, the Byrd rule has stood in the way of various measures that would have imposed further fiscal discipline on the budget reconciliation process and that would have closed apparent loopholes. The Byrd rule's "merely incidental" limit also constrains Congress from enacting tax simplification measures through budget reconciliation, and the deficit-related restrictions result in a code that is cluttered with temporary and dormant provisions. Finally, the Byrd rule reduces the transparency of a tax legislative process that already seems inscrutable to many voters. To address this last problem, this article tentatively suggests several steps that Senators, their staffs, and the Senate Parliamentarian might take to make the Byrd rule's operation somewhat less opaque.

This article proceeds in four parts. Part I provides an overview of the budget reconciliation process and explains the Byrd rule's role in that process. Part II examines how the Senate Parliamentarian—the nonpartisan official tasked with interpreting most elements of the Byrd rule—has construed the rule's provisions in past reconciliation efforts. Part III turns toward the bill formerly known as the Tax Cuts and Jobs Act of 2017, and explains how the Byrd rule shaped Congress's final product. The article ends in Part IV with a reflection on the Byrd rule's future and evaluates the practical and normative implications of the Byrd rule's ever-more-prominent role.

## II

### BUDGET RECONCILIATION AND THE BYRD RULE IN BRIEF

Understanding the operation of the Byrd rule requires first understanding the importance of the budget reconciliation process, and understanding the role of budget reconciliation requires understanding the significance of the Senate's cloture procedure. This part begins by explaining the evolution of cloture and then explains how that procedure relates to the Byrd rule.

For most of the Senate's history, its members have been able to extend debate on pending measures indefinitely—a practice known as the filibuster.<sup>6</sup> The filibuster is a feature that defines the character of the institution and that

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6. See STANDING RULES OF THE SENATE, R. XXII, S. DOC. NO. 113-18 (2013), <http://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf> [<https://perma.cc/2LYZ-6TJV>]; VALERIE HEITSCHUSEN & RICHARD S. BETH, CONG. RESEARCH SERV., RL30360, FILIBUSTERS AND CLOTURE IN THE SENATE 1 (2017); Sarah Blinder, *The History of the Filibuster*, BROOKINGS INST. (Apr. 22, 2010), <http://www.brookings.edu/testimonies/the-history-of-the-filibuster/> [<https://perma.cc/73XX-CWES>] (testimony before the U.S. Senate Committee on Rules and Administration); Erwin Chemerinsky & Catherine Fisk, *The Filibuster*, 49 STAN. L. REV. 181, 198 (1997); see generally GREGORY WAWRO & ERICK SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE (2006).

distinguishes the Senate from other legislative bodies.<sup>7</sup> Only for the last hundred years have Senate rules provided for “cloture,” a maneuver that brings an end to debate through a supermajority vote (initially two-thirds, and now sixty votes).<sup>8</sup> Until 1974, the rule that any measure could be filibustered applied to all legislation in the Senate, including budget bills.

The Congressional Budget Act of 1974 marked a change to the rule that only a supermajority could cut off debate in the Senate.<sup>9</sup> With the goal of reining in the budgetary process, Congress implemented a new budget reconciliation procedure that allows revenue-related measures to pass the Senate without the possibility of a filibuster. The procedure begins with the House and Senate passing a concurrent budget resolution that gives “reconciliation instructions” to subject-matter committees.<sup>10</sup> These instructions generally direct subject-matter committees to report legislation that increases or decreases revenue or outlays by up to a specified amount over a defined budget window. For example, the concurrent resolution for fiscal year 2018 instructed the House Ways and Means and Senate Finance Committees to submit changes that would increase the deficit by no more than \$1.5 trillion for fiscal years 2018 through 2027.<sup>11</sup> The House and Senate have never set a budget window longer than ten years, though there is nothing in the text of the Budget Act that would prohibit them from choosing a longer period.<sup>12</sup>

Once the House and Senate agree to a concurrent resolution with reconciliation instructions, subject-matter committees in both chambers then report legislation that implements those instructions. Each chamber then considers the legislation produced by its committees.<sup>13</sup> If the House and Senate pass bills that are not identical, a committee of lawmakers works out a conference report that must be approved again in identical form by each chamber and

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7. Gregory J. Wawro & Eric Schickler, *Legislative Obstructionism*, 13 ANN. REV. POLIT. SCI. 297, 297 (2010).

8. STANDING RULES OF THE SENATE, *supra* note 6, at 15–17 (2013); FLOYD M. RIDDICK, & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. 101-28, at 282–334 (Alan S. Frumin ed., 1992).

9. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified at 2 U.S.C. §§ 601–88 (1990)); *see generally* MEGAN S. LYNCH & JAMES V. SATURNO, CONG. RESEARCH SERVICE, R44058, THE BUDGET RECONCILIATION PROCESS: STATES OF CONSIDERATION (2017).

10. *See* U.S. Senate Glossary, *Budget Resolution*, SENATE.GOV, [http://www.senate.gov/reference/glossary\\_term/budget\\_resolution.htm](http://www.senate.gov/reference/glossary_term/budget_resolution.htm) [<https://perma.cc/63SQ-HX49>] (last visited Apr. 12, 2018).

11. H.R. Con. Res. 71, 115th Cong. (2017).

12. Dylan F. Moroses & Stephen K. Cooper, *Questions Raised on Budget Window Extension for Tax Reform*, TAX ANALYSTS (May 13, 2017), <http://www.taxanalysts.org/content/questions-raised-budget-window-extension-tax-reform> [<https://perma.cc/7A8T-QCET>]; Brian Riedl, *Extend Budget Resolution for Tax Reform and Fiscal Responsibility*, MANHATTAN INST. (June 22, 2017), <http://economics21.org/html/extend-budget-resolution-window-tax-reform-and-fiscal-responsibility-2410.html> [<https://perma.cc/QU6Z-LBB3>].

13. *See* U.S. Senate Glossary, *Reconciliation Bill*, SENATE.GOV, [http://www.senate.gov/reference/glossary\\_term/reconciliation\\_bill.htm](http://www.senate.gov/reference/glossary_term/reconciliation_bill.htm) [<https://perma.cc/ZWW8-WBNV>] (last visited Mar. 26, 2018).

presented to the President for signature or veto.<sup>14</sup>

The availability of this new fast-track process threatened to undermine the Senate's supermajoritarian norms by allowing a simple majority to enact measures via reconciliation that had little relation to the federal budget. To protect the reconciliation process from abuse, Democratic Senator Robert Byrd of West Virginia introduced the rule that now bears his name. In introducing the provision in October 1985, Senator Byrd explained:

Mr. President, the amendment speaks for itself. I would just say that we are in the process now of seeing, if we have not seen earlier, the Pandora's box which has been opened to the abuse of the reconciliation process. That process was never meant to be used as it is being used.

...

Mr. President, the Senate is a deliberative body, and the reconciliation process is not a deliberative process. It [is] not a deliberative process. Such an extraordinary process, if abused, could destroy the Senate's deliberative nature . . .<sup>15</sup>

The Senate adopted the Byrd rule unanimously, 96-0.<sup>16</sup>

Although it was initially a temporary measure,<sup>17</sup> Congress made the Byrd rule permanent and codified it in 1990.<sup>18</sup> In its present form, the Byrd rule applies to legislation at each stage of the budget reconciliation process: to budget resolutions with reconciliation instructions, to reconciliation bills, and to conference reports that emerge when each chamber passes separate reconciliation legislation.<sup>19</sup> Whenever the Senate is considering any of these "measures, any Senator can raise a point of order"<sup>20</sup> asserting that the legislation includes a provision that is "extraneous." The Byrd rule defines a provision as "extraneous" if it:

- (A) does not produce a change in outlays or revenues;
- (B) produces an increase in outlays or decrease in revenues that does not follow the reconciliation instructions in the budget resolution;
- (C) is not in the jurisdiction of the committee that reported the provision;
- (D) produces changes in outlays or revenues that are merely incidental to the non-budgetary components of the provision;
- (E) increases the deficit in any fiscal year after the period specified in the budget resolution (i.e., the "budget window"); or

14. See U.S. Senate Glossary, *Conference Report*, SENATE.GOV, [http://www.senate.gov/reference/glossary\\_term/conference\\_report.htm](http://www.senate.gov/reference/glossary_term/conference_report.htm) [<https://perma.cc/6WAR-DNEB>] (last visited Mar. 26, 2018).

15. WILLIAM G. DAUSTER, *BUDGET PROCESS LAW ANNOTATED* 231-32 n.616 (1993) (quoting 131 CONG. REC. S14,032-37 (daily ed. Oct. 24, 1985)).

16. *Id.* at 237 (quoting 131 CONG. REC. S14,038). Senators Eagleton, Hatfield, Simon, and Stennis were absent. *Id.*

17. See BILL HENIFF, JR., CONG. RESEARCH SERV., RL30862, *THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE"* 1-2 (2016).

18. 2 U.S.C. § 644 (2012).

19. See *id.* § 644(a), (d).

20. See U.S. Senate Glossary, *Point of Order*, Senate.gov, [http://www.senate.gov/reference/glossary\\_term/point\\_of\\_order.htm](http://www.senate.gov/reference/glossary_term/point_of_order.htm) [<https://perma.cc/K8YR-A26L>] (last visited Mar. 26, 2018).

(F) recommends changes to Social Security.<sup>21</sup>

The Byrd rule is not self-executing: a provision will be stricken from a reconciliation bill only if it is challenged on grounds that it is extraneous. And once a provision has been challenged on the grounds that it is extraneous, the Presiding Officer<sup>22</sup> of the Senate—who is either the Vice President or a majority party member selected by the Senate's President pro tempore—must decide whether to sustain or overrule the point of order.<sup>23</sup> If the Presiding Officer sustains the point of order (in other words, agrees that the provision is extraneous), the provision is stricken from the legislation<sup>24</sup> unless sixty Senators vote to waive the Byrd rule or override the Presiding Officer.<sup>25</sup> Likewise, if the Presiding Officer rejects the point of order, sixty Senators can overcome that ruling to strike the provision.<sup>26</sup>

In practice, the Presiding Officer rarely rules on a Byrd rule point of order before consulting one of two individuals: the Senate Budget Committee Chair or the Senate Parliamentarian.<sup>27</sup> The Senate Budget Committee Chair advises the Presiding Officer with respect to Byrd rule challenges made under subparagraphs (B) and (E): whether the revenue effects conform to the concurrent resolution's reconciliation instructions and whether the bill increases the deficit beyond the budget window. As a matter of practice, the Senate Budget Committee Chair defers to revenue estimates produced by the Staff of the Joint Committee on Taxation (JCT) and the Congressional Budget Office (CBO) with respect to these types of Byrd Rule challenges.<sup>28</sup> Former Senate Finance Committee Chair Bob Dole reportedly said that the entire process “made him feel like the chair of a subcommittee of the Budget Committee, rather than chair of the usually powerful Finance Committee.”<sup>29</sup>

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21. See § 644(b)(1).

22. See U.S. Senate Glossary, *Presiding Officer*, SENATE.GOV, [http://www.senate.gov/reference/glossary\\_term/presiding\\_officer.htm](http://www.senate.gov/reference/glossary_term/presiding_officer.htm) [<https://perma.cc/9PSM-9C72>] (last visited Mar. 26, 2018).

23. § 644(e); see also Cheryl D. Block, *Pathologies at the Intersection of the Budget and Tax Legislative Processes*, 43 B.C. L. REV. 863, 882 (2002) (“The meaning of ‘extraneous’ can be complex, ambiguous, and often depends on controversial rulings from the Chair.”).

24. 2 U.S.C. § 644(a), (e) (2012).

25. HENIFF, JR., *supra* note 17, at 4.

26. *Id.*

27. See RIDDICK & FRUMIN, *supra* note 8, at 505; IDA A. BRUDNICK, CONG. RESEARCH SERV., R43532, OFFICES AND OFFICIALS IN THE SENATE: ROLES AND DUTIES (2015); VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RS20544, THE OFFICE OF THE PARLIAMENTARIAN IN THE HOUSE AND SENATE (2017). Senate Majority Leader Trent Lott fired Parliamentarian Robert Dove rather than ignoring his rulings. See *infra* text accompanying notes 82–85.

28. See BILL HENIFF, JR., CONG. RESEARCH SERV., 98-560, BASELINES AND SCOREKEEPING IN THE FEDERAL BUDGET PROCESS 1–2 (2012); JAMES V. SATURNO ET AL., CONG. RESEARCH SERV., 98-721, INTRODUCTION TO THE FEDERAL BUDGET PROCESS 8 (2012); CONG. BUDGET OFF., AN INTRODUCTION TO THE FEDERAL BUDGET OFFICE (2016), <http://www.cbo.gov/sites/default/files/cbofiles/attachments/2016-IntroToCBO.pdf> [<https://perma.cc/PNS4-MN9F>]; *About Us*, STAFF OF J. COMM. ON TAX'N, <http://www.jct.gov/about-us/statutory-basis.html> [<https://perma.cc/72R3-GUXB>] (last visited Mar. 11, 2018).

29. George K. Yin, *The Evolving Legislative Process: Implications for Tax Reform*, 114 TAX NOTES 313, 316–17 (2007) (quoting JOHN B. GILMOUR, RECONCILABLE DIFFERENCE? CONGRESS, THE

To illustrate: if a Senator raised a point of order objecting to the recent tax law on the grounds that it adds more than \$1.5 trillion to the deficit over the 2018–2027 budget window, the Presiding Officer would presumably defer to the Senate Budget Committee Chair’s judgment as to whether the point of order should be sustained. The Senate Budget Committee Chair would then consult the JCT staff and the CBO. Likewise, if a Senator raised a point of order claiming that the reconciliation bill adds to the deficit beyond the budget window, the Senate Budget Committee Chair would likely resolve that dispute based on the JCT and CBO projections.

To be sure, there is no statute requiring that the Senate Budget Committee Chair yield to the JCT and CBO estimates. Thus, the Presiding Officer’s deference to the Senate Budget Committee Chair in instances of Byrd rule challenges vests the Budget Committee Chair with considerable power.<sup>30</sup> However, the Senate Budget Committee Chair’s power to override JCT and CBO estimates has long remained latent.<sup>31</sup>

In contrast to the Senate Budget Committee Chair’s role in adjudicating Byrd rule challenges under subparagraphs (B) and (E), it is the Senate Parliamentarian who generally calls the shots with respect to challenges raised under the Byrd rule’s other provisions. The Senate Parliamentarian is a nonpartisan official who serves as the official adviser to the Senate on the interpretation of the body’s rules and procedures.<sup>32</sup> With very few exceptions,<sup>33</sup> the Presiding Officer follows the Parliamentarian’s recommendations on matters of procedure, and no reports indicate that the Presiding Officer has ever rejected the Parliamentarian’s advice with respect to a Byrd rule point of order.

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BUDGET PROCESS AND THE DEFICIT 148 (1990)).

30. See Daniel Hemel & David Herzig, *The Art of the (Budget) Deal*, YALE J. ON REG. (Dec. 2, 2016), <http://yalejreg.com/nc/the-art-of-the-budget-deal-by-daniel-hemel-and-david-herzig> [<https://perma.cc/6RAN-TGGC>].

31. The idea of exercising this power more robustly had been floated by some commentators in the lead-up to the recent tax reform. See Tara Golshan, *The Republican Tax Reform Bill Will Live and Die By This Obscure Senate Rule*, VOX (Nov. 14, 2017), <http://www.vox.com/policy-and-politics/2017/11/14/16634200/republican-tax-reform-byrd-rule> [<https://perma.cc/4FRM-NY5H>] (“The Senate Budget Committee could also use a different, more ideologically conservative score of their tax plan instead of the CBO’s evaluation.”). Despite criticism from some Republican Senators that the JCT’s economic growth projections were too low, the Senate still used its scores when crafting the recent tax reform legislation. See *Senate Republicans Scramble to Find Revenue for Tax Bill with Vote Expected Friday*, N.Y. TIMES (Nov. 30, 2017), <http://www.nytimes.com/2017/11/30/us/politics/tax-overhaul-senate-debate.html> [<https://perma.cc/8LVS-KQR9>].

32. See U.S. Senate Glossary, *Parliamentarian*, SENATE.GOV, [http://www.senate.gov/reference/glossary\\_term/parliamentarian.html](http://www.senate.gov/reference/glossary_term/parliamentarian.html) [<https://perma.cc/ZV66-VKU6>] (last visited Mar. 26, 2018); U.S. H.R. COMM. ON RULES, SUMMARY OF THE BYRD RULE, [http://archives-democrats-rules.house.gov/archives/byrd\\_rule.htm](http://archives-democrats-rules.house.gov/archives/byrd_rule.htm) [<http://perma.cc/9XYU-6UY9>] (archived) (last visited Mar. 11, 2018).

33. One such instance was in February 1987, when then-Vice President George H.W. Bush exercised this power during a now-forgotten fight over energy efficiency standards. See Bernard Weinraub, *Appliances, Rules and Politics Have Senators in an Uproar*, N.Y. TIMES (Feb. 6, 1987), <http://www.nytimes.com/1987/02/06/us/appliances-rules-and-politics-have-senators-in-an-uproar.html> [<https://perma.cc/SEM5-CDUK>].



While points of order are raised and decided in public view,<sup>34</sup> the Parliamentarian exerts her influence over the interpretation of the Byrd rule largely behind closed doors. In a so-called “Byrd bath,”<sup>35</sup> representatives from the majority and minority parties in the Senate (usually Budget and Finance Committee staffers, but occasionally others) will meet with the Parliamentarian and debate which provisions violate the Byrd rule’s strictures. Sponsors generally remove such provisions<sup>36</sup> before the bill goes to a final vote. (Continuing with the avian theme, staffers sometimes refer to such provisions as “Byrd droppings.”<sup>37</sup>) As a result, the handful of cases in which the Presiding Officer has ruled on whether a provision violates the Byrd rule’s strictures represent just a small share of the total number of instances in which material has been stripped from legislation on the advice of the Parliamentarian.<sup>38</sup>

Of all the Byrd rule’s elements, it is subparagraph (E)—the prohibition on provisions that “produce[] changes in outlays or revenues that are merely incidental to the non-budgetary consequences”—that adds most to the opacity of the Byrd bath process. It is, in jurisprudential terms, a “standard” rather than a “rule,”<sup>39</sup> and it is an especially amorphous standard at that. An annotated edition of the federal budget laws produced by the Senate Budget Committee in 1993 so concedes:

This subparagraph contributes much of the ambiguity created by [the Byrd rule]. Its language calls for the exercise of judgment. The Parliamentarian has not laid down any bright-line test to aid that judgment, and reserves the right to consider each individual case on its merits.

The drafters of this subparagraph wished to prohibit provisions in which policy changes plainly overwhelmed deficit changes. For example, a nationwide abortion prohibition might marginally reduce Government spending, but would constitute a much more significant policy change than budgetary action. The application of this subparagraph, however, has ranged wider than such plain cases.<sup>40</sup>

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34. See 2 U.S.C. § 644(e) (2012).

35. See ALLEN SCHICK, *THE FEDERAL BUDGET PROCESS: POLITICS, POLICY, PROCESS* 149 (3d ed. 2007); Margot Sanger-Katz, *Byrd Bath: Seven Provisions That Could Disappear from the Senate Health Bill*, N.Y. TIMES (July 21, 2017), <http://www.nytimes.com/2017/07/21/upshot/byrd-bath-seven-provisions-that-could-disappear-from-the-senate-health-bill.html> [<https://perma.cc/9KXD-TYT8>].

36. See Yin, *supra* note 2, at 216; Sheryl Gay Stolberg, *Parliamentarian in Role as Health Bill Referee*, N.Y. TIMES (Mar. 13, 2010), <http://www.nytimes.com/2010/03/14/us/politics/14rules.html> [<https://perma.cc/M9AY-6PB9>].

37. See Yin, *supra* note 2, at 216; Stolberg, *supra* note 36.

38. See HENIFF, JR., *supra* note 17, at 20–32, tbl.4.

39. One prominent scholar frames the distinction as follows:

The general debate over legal form in jurisprudence and private law characterizes rule-like directives as affording less discretion than standards. . . . A legal directive is “rule”-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. . . . A legal directive is “standard”-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation. Standards . . . giv[e] the decisionmaker more discretion than do rules.

Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 26, 58 (1992) (footnote omitted).

40. DAUSTER, *supra* note 15, at 208 n.580.

The abortion example illustrates a point that the annotation goes on to state explicitly: “Budgetary effect, without more, does not insulate a provision from violating the [‘merely incidental’ condition].”<sup>41</sup> At the same time, “[p]rovisions that have budgetary effects that the Congressional Budget Office cannot estimate do not necessarily violate” the Byrd rule.<sup>42</sup> It is thus clear that the “merely incidental” proviso does not come down to a single number. What is less clear is which features of a challenged provision lead the Parliamentarian to conclude that it runs afoul of subparagraph (E).

### III

#### THE BYRD RULE IN OPERATION

The Byrd rule’s history can be divided into five eras: (1) an early period of relative quietude; (2) a brief interval from 1993 to 1994 in which Democrats used budget reconciliation to enact important elements of President Clinton’s domestic policy agenda; (3) a longer stretch from 1995 until the end of the Clinton presidency when a Republican-controlled Congress used budget reconciliation to pursue its legislative goals; (4) a period in the early twenty-first century when budget reconciliation was used primarily to pass tax cuts and the Byrd rule’s primary effect was to force the inclusion of sunset provisions; and (5) the current period of Byrd rule battles that have shaped all aspects of the most important legislation in recent years. This part traces the Byrd rule through those five eras in an attempt to understand how it has come to play the role that it now does.

#### A. The Early Years

From the time of the Byrd rule’s introduction until 1993, the Senate used the budget reconciliation process primarily to enact legislation with supermajority or bipartisan support. The Omnibus Budget Reconciliation Acts of 1986,<sup>43</sup> 1987,<sup>44</sup> and 1989<sup>45</sup> all garnered more than sixty votes. The Omnibus Budget Reconciliation Act of 1990<sup>46</sup> passed by a narrower margin—only fifty-four votes—but those years included thirty-seven Democrats and seventeen Republicans, including both the majority and minority leaders.<sup>47</sup>

Perhaps due to the relative amity of the Senate in those years, the Byrd rule’s early life was a quiet one. This is not to say, however, that Byrd rule issues were entirely absent from the budget reconciliation process in the late 1980s and early

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41. *Id.* at 509.

42. *Id.*

43. See Omnibus Budget Reconciliation Act of 1986, H.R. 5300, 99th Cong. (1986).

44. See Omnibus Budget Reconciliation Act of 1987, H.R. 3545, 100th Cong. (1987).

45. See Omnibus Budget Reconciliation Act of 1989, H.R. 3299, 101st Cong. (1989).

46. Omnibus Budget Reconciliation Act of 1990, H.R. 5835, 101st Cong. (1990).

47. See *U.S. Senate Roll Call Vote 101<sup>st</sup> Congress – 2<sup>nd</sup> Session*, SENATE.GOV, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=101&session=2&vote=00326#position](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=101&session=2&vote=00326#position) [https://perma.cc/28G7-9AYQ] (last visited Mar. 1, 2018) (on H.R. 5835). No budget reconciliation bills were passed in 1988, 1991, or 1992. See HENIFF, JR., *supra* note 17, tbl.4.

1990s. For example, during consideration of the Omnibus Budget Reconciliation Act of 1990, Democratic Senator Howard Metzenbaum of Ohio raised a point of order to strike two provisions imposing criminal penalties for violations of workplace safety laws. Senator Metzenbaum did not object to the provisions on substantive grounds—in fact, he had supported them in the Labor Committee. In explaining his point of order, Senator Metzenbaum said:

We consulted with the Budget Committee experts before including the OSHA criminal penalty provisions in the reconciliation package. Based on the revenue estimate by the Congressional Budget Office, those experts indicated that the criminal penalty provisions were not extraneous under the Byrd rule. But I understand this may be a close question. I want to support the leaders in their effort to keep extraneous provisions out of this package; therefore I am willing to put the question to the Chair and to abide by the Chair's ruling.<sup>48</sup>

The Chair (that is, Presiding Officer), at the Parliamentarian's recommendation, sustained the point of order and struck the criminal penalty provisions from the final bill.

One of the few contentious Byrd rule debates during these early years concerned a provision in the 1990 Act that directed the Secretary of Transportation to develop a "National Aviation Noise Policy."<sup>49</sup> The provision drew strong opposition from Senators who were concerned that the new policy would preempt local noise controls.<sup>50</sup> Democratic Senator Daniel Patrick Moynihan of New York described it as "an atrocious measure to be on a budget reconciliation bill."<sup>51</sup> His Republican colleague from New York, Alfonse D'Amato, agreed, and raised a point of order on the ground that the noise policy produced no change in outlays or revenues.<sup>52</sup> The Parliamentarian evidently concurred in D'Amato's assessment, but the Senate voted 69–31 to waive the Byrd rule so that the provision could remain in the bill. Incidentally, Senator Byrd was one of the Senators who voted in favor of waiving his namesake rule.<sup>53</sup>

## B. 1993 as a Turning Point

The 103rd Congress, from 1993 to 1994, was a turning point in the life of the Byrd rule. In 1993, for the first time since the rule's introduction, both houses of Congress and the presidency were under the unified control of a single party. Bill Clinton began his first term with a 259–175 Democratic majority in the House, and a 57–43 majority in the Senate.<sup>54</sup> Thus, a united Republican minority could block legislation subject to the filibuster in the Senate but could not stop reconciliation bills. This new configuration came at a time of increasing

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48. See 136 CONG. REC. S15,771 (daily ed. Oct. 18, 1990).

49. See 136 CONG. REC. S15,777 (daily ed. Oct. 18, 1990).

50. See, e.g., *id.* (statement of Sen. Durenberger).

51. *Id.*

52. *Id.*

53. *Id.*

54. See KENNETH E. COLLIER, BETWEEN THE BRANCHES: THE WHITE HOUSE OFFICE OF LEGISLATIVE AFFAIRS 290, app. B (1997).

ideological polarization between the parties.<sup>55</sup>

At one point in the 103rd Congress, President Clinton and Senate Majority Leader George Mitchell considered using the budget reconciliation process to pass a sweeping health care reform package. Senator Byrd, protective of the institution's supermajoritarian norms, apparently nixed that idea along with a handful of other Democrats who thought that using budget reconciliation for health care reform would be, in the words of North Dakota Democrat Kent Conrad, an "abuse of the process" that was "not what the Founding Fathers intended for this body."<sup>56</sup> Even so, the Omnibus Budget Reconciliation Act of 1993 was distinctively contentious and partisan, with a number of provisions that pushed the Byrd rule's boundaries. While health care reform was left out, the final bill implemented important elements of the Clinton administration domestic policy agenda, including an expansion of the earned income tax credit, the creation of "empowerment zones" and "enterprise communities," and the extension of Food Stamps to new beneficiaries.<sup>57</sup> The package passed without a single Republican Senator's support, and with Vice President Al Gore casting the deciding vote.

A couple of additional examples offer a taste of the Byrd rule debates during the 1993 budget fight. One involved a provision requiring childhood vaccine manufacturers who sold vaccines to the federal Centers for Disease Control to offer similar terms to states. During the debate over the Senate's initial reconciliation bill, Republican Senator Bob Packwood of Oregon challenged that provision on Byrd rule grounds, and the Presiding Officer—apparently on the Parliamentarian's recommendation—agreed that it was extraneous, evidently because the provision primarily affected state, rather than federal, budgets.<sup>58</sup> However, the Congressional Budget Office later said that allowing states to buy vaccines at the CDC price would have some effect on the price that the federal government paid, even though it could not quantify the effect.<sup>59</sup> When a similar provision appeared in the conference report, Republican Senator John Danforth of Missouri challenged it. This time, however, the Presiding Officer—apparently again on the Parliamentarian's recommendation—overruled the point of order and allowed the provision to remain in the final bill.<sup>60</sup>

Another controversial provision in the 1993 bill imposed an assessment on cigarette manufacturers importing more than twenty-five percent of the tobacco they used. The assessment was set at a rate that would make it unprofitable for manufacturers to trigger it. It also caused the United States to violate

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55. See Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 25–29 (2018).

56. 147 CONG. REC. S3,263 (daily ed. Apr. 2, 2001) (statement of Senator Conrad) (describing his reaction several years later).

57. DAUSTER, *supra* note 15, at 209.

58. *Id.* at 207 n.575 (citing 139 CONG. REC. S7,926, S7,928 (daily ed. June 24, 1993)).

59. 139 CONG. REC. S10,665, ex.1 (daily ed. Aug. 6, 1993).

60. DAUSTER, *supra* note 15, at 210–12, n.580 (quoting 139 CONG. REC. S10,659–61 (daily ed. Aug. 6, 1993)).

international trade laws (as the World Trade Organization would later rule). The Congressional Budget Office estimated that the assessment would raise only \$6 million a year, and Republican Senator Hank Brown of Colorado raised a Byrd rule challenge.<sup>61</sup> On the Parliamentarian's recommendation, however, the Presiding Officer ruled that the provision's budgetary effects were more than "merely incidental" to the non-budgetary consequences.<sup>62</sup>

### C. The Byrd Rule under Divided Government

Partisan fights over the Byrd rule continued after the November 1994 mid-term elections, when Republicans gained control of both houses of Congress for the first time in forty years. During the debate over the Republican-backed Balanced Budget Act of 1995, then-Parliamentarian Robert Dove ruled that a provision that would have barred the use of federal funds for abortion violated the Byrd rule's "merely incidental" proviso because, as Dove later explained, it "was not there to save money but to implement a huge social policy."<sup>63</sup> The Senate ultimately passed the bill without the abortion provision, although President Clinton's veto prevented the bill from becoming law.

The Byrd rule also played a role in shaping the Personal Responsibility and Work Opportunity Act of 1996, the bipartisan bill that fulfilled President Clinton's promise to end "welfare as we know it."<sup>64</sup> The final bill passed the Senate by a 78–21 margin, making the resort to reconciliation unnecessary as a maneuver to circumvent the filibuster.<sup>65</sup> Nonetheless, the Byrd rule shaped the legislation's content in a number of ways. In July 1996, Democratic Senator James Exon of Nebraska raised Byrd rule points of order against several controversial elements of the law.<sup>66</sup> His points of order included a provision that would have prevented mothers who had children while on welfare from receiving additional benefits,<sup>67</sup> a measure that would have set aside \$75 million from the Maternal and Child Health Block Grant Program to fund abstinence education, and a provision that would have allowed states to contract with charitable, religious, and private organizations to administer block grant-funded services. Republican Senator Pete Domenici of New Mexico moved to waive all three

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61. 139 CONG. REC. S10,675–77 (daily ed. Aug. 6, 1993).

62. *Id.*

63. Gail Russell Chaddock, *Who's Al Frumin and Why Might He Shape US Health Reform?*, CHRISTIAN SCI. MONITOR (Oct. 14, 2009), <http://www.csmonitor.com/USA/Politics/2009/1014/whos-alan-frumin-and-why-might-he-shape-us-health-reform> [<https://perma.cc/YY28-P9QP>] (quoting Robert Dove).

64. See Pam Fessler, *Welfare "As We Know It" Ended in 1996. Did It Help or Hurt?*, NPR (Aug. 21, 2016), <http://www.npr.org/2016/08/21/490852973/20-years-since-welfare-reform-what-are-its-lasting-effects> [<https://perma.cc/L5DQ-KP3N>].

65. See Personal Responsibility and Budget Reconciliation Act of 1996, H.R. 3734, 104th Cong. (1996).

66. For the debate over the Exon points of order, see 142 CONG. REC. S8,501–32 (daily ed. July 23, 1996).

67. This measure evidently would not have affected federal revenues or outlays because it did not alter the size of any state's block grants.

points of order. His motion failed with respect to the family cap provision by a 42–57 vote<sup>68</sup> and failed with respect to the abstinence education measure by a 52–46 margin.<sup>69</sup> His motion succeeded, however, with respect to the contracting provision: the Senate voted 67–32 to keep that provision in the final bill, notwithstanding the apparent Byrd rule violation.<sup>70</sup>

The debate over the abstinence education measure illustrates the extent to which the Byrd rule’s application depends critically on the definition of the word “provision.” Recall that the Byrd rule applies on a provision-by-provision basis: “a *provision* of a reconciliation bill . . . shall be considered extraneous if such *provision* does not produce a change in outlays or revenues . . . [or] produces changes in outlays or revenues which are merely incidental to the non-budgetary components of the *provision*.”<sup>71</sup> Setting aside \$75 million in Maternal and Child Health Services Block Grant money for abstinence education does not produce a change in outlays, but if the measure is construed as containing two provisions—one that increases spending on abstinence education by \$75 million and one that cuts \$75 million from the block grant—then each provision produces a change in outlays. As later developments demonstrate, however, the manner in which the Parliamentarian defines “provision” appears to be less than consistent.

Two more episodes from the Clinton years deserve attention because of what they teach us about the Byrd rule’s potential unintended consequences. The first involved a proposal in the Balanced Budget Act of 1997 to raise the Medicare eligibility age incrementally from sixty-five to sixty-seven over the course of a twenty-four year period, from 2003 to 2027. Democratic Senator Richard Durbin of Illinois raised a point of order on the grounds that the provision “produces no change in outlays or revenues during the required period of time”—in that case, the 1998–2003 period covered by the budget resolution.<sup>72</sup> The Parliamentarian apparently agreed and advised the Presiding Officer that the eligibility age provision did indeed violate the Byrd rule.<sup>73</sup>

Republican Senator William Roth of Delaware, a supporter of the provision, responded:

[It was] very ironic that a point of order was made on this matter, because while it is true that it will not have a significant impact on revenue in the early years because of the very, very compassionate way we are introducing changing the age of eligibility, the fact is that this very modest approach will do a very, very great deal in the long term in helping the solvency of this program.<sup>74</sup>

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68. 142 CONG. REC. S8,507 (daily ed. July 23, 1996).

69. *Id.* at S8,509.

70. *Id.* at S8,508.

71. 2 U.S.C. § 644(b)(1)(A), (D) (2012) (emphases added).

72. 143 CONG. REC. S6,092 (daily ed. June 23, 1997).

73. The Parliamentarian’s rationale is certainly open to question. The relevant subparagraph of the Byrd rule states that “a provision of a reconciliation bill . . . shall be considered extraneous if such provision does not produce a change in outlays or revenues,” 2 U.S.C. § 644(b)(1)(A), but it does not say that the change in outlays or revenues must fall within the window set by the budget resolution. *See id.*

74. 143 CONG. REC. S6,117 (daily ed. June 24, 1997).

Republican Senator Phil Gramm of Texas, another supporter of the provision, called it “the ultimate paradox” that the Byrd rule could be used to scuttle a measure aimed at saving Medicare from insolvency.<sup>75</sup>

Ultimately, the Byrd rule was not what prevented Congress from raising the Medicare eligibility age. The Senate voted 62–38 to waive the point of order, with twelve Democrats joining fifty Republicans in support of waiver.<sup>76</sup> But Senators could not convince House Republicans to back the change, and the provision was dropped in conference.<sup>77</sup> Still, the Medicare eligibility episode seems surprising in hindsight. On its face, the Byrd rule simply requires each provision to “produce a change in outlays or revenues;” it does not require the outlay or revenue change to occur within the budget window. And looking beyond the Byrd rule’s text to its purpose, the idea that the Byrd rule would stand as an obstacle to legislation that dramatically reduces the long-term deficit seems to turn the Byrd rule on its head.

The second episode involved the fate of balanced budget enforcement measures in the Taxpayer Relief Act of 1997. During the Senate’s debate over that legislation, Republican Senator Sam Brownback of Kansas and Democrat Herb Kohl of Wisconsin introduced an amendment that would have set target levels for direct spending from fiscal year 1998 through fiscal year 2002. If direct spending (such as Social Security, Medicare, and Medicaid) exceeded those targets, then Senate consideration of a budget resolution would be out of order unless the resolution fully addressed the overage.<sup>78</sup> Democratic Senator Frank Lautenberg of New Jersey, who opposed the amendment, raised a point of order on the grounds that the amendment violated the Byrd rule—evidently because it would not produce a change in outlays or revenues if direct spending remained below target levels. A waiver motion failed on a 57–43 vote (with four Democrats joining all fifty-three Republicans in support), and the amendment fell out of the final bill.<sup>79</sup> Immediately afterwards, Republican Senator Bill Frist of Tennessee introduced an amendment that would have set a sixty-vote threshold for any deficit-increasing legislation starting in fiscal year 2002 and would have required the President to submit a balanced budget to Congress starting in 2002.<sup>80</sup> Again, Senator Lautenberg raised a point of order on the grounds that the amendment would not produce a change in outlays or revenues. This time, the waiver motion fell one vote short of the sixty-vote threshold, with six Democrats joining fifty-

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75. *Id.* at S6,118.

76. See Eric Pianin, *Senate Votes To Raise Medicare Eligibility Wage*, WASH. POST (June 25, 1997), <http://www.washingtonpost.com/archive/politics/1997/06/25/senate-votes-to-raise-medicare-eligibility-age/aa2f8985-566a-44fc-a130-eb222e0af60d> [<https://perma.cc/6BY8-GZ4R>].

77. See Eric Pianin, *Medicare Eligibility-Age Rise Rejected*, WASH. POST (July 11, 1997), <http://www.washingtonpost.com/wp-srv/politics/special/medicare/stories/med071197.htm> [<https://perma.cc/FMS6-FGU6>].

78. 143 CONG. REC. S6,676 (daily ed. June 27, 1997).

79. *Id.* at S6,677.

80. *Id.*

three Republicans in support.<sup>81</sup>

The failure of the Frist amendment set the stage for the reconciliation bills that would follow in the early years of the Bush administration. If Frist's amendment had become and remained law, the deficit-increasing Bush tax cuts of 2001 and 2003 could not have been enacted through budget reconciliation. In this respect, the use of budget reconciliation for deficit-increasing legislation in the Bush years followed directly from the Parliamentarian's earlier formalism.

#### D. The Byrd Rule Enters the Twenty-First Century

The next major front in the fight over the Byrd rule concerned the use of budget reconciliation to enact deficit-increasing tax cuts. The 107th Congress began in 2001 with Republicans holding the Presidency, the House of Representatives, and the slimmest of Senate majorities—fifty seats plus Vice President Dick Cheney as the tie-breaking vote. Republicans sought to use budget reconciliation to slash taxes, prompting objections from Democratic Senators who believed that budget reconciliation should be used for deficit-reducing—not deficit-increasing—legislation. But neither the text of the Byrd rule nor the other provisions of the Budget Act explicitly prohibit Senators from using budget reconciliation to pass legislation that increases the deficit during the budget window, and then-Senate Parliamentarian Robert Dove ruled in early 2001 that budget reconciliation could indeed be used to enact deficit-increasing tax cuts.<sup>82</sup>

Dove's ruling reportedly "delighted Republicans and infuriated Democrats."<sup>83</sup> But the Republican majority's satisfaction with Dove would not last much longer. Dove interpreted the Budget Act to allow for only one tax-related reconciliation bill per year, and he also opined that a measure to set aside \$5 billion for natural disasters would violate the Byrd rule on the grounds that the set-aside would not produce a change in revenues or outlays if the funds went unused.<sup>84</sup> Senate Majority Leader Trent Lott responded by instructing the Secretary of the Senate to dismiss Dove. The Secretary of the Senate promptly did so.<sup>85</sup>

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81. *Id.* at S6,678.

82. See David E. Rosenbaum, *Rules Keeper Is Dismissed by Senate, Officials Say*, N.Y. TIMES (May 8, 2001), <http://www.nytimes.com/2001/05/08/us/rules-keeper-is-dismissed-by-senate-official-says.html> [<https://perma.cc/F3YC-U5DN>].

83. *Id.*

84. See SCHICK, *supra* note 35, at 148–49; Charles Tiefer, *Firing Parliamentarian—What Rules?*, DAILY REP. (Fulton Cty., Ga.), May 18, 2001, at 1.

85. See SCHICK, *supra* note 35, at 148–49 (Box 6-2); Nick Anderson & Janet Hook, *Lott to Oust Senate Parliamentarian Who Ruled Against GOP*, L.A. TIMES (May 8, 2001), <http://articles.latimes.com/2001/may/08/news/mn-60735> [<https://perma.cc/R9CE-JXYM>]; Helen Dewar, *Key Senate Official Loses Job in Dispute With GOP*, WASH. POST (May 8, 2001), [http://www.washingtonpost.com/archive/politics/2001/05/08/key-senate-official-loses-job-in-dispute-with-gop/e2310021-0f14-4667-a261-54e6c033207c/?utm\\_term=.b3d6e359c76d](http://www.washingtonpost.com/archive/politics/2001/05/08/key-senate-official-loses-job-in-dispute-with-gop/e2310021-0f14-4667-a261-54e6c033207c/?utm_term=.b3d6e359c76d) [<https://perma.cc/FB7B-UMC8>]; Rosenbaum, *supra* note 82.



The Senate then went ahead and passed the Economic Growth and Tax Reconciliation Act of 2001, which slashed taxes by an estimated \$1.35 trillion over a decade.<sup>86</sup> The Byrd rule required (or had the effect of requiring) the Republicans to add several sunset provisions to the legislation, with some of the bill's tax cuts expiring in 2008 and 2010. These sunset provisions ensured that the bill would not add to the deficit beyond the ten-year budget window established by the applicable budget resolution. Subsequent tax bills under President Bush in 2003<sup>87</sup> and 2006 also included such sunsets.<sup>88</sup>

While the Senate passed five budget reconciliation bills during the Bush years, the 2001–2009 period saw relatively little Byrd rule-related activity on the Senate floor. Two episodes, however, deserve brief mention. The first involved the Deficit Reduction Act of 2005, which included several significant changes to Medicare, Medicaid, and student loan formulas. In December 2005, negotiators from the House and Senate hashed out a conference report that then went back to both chambers for final approval. The House passed the conference report by a 212–206 margin on December 19, 2005, after which House members left Washington for a holiday recess.<sup>89</sup> Senator Kent Conrad then raised a point of order against several provisions in the conference report, including one that would have affected medical malpractice suits brought by Medicare beneficiaries. Under that provision, Medicaid patients could recover for medical malpractice only by showing that defendant hospitals and physicians flunked a “gross negligence” (rather than “negligence”) standard. Senator Conrad argued—and the Parliamentarian evidently agreed—that the budgetary effects of this provision were “merely incidental” to the non-budgetary consequences.<sup>90</sup> A motion to waive the point of order garnered fifty-two votes—well short of the sixty votes needed—and the provision fell out of the final bill. The success of Conrad's point of order not only blocked the medical malpractice provision, but also meant that the final bill that passed the Senate did not match the version of the conference report approved by the House. The House did not approve the Senate's version until February of the following year.<sup>91</sup>

Another example from this period demonstrates how the Byrd rule requirement that out-year deficit effects be determined only on a net basis can produce perverse results.<sup>92</sup> The Tax Increase Prevention and Reconciliation Act

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86. STAFF OF J. COMM. ON TAX'N, JCX-51-01, 107TH CONG., ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1836, at 1–8 (Comm. Print 2001).

87. Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752 (2003).

88. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006).

89. See Sheryl Gay Stolberg, *House Approves Budget Cutbacks of \$39.5 Billion*, N.Y. TIMES (Feb. 2, 2006), <http://www.nytimes.com/2006/02/02/politics/house-approves-budget-cutbacks-of-395-billion.html> [<https://perma.cc/3BMP-HTCW>].

90. 151 CONG. REC. S14,202 (daily ed. Dec. 21, 2005).

91. See Stolberg, *supra* note 89.

92. See Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754, 784–85 (1987); Yin, *supra* note 2, at 222–24.

of 2005 (TIPRA),<sup>93</sup> which did not pass until May 2006,<sup>94</sup> extended lower tax rates on capital gains and dividends. These changes were estimated to produce large revenue losses in the first two years after the budget period.<sup>95</sup> This revenue loss, standing alone, violated the Byrd rule.<sup>96</sup> In order to offset this revenue loss and thus comply with the Byrd rule, the conference agreement added a provision that expanded the ability of taxpayers after 2009 convert traditional IRAs into Roth IRAs.<sup>97</sup> But the Roth IRA conversion provision itself produced an estimated revenue loss, in later years and overall.<sup>98</sup> Nonetheless, as Professor George Yin has chronicled, Senate Budget Committee Chair Judd Gregg “refused to identify to the Parliamentarian any provision, including the Roth IRA conversion provision, as extraneous for purposes of the Byrd Rule.” Instead, Gregg, a New Hampshire Republican, “apparently took the position that the budget effects of the bill beyond that time were not known and therefore could not be the basis for a Byrd Ryle violation.”<sup>99</sup> Because the vote on passage of the bill was only 54–44,<sup>100</sup> the refusal to identify a Byrd rule violation was crucial. Evaluating the result, Professor Yin laments, “The end result was that the addition of a new tax cut provision to a preexisting tax cut bill already in violation of the Byrd Rule somehow was found to eliminate the violation.”<sup>101</sup> Again, as with the 1997 Medicare eligibility episode, the Byrd rule in operation can produce consequences quite far from what its author intended.

In 2007, after Democrats regained control of Congress, Budget Committee Chair Kent Conrad introduced a resolution with a provision aimed at preventing the Senate from considering reconciliation legislation that added to the deficit over a five- or ten-year window. The so-called “Conrad rule” allowed any Senator to raise a point of order against deficit-increasing reconciliation

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93. See generally H.R. Rep. 109-62 (2005).

94. The reconciliation legislation became the Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-122, 120 Stat. 345 (2006).

95. STAFF OF J. COMM. ON TAX’N, JCX-18-06, 109TH CONG., ESTIMATED REVENUE EFFECTS OF THE CONFERENCE AGREEMENT FOR THE “TAX INCREASE PREVENTION AND RECONCILIATION ACT OF 2005,” at 1 (Comm. Print 2006).

96. See generally Wesley Elmore, *Parliamentary Maneuvering Delays Tax Reconciliation Conference*, 110 TAX NOTES 1020 (2006).

97. STAFF OF J. COMM. ON TAX’N, *supra* note 95, at 1; ROBERT KEITH, CONG. RESEARCH SERV., RL33132, BUDGET RECONCILIATION LEGISLATION IN 2005–2006 UNDER THE FY BUDGET RESOLUTION 41 (2006).

98. STAFF OF J. COMM. ON TAX’N, *supra* note 95, at 2; Leonard E. Burman, *Roth Conversions as Revenue Raisers: Smoke and Mirrors*, 111 TAX NOTES 953, 953–54 (2006).

99. Yin, *supra* note 2, at 223; see also 152 CONG. REC. S4,443 (daily ed. May 11, 2006) (statement of Sen. Gregg). Cf. 152 CONG. REC. S4,443 (statement of Sen. Levin criticizing Chair’s position); 152 CONG. REC. S4,443 (statement of Sen. Baucus criticizing Chair’s position and introducing contradictory projections from Finance Committee Democratic staff); Wesley Elmore, *Senate Budget Chair Not Opposed to Controversial Revenue Raiser*, 111 TAX NOTES 15, 16 (2006) (discussing critics of Roth conversion extension).

100. 152 CONG. REC. S4,446 (daily ed. May 11, 2006).

101. Yin, *supra* note 2, at 224. As Yin observes, “successful enforcement of the Byrd Rule depends on highly uncertain long-term budget estimates.” *Id.*

legislation, which would require a three-fifths vote to waive.<sup>102</sup> The Senate approved the measure by a 52–40 vote, effectively putting an end to the use of budget reconciliation for deficit-increasing bills for the next eight years. After Republicans regained control of the chamber in 2015, the Senate voted almost entirely on party lines to repeal the Conrad rule, setting the stage for the deficit-increasing tax legislation of 2017.<sup>103</sup>

#### E. No Longer “Merely Incidental”: The Byrd Rule Reaches New Heights

President Obama’s inauguration in 2009 heralded a new era for budget reconciliation and the Byrd rule. The incoming administration had little interest in the deficit-increasing tax cuts that had been the stuff of reconciliation bills in the Bush years. Its top domestic policy priority was health care, and President Obama told congressional Democrats in April 2009 that they should be prepared to use budget reconciliation to enact health care legislation if that proved necessary to overcome a Senate filibuster.<sup>104</sup>

Several top Senate Democrats—including Budget Committee Chair Kent Conrad and Finance Committee Chair Max Baucus—made clear early on that they would prefer not to use budget reconciliation for health care reform.<sup>105</sup> Two events in 2009 made it possible for Conrad and Baucus to have their wish come true. First, in April, Senator Arlen Specter of Pennsylvania changed his party affiliation to Democrat. Including independents Joe Lieberman of Connecticut and Bernie Sanders of Vermont, who caucused with the majority, this switch brought the size of the Democratic contingent to fifty-nine.<sup>106</sup> Then, at the end of June, Democrat Al Franken of Minnesota emerged triumphant from a protracted recount.<sup>107</sup> This victory meant that the Senate Democrats could break a filibuster.

In December 2009, the Senate voted along party lines to end debate and pass the Patient Protection and Affordable Care Act (ACA). But the story did not end there.<sup>108</sup> In January 2010, Republican Scott Brown scored a surprise win in a

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102. S. Con. Res. 21, 110th Cong., 2d Sess., § 202 (May 17, 2007).

103. S. Con. Res. 11, 114th Cong., 1st Sess., § 3101(f) (May 5, 2015). Two Republican Senators, Ted Cruz of Texas and Rand Paul of Kentucky, voted against the repeal resolution. A third, David Vitter of Louisiana, was not present. *Roll Call Vote 114<sup>th</sup> Congress – 1<sup>st</sup> Session*, SENATE.GOV, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=114&session=1&vote=00171](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=1&vote=00171) [<https://perma.cc/UW9N-9FWW>] (last visited Mar. 26, 2018).

104. See Carl Hulse, *Obama Tactic Shields Health Care Bill From a Filibuster*, N.Y. TIMES (Apr. 24, 2009), <http://www.nytimes.com/2009/04/25/us/politics/25budget.html> [<https://perma.cc/5YWP-746F>].

105. *Id.*

106. To be sure, Senator Specter might have voted in favor of the Affordable Care Act even if he had remained a Republican. But his switch of party and a looming Democratic Senate primary made it more likely that he would support the central platform plank of the Democratic President. *Cf.* Carl Hulse, *Specter Switches Parties*, N.Y. TIMES: THE CAUCUS (Apr. 28, 2009), <https://thecaucus.blogs.nytimes.com/2009/04/28/specter-will-run-as-a-democrat-in-2010> [<https://perma.cc/LWH7-8EE3>] (discussing Specter’s primary calculus).

107. See Josh Kraushaar & Manu Raju, *Coleman Concedes to Franken*, POLITICO (June 30, 2009), <https://www.politico.com/story/2009/06/coleman-concedes-race-to-franken-024383> [<https://perma.cc/HW39-HWVU>].

108. See Emily Smith, *Timeline of the Health Care Law*, CNN (June 28, 2012), <https://www.cnn.com/>

special election for a U.S. Senate seat from Massachusetts previously occupied by the late Edward Kennedy, and Brown's victory brought the size of the Democratic caucus back down to fifty-nine. House Democrats insisted on changes to the Senate version of the ACA, and Senate Democrats now lacked the sixty votes needed to break a filibuster on the compromise bill. However, Congressional Democrats succeeded in breaking the logjam through a series of creative parliamentary maneuvers. First, the House passed the Senate's version of the ACA without amendment, a move that allowed President Obama to sign the ACA into law without the need for another Senate vote. Next, the House and Senate used the budget reconciliation process to pass the Health Care and Education Reconciliation Act of 2010 (HCERA), which included a number of amendments to the ACA upon which House Democrats had insisted. These included larger tax credits to help low- and middle-income households buy insurance, a repeal of the controversial "Cornhusker Kickback," a small reduction in the penalty for individuals who failed to comply with the health insurance mandate, and a new 3.8% tax on investment income of households earning more than \$250,000 a year.

During the Byrd bath over the HCERA, Parliamentarian Alan Frumin reportedly advised Democrats that several provisions in early drafts of the reconciliation bill would flunk the Byrd rule. These included a provision that would have limited the ability of health insurers to raise rates, a provision that would have allowed community health centers and federal grantees to purchase prescription drugs at discounted prices, a measure that would have enhanced the powers of the Independent Payment Advisory Board, a provision that would have required existing group plans to cover preventive services, and a provision that would have barred insurers from charging higher rates to smokers.<sup>109</sup> Republican Senators also raised points of order against two provisions of the HCERA that affected Pell grant funding, and those provisions were removed from the final bill.<sup>110</sup> These changes required the House to vote a second time on the HCERA so that its version matched the Senate's. The second vote, however, delayed final passage by only a matter of hours.<sup>111</sup>

The Byrd rule clashes over the 2010 reconciliation bill represented only the opening volley in what would become a years-long effort to undo President Obama's signature legislative achievement via budget reconciliation. In November 2015, Parliamentarian Elizabeth MacDonough ruled that budget reconciliation could not be used to repeal the ACA's individual and employer mandates—evidently because the budgetary effects were merely incidental to the nonbudgetary consequences.<sup>112</sup> Later that year, however, MacDonough

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2012/06/28/politics/supreme-court-health-timeline/index.html [https://perma.cc/2YRN-QNP2].

109. See Jay Newton-Small, *Al Frumin's Bad Day*, TIME (Mar. 25, 2010), <http://swampland.time.com/2010/03/25/al-frumins-bad-day> [https://perma.cc/76BX-JQHR].

110. See Health Care and Education Reconciliation Act of 2010, H.R. 4872, 111th Cong. (2010).

111. *Id.*

112. See Niels Lesniewski, *Does Obamacare Repeal Have a Senate Path Without the Mandates?*, ROLL

apparently agreed with Senate Republicans that budget reconciliation could be used to pass a bill that would leave the individual and employer mandates in place but reduce the penalties for violating either mandate to zero.<sup>113</sup> This decision had only symbolic significance at the time because any legislation rolling back the ACA would surely have been vetoed by President Obama. MacDonough's determination, however, set the stage for Republican efforts to repeal and replace the ACA via budget reconciliation once the party gained control of Congress and the presidency in the November 2016 election—and ultimately for the successful repeal of the individual mandate as part of the December 2017 tax law.

The successive Republican repeal-and-replace efforts in the spring and summer of early 2017 brought new attention to the Byrd rule and to the Parliamentarian. In the summer of 2017, as Republicans sought to pass the so-called “Better Care Reconciliation Act,” MacDonough concluded that a provision that would have temporarily blocked Medicaid funding for Planned Parenthood violated the Byrd rule. MacDonough also indicated that a provision preventing ACA tax credits from being used to purchase health insurance that covers abortion would have violated the Byrd rule's requirements.<sup>114</sup> Aside from these abortion-related determinations, MacDonough made a number of other significant decisions in Byrd baths leading up to a floor vote on ACA repeal legislation in July 2017. Among the provisions that were removed from the legislation based on MacDonough's Byrd bath advice were:

- A provision authorizing states to allow certain Medicaid-funded plans to drop coverage for “essential health benefits” that the Affordable Care Act required them to cover;
- A provision establishing a six-month waiting period before consumers could enroll in individual market plans if they had failed to maintain continuous coverage;
- A provision allowing states to modify the ACA's medical loss ratio, which currently requires insurers to spend at least 80% of premium dollars on medical care rather than administrative costs and profits;
- A provision allowing states to use certain Medicaid funds for non-health purposes;
- A provision allowing insurers to charge older patients up to five times what they charge younger patients; and
- A provision allowing states to waive various ACA rules (including rules related to essential health benefits and preexisting conditions) if they adopted “innovation” plans

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CALL (Nov. 12, 2015), <http://www.rollcall.com/news/home/does-obamacare-repeal-have-a-senate-path-without-the-mandates> [https://perma.cc/G3AN-X3ZU].

113. Alexander Bolton, *Senate Republicans Get Green Light for ObamaCare Repeal Bill*, THE HILL (Nov. 10, 2015), <http://thehill.com/homenews/senate/259752-senate-gop-gets-green-light-for-obamacare-repeal-bill> [https://perma.cc/3G9J-FMNV].

114. SENATE BUDGET COMM. MINORITY STAFF, BACKGROUND ON THE BYRD RULE DECISIONS (2017), [http://www.budget.senate.gov/imo/media/doc/Background%20on%20Byrd%20Rule%20decisions\\_7.21%5b1%5d.pdf](http://www.budget.senate.gov/imo/media/doc/Background%20on%20Byrd%20Rule%20decisions_7.21%5b1%5d.pdf) [https://perma.cc/N65N-CD5A]. For a summary of some of MacDonough's other Byrd rule determinations during this summer's health care debate, see Daniel Hemel, *Graham-Cassidy Is on a Collision Course With the Byrd Rule*, MEDIUM (Sept. 19, 2017), <http://medium.com/whatever-source-derived/graham-cassidy-is-on-a-collision-course-with-the-byrd-rule-50a760f09419> [https://perma.cc/M69E-HUX6].

that did not add to the federal deficit.<sup>115</sup>

Ultimately, the Republican effort to repeal the ACA in July 2017 failed when three Republican Senators—Susan Collins of Maine, John McCain of Arizona, and Lisa Murkowski of Alaska—voted against final passage.<sup>116</sup> Yet the Senate Parliamentarian soon would reemerge as a crucial player during the race to enact a new tax law before the end of 2017, and the Byrd rule would go on to shape the final bill in ways large and small.

#### IV

##### THE BYRD RULE AND THE 2017 TAX LAW

The tax bill that reached the Senate floor in December 2017 reflected the Byrd rule's influence in a number of important respects. The legislation was crafted in the shadow of the Byrd rule's prohibition on out-year deficit effects; thus, the Senate Finance Committee added a series of sunset clauses so as to ensure that the bill did not add to the deficit beyond the ten-year budget window.<sup>117</sup> Virtually all of the individual tax provisions—including the new rate structure, the expansion of the child tax credit, the increase in the standard deduction, and the new twenty percent deduction for pass-through business income—will cease to apply after tax year 2025.<sup>118</sup> The doubling of the estate and gift tax exemption also will lapse on January 1, 2026.<sup>119</sup> These sunset provisions came as no surprise to informed observers, who recalled the bevy of similar sunsets under the Bush tax cuts. Less predictable were the ways in which the Senate bill was modified to comply with the Byrd rule's prohibition on provisions that have no or only a “merely incidental” budgetary effect.

The first unexpected turn of events came in late November, after the House already had approved its version of the bill but before the Senate as a whole took action. The Parliamentarian reportedly ruled that a “trigger” mechanism suggested by Republican Senator Bob Corker of Tennessee—which would have rolled back some of the bill's tax cuts in the event that future revenue fell short of optimistic projections—violated the Byrd rule.<sup>120</sup> The basis for the Parliamentarian's opinion is unclear. The most plausible explanation is that the trigger failed to satisfy the requirement that every provision must “produce a change in outlays or revenues” because the provision would produce no such

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115. See Hemel, *supra* note 114.

116. 163 CONG. REC. S4,399 (daily ed. July 27, 2017) (roll call vote); see also Robert Pear and Thomas Kaplan, *Senate Rejects Slimmed-Down Obamacare Repeal as McCain Votes No*, N.Y. TIMES (July 27, 2017), [http://www.nytimes.com/2017/07/27/us/politics/obamacare-partial-repeal-senate-republicans-revolt.html?\\_r=0](http://www.nytimes.com/2017/07/27/us/politics/obamacare-partial-repeal-senate-republicans-revolt.html?_r=0) [https://perma.cc/QRV9-KLDJ].

117. See generally H.R. 1, 115th Cong. (1st Sess. 2017) (as passed by Senate, Dec. 20, 2017).

118. See *id.* § 1101(j) (sunset of increased standard deduction); § 11021(a) (sunset of increased child credit); § 10221(a) (sunset of 20% deduction in new § 199A(h)).

119. *Id.* § 11061(a) (sunset of doubling of estate tax exclusion).

120. See Ryan McCrimmon, *GOP Searching for New Tax Tweak After Senate Parliamentarian Guidance*, ROLL CALL (Nov. 30, 2017), <http://www.rollcall.com/news/policy/tax-increase-trigger-would-violate-rules-perdue-says> [https://perma.cc/5UV4-XM3H].

change in the event that the trigger did not activate.<sup>121</sup> Senator Corker initially voted against the bill without the trigger, though he switched his position after the House-Senate conference committee produced a compromise between the two chambers.<sup>122</sup>

Hours before the Senate passed its first version of the bill at the beginning of December, Senate Finance Committee Chair Orrin Hatch stripped a number of provisions for purposes of “Byrd rule compliance,” according to a Finance Committee release.<sup>123</sup> Senator Hatch presumably acted after receiving advice from the Parliamentarian that these provisions would violate the Byrd rule. The measures stripped at the beginning of December included, with JCT’s estimates of the ten-year revenue effects in parentheses<sup>124</sup>:

- A provision that would have required foreign airlines to pay U.S. corporate income tax on a portion of their profits (\$200 million revenue gain);
- A provision that would have allowed taxpayers to set up 529 college savings plans for children in utero (\$100 million revenue loss);
- A provision that would have repealed the tax-exempt status of professional sports leagues, including the U.S. Tennis Association and the PGA Tour (\$100 million revenue gain);
- A provision that would have exempted certain private foundations from a two hundred percent excise tax on the value of for-profit companies that they wholly own—apparently intended to spare the foundation that holds the Newman’s Own company<sup>125</sup> (revenue loss of less than \$50 million, presumably because any foundation would choose to sell the company rather than pay the tax); and
- A provision that would have limited the ability of plaintiff-side lawyers to deduct expenses in pending contingency-fee cases (\$50 million revenue gain).<sup>126</sup>

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121. 2 U.S.C. § 644(b)(1)(A) (2012).

122. See Jordan Buie, *Sen. Bob Corker Reverses Course, Will Vote for Republican Tax Bill*, TENNESSEAN (Dec. 15, 2017), <http://www.tennessean.com/story/news/2017/12/15/sen-bob-corker-reverses-course-vote-republican-tax-bill/956602001> [<https://perma.cc/YE2K-LWQD>].

123. See TAX CUTS AND JOBS ACT (H.R.) CHANGES MADE TO THE COMMITTEE-REPORTED BILL DURING FLOOR CONSIDERATION: CHANGES MADE BY PERFECTING AMENDMENT (HATCH #1618) 2, available at <http://www.finance.senate.gov/imo/media/doc/12.4.17%20SxS%20Appendix%20-%20FINAL.pdf> [<https://perma.cc/7QFB-JQZ9>] (last visited Apr. 12, 2018) (Provisions Removed for Byrd Rule Compliance).

124. STAFF OF J. COMM. ON TAX’N, JCX-62-17, 115TH CONG., ESTIMATED REVENUE EFFECTS OF MODIFICATIONS TO THE “TAX CUTS AND JOBS ACT,” AS REPORTED BY THE COMMITTEE ON FINANCE 1–4 (Comm. Print 2017).

125. Brian Faler, *Newman’s Own Faces Mammoth Tax Bill after Lawmakers Fail to Spare the Foundation*, POLITICO (Dec. 7, 2017), <http://www.politico.com/story/2017/12/07/newmans-own-tax-bill-congress-212925> [<https://perma.cc/P92E-M7W9>]. As discussed below, the provision benefitting Newman’s Own ultimately became law as part of the Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 41110, 132 Stat. 64 (2018) (to be codified at 26 U.S.C. § 4943(g)). See *infra* note 168 and accompanying text.

126. Significant changes to the low income housing tax credit—which, among other things, would have renamed the credit as “the Affordable Housing Tax Credit” and made it harder for local officials to block the construction of new developments in their communities—were also stripped from the Senate bill on Byrd rule grounds. See Michael Novogradac, *Senate Approves Tax Cuts and Jobs Act with Some Changes from Committee-Passed Version*, NOVOGRADAC (Dec. 2, 2017), <https://www.novoco.com/notes-from-novogradac/senate-approves-tax-cuts-and-jobs-act-some-changes-committee-passed-version> [<https://perma.cc/82FU-MATK>].

One notable aspect of the provisions stripped from the Senate bill in early December was that several of them “scored”—in other words, the JCT assigned a dollar value to their revenue effects. Recall that the vaccine price provision in the Omnibus Budget Reconciliation Act of 1993 ultimately survived a Byrd rule challenge notwithstanding the fact that CBO could not quantify the revenue effects of the measure.<sup>127</sup> Recall as well that the imported tobacco provision in 1993 legislation made it into the final bill even though the revenue effect—\$6 million a year over five years—was smaller than several of the measures removed by Senator Hatch.<sup>128</sup> All of these decisions suggest that the current Parliamentarian is applying the Byrd rule’s “merely incidental” proviso more robustly than did her predecessors.

The list of provisions stripped from the Senate bill also illustrates the inherent subjectivity of the Parliamentarian’s “merely incidental” determination. For instance, consider whether the provision to allow taxpayers to set up 529 savings plans for children in utero has significant non-budgetary consequences, such that the revenue effects can be characterized as “merely incidental.” Key to that determination is an assessment of the symbolic significance of a tax provision that places fetuses on the same plane as children who have emerged from the womb. Evidently, the Parliamentarian concluded that the provision was primarily intended to convey a message regarding the morality of abortion rather than to facilitate college savings by expecting parents. That seems to be the correct determination, but it requires an evaluation of motives as well as budget math.

The list of provisions removed in early December also indicates that measures will run afoul of the “merely incidental” proviso if they affect a limited number of taxpayers. Notably, this pattern applies both to provisions that bestow benefits on a narrow group—for example, the Newman’s Own provision—as well as measures that would bring such limited benefits to an end—for example, the foreign airline and sports league provisions. Such applications of the Byrd rule stand in contrast to previous Parliamentarians’ interpretations. For example, a provision that conveyed several hundred acres of public land to the Texas Plains Girl Scout Council in exchange for one dollar—arguably the epitome of a special interest measure—survived a Byrd rule challenge during the debate over the Balanced Budget Act of 1995.<sup>129</sup>

The Senate Parliamentarian’s Byrd rule determinations continued to shape the tax legislation as it moved closer to passage. In mid-December, the Parliamentarian apparently informed Senators that a controversial provision in the House version—which would have modified the so-called Johnson amendment—violated the Byrd rule’s “merely incidental” proviso.<sup>130</sup> The

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127. See *supra* text accompanying notes 59–60.

128. See *supra* text accompanying notes 61–62.

129. See 141 CONG REC. S17,247 (daily ed. Nov. 17, 1995).

130. See Heather Long, *In Small Win for Democrats, the Final Tax Bill Will Not Include a Provision Allowing Churches to Endorse Political Candidates*, WASH. POST (Dec. 14, 2017), <http://www.washingtonpost.com/news/wonk/wp/2017/12/14/in-small-win-for-democrats-the-final-tax->



Johnson amendment—named for its sponsor, then-Senator and future President Lyndon Johnson—states that a nonprofit organization exempt from taxation under section 501(c)(3) cannot “participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.” The House bill would have created a safe harbor for statements “made in the ordinary course of the organization’s regular and customary activities” that results in “not more than de minimis incremental expenses.”<sup>131</sup> The safe harbor would have applied from 2019 to 2023.<sup>132</sup>

The question of whether the Johnson amendment violates the Byrd rule’s “merely incidental” proviso illustrates the ambiguity and subjectivity of that restriction. On the one hand, the House provision potentially would have enormous consequences for churches and other charities. As one co-author of this article wrote in the *New York Times*, “permitting charities to engage directly in electoral politics will reduce the respect they have long been afforded” and “will harm the sector.”<sup>133</sup> It may also distort the political marketplace by allowing tax-deductible donations to go toward supporting candidates. And the motive for the provision clearly had little to do with revenue. Then-candidate Donald Trump made repeal of the Johnson amendment a major component of his appeal to religious conservatives during the 2016 campaign.<sup>134</sup> House Republicans had introduced legislation called the “Free Speech Fairness Act” to roll back the Johnson amendment several times before, with nary a reference to the revenue effects.<sup>135</sup>

On the other hand, the House provision would indeed have had a revenue effect. JCT estimated that this change would lose revenue of \$2.1 billion over the five years for which it would have been in place, as donors who otherwise might

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bill-wont-include-a-provision-to-allow-churches-to-endorse-political-candidates/?utm\_term=.c0e999b7288f [https://perma.cc/QM95-U4FR].

131. H.R. 781, 115th Congress (2017).

132. See *HOUSE PASSED: Historic Legislation to Overhaul Nation’s Tax Code for 1st Time in 31 Years*, WAYSANDMEANS.HOUSE.GOV (Nov. 16, 2017) <https://waysandmeans.house.gov/house-passed-historic-legislation-overhaul-nations-tax-code-1st-time-31-years/> [https://perma.cc/DSW5-K84F]. As originally proposed, the exception applied only to churches. See H.R. 1 § 5201, 115th Cong. (1st Sess. 2017). The House provision was amended to apply to all section 501(c)(3) organizations but only for the period beginning after December 31, 2018 and ending on December 31, 2023. See *Amendment to the Amendment in the Nature of a Substitute to H.R. 1 Offered by Mr. Brady of Texas*, WAYSANDMEANSFORMS.HOUSE.GOV (Nov. 9, 2017), [http://waysandmeansforms.house.gov/uploadedfiles/chairman\\_amendment\\_2.pdf](http://waysandmeansforms.house.gov/uploadedfiles/chairman_amendment_2.pdf) [https://perma.cc/K82V-2Q3F].

133. Ellen P. Aprill, Opinion, *Leave the Johnson Amendment Alone*, N.Y. TIMES (Dec. 10, 2017), <http://www.nytimes.com/2017/12/10/opinion/johnson-amendment-campaigns.html> [https://perma.cc/S339-JMK3].

134. See Sarah Pulliam, *Bailey, Trump Promised to Destroy the Johnson Amendment. Congress is Targeting it Now*, WASH. POST (July 14, 2017), [http://www.washingtonpost.com/news/acts-of-faith/wp/2017/06/30/trump-promised-to-destroy-the-johnson-amendment-congress-is-targeting-it-now/?utm\\_term=.63c690e90414](http://www.washingtonpost.com/news/acts-of-faith/wp/2017/06/30/trump-promised-to-destroy-the-johnson-amendment-congress-is-targeting-it-now/?utm_term=.63c690e90414) [https://perma.cc/S4YV-VE64]; see generally Ellen P. Aprill, *Amending the Johnson Amendment in the Age of Cheap Speech*, 2018 U. ILL. L. REV. ONLINE 1 (Jan. 16, 2018), <http://illinoislawreview.org/online/amending-the-johnson-amendment-in-the-age-of-cheap-speech> [https://perma.cc/LN8J-HEKS].

135. See Free Speech Fairness Act, H.R. 6195, 114th Cong. (2016); see also Aprill, *supra* note 134.

have made nondeductible contributions to social welfare and political organizations instead made deductible gifts to 501(c)(3) entities.<sup>136</sup> The Parliamentarian, however, decided that this dollar amount did not shield the provision from the Byrd rule.<sup>137</sup> As far as we are aware, this decision was the first and only time that the Parliamentarian has determined that a provision with revenue effects exceeding \$1 billion flunks the Byrd rule on “merely incidental” grounds.

The Senate Parliamentarian’s guidance with respect to the Johnson amendment moved the House-Senate conference committee to remove that measure from its conference report. Still other provisions of the conference report would be the subject of last-minute Byrd rule challenges. One such provision, pushed by Republican Senator Ted Cruz of Texas, would have permitted Section 529 accounts to be used for homeschooling.<sup>138</sup> A second would have exempted colleges from a new 1.4% excise tax on endowment income if their students were not “tuition-paying.” This exemption was reportedly designed by Senate Majority Leader Mitch McConnell, who sought to spare Berea College in his home state of Kentucky from the new tax.<sup>139</sup>

The Parliamentarian’s rulings on these two measures reflect her apparent judgment that the political and symbolic motivations for the homeschooling provision and the carveout from the new excise tax outweighed the (nonzero) budgetary consequences. Yet they also reflect a decision to splice sections of the conference report in ways that are hard to rationalize. In the Section 529 case, the relevant provision of the conference report allowed for funds from 529 accounts to be used for expenses related to elementary and secondary public, private, and religious school attendance as well as for homeschooling. The Parliamentarian decided to analyze the homeschooling element separately from the rest of the provision. In the case of the excise tax on endowment income, the Parliamentarian evidently considered the term “tuition-paying” apart from all that surrounded it rather than considering the new excise tax measure as a whole. In these cases, the Parliamentarian appears to be applying the Byrd rule on a word-by-word and sentence-by-sentence basis.

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136. See generally STAFF OF J. COMM. ON TAX’N, JCX-49-17, 115TH CONG., ESTIMATED REVENUE EFFECTS OF THE CHAIRMAN’S AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 1 (Comm. Print 2017).

137. See Richard Rubin, *Proposal to Let Churches and Other Nonprofits Get Political Blocked from Tax Bill*, WALL ST. J. (Dec. 14, 2017), <https://www.wsj.com/livecoverage/tax-bill-2017/card/1513303223>.

138. See Cruz *Provision on 529 Plans for Homeschoolers Falls out of Bill*, WALL ST. J. (Dec. 20, 2017), <http://www.wsj.com/livecoverage/tax-bill-2017/card/1513748902>.

139. The parliamentarian stripped the qualification “tuition-paying” from the requirements regarding the minimum number of students triggering the provision. Berea College admits only students whose families cannot pay for college. See Erica L. Green, *How a Tuition-Free College Turned Into a Casualty of the Tax Wars*, N.Y. TIMES (Dec. 20, 2017), <http://www.nytimes.com/2017/12/20/us/politics/berea-college-bernie-sanders-mcconnell-tax-cut.html> [<https://perma.cc/V9T2-JUB7>]. Note that this provision also became law in the Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 41109(a), 132 Stat. 64 (2018) (amending 26 U.S.C. § 4968(b)(1)). See *infra* note 169 and accompanying text.

Not all of the Senate Parliamentarian's rulings regarding the "merely incidental" proviso went against the Republicans. Most controversially, the Parliamentarian advised that a measure opening the Alaska National Wildlife Refuge (ANWR) to oil drilling did not run afoul of the Byrd rule even though the CBO projected that the measure would raise only \$910 million in leasing revenue over a ten-year window,<sup>140</sup> and even though ecologists and biologists said that the measure would have a dramatic impact on the habitats of polar bears and other Arctic animals.<sup>141</sup> The Parliamentarian reportedly said that an early version of the ANWR provision violated the Byrd rule because it encroached on the jurisdiction of the Senate Environmental and Public Works Committee,<sup>142</sup> but Senate Republicans resolved that concern with a minor wording change that left the heart of the ANWR provision intact.<sup>143</sup>

Perhaps the oddest Byrd rule challenge was to the short name of the bill, the "Tax Cuts and Jobs Act." According to a spokesman for Senate Budget Committee ranking member Bernie Sanders, "[t]he short title has no budgetary impact."<sup>144</sup> The Parliamentarian agreed. Her determination flew in the face of advice given by her predecessor, Alan Frumin, who indicated in the summer of 1993 that he did not view short title provisions as violations of the Byrd rule. A Budget Committee print from around that time noted that the free pass for short title provisions was apparently motivated by "the theory that the [Byrd] Rule does not cover trifling matters."<sup>145</sup>

These Byrd rule challenges to the conference report led to last-minute maneuvering by both parties. On December 19, 2017, the House passed the conference report in a form that included the 529 provision, the exemption from the endowment tax for colleges without tuition-paying students, and the "Tax Cuts and Jobs Act" short title. When the Senate took up the conference report later that same day, Senator Sanders raised points of order regarding each of these provisions.<sup>146</sup> Republican Senator Mike Enzi of Wyoming moved for waiver of Sanders's objections.<sup>147</sup>

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140. 163 CONG. REC. S7,710 (daily ed. Dec. 1, 2017).

141. *Id.* at S7,708–10.

142. See Niels Lesniewski, *Tax Overhaul's Arctic Drilling Byrd Problems Resolved*, ROLL CALL (Nov. 29, 2017), <http://www.rollcall.com/news/policy/byrd-rule-imperils-arctic-drilling-provisions-tax-bill> [<https://perma.cc/D23W-MFK3>].

143. See Elwood Brehmer, *ANWR Clears Senate, Young Named to Conference Panel*, ALASKA J. COM. (Dec. 5, 2017), [http://www.alaskajournal.com/2017-12-05/anwr-clears-senate-young-named-conference-panel#.WmVIRZO7\\_os](http://www.alaskajournal.com/2017-12-05/anwr-clears-senate-young-named-conference-panel#.WmVIRZO7_os) [<https://perma.cc/YL6C-GM3S>].

144. Naomi Jagoda, *Senate Parliamentarian Rules against GOP Tax Bill's Name*, THE HILL (Dec. 19, 2017), <http://thehill.com/policy/finance/365691-senate-parliamentarian-rules-against-gop-tax-bills-name> [<https://perma.cc/XJN5-89E9>].

145. DAUSTER, *supra* note 15, at 206.

146. 163 CONG. REC. S8,101 (Dec. 29, 2017). Senator Sanders specified that the short title violated the Byrd rule constraint requiring a change in outlays or revenues and that the other two provision came within the merely incidental category.

147. *Id.*

The ensuing debate on the Senate floor focused primarily on the Cruz amendment that would have allowed 529 plans to be used for homeschooling. Senator Cruz accused his Democratic colleagues of taking away an important benefit from “50 million schoolkids” on the basis of “an obscure procedur[al] rule that nobody at home knows what it is.”<sup>148</sup> Senator Ron Wyden of Oregon, the ranking Democrat on the Finance Committee, responded that the “modest budget impact” of the Cruz amendment “is vastly outweighed by the profound impact, as a matter of social and education policy, of providing Federal support for homeschooling for the first time.”<sup>149</sup> The motion to waive the Byrd rule with respect to the Cruz amendment, the endowment tax exemption, and the short title ultimately failed on a strict party line vote.<sup>150</sup>

The fallout from the Byrd rule violations in the conference report turned out to be limited. Republicans in the Senate passed a “clean” bill early on the morning of December 20 omitting the measures that had been the subject of successful Byrd rule challenges. House Republicans re-passed the modified conference report later that same day. The Byrd rule made for high drama on C-SPAN, but did not ultimately prevent passage of the legislation before members of the House and Senate left Washington, D.C., for the winter holiday.

## V

### THE FUTURE OF THE BYRD RULE

The immediate aftermath of the passage of the most sweeping tax law of the last thirty years is an appropriate moment for reflection on the Byrd rule’s role in the tax lawmaking process. This final part considers whether and how the Byrd rule will continue to shape future tax legislative efforts, concluding with tentative thoughts on the normative implications of the Byrd rule’s increasing prominence.

#### A. Three Futures for the Byrd Rule

The race toward tax “reform” at the end of 2017 might seem to suggest that the Byrd rule will continue to shape the tax legislative process in important ways. As long as a narrow majority in the Senate seeks to enact tax legislation without broad bipartisan support, budget reconciliation would seem to be the only available route around a filibuster. From the vantage point of early 2018, it appears exceedingly unlikely that either party will gain a sixty-vote Senate supermajority in the upcoming midterm elections, and it seems even less probable that the relative amity between the parties characteristic of the late 1980s and early 1990s will reemerge anytime soon. All of this suggests that the Byrd rule’s prominence in the tax lawmaking process will be long lasting.

There are, however, two alternative futures for the Byrd rule and the tax lawmaking process. The first would involve an end to the Senate filibuster.

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148. 163 CONG. REC. S8,139 (daily ed. Dec.19, 2017).

149. *Id.*

150. 163 CONG. REC. S8,141 (daily ed. Dec. 19, 2017).

Without the filibuster, there would be no need to use the budget reconciliation process to circumvent the threat of endless floor debate. Thus, the Byrd rule would be rendered little more than an arcane limit on a rarely invoked procedural pathway.

The second alternative future would involve undermining the Senate Parliamentarian's independence or influence. The Majority Leader could instruct the Secretary of the Senate to install a Parliamentarian who would rubber-stamp majority-backed bills, or the Presiding Officer could refuse to heed the Parliamentarian's advice on controversial Byrd rule questions. In this scenario, the legislative filibuster would remain in place, and so the Senate majority still would need to rely on budget reconciliation to enact legislation by simple majority vote, but the Byrd rule would no longer impose binding limits on the contents of budget reconciliation bills.

As for the first, one of the most curious facts about the Senate is that the rule requiring a three-fifths supermajority for cloture can itself be changed by simple majority vote.<sup>151</sup> Senate Democrats invoked this so-called "nuclear option" in November 2013 to eliminate the use of the filibuster against all nominations except for nominations to the U.S. Supreme Court.<sup>152</sup> Senate Republicans did the same in April 2017 to allow for cloture with respect to Supreme Court nominations by simple majority vote.<sup>153</sup> And President Trump called on Senate Republicans to invoke the nuclear option again to pass a budget during the government shutdown of January 2018.<sup>154</sup>

Yet there are several factors that may deter the Senate majority from invoking the nuclear option for legislation. First, veteran lawmakers who have internalized the Senate's norms may be reluctant to break with the chamber's traditions. Second, members of the Senate majority are well aware that they may find themselves in the minority in the future, and thus that disempowering the minority today means that they may be members of a disempowered minority just a few years down the road. Third, the more moderate members of the Senate majority may be concerned that ending the filibuster will render them irrelevant. For example, the fifty-first most conservative member of a Republican-controlled Senate knows that, without the filibuster, fifty of her Republican colleagues can pass legislation that she opposes. Fourth and finally, specific Senators—namely

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151. See Charlie Savage, *The Senate Filibuster, Explained*, N.Y. TIMES (Apr. 3, 2017), <http://www.nytimes.com/2017/04/03/us/politics/filibuster-supreme-court-neil-gorsuch.html> [<https://perma.cc/TEV6-8NMB>].

152. *Id.*

153. See Ed O'Keefe & Sean Sullivan, *Senate Republicans Go "Nuclear," Pave the Way for Gorsuch Confirmation to Supreme Court*, WASH. POST (Apr. 6, 2017), [http://www.washingtonpost.com/powerpost/senate-poised-for-historic-clash-over-supreme-court-nominee-neil-gorsuch/2017/04/06/40295376-1aba-11e7-855e-4824bbb5d748\\_story.html?utm\\_term=.77fb5fa3a765](http://www.washingtonpost.com/powerpost/senate-poised-for-historic-clash-over-supreme-court-nominee-neil-gorsuch/2017/04/06/40295376-1aba-11e7-855e-4824bbb5d748_story.html?utm_term=.77fb5fa3a765) [<https://perma.cc/38NB-G2E6>].

154. See Rebecca Savransky, *Trump Calls for Republicans to Trigger "Nuclear Option" If Stalemate Continues*, THE HILL (Jan. 21, 2018), <http://thehill.com/homenews/administration/369971-trump-calls-for-republicans-to-go-nuclear-if-stalemate-continues> [<https://perma.cc/8FG5-F2ZP>].

senior members of the Budget Committee—have an interest in the budget reconciliation process remaining relevant. Without the filibuster, the budget reconciliation process would be mostly irrelevant, and these Senators would exert significantly less influence over legislative outcomes.

To be sure, the first three factors did not prevent the Senate from changing its procedural rules several times in the past, nor did they prevent the Democratic and Republican caucuses from going nuclear on nominations in 2013 and 2017, respectively. The fourth factor—senior Budget Committee members' interest in maintaining the relevance of budget reconciliation—presumably would not affect those Senators' support for the nuclear option with respect to nominations, which never go through the Budget Committee. At the same time, Senators who are not members of the Budget Committee may have an interest in reducing the use of budget reconciliation for precisely the reason that Senator Dole stated: the budget reconciliation process potentially makes non-Budget Committee members feel as if they occupy subordinate positions.

As for the possibility that the Senate majority will undermine the Parliamentarian's independence and influence, some of the same factors that may make the Senate majority reluctant to end the filibuster also may deter them from pursuing this alternative path. The norm of deference to the Parliamentarian on procedural matters is well entrenched, and members of the majority know that if Presiding Officers from their party disregard this norm or if the Majority Leader installs a partisan as Parliamentarian, the other party will do the same if and when it gains control of the chamber. Still, there is at least some support among Senate Republicans for going down this road: most outspokenly, in March 2017, Senator Cruz urged his Republican colleagues to consider whether the Presiding Officer should simply disregard the Parliamentarian's advice if the Parliamentarian proved to be an obstacle to ACA repeal.<sup>155</sup>

The perils of prediction apply here, and neither of these alternative futures can be confidently ruled out. What is clear is that the Senate's supermajoritarian norms have proven to be remarkably resilient, though somewhat less so over the past half-decade. The surest conclusion is that as long as the legislative filibuster remains in place and the Parliamentarian continues to be an independent interpreter of Senate procedure whose views are heeded by the Presiding Officer, the budget reconciliation process will likely remain an important route for tax legislation and that the Byrd rule will continue to shape outcomes.

## B. The Byrd Rule's Ramifications

The most charitable view of the Byrd rule goes something like the following: by preventing the Senate from passing legislation that increases the deficit

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155. See Alexander Bolton, *Cruz: Let's Overrule Senate Officer to Expand ObamaCare Bill*, THE HILL (Mar. 9, 2017), <http://thehill.com/homenews/senate/323272-cruz-lets-overrule-senate-officer-to-expand-obamacare-bill> [https://perma.cc/568C-SNDC].

beyond the budget window, the Byrd rule imposes a measure of fiscal discipline on Congress. Insofar as the “merely incidental” proviso leads to the excision of provisions such as the Newman’s Own tax change and the Berea College carveout, the rule serves to limit the use of budget reconciliation for what are essentially giveaways to favored interests. By narrowing the range of issues that can be considered in a budget reconciliation bill, the rule reduces the risk that tax and spending legislation will be held up by fights over largely unrelated issues, such as abortion or immigration. And by forcing the majority party to seek support from the minority on more matters, the Byrd rule promotes a more consensus-oriented lawmaking process.

There is a measure of truth to each of these claims. But the Byrd rule is also susceptible to less charitable interpretations: the rule’s effect on fiscal discipline is ambiguous and perhaps even perverse; it can be an obstacle to compromise as much as a catalyst; it probably contributes to the tax code’s extraordinary complexity; and the way that the Byrd rule is presently applied—through closed-door Byrd baths and unpublished advice from the Parliamentarian to the Presiding Officer—makes an already-opaque tax lawmaking process even less transparent.

### 1. Fiscal Discipline

As a tool for imposing fiscal discipline on Congress, the Byrd rule has turned out to be somewhat of a toothless tiger. Congress can pass legislation that increases the deficit during the window set by the budget resolution and then add sunset provisions to avert out-year deficit effects without running afoul of the rule. This well-documented practice<sup>156</sup> has become a standard tactic for Senate Republicans seeking to enact tax cuts. Additionally, successive extensions can transform nominally “temporary” deficit-increasing provisions into effectively permanent features of the tax code.

Arguably, the Byrd rule has now become worse than worthless as a deficit-control mechanism. First, once the House and Senate pass a concurrent resolution with a deficit cap, that cap tends to become both a ceiling and a floor. Thus, the budget resolution passed in October 2017 allowed Congress to add \$1.5 trillion to the deficit over a ten-year window, and the final legislation added more than \$1.4 trillion to the deficit on a static basis.<sup>157</sup> The \$1.5 trillion figure operated both as a limit on what Congress could add to the deficit and as a license to run up a tab of approximately that amount. Previous budget reconciliation efforts reflect a similar pattern of Congress setting a cap for itself and then increasing the deficit right up to the cap.<sup>158</sup>

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156. See Jonathan Curry, *Senate Republicans Contort Tax Bill to Fit Byrd Rule Box*, TAX ANALYSTS (Nov. 16, 2017), <http://www.taxanalysts.org/content/senate-republicans-contort-tax-bill-fit-byrd-rule-box> [<https://perma.cc/V9HM-S394>]; Rebecca M. Kysar, *The Tricks That Will Deliver Tax Reform*, SLATE (June 1, 2017), [http://www.slate.com/articles/business/moneybox/2017/06/the\\_budget\\_gimmicks\\_the\\_gop\\_could\\_use\\_for\\_tax\\_reform.html](http://www.slate.com/articles/business/moneybox/2017/06/the_budget_gimmicks_the_gop_could_use_for_tax_reform.html) [<https://perma.cc/2ZD2-KYUM>].

157. See Curry, *supra* note 156.

158. For example, the budget resolution agreed to May 2001 allowed for a \$1.35 trillion increase in

Second, the elaborate exercise of setting medium-term deficit caps and then complying with those caps via sunset provisions potentially allows lawmakers to convince themselves—and perhaps some of their more gullible constituents—that they are acting in a fiscally responsible manner when in fact their actions are likely to lead to long-term deficit increases. To be sure, the ruse is so transparent that one wonders whether it matters at all. But insofar as nominal compliance with the Byrd rule reinforces a fiction of fiscal responsibility, it may actually undermine fiscal discipline in practice.

A third way in which the Byrd rule may perversely undermine fiscal discipline is by preventing Congress from passing measures such as the Brownback-Kohl and Frist amendments, as well as the trigger mechanism proposed by Senator Corker. A provision that prohibits Congress from considering future deficit-increasing legislation through budget reconciliation—or that triggers tax increases in the event that revenues thresholds are not met—evidently runs afoul of the Byrd rule’s prohibition on measures with no budgetary effect. It is not obvious that the text of the Byrd rule requires this result—and quite obvious that the consequence is at odds with the Byrd rule’s anti-deficit intent. The irony is that but for the Byrd rule, the Balanced Budget Act of 1997 would have added a statutory provision that could have prevented Congress from passing the deficit-busting tax cuts of 2001, 2003, and 2017.<sup>159</sup>

Fourth, the Byrd rule may in some circumstances encourage Congress to add deficit-increasing measures to reconciliation bills for the purpose of Byrd rule compliance. The 2006 Roth IRA episode is one such illustration. As noted above, Congress added a provision in TIPRA allowing for traditional-to-Roth IRA conversions starting in 2010 so that the legislation would appear to be deficit-neutral beyond the budget window, even though the provision almost certainly increases the deficit in the long run. To be fair, Congress rarely adds a deficit-increasing provision to a reconciliation bill solely for the purpose of cosmetic compliance with the Byrd rule, but the very fact that this maneuver occurred in full public view raises serious doubts about the rule’s efficacy.<sup>160</sup>

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the deficit over ten years, and the Joint Committee on Taxation estimated that the reconciliation bill would add \$1.349 trillion to the deficit over a decade. *See* STAFF OF J. COMM. ON TAX’N, JCX-51-01, 107TH CONG., ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1836, at 3 (Comm. Print 2001); H. Con. Res. 83, 107th Cong., 1st Sess., § 103 (2001). The budget resolution agreed to in April 2003 allowed for an addition of \$350 billion to the deficit, and the Joint Committee estimated that the resulting reconciliation bill would add \$349.7 billion to the deficit over that timeframe. *See* STAFF OF J. COMM. ON TAX’N, JCX-55-03, 108TH CONG., ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 2, THE “JOBS AND GROWTH TAX RELIEF RECONCILIATION ACT OF 2003,” at 2 (Comm. Print 2003); H.R. Con. Res. 95, 108th Cong., 1st Sess., § 202 (2001).

159. Emphasis is placed on the phrase “could have” rather than “would have.” Of course, even if the Frist amendment had become law in 1997, the Senate might have mustered 60 votes to repeal it at a later date, or the proponents of the 2001, 2003, and 2017 tax cuts conceivably could have cobbled together a filibuster-proof majority for deficit-busting tax reductions.

160. Also note that Byrd rule compliance is not the only reason why Congress might, under some circumstances, pass provisions that appear to reduce the deficit in the short term but that have the opposite effect over the long term. The Byrd rule is, however, an additional impetus for Congress to play games with budgetary arithmetic.



Finally, the Byrd rule's prohibition against adding to the deficit beyond the budget window has force only if the budget window is relatively short. Early budget resolutions covered one-year windows. Budget resolutions in the 1980s looked three years out; resolutions in the early 1990s established five-year windows; the Balanced Budget Act of 1995 stretched that to seven years; and the budget resolution passed in 1999 set the first ten-year window.<sup>161</sup> In theory, there is nothing standing in the way of a budget window lasting twenty or thirty years, or even longer. Republican Senator Pat Toomey of Pennsylvania has advocated a longer budget window, and Trump administration officials have expressed interest in the idea.<sup>162</sup> The rule against out-year deficit effects accomplishes little if the budget window lasts an entire generation.

## 2. Subject Matter Limits

The Byrd rule's prohibition on provisions with "merely incidental" budgetary effects is arguably necessary in order to preserve the Senate's supermajoritarian norm. Otherwise, a simple majority could accomplish virtually anything via budget reconciliation.<sup>163</sup> In this respect, the Byrd rule preserves the minority party's power in the Senate. It also keeps certain issues off the table in budget negotiations, possibly reducing the risk that reconciliation bills will be held up by debates over abortion, immigration, and other controversial topics.

In practice, however, the subject matter limitations imposed by the Byrd rule do not always appear to be very stringent. If a measure that opens the Alaska National Wildlife Refuge to drilling does not violate the "merely incidental" proviso, one wonders what other controversial measures might pass the Byrd rule test. For example, could a future Democratic-controlled Senate use budget reconciliation to reinstate the Deferred Action for Childhood Arrivals (DACA) program, which—according to one estimate<sup>164</sup>—would raise \$60 billion in federal revenue over a decade? Could budget reconciliation be used to legalize and then tax the sale of marijuana, which could raise \$132 billion in federal revenue over nine years?<sup>165</sup> The answers to these questions would depend heavily on the subjective judgment of the individual who occupies the Parliamentarian position

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161. BILL HENIFF, JR., CONG. RESEARCH SERV., RL30297, CONGRESSIONAL BUDGET RESOLUTIONS: HISTORICAL INFORMATION 11–13, tbl.5 (2015).

162. See Naomi Jagoda, *Prominent Conservatives: Extend the Budget Window to Pass Tax Cuts*, THE HILL (June 14, 2017), <http://thehill.com/policy/finance/337768-prominent-conservatives-extend-the-budget-window-to-pass-tax-cuts> [<https://perma.cc/R3DN-UMY5>].

163. No such rule was in place for the first eleven years of budget reconciliation, though the risk that the majority party would use budget reconciliation to circumvent the filibuster may have been smaller in the less partisan environment of the 1970s and early 1980s.

164. See Ike Brannon & Logan Albright, *The Economic and Fiscal Impact of Repealing DACA*, CATO INST. (Jan. 18, 2017), <http://www.cato.org/blog/economic-fiscal-impact-repealing-daca> [<https://perma.cc/TZ7K-PTUQ>].

165. See Katie Zezima, *Study: Legal Marijuana Could Generate More Than \$132 Billion in Federal Tax Revenue and 1 Million Jobs*, WASH. POST (Jan. 10, 2018), [http://www.washingtonpost.com/national/2018/01/10/study-legal-marijuana-could-generate-more-than-132-billion-in-federal-tax-revenue-and-1-million-jobs/?utm\\_term=.27cda74008e9](http://www.washingtonpost.com/national/2018/01/10/study-legal-marijuana-could-generate-more-than-132-billion-in-federal-tax-revenue-and-1-million-jobs/?utm_term=.27cda74008e9) [<https://perma.cc/X6WJ-JJM3>].

at the time the questions arise. And if policies with these sorts of sweeping non-budgetary consequences can be enacted by simple majority vote, then the subject matter limitations of the Byrd rule are as chimerical as the Byrd rule's deficit limitations.

Even if the Byrd rule does limit the subject matter of reconciliation bills in meaningful ways, the impact of such limitations on the prospects for bipartisan compromise are uncertain. Under some circumstances, "issue linkage" (i.e., adding additional issues to be bargained over in a negotiation) can indeed reduce the probability of agreement.<sup>166</sup> Democrats and Republicans might, to use a not-so-hypothetical example, have similar views regarding the extension of funding for the Children's Health Insurance Program (CHIP) but very different views on immigration. Adding immigration to the mix of issues could scuttle a deal on CHIP. In other cases, issue linkage makes agreement much more likely. Jack and Jill may be at loggerheads over whether to see the movie "Darkest Hour" or "Ladybird," but adding another issue (say, where to go to dinner afterwards) may allow them to reach a deal. Thus, it is difficult to arrive at any general statement as to whether the Byrd rule's subject matter limitations make compromise more likely or less so.

Insofar as the Byrd rule stands in the way of what might be described as special interest giveaways, this impact too has uncertain normative implications. One view of the Newman's Own provision is that it simply allowed a private foundation to run a profitable business in a socially responsible manner and channel the proceeds to charitable causes—not necessarily an undesirable outcome.<sup>167</sup> (In any event, the Newman's Own modification ultimately became law as part of the shutdown-averting Bipartisan Budget Act of 2018.<sup>168</sup>) One perspective on the Berea College provision is that it would have incentivized wealthy colleges and universities to eliminate tuition for more students—again, a potentially palatable result (and again, a result that Congress ultimately accomplished by adding to the Bipartisan Budget Act an exemption from the endowment tax for schools such as Berea that do not charge tuition<sup>169</sup>). Moreover, the ability to include special interest provisions in legislation arguably serves to "grease the locked wheels of government,"<sup>170</sup> as journalist Jonathan

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166. On the variable effects of issue linkage in negotiations, see generally T. Clifton Morgan, *Issue Linkages in International Crisis Bargaining*, 34 AM. J. POL. SCI. 311 (1990).

167. See Daniel Hemel, *A (Lite) Defense of Newman's Own*, MEDIUM (Aug. 22, 2016), <http://medium.com/whatever-source-derived/a-lite-defense-of-newmans-own-d89ffa145b03> [<https://perma.cc/39A8-ETCQ>].

168. Pub. L. No. 115-123, § 41110, 132 Stat. 64 (2018) (to be codified at 26 U.S.C. § 4943(g)). The Byrd rule did not apply to the Budget Act, which passed through normal order by a filibuster-proof 71-28 margin rather than through the budget reconciliation process. See Thomas Kaplan, *Trump Signs Budget Deal to Raise Spending and Reopen Government*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/2018/02/08/us/politics/congress-budget-deal-vote.html> [<https://perma.cc/BB3T-EVZB>].

169. *Id.* § 41109(a), 132 Stat. 64 (amending 26 U.S.C. § 4968(b)(1)).

170. See Jonathan Allen, *The Case for Earmarks*, VOX (June 30, 2015), <http://www.vox.com/2015/6/30/8864869/earmarks-pork-congress> [<https://perma.cc/3EB8-YGA6>].

Allen and several others have argued in the analogous context of congressional earmarks. A world in which lawmakers cannot reward favored constituents through targeted provisions may be a world in which relatively little gets accomplished. Furthermore, the Byrd rule as applied in the most recent tax legislative effort had the effect of freezing in place provisions of the Code—such as the tax exemption for professional sports leagues—that might be characterized as special interest provisions in their own right. The Byrd rule may prevent new pork from being added to the Code, but it preserves the pork that is already there.

### 3. Complexity

One clear consequence of the Byrd rule is that it causes Congress to add complexity to the Internal Revenue Code. Title 26 is now a tangle of provisions with looming expiration dates as well as others that will not come into effect again for another eight years. Uncertainty as to whether temporary provisions will be extended makes it harder for taxpayers to develop long-term plans. The imperative to avoid out-year deficit effects has real and negative practical effects.

All of these considerations are compounded by the fact that the Byrd rule makes it harder for Congress to pursue simplification measures. Consider the story of the Form 1040SR, intended to be “a simplified income tax return . . . for use by persons who are age 65 or older.”<sup>171</sup> An early version of the tax plan that emerged from the Senate Finance Committee in November 2017 instructed the IRS to develop a new Form 1040SR and make it available to senior citizens starting in 2019.<sup>172</sup> However, Senate Finance Committee Chair Hatch removed the provision from the bill at the beginning of December for reasons related to Byrd rule compliance—presumably because the budgetary effects would be “merely incidental” to the simplification benefits.

The point here is not to suggest that the Byrd rule blocks the Senate from pursuing tax simplification. With sixty votes in the Senate—either to waive a Byrd rule point of order or to pass legislation through the normal process—simplification measures such as the Form 1040SR provision remain possible (and, indeed, Congress ultimately enacted the Form 1040SR provision as part of the Bipartisan Budget Act of 2018).<sup>173</sup> What the Byrd rule does do is encourage Congress to make a mess of a code while also making it at least marginally more difficult for Congress to clean that mess up.

### 4. Transparency

Last but not least, the Byrd rule adds to the opacity of a legislative process that is already far from transparent to outsiders.<sup>174</sup> The Parliamentarian gives

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171. STAFF OF J. COMM. ON TAX'N, JCX-51-17, 115TH CONG., DESCRIPTION OF THE CHAIRMAN'S MODIFICATION TO THE CHAIRMAN'S MARK OF THE “TAX CUTS AND JOBS ACT” 32 (Comm. Print 2017).

172. *Id.*

173. Pub. L. No. 115-123, § 41106, 132 Stat. 64 (2018).

174. See Yin, *supra* note 2, at 225–26.

guidance to staffers behind closed doors, and the Parliamentarian's advice to the Presiding Officer literally takes the form of a whisper.<sup>175</sup> At least in the latter case, the outcome of the Parliamentarian's thought process becomes public: those watching in the Senate Gallery or on C-Span—or reading the Congressional Record afterwards—can see how the Presiding Officer ultimately ruled on a point of order. When it comes to closed-door Byrd baths, there is no public record of the list of provisions challenged on Byrd rule grounds or how the Parliamentarian came down on each one. What little we know comes from what Senators and their staffers choose to share.

This lack of transparency is normatively problematic for at least two reasons. First, members of the public cannot comprehensively assess the actions of their elected representatives without knowing what constraints those representatives faced. For example, we know from a single line of a Senate Finance Committee release that the repeal of the tax-exempt status of professional sports leagues was removed from the 2017 tax law “for Byrd rule compliance.”<sup>176</sup> We do not know why the provision flunked the Byrd rule's test or whether it could have been drafted so as to pass. Was the Byrd rule a genuine impediment to the provision's enactment, or is it a bogeyman that Senators have used to justify a change requested by a well-resourced interest group? Concededly, a certain degree of opacity is inevitable whenever lawmakers hash out legislative language in Capitol cloakrooms, but the Byrd bath process makes it even harder for voters and activists to know what is going on.

Second, the fact that the Parliamentarian need not explain her determinations in public raises the risk that those determinations will be inconsistent and unsupported. Why did repeal of the tax exemption for professional sports leagues flunk the Byrd rule test while the opening of ANWR to drilling passed? There may well be a plausible rationale for the Parliamentarian's pattern of rulings, and we do not mean to cast doubt on this or any previous Parliamentarian's good faith. But as a general matter, freedom from any explanatory requirement makes it all the easier to engage in arbitrary and biased decisionmaking. This is no less true for the Senate Parliamentarian than for anyone else.

To their credit, the staffs of Senators Sanders and Hatch have made the Byrd rule's operation somewhat more transparent by releasing certain details to the public. In the case of Senator Sanders's staff, that transparency came through a series of press releases following Byrd baths throughout 2017.<sup>177</sup> In the case of Senator Hatch's staff, it took the form of a single document explaining the

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175. See Erin Mershon, *Presiding Loses Its Prestige in the Senate*, ROLL CALL (Aug. 1, 2011), <http://www.rollcall.com/news/presiding-loses-its-prestige-in-senate-207942-1.html> [<https://perma.cc/JE84-BEF7>].

176. See TAX CUTS AND JOBS ACT (H.R.) CHANGES MADE TO THE COMMITTEE-REPORTED BILL DURING FLOOR CONSIDERATION, *supra* note 123, at 2.

177. See generally *Ranking Member Bernie Sanders*, U.S. S. COMM. ON THE BUDGET, <http://www.budget.senate.gov/ranking-member/newsroom> [<https://perma.cc/N8BV-A6VS>] (last visited Mar. 1, 2018).

rationales for various amendments to the tax bill in early December.<sup>178</sup> In neither case did the release articulate the reason why any provision was found to be in violation of the Byrd rule. Still, drips and drabs of information are better than no information at all.

To be sure, this article's focus on the Parliamentarian's Byrd rule determinations may reflect the authors' own idiosyncratic interests. Most voters are unaware of the rule and unconcerned about what happens in Byrd baths behind closed doors. That said, transparency can serve to discipline decisionmaking even if it makes little difference at the ballot box. It can serve to legitimize a process that now appears ad hoc.

The virtues of transparency do not necessarily lead to the prescription that Byrd baths should occur in full public view. But important process values would be vindicated if the results and rationales of Byrd baths were revealed. One way for this to happen would be for Budget Committee staffers from both parties to publish short summaries of these sessions afterwards, with some explanation as to how each decision was reached. The Senate Parliamentarian also could publish her guidance and rationale after the fact, though this proposal might impose additional paperwork requirements on an office that is already thinly staffed.

## VI

### CONCLUSION

Reflection on the Byrd rule's first three dozen years leads to a richer understanding of the provision's importance as well as a heightened awareness of its potential unintended effects. The Byrd rule's namesake envisioned it as a bulwark that would protect the Senate's deliberative character and supermajoritarian norms from the threat posed by the fast-track budget reconciliation process. In practice, the Byrd rule has proven to be much less than that and much more. It has proven to be less than that insofar as it has failed to prevent either party from using the reconciliation process to implement controversial domestic policies with tangential budgetary impacts. And yet the fact that so many significant bills become law through the reconciliation route means that the Byrd rule ripples widely across the United States Code. Nowhere is that more true than in tax law, where budget reconciliation has become the primary pathway for legislative action and where the Byrd rule has proven to be a sometimes-binding constraint on the contents of statutes.

This evaluation of the Byrd rule's role in recent reconciliation efforts leads toward a set of pessimistic conclusions regarding its practical effects. The Byrd rule has not prevented Congress from passing legislation that increases the long-term deficit, and in some respects it may have served to undermine fiscal discipline. It has not nudged the parties toward a more consensus-oriented approach to lawmaking—and in some instances, it has become a weapon of

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178. See TAX CUTS AND JOBS ACT (H.R.) CHANGES MADE TO THE COMMITTEE-REPORTED BILL DURING FLOOR CONSIDERATION, *supra* note 123, at 2.

partisan warfare. Its substantive effects have been scattershot: important provisions have been excised from reconciliation bills as a result of the Byrd rule, but the Parliamentarian's pattern of Byrd rule decisions sometimes reveals no discernable rhyme or reason. This observation is not intended as an indictment of any individual Parliamentarian as much as it is a criticism of the opaque process through which Byrd rule determinations are made.

Nonetheless, the problems with the Byrd rule do not lead ineluctably to an argument for the rule's repeal. Some sort of subject-matter limit on budget reconciliation is probably necessary in the present environment if the Senate is to retain its supermajoritarian character. (Whether the Senate's supermajoritarian character is itself normatively desirable presents a more difficult question.) True, the budget reconciliation process existed for a decade before the Byrd rule's emergence without swallowing the legislative filibuster entirely, but the Senate was a very different—and much less partisan—body in the late 1970s and early 1980s than it is today. The Byrd rule turns out to be a rather elastic limit on budget reconciliation, but it is likely to be an enduring feature of Senate procedure as long as the legislative filibuster persists. Given the surprising durability of the Senate's supermajoritarian norms, the Byrd rule likely will continue to play an influential—if often erratic—role in the tax legislative process in the coming years.

The Byrd rule's ongoing importance underscores the need for reform. The application of the Byrd rule to scuttle balanced budget enforcement procedures and revenue-dependent trigger mechanisms is a perverse result that is not obviously mandated by the rule's text. The use of the Byrd rule to preserve provisions that confer large benefits on small groups—such as the tax exemption for professional sports leagues—seems like a dubious application of the “merely incidental” proviso that, again, the text does not demand. Perhaps there is a coherent theory of the Byrd rule that the Parliamentarian is invoking in these cases that the authors of this article have failed to discern. But if so, that is a further argument for greater openness on the part of the Parliamentarian and Senate staff. Transparency could help to legitimize a process that now seems both capricious and consequential. If the Byrd rule continues to shape tax legislation, as it likely will, then it ought to do so outside of the shadows.