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TAX LAW AND THE ERODING BUDGET PROCESS

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I

INTRODUCTION

Tax scholars have long lamented the tendency of the budget process to blemish tax policy. The budget process takes pristine tax concepts and subjects them to its rules and gimmicks so that they are unrecognizable by the time they leave Congress.¹ The 2017 Tax Cuts and Jobs Act (TCJA), the largest overhaul of the tax code since 1986, is an example of this phenomenon, with its many sunset provisions, phase-ins, and revenue-forced policies.²

The relationship between tax and budget rules, however, is not unidirectional. Increasingly, political pressures to enact tax legislation also impact the budget process, with enduring consequences that sometimes reach beyond tax law. Most recently, partisan conflict over the 2017 tax legislation challenged fundamental aspects of the budget process—such as the length of budget windows, the construction of budget baselines, even the independence of the estimators—in order to fit the law through the requirements of the budget reconciliation process. The succumbing of these fundamental features of the budget process to partisan wrangling presents challenges for which the existing budget institutions were ill-designed to meet.

Lawmakers adhered to many of the budget process rules in a formal sense, which could be viewed as demonstrating the resiliency of the budget process. There is reason, however, to not be so optimistic. The budgetary disputes heavily shaped the contours of the legislation, exacerbating the tendency of lawmakers to disregard long-term fiscal concerns and contributing to revenue losses of \$1.9

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1. See, e.g., Michael J. Graetz, *Paint-by-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609 (1995); Charles E. McLure, Jr., *The Budget Process and Tax Simplification/Complication*, 45 TAX L. REV. 25, 79 (1989) (arguing that reconciliation has contributed to complexity in tax legislation).

2. One consequence of the budget process rules is that the 2017 tax legislation actually has no title. The Parliamentarian struck the provision that set forth its short name since this was a non-germane amendment and therefore outside the scope of the reconciliation process. Dan Shaviro, *The Act with No Name*, START MAKING SENSE BLOG (Dec. 21, 2017), <http://danshaviro.blogspot.com/2017/12/the-act-with-no-name.html> [<https://perma.cc/J7G5-UVMW>]. For convenience's sake, I will refer to the bill using its original short title, its subsequent omission from the actual legislation notwithstanding.

trillion in the TCJA's first ten years.³ Additionally, the extent to which the 2017 tax legislation challenged the budget process likely has eroded important budget norms, casting doubt upon their staying power going forward. Thus, tax policy has impacted budget policy by encouraging the ill-conceived use of reconciliation to ease the passage of revenue-losing legislation, while also creating pressure for Congress to unshackle itself from the budget process. This Article identifies points of instability in the budget process and offers suggestions for improving those areas in light of the new strains placed upon them.

Part II discusses the recent expansion of the budget reconciliation process and accompanying budget gimmicks to accommodate ambitious tax legislation. Part III examines the effect of TCJA upon the budget process and the latter's impact upon the enacted tax policy. It then offers possible ways to reduce the undesirable consequences of these interactions. Part IV discusses general conclusions about the state of the budget process and more ambitious reforms of it.

II

THE CHANGING BUDGET PROCESS

In the spring of 2017, Senate Republicans deployed the so called "nuclear option" to remove the filibuster obstacle to confirming Supreme Court nominees,⁴ thereby empowering the simple majority in an institution that has traditionally privileged the rights of the minority party. This development may have seemed like a paradigm shift from the Senate's standing as the more deliberative body, but the shift has not been sudden. Instead, the shift has been a result of a long path of steady erosion of the filibuster.

The budget reconciliation process allows for the passage of legislation that avoids a Senate filibuster.⁵ The scope of the process has expanded in the past few decades to encompass large tax cuts and parts of health care reform.⁶ This

3. The original score for the bill was approximately \$1.5 trillion. STAFF OF J. COMM. ON TAX'N, JCX-67-17, 115TH CONG., ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE "TAX CUTS AND JOBS ACT" (Comm. Print 2017). CBO has since revised that figure to \$1.9 trillion. CONG. BUDGET OFF., THE BUDGET AND ECONOMIC OUTLOOK: 2018-2028, at 106 (April 2018).

4. Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> [<https://perma.cc/M9CN-H6TG>].

5. See Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 310(e)(2) (2012), 93 Pub. L. No. 93-344, 88 Stat. 297, 315 (1974); Anita S. Krishnakumar, Note, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995-96 Budget "Train Wreck"*, 35 HARV. J. ON LEGIS. 589, 593 (1998).

6. For general scholarly examinations of the reconciliation process, see JOHN B. GILMOUR, RECONCILABLE DIFFERENCES? 93-138 (1990); see also generally Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387 (1998); Philip G. Joyce & Robert D. Reischauer, *Deficit Budgeting: The Federal Budget Process and Budget Reform*, 29 HARV. J. ON LEGIS. 429 (1992); Krishnakumar, *supra* note 5; James A. Miller & James D. Range, *Reconciling an Irreconcilable Budget: The New Politics of the Budget Process*, 20 HARV. J. ON LEGIS. 4 (1983). For a historical overview of the process, see ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 142-49 (3d ed. 2007). I have previously explored reconciliation in the tax reform context in particular. Rebecca M. Kysar, *Reconciling Congress to Tax Reform*, 88 NOTRE DAME L. REV.

legislation would have otherwise failed due to a lack of bipartisan support. In many ways, the expansion of the reconciliation process tracks increasing obstructionism by the minority party. Reconciliation has become a release valve for the legislative filibuster, perhaps allowing it to endure longer than it otherwise would.

But reconciliation was not designed to accommodate such ambitious legislative efforts. To fit such laws within reconciliation's confines, the majority party has had to employ several budgetary devices, which have consequences upon the budget process. While the expansion of reconciliation has thus served to preserve Senate tradition, it has come at a cost to the budget process. It also reduces the prospect for serious tax reform. This Part outlines the history of reconciliation as well as its present and likely future incarnations.

A. A Short History of Reconciliation

1. Original Goals and Early History

Although it has been modified several times, the Congressional Budget and Impoundment Control Act of 1974 (hereafter, the Budget Act) serves as the backbone for the congressional budget process.⁷ It was initiated as a means of asserting and unifying Congressional authority over the budget, which had fallen into the Executive Branch's ambit with the President's Budget and the controversial impoundments by President Nixon.⁸ The Budget Act allows Congress to formulate its own budget in a cohesive manner through the budget resolution, as opposed to simply passing numerous appropriations bills every year in an uncoordinated manner.⁹ The budget resolution introduces the budget priorities and most major legislation that Congress plans to pursue in the fiscal year, which runs from October 1 to September 30.

To help Congress meet the targets in the budget resolution, the Budget Act created the Congressional Budget Office (the "CBO"), a nonpartisan agency within the legislative branch that estimates the costs for legislative proposals. The Budget Act also formed the budget committees in each house that draft the budget resolution.¹⁰ Because majority party leaders control the budget committees, the centralization of power in those committees has helped to give rise to a new era in Congress—one of majoritarian politics as opposed to dispersed committee power.¹¹ The drafting of the budget resolution, not surprisingly, is often contentious due to its importance in setting policy priorities.¹² Prior to fiscal year 1999, Congress passed a budget resolution

2121 (2013).

7. See generally Congressional Budget and Impoundment Control Act of 1974.

8. SCHICK, *supra* note 6, at 119–20.

9. *Id.*

10. Congressional Budget Act and Impoundment Control Act of 1974 § 301.

11. Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-in-Government*, 100 COLUM. L. REV. 702, 716–24 (2000).

12. SCHICK, *supra* note 6, at 119–20.

relatively on time. In more recent years, the process has stalled entirely, and the budget resolution is not enacted at all.¹³

Reconciliation began as an ancillary part of the congressional budget process to assist Congress in balancing the budget. In the Budget Act as originally enacted, Congress had to revise budgetary targets in a second budget resolution just prior to the new fiscal year.¹⁴ Unlike those set out in the first budget resolution, these new targets were binding.¹⁵ The reconciliation process, by removing the threat of filibuster and non-germane amendments, gave Congress an expedited procedure to enact legislation that would bring the budget in conformity with the new targets.¹⁶

Congress never quite used the reconciliation process as originally envisioned. The first few years following the enactment of the Budget Act, the budget committees delegated compliance with the goals of the second budget resolution to the authorizing committees in a practice called "assumed legislative savings."¹⁷ When this practice repeatedly failed to comply with the budget directives, Democratic leaders embarked on a new path to balance the budget. In the spring of 1980, they used the first budget resolution to enact reconciliation legislation rather than waiting for the second.¹⁸ The bill cut entitlements and raised revenue, resulting in a savings of \$8.2 billion.¹⁹ By the early 1980s, Congress eliminated the second budget resolution altogether. During this time period, Congress used this new incarnation of reconciliation to enact several bills that cut deficits by a significant degree.²⁰

2. The Growing Influence of Reconciliation and the Byrd Rule

Reconciliation thus began as a deficit-decreasing device and was used as such several times during the 1980s without much effect. When deficits still ballooned, Congress enacted the Gramm-Rudman-Hollings Act of 1985, which mandated sequestration if Congress failed to meet deficit reduction targets.²¹ Eventually, the threat of sequestration proved too harsh, and Congress repealed the Gramm-Rudman-Hollings Act in favor of pay-as-you-go rules and discretionary spending caps in the Budget Enforcement Act of 1990.²²

During the debate of the Gramm-Rudman-Hollings Act, Congress also revisited the reconciliation process. Unhappy with the ability of members to add unrelated amendments to reconciliation legislation, Senator Robert Byrd helped

13. *Id.* at 123.

14. Krishnakumar, *supra* note 5, at 592-93.

15. *Id.*

16. *Id.* at 593.

17. GILMOUR, *supra* note 6, at 105.

18. *Id.* at 108-09.

19. Omnibus Budget Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2599 (1980).

20. See Kysar, *supra* note 6, at 2129-30.

21. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985); see GILMOUR, *supra* note 6, at 185-86.

22. Budget Enforcement Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990).

reform the process with the Senate “Byrd Rule.” The rule can be used to strike provisions that are unrelated to the budget.²³ These “extraneous provisions” are defined to include those that do not produce a change in outlays or revenues.²⁴ Once a Byrd Rule point of order is raised, it can be waived only by a three-fifths vote of the Senate.²⁵

The Byrd Rule has since been codified and expanded.²⁶ The rule also forbids reconciliation measures from increasing the deficit in a fiscal year beyond the budget window.²⁷ This change was in response to a controversy regarding legislation that decreased deficits in the near-term but produced deficits in the long-term—tax cuts (or spending increases) that sprung into life immediately after the budget window period.

Reconciliation was used in the early 1990s under President Bill Clinton to enact significant legislation without bipartisan support. The Omnibus Budget Reconciliation Act of 1993 significantly raised taxes on the rich.²⁸ The Byrd Rule, however, was in full effect, and led to the removal of 150 extraneous provisions from the legislation.²⁹ The heightened influence of the Byrd Rule had a profound effect on the resulting law, upsetting many members of the House who thought the rule led to too much power in the Senate.³⁰

During this era, when Republicans regained control of Congress, they tried to use reconciliation to fulfill their campaign pledges in the Balanced Budget Act of 1995, a reconciliation bill that dramatically cut taxes and entitlement spending.³¹ Although President Clinton ultimately vetoed the bill, Republicans again heavily invoked the Byrd Rule at the drafting and deliberation stages to remove dozens of provisions.³²

The Byrd Rule grew in importance in the 1990s. The minority party formally invoked it over eighty times in that decade as compared to just five times in the 1980s.³³ This increase likely reflects the more ambitious use of reconciliation to pass social policy and the increasing divergence between the two political parties during this time period.

As the deficits lifted in the late-1990s, Republicans tried to use the reconciliation process to enact tax cuts that were not offset by decreases in spending. In 1999, the budget resolution instructed the tax-writing committees to

23. BILL HENIFF, JR., CONG. RESEARCH SERV., RL30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE’S “BYRD RULE” 2 (2016).

24. *Id.* at 5.

25. *Id.* at 4.

26. *Id.* at 3.

27. *Id.* at 5.

28. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

29. 139 CONG. REC. S19767 (daily ed. Aug. 6, 1993) (remarks of Sen. Jim Sasser).

30. HENIFF, JR., *supra* note 23, at 13–14.

31. H.R. 2491, 104th Cong. (1st Sess. 1995) (as received in the Senate).

32. HENIFF, JR., *supra* note 23, at 22–24.

33. *Id.* at 10.

report such a bill.³⁴ At the time, the revenue-reducing legislation was expected to lower budget surpluses.

The use of reconciliation in this manner became divisive in the Senate since reconciliation had never been used other than to maintain or improve the nation's fiscal picture. Some Senators opposed the move, arguing that the original intention of reconciliation was as a deficit-decreasing device. Others argued that the actual language of the Budget Act simply prescribes that reconciliation bills "change" spending and revenue.³⁵ The better view is likely the former—the fast track procedures enabled easier passage of legislation requiring tough votes—that is, unpopular tax increases or spending cuts. It is difficult to imagine that Congress instead enacted this apparatus to facilitate legislation that is relatively easy to pass—that is, tax decreases or spending increases. That being said, the "original intent" of Congress of course does not bind it going forward, and there is nothing to prevent Congress from using the procedure for new purposes, however short-sighted they are.

Ultimately, the Senate Parliamentarian would bless using reconciliation for deficit-increasing legislation in a move that could be described as the "original sin" that has produced many subsequent reconciliation-related controversies.³⁶ For one, the Byrd Rule necessitated additional procedural maneuvers since it prohibits legislation from increasing the deficit beyond the budget window period. To meet the rigors of the Byrd Rule, drafters of the deficit-increasing Taxpayer Refund and Relief Act of 1999 sunsetted the tax cut in 2009, keeping its costs within the budget window period. Originally, the expiration was itself only temporary, and the drafters reinstated the cuts after the sunset date.³⁷ A Byrd Rule point of order, however, struck the reinstatement of the cuts from the bill, causing them to permanently sunset ten years after their enactment.³⁸ President Clinton, however, vetoed the 1999 reconciliation bill.

In 2001, Republicans finally passed enormous reconciliation tax cuts into law in the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA).³⁹ The cuts were initially sunsetted to meet the Byrd Rule, as well as to keep the costs within the levels set forth in the reconciliation instructions.⁴⁰ Some Senators again decried the use of reconciliation for anything other than deficit-reducing measures. Senator Byrd argued that although the original Budget Act did not delineate between tax increases and tax cuts, amendments to it clarified that deficit-reduction was the goal.⁴¹ Many also protested the sunset

34. H.R. Con. Res. 68, 106th Cong. §§ 104–105 (1999).

35. HENIFF, JR., *supra* note 23, at 15.

36. Thanks to George Yin for this turn of phrase.

37. Michael W. Evans, *The Budget Process and the 'Sunset' Provision of the 2001 Tax Law*, 99 TAX NOTES 405, 412 (2003).

38. *Id.* at 411.

39. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001) (codified as amended in scattered sections of 26 U.S.C.).

40. David Kamin, *Basing Budget Baselines*, 57 WM. & MARY L. REV. 143, 169–70 (2015).

41. 147 CONG. REC. S5651–52 (daily ed. Apr. 5, 2001) (remarks of Sen. Robert Byrd).

provisions, arguing that the resulting disruptions to taxpayer planning would erode the positive impact that the tax cuts would otherwise have upon investment. Others were more optimistic, concluding that the sunsets would provide an opportunity to reexamine policy at a later date in light of the nation's altered economic circumstances.⁴²

Despite the mixed view on sunset provisions, Republicans used them again to avoid the Byrd Rule in the Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA), which lowered rates on capital gains and dividends.⁴³ When Democrats regained control of Congress in 2007, both the House and Senate each passed new procedural rules forbidding reconciliation bills that increased the deficit or reduced surpluses, even within the budget window period.⁴⁴ The prohibition on reconciliation tax cuts, however, was short-lived. Once Congress changed hands again, the Republicans eliminated the new rules.⁴⁵

3. The Current and Future Eras: Reconciliation in Flux

a. Reconciliation and an eroding filibuster. The above history illustrates the fluidity of the reconciliation process, as well as its contested boundaries. The expansion of the process has not abated. In the period following the sunsetted tax cuts, Democrats controversially used reconciliation to enact parts of major health care reform in the Patient Protection and Affordable Care Act (ACA).⁴⁶ After winning both houses and the Presidency, Republicans repeatedly attempted to use the process to repeal that reform in the early part of 2017.⁴⁷

The majority party will likely continue to test the boundaries of reconciliation to effectuate its legislative goals. The filibuster was previously invoked only in extraordinary circumstances but now has become routine in the Senate, creating a climate of minority obstructionism. Historically, when legislative tools have stymied majority rule, the majority has eliminated them.⁴⁸ Although a simple

42. HENIFF, JR., *supra* note 23, at 16.

43. Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752 (2003) (codified as amended in scattered sections of 26 U.S.C.).

44. H.R. Res. 6, 110th Cong. (2007); S. Con. Res. 21, 110th Cong. (submitted as amended on May 8, 2007). *See also* Kysar, *supra* note 6, at 2135.

45. H.R. Res. 5, 112th Cong. (2011) (repealing House rule); H.R. Con. Res. 27, 114th Cong. (2015) (repealing Senate rule); *see also* Kysar, *supra* note 6, at 2135; David Reich & Richard Kogan, *Introduction to Budget "Reconciliation," Center on Budget and Policy Priorities*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 9, 2016), <https://www.cbpp.org/sites/default/files/atoms/files/1-22-15bud.pdf> [<https://perma.cc/87FL-ZYFQ>].

46. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). Other parts of the healthcare reform plan are enacted under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

47. *See, e.g.*, American Health Care Act of 2017, H.R. 1628, 115th Cong. (2017). *See also* S. Con. Res. 3, 115th Cong. (2017) (providing for reconciliation instructions in budget resolution).

48. Josh Chafetz, *The Filibuster Was Already Doomed Before the Nuclear Option Vote*, WASH. POST (Apr. 6, 2007), https://www.washingtonpost.com/posteverything/wp/2017/04/06/the-filibuster-was-already-doomed-before-the-nuclear-option-vote/?utm_term=.5207d9ffab50 [<https://perma.cc/6F3E-YKMD>]. For instance, when House Democrats declined to vote, causing the body to fail its quorum rules, the Speaker of the House simply recorded the names of Democrats for the purpose of fulfilling the

majority could prefer adhering to the limitations imposed by the budget process because they fear minority retaliation, this fear no longer seems to hem in lawmakers as it once did.

Reconciliation serves as a release valve against the pressures of obstruction by the minority party, helping to stave off the elimination of the legislative filibuster. Tax policy is one of the most contentious and wide-sweeping areas of government, and the majority's will to effectuate its agenda in this area is acute. The Byrd Rule requires that reconciliation provisions be budget-related, which most of tax law is. Because reconciliation can move policy forward in this area, the need to get rid of the legislative filibuster entirely becomes less necessary.

Because reconciliation has become a tool to bypass the minority, it should be no surprise that its boundaries in that context have expanded and will continue to do so. From a strategic perspective, it also makes sense for the majority to eliminate the legislative filibuster in incremental steps, which reconciliation allows it to do. Exercising the nuclear option may backfire on the majority party once the minority regains control of the Senate. Eroding the filibuster gradually allows the majority party to at least obtain a big victory each time the filibuster gets weakened and limits the risk of backfiring to the particular subject matter at hand.

This incremental approach to the nuclear option has borne out thus far. The expansion of reconciliation to encompass tax cuts and health care reform can be seen as an initial step in that process,⁴⁹ even though a supermajority of Senators recently expressed support for retention of the legislative filibuster.⁵⁰ The majority's elimination of the filibuster with respect to lower court confirmations and then Supreme Court nominees continued the trend.

b. Reconciliation and the 2017 tax legislation. The history of reconciliation illustrates that its scope is increasing, and the expansion process will likely continue. Trying to accommodate ambitious tax legislation within the confines of reconciliation, however, has impacted the budget process (as well as tax policy).

quorum. In the Senate, the filibuster has faced waves of reforms. In 1917, the Senate adopted the cloture rule, which allows a supermajority vote to end debate, after a controversial invocation of the filibuster. In 1975, the cloture requirement dropped from a two-thirds vote to three-fifths following a period of an increase in filibustering. More recently, the Senate has eliminated the filibuster completely for nominations. *Id.*

49. Appropriation bills are another likely area to face elimination of the filibuster since, like reconciliation bills, they have a special procedural status. This feature might help contain the nuclear option to that context. Repealing the filibuster for appropriations bills would also have lower stakes because of such bills' temporary nature and limited subject matter. Appropriations typically fund the government for a year, although sometimes less. Appropriations also are not allowed to change existing law or contain provisions that are not germane to the subject matter of the bill. David Freddoso, *Nuclear Option for Appropriations Bills: It's Probably Only a Matter of Time*, WASH. EXAMINER (Jan. 23, 2018), <http://www.washingtonexaminer.com/nuclear-option-for-appropriations-bills-its-probably-only-a-matter-of-time/article/2621113> [<https://perma.cc/S3YU-AFCX>].

50. Ted Barrett, *61 Senators Sign Letter to Preserve Filibuster Rules*, CNN (Apr. 9, 2017), <http://www.cnn.com/2017/04/07/politics/senate-filibuster-rules-letter/index.html> [<https://perma.cc/U7X8-QD5A>].

The sunsets of prior reconciliation tax cuts are one such maneuver, and that tactic continues with the new TCJA sunsets. During the 2017 process, the majority party also explored other methods to meet reconciliation's procedural requirements.

In early 2017, Republicans announced their plan to pass complex tax reform through reconciliation, which was itself unprecedented. In the past, tax reform has been conducted in a bipartisan fashion. Bipartisanship is often thought of as a necessary ingredient to tax reform so that one party alone does not get blamed for taking away special tax benefits or otherwise raising taxes on one industry or another.⁵¹

As mentioned above, the Byrd Rule requires that reconciliation bills not decrease revenues beyond the budget window period. Under reconciliation, a permanent tax cut has to be paid for with spending cuts or tax increases. Sunsets were used to pass the reconciliation tax cuts of the 2000s so that the law would expire prior to the end of the budget window. These temporary reconciliation bills, however, primarily involved simple rate cuts for individuals. In 2017, Republicans were worried that making complex tax reform temporary would cause much greater planning distortions, especially on the business side, muting the growth effects of the plan. One study estimated that a temporary corporate rate cut would largely be a windfall to shareholders with little impact on economic growth.⁵² In order to combat the problems that sunsets would present for complex tax reform, lawmakers proposed to simply lengthen the budget window from a ten-year period to twenty, even thirty, years.⁵³ This way the tax reform bill could have a much further off sunset date, potentially overcoming the downsides of temporary policies.

Lawmakers also contemplated other ways to avoid Byrd Rule objections. The House's "A Better Way" blueprint for tax reform prescribed using a baseline of current policy rather than the traditional current law baseline to reduce the costs of the plan.⁵⁴ The official cost of legislation is the difference between the baseline and the amount of government revenues that are generated or spent subsequent to the enactment of the legislation.⁵⁵ Under budget rules, the baseline generally follows "current law," or the law as written.⁵⁶ A current policy baseline, on the

51. See Kysar, *supra* note 6, at 2145–46.

52. Alan Cole, *Why Temporary Corporate Income Tax Cuts Won't Generate Much Growth*, TAX FOUND. (2017), <https://files.taxfoundation.org/20170612135617/Tax-Foundation-FF549.pdf> [<https://perma.cc/K9M5-6PUY>].

53. Sahil Kapur, *GOP Push for 20-Year Tax Cut Grows as Ryan Seeks Permanent Fix*, BLOOMBERG (June 24, 2017), <https://www.bloomberg.com/news/articles/2017-06-24/gop-push-for-20-year-tax-cut-grows-as-ryan-seeks-permanent-fix> [<https://perma.cc/E7ZA-STBR>].

54. BETTER.GOP, A BETTER WAY: OUR VISION FOR A CONFIDENT AMERICA 16 (June 24, 2016), https://abetterway.speaker.gov/_assets/pdf/ABetterWay-Tax-PolicyPaper.pdf [<https://perma.cc/D9N9-6AM9>].

55. For discussions of budget baselines, see generally Kamin, *supra* note 40; David Kamin & Rebecca Kysar, *Temporary Tax Laws & the Budget Baseline* 125 (N.Y.U. Working paper No. 17-44, 2017).

56. CBO, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2011 TO 2021 (2011)

other hand, measures the costs of policy changes not against the baseline of current law but against a baseline assuming the continuation of current policy. With a current policy baseline, expiring laws are typically presumed to be permanent, thereby making their extension costless.⁵⁷

In addition to these tactics, there was also growing pressure to rely upon nontraditional estimates external to the independent estimators, and to dispense with regular process involving the Joint Committee on Taxation (“JCT”) and the CBO. These developments occurred in the context of TCJA, as well as with the attempted repeal of the ACA earlier in the year.⁵⁸

Ultimately, lawmakers sunsetted most of the provisions aimed at individuals in 2025 in order to fit the bill through reconciliation. The sunsets allowed the bill to be compliant with the Byrd Rule and to meet the \$1.5 trillion limit for deficit increases.⁵⁹ Republicans retained the ten-year window and the current policy baseline, although the latter ended up shaping the magnitude of the tax cut fairly dramatically. Congress also ultimately deferred to the JCT.

These budget controversies will likely have continuing effects. For instance, the current policy baseline debate tees up the costless extension of the expiring provisions of TCJA down the line, as is discussed below, and Congress may be one step closer to relying upon unofficial revenue estimates. The next Part evaluates these developments and discusses how budget process pressures ultimately shaped the tax bill.

III

THE TAX BILL AND THE 2017 BUDGET PROCESS

The pressures to enact the tax bill would impact the budget process in myriad ways. But before we begin that discussion, it is helpful to point out that, as a constitutional matter, budget rules, even when codified, do not bind Congress because they are considered rules of procedure. Courts generally cannot enforce them against Congress since this would undermine Congress’s lawmaking authority and separation of powers principles. Additionally, a simple majority in each house can change or waive them.⁶⁰ Congress can thus easily ignore or evade the rules upon their application. In a climate of increasing hostility between the

(describing debt projections as reflecting current law).

57. Kamin & Kysar, *supra* note 55, at 127.

58. Jim Tankersley, *Republicans Sought to Undercut an Unfavorable Analysis of the Tax Plan*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/politics/republicans-joint-committee-on-taxation-estimate.html> [<https://perma.cc/5FD8-GNA8>]; Alan Rappeport, C.B.O. Head, *Who Prizes Nonpartisanship, Finds Work Under G.O.P. Attack*, N.Y. TIMES (June 19, 2017), <https://www.nytimes.com/2017/06/19/us/politics/cbo-congressional-budget-office.html> [<https://perma.cc/3NE2-WTDX>].

59. Because of the latter, most of the individual provisions sunset in 2025 rather than the end of the budget window in 2027.

60. Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 595, 667 (1988) (analyzing how either House of Congress, acting alone, could undo the statutory budget process rules of the Gramm-Rudman-Hollings Act).

parties, the rules become more and more unstable.

As to the purpose of budget rules, it my view that the general aim of budget rules should be to protect the interests of future generations rather than to simply provide information for decision-making purposes.⁶¹ Such protection is necessary given the tendency of the political process to reward the shifting of financial obligations to later generations.⁶² The budget rules also serve to overcome a collective action problem. Lawmakers may have a primary goal of deficit reduction, but they will individually defect from that goal if others do so. The rules, by serving the goal of deficit reduction, can help lawmakers overcome these coordination issues.

A. Longer Budget Windows

As described above, numerous policymakers advocated for a longer budget window in order to accommodate deficit-increasing tax reform, but ultimately, lawmakers retained the ten-year budget window. An extended budget window would have posed difficulties for the budget process. Although there are some valid reasons for choosing a longer budget window, these tend to be obscured if the window is extended for the purpose of avoiding a shorter sunset date under reconciliation.

1. Pros and Cons of Longer Budget Windows

The Budget Act of 1974 provides that windows must be a minimum of five years, but beyond that lawmakers have flexibility in setting their length in the budget resolution. Historically, budget windows were typically five years, but since the mid-1990s, the CBO has used a ten-year budget window period.⁶³ This shift occurred in part due to interest in analyzing the long-term impact of the 1997 Balanced Budget Amendment.⁶⁴ OMB's budget windows have oscillated between five and ten years. A budget window longer than ten years would have been unprecedented.

At first glance, a longer budget window seems to further the goals of deficit reduction. Cutting off the window at ten years allows policymakers to simply ignore costs after that time period. For this reason, some have suggested that the budget window be much longer, perhaps estimating costs of legislation over a seventy-five-year period, which would follow the timeframe for estimating the

61. See Alan J. Auerbach, *Budget Windows, Sunsets, and Fiscal Control*, 90 J. PUB. ECON. 87, 88–89 (2006).

62. Buchanan and Wagner examined the lawmaking process's bias towards deficits in an influential book that, in part, led to Keynesian economics falling out of favor among economists. JAMES M. BUCHANAN & RICHARD E. WAGNER, *DEMOCRACY IN DEFICIT: THE POLITICAL LEGACY OF LORD KEYNES* (1977). This view is not uncontroversial. For instance, in the Great Depression and Great Recession eras, lawmakers were critiqued for being too reluctant to borrow and invest. In recent decades, however, the overarching tendency has been to deficit spend.

63. R.G. Penner, *Dealing with Uncertain Budget Forecasts*, 22 PUB. BUDGETING & FIN. 1, 12 (2002).

64. Robert McClelland, *Why We Should Stick with a 10-Year Budget Window*, TAX POL'Y CTR. (Aug. 9, 2017), <http://www.taxpolicycenter.org/taxvox/why-we-should-stick-10-year-budget-window> [<https://perma.cc/VUV6-EQ4L>].

fiscal outlook for Medicare and Social Security.

Depending on the details of tax reform, a longer budget window could better capture its fiscal impact. For instance, changing from the current tax depreciation system, in which investment expenditures are recovered over time, to one of expensing, in which such cost is expensed immediately, would have significant upfront costs that diminish over time.⁶⁵ Similarly, repealing or limiting interest deductibility would raise little revenue upfront but substantially more over time. By some estimates, a move to full expensing and elimination of the interest deduction would lose \$1 trillion over the first decade but would raise \$1 trillion over the second.⁶⁶

The case for a longer budget window grows stronger in light of recent events. In the past, one obstacle to a longer budget window has been the need to produce estimates of the macro-economic effects of legislative proposals under so-called “dynamic scoring.”⁶⁷ In recent years, Congress has started to direct the estimators to dynamically score proposed legislation, a process that is quickly becoming routine for major legislation.⁶⁸ The estimators’ ability to conduct such estimates breaks down one obstacle to a longer budget window.

Lengthening the budget window, however, might simply prove too unworkable, heavily testing the processing power of the CBO and the JCT, which are accustomed to working on a ten-year timeframe. Forecasting variables—such as discount rates, economic growth, and macroeconomic factors—across a much longer horizon will introduce substantial uncertainty into the scoring process. Additionally, the longer the budget window, the greater the sensitivity of the forecasts to subtle changes in these assumptions.⁶⁹ The CBO has estimated the 90% confidence range surrounding its forecast of the deficit to be plus or minus 5% of GDP after five years. After twenty years, however, this margin of error rises to 17% of GDP.⁷⁰ At such levels of uncertainty, projections become relatively meaningless. CBO could mitigate some of the volatility in its long-range projections by updating the growth rate in its models more slowly or giving

65. Kyle Pomerleau & Scott Greenberg, *Full Expensing Costs Less Than You'd Think*, TAX FOUND. (June 13, 2017), <https://taxfoundation.org/full-expensing-costs-less-than-you-d-think/> [<https://perma.cc/R3C3-ADAJ>]. The tax bill adopted such a provision for expensing in some circumstances, but the provision lasts only five years. The tax bill also limited interest deductibility.

66. Kyle Pomerleau, *How a Longer Budget Window Helps and Doesn't*, TAX FOUND. (June 27, 2017), <https://taxfoundation.org/longer-budget-window-helps-doesnt/> [<https://perma.cc/57YU-74ME>].

67. George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 210 (2009).

68. H.R. Res. 5, 108th Cong. § 2(j) (2003) (adopting a dynamic scoring rule). JCT, for instance, produced a macroeconomic analysis of TCJA. STAFF OF J. COMM. ON TAX'N, JCX-69-17, 115TH CONG., MACROECONOMIC ANALYSIS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE “TAX CUTS AND JOBS ACT” (Comm. Print 2017).

69. Yin, *supra* note 67, at 209.

70. CBO, THE UNCERTAINTY OF BUDGET PROJECTIONS: A DISCUSSION OF DATA AND METHODS (Mar. 2007), <https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/78xx/doc7837/03-05-uncertain.pdf#page=18> [<https://perma.cc/M7WV-C75S>].

new data less weight, but such forecasts would sacrifice accuracy for stability.⁷¹

Although the estimators have some experience estimating costs beyond the budget window in order to ensure a bill's compliance with the Byrd Rule, its longer-term projections for these purposes remain limited.⁷² A longer budget window places the estimators "in the untenable position of having to defend the indefensible," which inevitably "increase[s] the suspicion, if not the reality, of political manipulation."⁷³

For instance, in scoring a Senate Obamacare repeal bill, Democrats asked CBO to extend their analysis out twenty years for Medicaid outlays.⁷⁴ Although CBO complied with the request, estimating that the bill would create a 35% reduction in Medicaid spending over two decades, it could not quantify the legislation's effect on insurance coverage beyond the coming decade since it lacked an insurance coverage baseline during that time period. CBO stated that long-term federal spending on Medicaid becomes "increasingly difficult" in the years beyond the budget window due to variables in people's health, in states' decisions about Medicaid policy, and in medical care that are "almost impossible to predict."⁷⁵ CBO instead used a formulaic approach for years beyond 2026 that combined estimates of Medicaid enrollees with mechanical projections of growth in federal spending, adjusting for demographic changes in the Medicaid population. In so doing, CBO warned that it was only able to employ this simplified method when legislation "affect[s] spending in a similarly straightforward manner."⁷⁶

An extended budget window would also present substantial gaming opportunities that could negatively impact the budget process. Lawmakers could pretend to pay for costly policies by specifying tax increases or spending cuts that would not go into effect for many years—an event that would be unlikely to actually occur. For instance, a 1997 advisory council to address the insolvency of the Social Security system suggested that the gap be closed by initiating a 1.6% increase in the payroll tax, but only starting in the year 2045.⁷⁷ The long budget window of seventy-five years, which is used in the entitlement context, allowed this far-off tax to fully count as an offset even though it was unlikely to ever be enacted.

71. McClelland, *supra* note 64.

72. For an argument that the budget window should be reduced to five years, see Penner, *supra* note 63.

73. Yin, *supra* note 67, at 211.

74. CBO, LONGER-TERM EFFECTS OF THE BETTER CARE RECONCILIATION ACT OF 2017 ON MEDICAID SPENDING (June 2017), <https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52859-medicaid.pdf> [<https://perma.cc/9LGV-2C89>].

75. *Id.* at 1.

76. *Id.*

77. See Alan J. Auerbach, *Budget Windows, Sunsets, and Fiscal Control*, 90 J. PUB. ECON. 87, 88 (2006); see also Peter A. Diamond & Peter R. Orszag, *Accrual Accounting for Social Security*, 41 HARV. J. ON LEGIS. 173, 185 (2004); Howell E. Jackson, *Accounting for Social Security and Its Reform*, 41 HARV. J. ON LEGIS. 59, 85–86 (2004) (critiquing the delayed tax proposal as "irresponsible").

This problem already exists to some extent under a shorter budget window. Congress has repeatedly delayed the effective date of the Cadillac Tax, which imposes an excise tax on high-cost employer-sponsored health insurance plan. The tax was originally enacted in 2010 as part of the ACA and was set to go into effect in 2018, although a recent budget deal has delayed the tax until 2022.⁷⁸ TCJA also deploys far off tax increases on multinational corporations beginning in the year 2026.⁷⁹ It is unclear if Congress will ever allow these increases to go into effect.

The advantage of delaying unpopular taxes is that they produce revenue to meet budget rules but also signal to constituents that lawmakers do not intend to let the tax actually take effect. A longer budget window creates incentives to enact disingenuous provisions that offset revenue losses that will never come to fruition. A longer delay will minimize the risk that the law will go into effect, allowing many chances for eventual repeal. In this manner, lengthy budget windows accommodate gimmicks that push costs onto future generations.

On the other hand, short budget windows also allow for a different kind of gamesmanship. This phenomenon is perhaps best illustrated by the tax provisions involving Roth IRAs. Traditional and Roth IRAs are similar savings vehicles but differ in tax treatment. Contributions to traditional IRAs are deductible with the consequence that withdrawals are taxable. Contributions to Roth IRAs are not deductible but withdrawals are tax-exempt. If interest and tax rates are held constant, these vehicles produce identical revenue costs from a present value perspective. Traditional IRAs have large revenue costs upfront, in the year of contribution, whereas revenue losses from Roth IRAs come in the year of withdrawal.⁸⁰

Historically, lawmakers have exploited this difference in order to generate revenues within the budget window period. For instance, in 2006, Congress passed a law that removed the income limit on converting traditional IRAs to Roth IRAs. The conversion triggered a taxable event, thereby raising \$6.4 billion in revenues during the budget window period. In present value terms, the change in law cost the government \$25 billion in revenues over the long haul, but these costs were predominantly ignored because they fell outside the budget window period.⁸¹ Republicans proposed similar “Rothification” revenue games in the

78. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, § 10901 (2010); Extension of Continuing Appropriations Act of 2018, H.R. 195, 115th Congress (2018).

79. Beginning in 2026, the deduction for foreign derived intangible income is reduced from 37.5% to 21.875%. The deduction for global intangible low-taxed income is reduced from 50% to 37.5%. An earlier proposal made these increases revenue-contingent, meaning that they were turned off if revenues turned out to be higher than expected. Notably, the delayed tax increases were originally designed such that the tax increases could be turned off “even if revenues through 2026 are hundreds of billions below what would be expected if the tax cuts weren’t enacted in the first place.” David Kamin, *The Senate’s Revenue-Trigger Giveaway to Businesses*, MEDIUM (Nov. 22, 2017), <https://medium.com/whatever-source-derived/the-senates-revenue-trigger-giveaway-to-businesses-97b73a624ec1> [<https://perma.cc/VBW5-5DNV>]. This revenue-trigger did not make it into the final bill.

80. See Auerbach, *supra* note 77, at 88.

81. Richard Rubin, *Tax Break for Roth IRA Conversion Lured 10% of Millionaires*, BLOOMBERG

2017 process.⁸² Although these revenue-raisers did not make it into the legislation, Congress has kept them on the table.⁸³

2. Budget Windows Going Forward

Lawmakers ultimately decided to keep the budget window length as it is, but does this mean they will do so going forward? Perhaps not. One of the reasons that Republicans retained the ten-year budget window for 2017 was that a longer budget window might have still forced a relatively short sunset. This is because a temporary corporate rate cut would have affected revenues for many years after the expiration date. Earlier in the year, the JCT estimated that a three-year, corporate rate cut to 20% would have produced “nonnegligible” revenue losses beyond the ten-year budget window period, seven years after the sunset date.⁸⁴ This is because companies would time their taxable profits to occur in years when the lower corporate rate is in effect, thereby lowering profits, and thus revenue, in later years when the rate reverts to its pre-sunset level.⁸⁵ To be in compliance with the Byrd Rule, a corporate rate cut would have to have sunsetted well within ten years even if the budget window was extended to twenty years.

In the end, lawmakers chose to sunset the individual provisions rather than the corporate rate cut. The budget resolution, however, required lawmakers to set forth the length of the budget window relatively early in the process, before the decision on sunsets had been made.⁸⁶ The fact that a long budget window would have still required a short sunset for the corporate rate may have influenced their decision to continue with the traditional ten year budget window. Going forward, a different set of policies under consideration may push lawmakers to lengthen the budget window in order to meet the constraints of reconciliation. How then, should we evaluate such a move?

Alan Auerbach has described the debate over budget windows as involving the following tradeoffs: Budget windows that are too short allow for costs to be shifted beyond the budget window period, but budget windows that are too long

(Jan. 3, 2014), <http://www.mercurynews.com/2014/01/03/tax-break-for-roth-ira-conversion-lured-10-of-millionaires/> [<https://perma.cc/56GZ-CNHT>].

82. Amir El-Sibaei, *What Rothification Means for Tax Reform*, TAX FOUND. (Sept. 12, 2017), <https://taxfoundation.org/what-rothification-means-for-tax-reform/> [<https://perma.cc/67Q7-BFVX>].

83. Stephanie Cumings, *Republicans Expected to Return to Retirement Policy for Revenue*, 158 TAX NOTES 439, 439 (2018).

84. Letter from Thomas A. Barthold, Chief of Staff of Joint Committee on Taxation, to Paul D. Ryan, Speaker of the House of Representatives (Apr. 25, 2017), (on file at <http://www.politico.com/f/?id=0000015b-a645-d0b0-afdb-b7c7e71d0001>) [<https://perma.cc/LDV8-PN2U>].

85. The JCT analysis on the issue referenced timing shifts of foreign tax credits as one reason why a temporary corporate rate cut would lose revenue in the out-years. Although this dynamic would likely not be an issue in the new quasi-territorial system enacted in TCJA, the ability of businesses to carry forward other credits, such as the research credit and the low-income housing credit, would likely result in revenue losses in the years beyond the budget window.

86. In fact, just before release of the initial version of the House bill several weeks following the budget resolution, lawmakers were reportedly considering sunseting the corporate rate cut. Damian Paletta (@damianpaletta), TWITTER (Nov. 1, 2017, 2:51 PM), <https://twitter.com/damianpaletta/status/925842836804833281> [<https://perma.cc/HVS9-VLER>].

include future years for which announced policies cannot be taken seriously, also allowing for gamesmanship.⁸⁷ Moreover, even if such policies are eventually enacted in the distant future, they will impose costs predominantly on future generations, an undesirable result given the aim of the budget rules to protect that constituency.⁸⁸

Auerbach argues that these deficiencies could be overcome by shifting away from windows that give equal weights to policies within the budget window period and then fall to zero.⁸⁹ Auerbach also rejects an infinite budget window that gives full weight to policies in later time periods.⁹⁰ Instead, budget rules, according to Auerbach, should place less weight on policies in future years, discounting expected cash flows (over and above normal discounting for interest) in order to reflect the reality that future policies are unlikely to be enacted.⁹¹

Auerbach's approach, while theoretically sound, would be difficult, if not impossible to implement in practice. Judging the staying power of a particular policy, or group of policies, would require ascertaining the probability that political stalemate or change in control will occur and how sensitive the policy is to those factors. One could imagine, however, some kind of discounting of future years that would not necessarily follow Auerbach's precision but would avoid the cliff-effect of the current ten-year budget window.

Daniel Shaviro has also attempted to deal with gamesmanship over a longer budgetary window, colorfully describing a proposed massive tax increase upon newborns that is collected when they reach the ripe old age of seventy as one such maneuver.⁹² Shaviro proposes disregarding, for official estimates, policies if they are "discontinuous changes" that are adverse in nature, such as policies that increase detriments to constituencies rather than benefits.⁹³ Under this proposal, the budget rules would ignore a tax increase that suddenly springs into life at a later period of time.

Shaviro's proposal, like many budget rules that attempt to deal categorically with policies that vary across time, is somewhat over-inclusive. For instance, there may be legitimate policy reasons for preferring that a tax increase begin several years into the future, such as giving markets time to adjust to a new regime. Moreover, the definition of discontinuity itself might prove easily circumvented through the use of provisions that phase in gradually. Given these difficulties, it may be preferable to simply shorten the budget window period.

As a normative matter, there are no easy answers to setting the correct length of the budget window. Indeed, it might very well be that heterogeneity in budget windows is preferred, with their length extending to accommodate those policies

87. Auerbach, *supra* note 77, at 88.

88. *Id.*

89. *Id.* at 94–98.

90. *Id.* at 89 n.2.

91. *Id.* at 99–100.

92. DANIEL SHAVIRO, DO DEFICITS MATTER? 234 (1997).

93. *Id.*

with greater permanence, like Social Security, and shortening for unstable policies, like discretionary spending.⁹⁴ Lack of forecasting ability might also weigh in favor of such heterogeneity. For instance, Medicare costs that rely on uncertain predictions of how technology will advance might call for shorter windows, in contrast to Social Security projections that do not face as dire complications in long-term estimating.⁹⁵

Although theoretical arguments can be made for extending the budget window, at least in certain contexts, these are not convincing where the pressures of reconciliation are driving the change towards longer budget windows, rather than any thoughtful inventory of current budget policy. A budget window formed under these circumstances will almost certainly be of sub-optimal length from the standpoint of accurately assessing the nation's future commitments since its extension was not designed for this purpose.

It could be argued that the longer budget window would produce the ancillary benefit of more accurately portraying government commitments because, by happenstance, it coincides with, or is at least closer in length, to the optimal budget window for that purpose. But it is difficult to see how a twenty- or thirty-year window, as was proposed to accommodate the 2017 tax bill, would best represent the budget trajectory or policy impact on the budget. Such a window would still face the cliff effect, whereby all costs disappear beyond the window, leading to estimating challenges for the latter decades.

Even assuming *arguendo* that a twenty- or thirty-year window more accurately measures fiscal costs and receipts, a budget window lengthened to circumvent budget rules will also be more likely to create further gamesmanship than a budget window lengthened to more accurately capture the government's fiscal picture. That is, we can expect that the risks of a longer budget window—using future offsets that are unlikely to occur—to be more or less pronounced depending on the reason for the change in the window's length. A Congress that is willing and able to lengthen the window to avoid budget rules will also face similar pressures to jeopardize deficit-decreasing goals through budget gimmicks premised on that longer window.

In the end, it might be preferable to have different budget windows for varying purposes. For purposes of the budget rules, a shorter budget window would be advisable due to practical difficulties in implementing a longer window

94. See Auerbach, *supra* note 77, at 99. See also Henry J. Aaron, *The Economics and Politics of Long-Term Budget Projections* n.7 (Hutchins Ctr. on Fiscal & Monetary Pol'y Brookings, Working Paper No. 8, 2014), https://www.brookings.edu/wp-content/uploads/2016/06/15_economics_politics_longrun_budget_aaron.pdf [<https://perma.cc/C3KR-DZT4>]. (“The short term nature of almost all budget commitments regarding discretionary spending and much so-called mandatory spending contrasts starkly with the commitments under Social Security, where tax and spending are heavily freighted with political (although not legal or contractual) commitment. Few federal budget categories carry any such message of permanence. Tax laws are changed periodically in major ways. Defense and other discretionary spending has fluctuated over enormous ranges. The difference is one of degree, not of kind, but the difference is palpable and large.”).

95. Aaron, *supra* note 94, at 1.

and the gaming opportunities presented by such a window. Outside of the official scores, however, the estimators could also make longer-term projections when feasible. Estimators could deal with the greater uncertainty produced by these unofficial, longer-term projections by incorporating confidence intervals or a range of results. This option is not possible for the official estimates because the budget rules require point estimates and thus this is further justification for keeping the official window shorter.⁹⁶

It should also be noted that the current system, in a sense, employs multiple budget windows for purposes of reconciliation. The official budget window is ten years, but the Byrd Rule effectively requires consideration of a longer window requiring deficit neutrality in the period beyond the official budget window. The operation of this “shadow” budget window in the background of the official one could be seen as creating a compromise between those different types of gamesmanship identified by Auerbach.

One other related point—although the Byrd Rule essentially requires estimates for the out-years, there is no transparency regarding how such estimates are made or even what they are. The law allows the budget committee chair to use discretion to make these determinations.⁹⁷ A longer budget window would have an indirect effect of bringing to light such estimates. One could thus argue that the difference between short and long budget windows is the degree of transparency.⁹⁸ Instead of making the window longer, one could require greater transparency of the out-year determinations. This would, however, bring the inaccuracy disadvantages that accompany longer budget windows. A compromise approach would be for the chair to at least give a general sense of the out-year scores and the process involved in comprising them.

Finally, the type of gamesmanship that results from shorter budget windows—namely sunsets—can also be addressed through reformation of the budget baseline, a topic discussed below. Addressing the problem of temporary legislation through the budget baseline does not present the same type of difficult estimating questions that addressing the problem through lengthening of the budget window raises.

3. Shifting Baselines

a. A Brief History of the Budget Baseline. During the 2017 tax legislative process, there were many signals that pivotal Republican lawmakers were considering changing the official baseline to one of “current policy” in order to fit bigger tax cuts within the parameters of reconciliation.⁹⁹ This shift would have

96. Yin, *supra* note 67, at 210. See also Doug Elmendorf, *Communicating the Uncertainty of CBO's Estimates*, CBO (Dec. 15, 2014) <https://www.cbo.gov/publication/49860> [<https://perma.cc/MR26-LZ4S>] (incorporating some of these arguments).

97. 2 U.S.C. §§ 643(a), 641(d)(4) (2012).

98. Thanks to George Yin for this point.

99. See, e.g., Sahil Kapur, *GOP Eyes Budget Maneuver to Allow \$450 Billion More in Tax Cuts*, BLOOMBERG (Aug. 22, 2017), <https://www.bloomberg.com/news/articles/2017-08-22/gop-eyes-budget->

been a significant change to the budget process. However, even without a formal change to the rules, the current policy concept has significantly impacted the budget process and the tax bill.

The current official baseline is described as a “current law” baseline. This is because the baseline, the parameters of which were first set out in the Budget Enforcement Act of 1990,¹⁰⁰ generally follows current law as written with some exceptions. For instance, in most cases, if a law sunsets, the baseline takes the sunset seriously, assuming that the law will expire as scheduled. In other specific contexts, the baseline deviates from this rule, instead assuming that annual appropriations, certain temporary spending programs like Temporary Assistance for Needy Families and farm subsidies, and temporary taxes that are earmarked to trust funds continue without regard to their legal temporality.¹⁰¹ The baseline also assumes that the government will issue debt above the debt limit, contrary to enacted law.

The parameters of a current policy baseline are less defined. The blueprint plan for tax reform, released by the House Tax Reform Task Force in 2016, called for the assumption that current policy will extend since this is in keeping with “historical experience.”¹⁰² The question, of course, is what constitutes current policy. From the blueprint, it is clear that the intention was to assume the continuation of several expiring tax provisions,¹⁰³ chiefly the partial expensing of new business equipment and property and a group of about fifty tax breaks known as the tax extenders.¹⁰⁴ A current policy baseline of the sort proposed in the blueprint would have made extensions of these provisions, losing about \$460 billion in revenues over a ten-year period, costless.

Although Congress has never directed CBO to use a current policy baseline as the official one, there has been extensive governmental experience with the concept. Controversy over baselines started after EGTRRA and JGTRRA (collectively, the Bush tax cuts) were sunsetted. Efforts to make these cuts permanent began almost immediately, but the costs of doing so were in the trillions—nearly 2% of GDP.¹⁰⁵ Many experts thought the official baseline put forth by CBO reflected rosy assumptions that had no bearing on reality.

maneuver-to-allow-450-billion-more-in-tax-cuts [<https://perma.cc/D6F4-YRHS>].

100. Budget Enforcement Act of 1990, Pub. L. No. 101-508, § 257, 104 Stat. 1388–591 (1990). The BEA refined the baseline previously established in the Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA). Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 251(a)(6), 99 Stat. 1037, 1067-68 (1985). The BBEDCA baseline had been used in administering a possible sequester if deficit targets weren’t met; the BEA then adopted a revised version of this baseline for scoring of new legislation.

101. Budget Enforcement Act of 1990 § 257.

102. BETTER.GOP, *supra* note 54, at 16.

103. *See id.*

104. Many of these temporary provisions incentivize alternative energy. STAFF OF J. COMM. TAX’N, JCX-1-17, 115TH CONG., LIST OF EXPIRING FEDERAL TAX PROVISIONS: 2016–2026 (Comm. Print 2016).

105. Emily Horton, *The Legacy of the 2001 and 2003 Bush Tax Cuts*, CTR. ON BUDGET & POL’Y PRIORITIES (Oct. 23, 2017), <https://www.cbpp.org/research/federal-tax/the-legacy-of-the-2001-and-2003-bush-tax-cuts> [<https://perma.cc/A4X9-VNFL>].

Assuming the tax cuts were truly temporary was an unlikely scenario, and thus the baseline drastically overestimated future revenues. Because the Bush tax cuts were so large, the stakes over the baseline dispute were high.

In an effort to depict the nation's fiscal picture more accurately, think tanks began putting forth more realistic baselines that assumed the continuation of the Bush tax cuts.¹⁰⁶ These alternative baselines became influential, in some respects more so than the official baseline. By Fiscal Year 2005, Presidential Budgets under President Bush and the Office of Management and Budget ("OMB") baseline no longer assumed current law but instead reflected current policy by ignoring the sunsets.¹⁰⁷

Although arguably more accurate, the current policy deadline made the costs of making the cuts permanent disappear. A mere temporary extension of the cuts would even score as a revenue gain under this approach. President Obama's budgets also shifted the OMB baseline to current policy, incorporating some of the Bush tax cuts into the baseline.¹⁰⁸ In these baselines, the Obama administration even included those tax cuts it did not support into the baseline, a move out of the Bush Administration's playbook.¹⁰⁹ Thus, when the administration proposed to let lapse the cuts for high-income taxpayers as scheduled in current law, it scored this policy position as *increasing* revenues.¹¹⁰

CBO also began experimenting in how it constructed baselines; it constructed an "alternative fiscal scenario," which assumed continuation of the cuts.¹¹¹ Although the official CBO baseline remained one of current law, Congress did shift certain procedural rules to mirror the consequences of a current policy baseline. For instance, the budget resolution for Fiscal Year 2010 granted authority to the Chairman of the House Budget Committee to ignore the budgetary effects of certain policies, including the extension of most of the Bush

106. Kamin, *supra* note 40, at 156.

107. See OFF. OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009, at 222 (2008); OFF. OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MAJOR SAVINGS AND REFORMS IN THE PRESIDENT'S 2008 BUDGET 203 (2007); Cheryl Block, *Budget Gimmicks*, in FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 58 (Elizabeth Garrett et al. eds.) (2007). See also Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1028 (2011).

108. See DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2010 REVENUE PROPOSALS (2009) ("Most of the tax reductions enacted in 2001 and 2003 expire on December 31, 2010. The Administration's baseline projection of current policy continues all of these expiring provisions except for repeal of estate and generation-skipping transfer taxes."); OFF. OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2011, at 170 n.5 (2010) [hereinafter OMB, ANALYTICAL PERSPECTIVES 2011] ("[T]he Budget, in the current policy baseline, assumes continuation of the 2001 and 2003 tax cuts as amended through June 2009 Among other changes, this continues two amendments made to these tax cuts . . . [which] expand child tax credit refundability and the earned income tax credit for married couples.").

109. Kysar, *supra* note 107, at 1029–30.

110. See OMB, ANALYTICAL PERSPECTIVES 2011, *supra* note 90, at 187–88 tbl.14-3 (forecasting that failing to extend the 20% rate for upper-income taxpayers will have a positive effect on revenues).

111. Kamin, *supra* note 40, at 157.

tax cuts, for purposes of House business if they would have been ignored under a current policy baseline.¹¹² This allowed any extension of the cuts to avoid needing revenue offsets under House rules, known as pay-as-you-go or PAYGO rules, which require spending and revenue legislation that increase the deficit to be paid for through tax increases or spending decreases.¹¹³ When the Bush tax cuts were made permanent in 2013, Congress exempted these acts not only from the House PAYGO rules but from their statutory form as well.¹¹⁴ When a portion of the extenders were made permanent, Congress also carved out an exception for them in the statutory pay-go rules.¹¹⁵

Despite much discussion of the current policy baseline in the 2017 legislative process, Congress again ultimately adhered to maintaining the current law baseline as the official baseline. This could have been because the Senate parliamentarian took a stance that the new baseline could not be used for purposes of reconciliation, or because any such baseline also had to apply to new tax cuts that expire, as well as old ones. Rhetoric surrounding the current policy baseline, however, shaped the policy parameters of the proposed reconciliation bill. Key Republicans described the \$1.5 trillion tax cut figure agreed upon in the budget resolution as accommodating \$500 billion of revenue from a current policy baseline as well as \$1 trillion from dynamic growth.¹¹⁶ Indeed, pivotal Senators explicitly cited the current policy baseline as the reason for their positive vote on the final bill.¹¹⁷ Treasury Secretary Steven Mnuchin also relied upon a current policy baseline and growth effects in selling the tax package to the public,¹¹⁸ and official analysis of TCJA from Treasury's Office of Tax Policy referenced the current policy baseline.¹¹⁹

112. S. Con. Res. 13, 111th Cong. § 421 (2009).

113. Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, 124 Stat. 8 (2010).

114. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 911, 126 Stat. 2313 (2012) (ordering that the act's budgetary effects be ignored for pay-go purposes).

115. The Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 1001, 129 Stat. 2242 (2016) (preventing budgetary effects from entering on the paygo scorecard).

116. Ernst & Young, *Senate FY 2018 Budget Clears Path for \$1.5 Trillion Tax Cut*, TAX NEWS UPDATE: U.S. EDITION (Sept. 29, 2017), <https://taxnews.ey.com/news/2017-1600-senate-fy-2018-budget-clears-path-for-15-trillion-tax-cut> [<https://perma.cc/4BFL-M2RH>]; Dylan F. Moroses, *Brady: State and Local Deduction Deal Will be Part of Tax Bill*, TAX ANALYSTS (Oct. 26, 2017), <http://www.taxanalysts.org/content/brady-state-and-local-deduction-deal-will-be-part-tax-bill> [<https://perma.cc/MN9D-FCEJ>].

117. Seth Hanlon & Alex Rowell, *The Senate Tax Bill is Even More Costly Under Current Policy Assumptions*, AM. PROGRESS (Dec. 13, 2017), <https://www.americanprogress.org/issues/economy/news/2017/12/13/444103/senate-tax-bill-even-costly-current-policy-assumptions> [<https://perma.cc/R3RA-DH4R>] (referencing statements by Senators Flake and Corker that rely upon a current policy baseline in justifying their support for tax bill, revenue losses notwithstanding).

118. "This Week" Transcript 10-1-17: Steven Mnuchin and Sen. Bernie Sanders, ABC NEWS (Oct. 1, 2017), <http://abcnews.go.com/Politics/week-transcript-10-17-steven-mnuchin-sen-bernie/story?id=50200661> [<https://perma.cc/QL8Z-9LA3>].

119. DEP'T OF TREASURY, ANALYSIS OF GROWTH AND REVENUE ESTIMATES BASED ON THE U.S. SENATE COMMITTEE ON FINANCE TAX REFORM PLAN (Dec. 11, 2017) (concluding that the bill lost approximately \$1.5 trillion on a current law basis and approximately \$1 trillion on a current policy basis).

b. **Gaming the Current Policy Baseline.** As the above history illustrates, a current policy baseline has the potential to allow the costs of making tax cuts permanent to disappear. But it is the inconsistent use of the current policy baseline, rather than the baseline per se, that causes the problem.¹²⁰ Indeed, as discussed below, a current policy baseline could be used to enhance the budget process, but only when used consistently.

To understand how the baseline can be manipulated, it is first useful to consider how either a current law or current policy baseline can properly account for costs if used consistently.¹²¹ Assume, for instance, that in year one lawmakers enact a tax cut that loses annual revenues of \$100 billion and sunsets in the following year, but the lawmakers have the intention of extending it. In year one, under a current law baseline, the tax cut is assumed to expire in year two and is thus scored as costing \$100 billion. If, in year two, lawmakers indeed extend the sunset for another year, the extension will then be scored as costing another \$100 billion under the same baseline. At every extension, the budget process accounts for the costs of the legislation that fall within the budget window and the costs of the policy are correctly counted once. This is because the current law baseline is used consistently at the time of original enactment and renewal.

The same point could be made about the consistent use of current policy baselines. Under the same scenario, in year one, the tax cuts are assumed to be permanent in keeping with the lawmakers' policy going forward. Under this scenario, the tax cut is scored as costing \$1 trillion through the ten-year budget window. In year two, the extension is costless because the current policy baseline assumes the cut remains in place. This continues at every one-year extension. Again, the costs of the provisions are fully accounted for, the difference being that the costs are scored upfront under a current policy baseline.

Note that this discussion creates problems for one argument Republicans use to justify a shift to a current policy baseline in the tax context. Republicans have argued that this move merely aligns the tax side with the spending side, which already assumes many expiring spending programs are permanent.¹²² Since the current policy baseline in those cases is used consistently, however, they receive no advantage as compared to temporary tax cuts.

Instead, if we switch from a current law baseline at the time of original enactment to a current policy baseline at the time of extension, the costs of the cuts will never be accounted for in the budget process. Under a current law baseline in year one, the tax cut is assumed to expire as scheduled and thus is scored as costing \$100 billion. In year two, if lawmakers switch to a current policy baseline that assumes the tax cut continues, the extension is scored as costless,

120. See Kamin, *supra* note 40, at 204.

121. This example comes from Kamin & Kysar, *supra* note 55, at 127–28.

122. Editorial Board, *The GOP's Tax Reform Baseline*, WALL ST. J. (Aug. 31, 2017), <https://www.wsj.com/articles/the-gops-tax-reform-baseline-1504134278>; Edwin J. Feulner, *Giving Tax Cuts a Fighting Chance*, HERITAGE FOUND. (Aug. 29, 2017), <https://www.heritage.org/taxes/commentary/giving-tax-cuts-fighting-chance> [<https://perma.cc/PDJ5-UCAD>].

causing the \$100 billion cost of extending the cut to disappear. All subsequent extensions would receive the same favorable treatment.

PAYGO exemptions for expiring tax policy can also serve the same effect, as was made evident in the context of the Bush tax cuts when Congress waived their application upon extension of the cuts in 2010 and in making them permanent in 2013. All of these moves, however, required sixty votes in the Senate. A baseline shift is thus more effective than PAYGO exemptions if the legislation extending the sunsetted provisions or making them permanent needs to be deficit-neutral in order to be passed through reconciliation. Indeed, such a maneuver would undermine the Byrd Rule's protection of long-term fiscal restraint.¹²³

The primary game is thus shifting between baselines across time by different legislatures. Gamesmanship can also arise by inconsistently applying the concept of current policy. Throughout 2017, Republicans contemplated making some of the new tax cuts temporary in order to meet the requirements of the Byrd Rule. Indeed, most of the individual provisions in the final bill were sunsetted at the end of 2025 to comply with the Byrd Rule, as well as to lower costs within the official 2018–2027 revenue window. Although Republicans called for the current policy baseline to be used in the context of the expiring tax provisions already in place, they failed to do so for any new temporary tax provisions.

In a sense, one could describe the Republican position as embodying a mixture of current law and current policy baselines—the former for new expiring law and the latter for old expiring law. Republicans could have justified this distinction on the basis of the reasoning employed in the blueprint—only those provisions where “historical experience” has shown Congressional intent to extend get the current policy baseline.¹²⁴ Note that this rationale opens the door to switching to the current policy baseline for extension of the new cuts, because at the time of extension there will be historical experience with that temporary policy in place. In this manner, the costs of extension are likely to escape the budget process.

In the end, lawmakers only informally incorporated the savings from the current policy baseline into the \$1.5 trillion limit for the tax cuts in the reconciliation instructions. This essentially allowed Republicans to have their cake and eat it too. They did not get to enjoy the benefit of the current policy baseline for purposes of the Byrd Rule since the extra \$500 billion was only rolled into the overall figure for the tax cut applicable to the budget window period (whereas a change in the official baseline would have also covered the period beyond the budget window). They were, however, able to secure votes from deficit hawks by invoking the current policy baseline to essentially make the tax cut \$500 billion larger while also not having the current policy baseline apply to

123. Kamin & Kysar, *supra* note 55, at 130.

124. These examples of gamesmanship all involve temporary legislation, but the gaming opportunities extend beyond that context. The shift to the current policy baseline is easier to justify when a timing mechanism like a sunset causes doubt as to whether current law captures the likely future course of policy. However, the baseline could potentially be used to render costless any policy position.

the new expiring tax cuts, which would have made the deficit-increasing package non-compliant with the Byrd Rule and also would have exceeded the \$1.5 trillion limit.¹²⁵ As mentioned above, Republicans could have differentiated between the old expiring provisions and the new cuts, having the current policy baseline apply to the former but not the latter, but it is unclear whether the Senate Parliamentarian would have approved of this approach.¹²⁶

Having scored the new temporary tax cuts as truly temporary under a current law baseline, what will happen going forward? If history with the Bush tax cuts is any guide, the rhetoric of the current policy baseline will obscure the costs of renewal, which in turn will pave the way for permanency of the new expiring tax cuts and an exemption from PAYGO rules.¹²⁷ This dynamic will be even more likely in the new environment given the now decades-long experience with the current policy baseline and Republicans' repeated reliance on it during the 2017 legislative process. A new tactic, however, might be to invoke the current policy baseline to make permanent the expiring tax cuts in TCJA through reconciliation. So long as such a bill does not have a mixture of old and new expiring provisions, Republicans might have more luck getting the Senate Parliamentarian on board with a current policy baseline.

c. *Baseline Reforms.* On the one hand, a current law baseline fails to paint an accurate picture of future revenues by assuming an unrealistic course, for example, that tax cuts expire as scheduled. A current policy baseline, on the other hand, perhaps more accurately portrays future governmental obligations, but its ill-defined and subjective boundaries enhance gamesmanship. Given the likelihood that the expiring provisions in TCJA will further destabilize the budget baseline, it is worthwhile to explore reform options to address these problems. Indeed, in the discussion above, possible gamesmanship occurred because of shifting between baselines across time and inconsistently applying the concept of current policy to old and new expiring tax cuts. Both of these games could be curtailed by formalizing the baseline to properly address temporary legislation in some manner. Unfortunately, doing so is not that easy.

Temporary legislation produces a true quandary for the budget process. Congress could have a rule whereby all temporary legislation is treated as permanent. It would be simple to administer, requiring no judgment calls. But it would also be over-inclusive since some temporary legislation is designed to be

125. Making the individual tax provisions permanent would cost approximately \$240 billion over the remainder of the budget window period since most of these expire in 2025 and the budget window runs through 2027. See *New Senate Tax Bill Hides over \$500 Billion of Gimmicks*, COMM. FOR A RESPONSIBLE FED. BUDGET (Nov. 15, 2017), <http://www.crfb.org/blogs/new-senate-tax-bill-hides-over-500-billion-gimmicks> [https://perma.cc/5B6T-T8QQ].

126. It is, in fact, possible that the Senate Parliamentarian advised Republicans against this approach. Frustratingly, however, many of the Parliamentarian's interpretations and actions are non-transparent. See Ellen P. Aprill & Daniel J. Hemel, *The Tax Legislative Process: A Byrd's Eye View*, 81 LAW & CONTEMP. PROBS., no. 2, 2018, at 134–35.

127. See Kysar, *supra* note 107, at 1026–35.

truly temporary rather than just arising out of the avoidance of budget rules. For instance, temporary legislation might be used in times of emergencies or to spur investment during economic downturns. Sunsets enacted because of such events should arguably be taken at face value. How then should we proceed?

There are proponents of shifting to a current policy baseline, or something close to it. David Kamin argues that if the initial budget baseline was more realistic to begin with, much budget gimmickry involving temporary legislation would be shut down. Kamin suggests adoption of an “expectations baseline,” which would adopt the best objective estimate of the future path of policy.¹²⁸ In the context of the Bush tax cuts, using an expectations baseline at the outset would have meant that the cuts would have been scored as though they continued rather than sunsetted since this reflected expectations at the time of enactment. In Kamin’s view, this avoids the gaming that a current law baseline abets by assuming temporary legislation expires.¹²⁹ At the time of enactment, an expectations baseline factors in the expected costs of legislation, thus preventing lawmakers from hiding costs behind an unrealistic assumption that the legislation will expire and also from benefitting from baseline shifts midstream.

Kamin attempts to protect against manipulation by assuring that the expectations baseline would be assembled from objective, rather than anyone’s subjective, views about what policy path represents the best estimate of what is expected to occur. This determination could be outsourced, for instance to CBO or think tanks.¹³⁰ One could expect, however, that even if an independent body constructs the expectations baseline, the estimating process will rely heavily upon how lawmakers characterize the provision. The expectations baseline could easily be undermined if lawmakers disingenuously disavow the intention to reenact or make permanent the temporary provision at issue in order to game the baseline.

In the context of the official baseline, Kamin attempts to deal with this gamesmanship by creating a default rule that new provisions are permanent if the legislation in which they are enacted adds to the deficit. Congress could turn off this default rule by explicitly stating that the provision is meant to be temporary. Under Kamin’s proposal, this would be enforced by a point of order (requiring sixty Senators to override it) such that any extension of a provision previously designated to be temporary would be deemed out of order.¹³¹

A point of order, however, is not a foolproof way of protecting against gamesmanship. Just as a supermajority of Senators eventually approved of extending the Bush tax cuts while waiving PAYGO, we could expect the same dynamic to occur with extensions of the expiring provisions, or at least the most popular provisions. As a result of this ability to avoid the point of order, at the outset, lawmakers will over-designate provisions as temporary in order to avoid scoring them as permanent initially.

128. Kamin, *supra* note 40, at 181.

129. *Id.* at 182.

130. *Id.* at 181.

131. *Id.* at 207–08.

The difficulty is that taking a more flexible approach to the baseline to realistically reflect the varying expectations regarding the true length of sunsetted laws opens the baseline up to subjectivity and hence gamesmanship. Still, Kamin is right to question whether the official baseline could be improved upon. The current law approach, especially with regard to temporary legislation, does not reflect expected policy outcomes¹³² and thus fails to guide policy decisions or private planning.¹³³ It also distorts political accountability by obscuring whether lawmakers have enacted policies that impact the expected course of the law.¹³⁴

In the context of enforcing budget rules, however, consistency and coherence remain essential. In many respects, the official baseline in its current form remains superior from that standpoint, with a set of bright line rules that have generated bipartisan agreement. Yet it too is susceptible to gamesmanship if lawmakers toggle between it and a current policy baseline. To reduce that vulnerability, it is tempting to simply reform the baseline to score temporary provisions as permanent ones. As Kamin recognizes, this would be over-inclusive, capturing policies truly meant to be temporary. Prescribing a carve-out to be exercised at the lawmakers' option, however, does not cure the problem—it is susceptible to the very gamesmanship that the expectations baseline seeks to prevent.

In prior work, I have discussed how sunset provisions attached to tax cuts and borne out of the budget process should be looked upon with skepticism from a policy perspective, in part because of the budgetary pathologies they produce.¹³⁵ Applying this policy presumption to the baseline context, we could refine the official baseline. A new rule could assume provisions are temporary unless they were enacted for budgetary reasons; that is, unless they were enacted through a reconciliation bill. This scoring rule would be easy to apply and would not require judgment on the part of the estimators. It should also track expectations well enough that there would be no need for a carveout that would create room for subterfuge by lawmakers.

Although it is certainly possible that Congress could enact truly temporary policies through reconciliation to address an economic downturn or other emergency, there is a strong presumption that, in the reconciliation context, the sunset was enacted to avoid the Byrd Rule and thus would not be truly intended to be temporary. There would, in other words, be no independent justification, outside of the budget process, for the sunset. Such a baseline rule could also be critiqued for being under-inclusive since some temporary provisions outside the reconciliation process are indeed meant to be permanent.

132. For discussion of the critiques of the official baseline, see Jared Shirck & Francis Shen, *The Role of Estimation in Budget Procedures: Baselines*, HARV. L. SCH. FED. BUDGET POL'Y SEMINAR 16–18 (2005).

133. See Kamin, *supra* note 40, at 191.

134. *Id.*

135. Kysar, *supra* note 107, at 1065–66.

The proposed reform would sacrifice potential over- and under-inclusion for the sake of clarity and reigning in gamesmanship, while also attempting to better align the baseline with the future expected course of policy. However, there are some practical hurdles to adopting such a baseline change. If temporary legislation is scored as permanent, then this would violate the Byrd Rule prohibition against increasing the deficit beyond the budget window, making the reconciliation vehicle unavailable for most tax cuts. This highlights one major difficulty with changing the baseline to address temporary legislation—it is fraught with politics over the desirability and size of tax cuts. Although far from ideal, the current official baseline at least represents a set of rules that have heretofore been agreed upon by the parties, which is partly why a shift to a current policy baseline would be so significant.

Because of the politics over tax cuts and the ambiguity introduced in defining a current policy baseline, maintaining the current law baseline might be the least imperiled option. Although lawmakers lose some information on costs upfront by using that baseline, the budget estimators and think tanks can also continue to supplement the official baseline with alternative projections of what the budget landscape looks like if the assumptions over temporary legislation turn out to be unreasonable. Although the official current law baseline would be used to assist in enforcing budgetary targets, these alternative baselines would be available to fulfill other goals, such as facilitating private and public planning.

Since the current law baseline is arguably superior from a gamesmanship standpoint due to its objective grounding in the statute rather than an amorphous judgment about what constitutes current policy, it is particularly well-suited for the budget rule context. For purposes of the official baseline, there is a need for a baseline with as little ambiguity as possible in order to lessen the inevitable partisan disputes about the budget estimates. A current policy baseline's more nuanced, contextualized depiction of the nation's fiscal future might provide more realism, but it loses certainty as a result. As a result, it might be best suited for an unofficial role in the budget process.

Whatever path is chosen, bipartisan agreement over how to refine the baseline is essential; a baseline must be a neutral benchmark against which policy changes are measured. Simply deferring to the majority on what constitutes current policy and when that baseline applies is a recipe for gamesmanship. Above all, inconsistent toggling between baselines undermines the integrity of the budget process and destabilizes the budget rules generally. Emphasizing this point is worthwhile since shaming the parties over their inconsistent baseline usage is likely more politically expedient than attempting baseline reform.

4. The Role of the Estimators

a. Controversy Over the Estimators. The 2017 budget process also unleashed criticism of the budget estimators, questioning their credibility and encroaching upon their independence. These criticisms began in conjunction with health care reform. In the spring of 2017, CBO prepared its analysis of the House

Republican plan to repeal and replace the ACA. During that time, the White House Press Secretary Sean Spicer began criticizing the reliability of CBO's track record.¹³⁶ After CBO estimated that the House bill would result in 23 million people losing health insurance, OMB Director Mick Mulvaney described the scoring as "absurd" and went on the question the continued relevance of CBO and whether it was truly independent:

At some point, you've got to ask yourself, has the day of the CBO come and gone? . . . [I]s it really feasible to think of that as a nonpartisan organization? . . . To defer to them, I think is giving them way too much authority. Certainly there is value in having that information, especially if they could return to their nonpartisan roots. But at the same time you can function, you can have a government, without a Congressional Budget Office.¹³⁷

Mulvaney also suggested that, instead of deferring to CBO, lawmakers could rely on scoring from OMB and think tanks. These attacks on CBO escalated in the summer of 2017, when the healthcare repeal efforts faced increasing opposition. White House Aides called the CBO analysis of the health care plan "little more than fake news," urging Congress to give it "little weight."¹³⁸

Republicans tried shifting gears abruptly. Rather than waiting for a CBO score on one such alternative plan, Republicans considered enlisting the U.S. Department of Health and Human Services (HHS) to score a new amendment pushed by Senator Ted Cruz. The amendment would allow stripped down health care plans to be eligible for premium tax credits.¹³⁹ This move would have been unprecedented, substituting analysis from a part of the executive branch that was supportive of the bill's passage.¹⁴⁰ It was an open question whether the alternative score could be used as the official score in meeting the requirements of reconciliation. The HHS produced detailed analyses of the Cruz amendment, which were attacked as misguided and opaque by various experts.¹⁴¹ Unlike other analyses of the Cruz amendment, HHS's analysis concluded that it would reduce

136. Alan Rappeport, *White House Casts Pre-Emptive Doubt on Congressional Budget Office*, N.Y. TIMES (Mar. 9, 2017), https://mobile.nytimes.com/2017/03/09/us/politics/cbo-congressional-budget-office-american-health-care-act.html?hp&_r=0&referrer=https://www.nytimes.com/ [<https://perma.cc/AN25-GMMJ>].

137. Philip Klein, *The Day of the CBO "has finally come and gone,"* WASH. EXAMINER (May 31, 2017), <http://www.washingtonexaminer.com/mick-mulvaney-the-day-of-the-cbo-has-probably-come-and-gone/article/2624609> [<https://perma.cc/AGQ9-NW9P>].

138. Marc Short & Brian Blase, *The Fundamental Error in the CBO's Health Care Projections*, WASH. POST (July 14, 2017), https://www.washingtonpost.com/opinions/the-fundamental-error-in-the-cbos-health-care-projections/2017/07/14/25f0d8a4-67ee-11e7-a1d7-9a32c91c6f40_story.html?utm_term=.87af86191064 [<https://perma.cc/UF72-9LXR>].

139. Haley Byrd, *Senate Republicans Considering Alternative Scoring for Cruz Amendment Instead of Waiting for CBO*, INDEP. J. REV. (July 13, 2017), <http://ijr.com/2017/07/919440-senate-republicans-considering-alternative-scoring-cruz-amendment-instead-waiting-cbo/> [<https://perma.cc/JS3H-2PPC>].

140. M.J. Lee et al., *Health Care State of Play: McConnell Puts Bill on Ice After Losing McCain's 'Yes' Vote for Now*, CNN (July 17, 2017), <http://www.cnn.com/2017/07/17/politics/health-care-state-of-play/index.html> [<https://perma.cc/98QR-6K8W>].

141. Vann R. Newkirk II, *The GOP Escalates its Battle with the CBO*, THE ATLANTIC (July 22, 2017), <https://www.theatlantic.com/politics/archive/2017/07/republicans-cbo-hhs-score-bcra/534480/> [<https://perma.cc/4KMA-FYR7>].

health insurance premiums and encourage greater coverage. Republicans eventually discarded plans to use the HHS score.¹⁴² Since the Cruz amendment had not been scored by CBO, it had to overcome a point of order but did not secure the requisite sixty votes.¹⁴³

During the first half of 2017, Republican criticism against CBO was so intense that eight former CBO directors wrote a letter to congressional leaders objecting to the attacks.¹⁴⁴ The battle escalated when House Republicans introduced three amendments that would severely weaken the agency, eliminating the Budget Analysis Division and reducing staff by at least one-third.¹⁴⁵ One such amendment would have turned CBO into an aggregator of scores, gathering data from several think tanks—the Heritage Foundation, the American Enterprise Institute, the Brookings Institution, and the Urban Institute. It is unclear how such a system would work. The think tanks would have to disclose donors and subject themselves to government oversight. It is also unclear whether the think tanks would even assent to such a role and how the reform would be implemented given that the analyses from think tanks are often derived from the CBO baseline. The House resoundingly rejected the amendments but efforts to discredit CBO lingered.¹⁴⁶

When Republicans failed to overhaul the ACA, they began to pivot to tax reform and controversy over the budget process continued in that context. Using reconciliation to enact tax law places ultimate pressure on the budget estimates since the legislation must comply with the deficit-neutral safeguards of the Byrd Rule. One early signal indicating an attempt to reduce the influence of the estimators was a rule change made by Senate Republicans in the budget resolution, which repealed an existing rule that required a CBO estimate to be publicly available twenty-eight hours prior to a vote for bills reported out of committee.¹⁴⁷ Presumably the aim was to set up the tax bill so that it did not need an official score from CBO and JCT, and instead allow lawmakers the flexibility to use a score from Treasury for purposes of enforcing the rules of

142. Vann R. Newkirk II, *Making Sense of the Obamacare Repeal Process*, THE ATLANTIC (July 26, 2017), <https://www.theatlantic.com/politics/archive/2017/07/trying-to-make-sense-of-whats-happening-senate-reconciliation/534942/> [<https://perma.cc/99BM-T94H>].

143. Russell Berman, *Senate Republicans Clear Key Health-Care Hurdle*, THE ATLANTIC (July 25, 2017), <https://www.theatlantic.com/politics/archive/2017/07/senate-republicans-clear-key-health-care-hurdle/534861/> [<https://perma.cc/B56M-WJJU>].

144. Letter from Former CBO Directors on the Importance of CBO's Role in the Legislative Process to Paul Ryan, Speaker of the House, et al. (July 21, 2017) (on file at <https://medium.com/@douglas.elmendorf/letter-from-former-cbo-directors-on-the-importance-of-cbos-role-in-the-legislative-process-278863b7e1c6> [<https://perma.cc/NQ6N-MNXB>]).

145. See *Make America Secure Appropriations Act, 2018, Hearing on H.R. 3219 before the Rules Committee*, 115th Cong. (1st Sess. 2018) (Amendment 19 proposed by Reps. Griffith, Jordan, Meadows, Perry, Amendment 21 proposed by Reps. Perry, Jordan, Meadows, Amendment 26 proposed by Rep. Perry).

146. Jonathan Nicholson, *House Rejects Two Amendments Aimed at Trimming CBO Budget*, BLOOMBERG BNA (July 27, 2017), <https://www.bna.com/house-rejects-two-b73014462351/> [<https://perma.cc/8ERH-WEQK>]. The House only considered two of the amendments—one was held back.

147. H.R. Con. Res. 71, 115th Congress § 4111 (2017) (budget resolution).

reconciliation.¹⁴⁸

Rankle over the incidence of the corporate tax also pitted the Trump administration and certain Congressional Republicans against traditional career analysts in the government. The cutting of the corporate tax rate was a long-time goal of Republicans but one in tension with promises to prioritize tax cuts for the middle class. Official estimates from CBO and Treasury concluded that 75–82% of the corporate tax is borne by owners of capital, with labor contributing to the rest.¹⁴⁹ In the media, however, Mnuchin countered such statistics, including those from his own staff at Treasury, and argued that 70–80% of the corporate tax is actually paid by workers.¹⁵⁰ Other Republican leaders, including Senate Finance Chairman Orrin Hatch, echoed Mnuchin's view that a lower corporate tax would predominantly benefit laborers. The controversy culminated in Treasury taking the unprecedented step of removing its prior study contradicting the administration's current view from its website.¹⁵¹

Another area of contention in the 2017 process was the amount of growth attributable to tax cuts. Early on in the tax reform process, the White House took an aggressive stance on how much economic growth from the tax cuts could be expected and also attempted to undermine the official estimates from JCT. The Trump Administration's 2018 budget assumed that their proposed cuts would generate an additional \$2.1 trillion, essentially paying for themselves. Secretary Mnuchin suggested during one interview that the dynamic estimates produced by JCT might not necessarily be the ones used for official scoring.¹⁵² In the initial version of the budget resolution, the House Budget Committee reined in the White House's ambitious predictions, limiting the amount of revenues produced by dynamic scoring to only \$300 million. Still, the White House's refutation of JCT as ultimate authority on the subject was a notable development.

In recent years, Congress made rule changes instructing CBO and JCT to dynamically score certain legislation. The methodologies in estimating macroeconomic feedbacks remain contestable though. Additionally, the Senate Parliamentarian reportedly disallowed using dynamic scoring for

148. See David Kamin (@davidkamin), TWITTER (Sept. 29, 2017, 10:57 AM), <https://twitter.com/davidkamin/status/913825150080110592> [<https://perma.cc/9RC6-G9YV>].

149. Jennifer Gravelle, *Corporate Tax Incidence: A Review of Empirical Estimates and Analysis* (Cong. Budget Off. Working Paper 2011-01, June 2011).

150. Richard Rubin, *Who Ultimately Pays for Corporate Taxes? The Answer May Color the Republican Overhaul*, WALL ST. J. (Aug. 8, 2017), <https://www.wsj.com/articles/who-ultimately-pays-for-corporate-taxes-the-answer-may-color-the-republican-overhaul-1502184603>.

151. Richard Rubin, *Treasury Removes Paper at Odds with Mnuchin's Take on Corporate-Tax Cut's Winners*, WALL ST. J. (Sept. 28, 2017), <https://www.wsj.com/articles/treasury-removes-paper-at-odds-with-mnuchins-take-on-corporate-tax-cuts-winners-1506638463>.

152. "This Week" Transcript 7-9-17: Steven Mnuchin, Sen. Ted Cruz, and Walter Shaub, ABC NEWS (July 9, 2017), <http://abcnews.go.com/Politics/week-transcript-17-steven-mnuchin-sen-ted-cruz/story?id=48521537> [<https://perma.cc/LJ63-S7FW>] (quoting Treasury Secretary Mnuchin: "[W]ith our projections, you create over \$2 trillion of additional revenues. So it will be paid for over ten years. The question is whether we'll get credit for all of that under the—under the current models of the joint tax commission [sic]. And, again, that's one of the things that's under negotiations that we're discussing right now with leadership.")

reconciliation.¹⁵³ The Parliamentarian's rational may have been because the Byrd Rule is enforced on a provision-by-provision basis and dynamic scores are given on the entire bill. Another issue is that the Senate requires one official revenue score for reconciliation legislation. For dynamic scores, the estimators judge a bill's cost assuming no macroeconomic changes and then add those changes in, thereby arguably producing two revenue scores. Both of these obstacles seem surmountable. The dynamic effects could for instance be distributed across provisions using an ordering rule. Although admittedly arbitrary, such a rule would not be unprecedented in the scorekeeping context. Also, although the dynamic effects could be separated out as a line item, the estimators could designate the dynamic score as the official score.¹⁵⁴

In truth, there was probably little will to strong arm the Parliamentarian on these points since the dynamic scores ultimately did not bring in much additional revenue due to the negative impact on growth from the bill's addition to the national debt.¹⁵⁵ JCT's official dynamic score of the Senate tax bill estimated \$407 billion of budgetary feedback, reducing net costs to just over \$1 trillion over the budget window period. JCT projected a similar figure for the House and conference bills.¹⁵⁶

Despite the fact that JCT's conclusion that the tax cut would not pay for itself was echoed by multiple think tanks including the conservative Tax Foundation, Republicans mounted a campaign to discredit JCT's analysis. Party leaders circulated a memorandum declaring the JCT's growth estimate "suspect" and "consistently wrong," while also attacking JCT's revenue analyses in general as having been "off to the tune of more than \$1.5 trillion over ten years." Majority leader Mitch McConnell concluded that, in spite of the JCT analysis, TCJA was a "revenue-neutral bill."¹⁵⁷

In the end, Congress ultimately adhered to JCT's conventional analysis of the tax bill. Did JCT, then, emerge from the process with its reputation intact? Perhaps largely so, but the process, and the political rhetoric lodged at JCT, can teach us about some of the institution's vulnerabilities going forward.

153. Daniel Clifton, *How Tax Reform Will Play Out This Fall*, BARRON'S (Oct. 3, 2017), <https://www.barrons.com/articles/how-tax-reform-will-play-out-this-fall-1507057230> [<https://perma.cc/D34M-H2NC>].

154. Thanks to David Kamin for this analysis.

155. For a discussion of current approaches to dynamic scoring, see generally Auerbach et al., *Macroeconomic Modeling of Tax Policy: A Comparison of Current Methodologies*, 70 NAT'L TAX J. 819 (2017).

156. The House bill was passed two weeks after its introduction, and JCT could not produce a dynamic analysis in time. JCT's chief of staff, Thomas A. Barthold, suspended work on the House analysis to turn to the Senate bill so that such an analysis could be provided before a Senate vote. After the Senate vote on its bill, the JCT provided a dynamic analysis of the House bill. STAFF OF J. COMM. TAX'N, JCX-66-17, 115TH CONG., MACROECONOMIC ANALYSIS OF THE "TAX CUTS AND JOBS ACT" AS PASSED BY THE HOUSE OF REPRESENTATIVES ON NOVEMBER 16, 2017 (Comm. Print 2017).

157. Jim Tankersley, *Republicans Sought to Undercut an Unfavorable Analysis of the Tax Plan*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/politics/republicans-joint-committee-on-taxation-estimate.html> [<https://perma.cc/KC9B-65DT>].

b. The Role of the Estimators Going Forward. Conclusions about the incidence of the corporate tax or the macroeconomic growth effects of tax cuts are not easily drawn. Although the dynamic analysis did not prove terribly useful to the GOP—in fact they did not wait for it before voting on the conference bill¹⁵⁸—JCT’s macroeconomic analysis was corroborated by several think tanks and private-sector economists. Going forward, however, the dynamic estimates will continue to be a flash point. Many shortcomings of the models have been pointed out. For instance, they do not incorporate strategic responses by other countries and hence did not account for the fact that other countries will drop their corporate tax rates to compete with the new lower U.S. corporate rate, reducing investment here.¹⁵⁹ Additionally, because deficits are outpacing growth, dynamic analyses must infer future fiscal policy in an unspecified manner.¹⁶⁰ Further, dynamic estimates have the tendency to exacerbate the tendencies in the legislative process towards privileging the short term. Although a bill might spur growth effects within the budget window, these might occur in exchange for lower growth in the long-run.¹⁶¹

The dynamic score is just one area of controversy among many. But it shows the difficult task for JCT going forward, especially with so much riding on the revenue scores for purposes of reconciliation. Although the estimators and their staff have earned their well-deserved reputation of impartiality, reforms might assist in diffusing some of the tension over the estimators’ role. One promising reform option has been recently proposed in a bill entitled the “CBO Show Your Work Act.” The bill would, true to its name, require that CBO adhere to publishing the data, models, and data preparation routine it uses in preparing its estimates.¹⁶² This reform would allow lawmakers and policy analysts to more fully grasp CBO’s methodologies, making possible replication of those methodologies and tweaking of its assumptions. Opening up the estimating process would also allow experts outside of CBO to make suggestions for improving it.¹⁶³ JCT could also follow this approach. This would allow for better understanding of some of the assumptions underlying the dynamic estimates and subsequent improvement

158. For the dynamic estimate of the conference bill, see *MACROECONOMIC ANALYSIS OF THE CONFERENCE AGREEMENT FOR H.R.1*, *supra* note 68. It was released on December 22, 2017, the same day the President signed the bill into law and a few days after it was passed by Congress.

159. See Reuven S. Avi-Yonah et. al., *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the New Legislation* 23 (Dec. 18, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084187 [<https://perma.cc/4VAC-UUV4>].

160. Ed Kleinbard, *Perversion of the Tax Policymaking Process* (USC CLASS Research Papers Series No. CLASS18-1, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3112866 [<https://perma.cc/3R46-ZKBP>].

161. See Dan Shaviro, *Greg Leiserson on Dynamic Scoring Part 2*, START MAKING SENSE BLOG (Jan. 17, 2018), http://danschaviro.blogspot.com/2018/01/2018-nyu-tax-policy-colloquium-greg_17.html [<https://perma.cc/VR73-5MKQ>].

162. CBO Show Your Work Act, S. 1746, 115th Cong (2017).

163. Yuval Levin, *Some Transparency for CBO*, NAT’L REV. (Aug. 10, 2017), <http://www.nationalreview.com/corner/450368/cbo-should-show-its-work-yuval-levin> [<https://perma.cc/GHN6-ZQPH>].

of them.

Another idea is for CBO and JCT to open up their estimating processes to produce range estimates, instead of point projections, allowing participants in the lawmaking process to better assess the agency's confidence levels and the plausible spectrum of end results. To be sure, there are practical difficulties in producing range estimates. Often times, the estimators may simply be unable to produce measures of uncertainty because they are not using formal probability models in producing their estimates or are relying upon a limited number of studies.¹⁶⁴ But when such levels of uncertainty can be measured, the estimators may do more harm than good by holding them back.

In 2014, then-CBO Director Douglas Elmendorf made the point that even when CBO can quantify uncertainty it is not always wise to do so.¹⁶⁵ Budget rules, after all, require point estimates, and it is unclear how legislators would respond to range estimates, perhaps seizing upon only those parts of the range that support their policy preference.¹⁶⁶ Although the enforcement mechanisms of budget rules do not lend themselves to accommodating range estimates, this does not mean such estimates have no place in the lawmaking process. The range estimates could instead be provided as a supplement to the official point estimate. Elmendorf may be right to worry that politicians may use one end of the range to their advantage, but this concern is likely outweighed by the benefits provided by more openness regarding the limitations in the estimators' analyses. Together, these reforms could go a long way toward restoring the legitimacy of the embattled institutions.

5. Impact on Tax Policy

Thus far, the discussion has been on how the 2017 tax legislation has challenged the budget process, but what about the effects of the budget process on the tax legislation? Budget numbers, of course, heavily shaped the contours of the bill and the scope of its provisions. In order to fit the chosen policies within the \$1.5 trillion deficit-increasing limit set forth in the budget resolution and to comply with the Byrd Rule, Republicans had to deviate from their initial plans. They cut back on the scope of the pass-through incentives, sunsetted most of the individual cuts in 2025, increased rates on a one-time international repatriation, increased taxation of certain foreign corporate income in future years, and raised the new corporate rate from 20% to 21%.

Budget pressures also affected the bill in other ways. Using reconciliation to bypass supermajority rules meant that Republicans did not need to secure even one Democratic vote, making for less moderate, and hence less stable policy. For instance, Republicans chose a permanent and deep corporate rate cut while providing only temporary relief to individuals—a policy tradeoff that would have

164. Doug Elmendorf, *Communicating the Uncertainty of CBO's Estimates*, CONG. BUDGET OFF. BLOG (Dec. 15, 2014), <https://www.cbo.gov/publication/49860> [<https://perma.cc/F7ZB-AFS8>].

165. *Id.*

166. *Id.*

looked much different in bipartisan legislation. Past tax overhauls have involved support from the minority party—even the Bush tax cuts drew the votes of twelve Democratic Senators. The exclusion of the minority party means that Democrats will be more likely to repeal the legislation when they become the majority. Although the Byrd Rule tempers the tendency towards extreme legislation somewhat by requiring legislation to be deficit-neutral in the out-years, the use of temporary legislation in turn undermines this tempering effect by allowing more extreme legislation to pass through the reconciliation process so long as it is sunsetted. The many sunset provisions in TCJA will themselves further destabilize the legislation going forward.

The reconciliation vehicle also made the achievement of “true” tax reform less likely. This is because if both parties share the blame of taking away special tax benefits, doing so becomes much easier. Compared with the 1986 reform, the 2017 legislation had relatively few base broadening measures, eliminating only one tax expenditure of JCT’s list of such provisions. Although the revenue pressures of reconciliation can force some difficult choices, the availability of budget gimmicks and sunsets overall reduced the need for revenue offsets. The limited amendments and debate required under reconciliation also exacerbated an already hasty process. This contributed to mistakes and loopholes in the legislation that will present challenges for the IRS in implementing the legislation and for taxpayers in planning their affairs.¹⁶⁷

Finally, although reconciliation has elevated the importance of JCT’s role as revenue estimator, in many ways this has come at the cost of reducing its influence in developing the substance of tax bills. Lacking JCT’s expertise and input, the legislative outcome is arguably inferior as compared to an era when JCT’s policy impact was ascendant.¹⁶⁸

IV.

THE FUTURE OF THE BUDGET PROCESS?

In recent years, the budget process has been severely tested by the increasing use of reconciliation for major policy initiatives, which the process was never intended to accommodate. The budget process developments of 2017 have shown important areas of vulnerabilities. Although the norms and institutions ultimately held, they arguably suffered damage during the process. The sunsets of the 2017 bill will lead to more budget gamesmanship going forward. Party polarization will continue to make reconciliation powerful, thereby putting immense pressure on the estimates and the estimators. This discussion has proposed smaller changes that could help restore those aspects of the budget process that have been challenged, but it is also worthwhile to consider more

167. See *supra* note 159, at 24.

168. Thanks to Vic Fleischer and George Yin for this point. For an excellent overview on the history of the Joint Committee on Taxation, see George K. Yin, *Codification of the Tax Law and the Emergence of the Staff of the Joint Committee on Taxation* (U. Va. L. & Econ. Research Paper Series No. 2017-20, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3008878 [<https://perma.cc/7KNY-8UPA>].

substantial changes to the budget process.

These breakdowns in the budget process underscore a fundamental condition of the budget process—its endogeneity. Because the non-enforcement problem is seemingly inherent to all current budgeting tools, any solution to it must involve a fundamental rethinking of the budget process. In conjunction with improved procedural rules, budgetary constraints could be built into the substance of the law so that Congress cannot easily elude them. For instance, tax laws could be pegged to a particular revenue goal, automatically adjusting to ensure that target is met.¹⁶⁹ This “trigger” would elevate the status of budgetary goals from simply process rules but without the need for constitutional action, like a balanced budget amendment.

Similar measures have been utilized at the state level.¹⁷⁰ Senate deficit hawks also tried such an approach, proposing to roll back the tax cuts in TCJA if the law’s deficit impact turned out to be worse than advertised.¹⁷¹ Design, however, is important for any such budgetary device,¹⁷² and triggers should not be used in a symbolic fashion to justify unaffordable tax cuts. For instance, the targets contemplated in the TCJA trigger were too modest in comparison to the huge revenue losses of the bill, making up for only about 10% of the bill’s increase to the debt in the budget window period.¹⁷³

Automatically adjusting laws and processes in general may also help to overcome the status quo bias in the legislative process, which is worsened by party polarization. They might also help to overcome the cliffs, sequesters, shutdowns, and other emergency forms of lawmaking that have come to characterize the modern budget process.¹⁷⁴ Default budgets, for instance, could be employed to apply when lawmakers are unable to pass a budget (or when they pass only a shell budget).¹⁷⁵

169. See Rebecca M. Kysar, *Legislation* (Mar. 6, 2018) (working draft) (on file with author).

170. Jared Walczak, *Designing Tax Triggers: Lessons from the States*, TAX FOUND. (Sept. 7, 2016), <https://taxfoundation.org/designing-tax-triggers-lessons-states/> [<https://perma.cc/DGH7-WXBK>].

171. The Senate Parliamentarian scuttled this plan, ruling that the trigger did not meet Byrd Rule requirements because it did not have a budgetary impact. Jacob Pramuk, *Senate GOP Rushes to Change Tax Bill as Setback Hits Hours Before Vote*, CNBC (Nov. 30, 2017), <https://www.cnbc.com/2017/11/30/parliamentarian-says-revenue-trigger-in-gop-tax-plan-will-not-work-under-rules-of-senate.html> [<https://perma.cc/2RRF-66PC>].

172. For instance, in 2014, Oklahoma tied tax cuts to estimated revenues as opposed to actual revenues, causing tax cuts to be triggered even though the state’s deficits were rapidly increasing. Richard C. Auxier, *A Tale of Two Tax Triggers*, TAXVOX BLOG: TAX POL’Y CTR. (May 17, 2017), <http://www.taxpolicycenter.org/taxvox/tale-two-tax-triggers> [<https://perma.cc/KGZ9-KJ7C>]. Particular care should also be taken so that the trigger mechanism does not become an anti-stimulus measure during an economic downturn.

173. David Kamin, *Will the Trigger Make Only a Small Dent in the Debt?*, MEDIUM (Nov. 29, 2017), <https://medium.com/whatever-source-derived/will-the-trigger-make-only-a-small-dent-in-the-debt-e9c7568256fa> [<https://perma.cc/VQN8-VSUA>].

174. Kysar, *supra* note 169.

175. David Scott Louk & David Gamage, *Preventing Government Shutdowns: Designing Default Rules for Budgets*, 84 U. COLO. L. REV. 182, 185–86 (2015).

Finally, if the Senate abolishes the legislative filibuster it will have major consequences for the budget process. Given the policy distortions reconciliation creates due to its sometimes arcane rules, one might question whether reconciliation is the right vehicle for major policy initiatives, a point which I have argued in the past.¹⁷⁶ Using reconciliation as the main vehicle for tax legislation often results in poor tax policy because its constraints supplant norms such as simplicity, fairness, and efficiency. Additionally, reconciliation has hijacked the budget process in order to achieve these policy initiatives and little with regard to true budgeting can be accomplished as a result. A good example of this is the Fiscal Year 2017 budget resolution, which only contained reconciliation instructions for healthcare repeal and omitted all other spending priorities.¹⁷⁷ Lastly, reconciliation has also effectively “weaponized” the budget process, with the majority party using its instruments to weight the legislative process in its favor.¹⁷⁸

In these respects, the nuclear option would be a welcome development since reconciliation would no longer be necessary to pass major policy initiatives. But getting rid of the filibuster will also produce more extreme legislation, including in contexts beyond those available currently in the reconciliation process. Under these conditions, partisan legislation and policy instability may very well become the new normal.

Importantly, the nuclear option will also render the Byrd Rule’s protections for long-term fiscal prudence meaningless, since the rule will have no teeth in a world without the filibuster. Whatever one’s view of simple majority rule, this would be an unfortunate development, impeding the ability of lawmakers to take into account long-term fiscal interests. Many features of the budget process in fact do not discourage, and even encourage, this tendency—features like the ten-year budget window. By focusing explicitly on the period beyond the budget window period, the Byrd Rule attempts to guard the long-term fiscal health of the nation

Any proposal to change Senate voting rules, then, must be weighed not only as a choice between the protection of the majority party as against the minority, but of current generations as against future ones. Likewise, the attempts in 2017 to circumvent the Byrd Rule—through maneuvers like shifting to a current policy baseline—should be judged as jeopardizing the interests of those future generations. Of course, another option would be to undo the “original sin” of reconciliation by restoring it to only apply to deficit-decreasing legislation. Although similar reforms by Democrats have thus far proven unstable, the dismal fiscal outlook and each party’s failure to contain the debt unilaterally may finally

176. Kysar, *supra* note 6.

177. S. Con. Res. 3, 115th Cong. (2017).

178. See Dan Shaviro, *Greg Leiserson on Dynamic Scoring Part 2*, START MAKING SENSE BLOG (Jan. 17, 2018), http://danschaviro.blogspot.com/2018/01/2018-nyu-tax-policy-colloquium-greg_17.html [<https://perma.cc/SF8W-5Q9N>] (discussing the weaponization of dynamic scoring). Shaviro argues that, in comparison with the left, the right has more effectively used the budget process to advance their substantive policies, an observation with which I do not disagree.

provide the impetus for the parties to work toward fiscal stability in a bipartisan manner.

V

CONCLUSION

In one retelling of the 2017 tax legislative process story, budget rules were largely maintained, giving hope for their resiliency. Upon further scrutiny, there is reason to doubt this account since proponents of the tax bill were able to secure many of the benefits of proposed process changes informally. The debate over certain aspects of the budget process illustrates many of the process's vulnerabilities—budget windows, baselines, and the independence of the estimators—that will likely be under continued pressure. Given the instability of the regime, it is worth taking the opportunity to reflect on which of those aspects are deserving of reform and the possible trajectory going forward. This Article has suggested how to analyze changes in those contexts, as well as providing avenues for more ambitious rethinking of the budget process. Such budget reforms, however, must be examined in light of possible changes to the Senate filibuster, and vice versa.
