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BUDGETING ON AUTOPILOT: DO SEQUESTRATION AND THE INDEPENDENT PAYMENT ADVISORY BOARD LOCK-IN STATUS QUO MAJORITY ADVANTAGE?

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Amid deeply polarized discourse over spending choices, Congress has resorted frequently to the particular device of binding "automatic" cuts, a form of Congressional precommitment whereby Congress takes steps at time one with the intention of changing the likelihood it will make certain choices at time two. I argue that these devices are disingenuous in two ways. First, legal analysis shows they do not actually bind Congress,

even as they claim to. To the extent they have any traction, it is by appealing to our normative reluctance to flout pre-existing rules, which, in other words, means they work by invoking the ideology of "legalism." Legalism, as defined by political theorist Judith Shklar, is the norm privileging rule-following, which is seen as "neutral," over other forms of decision-making, which are "political." However, in the realm of guns-or-butter spending choices, the invocation of legalism is disingenuous, since these decisions are deeply politically contested. Not only do they purport to bind when they don't, these Congressional precommitments also purport to be neutral when they are politically purposive efforts to lock-in preferences.

This article analyzes and debunks the three main methods of precommitment, and then applies those findings to sequestration and the Independent Payment Advisory Board from the health reform law, to show what happens when we try to make these kinds of political decisions by legalistic "automatic cuts" which deceptively purport to be a more rule-bound, "neutral" approach. I find that these precommitments amplify the advantages of status-quo majorities over minorities, while undercutting the values of transparency and coherence.

INTRODUCTION

The Affordable Care Act, the culmination of nearly a century of attempts to reform the U.S. health system, sought to bring a number of health system dynamics within its compass, including the spiraling cost of health care, which is on track to consume nearly thirty percent of GDP by 2030. Meanwhile our overall federal budgeting and spending processes have veered dangerously off-course. Until the "modest" budget and spending deal for fiscal year 2014, Congress had not passed a budget in three years.[1] The Government was funded through a series of continuing resolutions,[2] and the credit rating of the United States Treasury has been threatened by repeated debt-ceiling brinksmanship.

The two problems—health spending and budgeting—are of course inseparable. Medicare and Medicaid represent twenty percent (half a trillion USD annually) of federal spending, while Social Security, other entitlement spending, and net interest on the debt consume another forty-three percent.[3] President Obama contended that to solve the deficit problem, the nation must solve the health problem first, and to that end he made "bending the cost curve" a primary focus of health reform.[4] The centerpiece of his efforts has been

1. Hari Sreenivasan, *Budget Battles Aren't Just About Money, but Different Visions of Government,* PBS NEWSHOUR (Mar. 21, 2013), http://www.pbs.org/newshour/bb/politics-jan-june13-budget_03-21.

2. Suzy Khimm, *Senate Democrats promise to pass a budget. Why is this a big deal?* WASH. POST (Jan. 20, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/20/senate-democrats-promise-to-pass-a-budget/.

3. WALTER OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 44 (7th ed. 2007).

4. *See* President Barack Obama, *Address at the Capital Center Visitor Auditorium* (Mar. 20, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-house-democratic-congress. *See also* President Barack Obama, *Remarks by the President to a Joint Session of Congress on Health Care* (Sep. 9, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care.

an agency called the Independent Payment Advisory Board (IPAB). IPAB is a new independent agency created by the health reform law[5] to devise Medicare cuts that would automatically take effect to keep program growth no higher than roughly one percent above GDP growth.[6]

This article puts IPAB, with its much-vaunted automatic cuts, in the context of Congress' showdowns over the budget. The ongoing budget brawls have featured related legislative tools, particularly automatic sequestration, which imposes across-the-board cancellation of budget resources to enforce spending caps. What emerges is a picture of the national conversation about our economic and fiscal priorities and the role such tools might play in that discourse. I argue that these automatic devices constitute bad faith. First, they purport to bind when they cannot. Second, they represent Congressional actors seeking to pass-off their political preferences as neutral requirements. These devices are incursions of legalism into the political domain, and, as such, suggest the instability of liberalism, which depends on this distinction between the just and the good, between law and politics.

The two examples of sequestration and IPAB are similar insofar as they are both precommitment devices whereby Congress acts at time one to change the likelihood it will make certain choices at time two.[7] There is a lively academic debate in the legal literature about whether precommitment devices, a subset of which are called legislative entrenchment, should be permitted or not,[8] but both sides of the debate agree on the current state of the law—they are rarely if ever enforceable. This article seeks to answer the question of why Congress uses this technology at all.[9] I analyze IPAB and sequestration closely to demonstrate how they fail to genuinely constrain Congress at time two. I show that instead, they rely for their effect upon the ideology of legalism, formulated by Judith Shklar, as the normative belief that conduct should be guided by obedience to rules. This commitment to rule-adherence disadvantages rival preferences precisely because under this ideology, "decisions seem to be not choices but accepted necessities."[10] But because the rules in this case do not bind, the claim of necessity is false, constituting a form of political bad faith. In our polarized world, the invocation of legalism through the use of precommitment is a potent political weapon, privileging one set of values over competing claims.

Throughout this piece I use Jon Elster's definition of precommitment as an act at time one by a particular actor to make that same actor's choice of an option more difficult at time two.[11] My concern in this project is with Congressional precommitments, and

5. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111–148, 124 Stat. 119 (2010) (codified in scattered sections of titles 26 and 42 of the United States Code).

6. The limit is the average of the general urban consumer price index (CPI-urban) and medical CPI in the first years IPAB takes effect.

7. While some writers may prefer the term "pre-commitment," I use "precommitment" throughout this piece as this spelling is what Jon Elster used in the course of his writing defining and applying the concept.

8. Some of the main supporters of permitting entrenchment include Eric Posner and Adrien Vermeule, though I will show that their case is internally inconsistent. *See* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1671 (2002).

9. I would like to thank Erin Fuse Brown for suggesting this way of posing the question.

10. JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 11 (1986).

11. JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (1990) [hereinafter SIRENS]. *See also* JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS (2000) [hereinafter UNBOUND].

therefore with Congress as an actor trying to bind its own actions in the future.[12] This definition excludes instances of Congress trying to bind other actors.

In Part I, I introduce the concept of precommitment, first to characterize the common phenomenon represented by IPAB, the sequester and its antecedents, but also because when the core functions of precommitment are identified, it becomes clear that they match the functions served by the law-politics distinction, a distinction which undergirds both classical liberalism and its metastatic form, legalism. To understand this distinction and how it functions in a political arena like Congress, I introduce Judith Shklar's account of "legalism." Shklar gives this name to the ideology that conduct should foremost conform to rules, and she explains how this norm derives from the paramount importance legalism assigns to expunging politics from the conduct it regulates and legitimates; legalism thus depends upon the law-politics distinction. Part I therefore lays out the resources I use to describe my hypothesis: *that Congressional precommitments in our guns-or-butter decisions, which the sequester and IPAB exemplify, are expressions of legalism*, expressions of the ideology that rule-following, unlike political choice in all its partiality, is even-handed and should therefore be privileged.

In Part II, I begin to test that hypothesis against examples of Congressional precommitments. I identify three principal methods of Congressional precommitment, and three important cases, each of which employ multiple precommitment methods at once. I show first that these Congressional examples overclaim: they cannot actually bind at time two, which poses the central question of why Congress would use these tools. My second finding answers that question, as I show that the examples of Congressional precommitments—or more precisely, attempted precommitments—are appeals to the social norm of rule-following, i.e. the ideology of "legalism." This ideology, as identified by Judith Shklar, is itself a form of overclaiming—professing the (unearned) authority of neutrality.

Finally in Parts III and IV, I focus back on the specific recent examples which inspired this article, namely the example of IPAB as enacted in the Affordable Care Act and the sequester as enacted in the Budget Control Act of 2011. These examples show in detail the operation of precommitment devices by Congress and their dependence upon legalism. The methodology of examining particular examples is not only to illustrate the false necessity of precommitment by detailing how the measures fail to bind. The choice to look at particular cases also shows how individual instances of competing claims fare under automatic precommitment, which in turn reveals the specific and policy-laden effect of these purportedly general "rules" in the context of budget and spending decisions. The examples begin the task of illustrating the specific winners and losers under these devices. The interests favored turn out to be those who already enjoy conventional political power, while transparency, coherence, and the interest of the less empowered are disserved. The downside of legalism is both what we sacrifice to blind fidelity to the rule without consideration for the contingencies of a particular instance, but also how creeping legalism in political realms functions to privilege certain values and exclude rivals.

12. My definition of my project therefore excludes examples of Congress binding the executive branch, the executive branch binding Congress, the Constitution binding Congress or the executive, or the executive branch entering into contracts that bind itself.

I: THE STRUCTURE OF PRECOMMITMENT AND ITS ROLE IN SEPARATING LAW FROM POLITICS

A. The Structure of Precommitment

Neither IPAB nor the sequester is sui generis. They both belong to the class of laws with a "precommitment" structure. Legal scholars have recognized, applied, debated, and contested this structure,[13] relying heavily upon thinking by Jon Elster, who began pursuing this line of inquiry to account for predictable irrationality[14] from the standpoint of rational choice modeling, a project now popularly known as behavioral economics.[15] Precommitments represent a potential tool by which rational actors, knowing they are subject to flawed decision-making, might seek to correct for those predictable defects. According to Elster, a person engages in precommitment when he "acts at one point in time in order to ensure that at some later time he will perform an act that he could but would not have performed without that prior act."[16]

Elster utilizes several other criteria to distinguish precommitment from other related notions.[17] One of the most notable is his requirement that for some decision at time one to count as a precommitment, the effect of carrying out the time one decision must be to set up some external constraint.[18] This stipulation specifically distinguishes precommitment from "some mental attitude that can be described as 'resolution,' or 'firmness of purpose.'"[19] If Ulysses simply decided at time one that he would hold steadfast in the face of the Sirens' call, but did not tie himself down with ropes, nor instruct his crew to ignore his pleas for release, that would not count.

B. "Legalism" in the Liberal Tradition

In Parts II through IV, I analyze numerous Congressional precommitment examples

13. Symposium, *"Paying the Alligator": Precommitment in Law, Bioethics, and Constitutions*, 81 TEX. L. REV. 1729 (2003) (including the following contributors: Robert H. Frank, John Ferejohn and Lawrence Sager, John Robertson, Daniel Brock, Samuel Issacharoff, Sanford Levinson, William Forbath, Steven Ratner, and others); Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593 (1988); Rebecca Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519 (2008); Tim Westmoreland, *Standard Error*, 95 GEO. L.J. 1555 (2007); JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (2003); Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633 (1991).

14. *See* UNBOUND, *supra* note 11, at 29–30 (identifying predictable irrationality as that owing to passions, collective action problems, and weakness of will).

15. *See generally* SIRENS, *supra* note 11; *see also* THOMAS SCHELLING, *The Intimate Contest for Self-command, and Ethics, Law, and the Exercise of Self-command, in* CHOICE AND CONSEQUENCE 57–82 (1984); Jeremy Waldron, *Disagreement and Precommitment*, *in* LAW AND DISAGREEMENT (1999). Behavioral economics identifies categories of predictable irrationality and Elster explores whether these second-order (precommitment) methods are available to correct for irrationalities. *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases, in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Kahneman et. al., eds., 1982).

16. Jon Elster, *Don't Burn Your Bridge Before You Come To It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1754 (2003).

17. SIRENS, *supra* note 11, at 42–46.

18. Elster, *supra* note 16, at 1754 (stipulating that precommitment "requires an observable action, not merely a mental resolution. Moreover, the action must be one that creates a change in the external world that can be undone only (if at all) with some cost or effort").

19. SIRENS, *supra* note 11, at 43.

to show that they represent legalism at work. My methodology is two-fold. First, the specific examples will show that the obligations imposed by precommitments are grounded in nothing else; to the extent that they motivate, it is only due to a social norm felt among members of Congress that rules should be followed. This norm of rule-adherence is precisely what constitutes legalism. Second, I will show that the reasons and motivations cited by members of Congress for such legislative efforts are characteristically legalistic justifications, claiming the binding authority of pre-existing rules, distinguishing and denigrating politics, and relegating the particular details of any matter to irrelevance.

"Legalism," as Shklar identifies, is the elevation of rule-following to a normative commitment. In her account, there are any number of norms apart from rule-following that we could use to guide our conduct. Force,[20] custom,[21] act-utilitarianism,[22] patrimonial authority,[23] sincerity,[24] revealed divine intervention,[25] community sentiment[26] are just a few candidates. Legalism eschews these for what Shklar calls "the morality of rule following."[27] The claim for privileging this method of decision, i.e. the conformance of conduct to rules, is the separation of law from politics, and we see how it can arise from the precepts of liberalism.

Shklar explains that under liberal theory, the binding quality of rules does not diminish freedom. By contrast, decision by political preference amounts to the tyranny of particular inclinations.[28] She voices the liberal viewpoint thus:

> [T]he rule of law is the miracle of liberalism, government without coercion. By coercion, [liberals like] Professor Hayek [do] not mean any exercise of power, but only what occurs when one man issues a direct command to others to perform a specific action to serve his own ends. . . . Coercion can, however, be eliminated if men are governed entirely by general rules which are applied impersonally and equally to all.[29]

Thus does the liberal state rely for its legitimacy upon the separation of law from politics, the separation of the impartial rule binding all, from political action to achieve

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20. SHKLAR, *supra* note 10, at 20 (speaking of hypothetical rule by "spontaneous violence").
21. *Id.*
22. *Id.* at 50.
23. *Id.* at 21 (characterizing qadi justice).
24. *Id.* at 57.
25. *Id.* at 54 (as would be the case under theocracy).
26. *Id.* at 102.
27. *Id.* at 87.
28. *Id.* at 55 (attributing acceptance of such tyranny to some theories of pluralism).
29. *Id.* at 23. *See also id.* at 122.

> [A] policy of justice in this, as in many other areas, may lead to far worse social consequences than a policy of semi-justice, in which several incompatible goals are allowed to live in compromise, even though logically they are mutually exclusive. It is not wickedness that creates a multiplicity of needs and values, but the inevitable diversity among people and the complexity of the demands that a highly developed culture makes upon them. This does not diminish the value of legalistic ethics or of legal institutions. To show that justice has its practical and ideological limits is not to slight it.

Id.

personal contingent ends.[30] Liberalism typically confines rule-abidance then to the arena of universal agreement among equals (or derivation of a process undertaken by an authority that equals can all agree upon) while leaving other areas open to coexistence if possible, or contest.[31] The separation of law from politics, justice from expediency, then follows from the diversity and incompatibility of ends, as well as the possibility of social consensus on the rules under which we may pursue those ends.[32] And the standard liberal rationale for why universal agreement is possible with respect to "justice" is because without such rules, all ends are undermined.[33] Rawls formulates the useful device of the original position and "veil of ignorance" by which one might distinguish "justice" from "politics." Rules of the former sort would be adopted behind the veil by those on equal terms who do not know what contingent ends they may come to pursue.[34] The dictates of justice and fairness, therefore, are distinguished as "untainted" by the danger of arbitrariness, partisanship, or coercion of others with respect to ends.

But, legalism, says Shklar—cannot stop there with the mere distinction between law and politics. It must claim law's superiority to politics.[35] The primacy of rules over every other value or inclination cannot admit of competing considerations.

The importance of rules in a liberal system preoccupied with the fear of arbitrariness and partiality, is that by following them, competing choices are concealed such that "decisions seem to be not choices but accepted necessities."[36] Legalism, according to Shklar, is an ideology that masks disagreement. Though it presupposes agreement, it unfortunately cannot generate it. Indeed, Shklar speculates that legalism "may in practice make people especially uncompromising for it has nothing to say about incompatible systems of rules save that one set must be binding."[37] Amid discord, legalism "imposes a unity"[38] and "the type of agreement demanded is adherence to certain universally valid *rules* that are 'there' for all the rational to see."[39]

Acknowledging any countervailing views reduces the demands of legalism to arbitrariness as well. A society absent such agreement would "leave the question of the scope

30. JOHN RAWLS, A THEORY OF JUSTICE 451 (1971) ("[I]n justice as fairness the concepts of the right and the good have markedly distinct features. These differences arise from the structure of contract theory and the priority of right and justice that results.").

31. *Id.* at 356–91 (discussing abidance by the rule of the majority and the role of civil disobedience and conscientious refusal). JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT WITH GENEVA MANUSCRIPT AND POLITICAL ECONOMY 77 (Roger Masters ed., Judith Masters trans., 1978) (observing that civil laws arise to govern "the . . . relation of the members to each other or to the entire body, and this relationship should be as small as possible with respect to the former and as large as possible with respect to the latter, so that each citizen is in a position of perfect independence from all others").

32. RAWLS, *supra* note 30, at 126, 447.

33. THOMAS HOBBES, LEVIATHAN 189–91 (C.B. MacPherson ed. 1968). *See also* RAWLS, *supra* note 30, at 269 ("This is simply the general case of the prisoner's dilemma of which Hobbes' state of nature is the classical example.").

34. HOBBES, *supra* note 33, at 126–30, 136–42, 251–57.

35. *See* SHKLAR, *supra* note 10, at 122.

36. *Id.* at 11.

37. *Id.* at 104.

38. *Id.* at 123.

39. *Id.* at 63.

of law, the question of what should and what should not be enforced, in an exposed position as an open question of political preference."[40] And for legalism, political preference could never be deemed adequate to the task of drawing such boundaries. To preserve the utility and function of rules, whose special feature is their impartiality, politics, Shklar says, must ever be characterized in derogatory terms:

> Direct bargaining, for instance, is often treated as a matter of disreputable expediency, a sort of ideological anarchy, hardly to be distinguished from uncontrolled physical violence. . . Thus to maintain the contrast between legal order and political chaos and to preserve the former from any taint of the latter it is not just necessary to define law out of politics; an entirely extravagant image of politics as essentially a species of war has to be maintained. Only thus can the sanctity of rule-following as a social policy be kept from compromising associations.[41]

This invidious separation of "politics" from "law" is pervasive throughout our discourse and our institutions, separating the legislative from the judicial and the substantive from the procedural. Budgetary decisions, guns-or-butter choices, have been conventionally placed squarely on the "politics" side of this divide, an expression of contingent preference rather than universal agreement.[42] My argument here is that the aggressive use of precommitment devices in guns-or-butter decisions will prove to depend on an ideology of legalism, on a normative belief that a "better" way to make decisions is by following pre-existing rules. The telltale signs of legalism will include efforts to anoint rules as binding and pre-existing, to elevate such rules above "politics," and a suppression of the particularities of any issue. Such maneuvers in political budget fights should arouse our keen scrutiny. The invasion of legalism into the budgeting realm ironically undermines the liberal distinctions upon which it relies, blurring the boundary between law and politics.

The liberal tradition obviously supplies fertile ground for legalism's growth. What Shklar's articulation of legalism contributes is the ability to regard legalism as distinct from liberalism, and thereby recognize and describe it as it colonizes arenas of life that are not necessarily juridical.[43] Shklar herself identified political trials, such as those in Nuremberg, as an example of such colonization.[44] More recently, Robin West has used Shklar's

40. *Id.* at 63.

41. *Id.* at 122.

42. RAWLS, *supra* note 30, at 283 (characterizing the functions of budgeting, such as budgeting for public goods as follows: "The basis of this scheme is the benefit principle and not the principles of justice"); ROUSSEAU, *supra* note 31, at 75–76 (stating that "these general objects . . . [of legislation] should be modified in each country according to the relationships that arise as much from the local situation as from the character of its inhabitants." These questions are for him "matters of expediency."). However, justice also sets outer boundaries for allocative decisions. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 348–52 (Peter Laslett ed., 1988) (stressing the protection of property against legislatures). Rawls also proposes the difference principle as a limit justice places upon distributive decisions, *see* RAWLS, *supra* note 30, at 258–64.

43. The language and imagery of "colonization" and "juridification" of areas of life previously free from such rationalities borrows from 2 JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON 360–73 (Thomas McCarthy, trans, 1987).

44. *See* Robin West, *Reconsidering Legalism*, 88 MINN. L. REV. 119, 120 (2003).

work to describe the "legalistic" cast of the arguments for military action in Iraq and Afghanistan.[45] Zephyr Teachout writes of the "legalistic" culture of the Occupy movement.[46] The incursion of legalism into these arenas bespeaks legalism's "inability to recognize its own social functions, both in their greatness and in their limitations."[47] Shklar's work suggests a pathway for considering how legalism, while still valuable in characteristically juristic practices and institutions, can stray beyond its purview in a way that is blind to the legitimacy of alternate modes.[48]

Moreover, Shklar's work explains how legalism operates to undermine the law-politics distinction upon which it relies. She says her "entire aim is rather to account for the difficulties which the morality of justice faces in a morally pluralistic world and to help it recognize its real place in it—not above the political world but in its very midst."[49] This makes Shklar a useful guide in this article's project, to show that rule following obtains in certain arenas not by legal necessity but as a social and political norm. It is one weapon, like any other in the political arena, but not a trump over other political considerations.

C. The Context of Legal Scholarship

Legal scholars, in considering legislation and statutory interpretation, have recognized the proliferation of precommitment devices and analyzed them under other names, such as entrenchment, statutized rules, framework legislation,[50] or recusal legislation.[51] All are subsets of the class of precommitment devices.

I pause to specify legislative entrenchment, one subset of Congressional precommitment in particular, because my conclusions run directly contrary to those of legislative entrenchment's most vocal proponents, Eric Posner and Adrian Vermeule. Posner and

45. SHKLAR, *supra* note 10, at 112.

46. Zephyr Teachout, *Legalism and Devolution of Power in the Public Sphere: Reflections on Occupy Wall Street*, 39 FORDHAM URB. L.J. 1867 (2012).

47. SHKLAR, *supra* note 10, at 112; Teachout, *supra* note 46.

48. West, *supra* note 44, at 119–20 ("[L]egalism can be found in a 'more or less' state in a wide range of political, social, and cultural institutions and practices, and not just in those institutions dubbed 'legal.' Therefore, barriers generally drawn by professional legal philosophers between 'jurisprudence' and political and moral philosophy are artificial and unjustified.").

49. SHKLAR, *supra* note 10, at 123.

50. Elizabeth Garrett and others have looked at Congress's efforts to calibrate the level of difficulty of future choices through a specific method—the modification of Congressional rules. Garrett dubs these efforts "framework legislation," which she says are laws that "establish internal procedures that will shape legislative deliberation and voting on certain decisions in the future. They are laws about the congressional lawmaking process itself." Elizabeth Garrett, *Framework Legislation and Federalism*, 83 NOTRE DAME L. REV. 1495, 1496, 1531 (2008). Aaron Andrew-Bruhl uses the term "statutized rules," and Garrett identifies how her notion of framework legislation, while clearly broader than "entrenchment," as it would include fast-track trade legislation, is narrower than statutized rules insofar as she is only looking at statutes that change the rules for a specific set of decisions. *Id.* at 1497 & n.11. The term "statutized rules," on the other hand, refers to any statute that addresses the congressional lawmaking process even without delimiting the specific set of decisions subject to that process. Aaron Andrew-Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 346 (2003). Bruhl considers his notion of "statutized rules" to be like legislative entrenchment because both aim to change the relative burdens of certain subsequent Congressional acts from what they would have been otherwise. *Id*. at 372–73.

51. Michael J. Teter, *Recusal Legislating: Congress's Answer to Institutional Stalemate*, 48 HARV. J. ON LEGIS. 1, 8–12 (2011).

Vermeule, among others, have examined entrenchment,[52] and they define entrenchment as follows:

> [W]e mean the enactment of either statutes or internal legislative rules that are binding against subsequent legislative action in the same form . . . . On our definition, an ordinary law has some propositional content *P*—no bicycles in the park, for example. An entrenching statute has this propositional content plus an additional provision *R* which governs the conditions under which the statute may be repealed or amended. For example, *R* might say that *P* cannot be repealed or amended with less than a two-thirds majority in both the House and the Senate.[53]

Thus, entrenchment affects the degree of difficulty with which some set of decisions in the future can be made, and is thereby a precommitment, i.e. a modification of the likelihood that some choice will be made in the future. The reason I elect to use the term precommitment rather than entrenchment throughout the piece is that entrenchment is defined quite narrowly insofar as the legislative action must be "binding against subsequent legislative action *in the same form*."[54] Under such a narrow definition, even fast-track legislation and budget legislation would fall outside the scope of our inquiry. While these statutes arguably alter the mode by which each chamber's rules may be changed from internal resolution by each house to statutory means requiring bicameralism and presentment, these statutes do not make their *own* amendment more difficult. The statutes can be amended by merely passing a contrary or amending statute.[55] Therefore, subsequent legislative action "in the same form" is not affected. However, this level of formal rigor seems too restrictive for my purposes. Fast-track and other procedurally privileging statutes can still be usefully understood as Congress intentionally aiming to change the relative burden of certain subsequent Congressional acts from what they would have faced otherwise. They still qualify as deliberate attempts to adjust the difficulty of making certain choices at time two.

II: PRECOMMITMENT EXAMPLES: THREE METHODS, THREE CASE STUDIES

To further illustrate what the label "Congressional precommitment" encompasses, I have gathered examples, showing along the way both their weaknesses in fending off changes of heart at time two, and their dependence upon legalism. The three principal tools I discuss are supermajority requirements, statutized rules like those pertaining to fast-track legislation, and "notwithstanding" clauses. These are not mutually exclusive categories. Indeed many statutized rules are protected by notwithstanding clauses or supermajority points of order, and some supermajority requirements are codified as statutized rules. Moreover, many examples of ostensible Congressional precommitment employ multiple

52. Amandeep S. Grewal, *Legislative Entrenchment Rules in the Tax Law*, 62 ADMIN. L. REV. 1011, 1022 & n.60 (2010).

53. Posner & Vermeule, *supra* note 8, at 1667.

54. *Id.* (emphasis added).

55. Indeed with the disclaimer language that Congress usually passes along with any statutized rule, such mechanisms do not even make their own amendment by "a different (and presumably less weighty) form of enactment—in this case, internal resolutions of one chamber," more difficult. Bruhl, *supra* note 50, at 376–77.

precommitment tools at once. Three important case studies, each of which display more than one of the three methods, are the Congressional budgeting framework, recusal delegation, and entitlements. These cases are crucial for understanding the genealogy and characteristics of sequestration and IPAB, and I look at each of these in greater depth through the examples below.

A. Supermajority

We have referred to supermajority requirements for certain congressional actions. Though it is technically a Senate precommitment, not a Congressional precommitment *per se*, one of the most well-known is Rule XXII in the Senate, the "filibuster." This rule not only requires three-fifths of the Senate to invoke cloture (ending Senate floor debate on a bill), but also demands that any changes to the Senate rules, including the rules on cloture, achieve two-thirds support.[56] Nearly all Senate action has been made more difficult by virtue of this precommitment.[57] Moreover, an even greater supermajority requirement at time two, a requirement of two-thirds of those present and voting, burdens the particular act of changing the cloture rule.[58]

While cloture rules apply more-or-less generally across a number of topical areas, sometimes supermajority requirements have been proposed that burden legislative activity of a more specific type. As part of the Republican Revolution of the mid-1990's, when the GOP exploited the political fall-out from the Clinton health reform efforts to reclaim a majority in the House after four decades in the minority, newly elected House Speaker Newt Gingrich championed the so-called "Contract with America."[59] This platform, designed to evoke the aura of legitimacy surrounding the social contract, included a plank subjecting tax increases to a three-fifths majority vote in the House.[60]

1. Obstacles to Supermajority Entrenchment

By virtually universal acclamation, legislatures face grave doctrinal obstacles enlisting courts to help them bind their successors.[61] The classic cases cited include *Newton v. Commissioners*, in which the Supreme Court struck as unconstitutional a state legislature's attempts to "permanently establish" the town of Canfield as the county seat of Mahoning County in Ohio."[62] In *Reichelderfer v. Quinn*, the Court interpreted a statute that "perpet-

56. *See, e.g.*, Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205, 207, 212 (2004).

57. Although some acts, such as the budget resolution, or reconciliation, are subject to limited debate.

58. OLESZEK, *supra* note 3, at 241.

59. Jennifer Harper, *When the GOP 'loudy and proudly' spoke up: The Contract with America turns 20*, WASH. TIMES (Sept. 25, 2014), http://www.washingtontimes.com/news/2014/sep/25/two-decades-later-contract-america-turn-20/.

60. Bruce Ackerman, *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539 (1995); *see* Skaggs v. Carle, 110 F.3d 831 (D.C. Cir. 1997).

61. John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1773, 1776 (2003) (referring to the "virtually unanimous [rejection by] . . . everyone who has ever thought or written about the issue" of "the idea that one legislature, through ordinary legislation, should be allowed to bind future legislatures").

62. Newton v. Comm'rs, 100 U.S. 548, 553 (1879).

ually dedicated" certain lands for Rock Creek Park, to achieve less than a "perpetual" effect in order to avoid constitutional problems.[63]

Most have understood this anti-entrenchment principle to apply to procedural entrenchment statutes as well, i.e. statutes that entrench not by using the words "permanent" or "perpetual" to ward off future legislative change, but by requiring a procedural hurdle such as a supermajority for Congressional action of that type. Even the most vigorous defenders of the permissibility of such entrenching statutes do not advocate for courts to enforce those entrenchments in the face of a contrary later-enacted statute.[64] Posner and Vermeule, while arguing in favor of the constitutionality of entrenchment, conspicuously "take no position . . . on whether courts should enforce entrench[ing] statutes when subsequent legislatures violate the entrenchment by enacting a contrary statute."[65] In discussing the Gingrich House's supermajority rule for tax increases, McGinnis and Rappaport not only conclude that this rule is subject to repeal by simple majority, but that to make it otherwise would be unconstitutional.[66] They then consider the example of an insulated supermajority rule,[67] which protects a supermajority requirement from being changed or repealed by Congress except by supermajority.[68] They argue against permitting such devices based on the historical precept of the equality of legislatures, and on the structural circumstance that permitting entrenchment of this type allows legislatures to effectively amend the Constitution in ways other than prescribed under Article V.[69]

Even the filibuster is vulnerable. Some opine that the Senate is a continuing body, based on the feature that no more than one-third of the Senators are up for re-election at any given time.[70] Accordingly, the Senate rules persist until changed,[71] which under the Senate rules themselves, requires a two-thirds majority.[72] The House, by contrast, adopts

63. Reicheldferfer v. Quinn, 287 U.S. 315, 317–18 (1932). A seminal academic article defending the anti-entrenchment rule is Julian Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379.

64. Posner & Vermeule, *supra* note 8, at 1670.

65. *Id.* (explaining that "[o]ur argument is simply that the subsequent legislature is bound by the entrenchment").

66. *See* John McGinnis & Michael Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 500 (1995).

67. Posner & Vermeule, *supra* note 8, at 1669 (calling this the solution by "self-reference."); *see* McGinnis & Rappaport, *supra* note 66. McGinnis and Rappaport provide the following hypothesis:

> that, instead of passing a three-fifths rule that a majority could repeal, the House had passed the three-fifths rule and a special repeal rule that required a supermajority vote to repeal the three-fifths rule. . . [A] majority could simply pass resolutions that repealed the repeal rule and the three-fifths rule. . . . To prevent this maneuver, the House might . . . pass . . . the insulated repeal rule—providing that both it (the insulated repeal rule) and the three-fifths rule could only be repealed by a supermajority vote. We believe, however that the Constitution does not allow such an insulated repeal rule to be given effect.

McGinnis & Rappaport, *supra* note 66, at 503–04.

68. *See* McGinnis & Rappaport, *supra* note 66, at 503–04.

69. *Id.* at 505–07 (regarding the filibuster, declaring, "Here we can state with some confidence only that when a house votes, the Constitution requires that a majority be able to repeal an existing rule." However, they allow that a supermajority can be required for bringing something to a vote).

70. *United States Senate Overview*, ALLGOV.COM, http://www.allgov.com/departments/legislative-branch/united-states-senate?agencyid=7433# (last visited Feb. 16, 2015).

71. S. Comm. on Rules and Admin., 113th Cong., Standing Rules of the S. Rule V (2013) [hereinafter Senate Rules].

72. Senate Rules, XXII.

a new set of House rules at the beginning of each Congress, requiring only a majority for passage.[73] However, others contend that nothing bars the Senate from similarly adopting new rules at the beginning of each Congress, or indeed at any time, and that this adoption is not constrained by the two-thirds requirement for changing the continuing rules. This view has been called the nuclear option and has recently been used by Senate Majority Leader Harry Reid to exempt confirmation of most presidential appointees from potential filibuster.[74]

A former aide to Senate Majority Leaders William Frist and Howard Baker has outlined several additional ways the Senate can change the cloture rule by simple majority.[75] For instance, such a change could be achieved by setting a precedent altering the Senate's procedures governing debate, which would only require a simple majority.[76] Moreover, a Standing Order, which needs only a majority, could modify the Senate's procedures, as "Standing Orders are not incorporated into the text of the Standing Rules, but nonetheless bind the Senate."[77] Indeed, in 2000, a majority vote instituted a Standing Order that prevented Senators from asking for the reading of conference reports, a tactic that had been used to delay business.[78]

Furthermore, Congress itself has exempted certain legislation, such as reconciliation, fast-track, or other must-pass bills from the filibuster through ordinary legislation, a phenomenon I discuss further in Part II.B.

2. Supermajority Requirements as Legalism

Each attempt to impose supermajority requirements tries to assimilate the process of deciding among political values to mere rule-abidance. Under such regimes, political outcomes can be blamed on the filibuster, rather than Congress' substantive opposition. "The defeat of the bill, despite majority support" is common parlance in press statements on Senate outcomes.[79] This formulation then allows members of the Senate to deflect accountability by portraying the result as determined by a "rule," rather than by the political preferences of Senators.[80]

73. Wm. Holmes Brown, Charles W. Johnson, & John V. Sullivan, *House Practice A Guide to the Rules, Precedents, and Procedures of the House*, GPO.GOV 837-38, http://www.gpo.gov/fdsys/pkg/GPO-HPRACTICE-112/pdf/GPO-HPRACTICE-112.pdf (last visited March 16, 2015).

74. Paul Kane, *Reid, Democrats trigger 'nuclear' option; eliminate most filibusters on nominees,* WASH. POST (Nov. 21, 2013), http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html.

75. *See* Gold & Gupta, *supra* note 56, at 208.

76. *Id.* at 209.

77. *Id.*

78. *Id.*

79. *See, e.g., Despite Majority Support, Republicans Block Cantwell Effort to Help Families Heat their Homes this Winter*, SENATE.GOV (Oct. 26, 2005), http://www.cantwell.senate.gov/public/index.cfm/press-releases?ID=edee3e15-c307-426c-96e2-addac8aa9a63. *See also* Steve Benen, *GOP Kills Jobs Bill Despite Majority Support*, WASH. MONTHLY (Oct. 12, 2011), http://www.washingtonmonthly.com/political-animal/2011_10/gop_kills_jobs_bill_despite_ma032756.php.

80. BARBARA SINCLAIR, UNORTHODOX LEGISLATION (4th ed. 2011).

B. Statutized Rules: Privileging Procedures (Fast-Track)

In some sense, privileged procedural status is the mirror image of a supermajority requirement. Rather than procedurally encumbering a particular set of actions, it greases the procedural wheels by disabling the filibuster through debate limits, by prohibiting amendments or other delaying motions, and by setting deadlines for Congressional action. Congress' so-called "fast-track" authority on trade agreements falls in this category.[81] As Aaron Andrew-Bruhl stated, "[u]nder fast track rules, Congress is required to schedule a vote within two months, and neither chamber may amend the president's implementing bill. Fast track thus guarantees the president (and trade partners) a speedy up-or-down decision on the nation's participation in a free trade agreement."[82]

The passage of statutes setting such internal rules could, by implication, suggest that procedures codified in statute can only be modified by statute, thereby requiring bicameral passage and presentment. But this state of affairs has been understood to exist, if not in conflict, then at least in tension with the Constitution's Rules of Proceedings clause, under which "[e]ach house may determine the Rules of its Proceedings."[83] Therefore to clarify that such statutized rules could still be changed by one house, Congress includes in any such bill the following boilerplate language, stating that the statutized rule was enacted:

> [A]s an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such. . .[is] deemed a part of the rules of each House, respectively . . . and . . . supersede[s] other rules only to the extent that they are inconsistent therewith; and with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.[84]

This language was included by the Defense Base Realignment and Closure Commission (BRAC) and part of that act's institutional division-of-labor that the Supreme Court declined to actively supervise in *Dalton v. Specter*.[85]

The BRAC law, like IPAB, also sought to enable cuts in a situation where spending was plagued by collective action problems. In the decade leading up to BRAC, the government was unable to close a single military base, despite consensus that the military had many more bases than could be justified.[86] Because each base brought economic benefits to the community in which it resided, each individual legislator would always oppose the

81. Bruhl, *supra* note 50.

82. *Id.* at 345. *See also* 19 U.S.C. § 2191.

83. U.S. CONST. art 1, §. 5, cl. 2.

84. Bruhl, *supra* note 50, at 364.

85. Defense Authorization Amendments and Base Closure and Realignment Act of 1990 (BRAC), § 2908(f), Pub. L. No. 100–526, 102 Stat. 2623 (1988) [hereinafter BRAC]; *see* Dalton v. Spector, 511 U.S. 462 (1994) (adopting a posture of judicial non-interference with the allocation of roles effected by BRAC).

86. *See, e.g.*, Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717 (2004).

closure of her district's base, even if all legislators agreed on the general need for some bases to be closed. Therefore in 1988, Congress passed BRAC, which established a commission of experts who, within the framework of the Department of Defense's (DOD) strategic plan, would identify a list of bases to be closed based on set criteria, such as military need.[87] Those closures would take effect unless Congress passed a joint resolution of disapproval. This device presumably changed Congress' options at time two, because the joint resolution of disapproval was procedurally protected by statutized rules of proceeding, and could not be amended.[88] That is, if Congress wished to reject the Commission's base closure list, the joint resolution, presumed to be the only available option, would permit the rejection of the whole list, but not the modification of any portion.

1. Congress' Statutized Rules Fail to Bind

However, courts eschew judicial intervention against Congress as it carries out its internal procedures.[89] First of all, judges policing Congress' deviation from statutized rules would confront the obstacle of the boilerplate disclaimer language immunizing such measures against questions based on the Rulemaking Clause.[90]

When Congress tries to establish procedures regularizing its own activities, it often finds itself in the position of author, arbiter, interpreter, and enforcer. In *Marshall Field & Co. v. Clark (Marshall Field)*, the Supreme Court held that Congress judges what counts as an enrolled bill and how much legislative journal-keeping to undertake.[91] In this case, some private plaintiffs alleged that the enrolled bill presented to the President differed from the provision passed by the Congress.[92] The Court, inaugurating what would be termed the "enrolled bill doctrine," ruled that it would not second-guess Congress on this matter. Rather than a statutized rule, *Marshall Field* concerned an internal legislative rule and practice about presiding officers attesting to whether the bill presented to the President was in fact the same as the bill passed by the Senate. However, the implication of *Marshall Field* is that if Congress were to change its internal rules and practices to conflict with an earlier statutized rule, especially one with a disclaimer, Congress' use of that later practice would be difficult to challenge in court.[93]

Other collateral doctrines also function to deprive Congress of an "enforcement

87. BRAC, *supra* note 85, §§ 201–03, 2901(a), 2902(c), 2903(b); 10 U.S.C. § 2687 (1994); *see also* BRAC, *supra* note 85, at §§ 203(a) & 206 (identifying military need as the principal criterion).

88. BRAC, *supra* note 85, § 2908(d).

89. *See* Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1253, 1274–79, 1298-1301 (2000). U.S. CONST., art I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings."); Kysar, *supra* note 13, at 559.

90. Bruhl, *supra* note 50, at 369 (finding only a few statutes that fail to include the disclaimer).

91. Marshall Field & Co. v. Clark, 143 U.S. 649 (1892). Decided the same day, *U.S. v. Ballin* 144 U.S. 1 (1892), also relied on the Rulemaking Clause to protect from outside scrutiny Congress' ability to set and judge its own interpretation of the requisite quorum, as long as no other provision of the constitution or aspect of a third-party's personal fundamental liberties were violated.

92. *Marshall Field*, 143 U.S. at 672–73.

93. *Marshall Field* remains good law today. *See* United States v. Munoz-Flores, 495 U.S. 385 (1990) (upholding *Marshall Field*).

mechanism outside of congressional will" for these procedural precommitments.[94] For instance, the Alaska Natural Gas Transportation Act[95] gave the president authority to recommend waiver of regulatory requirements that might impede a natural gas pipeline project, and it imposed a statutized rule that Congress consider such a recommendation through a particular type of procedurally streamlined resolution.[96] But such resolution relating to the same recommendation could not be considered twice within the same sixty-day period. Congress waived this once-in-sixty-day rule and then-Senator Metzenbaum sued. However, courts would not address the violation, claiming political question.[97] This case confirms that the courts' reluctance to interfere in Congress' internal procedures extends to instances where such procedures contravene a previously enacted statutized rule.

The general passivity of the courts is punctuated by a few exceptions. Courts will venture in if the congressional action with respect to a rule is arguably not internal, because it "affect[s] persons other than congressional members."[98] In *United States v. Smith*, the Senate rule required that the President take particular action, i.e. return a resolution, in order for the Senate to reconsider a nomination.[99] The Court enforced this rule because a third-party's eligibility for a particular office was at stake.[100]

Nevertheless, courts have declined to enter the fray in many other instances when non-legislators' rights, even Constitutional rights, were at stake.[101] Observers have concluded from this history that "legislative rules rely wholly upon internal enforcement by Congress."[102]

C. "Notwithstanding Clauses" (Statutized Rules of Construction)

I next consider "notwithstanding clauses" under the precommitment rubric. Others have called these "statutized rules of construction," or "Mother-May-I" clauses, and the clauses claim to control the effect of subsequent laws.[103] These clauses purport to apply

94. Kysar, *supra* note 13, at 553.

95. Alaska Natural Gas Transportation Act of 1976, Pub L. No. 94–586, 90 Stat. 2903 (codified at 15 U.S.C. § 719g).

96. *Id.* § 719f(d)(5)(B).

97. Metzenbaum v. FERC, 675 F.2d 1282, 1284–88 (D.C. Cir. 1982); *see* Bruhl, *supra* note 50, at 369 n.102; *see also* United States v. Rostenkowski, 59 F.3d 1291, 1305–06, 1310 (D.C. Cir. 1995).

98. Kysar, *supra* note 13, at 555.

99. United States v. Smith, 286 U.S. 6 (1932).

100. In *Smith*, the third party was seeking appointment to the Federal Power Commission. The Senate proceeded, even without the President's return of the resolution, to reconsider and reject the nomination. *Smith*, 286 U.S. 6. *See also* Yellin v. United States, 374 U.S. 109 (1963) (enforcing Congressional rules that conferred rights upon witnesses whose testimony was being compelled by a Congressional committee and justifying interference because in questions where the Constitution or fundamental personal rights were at stake, the courts reserve the power to step in). *See also* Christoffel v. United States, 338 U.S. 84 (1949) (allowing the defendant to question the quorum of a constitutional committee before which his testimony was adjudged perjury).

101. *See* Exxon v. FTC, 589 F.2d 582 (D.C. Cir. 1978) (barring plaintiffs from obtaining court relief interfering with Congress' manner of exercising its subpoena authority even if that manner threatened the confidentiality of its trade secrets); *see also* United States v. Bryan, 339 U.S. 323 (1950) (defendant raising lack of quorum as an affirmative defense for her failure to produce records in response to a House Committee on Un-American Activities subpoena, and the Court dismissing the claim).

102. Kysar, *supra* note 13, at 526.

103. *See, e.g.*, Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2117–19 (2002); *see also* Grewal, *supra* note 52.

"notwithstanding" any other or subsequent provision of law, or "without regard" to those other laws, ostensibly brushing them aside to give effect to only those laws meeting the conditions specified in the instant clause. For the purposes of considering these clauses as precommitment devices, we attend only to the effect of these clauses on *subsequent* law.

Some examples of such clauses supply a default definition, as in the Dictionary Act,[104] and others stipulate certain canons of interpretation.[105] Professor Lawrence Tribe, in considering the "notwithstanding clause" of Section 6 of the Religious Freedom Restoration Act of 1993 (RFRA), which purports to apply RFRA to any future law "unless such law explicitly excludes such application,"[106] concludes that the problem with enforcing such a law is that it "would in a sense permit an earlier Congress to add to Article I's requirements for the enactment of laws by a later Congress."[107] Do these constitute precommitments to the extent that they apply to and govern the interpretation or effect of subsequent laws? Tribe argues that at least some are impermissible entrenchments. However, Professor Nicholas Rosenkranz contends that they do not entrench[108] because these rules "[themselves] may be suspended or repealed by an act that comports with Article I, Section 7."[109]

Amandeep Grewal has called some of these clauses "Mother-May-I" laws. These laws on their face require Congress to jump through hoops in order to take future action of a particular kind. These hoops consist of specific statements, or placement within or invocations of some particular subsection of the code.[110] Examples include Section 501(c)(1) of the tax code which declares that tax exemptions for federal instrumentalities cannot simply be enacted anywhere, at anytime.[111] Only the exemptions in the same title 501(c) will be effective, because the language stipulates that the tax must be applied "without regard to any provision of law which is not contained in this title and which is not contained in a revenue Act."[112] Statutized rules of construction purport to apply to later laws as well, aiming to establish a different effect or different construction "notwithstanding" other background rules. These altered rules of construction usually provide for their own application unless Congress includes some particular statement or invocation. As I discuss later, the IPAB law's ban against repealing certain of its features in any way other than through a limited type of joint resolution falls within this category.

104. 1 U.S.C. §§ 1–7.

105. *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102–66, 105 Stat. 1071 (stating that "[n]o statements other than the interpretive memorandum . . . shall be considered legislative history of, or relied upon in any way as legislative history of [certain provisions] of this Act"). Although this section applies to contemporaneous law and does not specifically claim to apply as against "subsequently" passed provisions of law, it represents a clear example of Congress trying to change the underlying conditions under which its legislation is interpreted by courts.

106. Religious Freedom Restoration Act of 1993, Pub. L. No. 103–41, 107 Stat. 1488.

107. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 125–26 (3d ed. 2000)

108. Though they may still be intended as precommitments.

109. Rosenkranz, *supra* note 103, at 2118.

110. Grewal, *supra* note 52 (usefully grouping various examples into categories).

111. 26 U.S.C. § 501(c)(1) (2014).

112. *Id*.

1. The Doubtful Effect of Statutized Rules of Construction on Later-In-Time Statutes

Once again, we find that distinguishing the effect of these provisions from that of ordinary legislation becomes difficult. Certainly Congress can change its mind at time two and repeal the clause through ordinary means. Thus, statutized rules of construction are no more binding than supermajority requirements or statutized rules of proceedings like fast-track. But even short of that, these clauses are often defeated by implied repeals or last-in-time doctrines.[113] The implied repeals doctrine construes a subsequent statute as repealing an earlier statute if the two are in irreconcilable conflict.[114] This principle is congruent with the "last-in-time rule,"[115] which provides that if there is no way to give effect to two statutory provisions, then the last-in-time will be favored.[116] Under this doctrine, these "notwithstanding" statutes do not have force against Congress' clear attempts to override, and must often cede even in the face of Congress' later *implied* decisions to override.

Posner and Vermeule mount the most aggressive defense of these "notwithstanding" devices as effective self-entrenchment, changing the degree of difficulty of Congress' actions at a future time. They concede that "[t]hese provisions are not wholly entrenched, because they could be repealed by a simple majority."[117] However, they contend that "unlike an ordinary statute they could not be repealed by a simple majority acting by implication."[118] There are a number of responses to Posner and Vermeule. Posner and Vermeule seem to suggest[119] that the permissibility of these notwithstanding laws is less than clear, as there may be separation of powers concerns with taking these rules of interpretation out of the hands of courts and putting them into the hands of legislators.[120] Moreover, repeal-by-implication does not always constitute the background rule, since there are often presumptions against such repeal.[121] It is not clear that the difficulty of Congress' future implied repeals is thus appreciably changed. All of this must further be understood in the context of Posner and Vermeule's stance that their support for such self-entrenchment does not mean they believe such provisions should be judicially enforced, a position about

113. This discussion of "statutory rules of statutory interpretation" does not speak to the implications when these types of clauses are enforced against prior-passed law or contemporaneous law, but only when they purport to apply to subsequent law. *See* Abbe Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of* Statutes, 54 WILLIAM & MARY L. REV. 753, 801–04 (2013) (citing cases where courts relied upon savings clauses to decide effect on contemporaneous law, but also noting that jurists and scholars have exhibited resistance to legislated interpretive rules even in that context).

114. Grewal, *supra* note 52, at 1040, 1048 (citing Abrego v. Dow Chem. Co., 443 F.3d 676, 684 (9th Cir. 2006) (per curiam) (proposing that if Congress' later enacted statute is flatly inconsistent with earlier enactment, the prior legislatures are overridden).

115. Posner & Vermeule, *supra* note 8, at 1668.

116. Chae Chan Ping v. U.S., 130 U.S. 581, 600 (1889) (noting that in the event of conflict between earlier and later statutes, "the last expression of the sovereign will must control").

117. Posner & Verneule, supra note 8, at 1698.

118. *Id.*

119. *Id.* at 1698–99.

120. Though Rosenkranz argues that this statement cannot be presumed as a general matter, but may need a more nuanced approach taking into account the circumstances of each individual instance. *See* Rosenkranz, *supra* note 103, at 2103–09.

121. Morton v. Mancari, 417 U.S. 535, 549 (1974) (declaring that "'repeals by implication are not favored,'" (quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936)).

which some have remarked "as a practical matter, is often equivalent to a position that rejects entrenchment."[122]

Indeed, it strains credulity to characterize existing case law as recognizing "Mother-May-I" or "notwithstanding" requirements. For instance, the Supreme Court has held the Administrative Procedure Act's (APA) Section 559 requirement—that any subsequent statute may supersede the APA's requirements only if it does so expressly—does not require "magical passwords."[123] Thus the Immigration and Naturalization Act's detailed procedures for deportation hearings, which purported to be the sole and exclusive procedures for those hearings, could displace the APA hearing provisions, despite the lack of express reference to the APA.[124]

In sum, these interpretive clauses may be directly repealed by ordinary legislation of a future Congress, and courts often do not give effect to them, even against Congress' implied later repeals.

D. Case Study 1: Budgeting

Congress' budget process, as Garrett and others have documented, is a deep reservoir of precommitment examples.[125] The process simultaneously employs many of the different precommitment strategies catalogued here, including elaborate statutized rules such as points of order to procedurally privilege the budget resolution, the appropriations bills and reconciliation measures from certain maneuvers, as well as supermajority requirements to overcome those points of order.

A fundamental concept structuring Congress' budgeting work is the distinction between authorizing and appropriating. As Olesczek explains, "[a]uthorizations establish, continue or modify programs or policies; appropriations fund authorized programs and policies."[126] This distinction is a creature of House and Senate rules devised in the 1800's which bar unauthorized appropriations.[127] It parallels the distinction between legislating and implementing, between politics and law, and accordingly frowns upon the disposition of "matters of policy" in appropriations vehicles.

The distinction continues to be delineated in many ways, including the separation of the appropriations from the authorizing committees, as well continued application of the House rule that imposes a point of order on authorizing language on an appropriations bill.[128] This House rule is matched by Senate Rule XVI that disallows authorizing legislation on an appropriations bill as non-germane, although the rule provides for an exception

122. Stewart Sterk, *Retrenchment on Entrenchment*, 71 GEO. WASH. L. REV. 231, 233 (2003).

123. *See, e.g.*, Marcello v. Bonds, 349 U.S. 302, 310 (1955) (upholding Congress' modification of the Immigration and Naturalization Act in response to the Supreme Court's decision in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) that the APA governed deportation hearings).

124. *Id.*

125. Garrett, *supra* note 86.

126. OLESZEK, *supra* note 3, at 42.

127. Senate Rule XVI. *See* ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 15 (3d ed. 2007); *see also id.* at 49 (identifying the "House Rule in 1837 requiring authorization bills to precede appropriations") (citing ROBERT LUCE, LEGISLATIVE PROBLEMS 425–26 (1935).

128. *But see* OLESZEK, *supra* note 3, at 122 (observing that sometimes the Rules Committee can waive points of order enforcing the principle against unauthorized appropriations or legislative provisions in general appropriations bills).

if such legislation is germane to the House-passed bill.[129] But as with many other norms, this one is often honored in the breach. Appropriations riders, enacting policy by specifically instructing funds to be used or not used in certain ways, have come to be permitted on the Senate side. This practice has arisen because "[t]he authorization-appropriations rules, like almost all congressional rules, are not self-enforcing. Either chamber can choose to waive, ignore, or circumvent them, or establish precedents and practices that obviate distinctions between the two."[130] Under Clause 4 of Senate Rule XVI, questions of germaneness are not necessarily submitted to the chair for ruling, but instead are sent to the whole Senate for an up-or-down vote by majority without debate.[131] Thus the germaneness requirement is easily overcome as long as the underlying authorization has majority support. And even such a permissive procedure has not been routinely followed or invoked.[132] To avoid endless clogging of the appropriations process, Senate leadership now routinely heads off the many potentially non-germane "authorizing" amendments in other ways. Appropriations bills commonly bypass the Senate floor and instead are incorporated with other already-passed appropriations bills into omnibus conference reports before bringing them to a full Senate vote. This strategy benefits the bill managers because conference reports are protected against amendments.[133]

The budget process affects both authorization and appropriations. The process starts each year with a Presidential budget proposal submitted to Congress by the first Monday in February.[134] Congress then aims to adopt the budget as a concurrent resolution, which requires bicameral passage—but no presentment—by April 15. It often considers, but can depart from the President's request. The resolution functions each year to set binding aggregate annual targets for budget authority, outlays, deficits, surpluses, revenues, and allocation among the various functional categories. It sets the parameters for Congressional action in that year. If the budget contemplates new legislation, the amounts it assumes are then binding upon the various authorizing committees such that their legislation must conform to the allotments or draw a point of order. If the budget contemplates action necessary to raise revenue or change entitlement spending (also called mandatory or direct spending), it can include mandatory instructions (called reconciliation instructions) to the relevant congressional committees to produce legislation consistent with those requirements.[135] Those reconciliation instructions order the relevant committees to report legislation by

129. MARTIN GOLD, SENATE PROCEDURE AND PRACTICE 109 (3d ed. 2013) ("If a legislative amendment is proposed to an appropriations bill…a defense can be raised that the amendment is germane to legislative language in the House bill… If the Senate holds the amendment germane, the point of order falls... [T]his appeal…requires a simple majority of senators present.").

130. OLESZEK, *supra* note 3, at 50.

131. *But see* GOLD, *supra* note 129, at 109 (describing a practice of submitting to the chair anyway).

132. For a summary by Senators of such custom, see 116 Cong. Rec. 41340, 91st Cong. 2d Sess., Dec. 14, 1970.

133. Or filling the amendment tree so that no further amendments may be proposed. *See* Steven S. Smith, *The Senate Syndrome*, BROOKINGS INST. (June 2010), *available at* http://www.brookings.edu/~/media/research/files/papers/2010/6/cloture%20smith/06_cloture_smith.pdf.

134. 31 U.S.C § 1105(a) (2011).

135. *See* Anita S. Krishnakumar, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995-96 Budget "Train Wreck,"* 35 HARV. J. ON LEGIS. 589, 594 (1998) (asserting that this was a form developed in 1980 by Leon Pannetta, then Chairman of the House Budget Committee, now Director of the CIA, at least insofar as it was applied to the first budget resolution rather than the second).

certain deadlines to conform tax revenues or entitlements to the budget resolution. Such legislation would then be procedurally privileged so as to enable Congress to pass it expeditiously. Privileges include a germaneness requirement for amendments and a twenty-hour limitation on debate, protecting reconciliation bills against filibuster.[136] The Byrd Rule creates a three-fifths point of order against provisions in a reconciliation bill or conference report that are "extraneous to the instructions to a committee."[137]

And for already-authorized programs (those programs and policies which have already been passed and do not require new authorizing legislation) the budget resolution's allocations to the appropriations committees govern the appropriators' work funding all ongoing and previously-authorized discretionary activities. The appropriations committees are responsible for the twelve annual appropriations bills that Congress must pass before it adjourns each year. If it fails to do so, Congress may pass continuing resolutions (CRs), which often merely continue current funding levels so that the government does not shut down while Congress tries to complete its work.

This framework is the achievement of many rounds of Congressional legislative design regarding its own budgeting decisions, from the Budgeting and Accounting Act of 1921,[138] to the 1974 Congressional Budget and Impoundment Control Act[139] and beyond. These laws sought to rein in previous abuses, including Congress' practice of considering tax and spending legislation *ad hoc*, without meaningful ways to bring them into relationship with one another.[140]

But this basic framework still fails to cabin decisions. Following the Reagan tax cuts in the early 1980's, annual deficits ran to $200 billion each year more than double the highest previously recorded deficit.[141] In response, Congress adopted the Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA), commonly referred to as Gramm-Rudman-Hollings (GRH) in honor of its sponsors.[142] GRH introduced a number of major new concepts and devices, including the deficit and spending targets and the sequester, discussed further in Part II.D.1.

1. How Budget Devices Constitute Precommitments

On the most basic level, for the budget resolution to be meaningful it should impede

136. Congressional Budget Impoundment and Control Act of 1974, Pub. L. No. 93–344, §§ 305(b)(2) & 310(e)(1)–(2), 88 Stat 297 (1970) (codified as amended at 2 U.S.C. § 636(b)(2), 641(e)(1)(2)) [hereinafter the Congressional Budget Act].

137. *See* Congressional Budget Act, *supra* note 136, at § 310(c), 88 Stat. at 315; 2 U.S.C. § 644(b)(1)(A). A provision is extraneous if, among other things, it does not produce a change in outlays or revenues, or those changes are merely incidental, or it causes the bill to exceed the applicable targets, or it changes Social Security. The Byrd Rule thus polices the boundaries of what can be passed using this "fast-track" method.

138. Budgeting and Accounting Act of 1921, Pub. L. No. 67–13, 88 Stat. 297 (1921) (establishing the President's budget bureau and GAO).

139. Congressional Budget Act, *supra* note 136 (established Congress' side of the budget process, including reconciliation, established CBO and the House and Senate Budget Committees).

140. *See, e.g.*, Krishnakumar, *supra* note 135, at 592. *See also* Stith, *supra* note 13, at 600.

141. SCHICK, *supra* note 127, at 21 (reaching this high in FY 1981).

142. *See generally* Pub. L. No. No. 99–177, 99 Stat. 1037 (1985). In this piece, I will use GRH to refer to the Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA) in the form that it was originally passed." By contrast, I will use "BBEDCA amended" to refer to the statutory sections as they have been changed over time, including the changes enacted in the Budget Control Act of 2011.

the passage of Congressional action that exceeds the budget. Indeed, the budget laws do so through at least two major methods, both of which I argue fit the classic structure of precommitment. The first method is reconciliation. Reconciliation bills are characteristically precommitment devices in the sense that the reconciliation legislation is procedurally privileged by statutized rules, and easier to pass because of exemptions from obstructing devices like filibusters or certain types of amendments.[143] Thus, the notion that direct spending and revenue legislation will be more readily adopted if it conforms with the budget means that the time two reconciliation actions of Congress will have been eased by the time one decisions by Congress on the budget resolution, as well as, in a more general sense, by the time zero Congress enacting the budget framework procedures.

The second major method by which the budget resolution impedes nonconforming legislation at time two is by subjecting that action to points of order.[144] But points of order by themselves are not dispositive. They can be waived "by suspension of the rules, by unanimous consent, or, in the House, in a special rule" issued by the Rules Committee structuring debate on that bill.[145] The Senate can generally waive rules by majority vote because usually only a majority vote is required to override the ruling of a chair when such ruling is appealed to the whole Senate.[146] Further, the Senate, in some cases, may table a point of order by majority.[147] Thus, most waiving of points of order and votes on appeals can be done by majority in the Senate. Correspondingly, a Special Rule can be passed by a majority vote of the full House.[148] But the special discipline of the budget process was that it established certain points of order in the Senate that triggered sixty vote requirements to overturn the presiding officer or waive the application of those points of order.[149]

For instance, Section 302(f)(2)(A) of the Congressional Budget Act as amended by GRH declares that in the Senate, after a budget resolution is adopted, any legislation that would cause the applicable allocation from the budget resolution to be exceeded will be out of order unless the point of order is waived by three-fifths majority.[150] Some points of order also make it easier for a budget resolution to pass, which in turn reduces the difficulty of imposing such disciplining parameters.[151] For instance, while the Senate usually permits

143. Congressional Budget Act, *supra* note 136, § 310. *See also* ROBERT KEITH & BILL HENIFF, JR., CONG. RESEARCH SERV., RL33030, THE BUDGET RECONCILIATION PROCESS: HOUSE AND SENATE PROCEDURES (2005), *available at* http://assets.opencrs.com/rpts/RL33030_20050810.pdf. (discussing Pub. L. No. 93–344, § 310, 88 Stat. 297 (1970)).

144. Congressional Budget Act, 2 U.S.C. § 633 (f)(1)–(2) (subjecting such legislation to a point of order).

145. BILL HENIFF, JR., CONG. RES. SERV., RS20371, OVERVIEW OF THE AUTHORIZATION-APPROPRIATIONS PROCESS (2012), *available at* http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0DP%2BPLW%3C%22%40%20%20%0A (noting that Suspension of the Rules in the House means passage under the procedural framework of House Rule XV, when bills require 2/3 vote, but are otherwise exempt from points of order.)

146. Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101st Cong., 2nd sess., S. Doc. 101–28, at 145 (1992).

147. See Gold & Gupta, *supra* note 56, at 261.

148. Stanley Bach, *Special Rules in the House of Representatives: Themes and Contemporary Variations*, (1981), *available at* http://stanistan.org/docs/1/5.pdf.

149. *See* BBEDCA, *supra* note 142.

150. Budget Control Act of 2011, Pub. L. No. 112–25, 125 Stat. 240, at 25 (2011).

151. *Id*.

non-germane amendments before cloture[152] they are subject to a three-fifths point of order on budget resolutions[153] and on reconciliation legislation as well.[154]

When Congress operated under GRH, the budget resolution totals were not the only target amounts that constrained Congressional action. GRH stipulated other sets of numbers: the maximum annual deficits and annual discretionary spending limits. Congressional action that violated these new numbers, which existed independently from the budget resolution Congress set each year, would also invite points of order. For instance, Section 312(b) prohibited legislation that exceeds the discretionary spending limits set in Section 251(c) of GRH, while Section 312(c) prohibited budget resolutions that exceed the maximum deficit amount specified in GRH. Both are waivable only by three-fifths majority in the Senate. Thus GRH's numbers, which are set at time one, were designed to make the passage of nonconforming legislation or contrary budget resolutions at time two more difficult.

Another new mechanism introduced by GRH was the sequester, a significant precommitment device.[155] Congress' breach of the deficit targets or the annual discretionary spending limits would trigger sequestration, an automatic cancellation of funds in accordance with an across-the-board formula that would bring budget resources back in line with the time one GRH target deficit and spending levels.[156] This cancellation, again, presumably renders nonconforming spending at time two more difficult.[157] While presented as "uniform" insofar as it distributes cuts "across-the-board," the sequester does not innocently represent Congress' resolution to reduce the budget deficit in a way that is neutral to the expenditures cut.[158] Apart from the many exceptions, and systematic biases that characterize the sequester,[159] the sequester also encodes a particular policy privileging tax spending as opposed to program spending.

2. The Budget Examples Fail to Bind

Despite these elaborate efforts, Congress proved thoroughly capable of changing its budget and spending intentions at time two. GRH failed "both in terms of actually reducing

152. The House generally prohibits non-germane amendments. They can be prohibited by Unanimous Consent (UC) in the Senate.

153. 2 U.S.C. §§ 636(b)(2) & (c)(4).

154. 2 U.S.C. § 641(e).

155. *See* Westmoreland, *supra* note 13, at 1581 (specifically identifying the "precommitment" devices of GRH and Budget Enforcement Act and stating that they "created the significant precommitment devices of global caps on discretionary spending, PAYGO rules for mandatory spending, supermajorities to waive them, and sequesters").

156. A third type of sequestration which I discuss in subsection II.H *infra* is PAYGO sequestration, which is triggered when tax or entitlement legislation does not include offsetting spending cuts or revenue increases to pay for itself.

157. Though see Part II.H *infra* as to how it is a weak precommitment that can be, and was often, changed at time two.

158. Stith, *supra* note 140, at 652 (stating that "automatic sequestration, alters the political burden borne by those who would increase federal spending").

159. *See id*. at 639–45. (describing how programs that have a higher outlay (spend-out) rates would be differentially disadvantaged by sequestration relative to programs where spending is obligated early yet does not translate into outlays until far into the future, since programs with such obligations tend to be exempted or non-sequestrable. Personnel costs, for instance, incur faster outlay rates, while capital improvements spend-out more slowly. Programs with multi-year budget authority are also treated differently).

the deficit and introducing procedures capable of doing so."[160] Congress and the Administration engaged in gimmicks like pushing outlays to the next fiscal year by delaying a military payday by twenty-four hours. As Stith states, "GRH is only a statute, not a constitutional amendment."[161] And indeed, one perverse outcome she identifies from this limitation is that the stronger the penalty imposed by sequestration, the less binding the device becomes. The consequence of sequestration might become so uncomfortable that Congress has greater incentive to exercise its legislative power to simply change or repeal it.

Indeed, Congress often "contracted around" GRH. After sequestration was triggered in 1984, Congress simply passed COBRA 1985, under privileged reconciliation rules no less, to restore the sequestered funds.[162]

This situation has led observers to identify precommitment in the budget context as a perfect device for political cover. It appears as though the present Congress is doing something to constrain spending, leaving future Congresses the ability to spend when they so desire.[163]

3. Budget Devices as an Exercise of Legalism

Legalism frames actions as dictated by rules so they appear neutral. The political choice involved in any decision is camouflaged by appeal to the false necessity of the rule. Likewise, many of these budget precommitments purport to shield legislators from direct political value trade-offs. Elster identifies the idea of a balanced budget amendment as motivated by the same logic: "Representatives need to be able to tell their constituents that their hands are tied."[164] Tim Westmoreland argues that budget rules deflect accountability and disguise political decisions.[165] For instance, expanding prenatal care and providing certain vaccines would violate the score-keeping and other rules implementing the Congressional Budget Act, "but for reasons that no Member of Congress would be willing to defend in public."[166] The reason why such proposals would draw a budget point of order is because the CBO's score-keeping model includes "survivor's costs," which frequently doom health provisions. The modeling of survivor's costs within the structure of the Budget Act, which asymmetrically requires weighing of budgetary costs, but not benefits, means that the benefits of helping people live longer are not considered; they do not produce savings, and are instead scored as costs for the reason that saving lives of children who would have died means that they will live to consume health care and other benefits throughout their remaining lives. It is cheaper for the government if premature children and others die. But this consideration is framed as a budget point of order that cloaks the

160. *See* Christopher D. Dodge, *Doomed to Repeat: Why Sequestration and the Budget Control Act of 2011 are Unlikely to Solve Our Solvency Woes*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 835, 845 (2012) (observing that "in 1990, when the budget deficit was supposed to have progressively shrunk to zero, it was actually at a record high").

161. Stith, *supra* note 13, at 652.

162. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99–272, 100 Stat. 82. *See also* GRH 1987, 2 U.S.C.A. § 905 (2013).

163. Stith, *supra* note 13, at 668.

164. UNBOUND, *supra* note 11, at 142.

165. Westmoreland, *supra* note 13, at 1600.

166. *Id.* at 1599.

political acceptability or unacceptability of such an argument. Westmoreland asks "[s]hould legislation to establish these interventions have fallen on a parliamentary point of order" as opposed to consideration on the particular merits of the matter.[167] The particular equities of the issue have been rendered invisible by the rule.

E. Case Study 2: "Recusal" Delegation

Certain Congressional precommitment examples depend upon Congress' abdication of power to other political actors whom they hope will hold them accountable at time two. Certain types of delegation fall into this category. While arguably even ordinary administrative delegation has some concessionary effect, agency action is still thought to derive from statutory authorization, and therefore remains, in theory, subject to Congressional override.[168] The Congressional Review Act ostensibly makes it even easier for Congress to override by providing that with respect to "major regulations," a congressional resolution of disapproval will be privileged against filibuster in the Senate, though still largely subject to normal rules in the House.[169]

A number of other laws also use privileged resolutions but to empower an agency relative to Congress. BRAC, for instance, empowers executive actors relative to Congress insofar as it limits Congressional overrides to only one type of action—an approval or disapproval of the entire package of base closures with no change. These types of precommitment employ both delegation as well as modification of procedural status for a class of Congressional actions—a restriction on amendments to the resolution of disapproval. Such a resolution of disapproval usually involves not only statutized rules, but also a "notwithstanding" clause. The "notwithstanding" clause ensures both that Congress must jump through the particular hoops pertaining to the resolution of disapproval to be effective in overriding the delegation, and that the delegated outcome will obtain without regard to other laws outside this class.[170] This combination of precommitment devices is what Michael Teter calls "recusal legislation."[171]

1. Recusal Delegation as Legalism

Just as legalism functions to elevate the "legally-required" and disparage politics, the precommitment device of recusal delegation changes the nature of decision-making away from value-based toward more rule-based decision making. Recusal delegation also privileges the general principle, and renders particular merits irrelevant. Yet, the motivations behind recusal-legislation seem to depend on the slippage in our understanding of whether

167. *Id.* at 1598–99.

168. *Cf.* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993) (arguing that ordinary delegation relieves Congress of having to make hard policy choices). *But see* Peter Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775 (1999) (detailing why Schoenbrod is mistaken).

169. Garrett, *supra* note 86, at 724–25 (characterizing the CRA as largely symbolic).

170. *See, e.g.*, Defense Authorization Amendments and Base Closure and Realignment Act of 1988, Pub. L. No. 100–526, § 205(1), 102 Stat. 2623 (authorizing the Secretary to follow the base closure recommendations "without regard to any provision of law restricting the use of funds for closing or realigning military installations included in any appropriation or authorization Act").

171. Teter, *supra* note 51.

such decisions should be legally governed or politically accountable. In *Dalton v. Specter*, Justice Souter, concurring in part, stated that Congress recognized that base closure was "politically difficult" and so it devised a scheme that would "bind its hands from untying a package."[172] This structure of submitting to the "general" principle while supporting a different result for the "particular" case provides political cover.[173] In this arrangement, Congress only votes on "the abstract and consensus notion of cutting spending by eliminating . . . bases. A 'veil of ignorance' provides members cover to vote for the measure, whether they have a base in their district or not."[174] Brito cites Senator Phil Gramm explaining the convenient posture of an individual legislator under the BRAC arrangement, a quote I reproduce in full here because it is so revealing (and colorful):

> The beauty of this proposal is that, if you have a military base in your district . . . under this proposal, I have 60 days. So, I come up here and say, "God have mercy. Don't close this base in Texas. We can get attacked from the South. The Russians are going to go after our leadership and you know they are going to attack Texas. We need this base." Then I can go out and lie down in the street and the bulldozers are coming and I have a trusty aide there just as it gets there to drag me out of the way. All the people . . . will say 'You know, Phil Gramm got whipped, but it was like the Alamo, He was with us until the last second.'[175]

2. Do Recusals and Other Delegations Bind?

These are instances where Congress empowers third parties against itself, just as Ulysses empowered his crew to ignore his later commands to untie him. But we have learned through experience with the Line-Item Veto Act,[176] the original GRH mechanism granting the Comptroller General authority in triggering the sequester,[177] and the legislative veto device,[178] that executive-legislative power-sharing pacts are often struck. It appears that Congress' toolkit for empowering the executive against the legislature is limited.[179] Certainly ordinary delegation remains available, but it can always be overcome by statutory override. To the extent that recusal delegation depends upon statutized rules and notwithstanding clauses, the mechanism rests on shaky ground indeed.

Meanwhile the success of BRAC was, on closer inspection, short-lived. While the "initial BRAC Commission ratified all DoD's recommended base closures without adding or subtracting from the list," later commissions modified the list, principally to exempt

172. Dalton v. Specter, 511 U.S. 462, 481–82 (1994).

173. Jerry Brito, *Running for Cover: The BRAC Commission as a Model for Federal Spending Reform*, 9 GEO. J.L. & PUB. POL'Y 131 (2011).

174. *Id.* at 143.

175. *Id.* at 142–43.

176. *See* Clinton v. City of New York, 524 U.S. 417 (1998).

177. *See* Bowsher v. Synar, 478 U.S. 714 (1986).

178. *See* INS v. Chadha, 462 U.S. 919 (1983).

179. This limitation applies to the converse situation as well, in empowering the legislature against the executive, as was the case for the legislative veto.

bases in districts represented by members on the Armed Services or Defense Appropriations Committee. Brito concludes that BRAC only works under certain circumstances and one of those circumstances, present only for the first round of cuts, was that Congress could agree on what to do: "The first round of cuts was made up of 'low-hanging fruit'—the most egregious examples of surplus bases on which most could agree."[180] It constrained only in instances when preferences were aligned anyway.

F. An Important Case: Entitlements (Including Taxes and Formulae)

Though Elster specifically mentions constitutionalized economic and social rights as precommitments,[181] statutory entitlements are not as regularly grouped among precommitment devices. Here I review the argument as to why entitlements, even sub-constitutional ones,[182] could arguably qualify as precommitments. Entitlements generate budgetary consequences insofar as a beneficiary meeting the eligibility criteria outlined in law may sue to enforce the delivery of benefits specified in statute.[183] Therefore, Congress cannot set contrary limits on the funding of such a program without changing the authorizing law.[184] This "mandatory" or "direct" spending contrasts with discretionary spending where "[t]he legal presumption . . . is that it will not be renewed unless Congress takes affirmative steps to do so."[185] Congress appears, in the case of entitlements, to have surrendered some of its later appropriations discretion to another political actor—the courts—though it still retains authority to change the authorizing language at any time so as to retract the mandatory funding obligation.[186]

1. The Ties of Entitlement Unravel

But even the previous description oversimplifies: for instance, what one has an entitlement to in Medicaid is deeply undercut by state flexibilities, such as those included in the Deficit Reduction Act of 2006 (DRA).[187] Medicaid has been classified as an entitle-

180. Brito, *supra* note 173, at 144.

181. UNBOUND, *supra* note 11, at 141–42.

182. Constitutional rights would not fall within the set of Congressional precommitments, because they would represent the sovereign binding Congress, rather than Congress binding itself.

183. *See* Bd. of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); Goldberg v. Kelley, 397 U.S. 254 (1970); Mathews v. Eldridge, 424 U.S. 319 (1976); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). *See also* Blessing v. Freestone, 520 U.S. 329 (1997); Gonzaga v. Doe, 536 U.S. 273 (2002). The statutory language must, among other requirements, be sufficiently mandatory to admit of individual enforcement. And while "shall" is one such indication of the mandatory nature of the provision, its effect can be undercut by language such as "subject to the availability of appropriations," or statements that under such law "there are authorized to be appropriated funds for." Westmoreland, *supra* note 13, at 1566. *See also* TIMOTHY JOST, DISENTITLEMENT? 46–50 (2003).

184. And we have discussed earlier, see *infra* Part II.D, how appropriations bills are procedurally favored compared to other authorizing legislation.

185. Westmoreland, *supra* note 13, at 1565.

186. This mechanism of ceding authority to courts may at first glance appear to be a fourth method of Congressional precommitment, distinct from supermajorities, statutized rules, or notwithstanding clauses, but we will see that entitlements essentially depend on statutized rules.

187. Harper Jean Tobin & Rochelle Bobroff, *The Continuing Viability of Medicaid Rights After the Deficit Reduction Act of 2005*, 118 YALE L.J. POCKET PART 147 (2009), *available at* http://yalelawjournal.org/the-yale-law-journal-pocket-part/legislation/the-continuing-viability-of-medicaid-rights-after-the-deficit-reduction-act-

ment because of the central requirement that states must "mak[e] medical assistance available . . . to all [eligible] individuals.[188] Moreover, that medical assistance is defined a certain way, with certain mandatory and other optional benefits. However, under the DRA, states no longer have to provide certain eligible populations[189] with the statutorily defined benefit package. Instead, states can get federal approval to provide either a "benchmark" package, which waters down the guarantees under law, or even a "benchmark equivalent" package, which allows even more state discretion to substitute actuarially equivalent alternatives for parts of the benchmark package. What then has Congress bound itself to fund at time two? The answer is increasingly blurred. Given these flexibilities, what is the specific content to which one is entitled and is the word "entitlement" meaningful under these circumstances?

Also, the premise that courts would step in to enable beneficiaries to enforce the delivery at time two of what Congress promised at time one is overstated. The availability of medical care depends not just on the specified content of the "medical assistance"[190] basket, but also on, for instance, the number of providers willing to provide such services. Having to travel to the next county to find a specialist, or queuing on a long waitlist to see the one dentist willing to take Medicaid patients severely undercuts the promise of medical assistance, even if the services were well-specified as part of the benefit basket. One might look to the Medicaid law and find that the federal statute contains an "Equal Access" provision, requiring state financing and payment to be "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area."[191] But that provision has proven difficult to enforce in court. Whether an aggrieved person has a right of action under Section 1983[192] turns on a three-prong test, whether the provision is clearly intended to benefit plaintiffs, whether it is phrased as a mandatory obligation, and not so vague and amorphous as to strain judicial competence. Courts have made this and related rights of action increasingly unavailable.[193]

Moreover, the Social Security Act's Medicaid requirements have always been liberally waived. Sections 1115 and 1915 of the Social Security Act (SSA) allow the federal government to waive virtually any of the requirements of the Medicaid statute for "demonstration" and other purposes. The existence of waivers gravely undermines the assurance that a state can be held to any particular aspect of Medicaid law.[194] For instance, Tennessee obtained an ambitious section 1115 waiver in the 1990's, easing the federal requirements

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of-2005/.

188. 42 U.S.C. § 1396(a)(10)(A) (2014).

189. Children, working parents, and pregnant women above 133% of poverty.

190. Often challenged in terms of whether it provides assistance sufficient in "Amount Duration and Scope."

191. 42 U.S.C § 1396(a)(30)(A).

192. Some of these cases have also considered the question of whether a right of action arises under the Supremacy Clause. *See* Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S. Ct. 546 (2012).

193. Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. DAVIS L. REV. 413 (2008). And recently the Supreme Court has even further undercut the implied Ex Parte Young cause of action. *See* Armstrong v. Exceptional Child Ctr., 135 S. Ct. 1378 (2015). *See also Douglas*, 132 S. Ct. 546.

194. David J. Barron & Todd Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013).

for medical assistance in order to allow Tennessee to enroll Medicaid beneficiaries in managed care. The conversion to managed care was intended to save money and thereby enable the state to use those resources to extend eligibility to new populations. The terms of the waiver, as with so many waivers of this type, promised Tennessee the federal dollars to which they would otherwise have been entitled, but in return, they could impose enrollment caps.[195] Two decades later, we find the newly eligible—those who have extremely high medical bills but would ordinarily not qualify for Medicaid—must be among the first 2,500 callers in a twice-a-year open enrollment window of typically one hour. Access to medical assistance depends on applicants dialing as fast as they can to request Medicaid during the brief time slot.[196] This portrait of a telephone lottery dictating whether one receives health care bears very little resemblance to the assurance and automatic quality that we imagine entitlements, as Congressional precommitments, to offer.

To the extent Congress has arguably ceded to any outside actors, those actors are the ones to which Congress routinely delegates: the states, and the Department of Health and Human Services ("HHS"), the agency in charge of approving the state plans. The characterization of Congress' accountability to beneficiaries, or the courts, is much weaker. Once one takes into account the enrollment or federal funding caps associated with state waivers, the difference between an "entitlement program" and ordinary block grant or other programs becomes even less distinct. Yet, even this account overclaims Congress' actual obligations: Congress can change the authorization language at any time to repeal the authorization of states and agencies in this regard. The only thing Congress has even ostensibly relinquished is the ability to limit or repeal the entitlement through appropriations, rather than through the authorization process. Yet, as we have seen in Part II.D above, Congress' statutized and standing rules distinguishing authorization and appropriations are themselves frequently overridden.

If, despite all these reservations, entitlements are precommitments nonetheless, such a label must also attach to revenue measures. Any tax provision is presumed to continue, unless changed or sunset, and courts are certainly employed to sanction those who do not pay taxes.[197] Tax "spending," in the form of exemptions and deductions favoring certain populations, is thus symmetrical to entitlement spending. For instance, tax "spending" to favor employer-sponsored health benefits is also a mandatory "cost" insofar as the amount foregone is not capped, and enjoyment of the deduction can be judicially enforced.

These examples of ostensible precommitment inevitably bleed into ordinary legislation. As Bruhl has said, "all legislation--or rather, all legislation that lacks a sunset clause--has this kind of *de facto* entrenching effect of establishing a new status quo.[198]

195. Kaiser Commission on Medicaid and the Uninsured, *Tennessee Section 1115 Waiver Amendment Proposal Fact Sheet*, KAISER COMMISSION KEY FACTS (Henry J. Kaiser Family Found., D.C., Oct. 2004), *available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/01/tennessee-section-1115-waiver-amendment-proposal-fact-sheet.pdf.

196. *See* Abby Goodnough, *Tennessee Race for Medicaid: Dial Fast and Try, Try Again*, N.Y. TIMES (Mar. 24, 2013), *available at* http://www.nytimes.com/2013/03/25/us/tennessee-holds-health-care-lottery-for-the-poor.html?pagewanted=all.

197. *See* Bruhl, *supra* note 50, at 373 (explaining that Social Security is not legally entrenching, just as tax rates are not, because neither provision is insulated).

198. *Id.* at 377.

2. The SGR Formula for Physician Payment under Medicare: A Special Variant of Entitlement Logic

As we test this concept of Congressional precommitment further, we might ask whether any formula represents a binding precommitment device by creating an automatic method of payment or distribution that obtains without separate decision about allotment.[199] This might not apply with respect to a formula that allots funds that are themselves capped or subject to appropriations, but it is worth considering with respect to formulae in entitlement programs.

The Sustainable Growth Rate (SGR) depended on a formula that is of particular relevance to the IPAB mission, as some observers have said that this payment formula, which has only recently been modified by Congress, was likely to be targeted by IPAB.[200]

The story of the SGR begins with the initial passage of Medicare, an entitlement program that had a very generous "open-ended cost-reimbursement system" in order to mollify any opposition, especially that of physicians whose lobbying group had spiked previous federal health coverage legislation. Therefore, under Medicare, physicians were initially paid for their services to Medicare beneficiaries according to their "usual" and "customary" fees.[201] In other words, physicians were being paid fee-for-service, at fees they set themselves. And due in part to the ability of physicians to induce demand for their own services, rapid inflation ensued.[202] The year after Medicare began, general physicians' rates rose twenty-five percent and internists' rates grew forty percent.[203]

Congress then tried to curb this dynamic by setting fees for a variety of physician services through the Resource-Based Value System (RBVS).[204] However, RBVS still did not control volume.[205] Therefore, Congress established the SGR, which compared aggregate Medicare expenditures for physician services to a certain target. If those expenditures exceeded the target, the SGR mechanism reduced the inflationary update applied to physicians' fees for the upcoming year to compensate. The target was calculated based on the increase in prices for physician services, the increase in the number of Medicare beneficiaries, estimated per-capita GDP growth, as well as any laws or regulatory changes that might otherwise have altered the physician services provided under Medicare.[206]

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199. Not all formulae are entitlements. Certainly the Children's Health Insurance Program (CHIP) formula is subject to funding caps, and there is a formula for qualifying as health care underserved communities for HRSA funding that is subject to appropriations.

200. *See, e.g.*, Ann Marie Marciarille & J. Bradford DeLong, *Bending the Health Cost Curve: The Promise and Peril of the Independent Payment Advisory Board*, 22 HEALTH MATRIX 75, 105 (2012) (predicting that physician payments would be a likely focus for IPAB). For the legislation passed April 16, 2015, finally reforming the SGR after nearly 20 years, *see*, Medicare Access and CHIP Reauthorization Act of 2015 (MACRA), Pub. L. No. 114-10.

201. *See* Randall R. Bovbjerg, Charles C. Griffin, & Caitlin Carroll, *U.S. Health Care Coverage and Costs: Historical Development and Choices for the 1990s*, 21 J.L. MED. & ETHICS 141 (1993).

202. *See, e.g.*, Jacqueline Fox, *Recent Development: Death Panels: A Defense of the Independent Payment Advisory Board*, 66 ADMIN L. REV. 131, 141 (2014).

203. Jill Quadagno, *Why the United States Has No National Health Insurance: Stakeholder Mobilization Against the Welfare State, 1945-1996*, 45 FLA. ST. J. HEALTH & SOC. BEHAV. 25, 33 (2004).

204. Which replaced the Medicare Volume Performance Standard.

205. Among numerous other problems, such as skewing toward specialty groups.

206. M. Kent Clemens, *Estimated Sustainable Growth Rate and Conversion Factor, for Medicaid Payments to Physicians in 2015*, CENTERS FOR MEDICAID & MEDICARE SERVS. (Apr. 2014), *available at*

Each year since 2002, the aggregate amount charged by physicians has indeed exceeded that which might be predicted by the factors of price inflation, growth in the patient population, economic growth, and regulatory change. Yet each year, physicians have lobbied Congress successfully to refrain from taking this excess growth out of their fee updates for the next year.[207] Such repeated deferrals have caused the accumulated cost of the Congressional override to mount accordingly. In January 2013, doctors should have received a cumulative 26.5 percent cut in pay, costing $25.2 billion to defer. Yet Congress agreed to do so through December 31, 2013 in the fiscal cliff deal, with a further three-month, $7.3 billion deferral hammered out in the "modest" budget and appropriations deal achieved for FY 2014.[208]

G. Other Candidates for Precommitment and Their Similarities to "Ordinary" Legislation

There are assorted other examples of precommitment that I mention briefly or not at all.[209] Garrett has examined the Unfunded Mandates Reform Act, which subjects any Congressional measure reaching some threshold impact on states and localities to a point of order, waivable initially only by a supermajority, but in later years subject to majority waiver.[210] Majority waiver, Garret contends, still changes the degree of difficulty of passing such a measure, because it makes such measures subject to separation from the rest of the legislative package for an independent roll-call vote.[211] Many measures that would survive if integrated into an omnibus offering other offsetting desirable elements could not prevail in stand-alone consideration requiring members to go on record on that single issue. By this analysis, the very common practice of rolling appropriations or other legislation into an omnibus form is arguably a precommitment because someone is choosing a form of legislation in order to increase costs and pressures on those who would block the bill. The pressure arises because everyone else wants something contained in the omnibus.[212] However, I do not classify the omnibus form as a *Congressional* precommitment because it does not represent Congress binding itself at time two. Instead, omnibus bills are a case of party leaders trying to bring the party to heel, and make it more difficult for the rank-and-file members to undermine the deals their leadership has struck. The actors are therefore different from our other examples, which I restrict to the legislature binding

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http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/SustainableGRatesConFact/Downloads/sgr2015p.pdf.

207. Uwe Reinhardt, *The Annual Drama of the 'Doc Fix*,*'* ECONOMIX: N.Y. TIMES BLOG (Dec. 17, 2010, 6:00 AM), http://economix.blogs.nytimes.com/2010/12/17/the-annual-drama-of-the-doc-fix/. *See also* Mary Agnes Carey, *FAQ On Medicare Doctor Pay: Why is it So Hard to Fix?*, KAISER HEALTH NEWS (Feb. 27, 2013), *available at* http://www.kaiserhealthnews.org/stories/2011/december/15/faq-doc-fix.aspx.

208. CONG. BUDGET OFFICE, ESTIMATE OF THE BUDGETARY EFFECTS OF H.R. 8, THE AMERICAN TAXPAYER RELIEF ACT OF 2012 (2013). As of this writing, Congress seems poised to extend the patch yet again, for one-year until March 31, 2015, at a cost of $20 billion.

209. Stith, *supra* note 13, at 662.

210. Garrett, *supra* note 50, at 1499.

211. *Id*. at 1503–04.

212. *See also* Krishnakumar, *supra* note 135, at 596 (attributing the omnibus reconciliations bills as crucial to the success of Reagan's economic program, "because dissatisfied congressman would be unlikely to kill an entire budget agenda over a few disagreeable provisions").

itself rather than one part of the legislature binding another.[213]

H. Drawing Lessons Regarding Commitment v. Precommitment: Hard Chains or Soft Norms?

This article follows Elster in restricting the term "precommitment" to those time one actions that operate by means of some external mechanism, rather than mere internal resolution.

Contrasting their notion of "external commitments" with Elsterian precommitments, John Ferejohn and Lawrence Sager have explained, "[o]n our account, external commitments do not need to be mechanical, operate causally, or be decisively efficacious."[214] They include commitments that can work more by manipulating "internal resolve" or generating normative force. Sometimes, the actor achieves a result not because the mechanism of the precommitment device is dispositive, but because its invocation signifies an intensity of preference. There may be a common understanding among members of Congress that the use of such a device signifies a high level of resolve. If someone announces that a policy will be effectuated using the device that was used in BRAC, that policy design may prove effective simply by virtue of the heightened intention it signals. When framework legislation engenders this type of effect, Garrett classifies it as serving a "symbolic" purpose.[215]

Vermeule and Posner also refer to "policy choices that become entrenched *de facto* through path dependence and inertia."[216] Even though the fast-track rules can be changed by simple majority, Garrett contributes the idea that political consequences still apply because the rejection by Congress of the President's fast-track authority would be a politically "salient" event.[217] A subcategory of these "softly" entrenched statutes might be Eskridge and Ferejohn's superstatutes, which have become more difficult to extirpate by virtue of political support and public normative coalescence around these laws.[218]

Elster himself was careful to distinguish norms or conventions from binding constraints that he classifies as precommitments.[219] Conventions and social norms constrain but, unlike other types of binding constraints, they are found and not freely invented.[220] For Elster, the process of changing conventions, the development of new collective self-understanding, remains mysterious. Indeed, my argument relies on this distinction—between the technical, freely-invented devices that bind, compared to the "softer" social norms that constrain by imposing political consequences—by showing that the examples

213. Some have argued that government contracts are precommitments. But I do not include contracts within the core examples of Congressional precommitment because they are not precisely Congress binding itself, but Congress allowing the executive branch to bind itself, and the Constitution then preventing the legislature from untying those bonds.

214. John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1939 (2003).

215. Garrett, *supra* note 86, at 733–36.

216. Posner & Vermeule, *supra* note 8, at 1676 (emphasis added).

217. Garrett, *supra* note 86, at 747.

218. WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES (2010).

219. UNBOUND, *supra* note 11, at 4.

220. *Id*. at 196–99.

that IPAB and the sequester seek to emulate work by the latter, non-mechanistic means. This distinction underlies the identification of "legalism," the ideology of rule-following, as distinct from a plainer operation of "law," which attaches consequences to rule-violation.[221]

1. Hard Chains Fail: Entrenching Statutes Bleed Into Ordinary Laws

In our analysis of Congress and precommitment so far, the problem emerges that legislative precommitment is only possible if Congress truly has the means to bind itself, to meaningfully encumber future options. Yet examination of these various examples leaves that in doubt. Many scholars have examined these and indeed have staged a vigorous dialogue over whether Congress *should* be able to bind itself. My analysis thus far sidesteps this debate even as it benefits from the premise—that Congress currently cannot—leaving open the question that I address, namely, why Congress engages in this form of action nonetheless.

Even if Congress were judicially restrained from directly changing statutized rules or other entrenching statutes, it is still too easy for Congress to evade the effect of its own rules. Creative drafting can almost always elude constraints. Although Congress ostensibly promised to disclose all "earmarks" or special interest pork-barrel projects,[222] Kysar illustrates how Congress could always draft around the earmarks restrictions.[223] For example, earmarks are defined as applying to ten or fewer beneficiaries.[224] A provision giving tax relief for "domestically manufactured arrows"[225] may only (or disproportionately) affect two companies, but unless one had extensive knowledge of the industry or the process, a reader would not be able to tell from the language on its face that it represented an earmark. Posner and Vermeule offer another example. Their "no bicycles in the park" law could be undermined by defining "bicycles as two-wheeled vehicles manufactured before 1900" and "shmicycles" as two-wheeled vehicles manufactured after 1900.[226] In Part IV.B.6, I consider the manifold ways by which Congress could circumvent IPAB's purported entrenchment.

2. The Limited Cases of Success are Better Explained by Soft Norms

Some have pointed to counterexamples. Indeed, entitlements under which Congress submits voluntarily to judicial enforcement have persisted, thereby empowering another government actor. But the problems of entitlements abound, as we have noted above, suggesting that there is case-by-case decision-making on whether the protection of an entitlement extends, rather than a clear automatic rule that at time two Congress will uphold the promise.

221. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Noonday Press, 1954) (1832) (propounding a "sanction" or "command" theory of law).

222. In the House, through H.R. Res. 6, 110th Cong. (2007) (enacted), and in the Senate through a statute, The Honest Leadership and Open Government Act of 2007, Pub. L. No. 110–81, Sec. 521, 121 Stat. 735, 760.

223. Kysar, *supra* note 13, at 545, 550–51.

224. *Id*. at 567.

225. American Jobs Creation Act of 2004, Pub. L. No. 108–357 §332, 118 Stat. 1418, 1477.

226. Posner & Vermeule, *supra* note 8, at 1669.

On inspection, other candidates for success have relied on norms, not precommitment, for their effect and remain vulnerable to running aground on any particularly compelling case. PAYGO, otherwise known as "pay-as-you-go" rules, worked reasonably well for the years that they were in effect. PAYGO was also an innovation of the GRH legislation, and it was designed to rein in tax and entitlement authorizing legislation, rather than setting limits on discretionary spending alone. It required new tax and entitlement spending to be "paid for" or offset by revenue-increases or other direct spending cuts and was enforced not merely by points of order, but also by sequestration. However, Allan Schick notes, "[i]t is highly probable that even in the absence of [PAYGO rules in the 1990s], big deficits would have deterred Congress and the [P]resident from establishing new entitlements and impelled them to seek savings in old ones."[227] In other words, public opinion constrained the White House and Congress as much as any automatic device for fiscal discipline. Then in 2002, PAYGO was allowed to lapse amid the passage of the Bush Administration's Medicare prescription drug proposal and tax cut package.

The filibuster, though subject to the nuclear option,[228] has survived since the early 1800's,[229] but was always subject to exceptions, such as any statutized rule that fast-tracks a class of legislation by limiting debate. Likewise, BRAC is frequently cited as a success, but it arguably failed to work in the second round, foundering on the competing political demands of the powerful defense-related committee members.

Garrett claims that UMRA has worked, but in her account, UMRA constrains by means of political norms. It is not necessarily enforceable by courts, but may still have bite insofar as it disaggregates logrolling, which forces political accountability.[230] If its effect relies on political accountability, UMRA is a creature of soft norms.

Regarding GRH, Stith concludes that "[u]ltimately . . . this constraint is political, not legal."[231] Again, these devices are at best "soft precommitments," more akin to social norms than an automatic mechanism that can be intentionally devised.

All of these examples illustrate that self-binding works until it does not. It works because people are willing to constrain themselves but does not add any further discipline to prevent people from engaging in conduct if they wish to flout the constraint. But this discussion has thus far bracketed the question of whether the devices worked by other, normative means, by changing Congress' *wishes* such that they might be less likely to *wish* to breach. Passing these ostensibly precommitting rules may not have changed the external difficulties faced at time two, but people, including the voting public, may believe that conforming to constraints and following rules has some special moral force. Thus, breaches of the precommitment are breaches of this norm and therefore bear consequences in the theater of public opinion. If so, then these episodes illustrate the force of the ideology

227. SCHICK, *supra* note 127, at 32.

228. For yet another example of the nuclear option employed to circumvent the filibuster, *see, e.g.*, Roberts & Chemerinsky, *supra* note 61, 1780 (recounting an instance in 1975 where the Senate Chair declared that the cloture rule could be changed by a simple majority, and was upheld by a majority vote of the Senate, though the Senate then voted to conceal the precedent-setting vote).

229. *Examining the Filibuster: History of the Filibuster 1798-2008: Hearing Before the Committee on Rules and Administration*, 111th Cong. 45 (Apr. 22, 2010) (statement of Sarah Binder, Senior Fellow, The Brookings Institution), *available at* http://www.brookings.edu/research/testimony/2010/04/22-filibuster-binder.

230. Garrett, *supra* note 50, at 1515.

231. Stith, *supra* note 13, at 664.

of "legalism" that Shklar identifies. We may have exposed these Congressional commitments as unable to exert the determinate power that they purport, but under the right conditions, they may still exert the normative power of legalism.

III: SEQUESTRATION IN THE BUDGET CONTROL ACT (BCA) OF 2011

A. The Political Context of the BCA Sequestration

Since the enactment of the health reform through which IPAB became law, the political battles over budget and spending have escalated in pitch. In 2011, Congress passed appropriations bills[232] enacting spending levels that it then tried to disavow by refusing to raise the statutory debt ceiling to accommodate the spending already approved.[233] This led to a standoff causing major credit rating agencies to downgrade the U.S. Treasury below triple-A status for the first time since 1917.[234]

The 2011 debt ceiling crisis finally resulted in the August 2, 2011 BCA legislation, which then triggered automatic sequestration of federal funds scheduled for January 1, 2013, coinciding with the expiration of the Bush tax cuts. The Congressional response to this so-called "fiscal cliff" in the American Taxpayer Reform Act of 2012 (ATRA) did not wholly avert but instead delayed sequestration by three months.

If, in the course of government activity, outlays exceed the amount in the U.S. Treasury, the government issues debt.[235] The debt ceiling, originally passed as part of the Liberty Bond Act of 1917, limits the Treasury Secretary's authority to issue debt in order to comport with the spending requirements authorized and appropriated by Congress.[236] As Buchanan and Dorf remark, this debt has already been approved by Congress each year when Congress sets the spending and revenue levels.[237] The existence of the statutory debt limit, however, means that Congress has to separately approve the foreseeable consequences of what it has already approved. When the accumulated consequences of the spending levels result in debt approaching the ceiling Congress has set, Congress has raised the ceiling, sometimes through intricate mechanisms. For some period, the debt limit was raised through a mechanism called the "Gephardt Rule," under which Congress' decision to pass a budget resolution exceeding the debt ceiling was deemed to have raised the debt ceiling.[238] The votes to raise the debt ceiling have historically tended to be treated as a routine

232. *See* Department of Defense and Full-Year Continuing Appropriations Act 2011, Pub. L. No. 112–10, 125 Stat. 38.

233. *See* Alan Silverleib & Tom Cohen, Latest *Deficit Talks End with a Tense Exchange*, CNN (July 13, 2011, 11:41 PM), http://www.cnn.com/2011/POLITICS/07/13/debt.talks/.

234. Charles Riley, *S&P Downgrades U.S. Credit Rating*, CNN (Aug. 6, 2011, 8:13 PM), http://money.cnn.com/2011/08/05/news/economy/downgrade_rumors/index.htm.

235. *See* Anita Krishnakumar, *In Defense of the Debt Ceiling*, 42 HARV. J. ON LEGIS. 135 (2005).

236. D. ANDREW AUSTIN & MINDY R. LEVIT, CONG. RESEARCH SERV., RL31967, THE DEBT LIMIT: HISTORY AND RECENT INCREASES (2013), *available at* http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0E%2C*P%5C%3F%3D%23%20%20%20%0A. *See also* Alan Silverleib, *Debt Ceiling Votes: From Routine to Radioactive*, CNN (Jul. 7, 2011, 10:35 AM), http://www.cnn.com/2011/POLITICS/07/06/debt.ceiling.fight/index.html.

237. Neil Buchanan & Michael Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175 (2012), *available at* http://www.columbialawreview.org/wp-content/uploads/2012/10/Buchanan-Dorf.pdf.

238. This mechanism is either ingenious, insofar as it shields Members from having to cast a recorded vote

matter. Since 1960, Congress has raised the debt limit seventy-eight times according to the Treasury website.[239]

In the aftermath of the spending packages responding to the economic downturn of 2007, the federal debt mounted and was due to pierce the ceiling by May 16, 2011. The government, by "extraordinary measures," was able to extend borrowing capacity to postpone the deadline for Congressional action until August 2011. However, House Republicans declared their intention to block any increase to the debt limit.

In freezing the statutory debt ceiling, and threatening government default, the Republican opposition saw an opportunity to extract from President Obama and the Senate Democratic majority significant concessions to a starve-the-government agenda. Though the sluggish economy could arguably have continued to benefit from fiscal stimulus, Democrats were willing to rein in budget deficits if the methods included revenue-side reform.[240] Republicans insisted upon entitlement cuts without raising taxes or additional revenue.[241] The substance of an overall compromise budget, revenue, and spending deal was unattainable. At the last possible moment however, a deal was struck that cut an initial roughly $900 billion in federal spending, and otherwise established a particular set of conditional arrangements that deferred agreement on the substance of a compromise. BCA passed on August 2, 2011 with the barest of majorities.[242] The deal temporarily extended the debt limit,[243] promised a vote on a Balanced Budget constitutional amendment,[244] and, in the meantime, established a "Supercommittee" charged with a November 23, 2011 deadline to negotiate a long-term substantive deal to achieve a target deficit reduction over the next ten years.[245] Such a deal would be given expedited consideration by Congress,[246] but if Congress could not pass such a bill or an alternative containing such savings, then automatic sequestration of $1.2 trillion, above the $900 billion already slated for cuts,

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baldly representing their desire to raise the debt, or obtuse, insofar as it takes a circuitous path to the obvious, which is that any vote for a budget that exceeds the debt limit represents a position that the debt limit should rise.

239. U.S. Treasury, *Debt Limit*, TREASURY.GOV, http://www.treasury.gov/initiatives/pages/debtlimit.aspx. (last visited Feb. 16, 2014).

240. *See, e.g.*, President Barack Obama, *Remarks by the President Addressed in the State Dining Room* (Aug. 8, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/08/08/remarks-president.

241. *See* Manu Raju & Jake Sherman, *John Boehner Open to More Revenues*, POLITICO (Dec. 12, 2012, 6:54 PM), http://www.politico.com/story/2012/12/fiscal-cliff-boehner-open-to-more-revenues-85012.html.

242. Bob Woodward, *Inside Story of Obama's Struggle to Keep Congress from Controlling Outcome of Debt Ceiling Crisis*, WASH. POST (Sept. 8, 2012), http://www.washingtonpost.com/politics/a-president-sidelined/2012/09/08/a463793c-f6db-11e1-8253-3f495ae70650_story.html (identifying the vote as 218-210 in the House).

243. Under the debt limit increases authorized under the BCA, the government was able to meet all its obligations until the debt limit required action again in early 2013. A temporary debt limit increase enacted on February 4, 2013 as the No Budget, No Pay Act of 2013 carried us to mid-October 2013 when the government was shut down by virtue of concurrent inaction by Congress on the expired continuing appropriations. No Budget, No Pay Act of 2013, Pub. L. No. 113–3, § 2, 127 Stat. 51 (2013). The resolution of that crisis on October 17, 2013 through the passage of the Continuing Appropriations Act, 2014 and the subsequent uneventful debt ceiling increase of February 12, 2014, brings the account to the present day. *See* Continuing Appropriations Act, 2014, Pub. L. No. 113–46, 127 Stat. 558 (2013); Temporary Debt Limit Extension Act, Pub. L. No. 113–85, 128 Stat. 1011 (2014).

244. Budget Control Act of 2011, Pub. L. No. 112–25, § 201, 125 Stat. 259 (2011) [hereinafter BCA 2011].

245. *Id.* § 401.

246. *Id*. § 402.

would reduce spending across-the-board to achieve the target.[247]

The deadlines came and went, Congress did not achieve the cuts, and as a result, the sequestration was due to strike January 1, 2013, at the same time as that $400 billion in Bush-era tax cuts would expire,[248] a situation dubbed, "the fiscal cliff." Only one day after the fiscal cliff, Congress came to a narrow agreement to avert that crisis, passing the American Taxpayer Relief Act of 2012 ("ATRA").[249] ATRA also enacted the "Doc Fix" while extending the Bush tax cuts permanently for all except those with incomes above $400,000.[250] The spending cuts required by sequestration were delayed by only three months, at which point, $85 billion was slashed from federal spending for fiscal year 2013. As a result, almost half of federal employees faced unpaid leaves of absence,[251] Head Start cut 57,000 children from service, needy families lost a month of aid from the Bureau of Indian Affairs, the Executive Office of Immigration Review cut back on translators, 3.8 million people receiving emergency unemployment saw benefits slashed, OSHA was slated to make 1200 fewer inspections, and Social Security field offices reduced their hours.[252]

B. BCA Description

The BCA[253] was enacted amid a political impasse, and it sought to achieve budget and spending action by setting up two alternative tracks. It established the automatic track of sequestration to shrink discretionary spending by $1.2 trillion over a ten-year period,[254] and established a bypass track of a "Supercommittee" charged with a deadline of November 23, 2011[255] to strike a global deal achieving a targeted $1.5 trillion deficit reduction over the next ten years.[256] Special statutized procedures privileging the Supercommittee proposal would have assured an up-or-down vote in Congress,[257] but if Congress failed to

247. *See generally* Dylan Mathews, *The Sequester: Absolutely Everything You Could Possibly Need to Know, in one FAQ*, WASH. POST (Mar. 1, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/20/the-sequester-absolutely-everything-you-could-possibly-need-to-know-in-one-faq/.

248. JANE GRAVELLE, CONG. RESEARCH SERV., R42700, THE "FISCAL CLIFF": MACROECONOMIC CONSEQUENCES OF TAX INCREASES AND SPENDING CUTS (2013), *available at* http://www.fas.org/sgp/crs/misc/R42700.pdf.

249. The American Taxpayer Relief Act of 2012, Pub. L. No. 112–240, 126 Stat. 2313 (2013) [hereinafter ATRA]. The statutory borrowing limit was separately extended for another three months in late January.

250. Certain Medicare cuts included reductions to combat inpatient and managed care severity upcoding, as well as reductions for services like radiology and therapy. Jim Hahn, CONG. RESEARCH SERV., R42944, *Medicare, Medicaid. and Other Health Provisions in the American Taxpayer Relief Act of 2012*, 1-2 (Jan. 31, 2013), *available at* https://www.fas.org/sgp/crs/misc/R42944.pdf.

251. Lisa Rein, *Unions Rally Federal Employees to Appeal Furloughs*, WASH. POST (July 22 2013), http://www.washingtonpost.com/politics/unions-rally-federal-employees-to-appeal-furlough/2013/07/22/fd72097e-f079-11e2-9008-61e94a7ea20d_story.html.

252. Darla Cameron, David Fahrenthold, & Lisa Rein, *Tracking the Predicted Sequester Impacts*, WASH. POST (Jul. 30, 2013), http://www.washingtonpost.com/wp-srv/special/politics/sequestration-federal-agency-update/.

253. Balanced Budget and Emergency Deficit Control Act of 1985, ch. 20, sec. 901a, § 302a, 125 Stat. 240, 256 [hereinafter BBEDCA amended].

254. Above and beyond the $917 billion already cut by resurrecting § 251 discretionary spending limits in BBEDCA amended.

255. BCA 2011, *supra* note 244, § 402(g)(1).

256. *See id.* § 401.

257. *Id.* § 402. The points of order "statutized" here protect the Supercommittee proposal against filibuster, amendment, or other delaying motions. *See infra* text accompanying notes 305–307.

achieve at least $1.2 trillion in savings by January 15, 2012,[258] then the process reverted to automatic sequestration.[259]

BCA sequestration has a multi-layered relationship with GRH sequestration. Unlike the long-expired GRH section 253 sequestration, BCA sequestration is not tied to deficit reduction goals. However, BCA does revive GRH's section 251 sequestration which occurs in the event of a breach of the discretionary spending targets.[260] Under BCA 2011, this type of sequestration is referred to as Title I sequestration.[261] The new discretionary spending targets that are enforceable by this sequester are already set to reduce federal spending by roughly $900 billion over the ten-year period FY 2012-2021.[262] They prescribe annual discretionary spending growth at roughly two percent a year.[263]

In addition, Title IV of BCA also provides for a new sequestration scenario. Specificallym, the scenario described above would be triggered by the failure of Congress to pass a Supercommittee global budget deal by January 15, 2012.[264] Title IV sequestration operates by revising the Title I discretionary spending limits and requiring reductions, including cuts in direct spending, such that $1.2 trillion more is saved than would be under the discretionary spending limits otherwise set forth in Title I.[265] Again, sequestration is defined as automatic "cancellation of budgetary resources"[266] in non-exempt federal programs in accordance with a (more-or-less) across-the-board formula.[267]

1. Calculating Title I Cuts v. Title IV Cuts

Title I and Title IV sequestration differ in a number of respects, particularly in terms of how security cuts and non-security cuts are defined and calculated, and whether they sequester discretionary funds only, as opposed to both discretionary and direct spending.

Under Title I sequestration, the "security" category is defined as discretionary appropriations associated with agency budgets not only for the Department of Defense, but also the Department of Homeland Security, Department of Veterans Affairs, the National

258. BBEDCA amended, *supra* note 253, § 251A.

259. *See* Gravelle, *supra* note 248, at 3.

260. BBEDCA amended, *supra* note 253, § 251(a)(6) (providing that if Congress adjourns in breach, or enacts appropriations, including continuing resolutions, that cause "a breach within a category for that year . . . 15 days later there shall be a sequestration"). New discretionary spending ceilings are set for FY 2012-FY 2021. These are higher than those imposed by the second-track sequestration (Title IV sequestration) triggered by failure of the Supercommittee. Finally, while we do not discuss it in depth here, as this sequestration exists independently of the BCA, there is a final trigger for sequestration that was independently reauthorized in 2010 and continues to operate in the background, namely PAYGO sequestration, Pay-As-You-Go Act of 2010, Pub. L. No. 111–139, 124 Stat. 8 (2010).

261. This name is used because the mechanism is outlined in Title I of the BCA 2011 language.

262. C. Stephen Redhead, *Budget Control Act: The Potential Impact of Sequestration on Health Reform Spending*, CONG. RESEARCH SERV., R42051, at 10 (May 31, 2013), *available at* http://www.fas.org/sgp/crs/misc/R42051.pdf.

263. *Id.*

264. BBEDCA amended, *supra* note 253, § 251A. Congress has until December 23, 2011 to pass the Supercommittee deal under the expedited procedures, but the sequester is not actually triggered unless, by those procedures or otherwise, Congress fails to pass a plan saving $1.2 billion by the January 15, 2012 deadline.

265. *Id.* § 251A(3)(C) (explaining how the discretionary limits would be reduced by a per annum portion of $1.2 trillion, adjusted by eighteen percent to account for reduced debt service).

266. 2 U.S.C. § 900(c)(2) (2013).

267. Stith, *supra* note 13, at 625.

Nuclear Security Administration, the 054 or intelligence account, and Function 150 Funds, which concern international affairs.[268] However, for Title IV sequestration, the "security" category is defined to refer to the Defense Department's Function 050 Funds alone.[269]

Both Title I sequestration and Title IV sequestration are intended to be divided across defense (security) and domestic (non-security) spending categories, but the mechanism is quite different for each.[270] Sequestration eliminates an ostensibly "uniform percentage" from each non-exempt account within the breaching category,[271] suggesting at first glance that the security and non-security categories would be treated equally. But the allocation of costs between these two categories also depends on the separation of security and non-security spending caps, which would affect the conditions under which a triggering breach would occur. Even within Title I sequestration, the division of burdens across security and non-security categories differs depending on the triggering year. In Title I, the FY 2012 and FY 2013 discretionary spending caps are defined separately with respect to both discretionary security and discretionary non-security categories, meaning that a breach can occur by virtue of excess spending in the security budget alone.[272] That security spending breach could not be avoided by simply reducing nondefense spending by a concomitant sum as it otherwise could if only one overall discretionary limit were established. The language of section 251 provides that a breach in either category will be eliminated by a sequestration within that category.[273] This structure ensures that those who favor defense spending must suffer some reductions under the Title I caps, at least in the first two years, and cannot shift or offset by cutting discretionary programs. As we will see, this allocative effect is extended if Title IV sequestration is triggered as well. However, under Title I alone, for the remaining eight years of the ten-year window until FY 2021, the legislation reverts to setting only an overall spending cap, thus permitting the cross-subsidization of defense spending by non-defense discretionary cuts so as to avoid a sequestrable breach.[274]

If Congress cannot pass a Supercommittee or alternative grand compromise by the deadline, thereby triggering Title IV sequestration, the discretionary spending limits are revised such that the spending cap for every year in the ten-year window is divided into security and non-security.[275] Again, certain members of Congress may have intended this

268. *See* BBEDCA amended, *supra* note 253, § 250(c)(4)(B).

269. *Compare id.* (defining "security" under Title I as "includ[ing] discretionary appropriations associated with agency budgets for the Department of Defense, the Department of Homeland Security, the Department of Veterans Affairs, the National Nuclear Security Administration, the intelligence community management account (98-0401-0-1-054), and all budget accounts in budget function 150 (international affairs.)."); *with id.* § 251A(4) (defining "revised security category" under Title IV as "discretionary appropriations in budget function 050."). To be precise, the 050 account includes not just Defense Department funds, but also some spending by other agencies, such as the Department of Energy and the FBI. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-452 (2013); SEQUESTRATION: SELECTED FEDERAL AGENCIES REDUCED SOME SERVICES AND INVESTMENTS, WHILE TAKING SHORT-TERM ACTIONS TO MITIGATE EFFECTS 6 (2014), *available at* http://www.gao.gov/products/GAO-14-452.

270. BBEDCA amended, *supra* note 253, §250(c)(4)(B).

271. *Id.* § 251(a)(2).

272. *Id.* § 251(c)(1)–(2).

273. *Id.* § 251(a)(1).

274. *Id.* § 251(c)(3)–(10).

275. *Id.* § 251A(2).

consequence to "penalize" the supporters of defense spending and induce them to participate in a "grand compromise." Defense proponents suffer additional consequences under Title IV arising from the "revised" definition of the "security" spending category. For instance, in 2013, when even the Title I spending cap had been divided into security and non-security components, triggering the overlay of Title IV would not only reduce the security-related discretionary spending limit from $686 billion to $546 billion (presumably to account for the fact that the security spending allocation now only covers the Defense Department's Function 050 account), but it would also render the 050 account the sole source of any cuts to eliminate breaches of the security cap. In other words, under Title IV sequestration, defense spending needs can no longer be absorbed or spread across other arguably security-related programs and must therefore observe strict spending limits.

For Title IV sequestration, both mandatory and discretionary resources are subject to cancellation.[276] The amount to be cancelled is set at $1.2 trillion, divided over the ten-year period.[277] Each year, the formula splits the annualized cuts into a security and non-security component dictated by the relative proportion between the two established by the revised discretionary spending limits listed in the statute.[278] The formula then divides the security cuts and non-security cuts each into their "discretionary spending" and "direct spending" components.[279] The subdivision of required savings between discretionary and direct spending in each category is calculated in proportion to the ratio that the discretionary spending, as limited by BCA, bears to the Administration's estimate of nonexempt direct spending outlays in that category.[280] This ratio is calculated for both the security category and the non-security category, as the proportion differs for each.[281]

Title IV encodes a number of policies. On the one hand, it is revising "discretionary spending limits," signaling that appropriators should reduce discretionary spending below the prescribed amounts. On the other hand, it is allocating the required spending reductions to both discretionary and direct spending categories. Title I targets discretionary spending alone, while Title IV ratchets down direct—i.e. entitlement spending—as well.

Cancelled budget resources are returned to the general fund, or in the case of expenditures that draw from designated trust funds, returned to those funds.[282]

276. *Id.* § 251A(3)–(10) (stipulating how to calculate the total reduction required and how to allocate that total reduction to discretionary and direct spending accounts in defense and nondefense functions as well as how to implement those allocated reductions).

277. *Id.* § 251A.

278. *Id.* § 251A(2).

279. *Id.* § 250(c)(8) (defining direct spending as the "budget authority provided by law other than appropriation Acts, entitlement authority, and the Supplemental Nutrition Assistance Program, formerly "the food stamp program").

280. *Id.* § 251A(5)–(6) (dividing the mandatory and discretionary spending for security and non-security categories. This ratio presumably ratchets down entitlement spending because the excess discretionary spending that triggers the breach means that the discretionary spending exceeds what is prescribed by the BCA discretionary spending limits. Yet the ratio of prescribed cuts assumes that discretionary spending relative to mandatory spending is less than what it in reality turned out to be).

281. *Id.* § 251A(8).

282. Stith, *supra* note 13, at 625 n.192.

2. Exceptions

The BCA also specifies a large number of exceptions, many carried over from GRH, which left "approximately seventy percent of the budget immune from sequestration."[283]

The President can, and has in Fiscal Year 2013, exempted military personnel accounts from the sequester.[284] This exemption must be paid for by further reductions within subfunction 051, which covers other military spending, meaning that no other subaccounts can subsidize this exception.[285]

"Low-income" programs, if arguably disadvantaged in the fight over post-sequester piecemeal "fixes," are actually well represented among the programs exempted from sequestration. Exempt programs include the school lunch, the school breakfast, but not the special milk program. Other exempted low-income programs include the Children's Health Insurance Program (CHIP) and Temporary Assistance for Needy Families (TANF), both of which are funded through block grants to states. Meanwhile certain mandatory programs for low-income groups are also exempt, such as Medicaid, food stamps (now known as the Supplemental Nutrition Assistance Program (SNAP)), Social Security Income (SSI), and the mandatory piece of the Child Support Enforcement Program.[286] In addition, foster care and Pell grants are exempted, as are certain special economic recovery programs, including GSE Preferred Stock Purchase Agreements, the Office of Financial Stability, and the Special IG for the Troubled Asset Relief Program.[287]

Many accounts related to the Federal Deposit Insurance Corporation are exempt as are housing finance accounts, including those for Fannie and Freddie Mac. Many retirement contributions that the government has obliged itself to make are exempt, as are Article III judges' salaries. Similarly, certain "prior legal obligations" of the federal government in specified budget accounts, such as that of the subsidized Federal Crop Insurance Corporation Fund, are exempt, as are all programs under the Veterans Administration.[288]

Apart from the specially designated exemptions, there are other loopholes through which spending could escape sequestration. Under section 251(b)(2)(A), Congress can override the sequester by designating an item as emergency appropriations or appropriations for the "war on terror."[289] The statute tries to minimize the abuse of this loophole by defining the term "emergency" as "a situation that requires new budget authority and outlays . . . for the prevention or mitigation of, or response to, loss of life, or property, or a threat to national security; and is unanticipated."[290] Unanticipated in the context of section 251 is further specified to mean "[s]udden . . . urgent . . . unforeseen . . . [and] temporary."[291] The statute even goes on to define each of these terms.

283. Dodge, *supra* note 160, at 861.
284. BBEDCA amended, *supra* note 253, § 255(f)(1).
285. *Id.* § 251(a).
286. *Id*. § 255.
287. Karen Spar, CONG. RESEARCH SERV., R42050, *Budget "Sequestration" and Selected Program Exemptions and Special Rules*, at 9 (June 13, 2013), *available at* http://www.fas.org/sgp/crs/misc/R42050.pdf.
288. *Id*.
289. BBEDCA amended, *supra* note 253, § 251(b)(2(A).
290. *Id.* §§ 250(c)(20)(A)–(B), 250(21).
291. *Id.* § 250(c).

Medicare had always been protected under GRH sequestration from cuts above a certain percentage.[292] BCA accordingly limits Medicare cuts to a level no greater than two percent.[293] The March 2013 sequester was calculated to require nondefense mandatory spending reductions of 5.1 percent.[294] Thus, mandatory Medicare spending is significantly protected by the two percent ceiling. The shortfall in non-security savings that results from this cap on Medicare cuts must be offset by slashing other non-security programs even more deeply, again prohibiting cross-subsidization between security and non-security programs.[295] In addition, certain Medicare spending is entirely exempt from even the two percent sequestration. These exemptions include low-income subsidies for the prescription drug benefits above the catastrophic limit, and outpatient coverage (Part B) premium, subsidies the government pays on behalf of individuals between 120–135 percent of FPL.[296] Spending on Medicare beneficiaries with even lower incomes, so-called dual eligibles (qualifying for Medicaid as well as Medicare), is also entirely protected from sequestration under the auspices of the Medicaid exemption.[297]

Community and migrant health centers are also protected from sequestration cuts beyond two percent.[298] These funds have not always been categorized as mandatory spending, but the 2010 health reform law gave them direct spending status from Fiscal Year 2011 to 2015. Indian Health Service (IHS) funds however, can be fully sequestered, except for the small amount of IHS funding that is classified as mandatory and is intended for diabetes care. Such cuts are capped at two percent.[299]

The policies encoded by these exceptions stand in tension with those represented by the Title IV allocation of reductions. While Title IV aims to cut entitlement spending, the exceptions also protect some of that entitlement spending. And of course, both the GRH and the BCA sequesters entirely exempt tax expenditures.[300]

3. Hallmarks of Precommitment

The BCA bears hallmarks of an intentional act of self-binding by Congress. First, Congress is precommitting in the same manner that it did through the sequester enacted under GRH.[301] According to this revived mechanism, Title I sequestration is triggered when Congress spends beyond the discretionary limits set in BCA 2011. Thus Congress has predetermined that certain consequences will attach to "excessive" spending at time two.

Additionally, BCA changes the incentives to strike a budget deal at time two through

292. However, these exemptions apply only to mandatory Medicare spending. Some Medicare spending, such as administrative costs, is discretionary. *See* BBEDCA amended, *supra* note 253, § 256(d)(1) (imposing the cuts as a reduction of payments for services offered in the sequestration time period).

293. *Id.* § 256(d) (this section was held over from GRH). *See also id.* § 251A(8).

294. Spar, *supra* note 287, at 12.

295. BBEDCA amended, *supra* note 253, § 251A(9).

296. Spar, *supra* note 287, at 8–9.

297. *Id.* at 12.

298. BBEDCA amended, *supra* note 253, § 256(e).

299. *Id.* § 256 (e)(1).

300. Dodge, *supra* note 160, at 845.

301. *See supra* text accompanying notes 136–39.

the new Title IV sequestration mechanism. However, the valence of the incentive change is different for different members of Congress. Michael Dorf has commented on how the sequestration should be understood as a penalty default,[302] which Ian Ayres and Robert Gertner have famously defined for the contract law arena as an objectionable default term that induces parties to contract for more desirable substitute terms.[303] As a penalty default, the sequestration should have made a comprehensive budget and spending deal, through the Supercommittee or otherwise, more likely at time two, because the presumably unwanted costs of *not* achieving such a deal are heightened by the sequester. However, because some members of Congress may wish to strangle government by dramatically restricting federal spending, the sequester is to them a "majoritarian" default, or a provision that accurately captures the desired result.[304] Thus for those members, the sequester reduces the cost of *not* achieving a grand budget deal. Of course this discussion assumes that the sequester is binding at time two and cannot be set aside by Congress without formal obstacle. This assumption is challenged in our previous and later discussion.

The BCA is also riddled with other ostensible precommitment devices. In BCA 2011, Congress bound itself to vote on the Supercommittee recommendation without filibuster,[305] without amendment,[306] and without any delaying motions, such as multiple quorum calls, motions to recommit, reconsider, postpone, or proceed to other business.[307] These motions are subject to points of order, which can presumably be waived, suspended, or appealed from a ruling of the chair, all in the usual fashion, requiring only ordinary majorities. These fast-track statutized rules are also enacted with the boilerplate disclaimer language.[308] Thus if there were majority support for any substantive amendment to the Supercommittee recommendation, presumably a majority could also be mustered to change the rules to permit such an amendment.[309]

Finally, the BCA legislation, apart from the Supercommittee and sequester provisions, includes a number of other features with deep familial resemblance to the types of laws we have been examining. Title II includes a promise of a vote on a Balanced Budget constitutional amendment.[310] In raising the debt ceiling, BCA also employs recusal delegation insofar as it leaves the decision of when to raise the debt limit ceiling, at least for the next $900 billion increase, to the President. This hike would automatically go into effect. However, within a fifty-day period after the President certifies such a debt limit

302. Michael Dorf, *So Much for Sequester Leverage*, DORF ON LAW (Apr. 29, 2013, 6:00 AM), http://www.dorfonlaw.org/2013/04/so-much-for-sequester-leverage.html.

303. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87, 91 (1989).

304. John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 840–41 (2006).

305. BCA 2011, *supra* note 244, §§ 402(c)(2)–(3) (after 2 days and no more than 30 hours of debate).

306. *Id*. § 402(d).

307. *Id*. §§ 402(a)–(e).

308. *Id*. § 404 (applying to all provisions of "this Title," presumably referring to Title IV, entitled, "Joint Select Committee on Deficit Reduction").

309. This claim of majority sufficiency assumes that cloture rule is itself able to be overcome by the nuclear option.

310. BCA 2011, *supra* note 244, § 201.

increase, Congress could overrule $500 billion of that amount with a joint resolution.[311] The joint resolution is protected from points of order, filibuster, amendment, and other delaying maneuvers. A similar delegation allows the President to decide if the debt limit needs to be raised by another $1.2 trillion, but such action would also be fully subject to Congressional joint resolution. By this arrangement, as with the BRAC legislation, Congress is relieved from having to vote affirmatively for something unattractive, namely, to raise the debt ceiling. Finally, the $1.2 trillion increase could be expanded to a $1.5 trillion increase by way of the Supercommittee reaching a deal, or submitting a proposal for a Balanced Budget amendment to the Constitution to the states for ratification.[312]

4. Weak Precommitment

Posner and Vermeule have argued that the budget precommitment mechanisms, including the GRH sequester, are pseudo-entrenching statutes.[313] Nevertheless, under the broader precommitment rubric, we can still ask: is it an act that professes to make the choice of some option at time two more difficult? It appears that Congress meant for it to operate in such a fashion: the sequester ostensibly subjects the choice of spending beyond the discretionary limits, or the outcome of failing to reach a Supercommittee deal, to a particular consequence.

However, is there any actual barrier to Congress changing its mind at time two and just deciding to set aside the punitive consequence? Dodge criticizes BCA and GRH alike as ineffective in their attempts to restrain Congress in the future.[314] Any Member who wishes to act in contravention of the BCA need only muster the support in Congress to waive, suspend, change the parameters, or even change the critical statutory language requiring the President to order sequestration upon breach in order to achieve their policy objective.

Because the support needed to pass such changes to the BCA is not necessarily—and certainly not by virtue of the BCA—different from the level of support needed to pass the first-order policy, BCA should be easy to circumvent. Indeed the statutized rules privileging the Supercommittee's work are expressly subject to change by simple majority of any given house of Congress because of the boilerplate "disclaimer" language.[315] Moreover, the Congressional Research Service suggests that through some error of enumeration, the points of order enforcing section 314(f), prohibiting consideration in the House or Senate of legislation that exceeds the discretionary spending limits, are waivable by simple majority rather than three-fifths of the Senate.[316]

311. *Id*. § 301 (codified as 31 USC §§ 3101A(a)–(b)).

312. *Id.* § 301 (codified as 31 USC §§ 3101A(a)(2)((A)(ii)–(iii)).

313. Posner & Vermeule, *supra* note 8, at 1695.

314. Dodge, *supra* note 160, at 855.

315. *See supra* text accompanying notes 305–40.

316. James V. Saturno, *Points of Order in the Congressional Budget Process*, CONG. RESEARCH SERV., 97-865, at 9 (July 11, 2013), *available at* http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%26*2%404RLC%3E%0A.

> This provision previously appeared at § 314(e) [of the amended Balanced Budget and Deficit Control Act of 1985], but was redesignated as § 314(f) under P.L. 112-78. The

But even GRH, which on its face managed to apply supermajority points of order to spending above the discretionary limits, achieved only "pseudo-entrenchment" because the supermajority points of order were not themselves protected from majority repeal.[317] Kate Stith does observe of GRH sequestration, and thus by logical extension BCA sequestration, that automatic spending cuts require "a future Congress to act twice, in effect, in order to undo one previous legislative enactment."[318] In other words, Congress must enact the desired GRH nonconforming policy, and act to legislatively amend or repeal the constraints of the GRH. The reason that the requirement of acting "twice" is not particularly meaningful as a device is that the two changes—the first-order policy change desired, and the second-order procedural change to the BCA permitting such a policy change—could be rolled into one bill which could be passed according to the ordinary rules. The existence of points of order does not prevent these two steps from taking place together with only ordinary majorities.[319] This is weak entrenchment at best, relying simply on the current norms or political winds; the majority while not barred from changing the caps, might not be willing to withstand the political consequences of overriding GRH.[320] As we have seen in our discussion, any other example of entrenchment is subject to the same problem; the only real cost is political.

Why all the indicia of entrenchment then? This paper argues that these efforts exist to prompt the political consequences by means of appealing to the false necessity of legalism. The binding quality comes from wishful "half-belief."

5. Sequestration: An Example of Legalism

Sequestration is therefore an example of Congress resorting to legalism as a maneuver to legitimize its spending choices. Sequestration was not the goal expressed by the sponsors of GRH, but instead was a fallback for the true aim, which was to constitutionalize a balanced budget. Short of that, Senator Gramm said that GRH was "the strongest provision[] that [could] be written in statute to force fulfillment of that promise made long ago that we balance the budget."[321] Kate Stith says that "GRH's strongest proponents clearly would have preferred a balanced budget amendment to the Constitution."[322] Indeed

> waiver threshold for this point of order was originally established as three-fifths of Senators 'duly chosen and sworn.' When the section was designated, however, the waiver threshold that appears in § 904(c) [of the Congressional Budget Act] was not amended to match this redesignation. Consequently, it appears that the simple majority threshold for waivers that appears in § 904(b) would now apply.

Id.

317. Posner & Vermeule, *supra* note 8, at 1696.

318. Stith, *supra* note 13, at 659.

319. Again, assuming the availability of the nuclear option against filibuster.

320. Paul Kahn, *Gramm Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185, 205 (1985).

321. 131 CONG. REC. S12568 (daily ed. Oct. 3, 1985) (statement of Sen. Phil Gramm).

322. Stith, *supra* note 13, at 624 n.190.

she calls the regime of GRH a building block in the architecture of "the fiscal constitution."[323] Another form of law that pre-exists is precedent,[324] and Congress' 2011 resuscitation of sequestration, which had already been used in a previous budget deficit struggle in the mid-1980's, benefits from the aura of precedent. The cuts prescribed by sequestration are distributed by an across-the-board formula, which admits of little discretion. Sequestration as a tool is therefore in the spirit of Congress trying to submit itself to already-binding law, "applying only norms already valid."[325] It is thus a classic example of legalism.

Sequestration also relies upon a disavowal of politics. It takes advantage of a veil of ignorance, allowing Members to support spending cuts and fiscal discipline in general, while ostensibly distancing themselves from the particular choice of programs to harm, beneficiaries to suffer, and employees to fire. It "encourages legislators to claim initial credit for passing the BCA and then avoid difficult compromises down the road."[326] With some immediate cuts, they can procrastinate on the politically riskiest decisions.[327] "Sequestration . . . still allows Congress to avoid blame for spending cuts. . . ."[328]

IV: IPAB

A. The Political Context of IPAB

Medicare, the program providing medical assistance to mostly elderly and disabled recipients who have qualified through their participation in the workforce, is an entitlement program whose expenditures have long fluctuated independently of Congressional appropriations. Medicare's spending on inpatient care, namely Part A, draws from dedicated trust fund accounts stocked by current workers' payroll tax contributions.[329] Roughly one-quarter of Medicare Part B spending, primarily covering physician care, is also paid for by dedicated trust funds, with the rest financed by general tax revenue.[330]

IPAB is a new independent agency created by the health reform law[331] to devise Medicare cuts that keep program growth to a target rate.[332] Anytime Medicare exceeds that

323. *See id.*

324. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 181–87 (1991).

325. MAX WEBER, LAW IN ECONOMY AND SOCIETY 74 (Max Rheinstein, ed., Edward Shils & Max Rheinstein, transl., Harvard Univ. Press 1954) (1925).

326. Dodge, *supra* note 160, at 862.

327. *Id.* at 863.

328. *Id.*

329. BARRY R. FURROW ET AL., HEALTH LAW 562 (1995).

330. Dodge, *supra* note 160, at 823.

331. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111–148, 124 Stat. 119-1025 (as amended by the Health Care Education and Reconciliation Act, Pub. L. No. 111–152, 124 Stat. 1029, codified as amended at scattered sections of the Internal Revenue Code and in 42 U.S.C., 19 U.S.C., and 20 U.S.C.) [hereinafter PPACA]. IPAB was among the amendments PPACA made to the Social Security Act, as codified in 42 U.S.C. Rather than using the PPACA section designations, or the sections references in the U.S. Code, I will refer to IPAB provisions using the relevant section designations in the Social Security Act [hereinafter SSA].

332. The limit is the average of general urban CPI and medical CPI in the first years IPAB takes effect. It is GDP + 1% in later years. *See* 42 U.S.C. § 1395kkk(c)(6)(C)(ii) (2010) (as amended by § 3403 of PPACA).

target, IPAB will propose Medicare spending cuts that would go into effect unless Congress passes an alternative that achieves equivalent savings.[333] The authorizing statute provides that the automatic implementation and the requirements for consideration of Congress' alternative can only be waived, changed, or repealed by a three-fifths majority. Indeed repeal of the automatic character of IPAB's proposals, or of the narrow parameters by which Congress can substitute for those proposals, is apparently restricted to a joint resolution of disapproval that can only be considered and passed within a seven-month span of 2017, must receive an up-or-down vote under expedited procedures, and requires three-fifths to pass.[334]

Because IPAB was part of the highly polarizing health reform package,[335] it was enacted without any Republican support. But IPAB actually has a precursor enacted in a Republican-led proposal that many Democrats opposed.[336] President George W. Bush's Medicare Modernization Act of 2003 (MMA) instituted a "trigger" mechanism that would require the President to submit Medicare-cutting proposals to Congress, and allow Congress to consider such proposals under expedited procedures anytime two successive Medicare trustees' reports showed that general revenue (rather than dedicated trust fund/payroll tax revenue) would constitute forty-five percent or more of Medicare outlays within the upcoming six-year horizon.[337] These triggers were called Medicare funding warnings. The proposals generated by these warnings however would not go into effect automatically, nor did any portion of the language instituting this mechanism claim to be insulated from change by future Congresses. And indeed, on two of the six occasions when the warning was triggered, the House of Representatives adopted a simple unicameral resolution declaring the expedited procedures in section 803 of the MMA inapplicable.[338]

The funding warnings were also rendered ineffective in the other instances in which they were triggered because on those occasions, the President invoked the Recommendations Clause of the Constitution to declare that Congress could only suggest, and not require, that he submit legislation. The President argued that to submit legislation, the President himself had to regard such legislation as necessary and expedient. President Bush indeed originally articulated this objection in a signing statement when the bill was first passed December 8, 2003.[339]

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333. There are a few other conditions that could interrupt this sequence explained *infra* text accompanying notes 360, 378–86. I also explain there that Congress' ability to pass an alternative will expire in 2020 under the current terms of the legislation.

334. 42 U.S.C. § 1395kkk(f)(2)(F) (2010).

335. House Republicans have voted 41 times to repeal PPACA. *See* Morgan Whitaker, *For 41st Time, GOP Votes Against Obamacare*, MSNBC (Oct. 2, 2013, 10:03 PM), http://tv.msnbc.com/2013/09/12/here-we-go-again-for-41st-time-gop-votes-against-obamacare/.

336. The Ryan-Wyden Medicare voucherization proposal also included the idea of limiting Medicare growth to GDP plus one, but the details of the plan as released were far too limited to extrapolate what that would mean as a policy *See, e.g.*, Austin Frakt, *What does a GPD + 1growth cap mean?*, THE INCIDENTAL ECONOMIST (Apr. 26, 2012, 12:00 PM), http://theincidentaleconomist.com/wordpress/what-does-a-gdp1-growth-cap-mean/.

337. H.R. 1, 118th Cong. (2003).

338. H. Res. 1368 (July 24, 2008) (applying to the 110th Congress); and H. Res. 5 (Jan. 6, 2009).

339. *See, e.g.*, President George W. Bush, *Statement on Signing the Medicare Prescription Drug, Improvement, and Modernization Act of 2003* (Dec. 8, 2003), http://www.gpo.gov/fdsys/pkg/PPP-2003-book2/pdf/PPP-2003-book2-doc-pg1698.pdf; President Barack Obama, *Statement on Signing the Omnibus Appropriations Act of 2009* (Mar. 11, 2009), http://www.gpo.gov/fdsys/pkg/PPP-2009-book1/pdf/PPP-2009-book1-Doc-pg216.pdf

The IPAB legislation can be understood as a lineal descendant of the funding warnings provision. The IPAB measure represents an effort to tie Medicare spending controls to a more politically salient trigger—Medicare spending growth relative to general inflation or GDP growth. It further allows IPAB's reports to be presented directly to Congress, and not solely through the President, obviating the Recommendations Clause concerns. The idea was originally proposed by Senators Jay Rockefeller and Sheldon Whitehouse as S. 1380 in the 111th Congress.[340] The original notion of the legislation was to take the current advisory committee to Congress on Medicare payments, the Medicare Payment Advisory Committee (MedPAC) and convert it into an independent executive branch agency, and enable its recommendations to take on binding force. The idea quickly attracted the support of President Obama.[341] Though many Democrats opposed the idea—and oppose it still[342]—the provision was included in the health reform bill, and touted by the President and his budget advisors as a key element of the health reform bill's strategy to "bend the cost curve."[343]

IPAB met with a firestorm of controversy. During the debate leading up to health reform, IPAB was associated with the threat of government death panels that would deny health care to elderly and disabled individuals.[344] Even after the bill became law, IPAB remained a focus of obstruction. The House of Representatives has tried to repeal IPAB specifically,[345] garnering 223 votes in favor and 181 opposing. The House has also voted forty-one times to repeal the health reform law entirely, including the IPAB provision.[346] House and Senate Republicans have refused to submit nominees themselves, while promising to block the confirmation of any others who would get nominated to the Board.[347] The Goldwater Institute has launched an advocacy campaign against what it calls "an authoritarian super-legislature," saying "IPAB may be the most anti-constitutional measure ever to pass Congress."[348] The Institute's litigation arm also represented plaintiffs in filing a lawsuit, *Coons v. Geithner*, challenging IPAB's constitutionality based, among other things, on improper delegation. Some of the counts were dismissed following the Supreme

(declaring that "because the Constitution gives the President the discretion to recommend only 'such measures as he shall judge necessary and expedient,'. . . I shall treat these directions as precatory").

340. Originally, S. 1110, 111th Cong. (2009).

341. *Id.*

342. *See* H.R. 351, 113th Cong. (2013) (introduced by Rep. Allyson Schwartz and Rep. David Roe to repeal IPAB). *See also* 156 CONG. REC. H1913 (daily ed. Mar. 21, 2010) (statement of Rep. Stark). Sen. Mark Pryor has co-sponsored the IPAB repeal bill in the Senate, S. 351, 113th Cong. (2013).

343. Peter R. Orszag & Ezekiel J. Emanuel, *Health Care Reform and Cost Control*, 363 NEW ENG. J. MED. PERSP. 601, 601–02 (2010).

344. Peter Ubel, *Why it is so Difficult to Kill the Death Panel Myth*, FORBES (Jan. 9, 2013, 12:00 PM), http://www.forbes.com/sites/peterubel/2013/01/09/why-it-is-so-difficult-to-kill-the-death-panel-myth/.

345. Pete Kasperowicz, House *Approves Repeal of Cost-Cutting Healthcare Board*, THE HILL (Mar. 22, 2012, 4:13 PM), http://thehill.com/blogs/floor-action/house/217583-house-passes-health-board-repeal-medical-tort-reform-bill.

346. *See* Whitaker, *supra* note 335.

347. John A. Boehner, *Letter to the President from the Speaker of the House* (May, 09, 2013), *available at* http://www.speaker.gov/sites/speaker.house.gov/files/documents/05-09-2013_letter_to_president.pdf.

348. Diane Cohen & Michael Cannon, CATO INSTITUTE, *The Independent Payment Advisory Board: PPACA's Anti-Constitutional and Authoritarian Super-Legislature*, POLICY ANALYSIS NO. 700 (2012), http://www.cato.org/publications/policy-analysis/independent-payment-advisory-board-ppacas-anticonstitutional-authoritarian-superlegislature.

Court's 2012 decision in *NFIB v. Sebelius*, all remaining counts were dismissed December 19, 2012, and on appeal, the Ninth Circuit ordered dismissal, declaring the matter unripe.[349]

B. IPAB Description

1. The Trigger: SSA Section 1899A(c)(6)

In section 1899A(c)(6) of the SSA, the IPAB legislation specifies a trigger activating a chain of duties. The trigger is a critical control point in the process envisioned by the legislation. Thus, IPAB does not send a proposal to the President and Congress,[350] starting the cascade of other consequences[351] unless the triggering growth conditions are satisfied. The determination of the growth numbers must occur by April 15 of each year. HHS's Chief Actuary trips the wire if she determines that the projected per capita Medicare growth rate[352] for the implementation year[353] will exceed the target growth rate.[354] The "implementation year" is defined as two years from the year in which the triggering determination is made,[355] which in turn is called the "determination year." The year sandwiched in between the determination year and the implementation year is called the "proposal year," indicating that it is the year in which the proposal is laid before Congress prior to automatic implementation in August of that year.[356]

The target growth rate is defined in (c)(7)(B) according to two different formulae.[357] In early years, it is the mean of CPI-urban and the medical expenditure component of CPI-urban. In determination years—2018 and beyond—the target growth rate is per capita GDP-plus-one.[358] The projected per capita Medicare growth rate is also further specified. The rate by which Medicare growth is measured is not a one-year rate but the average for the five-year period ending in the implementation year. Notably the trigger depends heavily on projection, rather than on purely retrospective data regarding actual Medicare spending.[359]

There are certain "escape hatch" scenarios under which the trigger is arrested, for instance if medical CPI is less than overall CPI.[360] In more limited instances, when per

349. *See Coons v. Geithner*, No. CV-10-1714-PHX-GMS, 2012 U.S. Dist. LEXIS (D. Ariz. Dec. 19, 2012). On appeal, the challenge to IPAB was further deemed unripe by the Ninth Circuit, which remanded to the District Court to dismiss for lack of jurisdiction, rather than reaching the merits. Coons v. Lew, 762 F.3d 891 (9th Cir. 2014), *cert. denied*, Coons v. Lew, 2015 WL 1400867 (Mar. 30, 2015).

350. SSA § 1899A(c)(3)(A)(ii). Although the Board submits advisory reports under § 1899A(c)(1) as well, the language expressly excludes those reports from the rules for congressional consideration under § 1899A(d).

351. *Id.* § 1899A(c)(4) (providing that when the President receives such a proposal either from IPAB or HHS under § 1899A(c)(5), he must submit it to Congress).

352. *Id.* § 1899A(c)(6)(B).

353. The implementation year is "the second year following the determination year." *Id.* § 1899A(b)(1).

354. *Id.* §1899A(c)(6)(C).

355. *Id.* § 1899A(b)(2).

356. *Id.*

357. *Id.* § 1395kkk(c)(7)(B).

358. *Id.* § 1395kkk (c)(6)(C).

359. Projected deficits rather than actual deficit numbers proved highly manipulable in the GRH sequestration context.

360. *Id.* §§ 1899A(c)(3)(A)(ii)(II) & (III).

capita national health expenditure (NHE) growth exceeds per capita Medicare growth, the trigger itself is not arrested, but automatic implementation is.

2. The Proposal: Section 1899A(c)

Upon the actuary's triggering determination in April of any year, IPAB must propose,[361] and then transmit to the President and Congress by January 15 of the following year,[362] a set of cost-cutting measures[363] sufficient to achieve target savings.[364] Simplifying slightly, this condition means that those cuts must bring that year's Medicare per capita spending within GDP-plus-one.[365] However, one complication of the way in which the requirement is drafted is that the savings must be achieved for the implementation year, though the excess growth is calculated based on a five-year growth average.

The legislation further specifies the parameters of those proposals,[366] including positive instructions to include cuts to Medicare Advantage and prescription drug payments, and negative instructions never to ration, restrict benefits, raise revenues or premiums, increase cost-sharing, or change eligibility.[367] The proposal must also include identification of the appropriations the government requires to implement the measures contained.[368]

Other language stipulates no increase over a ten-year window, which excludes proposals that achieve upfront savings in the implementation year at the expense of increasing spending in the out-years.[369]

Finally, if for any reason IPAB fails to transmit a proposal even when triggered to do so, the Secretary of HHS will fill in.[370]

3. Congressional Consideration: Section 1899A(d)

Once the proposal has been submitted to Congress, the special rules outlined in section 1899A(d) govern Congress' actions on that proposal. The bill employs a variety of streamlined procedures to privilege the consideration of this proposal.[371] It must be introduced and referred to specified committees, whose jurisdictions are enlarged to consider the proposal as a whole.[372] It must then be discharged from committee if the committee

361. *Id.* § 1899A(c)(2).
362. *Id.* § 1899A(c)(3).
363. *Id.* § 1899A(c)(2)(A).
364. *Id.* § 1899A(c)(2)(A)(i).
365. The simplification I made above is that I do not mention there will be a sliding upper limit to cuts. Thus by the time IPAB is fully phased in, in 2018, the cuts never exceed 1.5% of total Medicare spending. *Id.* § 1899A(c)(7)(C)(i).
366. *Id.* §§ 1899A(c)(2)(A)(ii)–(vi), 1899A(c)(2)(B)–(C) (detailing additional considerations).
367. Until proposal year 2019 (for implementation year 2020), proposals cannot decrease hospital and hospice inflationary updates as a means of cutting costs. *Id.* § 1899A(c)(2)(A)(iii).
368. *Id.* § 1899A(c)(2)(A)(v).
369. This language anticipates and prevents the type of budget manipulation such as those in FY 1989, when Congress scheduled a military payday one day later in order to have it count against a new fiscal year. Dodge, *supra* note 160, at 851.
370. SSA § 1899A(c)(5).
371. *Id.* § 1899A(d)(4).
372. *Id.* §§ 1899A(d)(1)(C)–(D), 1899A(d)(2)(c).

has not reported out the legislation by April 1 of the proposal year. The expedited procedures in Congress for debating and considering the proposal include imposing points of order limiting amendments to only those that are germane and do not breach the applicable savings target.[373] Senate debate, which is otherwise difficult to terminate because of the filibuster rule, is here specifically limited to a 30-10-1 framework, which means thirty hours of debate afforded to the measure overall, ten for the conference report, and one for amendments or motions.[374] Delaying procedural motions are tightly restricted. These statutized rules are protected against waiver or appeal from the chair ruling without a three-fifths majority, discussed further *infra*.[375] As with any other legislation, the President can veto Congress' amended version of the proposal, subject to a two-thirds override.[376]

4. Automatic Implementation: Section 1899A(e)

In the years leading up to 2019, if Congress does not succeed in passing substitute savings measures by August 15 of the proposal year, the Secretary will automatically implement IPAB's proposal.[377] For Congress' substitute to be effective in heading off the Secretary's automatic implementation, it must bear the following language: "This Act supersedes the recommendations of the Board contained in the proposal submitted . . . to Congress under section 1899A of the Social Security Act."[378]

Automatic implementation cannot be headed off by a Congressional substitute in proposal year 2019. In other words, implementation year 2019 would be the last year for which Congressional substitution in the prior year would have been possible without further action.[379] Thus, according to section 1899A(e), in implementation year 2020 and beyond, implementation would ostensibly only be curtailed if Congress had in the meantime discontinued the Board a certain way.[380] That way is specified as a particular Joint Resolution that is subject to certain burdens on passage.[381] It can only be introduced in January of 2017,[382] and it is subject to debate limitations of ten hours,[383] with a three-fifths majority required for passage.[384] Moreover, to be effective in halting automatic implementation in implementation year 2020, it must pass by August 15, 2017.[385] This language (regarding

373. *Id.* §§ 1899A (d)(3)(A)(ii)–(iv). However, in §§ 1899A(d)(4)(B)(iv)–(v), such amendments would be subject to a point of order that could only be waived or suspended by three-fifths in the Senate, as would be required for appeals from rulings of the chair. One interesting point is whether CMS OACT, rather than CBO would be the scorekeeper now for the amendments and their conformance to the savings target.

374. *Id.* §§ 1899A(d)(4)(D)(iv)–(E).

375. *See supra* text accompanying note 351.

376. SSA § 1899A(d)(3)(F). But then presumably the veto could be overridden by two-thirds vote of Congress). FURROW, *supra* note 329, at 799. Some have speculated that the President could not only veto if Congress affirmatively votes to approve the IPAB proposal, but even if the proposal takes effect without Congress' action. *See* Fox, *supra* note 202, at 159.

377. SSA § 1899A(e).

378. *Id.* § 1899A(e)(3)(A).

379. *Id.* § 1899(A)(e)(3)(B)(i).

380. Or at least certain features relating to the Board.

381. *Id.* § 1899A(f)(1).

382. *Id.* § 1899A(f)(1)(A).

383. *Id.* § 1899A(f)(1)(C)(ii).

384. *Id.* § 1899A(f)(1)(F).

385. *Id.* § 1899A(e)(3)(A)(ii).

the need for a joint resolution to discontinue the requirement of automatic implementation in order to allow Congress to continue to arrest automatic implementation by passing a substitute in 2020 and beyond) might appear nonsensical on its face. After all, how could a Congressional substitute for a proposal short-circuit automatic implementation if automatic implementation had already been repealed by Congress? However, one reading is that Congress merely meant to say that for implementation year 2020 and beyond, Congress' powers to intervene with the proposal's automatic implementation are reduced even further, unless of course Congress intends to disable automatic implementation entirely.

In all years, there is a limited third method of interrupting the automatic implementation of the proposal. That method arises if per capita NHE growth exceeds per capita Medicare growth.[386] This interruption, however, is restricted in its application. It cannot be used two years in a row, and it does not absolve the Board of its post-trigger duties to make its proposal and transmit that proposal to Congress, nor Congress of its role in considering that proposal.[387]

5. Preclusion of Review: Section 1899(e)(5)

The proposal's automatic effect is protected even further by the statutory language precluding judicial or administrative review of "the implementation by the Secretary under this subsection of the recommendations contained in a proposal."[388]

The language specifically cites review under SSA sections 1869 and 1878 as precluded, but also any review "otherwise" authorized.[389] SSA section 1878 applies to provider payment claims,[390] and SSA section 1869 generally applies to individual benefit or claim determinations under Medicare as well as national and local coverage determinations.[391]

IPAB's preclusion provision seeks to forestall obstruction of the automatic process and strengthen the "binding" quality of the automatic proposal implementation, but it also provokes many questions. Will it undermine the legislative purpose of the IPAB statute, because there is no way to ensure that the proposal to be implemented reduces Medicare spending sufficiently (or does not cut Medicare excessively) much less whether it complies with the parameters laid out above, such as implementation without rationing? Medicare law boasts a fair number of other limitations on judicial review.[392] At least one of these provisions, forcing aggrieved claimants to use the various special review channels that the Medicare statute authorizes, has been upheld by the Supreme Court in recent cases such

386. *Id.* § 1899A(e)(3)(B)(i)(II).

387. *Id.* §§ 1899A(e)(3)(B)(ii)–(iii).

388. *Id.* § 1899A(e)(5).

389. *Id.* § 1899A(e)(5). Such review might include that which is under 5 U.S.C. § 701(a)(1), which provides judicial review "except to the extent that statutes preclude judicial review."

390. SSA § 1878 (codified as amended at 42 U.S.C. § 1395oo (2014)).

391. SSA § 1869 (codified as amended at 42 U.S.C. § 1395ff (2014)).

392. *See, e.g.*, 42 U.S.C. § 405(h) is incorporated within the Medicare regime by SSA § 1395ii, which makes § 405(h) applicable to the Medicare program to the same extent, mutatis mutandis, as it is applicable to Social Security. SSA § 405(h)'s application means that even where there is federal question jurisdiction, there will be "no action . . . against the US . . . to recover on any claim arising under this subchapter." By upholding the preclusive effect of § 405(h), the Court is permitting Congress to designate the review path in § 405(g), or for Medicare, § 1868, as exclusive.

as *Shalala v. Illinois Council on Long Term Care*[393] on the condition that *some* review is otherwise available.

IPAB's preclusion purports, however, to cut off both administrative and judicial review, and may therefore raise concerns. Yet, the Medicare statute already includes some provisions denying administrative and judicial review of technical questions, such as the inflationary update for hospital payments or payment methodology.[394] Indeed GRH also protected the Comptroller General's computations of the deficit from any judicial or administrative review.[395] Despite the constitutional infirmity of placing final determination of the deficit breach triggering sequestration in the hands of a legislative officer, such as the Comptroller General,[396] (relieving the court of the need to consider other problems with the Comptroller General's role in GRH) the opinion of the D.C. District Court, whose judgment the Supreme Court affirmed in *Bowsher v. Synar*, took pains to discuss this judicial and administrative preclusion in dictum and found it unproblematic.[397] This discussion approvingly noted the limited scope of the preclusion, and one could argue that IPAB's preclusion provision is similarly narrow and less absolute than it might appear at first glance.

Because the IPAB preclusion language applies to the recommendations in a "proposal," it could be read, and under the constitutional avoidance canon, *should* be read, as allowing review if the savings are not in IPAB's proposal alone, but in the Congressional substitute. Arguably, this review should obtain even if Congress did not modify the particular item challenged, as long as Congress had changed or substituted for other aspects of the proposal.[398] Further, the language seems to preserve review of matters other than implementation. The proposal itself could perhaps be challenged, and one could imagine that a facial challenge in advance would escape the bar on review of implementation. Others have argued that the preclusion might not bar certain procedural challenges.[399] Again, these readings seems more likely in view of the court's presumption of reviewability when the statute is silent.[400] There are inherent limits to the reach of these preclusive measures.

393. Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1 (2000). *See also* Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 678 (1986) (stating, in a challenge to the preclusion of review of amount determinations for individual provider payment, that the Court "conclude[s], that those matters which Congress did *not* leave to be determined in a 'fair hearing' conducted by the carrier—including challenges to the validity of the Secretary's instructions and regulations—are not impliedly insulated from judicial review by 42 U.S.C. § 1395ff."). *See* SSA § 1868 for preclusion of review where the amount in determination is under $1000.

394. SSA § 1886(a)(1)(A)(i); 42 U.S.C. § 1395WW(D)(7)(B) (precluding review of the inflationary update to the payment schedule and "the establishment of the diagnosis-related groups" or DRGs, and "of the related methodology for the classification of discharges within groups, and of the appropriate weighting of factors thereof . . .").

395. GRH, *supra* note 142, § 274(h) (commanding that "[t]he economic data, assumptions, and methodologies used by the Comptroller General in computing the base levels of total revenues and total budget outlays . . . shall not be subject to review in any judicial or administrative proceeding.").

396. Bowsher v. Synar, 478 U.S. 714 (1986).

397. Synar v. U.S., 626 F. Supp. 1374 (D.D.C. 1986), *aff'd,* 478 U.S. 714 (1986).

398. *See* Johnson v. Robison, 415 U.S. 361 (1974) (Brennan J., distinguishing preclusion of review of decisions made by an Administrator, in this case of the VA, versus decisions made by Congress, and reading preclusive language to preserve review for Congressional decisions).

399. Fox, *supra* note 202, at 166 n.145.

400. Abbott Labs. v. Gardner, 387 U.S. 136 (1967); Dunlop v. Bachowski, 421 U.S. 560, 567 (1975). *But see* Block v. Cmty. Nutrition Inst., 467 U.S. 340 (1984) (remaining silent on the availability of judicial review in a

A due process claim by an individual provider or Medicare recipient would presumably still be available, as preclusion of review does not typically extend to constitutional challenges.[401]

6. Self-Entrenching?: Sections 1899A(f) and (d)(3)

A feature of the IPAB legislation that has aroused notice is the degree to which aspects of its design entrench or intentionally insulate laws against change by future Congresses. First, the privileging procedures (or statutized internal House and Senate Rules) for Congressional consideration of IPAB's proposals are entrenched by supermajority requirement. As noted above, a majority of the House and a three-fifths vote of the Senate is required to waive any of the restrictions listed in "this subsection" (presumably subsection (d) of section 1899A), namely those restrictions limiting debate, amendments, motions, and other delaying devices.[402] However, why could Congress not simply pass legislation by ordinary procedures either changing those waiver requirements or directly changing the statutory language of those privileging procedures? Indeed the section includes the boilerplate language mentioned above suggesting Congress does not even have to pass such legislation bicamerally, which means each chamber would retain the ability to change its own rules by majority.[403] Yet, some critics have read the language and structure of the IPAB authorizing measures to purport that the statutized rules regarding Congress' consideration of a substitute can be changed by one means alone, through the particular burdensome joint resolution described in section 1899A(f).[404]

This brings us to the second form of self-entrenchment included in IPAB. The prescribed joint resolution process also attaches to any attempt to change the provisions requiring the Secretary to automatically implement the annual proposal when the process reaches that stage without Congressional bypass. According to the statute, Congress can discontinue the rules around Congressional "consideration and automatic implementation of the annual proposal of the [Board]"[405] only in the first months of 2017,[406] only with a joint resolution that contains an expressly prescribed statement,[407] and only under certain modified House and Senate procedures,[408] including the requirement of a three-fifths majority.[409]

highly comprehensive scheme expresses Congress' intent to preclude).

401. Webster v. Doe, 486 U.S. 592 (1988). *See generally* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990).

402. SSA §§ 1899A(d)(3)(C)–(E).

403. *Id.* Again, assuming the nuclear option.

404. Cohen & Cannon, *supra* note 348.

405. SSA § 1899A(f)(1)(C).

406. *Id*. § 1899A(f)(1)(A).

407. *Id*. §§ 1899A(f)(1)(C)–(D).

408. *Id*. § 1899A(f)(2). For instance, ten hours are designated for debate and all points of order are waived against the joint resolution, except for those in the Congressional Budget Act of 1974.

409. *Id*. § 1899A(f)(2)(F).

a. The Ostensible Self-Entrenchment of Congressional Consideration of the Proposal

As mentioned, this joint resolution can be understood to attach to two types of future Congressional action. The first type is any change to the statutized rules for Congress' consideration of legislation bypassing the IPAB proposal, while the second is any change to the provisions concerning automatic implementation of the IPAB proposal. The understanding that the first type of Congressional action, changing the statutized rules of Congress' consideration, is subject to the limitations of the procedures surrounding the joint resolution derives somewhat indirectly from the language. First, it depends on the descriptive language required for inclusion in the joint resolution.[410] While nothing in the IPAB authorizing statute expressly states that change of the special statutized rules for the IPAB proposal is subject to this encumbered joint resolution procedure, the language describing such a joint resolution requires that the title and the language following the resolving clause of any such joint resolution include the phrase, "the discontinuation of the process *for . . . consideration* and automatic implementation *. . . of the annual proposal of the Independent Payment Advisory Board. . . .*"[411] If this wording is dispositive, it would seem to restrict the Joint Resolution to only a complete discontinuation of the two processes, namely Congressional consideration and automatic implementation. What if Congress wished to discontinue only the "automatic implementation of the annual proposal" while still retaining its fast-track consideration of any proposal made by IPAB? What if it wished to make a more tailored revision to the IPAB statute? After all, one could imagine Congress wishing to retain the IPAB process in 2020 and beyond, but merely modifying the automatic implementation language so that Congress could still arrest the automatic implementation by passing a Congressional substitute achieving target savings. As discussed *infra*, it may alternatively wish to modify or even abolish the trigger. However, none of these options are mentioned in the obligatory language of the joint resolution, and indeed some of the options, such as changes to the trigger, are not prohibited or insulated against change anywhere else in the IPAB statute. Therefore these actions would presumably have to be pursued through some means other than the joint resolution. The joint resolution therefore cannot serve as the sole method for modifying the IPAB statute.

Furthermore, subsection 1899A(d)(3)(C) declares, "[i]t shall not be in order in the Senate or the House of Representatives to consider any bill, resolution, amendment, or conference report that would repeal or otherwise change this subsection,"[412] presumably referring to its own subsection, subsection (d), which sets forth the parameters and procedures for "Congressional Consideration" of the IPAB proposal. These parameters include such crucial requirements as the limitation on delay and the prohibition against amendments that breach the applicable savings target.

However, the meaning of these two pieces of language together seems less than airtight. First, there is the issue of the other language in (d)(3), in the provision outlining "Limitation on Changes to the Board Recommendations." Nowhere in that provision does

410. *Id.* § 1899A(f).
411. *Id.* § 1899A(f)(C)(D) (emphasis added).
412. *Id.* § 1899(d)(3)(C).

it say that these "repeals or changes" that are otherwise not in order by means of (d)(3)(C) are subject to change by the joint resolution. Why would Congress fail to mention the joint resolution and its subsection designation, (f), in (d)(3)? Instead (d)(3) simply declares that such changes are not in order, and does not say that they would be in order under the joint resolution. Subsection (d)(3) does, however, refer to an entirely different channel for making such changes in order. Subsection (d)(3)(E), which applies to any point of order in "[t]his paragraph,"[413] does make clear that the (d)(3)(C) limitation against changes is subject to waiver, suspension, or appeal from chair rulings only by a three-fifths majority. The same language applies to (d)(4) waivers and suspensions of the statutized rules that attach to Congress' consideration of the IPAB proposal, but not (d)(1) or (2), which address the procedures surrounding introduction and committee consideration of the IPAB proposals.[414] Thus, while this channel of waivers, suspensions and appeals, as opposed to the joint resolution channel, does not require a smaller majority, it is less encumbered in the sense that it is not time-limited to 2017.

The language of (d)(5) further problematizes reliance on the mere recitation of the words "Congressional consideration" in the joint resolution's descriptive title language, and language following the resolving clause to conclude that changes to the subsection (d) statutized rules are exclusively limited to the method of joint resolution.[415] Subsection (d)(5) also contains the boilerplate language stating that subsections (d) and (f)(2) are enacted "with full recognition of the constitutional right of either House to change the rules," further undermining the exclusivity of the joint resolution as the method for changing the privileged Congressional treatment of the IPAB proposals.[416]

b. The Ostensible Self-Entrenchment of Automatic Implementation of the Proposal

The exclusive channeling of changes to the automatic implementation mechanism through the joint resolution process is somewhat clearer than the exclusive channeling of changes to the process of Congressional consideration of a substitute. With regard to changes to automatic implementation, the IPAB authorizing statute deploys a "notwithstanding" clause. According to section 1899A(e)(1), "[n]otwithstanding any other provision of law, the Secretary shall, except as provided in this paragraph (3), implement the recommendations contained in a proposal submitted by the Board or the President to Congress pursuant to this section . . ."[417] And the joint resolution described in (f)(1) is listed

413. *See generally* SSA § 1899A(d)(3) (noting that similar language requiring supermajorities on waivers and appeals from Chair rulings are contained in subsection (d)(4)(B)(v), and this might be read to refer to all the statutized rules for "Expedited Procedure" under (d)(4), including limitations on amendments, Senate limits on debate, consideration in conference, etc., but *not* facilitated procedures for introduction, referral, committee consideration, and discharge which are in subsections (d)(1) and (2). Of course if the (d)(4)(B)(v) and (d)(3)(E) mentions of "[t]his paragraph" in fact refer to all of subsection (d) on Congressional consideration, then those facilitated procedures would not be excluded from the entrenching three-fifths requirement on waivers).

414. *Id*. § 1899A(d)(1)–(4).

415. *Id*. § 1899A(d)(5).

416. *Id*.

417. This would therefore require implementation of the proposal unless the exceptions apply, and those exceptions include the Congressional bypass, or the specifically burdened joint resolution, as well as the limited exception if per capita NHE exceeds per capita Medicare growth.

as an exception in the afore-referenced paragraph (3). So, the notwithstanding clause claims that this IPAB provision, i.e., that of automatic implementation, trumps "any other provision of law," including any *subsequent* provision of law, unless the automatic implementation is changed by means of the joint resolution pathway with its attendant time limits referred to in the paragraph (3) exceptions.[418] However, we have described earlier some general vulnerabilities of notwithstanding clauses, noting that courts often fail to uphold them even against later implied repeals—not to speak of later express repeals.

Moreover, creative drafting could easily block or circumvent automatic implementation. To mention just one example, Congress could pass measures that increase Medicare spending, but also include language exempting those measures from counting toward per capita Medicare cost growth in the IPAB trigger. The IPAB trigger language is in subsection (c), whereas the supermajority joint resolution requirements protect only against amendment of subsections (d) and (e), which address Congressional consideration and automatic implementation of the proposal.[419] To disable the trigger would disable automatic implementation as well.

Under a superficial reading of the language of section 1899A, Congress' future actions might appear burdened in an additional way, apart from the burdens on its ability to consider the IPAB proposals, or its ability to change the conditions under which it considers those proposals and their implementation.[420] Congress' other Medicare-related actions in legislation unrelated to the IPAB proposals may also be chilled, if not thwarted. The statutory language not only limits Congress' ability to consider cost-noncompliant measures in the course of activity governed by this subsection (d),[421] namely, those measures that arise in the course of considering IPAB proposals. But in (d)(3)(B), it also forbids the Senate or House, even in activity *not* "pursuant to this section," from considering cost-noncompliant measures if they could be characterized as "repeal[ing] or otherwise chang[ing] the recommendations of the Board."[422] If, for instance, under the older SGR physician payment formula, IPAB were to have recommended strict application of cuts to the Medicare physician fee schedule in contravention of yearly Congressional overrides, it is possible that subsequent periodic independent legislation to delay the SGR update adjustment would have been in violation of this language. Arguably, its decision to reform the physician payment formula, as it did in the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA),[423] could still, under this hypothetical situation, have been considered to be "otherwise chang[ing] the recommendations of the Board," even though Congress was not acting pursuant to section 1899A in passing MACRA. Indeed, this overbroad dragnet could capture many things Congress does on a topic that has already been dealt with by IPAB.

So do IPAB recommendations claim the field from Congress and box out other Medicare bills in the area? It seems that such a reading could not prevail against the general

418. *Id*. § 1899A(e)(1)–(3).
419. *Id.* § 1899A(c).
420. *Id*. § 1899A.
421. *Id.* § 1899A(d)(3)(A).
422. *Id.* § 1899A(d)(3)(B).
423. See *supra* note 200. Medicare Access and CHIP Reauthorization Act of 2015, Pub. L. No. 114-10.

principle that later law will defeat former law if it conflicts with or occupies the field.[424] Indeed, Tim Jost reads the language to continue to permit independent Congressional legislation to increase Medicare spending.[425] Presumably in his reading, Congress also preserves its ability to cut Medicare.[426] In sum, if independent legislation affecting the items of Medicare spending already modified by the Board would not be blocked as "otherwise chang[ing] the recommendations of the Board," then Congress enjoys much more leeway in subsequent legislation to stymie automatic implementation of IPAB's proposal—even in years 2020 and after when its ability to pass a substitute is curtailed.

7. IPAB Displays Properties of Legalism

The IPAB mechanism is a way to decide to cut Medicare from behind a "veil of ignorance," elevating the general and ignoring particularities.[427] Just as Congress enjoyed political cover under BRAC, with IPAB, Congress can disclaim responsibility for the choice of particular reductions and the consequences to particular stakeholders because of those cuts. Congress can claim simply to have voted for the principle of cutting. This stance reflects the classic "liberal" tiering of law's universal constraints from ordinary particular interests, passions, and inclinations.

The IPAB mechanism purports to operate by separating certain categories from ordinary rules, and subjecting them to higher hurdles, constituting them as "higher law." Thus, the imperative to cut Medicare is "higher law," only to be changed by extraordinary procedures.

It may appear that the preclusion of review provision in IPAB runs counter to the hypothesis that IPAB is intended to operate by means of subjecting Congress to the force of "legalism" and binding Congress' decisions by "rules." Yet, given the realities of judicial review as a weaponized forum for interest group obstruction tactics, a more plausible reading is that Congress is trying to strengthen the "binding" quality of IPAB's proposals rather than exposing those proposals to interest-based contest.

CONCLUSION: SEQUESTRATION AND IPAB, CONGRESS HAS ALREADY SLIPPED ITS CUFFS, AMPLIGYING POWER DIFFERENCES AND REDUCING TRANSPARENCY

Indeed, developments suggest that Congress will take steps to circumvent the entrenching law. The President's FY 2014 and 2015 budgets proposed amending IPAB's

424. *See, e.g.*, Warden v. Marrero, 417 U.S. 653, 659 (1974) (holding that earlier savings clause, 1 U.S.C. § 109, declaring later statutory repeals of penalties ineffective "unless the repealing Act shall so expressly provide," did not nullify later repeals that failed to employ specific language, as long as they repealed by fair implication).

425. Tim Jost, *The Independent Payment Advisory Board*, 363 NEW ENG. J. MED. PERSP. 103, 105 (2010).

426. Independent legislation cutting Medicare spending would also be freighted because it would as a presumptive matter reduce the baseline against which Medicare spending growth is measured for the purposes of the trigger, and could thereby cause what would have formerly been rates of Medicare growth within the target rate to suddenly exceed the trigger threshold. Because that kind of legislation would asymmetrically ratchet Medicare spending down it might actually disincentivize Congressional action to pass legislation bending the cost-curve, and create a use-or-lose dynamic for Medicare stakeholders.

427. Brito, *supra* note 173, at 143.

targeted Medicare growth rate to GDP plus 0.5 percent.[428] Again, this proposal appears straightforward since the entrenching supermajoritarian amendment handicap does not apply to the trigger, only to the provisions stipulating automatic implementation and the provisions structuring Congressional consideration of a substitute. While Congress did not enact this provision in its "modest" budget and spending deal for Fiscal Year 2014, it did reduce appropriations for IPAB by ten million dollars,[429] just as it had in the continuing resolutions for FY 2012 and FY 2013 spending.[430]

Congress has even taken unicameral action to change IPAB's binding force. In January 2013, the Republican leadership in the House adopted a House rule declaring that section 1899A(d) of the IPAB legislation "shall not apply" in the current Congress, thereby rejecting the special procedures that section 1899A had established for Congressional consideration of IPAB recommendations.[431] Because subsection (d) also contains (d)(3)(D), which imposes the three-fifths supermajority threshold for waiving the requirements of section (d), entrenchment is undermined. Also because (d)(3)(A) requires Congress' substitute to achieve equivalent savings, IPAB's target savings can now be sidestepped by Congress. As (d)(3)(B) contains the point of order against other non-IPAB-related legislation that might repeal or change IPAB's proposal, the House is now free to pass subsequent bills that counteract, substitute for, or prevent any automatic implementation of IPAB's proposal.[432]

Congress has similarly modified the sequester. On January 2, 2013, in ATRA, the date of the sequester was delayed to March 2013, which concentrated the impact of the sequester into a shorter timeframe.[433] Congress undertook a number of spending changes in ATRA. To take health entitlement spending as a case in point, ATRA included another "Doc Fix" which pushed the scheduled 26.5 percent SGR formula cut to Medicare physician payments to the end of 2013.[434] It also acted to, among other things, extend the exceptions process for the Medicare therapy cap and extend current policy for rural health,

428. OFFICE OF MGMT & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2014 (2014); U.S. DEP'T OF HEALTH AND HUMAN SERVICES, FISCAL YEAR 2014 BUDGET IN BRIEF: STRENGTHENING HEALTH AND OPPORTUNITY FOR ALL AMERICANS 56 (2013), *available at* http://www.hhs.gov/budget/.

429. SSA § 1899A(m)(1)–(2) (authorizing $15 million for in FY 2012 appropriations, adjusted by CPI-U for subsequent years, and sourcing these funds from transfers from the Medicare Part A and Part B Trust Funds).

430. The Consolidated Appropriations Act 2012, Pub. L. No. 112–74, § 525, 125 Stat. 786 (2011) rescinded $10 million of IPAB's appropriation for FY 2012). The Consolidated and Further Continuing Appropriations Act 2013, Pub. L. No. 113–6, § 1521, 127 Stat. 198 (2013) did the same for Fiscal Year 2013.

431. H.R. Res. 5, §3(a), 113th Cong. (2013) (enacted).

432. Sarah Kliff, *Republicans Can't Stop IPAB but the Might Slow it Down,* WASH. POST (Jan. 3, 2013), *available at* http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/08/republicans-cant-stop-ipab-but-they-might-slow-it-down/.

433. American Taxpayer Relief Act ("ATRA"), Pub. L. No. 112–240, § 901(b), 126 Stat. 2313 (2013). Indeed the amount of the sequestration overall was revised slightly downward shortly thereafter in the Consolidated and Further Continuing Appropriations Act of 2013, Pub. L. No. 113–6, § 1521, 127 Stat. 198 (2013), from $85.3 billion in budget reductions to $80.5 billion for Fiscal Year 2013. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-452, 2013, SEQUESTRATION: SELECTED FEDERAL AGENCIES REDUCED SOME SERVICES AND INVESTMENTS, WHILE TAKING SHORT-TERM ACTIONS TO MITIGATE EFFECTS, at 6 (2014).

434. ATRA, *supra* note 433, § 603.

including the ambulance add-on payments, the payment adjustment for low-volume hospitals, and the Medicare Dependent Hospital program.[435] The specific interests benefited here include not just physicians, but others favored by the powerful rural Senators of the Senate Finance Committee.

A Congressional precommitment to fund health care (Medicare) was thus trimmed by a Congressional precommitment to cut spending across-the-board (sequestration), though Medicare was partly protected from such sequestration (exceptions) with Congress additionally increasing Medicare payments for benefit specific health sector interest groups.

Other legislation has also restored otherwise sequestrable funds to special interests, namely business travelers, the meat industry, and the defense industry. Despite the Administration's call for wholesale revisitation of sequestration,[436] Congress had, in the immediate aftermath of the March 2013 sequester, made only piecemeal efforts to address funding. It restored funds for air traffic controllers to prevent the delays that were clogging the airports.[437] By law, government food inspection services are required to be on-site for meat packers to keep their plants open, and the meat industry won a reprieve from cuts to their inspector.[438] Last, but not least, Congress granted the Pentagon flexibility to avoid some of the effects of sequestration.[439]

But a somewhat more comprehensive effort to provide sequestration relief did ultimately pass. The FY 2014 "modest" budget and spending deal[440] modified the sequester by easing the discretionary spending caps for fiscal years 2014 and 2015 and generating eighty-five billion dollars in revenue to offset the sequester cuts.[441] The list of programs spared the full brunt of the sequestration is longer. Head Start cuts were fully rescinded. The National Institutes of Health (NIH) received partial restoration. Defense cuts were mitigated.[442] Meanwhile, to offset some of this new funding, Medicare sequestration (though limited to only two percent) was extended for two additional years beyond when

435. *Id*. §§ 602–06.

436. OFFICE OF MANAGEMENT AND BUDGET EXECUTIVE OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2014 (2013), *available at* http://www.whitehouse.gov/omb/budget/Overview [hereinafter President Obama's FY 2014 Budget Proposal] (stating that the President's proposed FY 2014 budget substitutes for the $1.2 billion in cuts).

437. Reducing Flight Delays Act of 2013, Pub. L. No. 113–9, 127 Stat. 443 (2013). *See also* David Rogers, *FAA Fix Leads to Grief for Hal Rogers*, POLITICO (Apr. 30, 2013, 11:33 PM), ww.politico.com/story/2013/04/faa-fix-hal-rogers-aviation-air-travel-90800.html (recounting how "the meat packers got $19 million in March to protect against furloughs of food safety inspectors [and t]he FAA controllers are back on the job after $253 million was shifted from airport construction projects under the deal last week").

438. Consolidated and Further Continuing Appropriations Act of 2013, Pub. L. No. 113–6, 127 Stat. 198, 207–08 (2013).

439. *Id*. at 279; 159 Cong. Rec. S1986 (daily ed. March 20, 2013) (amendment offered by Sen. Mark Pryor).

440. Continuing Appropriations Resolution, 2014, Pub. L. No. 113–67, 127 Stat. 1166 (2014).

441. Lori Montgomery, *Senate Passes Bipartisan Budget Agreement*, WASH. POST (Dec. 18, 2013), http://www.washingtonpost.com/politics/senate-poised-to-pass-bipartisan-budget-agreement/2013/12/18/54fd3a1a-6807-11e3-a0b9-249bbb34602c_story.html.

442. *Cf.* David Farenthold & Ed O'Keefe, *Piecemeal Funding During the Government Shutdown*, WASH. POST (Oct. 8, 2013), http://www.washingtonpost.com/wp-srv/special/politics/house-appropriations-bills-during-shutdown/ (showing the list of programs that House Republicans proposed should receive selective appropriations during the government shutdown).

automatic cuts for all other programs would expire.[443] At the same time, the administrative budget for the operation of the fifteen-member IPAB was largely de-funded.[444]

What are we to make of this? Congress has ostensibly precommitted itself to fund Medicare as an entitlement for all those who met the eligibility criteria. Later, Congress turns around and pre-commits itself to cut entitlement spending by sequestration, even as it leaves tax spending untouched. However, it also wants Medicare to be exempted from automatic cuts above two percent. Certain interest groups must also receive additional payments under ATRA and other legislation. But Congress also wants Medicare spending to be cut more, or at least for longer, in order to fund NIH and defense. At the same time, it wishes to cripple the independent agency designed to cut Medicare, arguably in a more expert manner. No wonder the U.S. Government Accountability Office found in a recent report that CMS faced "challenges in applying sequestration in accordance with the law and changing budget parameters."[445] In a forum where more of the programs can be traded off against one another to strike a comprehensive spending plan, the additional headwind that programs face when confronting the sequester seems to produce not so much principled, transparent rule-bound results as extremely complex, incoherent results.

What do we gain from trying to conduct "preference aggregation," welfare tradeoffs, or "substantive" decision-making that purports to be the stuff of politics and democratic rule using the mode of legalistic, "principled" decision-making? Are the proponents of entrenchment, despite their commitment to the superiority of law over politics, paradoxically telegraphing that the two are no different?

This discussion has revealed that the promise of entrenchment qua entrenchment is a mirage. There are those who argue that entrenchment should be possible, even in these deeply political matters involving revenue and spending. They are driven by the same norm as those who deploy it, despite its ineffectiveness, and they insist that we honor it out of false necessity. We have shown they are both arguing from an ideological claim that preexisting rules should govern these decisions and that the outcomes of these fights should be pre-determined. They are arguing from legalism.

The notion that we are mechanistically protected from granular day-to-day decision is illusory. Oddly, Posner and Vermeule admit as much, even in their call for entrenchment. Even if precommitment or entrenchment were available, they say, it would not provide determinate results:

> Legal actors constantly must make judgments about whether a statute conflicts with a previous or hierarchically superior enactment. When an interpreter, such as a court or legislative body, decides whether a federal law preempts a state law, whether a federal or state law conflicts with the Constitution, or whether a transaction violates the tax law, it must be

443. Michael McAuliff, *Budget Deal Whacks Medicare Providers*, HUFFINGTON POST (Dec. 10, 2013), http://www.huffingtonpost.com/2013/12/10/budget-medicare-cuts_n_4422676.html.

444. Jessica Zigmond, *Reform Update: Its Funding Gutted, IPAB Fades into the Background*, MODERN HEALTHCARE (Jan. 24, 2014), http://www.modernhealthcare.com/article20140124/NEWS/301249973.

445. *See* U.S. GOV'T ACCOUNTABILITY OFFICE *supra* note 433, at 11–12.

> able to identify real conflicts that are concealed by statutory (or transactional) indirection. This task involves a well-known problem of interpretive theory, variously labeled as a "form and substance" problem, a "rules and standards" problem, a problem of the choice between "textualism" and "purposivism," or a problem of "circumvention" or "evasion."[446]

What then does the vain use of precommitment, despite its inability to change our decisions at time two, accomplish? If the mechanism fails, norms remain. Proponents of precommitment hope that those who do not know, or do not want to believe that rules fail in this arena will adhere nonetheless, and they will call for rule-abidance from political convention if nothing else. Legalism as political norm weighs in at the margin against any political norms that run contrary in that instance.

But if people wish as a matter of ideology to believe that they can bind themselves and should regard themselves as bound and will enforce norms about binding in the form of imposing political consequences, what objection can we have? I argue there are two types of bad faith operating. One type is the disingenuity of pretending to be bound when one is not—the bad faith of false necessity.

However, there is a second type of bad faith that should caution us to be wary of these devices and inspect them carefully for whom they serve. This is the bad faith of decision makers pretending to be apolitical in their decisions when they are not. Precommitments masquerade as a neutral principle with consent among equals; yet, they are in a collective context too easily manipulated. In scrutinizing the particular examples of IPAB and the sequester, we have shown that these devices do not serve reason in binding against passions or interests, but they are used by some to bind others to serve the first group's passions and interests. One example of non-neutral application is apparent insofar as the sequester locks-in a bias favoring, cutting spending rather than raising revenue. Reduced tax deductions and automatic revenue increases could have been included as part of the response to large deficits.[447] Thus, the failure to include revenue raisers along with spending sequestration is a policy choice.

IPAB is asymmetrical in this way as well. In a level competition between the norm to prioritize Medicare and the norm to cut Medicare, the outcome, most would agree, would depend. It would be a situationally contingent, particularistic decision. IPAB tips the scales, adding the norm of legalism to the side favoring cuts, and, as we have seen, legalism claims general applicability regardless of the situation. Congress at time one is wagering on one side of the question, betting against investing more money in Medicare and consenting to pay the political price of overriding or modifying IPAB's entrenchment provisions should a pro-Medicare-spending norm arise in the future.

These precommitments do not fall behind the veil of ignorance. They are not enacted from the original position. They are used in a forum where everyone is seeking strategic

446. *See* Posner & Vermeule, *supra* note 8, at 1669–70.

447. The idea of automatic revenue increases pegged to Social Security or other triggers is not new. *See, e.g.*, E. Donald Elliott, *Regulating the Deficit After* Bowsher v. Synar, 4 YALE J. ON REG. 317, 358–61 (1987); Stith, *supra* note 13, at 627; Westmoreland, *supra* note 13, at 1562 n.38.

advantage, trying to impose extra gridlock (even beyond that already assumed by positive political theory) to lock-in their preferences with greater security against their opponents. In addition, the use of precommitment may obfuscate the actual preferences enacted, as is the case with the ping-pong treatment of Medicare under IPAB and sequestration. The two case studies also reveal that Congressional precommitments in the budgeting arena amplify the difference between status quo majorities and minorities. The sequester was never a penalty default for Republicans that would force them to the table to negotiate an alternative that would head-off sequestration.[448] Instead, it was a majoritarian default decimating every social program that did not enjoy conventional popular support.[449] The reason for this tilt is that the popular interests, such as those favoring relief for business travelers facing flight delays, could "contract around" the sequester by lobbying Congress to relieve the sequestration of funds to air traffic controllers. However, the disempowered, vulnerable, minority interests, including the neediest Native American families,[450] could not.

Posner and Vermeule might respond in two ways. To the first form of bad faith surrounding Congressional precommitments, pretending to be bound when you are not, they might argue that the solution is simple enough: we could decide to make precommitments binding. And to the second form of bad faith, pretending to be impartial in the deployment of a tool that is deeply political, Posner and Vermeule might say, but it is available to anyone to not only wield politically, but also to combat politically; after all, we all know that the application of "prior law" cannot produce automatic answers and requires judgment at every turn. They might point to the numerous opportunities that opponents have to defeat precommitments that they dislike—including opportunities to insert special exemptions for their favored political interests or opportunities to "contract around" the precommitment, as the proponents of Head Start eventually did. However, that rejoinder actually depends on the precommitment failing to bind. In other words, it depends on the continued operation of the first form of bad faith. The proponents of precommitment are in a double-bind where solving one form of bad faith exacerbates the other.

Our politics has folded in on itself. A perennial concern of legal scholars is the intrusion of politics into law, but here we have the intrusion of "legalism" into politics. When Congress seeks to subject its political decisions to "formal rationality," "formal justice," and "rule of law"[451] above all other political values, does it actually relieve itself of hard choices in deciding priorities? What does it mean that we are making the kinds of value judgments that liberalism deems to be beyond legalism's domain by appealing to legalistic norms? And how does our polity recover competing modes of discourse?

448. *Contra* Dorf, *supra* note 302 (arguing that it was).

449. Ferejohn & Friedman, *supra* note 304, at 857–59.

450. Byron Dorgan, *Broken Promises*, N.Y. TIMES, July 11, 2013, at A27.

451. Judith Shklar, *Political Theory and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 1, 5–6 (Allan C. Hutchinson & Patrick Monohan eds., 1987). *See* Weber, *supra* note 325.