ENFORCING THE BALANCED BUDGET AMENDMENT

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I. INTRODUCTION

In American public debate, the goal of reducing the federal budget deficit has nearly achieved the status of political scripture. Policymakers from both sides of the aisle, including President Bill Clinton, often invoke deficit reduction as one of the primary objectives of American government.[1] One of the major explanations for President Clinton's election was negative public perceptions of the American economy.[2] The President's campaign focused on an economic program which pledged to reduce the federal budget deficit in half over four years.[3] Once he assumed office, President Clinton softened appreciably candidate Clinton's commitment to that promise, but recent budgetary developments show that he still considers deficit reduction important. For example, in a much-heralded address to Congress,[4] the

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[1]*See, e.g.*, William J. Clinton, The Budget Message of the President, *in* BUDGET OF THE UNITED STATES GOVERNMENT: 1994 (1993) [hereinafter 1994 BUDGET]; Robert Pear, *Clinton Outlines Spending Package of $1.52 Trillion*, N.Y. TIMES, Apr. 9, 1993, at A1, A16 (explaining Clinton Administration plans for deficit reduction); Remarks of Lloyd Bentsen, *Meet the Press* (NBC television broadcast, Dec. 19, 1993); Remarks of Phil Gramm, *Meet the Press* (NBC television broadcast, Feb. 7, 1993) [hereinafter Gramm].

[2]*See Opinion Outlook: Views on the Economy*, NAT'L J., Jan. 9, 1993, at 97 (giving poll data on Americans' opinions of economic performance of the Bush Administration and expectations of the Clinton Administration).

[3]BILL CLINTON & AL GORE, PUTTING PEOPLE FIRST: HOW WE CAN ALL CHANGE AMERICA 3 (1992). The other two major candidates also strongly endorsed deficit reduction. *See* George Bush, State of the Union Message, 102d Cong., 2d Sess. 8 (1992); ROSS PEROT, UNITED WE STAND: HOW WE CAN TAKE BACK OUR COUNTRY 34-56 (1992); *see also* Richard Darman, *Director's Introduction (and Overview Tables)*, *in* BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 1993 7, 11-17 (1992).

[4]Bill Clinton, *A Vision of Change for America*, Economic Address to Congress, Feb. 17, 1993, *reprinted in* White House Press Release.

President stated that his economic plan "tackles the budget deficit seriously and over the long term. It puts in place one of the biggest deficit reductions . . . in the history of this country . . . over the next four years."[5] The reasons for the increased public interest in reducing the deficit may stem from many sources, but the presumed virtues of deficit reduction are rarely questioned.

Critics of the federal budget deficit disagree over the proper method of deficit reduction.[6] They tend to fall into two camps: those who feel that the present budget process, perhaps with minor reform, is capable of reducing

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[5]The Clinton Administration's own projections show a much more modest reduction; the fiscal 1997 deficit is projected to be $181 billion, while the baseline projection for 1997 is $214 billion. 1994 BUDGET, *supra* note 1, at 5. These figures do not include any additional deficits that might be associated with health care reform; indeed, the Clinton Administration plans to realize budget savings from health care reform.

In one analysis, the actual deficit reduction from the Clinton plan is "virtually the same amount that was expected to result from the five-year budget summit agreement Congress approved in 1990," which is to say that the Clinton plan provides almost no incremental change. George Hager, *Democrats Hail Quick Passage of Clinton's Budget Plan*, CQ WKLY. RPT., Apr. 3, 1993, at 821, 823. The Congressional Budget Office, however, estimates the deficit reduction from the Clinton plan to be a total of $129 billion over five years — far short of the $500 billion claimed by the administration, but not nothing. *See* David Wessel, *The Outlook: Arguments Threaten to Divert Attention*, WALL ST. J., Dec. 13, 1993, at A13; *see also* David Wessel & John Harwood, *With Balanced Budget on Hold, Congress Abounds with Proposals to Cut Spending*, WALL ST. J., Nov. 11, 1993, at A2.

[6]Not every knowledgeable observer is at all critical of the deficit. One of the more prominent proponents of the deficit, as currently constituted, is former President of the American Economic Association Robert Eisner. He argues that in many fiscal years, the purported deficit is often actually a current account *surplus* and that the federal government's accounting system should reflect that analysis. *See generally* ROBERT EISNER, HOW REAL IS THE FEDERAL DEFICIT? (1986) [hereinafter EISNER I]. Professor Eisner's book contains at least three major flaws: it does not address in any way the macroeconomic effects of spending by state and local governments, it wishes away any need to account for unfunded liabilities, *id.* at 36-37, and it takes a cavalier approach toward inflation, *e.g.*, *id.* at 3. However, Professor Eisner's approach to the economic effects of the budget is an important contribution to policy debate, particularly in his lucid explanation of the many types of deficit and their implications. *See generally id.* at ch. 4.

Professor Eisner argues that inflation increases federal government income tremendously because it reduces the value of the outstanding national debt. *See id.* at 3 ("[A]s inflation wipes out the value of money, it also wipes out the value of debt."). This characterization may be correct, but ignores the deleterious short- and long-term effects of inflation on the economy and on the expectations of investors holding federal securities (who will demand a real rate of return on new debt no less than what they had on the old debt).

the deficit over the long term,[7] and those who feel that more drastic measures are necessary. Among the more drastic measures most often mentioned are a line item veto[8] and a balanced budget amendment.[9] This Article will not examine line-item vetoes or similar rescission devices directly;[10] instead, it will focus on the strictest budgetary control of all — a constitutional amendment requiring that the federal budget be balanced.

Balanced budget amendments in various forms have been proposed for years. A 1984 attempt to pass a balanced budget amendment that included strong language limiting expenditures passed the Senate by the required two-

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[7]Many highly regarded economists and government officials argue against a balanced budget amendment, primarily because it would be anti-countercyclical (revenues would go down during recessions, so federal spending would also decrease when it should arguably increase for economic stimulus). *See, e.g.*, 1 *The Balanced Budget Amendment: Hearings Before the House Comm. on the Budget*, 102d Cong., 2d Sess. 9-10, 19-20 (1992) [hereinafter 1 *House Hearings*] (testimony and statement of Lawrence Chimerine); *id.* at 151-52 (testimony of Robert Reischauer); James T. McIntyre, Jr., *Discretionary Control of the Federal Budget*, *in* THE CONSTITUTION AND THE BUDGET 57, 60 (W.S. Moore & Rudolph Penner eds., 1980) ("A balanced budget amendment would prevent the federal budget from being a discretionary element of economic policy . . . . [I]t would embed in the Constitution myopic fiscal policy."). Over one hundred economists, including Nobel Prize winners Kenneth Arrow and James Tobin, signed an open letter opposing the Balanced Budget Amendment at the time of the House vote in 1992. *See Economists Oppose Balanced Budget Amendment to the U.S. Constitution*, CHALLENGE, May-June 1992, at 59-60 [hereinafter *Economists*]. *See generally* 2 *The Balanced Budget Amendment: Hearings Before the House Comm. on the Budget*, 102d Cong., 2d Sess. (1992) [hereinafter 2 *House Hearings*].

[8]Various forms of line item veto authority for the President have been proposed for years. It was a staple of State of the Union addresses by Ronald Reagan and George Bush, although it never appeared to have much legislative priority. *See, e.g.*, Ronald Reagan, State of the Union Address, January 25, 1988, *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN, 1988, at 86; Bush, *supra* note 3, at 8. The latest incarnation is termed "enhanced rescission." *See Fight Flares Over Line-Item Veto*, CQ WKLY. RPT., Mar. 13, 1993, at 589 [hereinafter *Line-Item Veto*]; *see also infra* text accompanying notes 54-57 (discussing rescission).

[9]As a matter of style, I will use lower-case "balanced budget amendment" to refer to the general class, and upper-case "Balanced Budget Amendment" to refer to the specific amendment that is the subject of this paper, S.J. RES. 41, 103d Cong., 1st Sess., 140 CONG. REC. S1917-02, 1937-38 (daily ed. Feb. 25, 1994). This resolution is nearly identical to its predecessor, H.J. RES. 290, 102d Cong., 2d Sess., 138 CONG. REC. H4637 (daily ed. June 11, 1992).

[10]The concepts of rescission, impoundment, deferral, or sequestration may become important, however, in two contexts: Presidential constitutional defenses to unlawful refusal to spend, *see infra* text accompanying notes 193, 230-31, and remedies, *see infra* text accompanying notes 216-23.

thirds majority, but fell short of two-thirds in the House of Representatives by fifty-four votes.[11] Generally concurrent to that effort, a national movement to call for a convention to pass a balanced budget amendment began gathering the approval of the majority of state legislatures.[12] In 1990 and 1992, attempts to pass a balanced budget amendment failed in the House by seven and nine votes, respectively.[13] Finally, in March 1994, the most recent version of the Balanced Budget Amendment failed to obtain a two-

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[11]S.J. RES. 58, 97th Cong., 2d Sess., 128 CONG. REC. S9777-78 (daily ed. Aug. 4, 1982). Most of the academic commentary on the subject of balanced budget amendments dates from that time frame.

[12]Article V of the Constitution allows for a convention to amend the Constitution on the petition of two-thirds of the states. The number of states on record as having called for a convention is cited as being as many as thirty-two. *See, e.g.*, David Lubecky, Comment, *The Proposed Federal Balanced Budget Amendment: The Lesson From State Experience*, 55 U. CIN. L. REV. 563, 563 & n.1 (1986) (noting also that calls for a balanced budget amendment have passed in one house of nine states with bicameral legislatures). If these numbers are correct, it would mean that only a few of the remaining states would need to join the call in order for there to be a convention. However, it is unclear how many of the calls for a convention are presently valid, what discretion Congress would have in formulating a convention, what the convention would have the authority to do if it were called, and whether the convention could be limited only to the subject of a balanced budget amendment. *See* William T. Barker, *A Status Report on the "Balanced Budget" Constitutional Convention*, 20 J. MARSHALL L. REV. 29, 63-71 (1986) (concluding that of thirty-two resolutions, none is effective because a limited convention cannot be called and because the passage of time has rendered most of the resolutions ineffective); *see also* Charles Black, *Amendment by National Constitutional Conventions: A Letter to a Senator*, 32 OKLA. L. REV. 626 (1979); Walter Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623 (1979); Gerald Gunther, *The Convention Method of Amending the Constitution*, 14 GA. L. REV. 1 (1979). *But see* Walter Berns, Comment, *The Forms of Article V*, 6 HARV. J.L. & PUB. POL'Y 73 (1982); Grover Rees III, *Constitutional Conventions and Constitutional Arguments: Some Thoughts About Limits*, 6 HARV. J.L. & PUB. POL'Y 79 (1982); William Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only? — A Letter to a Colleague*, 1978 DUKE L.J. 1295; William Van Alstyne, *The Limited Constitutional Convention — The Recurring Answer*, 1979 DUKE L.J. 985.

[13]The 1990 measure, H.J. RES. 268, 101st Cong., 2d Sess., 136 CONG. REC. H4800 (1990), was defeated 279 in favor, 150 opposed. *Id.* at H4870. The 1992 proposal, H.J. RES. 290, 102d Cong., 2d Sess., 138 CONG. REC. H4594-4671 (daily ed. June 11, 1992), was defeated 280 in favor, 153 opposed. H.J. RES. 290 was introduced and supported by prominent Democrats; however, twelve of the amendment's co-sponsors voted against it. *Defeat of Budget Amendment Fans Anti-Deficit Flames*, CQ WKLY. REPT., June 13, 1992, at 1683. The defeat came after intense pressure by the Democratic leadership that included the rare occasion of Speaker Thomas Foley's taking the floor to speak against the measure. *Id.*

thirds majority in both houses of Congress — falling short by four votes in the Senate and nineteen in the House.[14]

While past congressional attempts to pass a balanced budget amendment have failed, the issue is not going away.[15] First, with the prospect of congressional elections in November 1994, another attempt to pass a balanced budget amendment may meet with success.[16] Second, in the near-to-mid-term future, states could create a new amendment to the Constitution requiring that the federal budget be balanced, notwithstanding congressional action.[17]

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[14]S.J. RES. 41, 103d Cong. 1st Sess., 140 CONG. REC. S2045-2161 (daily ed. Mar. 1, 1994) (setting forth the final debates and the vote on S.J. RES. 41).

[15]*See* Adam Clymer, *Balanced Budget Gaining Support Among Senators*, N.Y. TIMES, Nov. 8, 1993, at A1 (stating that S.J. RES. 41 had forty-two co-sponsors from both parties); Gramm, *supra* note 1; Remarks of Ross Perot, *Nightline* (ABC television broadcast, Feb. 17, 1993). During the 1992 campaign, Mr. Perot opposed the specific Balanced Budget Amendment that this Article addresses, but he apparently has since concluded that it is necessary. *Id.* Secretary of the Treasury Lloyd Bentsen, however, recently stated that the Clinton Administration did not support the Balanced Budget Amendment because it was unnecessary in light of the "500 billion dollars" in deficit reduction it had enacted. Bentsen, *supra* note 1. For an explanation of why that claim rings hollow, see Section IV of this Article.

[16]*See, e.g., G.O.P. Looks for Delayed Dividends in Redrawn Congressional Districts*, WASH. POST., Apr. 18, 1994, at A4.

[17]Two examples from history are instructive. The first is the recently enacted Twenty-Seventh Amendment. It was proposed as part of the Bill of Rights in 1791. *See* U.S. CONST. amend. XXVII. State ratifications were found by Congress to be still valid after as long as two centuries, so the validity of calls for a convention that are now as old as fifteen years probably is no longer a serious issue, *contra* Barker, *supra* note 12, at 66-71. As a matter of politics rather than law, it is difficult to imagine Congress refusing to call a balanced budget convention for technical reasons, just as Congress did not render the Twenty-Seventh Amendment invalid for equally valid technical reasons.

The second example is the Seventeenth Amendment. The last time that the United States was as close to a convention to amend the Constitution as it is now occurred in 1912. When the drive for a convention to propose an amendment for direct election of senators came within one state of success, Congress passed the Seventeenth Amendment in short order. *See* Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation*, S. DOC. NO. 82, 92d Cong., 2d Sess. 858 (1973), *cited in* E. Donald Elliott, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1077, 1085 n.35; *see also* RUSSELL CAPLAN, CONSTITUTIONAL BRINKSMANSHIP 61-65 (1988); Anita Bernstein, *Statesmanship: A Review of* Constitutional Brinkmanship: Amending the Constitution by National Convention *by Russell Caplan*, Book Review, 58 GEO. WASH. L. REV. 802, 813 n.84 (1990) (reviewing Caplan). Therefore, it is possible that a the call for a convention could spur the passage of a balanced budget amendment, even from a Congress reluctant to

Many highly regarded economists feel that a balanced budget limitation on the federal government would be a colossal mistake in public policy.[18] Conversely, the American public clearly favors a balanced budget amendment.[19] An interesting argument supporting a balanced budget amendment is provided by public choice theory, which holds that legislatures have an inherent bias toward rent-seeking behavior, or actions taken to benefit certain groups at the expense of the public at large.[20] In the budgetary context, the argument goes, chronic deficits financed by public borrowing allow legislative rent-seeking by present beneficiaries of public spending at the expense of unrepresented future taxpayers.[21] This phenomenon, according to Stewart Sterk and Elizabeth Goldman, was the reason that almost every state legislature, responding to popular outrage,

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do so otherwise.

Although the possibility of a convention is highly problematic, it looms in the background of this subject and it is not wholly implausible. *But cf. generally* THE CONSTITUTION AND THE BUDGET, *supra* note 7, at 145, 148 (statement of Ralph Winter) ("I feel very strongly that the failure of the Congress to call a convention would be a political question . . . . It is not the courts' business to hand down a mandatory injunction that a constitutional convention be called.").

[18]*See, e.g.*, EISNER I, *supra* note 6; sources cited *supra* note 7.

[19]*See* EDWARD HERMAN, THE FEDERAL BUDGET: A GUIDE TO PROCESS AND PRINCIPAL PUBLICATIONS v (1991) (citing Gallup poll data); 1 *House Hearings*, *supra* note 7, at 28 (testimony of William Niskanen).

[20]*See generally* JAMES M. BUCHANAN ET AL., TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (1980); GORDON TULLOCK, THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT-SEEKING (1989); Zane A. Spindler, *Constitutional Design for a Rent-Seeking Society*, 1 CONST. POL. ECON. 73 (1990). *But see, e.g.*, Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1355 n.61 (1988) [hereinafter Stith, *Congress*]; Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593, 622-23 nn.184-86 (1988) (arguing against public choice theory).

[21]*See* James M. Buchanan, *Procedural and Quantitative Constitutional Constraints on Fiscal Authority*, *in* THE CONSTITUTION AND THE BUDGET, *supra* note 7, at 80, 80-84; Elliott, *supra* note 17, at 1086-95; *see also* 1 *House Hearings*, *supra* note 7, at 241-42 (statement of James Buchanan); Rudolph G. Penner, *Constitutional and Statutory Approaches*, *in* RECONSTRUCTING THE FEDERAL BUDGET: A TRILLION DOLLAR QUANDARY 226, 226-27 (Albert T. Sommers ed., 1984) [hereinafter Sommers] (citing KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951); MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION (1965)).

enacted balanced-budget measures during the Nineteenth Century.[22] A more colorful version of this argument is provided by Ross Perot: "[I]n 1992 alone we will add over $330 billion to the $4 trillion we've already piled on our children's shoulders. That doesn't include another $3 trillion . . . the government has already promised to spend in the future . . . . The weight of that debt may destroy our children's futures."[23]

Statements like Mr. Perot's help to build public support for a balanced budget amendment, making it increasingly likely that one will be enacted and ratified. If such an amendment were adopted, there would be enormous practical difficulties with its operation. Beyond the language of the amendment itself, which might be open to widely varying interpretations, there would be the major problem of defining just what a balanced federal budget is. This Article explores that issue in a fair amount of detail; perhaps surprisingly, even after addressing the murky accounting practices of the federal government and the questionable reliability of economic forecasts, it concludes that a balanced budget can generally be defined to the degree of accuracy necessary for the identification of an unbalanced budget.

Beyond the definition problem, however, there are other matters of law that may render an amendment unenforceable. These include problems of

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[22]*See* Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 WIS. L. REV. 1301, 1306-15; *id.* at 1323-24 ("Constitutional restrictions on debt . . . reflected the widespread sentiment that the misfortunes created by legislative borrowing had not been simply the product of bad legislators. Debt limitations were meant to cure a perceived institutional defect of legislatures: the inability to account for the future costs of present decisions to incur debt."); *id.* at 1365-66 ("This limited check on legislative power developed as a result of numerous unpleasant experiences with state and local debt. Those experiences were not isolated instances of governmental abuse; rather, they reflect what we have come to accept as the natural workings of the legislative process . . . . [T]he legislative process is naturally skewed toward excessive debt.").

[23]PEROT, *supra* note 3, at 9; *see id.* at 36 ("This is not free money. It's your money, and more importantly, it's your children's money."); *see also* 1 *House Hearings*, *supra* note 7, at 25 (testimony of William Niskanen) ("[T]he case for a new constitutional rule . . . is to protect our children from our own lack of fiscal discipline."); *id.* at 129 (testimony of Richard Darman) (also invoking future generations as a reason for the Balanced Budget Amendment). Rudolph Penner even suggests that as the number of persons with a financial interest in Social Security continues to grow, the United States may one day be in the position where the *majority* of voters is exploiting the *minority*. Sommers, *supra* note 21, at 228.

Although invoking America's children as a reason not to incur debt may be politically well-received, it is in some cases a shortsighted point of view. Debt incurred now that will bear a greater return in the future (such as for space exploration or for Headstart) or that will allow the avoidance of a greater loss in the future (such as for strategic defense or for AIDS research) would appear to be in some cases to be our children's best interests, if internal rates of return justify the investment.

standing doctrine,[24] political question doctrine,[25] and remedies.[26] In other words, even if the budget is clearly unbalanced (hence unconstitutional), who has the power to do anything about it? If there is someone who can challenge the unbalanced budget, what can he or she do? Will the courts simply refuse to be involved in the determination of the issue? There are no definite answers to any of these questions, but in examining these issues this Article makes available much of the relevant range of arguments on either side. While the outcome of any particular fact- and issue-dependent litigation cannot be predicted, these obstacles should not be insurmountable in theory. Therefore, while a balanced budget amendment would be fraught with practical difficulties for its supporters, it could ultimately be an amendment that held meaning.

II. THE BALANCED BUDGET

The complexities involved with the federal budget defy simple explanation. The process of how the federal government moves from program proposals to actual expenditures is so byzantine that only a relative handful of experts fully understand it. The procedures would not be recognizable in terms of modern business, let alone to someone familiar only with household budgeting. In addition, the accounting rules that the federal government employs have no counterparts anywhere else.[27]

The combination of a unique accounting system and an intricately complex process create a great difficulty for the enforcement of a balanced budget: before a budget can be balanced, all of the actors involved must agree on how a budget is defined. Because of the multiple, partially

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[24]See *infra* notes 107-40 and accompanying text for a discussion of the standing doctrine.

[25]See *infra* notes 141-83 and accompanying text for a discussion of the political question doctrine.

[26]See *infra* notes 184-232 and accompanying text for a discussion of remedies.

[27]As Robert Eisner states concerning the deficit:

> The official Treasury and OMB measures of the federal deficit are outrageously misleading. They violate basic norms applied to private business accounting and indeed those for state and local governments. Federal budget accounting rules . . . if applied to private accounts would put almost every large business which borrows to finance investment into red ink . . . .

Robert Eisner, *National Saving and Our Real Deficits*, 4 DURRELL J. MONEY & BANKING 6, 7 (1992) [hereinafter Eisner II].

inconsistent meanings of "federal budget," it is important first to summarize the process, some of its complications, and the accounting rules, paying particular attention to their implications for enforcement.

A. THE BUDGET PROCESS AT A GLANCE[28]

Although many people in America believe that the executive is the most powerful of the three branches of the federal government, this is certainly not true with respect to federal expenditures. Every dollar that the federal government spends is done only on the explicit approval of Congress.[29] In fact, in most cases, Congress approves an expenditure three times before the money is ever spent. Here is a very simplified version of how it works (terms with a technical meaning are italicized for emphasis):

1. The President sends a budget message to Congress, which Congress is free to do with as it pleases.[30]

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[28]It is impossible to do justice to the enormously complicated system of financial management that has grown up around the federal budget in anything less than a full-length book, but I will attempt here to summarize the relevant information in a manner that is accessible to the non-specialist. For a fuller explanation, I recommend the following works as an introduction: STANLEY COLLENDER, THE GUIDE TO THE FEDERAL BUDGET, FISCAL 1993 (1992) [hereinafter COLLENDER]; HERMAN, *supra* note 19; ALLEN SCHICK, THE CAPACITY TO BUDGET (1990). The Herman and Schick books predate the Budget Enforcement Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990), *amending scattered sections of* 2 U.S.C. §§ 601-922 (1988). However, Collender explains the enforcement measures well, COLLENDER, at 21-33, 69-82, and a concise summary of the Budget Enforcement Act in operation is provided at CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1994-1998 xviii-xx, 83-101 (1993).

[29]The definitive work on this point is Stith, *Congress*, *supra* note 20. Professor Stith argues that the power of Congress to control the expenditure of public monies is "at the foundation of our constitutional order . . . . In specifying the activities on which public funds may be spent, the legislature defines the contours of the federal government." *Id.* at 1344-45; *see also* HERMAN, *supra* note 19, at 30-32.

[30]The 1994 budget message projected deficits of from $181 billion to $254 billion for Fiscal Years 1994 through 1998. 1994 BUDGET, *supra* note 1, at 5.

2. The House and Senate approve an overall budget resolution, resolving their differences at a conference committee if necessary.[31]

3. The House and Senate committees possessing substantive authority over functional areas of expenditure[32] (such as Agriculture and Armed Services) recommend spending at a certain level in each of their functional areas as specified by the budget resolution. These *authorizations*[33] are then voted on by the full House and Senate. In theory, the total of all the authorizations cannot exceed the total approved in the budget resolution. If it does, then the House and Senate *reconcile* the discrepancy by reducing the separate authorizations.[34] Again, a conference committee resolves differences between the two houses, and the President eventually signs authorization bills in thirteen substantive areas. No one yet has the authority to spend any money; all that has been done so far is to lay out the framework for spending.

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[31]COLLENDER, *supra* note 28, at 47-53. For an example of such a report, see *id.*, app. A., at 141-60 (citing *Concurrent Resolution on the Budget, Fiscal Year 1991*, CON. REP. NO. 101-820, 101st Cong., 2d Sess. (1990)).

[32]COLLENDER, *supra* note 28, app. A, at 155-57. The House committees are: Agriculture; Banking, Finance, and Urban Affairs; Education and Labor; Energy and Commerce; Interior and Insular Affairs; Judiciary; Merchant Marine and Fisheries; Post Office and Civil Service; Public Works; Science, Space, and Technology; Veterans' Affairs; and Ways and Means. *Id.* (setting forth *Concurrent Resolution on the Budget, Fiscal Year 1991*, CON. REP. NO. 101-820, 101st Cong., 2d Sess. (1990)). The reporting Senate committees are: Agriculture, Nutrition, and Forestry; Banking, Housing, and Urban Affairs; Commerce, Science, and Transportation; Energy and Natural Resources; Environment and Public Works; Finance; Governmental Affairs; Judiciary; Labor and Human Resources; and Veterans' Affairs. *Id.* app. A, at 157-59.

[33]Professor Stith notes that there is an important distinction between this type of budgetary "authorization" and the standard legislative meaning of the term. Stith, *Congress*, *supra* note 20, at 1370 n.135. This type of authorization is an internal rule of Congressional communication, meaning that one committee in each house of Congress has authorized the Appropriations Committee in each house to appropriate a certain amount of money. *Id.* The usual meaning of the term in the legislative context, however, is a constitutional or legislative grant of authority to someone outside Congress to act. *Id.* In effect, the authorization bill does not "authorize" anyone except Congress itself to do anything. *See id.*

[34]COLLENDER, *supra* note 28, at 31.

4. The House and Senate Appropriations Committees then report out thirteen separate *appropriations* bills, one in each functional area for which there has been an authorization. The full House and Senate then vote on each appropriation. Differences are resolved by conference committees, the amended appropriations bills are voted on by each house, and the bills are sent to the President for signature. The appropriations bills do not have to match the authorization bills exactly; Congress can always appropriate less than is authorized in any given area, but an increase in appropriation over authorization should require Congressional action.[35]

5. A few temporary restrictions were added by the Budget Enforcement Act of 1990.[36] These included the so-called "firewall," a requirement that reductions in defense and international programs could not be used for domestic program increases (or vice versa) and the "pay as you go" plan, which requires that increases in entitlements (other than automatic increases driven by economic factors) should be matched by corresponding revenues or spending reductions.[37]

Once monies have been appropriated by Congress, the various branches and agencies of the federal government then must spend money to perform the functions assigned.[38] If conditions change during the budget year, Congress may enact a supplemental appropriation to address the new circumstances.

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[35]*See id.* at 59-65. Agencies can receive money only by way of congressional appropriation. Stith, *Congress*, *supra* note 20, at 1356. For example, agencies generally cannot accept funds donated from private sources and cannot borrow funds from an over-appropriated agency. *Id.* at 1366 (citations omitted). Fees and fines collected throughout the fiscal year are treated as appropriated by Congress. *Id.* at 1379.

[36]Budget Enforcement Act of 1990, Pub. L. No. 101-508 (1990), 104 Stat. 1388, *amending scattered sections of* 2 U.S.C. §§ 601-922 (1988).

[37]For a more detailed explanation of these provisions, see COLLENDER, *supra* note 28, at 21-37; CONGRESSIONAL BUDGET OFFICE, *supra* note 28, at xviii-xx, 83-93. The "firewall" ended with fiscal 1993, but "pay as you go" was retained in the fiscal 1994 budget. H.R. CON. RES. 64, 103d Cong., 1st Sess. § 12 (1993).

[38]The agencies and departments have very little discretion *not* to spend monies appropriated; they also may not generally spend monies for purposes *different* from that for which the funds were appropriated. As a rule, funds must be expended as appropriated by Congress. *See* Stith, *Congress*, *supra* note 20, at 1348-56, 1386-92. *See also infra* text accompanying notes 50-57 (discussing rescission).

To the extent that the supplemental appropriation exceeds the authorization bills or the overall budget, Congress must either make cuts, amend the authorization bills, or amend the budget bill.[39]

B. COMPLICATIONS TO THE PROCESS

This explanation of the budget process is, of course, extremely simplistic. The process is complicated by a number of subtleties with which many people are familiar and others of which few are aware. For example, there is the issue of so-called "entitlement" programs. These programs are essentially automatic appropriations: Congress has voted (and the President has signed) permanent authorizations and appropriations for spending for them, so the programs require no additional Congressional action to be administered.[40] Another large, basically "untouchable" portion of the budget is principal and interest on the national debt. While this area requires annual authorization and appropriation, as a practical matter this requirement is *pro forma* because the consequences of default on United States government obligations would be dire for the national economy (indeed, for the world economy).[41] In the 1990 budget, "relatively uncontrollable" spending totaled 78.4% of the outlays.[42] This proportion included entitlements, debt service, and budget authority enacted in prior years.[43]

Many observers know that entitlements and debt service are basically non-discretionary and that the remainder of the federal budget is generally

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[39]*See* HERMAN, *supra* note 19, at 111-12; *see also* COLLENDER, *supra* note 28, at 25 (discussing "within session" and "look-back" sequesters, which were mandated under the Budget Enforcement Act to pay for supplemental appropriations within the appropriate spending category without breaking down the "firewall").

[40]Note that the programs still must be accounted for within the budget. It is also always possible for Congress to amend the automatic spending measures. *See* CONGRESSIONAL BUDGET OFFICE, *supra* note 28, at 47-50; Stith, *Congress*, *supra* note 20, at 1379 & nn.173-77; *cf.* 1994 BUDGET, *supra* note 1, at 141-44.

[41]*See* CONGRESSIONAL BUDGET OFFICE, *supra* note 28, at 55-58; *cf.* 1994 BUDGET, *supra* note 1, at 31-35.

[42]*See* COLLENDER, *supra* note 28, at 6. The other 21.6%, of course, could not realistically have been cut too drastically, as it included all the other spending of the federal government — items such as national defense, law enforcement, and program administration still would have to be maintained at some level. *Cf.* Alan Feld, *Shutting Down the Government*, 69 B.U. L. REV. 971 (1989) (giving a perspective on what may happen if a fiscal year ends without appropriations for the new fiscal year).

[43]COLLENDER, *supra* note 28, at 6.

discretionary. However, a few lesser-known practical and legal complications also decrease the degree of discretion available in the rest of the budget. For example, there is the difference between outlays and budgetary authority. Outlays are funds actually spent, while budget authority is the amount that an agency can obligate. For example, suppose the Agency for International Development requests bids in mid-1992 for a $2 million development project in Costa Rica. The project will begin in Fiscal Year 1992 and end in Fiscal Year 1994. Payments to the contractor will be made periodically based upon progress. The actual outlays will be made in Fiscal Years 1992, 1993, and 1994, but the budget authority for the project was allocated against Fiscal Year 1992 only. While this is a small example, it is multiplied over all the programs of the federal government. Thus, it becomes evident that there will always be a significant dollar amount of outlays that must be brought forward from previous fiscal years and there will always be a significant dollar amount of outlays carried over into future fiscal years. Even if a line of the budget is cut to *zero* budget authority in a fiscal year, that budget category will probably still require outlays in that year. This is significant because all of the votes in Congress concern *budget authority*; outlays from previous years' budget authority are taken as given.[44]

Another wrinkle in the current budget process is the existence of ninety trust funds, with the Old Age and Survivors Insurance and Disability Insurance Trust Funds (popularly known as Social Security) being the largest. Technically, taxes that are collected for these trust funds are to be spent only for the programs for which they are earmarked. In fact, if the programs have excess receipts over outlays in a given fiscal year, the excess must be held in the form of Treasury securities — in effect, lent to the appropriated funds budget with a promise of repayment from the budget later. This practice makes the appropriated funds budget deficit seem smaller than it actually is and hides the eventual repayment to the beneficiaries of the

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[44]*See* 1994 BUDGET, *supra* note 1, at 97-99; COLLENDER, *supra* note 28, at 2-6; George Hager, *Authority vs. Outlays*, CQ WKLY. RPT., June 6, 1992, at 1589 (discussing the difference between outlays and budget authority). It is possible to cut outlays in the current year by amending a previous year's budget in order to remove budget authority from that year. This would entail the cancellation of contracts entered into by the federal government in the previous year. This process occurs on occasion, but it more typically is driven from the bottom up, rather than from the top down: it involves the cancellation of a contract for other reasons, which then has the *effect* of reducing budget authority in a previous year and outlays in at least the current year. *See, e.g.*, *Cheney Cancels Navy's $57-Billion Attack Jet*, L.A. TIMES, Jan. 8, 1991, at A1 (discussing the cancellation of a large Navy contract). The total amount of savings realized from such contract cancellations usually will be decreased by liquidated damages provisions; it is even possible that, because of liquidated damages, cancellation of a contract will *increase* outlays in the current year.

trust funds in the "untouchable" category of the national debt, rather than in a recognizable budget item.[45]

A large category of government spending occurs off the official budget. In this gray area exist programs such as the government-sponsored enterprises (GSE's), which are privately owned businesses sponsored and supervised by the government.[46] One recently failed GSE that has presented enormous consequences to American taxpayers was the Federal Savings and Loan Insurance Corporation (FSLIC). While the resolution of the failed thrifts is occurring on-budget, most of FSLIC's activities before default were not accounted for by Congressional appropriations. Most of the financial dealings of GSE's are not part of the appropriated budget, but have significant impact in the economy.[47]

Another form of off-budget activity is countervailing receipts. Government agencies that have income from their own operations, such as from drug enforcement forfeitures or military post exchange sales, have an economic impact that is not reflected in the appropriated funds budget.[48] Independent sources of income allow these agencies considerably greater latitude in spending than other agencies have. More importantly, their income and expenditures are outside the present budgetary system, so to a

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[45]HERMAN, *supra* note 19, at 34, 160-66; *see also* 1994 BUDGET, *supra* note 1, at 21-30. The Social Security and other trust funds are technically off-budget, but for purposes of calculating the "unified deficit" under Gramm-Rudman-Hollings they are included with the appropriated funds budget. 31 U.S.C.S. § 1321 (Law. Co-op. Supp. 1992); *see* 1994 BUDGET, *supra* note 1, at 2, 101. Macroeconomically, the lumping together of the trust funds and the appropriated budget does make sense. Taxes collected for a specific purpose are still taxes, and government spending in a specific category is still government spending. *See* CONGRESSIONAL BUDGET OFFICE, *supra* note 28, at 30-33; *cf.* Wessel, *supra* note 5, at A1 (discussing the debate over whether employer-mandated payments under the Clinton administration's health care plan will be called "taxes" or "premiums").

[46]*See* Budget Enforcement Act of 1990, Pub. L. No. 101-508, § 13501, 104 Stat. 1388 (1990). There are a number of similar GSE's that are a part of everyday life, particularly for students and homeowners, such as the Federal Deposit Insurance Corporation (FDIC), the Student Loan Marketing Association (Sallie Mae), the Federal National Mortgage Association (Fannie Mae), and the Federal Home Loan Mortgage Corporation (Freddie Mac). *See id.*

[47]*See* HERMAN, *supra* note 19, at 33-34; 1 *House Hearings*, *supra* note 7, at 191-92 (statement of Louis Fisher) (citing THOMAS H. STANTON, A STATE OF RISK: WILL GOVERNMENT-SPONSORED ENTERPRISES BE THE NEXT FINANCIAL CRISIS? (1991); Ronald C. Moe & Thomas H. Stanton, *Government-Sponsored Enterprises as Federal Instrumentalities: Reconciling Private Management with Public Accountability*, 49 PUB. ADMIN. REV. 321 (1989)); 2 *id.* at 416, 427-28 (testimony and statement of Alan Morrison); *cf.* 1994 BUDGET, *supra* note 1, at 69-70, A-1263 to A-1268.

[48]Stith, *Congress*, *supra* note 20, at 1379.

certain extent they presently evade controls on spending imposed by the budget, authorization, and appropriations bills.[49]

Another important detail of budget law is that the President must generally expend any funds appropriated by Congress. At one time, it was thought by many in government that the executive could delay or withhold the spending of such monies. That discretionary authority,[50] known as deferral (if spending is delayed), impoundment (if spending is approved by Congress, but the funds are withheld by the President), or rescission (if spending is canceled), became the subject of a struggle between the Nixon Administration and Congress. The rule of law governing impoundment has never been resolved definitively by the Supreme Court. Although the Court, in *Train v. New York*,[51] affirmed the Second Circuit's ruling that the Nixon Administration was required to expend monies appropriated for environmental protection projects, the Court based the holding on the terms of the Federal Water Pollution Control Act and avoided ruling on the separation-of-powers issue.[52] This unsettled area of law was addressed by Congress in the Congressional Budget and Impoundment Control Act of 1974,[53] which requires generally that the President spend any monies appropriated by Congress.

A number of agreements between Presidents and Congressional leaders have ironed out details of deferral and rescission in the nearly twenty years

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[49]*See id.* at 1365-67; *id.* at 1367 n.121 ("There is no separate, comprehensive listing of all revolving funds and other activities with collection authority, either in the President's budget documents or in congressional budget documents. In both sets of documents all such programs are interspersed among budget data pertaining to other government activities."); *id.* at 1380-81 (arguing that many of these off-budget activities are unconstitutional); *see also* HERMAN, *supra* note 19, at 73-75. *But cf.* 1994 BUDGET, *supra* note 1, at 17-21 (listing some portion of offsetting collections).

[50]A fourth type of spending cut, sequestration, is technically not done at the discretion of the President; instead, it is mandatory when some triggering event occurs. Under Gramm-Rudman-Hollings, that event is the *occurrence* of a deficit; these "mandatory" sequesters are traditionally waived. Under the Budget Enforcement Act, the event that triggers a sequester is spending in excess of a previously agreed-to limit in total spending (when the "firewall" between defense and non-defense spending was in effect, this triggering event could take place in either category). *See* 1994 BUDGET, *supra* note 1, at 133-38; COLLENDER, *supra* note 28, at 67-82. Social Security is excluded from sequestration. H.R. CON. RES. 64, 103d Cong., 1st Sess. § 10 (1993); 1994 BUDGET, *supra* note 1, at 101.

[51]420 U.S. 35 (1975).

[52]*Id.* at 41.

[53]2 U.S.C.S. §§ 601-688 (Law. Co-Op. Supp. 1992).

since the Act,[54] but current law is as follows. The President may recommend line items from the appropriations bills to Congress for rescission, which Congress then must approve by a majority vote.[55] Alternatively, the President has authority to defer spending for certain items under certain circumstances, but the monies still will eventually be spent.[56] According to recent reports, the Clinton Administration and Congressional leaders are considering a proposal known as "enhanced rescission," in which the President could actually veto line items, but his or her veto could then be overridden by Congress on a simple majority vote.[57] Whether this reform is adopted or not, it is evident that the Executive Branch's powers to control spending are extremely limited once Congress has made appropriations.

The budget process has many other inputs, unimportant for this analysis, that increase the difficulty of adequate control of the budget by either the President or Congress. These include, for example: the long lead time it takes to produce a budget; inadequate information in many program areas; the powers of committee chairmen; the ability of the Executive Branch to write regulations; the relative unaccountability of the Federal Reserve Banks; and the ability of the Treasury to control the mix of securities it issues to borrow money for the national debt. A balanced budget amendment would presumably be relatively ineffective in addressing these types of difficulties, since they exist for the most part for other important policy reasons. However, it should be recognized that considerations like these do impact substantively on the federal budget, making the balancing process even more difficult for policymakers.

The ultimate result of all of these process complications — complications like "untouchable" programs, trust funds, differences between budget authority and outlays, off-budget activities, the inability of the executive not to spend appropriated funds, and uncontrollable activities

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[54]*See* COLLENDER, *supra* note 28, at 83-86 (giving the history of various rescission measures); SCHICK, *supra* note 28, at 111-13 (addressing "the disappearing impoundment power"). In City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987), the U.S. Court of Appeals for the District of Columbia Circuit held that the President's authority to propose deferrals for policy reasons was unconstitutional based on separation-of-powers considerations. *Id.*

[55]*See* 2 U.S.C.S. § 683 (Law. Co-Op. Supp. 1992); *see also* COLLENDER, *supra* note 28, at 85-87.

[56]*See* 2 U.S.C.S. § 684 (Law. Co-Op. Supp. 1992); *see also* COLLENDER, *supra* note 28, at 84-85.

[57]*See Line-Item Veto*, *supra* note 8, at 589.

outside the budget process[58] — is to make the federal budget almost impossible ever to understand completely for those Americans who are not involved in its implementation and execution. Therefore, even a facially simple balanced budget amendment would necessarily be open to widely divergent interpretations, various forms of implementing legislation and regulations, and politically motivated mischaracterizations. These considerations are often cited by detractors of a balanced budget amendment as flaws in the concept[59] and would probably be subjects of debate if such an amendment ever were enacted.

C. Accounting Discrepancies

An additional problem area associated with the budget process is that the accounting system used by the federal government is a cash, rather than an accrual, system.[60] Take a simple Social Security check covering the two weeks from September 24, 1994 to October 7, 1994. Because Fiscal Year 1994 ends on September 30, the money that the check represents is actually paid on October 7, in Fiscal Year 1995; it is thus a 1995 outlay. Only half of it, however, represents cost actually incurred by the federal government in 1995 — the portion covering the time from September 24 to September 30 was incurred in the 1994 budget.

In modern business practice, using the accrual accounting method, that portion would be considered a liability in the 1994 budget; in cash accounting, however, the liability is not incurred until 1995. This small example occurs routinely millions of times a year. Adding to that number the progressively larger discrepancies introduced by large procurement and service contracts and other forms of government expenditures, the choice of a cash accounting system appears to introduce significant error into the appropriated budget. Finally, when the effect of the large cash increase in tax receipts in the second quarter of the fiscal year (that presumably represent

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[58]See *infra* notes 74-75 and accompanying text for a discussion of these issues.

[59]*See, e.g.*, CONGRESSIONAL BUDGET OFFICE, *supra* note 28, at 83-93; 1 *House Hearings*, *supra* note 7, at 162-63, 169-70 (testimony of Robert Reischauer); 2 *id.* at 426-29 (statement of Alan Morrison); Paul A. Samuelson, *The U.S. Fiscal Crisis of the 1980's*, *in* Sommers, *supra* note 21, at 75, 79 ("[I]t is arbitrary to select *any* one definition of budget as the right and neutral one to be balanced.") (emphasis in original). *But see infra* text accompanying notes 87-92 (arguing that definitional problems are not insurmountable).

[60]The difference between the cash and the accrual accounting methods is well explained at WILLIAM A. KLEIN ET AL., FEDERAL INCOME TAXATION 54-57 (1990). The "cash" method taxes income when it is actually received; the "accrual" method taxes income when it is *earned*, regardless of when the income is actually received. *Id.* at 54.

liabilities incurred by taxpayers throughout the previous year) is figured into the cash-basis budget, the discrepancy becomes staggering.[61]

This discrepancy is in fact corrected, in an official government statistic known as the National Income and Product Accounts (NIPA). The NIPA budget converts the federal budget to an accrual accounting method, removes exchanges of assets from the budget, and adds offsetting receipts to both sides of the ledger, so it is a more realistic measure of how the federal government is managing its business in a given year. A lively debate rages as to whether accrual or cash accounting more accurately measures the government's macroeconomic effect — although it makes more sense to think of money as being spent when the liability is incurred, it is possible that the timing of the macroeconomic effect depends more on when the cash is paid than when the event occurred.[62]

This difference in accounting rules is important for two reasons. First, supporters and detractors of balanced budget amendments often use separate arguments. One is that a balanced budget amendment would have beneficial or detrimental macroeconomic effects.[63] The other is a more moral point, that the federal government should have to balance its books just like households, businesses, and state and local governments.[64] For the latter group, accrual accounting makes more sense, but for the former group, cash accounting might be the preferable alternative.

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[61]In one area of the budget, federal credit programs, accrual accounting is now used rather than cash accounting. *See* 1994 BUDGET, *supra* note 1, at 49-70. This is a result of the Federal Credit Reform Act of 1990, 2 U.S.C.S. §§ 661a-661f (Law. Co-Op. Supp. 1992); *see also id.* § 622 nn. ("It is the sense of the Congress that the Congress should undertake a coordinated effort to . . . reform the financial management systems of the United States Government, including the use of generally accepted accounting principles.").

[62]*See* HERMAN, *supra* note 19, at 79 n.2 (listing sources favoring cash or accrual accounting). *Compare, e.g.*, Leonard J. Santow, *Budget Outcomes and Capital Markets, in* Sommers, *supra* note 21, at 104, 105 (arguing in favor of cash accounting) *with, e.g.*, 2 *House Hearings*, *supra* note 7, at 415-16, 431 (testimony and statement of Alan Morrison) (arguing in favor of accrual accounting). *See generally* CONGRESSIONAL BUDGET OFFICE, *supra* note 28, at 115-19; EISNER I, *supra* note 6, at 34-36; Eisner II, *supra* note 27, at 7 (applying the NIPA method to deficit calculations).

[63]*Compare, e.g.*, Gramm, *supra* note 1 (arguing that a balanced budget amendment would promote economic prosperity) *with, e.g.*, *Economists*, *supra* note 7 (arguing that a balanced budget amendment would be economically harmful).

[64]*See, e.g.*, 1 *House Hearings*, *supra* note 7, at 25 (testimony of William Niskanen) ("The primary problem of federal borrowing . . . is a moral problem. We are passing an increasing part of the cost of current government services to our children and their children, and without their consent."); PEROT, *supra* note 3, at 6, 9, 36.

The second, and more practical, reason for the tendency to prefer one accounting method over another is that they produce different results. Traditionally, the NIPA deficit is much smaller than the one measured by the cash method.[65] If a balanced budget amendment were in effect, the temptation to "cut" the deficit by switching to accrual accounting from cash accounting would probably be great.[66] Whether this accounting change would actually introduce error or improvement is beyond the scope of this Article; it should simply be noted at this point that the alternative of NIPA accounting is available to policymakers attempting to balance a budget in order to comply with the Constitution.[67]

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[65]*See, e.g.*, 1994 BUDGET, *supra* note 1, at 90 ("In 1991, the unified budget deficit was $269.5 billion, while the NIPA deficit was $196.1 billion."); CONGRESSIONAL BUDGET OFFICE, *supra* note 28, at 119; EISNER I, *supra* note 6, at 34-36; Eisner II, *supra* note 27, at 7, 13 Table 1; *see also* HERMAN, *supra* note 19, at 157-60.

[66]The change would not necessarily have to come in one year. Conceivably, the switch to accrual accounting could go agency-by-agency, spread over several years, thus cleverly making the most of the apparent one-time savings over a series of budget years. *Cf.* note 61, *supra* (discussing federal credit programs now under an accrual accounting system).

[67]There are also two other budget alternatives. One alternative divides the budget into cyclical and structural (the latter is sometimes termed "full-employment" or "standardized-employment") components; this roughly separates budgetary effects due to economic variables from the budget as it would be at a high level of employment. *See, e.g.*, 1994 BUDGET, *supra* note 1, at 7; CONGRESSIONAL BUDGET OFFICE, *supra* note 28, at 6, 29-30, 123; EISNER I, *supra* note 6, at 38-39. The second alternative is to separate capital spending from current spending for operations. *Cf.* 1994 BUDGET, *supra* note 1, at 71-75; HERMAN, *supra* note 19, at 167-72 (giving an overview). *Compare, e.g.*, EISNER I, *supra* note 6, at 26-32; 2 *House Hearings*, *supra* note 7, at 431 (statement of Alan Morrison) ("[N]o sensible entity would operate without a capital as well as an operating budget."); Eisner II, *supra* note 27, at 9-10, 13; Sidney L. Jones, *The Capital-Budget Alternative*, *in* Sommers, *supra* note 21, at 182; Elmer B. Staats, *Improving the Framework for Decision Making*, *in* Sommers, *supra* note 21, at 167, 176-78 (all arguing for capital budgeting) *with, e.g.*, COMMITTEE FOR ECONOMIC DEVELOPMENT, STRENGTHENING THE FEDERAL BUDGET PROCESS: A REQUIREMENT FOR EFFECTIVE FISCAL CONTROL 20-21 (1983); Herbert Stein, *The Sad State of Fiscal Policy*, *in* Sommers, *supra* note 21, at 41, 54-55 (arguing against separating out a federal capital budget). Almost all states have separate budgets for capital projects. *See generally* 2 *House Hearings*, *supra* note 7, at 396-407 (testimony and statements of Steven Gold, Richard Riley, Lowell Weicker, and L. Douglas Wilder); Sterk & Goldman, *supra* note 22, at 1330-31, 1361-65.

D. PROBLEMS OF ESTIMATION

In addition to being a dismal science, economics is also an inexact science, a fact which introduces enormous difficulties into the budget process.[68] Many federal expenditures depend on economic variables such as the level of unemployment, the degree of inflation, or the amount of growth in Gross National Product.[69] Small differences in economic assumptions can make large differences in the budget.[70] A more particular problem with estimation in the balanced budget context is that revenues and outlays are both estimates.[71] Revenues are estimated by both the Treasury Department and the Senate Finance Committee,[72] but they are not known with accuracy until the fiscal year has ended. Outlays are also estimates;

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[68]Obviously, it is impossible to predict many non-economic events such as Iraq's invasion of Kuwait, Hurricane Andrew in Florida, or the floods in the Midwest, but these events also have budgetary consequences. Some flexibility can be built into the system through contingency funds, but major events like these normally will require supplemental appropriations. To the extent that these appropriations exceed the authorization or budget bills, amendment to those bills is also necessary. A balanced budget requirement can either contain emergency clauses allowing deficit spending for these purposes, can require that other federal expenditures be reduced, or can require that revenues be increased.

[69]COLLENDER, *supra* note 28, at 7.

[70]*See* 1994 BUDGET, *supra* note 1, at 7-9; COLLENDER, *supra* note 28, at 7; CONGRESSIONAL BUDGET OFFICE, *supra* note 28, at 1-25, 109-13; HERMAN, *supra* note 19, at 46-52. Some of these differences may be counterintuitive: for example, inflation may actually reduce the deficit by increasing tax revenues. *See* 1994 BUDGET, *supra* note 1, at 9 (demonstrating a reduction of up to $6.8 billion in the deficit for each percent of increased inflation, with real interest rates held constant).

[71]Inflation serves as a good example of the problems of economic measurement. Estimators for inflation include the Consumer Price Indexes (CPI-U and CPI-W), the Producer Price Index, and the Gross National Product deflator, all of which are reported in preliminary form and then revised after better information becomes available. None of these statistics is a perfect measure of inflation for budgetary purposes, and the estimators never agree exactly because they are based on different methodologies and are compiled for different purposes. Therefore, the choice of estimator policymakers use for inflation can be important because of its effect on the size of the projected deficit. The same is true for projections of growth, interest rates, unemployment, and so on. *See generally Improving Statistics on Economic Activity: Hearing Before the Subcomm. on Gov't Information and Regulation of the Senate Comm. on Gov't Affairs*, 102d Cong., 1st Sess. (1992).

[72]For purposes of the Budget Enforcement Act, the Treasury figures are authoritative in deciding whether sequestration is necessary, but Congress may use the Senate Finance figures in preparing the budget. *See* 2 U.S.C.S. § 921(h) (Law. Co-Op. Supp. 1992); COLLENDER, *supra* note 28, at 27.

while budget authority is appropriated by the dollar, it is often uncertain in which fiscal year the budget authority will actually be spent.[73] Like actual revenues, the level of actual outlays is not known with certainty until the fiscal year is over. These problems of estimation introduce difficulty into the enterprise of trying to judge whether revenues and outlays are to be in balance.

E. SUMMARY OF BUDGET PROCESS PROBLEMS

The federal budget process, by any reasonable assessment, is extremely difficult to comprehend fully, let alone to control. In fact, the information available to the many decisionmakers involved in the process is not entirely accurate; it certainly is not complete. Therefore, critics of a balanced budget amendment argue that such an amendment could never be implemented in any practical sense.[74] The amendment's difficulties, in this view, stem from the issues examined in this review of the process: procedural complexity, "untouchable" programs, differences between budget authority and outlays, trust fund maintenance, off-budget activities, accounting discrepancies, and problems of economic forecasting and estimation. Do these vagaries render any such amendment a mere "parchment barrier,"[75] easily evaded and practically meaningless?

III. LEGAL OBSTACLES TO ENFORCEMENT

Even assuming, despite the problems outlined above, that a federal budget is capable of being balanced — that, in terms of cash accounting, projected revenues and expenditures (however defined) for the budget year could be the same within a reasonable margin of error — how could such a requirement be enforced? Who in the United States of America could make the federal government live within a balanced budget if Congress enacted

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[73]*See* Hager, *supra* note 44.

[74]*See, e.g.*, CONGRESSIONAL BUDGET OFFICE, *supra* note 28, at 87; 1 *House Hearings*, *supra* note 7, at 162-63, 169-71 (testimony of Robert Reischauer); *id.* at 190-97 (statement of Louis Fisher); 2 *id.* at 413-32 (testimony and statement of Alan Morrison); Arthur Burns, *Prudent Steps Toward a Balanced Budget*, *in* THE CONSTITUTION AND THE BUDGET, *supra* note 7, at 46, 48-49; *Economists*, *supra* note 7, at 59; Peter W. Rodino, *The Proposed Balanced Budget/Tax Limitation Constitutional Amendment: No Balance, No Limits*, 10 HASTINGS CONST. L.Q. 785, 796-800 (1983).

[75]THE FEDERALIST No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

expenditures in excess of projected revenues? The question is more than rhetorical, for it goes to the very heart of the American constitutional order.

The hypothetical enforcement of a balanced budget amendment is a speculative enterprise.[76] Therefore, to limit the terms of the discussion, this Article will focus on one specific amendment proposal: the Balanced Budget Amendment that narrowly failed to pass the Senate on March 1, 1994.[77] This amendment is appropriate for analysis because it came only a few votes from being approved by both the Senate and the House of Representatives.[78] If such an amendment were to become part of the Constitution, then, it is important to consider what might happen if it were someday to be violated by the enactment of an unconstitutional budget.

Senate Joint Resolution 41, (as amended), the hypothetical Balanced Budget Amendment, reads as follows:

> Section 1. Total outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a rollcall vote.

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[76]Any balanced budget amendment could, of course, contain the usual clause, "The Congress shall have power to enforce this article by appropriate legislation." *See* U.S. CONST. amends. XIII-XV, XVIII-XIX, XXIII-XXIV, XXVI. Whether "appropriate legislation" would provide for its enforcement is another question; an independent Constitutional ground for enforcement may become necessary under many possible circumstances (*e.g.*, failure to enact enforcing legislation, invalidity of enforcing legislation, or assertion of an independent Constitutional defense or cause of action). Therefore, this analysis considers enforcement of the amendment on its own terms, separate from any statutory enforcement provisions. It is important to recognize, however, that the existence of a valid enforcement statute may have ramifications in many areas; this effect will be addressed periodically in this article. *See generally* 2 *House Hearings*, *supra* note 7, at 465-66 (statement of Charles Stenholm) (discussing implementing legislation and possible legislation on the subject of federal jurisdiction).

[77]S.J. RES. 41, 103d Cong., 1st Sess., 140 CONG. REC. S2045-2161 (daily ed. Feb. 25, 1994); *see also* H.J. RES. 290, 102d Cong., 2d Sess., 138 CONG. REC. H4637 (daily ed. June 11, 1992) (House predecessor of S.J. RES. 41). The House counterpart to S.J. RES. 41 was H.J. RES. 103. H.J. RES. 103, 103d Cong., 2d Sess, 140 CONG. REC. H1451-97 (daily ed. Mar. 17, 1994).

[78]*See* S.J. RES. 41, 103d Cong., 1st Sess., 140 CONG. REC. S2056-2161 (daily ed. Mar. 1, 1994). The House counterpart to S.J. RES. 41, H.J. RES. 103, was defeated 271 in favor, 153 opposed. H.J. RES. 103, 103d Cong., 2d Sess, 140 CONG. REC. H1451-97 (daily ed. Mar. 17, 1994).

Section 2. The limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House shall provide by law for such an increase by a rollcall vote.

Section 3. Prior to each fiscal year, the President shall transmit to the Congress a proposal budget for the United States Government for that fiscal year, in which total outlays do not exceed total receipts.

Section 4. No bill to increase revenue shall become law unless approved by a majority of the whole number of each House by a rollcall vote.

Section 5. The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect. The provisions of this article may be waived for any fiscal year in which the United States is engaged in military conflict which causes an imminent and serious threat to national security and is so declared by a joint resolution, adopted by a majority of the whole number of each House, which becomes law.

Section 6. The Congress shall enforce and implement this article by appropriate legislation, which may rely on estimates of outlays and receipts.

Section 7. Total receipts shall include all receipts of the United States Government except those derived from borrowing. Total outlays shall include all outlays of the United States Government except for those for repayment of debt principal.

Section 8. This article shall take effect beginning with fiscal year 1999 or with the second fiscal year beginning after its ratification, whichever is later.[79]

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[79]S.J. RES. 41, 103d Cong., 1st Sess., 140 CONG. REC. S1917, 1937-38 (daily ed. Feb. 25, 1994). Interestingly, although S.J. RES. 41 as introduced provided an effective date of 1999, considerable debate continued over whether to push back the effective date to 2001. *See, e.g.*, S.J. RES. 41, 103d Cong., 1st Sess., 140 CONG. REC. S1823 (daily ed. Feb. 24, 1994) (remarks of George Mitchell); S.J. RES. 41, 103d Cong., 1st Sess., 140 CONG. REC. S1788 (daily ed. Feb. 23, 1994) (remarks of Slade Gorton). 1999 was finally adopted on February 25, and the proposal was not again amended. *Compare* S.J. RES. 41, 103d Cong., 1st Sess., 140 CONG. REC. S1917, 1937-38 (daily ed. Feb. 25, 1994) (final amended version)

This language, like that of any constitutional amendment, is open to interpretation. However, its intention is fairly clear: beginning in Fiscal Year 1999, the federal government must plan to spend no more than it raises in revenue in the budget year. For Congress to do no less would be to violate the Constitution.[80]

Other commentators have considered potential litigation arising under a balanced budget amendment[81] and have generally concluded that any causes of action challenging unconstitutional appropriations must fail. The three flaws these other commentators have perceived in the enforcement of a Balanced Budget Amendment concern the standing doctrine,[82] the political

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with S.J. RES. 41, 103d Cong., 1st Sess., 140 CONG. REC. S2045-2161 (daily ed. Mar. 1, 1994) (version defeated in the Senate).

[80]Here, the analysis assumes that the unconstitutional spending measure has been enacted by majorities in both houses of Congress. There is considerable force to the argument that members of Congress have a duty, moral and legal, not to legislate in such an unconstitutional manner. *See* J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 127-28 ("Congress and the President have a duty to ensure that their actions conform to the law.") (citing Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587-88 (1975)).

Professor Stith argues that, even without a balanced budget amendment, some federal spending may now be unconstitutional because it violates the Appropriations Clause. *See* U.S. CONST. art. I, § 9; Stith, *Congress*, *supra* note 20, at 1382-86; *id.* at 1383 ("Congress renders meaningless [Constitutional principles] if it creates spending authority without amount or time limitations and it fails to subject such authority to periodic legislative review.").

[81]The particular proposed amendment addressed by these commentators was S.J. RES. 58, 97th Cong., 2d Sess., 128 CONG. REC. S9777-78 (daily ed. Aug. 4, 1982). Their analyses of the law, however, should not differ as applied to S.J. RES. 41.

[82]*See* John Patrick Hagan, *Judicial Enforcement of a Balanced-Budget Amendment: Legal and Institutional Constraints*, 15 POL'Y STUDIES J. 247, 255-58 (1986); Ralph K. Winter, *The Feasibility of an Amendment: Some Legal and Political Considerations*, *in* THE CONSTITUTION AND THE BUDGET, *supra* note 7, at 140, 142-43. Some supporters of the Balanced Budget Amendment also claim that standing to enforce it would pose a serious obstacle to litigation, while opponents claim that standing would not pose any difficulty; these positions must be taken with a grain of salt, because they would be exactly reversed in any future litigation (opponents moving to dismiss for lack of standing, supporters asserting standing). *Compare* 2 *House Hearings*, *supra* note 7, at 451-52, 465-66 (testimony and statement of Charles Stenholm); Letter from Lincoln Legal Foundation to L.F. Payne, June 5, 1992, at 1-4, *reprinted in* 2 *House Hearings*, *supra* note 7, at 502-05; S. REP. NO. 628, 98th Cong., 2d Sess. 66-67 ("[T]raditional judicial and constitutional conceptions of justiciability, and standing . . . suffice to ensure that the courts will not involve themselves, as a normal matter, in reviewing the operations of the budget process.") *with* 1 *House Hearings*, *supra* note 7, at 196-97 (statement of Louis Fisher); 2 *id.* at 413, 419-20 (testimony and statement of Alan Morrison) (arguing that passage of the amendment would inevitably

question doctrine,[83] and remedies.[84] Although these authors disagree as to the relative importance of these difficulties for enforcement,[85] all agree that the Balanced Budget Amendment is ultimately unenforceable. They may be wrong.

A. Analyzing Economic Data in the Courts[86]

The crux of the argument against judicial involvement in budgetary matters often appears to be institutional incompetence: the courts are simply incapable of analyzing a subject as complicated as the federal budget and rendering a meaningful verdict. This supposed incompetence generally results from the imprecision of budgetary language, the inexactitude of economic numbers, and the lethargy of the courts. The existence of complexities, however, does not necessarily argue against the applicability of the Balanced Budget Amendment.

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lead to parties having standing to litigate).

[83]*See* Hagan, *supra* note 82, at 250-54; Kenneth F. Lehrman III, *The Supreme Court and a Balanced Budget Amendment: An Invitation to Strategic Avoidance*, 17 ANGLO-AM. L. REV. 1, 14-23 (1988).

[84]*See* Gay Aynesworth Crosthwait, Note, *Article III Problems in Enforcing the Balanced Budget Amendment*, 83 COLUM. L. REV. 1065, 1090-1107 (1983); Note, *The Balanced Budget Amendment: An Inquiry into Appropriateness*, 96 HARV. L. REV. 1600, 1610-12, 1619 (1983) [hereinafter Note, *Balanced Budget Amendment*].

[85]In fact, each of the three "problems" appears to have been "solved" by at least one academic commentator. *See, e.g.*, William C. Banks & Jeffrey D. Straussman, Bowsher v. Synar*:* *The Emerging Judicialization of the Fisc*, 28 B.C. L. REV. 659, 666-69 (1987) (finding justiciable remedies to exist in budget cases); Crosthwait, *supra* note 84, at 1071-82 (finding standing doctrine not to preclude decision on the merits); *id.* at 1083-89 (finding political question doctrine not to preclude decision on the merits). These topics are explored in greater depth *infra* at text accompanying notes 107-232.

[86]As a practical matter, almost all balanced budget litigation would be in the federal courts. This is the quintessential "federal question," *see* 28 U.S.C. § 1331 (1988); additionally, the defendants are virtually certain to be federal officers who can remove causes of action from state to federal courts, *see id.* § 1442. It is conceivable, however, that a state agency or officer responsible for administering a program which has lost federal funding could raise a balanced budget amendment as a defense to a suit in state court.

First, the argument that courts will not be able to define budgetary terms is specious, at best.[87] Vague jurisprudential concepts such as free speech,[88] interstate commerce,[89] and due process[90] have been interpreted by the federal courts for decades. It is not unreasonable to expect that a court applying the Balanced Budget Amendment would be able to interpret that amendment's provisions just as authoritatively as any of these. Especially given the backdrop of modern substantive judicial involvement in much complex litigation,[91] there is no clear reason why the complexities of the budget process render it out of the province of the judiciary.[92] The ultimate task would be to determine, according to the terms of the amendment, what is federal government income and spending in a given

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[87]It is preferable, of course, that terms be defined explicitly in implementing legislation or borrowed from present budgetary practice. However, it is almost certain that litigants will attempt to stretch the boundaries of definition. *See, e.g.*, 2 *House Hearings*, *supra* note 7, at 414-18, 423-29 (testimony and statement of Alan Morrison) (giving creative examples of how litigants could define various terms); Rodino, *supra* note 74, at 796 & n.49 (citing, *e.g.*, OMB Director David Stockman's statement that "the process of trying to define what an outlay . . . is, what . . . revenues are, is far more complicated than most people anticipate, and that if we require a balance in terms of the definitions of outlays and revenues that we have today [1981], some people would invent a way to get around it.").

[88]*See, e.g.*, International Society for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992) (holding that the Free Speech Clause protects religious proselytization in airports, but not solicitation of money); Masson v. New Yorker, 111 S. Ct. 2419 (1991) (construing the Free Speech Clause not to apply to libelous misquotations).

[89]*See* Fort Gratiot Sanitary Landfill v. Michigan Dep't of Nat'l Res., 112 S. Ct. 2019 (1992) (holding that the dormant Commerce Clause prevents discrimination against out-of-state hazardous waste).

[90]*See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (holding by a plurality that the Due Process Clause of the Fourteenth Amendment prevents states from placing an undue burden on abortion rights).

[91]From the October 1991 Term alone, the Supreme Court decided matters involving census enumeration, Franklin v. Massachusetts, 112 S. Ct. 2767 (1992), apportionment for tax purposes of the income of a partially-owned subsidiary corporation, Allied-Signal, Inc. *ex rel.* Bendix Corp. v. Director, Div. of Taxation, 112 S. Ct. 2251 (1992), and market economic power of a supplier in a tying controversy, Eastman Kodak Co. v. Image Technical Servs., 112 S. Ct. 2072 (1992).

[92]Although I do not address that issue in this analysis, the budget process is a legal *process* and is thus clearly subject to the Due Process Clause of the Fifth Amendment. There might be a nonfrivolous argument that the very incomprehensibility of the process makes it unconstitutional.

budget year. That would be simply a job of defining constitutional and legal terms, a task that courts are well-equipped to perform when necessary.

Even if the terms are defined by the courts in a satisfactory manner, there remains the issue of inaccurate economic estimation and forecasting. However, economic inaccuracies are not beyond being addressed adequately in the law. Therefore, they do not necessarily make a balanced budget requirement unenforceable.

The practical effect of these differences in economic assumptions has previously been considered. In the Gramm-Rudman-Hollings legislation,[93] the Comptroller General, an employee of Congress, was tasked with reviewing the budget estimates of the President's Office of Management and Budget (OMB) and the Congressional Budget Office (CBO).[94] Although that provision was found unconstitutional because the Comptroller (an employee of the legislative branch) was responsible for sequestering[95] funds (an executive function), subsequent amendments removed the sequestration power and left the power to review OMB and CBO estimates.[96] This power remained in the Comptroller's hands until the Budget Enforcement Act of 1990, where the task of reviewing for enforcement and recommending sequestration was given to the Director of the OMB.[97] Presumably, if the

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[93]Balanced Budget and Emergency Deficit Control Act of 1985, *codified as amended at* 2 U.S.C.S. §§ 601-922 (Law. Co-Op. Supp. 1992).

[94]*Id.* § 904. This provision of the original Gramm-Rudman-Hollings law was held unconstitutional in Bowsher v. Synar, 478 U.S. 714 (1985), but amended by Pub. L. No. 100-119, 101 Stat. 786 (1987) to be a review function only.

[95]Sequestration under Gramm-Rudman-Hollings means across-the-board reduction in budget authority for almost all discretionary programs.

[96]*See* 2 U.S.C. § 904(d) (1988) (now superseded).

[97]*See* 2 U.S.C.S. § 904(d) (Law. Co-Op. Supp. 1992). These OMB estimates are not reviewable in court. *Id.* § 922(h). Constitutional doctrines allow deference by the courts to factual and legal determinations made by administrative agencies like OMB. Courts can simply adopt as fact an agency's findings, while retaining the ability to rule on the law and to conduct a *de novo* review of facts if such review is necessary for constitutional adjudication. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Crowell v. Benson, 285 U.S. 22 (1932); *see also* Richard Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 918 (1988). Under the rule established in Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984), it is possible to go further and defer to the agency's interpretations of law, but it is not clear how often this doctrine is actually followed. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992) (analyzing empirically the Supreme Court's application of *Chevron*). *But see* Peter H. Schuck & E. Donald Elliott, *To*

Balanced Budget Amendment were in effect, these or similar procedures would continue to be available.[98] Therefore, a procedure like this one for resolving discrepancies in a manner that is constitutionally sufficient[99] would clearly allow enforceable resolution of the question of whether a budget is or is not balanced.

Alternatively, it is not outside the competence of the courts to analyze economic data. This occurs routinely in the contexts of antitrust law,[100] regulatory law,[101] bankruptcy,[102] and business torts.[103] In most cases, the parties are required to employ expert witnesses to offer proof that the economic statistics presented are reasonable interpretations of the data. There is no theoretical reason why this approach could not be incorporated into budget litigation. Whether it would even need to be, given the availability of the OMB director's estimate or a special master's, is another question.

A budget, then, could be reviewed for balance by a court: first, by the court's acceptance of the data presented by the agent appointed pursuant to legislation implementing a balanced budget amendment; or second, if

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the Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (finding empirically that lower federal courts' deference to administrative agencies increased significantly after the *Chevron* decision). For discussion of the applicability of *Chevron*, see also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Laurence H. Silberman, Chevron — *The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821 (1990); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283 (1986); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990).

[98]Even if the provision of the United States Code appointing the Director of the Office of Management and Budget to approve the official economic assumptions of the United States were held unconstitutional, the courts would be able to appoint special masters to perform such a review function. FED. R. CIV. P. 53; *cf.* Delaware v. New York, 113 S. Ct. 1550 (1993) (illustrating the process by which the Supreme Court may appoint a special master to review complex data and make rulings subject to its review).

[99]Note that this statutory procedure would not be *binding* on a court conducting a review of the constitutionality of a budget; the court could choose to adopt some other fact-finding mechanism, but the court would also be free to use the one that is already available.

[100]*See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., 112 S. Ct. 2072 (1992).

[101]*See, e.g.*, Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos., 498 U.S. 211 (1991).

[102]*See, e.g.*, Reiter v. Cooper, 61 U.S.L.W. 4232 (Mar. 8, 1993).

[103]*See, e.g.*, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987).

necessary, by a court independently analyzing economic data. Even conceding inaccuracies in measurement and economic forecasting, the actions of lawmakers from all three branches facing this issue in the past demonstrate that the question of balance should not be rendered unsolvable by an inability to predict with exactitude future revenues and expenditures.[104] Thus, the estimation problem is not as much a problem as it seems initially.

Finally, the problem of the courts' inability to render decisions in an expeditious manner is sometimes considered a reason why the courts are institutionally incapable of making decisions on the Balanced Budget Amendment. This opinion is not supported by facts. In cases where the nation has needed speedy resolution of a grand legal controversy, the courts have in the past responded with alacrity.[105] If the courts were ever required to adjudicate a hypothetical crisis resulting from the government's not having a constitutionally adequate budget, those circumstances probably would be sufficient to overcome considerations of ripeness and would warrant expedited review.[106] Therefore, concern over the cumbersome and unwieldy judicial apparatus being unable to make timely decisions on budgetary matters is not an argument based on facts.

B. STANDING TO SUE

Article III requires that the federal courts be available to decide "cases and controversies."[107] This has been interpreted over the years to require that the parties before the court have an actual, tangible private interest in the

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[104]The state experience with changes in conditions is perhaps instructive. Almost all states impose some form of *de jure* or *de facto* "good faith" requirement that, at the time of budget proposal or enactment, anticipated revenues must be estimated as accurately as possible; as conditions change during the budget year, some states allow deficit or surplus conditions to exist, while others require changes in spending. *See* Sterk & Goldman, *supra* note 22, at 1305 n.15, 1314-17.

[105]*See, e.g.*, Cable News Network, Inc. v. Noriega, 498 U.S. 976 (1990); United States v. Nixon, 418 U.S. 683, 687 n.1 (1974); New York Times Co. v. United States, 403 U.S. 713 (1971). For an expedited schedule, see United States v. Nixon, 417 U.S. 960 (1974) (granting certiorari).

[106]*See, e.g.*, FED. R. CIV. P. 16; FED. R. APP. P. 2 (authorizing expedited review of cases in emergencies).

[107]U.S. CONST. art. III.

outcome of pending litigation.[108] Standing to bring a cause of action may come from an affirmative grant by Congress[109] or can be implied from the Constitution.[110] This analysis assumes that there is no statutory grant of standing and that plaintiffs will need standing as provided by the

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[108]For the Supreme Court's most recent articulation of this principle, see Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992):

> Over the years, our cases have established that the irreducible constitutional minimum of standing consists of three elements: First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 2136 (alterations in original) (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Allen v. Wright, 468 U.S. 737, 756 (1984); Los Angeles v. Lyons, 461 U.S. 95, 102 (1983); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41-42, 43 (1976); Warth v. Seldin, 422 U.S. 490, 508 (1975); Sierra Club v. Morton, 405 U.S. 727, 740-41 n.16 (1972)).

[109]Implementing legislation granting standing to some party to challenge an unconstitutional budget would be the preferred alternative. *See, e.g.*, 2 U.S.C.S. § 922 (Law. Co-Op. Supp. 1992). If such an affirmative grant existed, much of the analysis presented in this section would be unnecessary. Indeed, the rule is that where Congress explicitly grants statutory standing, it is to be denied *only* if the cause of action is "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress intended to permit the suit." Clarke v. Securities Industry Ass'n, 479 U.S. 388, 399 (1987); *see also* 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS 2D § 3531.7 (1984 & Supp. 1992). However, it might be construed to deny to all others *not* granted standing the ability to bring a lawsuit; the theory, in such a case, would be that Congress intentionally left those parties without standing. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1468 (1988) (citing Block v. Community Nutrition Inst., 467 U.S. 340 (1984)).

[110]*See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390-92 (1971); 13 WRIGHT ET AL., *supra* note 109, at § 3531.6, at 499-501 (citing, *e.g.*, Davis v. Passman, 442 U.S. 228 (1979); Cort v. Ash, 422 U.S. 66 (1975)); Sunstein, *supra* note 109, at 1474-76. *But see* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 115-20 (1962) (arguing that courts are actually more reluctant to allow standing in Constitutional cases because of separation-of-powers concerns), *cited in* Sunstein, *supra* note 109, at 1475 n.208. The current authoritativeness of Bickel's book, which is more than thirty years old and predates a great deal of the public law litigation, is subject to question.

Constitution; specifically, such standing for litigants would need to be implied from Article III[111] and the text and meaning of the Balanced Budget Amendment.

Current jurisprudence recognizes two potential classes of Constitutional plaintiffs and does not recognize several other groups of conceivable plaintiffs. First, taxpayers have the ability to challenge unconstitutional spending done pursuant to the Taxing and Spending Clause.[112] This power is limited in scope, however, because no general ability exists to challenge any governmental action thought to be unconstitutional. Instead, there must be "a logical nexus between the status asserted [*i.e.*, taxpayer] and the claim thought to be adjudicated."[113] In practice, this implied grant of standing has been limited to taxpayers wishing to challenge federal spending that violates the Establishment Clause[114] and, in some lower court opinions, other clauses as well.[115] The second conceivable group of plaintiffs would be members of Congress seeking to force the President to spend appropriated funds that he or she has impounded.[116] Although these two groups of

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[111]U.S. CONST. art. III.

[112]U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

[113]Flast v. Cohen, 392 U.S. 83, 101 (1976). The holding in *Flast* may be subject to question after *Defenders of Wildlife*, *see infra* note 108 and text accompanying notes 122-28, but *Defenders* did not address directly the concept of taxpayer standing. *But see* James T. Blanch, Note, *The Constitutionality of the False Claims Act's* Qui Tam *Provision*, 16 HARV. J.L. & PUB. POL'Y 701, 709-36 (1993) (arguing generally that *Defenders* establishes a high threshold for standing to litigate public policy questions).

[114]*Flast*, 392 U.S. at 105-106; *see also* 13 WRIGHT ET AL., *supra* note 109, at § 3531.10; Sunstein, *supra* note 109, at 1451 & nn.88, 89, 1470; Susan L. Parsons, Comment, *Taxpayers' Suits: Standing Barriers and Pecuniary Restraints*, 59 TEMPLE L.Q. 951, 957-61 (1986).

[115]Western Mining Council v. Watt, 643 F.2d 618, 630-33 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981) (allowing standing to challenge spending under War Powers Clause); Katkoff v. Marsh, 582 F. Supp. 463 (E.D.N.Y. 1984), *modified*, 755 F.2d 223 (2d Cir. 1985) (allowing standing to challenge spending for military chaplains under the War Powers Clause); *see also* 13 WRIGHT ET AL., *supra* note 109, at § 3531.10, at 645 nn.31 & 32, Supp. 266; Parsons, *supra* note 114, at 961-62.

[116]This would be a statutory cause of action pursuant to the Impoundment Control Act of 1974, 2 U.S.C. § 621 *et seq.* (1988), which Congress may do under the Appropriations Clause, U.S. CONST. art. I, § 9; *see also* Stith, *Congress*, *supra* note 20, at 1348-52. The President could presumably then assert the constitutional defense provided by the Balanced

potential plaintiffs may not be exclusive,[117] it is fairly certain that they could bring an action involving the Balanced Budget Amendment.

It is noteworthy that several groups that could also be plaintiffs are not recognized under current constitutional doctrine. First, citizens have no generalized standing to challenge unconstitutional government action.[118] Second, members of Congress may not themselves, absent extraordinary circumstances, challenge unconstitutional Congressional action.[119] Third,

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Budget Amendment.

[117]Conceivably, persons injured by Congressional spending cuts might also have standing to bring a cause of action, although there is no support for that position in current law. *See* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976). *But see* 2 *House Hearings*, *supra* note 7, at 420 (statement of Alan Morrison) ("[I]t would be my opinion that . . . those who may have a claim that their funds were cut off as a result of [the Balanced Budget Amendment] might well have standing."); *cf.* text accompanying notes 195-209, *infra* (discussing similar litigation in state courts).

[118]As one commentator puts it, "General citizen standing to vindicate the interest in lawful government is rejected, even though there be important issues and able — even fervent — litigants." 13 WRIGHT ET AL., *supra* note 109, at § 3531.3, at 411 (citing Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 486, 489 (1982); D'Amico v. Schweiker, 698 F.2d 903, 905-06 (7th Cir. 1983)); *see also id.* at § 3531.3, at Supp. 132 (citing *In re* U.S. Catholic Conference, 885 F.2d 1020, 1024 (2d Cir. 1989), *cert. denied*, 495 U.S. 918 (1990); Foster v. Center Township, 798 F.2d 237, 244 (7th Cir. 1986)).

This inability generally to challenge government action that did not directly injure the plaintiffs was addressed in *Lujan v. Defenders of Wildlife*, where the Supreme Court noted that there were "obvious difficulties insofar as proof of causation or redressability [was] concerned." 112 S. Ct. 2130, 2139; *see also id.* (citing Allen v. Wright, 468 U.S. 737, 759-60 (1984)); *id.* at 2143 ("We have consistently held that a plaintiff raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy." (citations omitted)).

[119]*See* Gregg v. Barrett, 771 F.2d 539 (D.C. Cir. 1985); Vander Jagt v. O' Neill, 699 F.2d 1166, 1168-71 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 91 (1984); Riegle v. Federal Open Mkt. Comm., 656 F.2d 873, 882 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1082 (1981); *cf.* Moore v. United States House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1984) (allowing standing to challenge Gramm-Rudman law, but dismissing on merits because controversy among members of Congress). *But see* Powell v. McCormick, 395 U.S. 486 (1969) (allowing a suit by a duly elected member of Congress to force the House of Representatives to seat him); Michel v. Anderson, 817 F. Supp. 126, 136-38 (D.D.C. 1993) (allowing standing to members of Congress to challenge territorial delegate voting in the Committee of the Whole House in the House of Representatives), *aff'd*, 14 F.3d 625 (D.C. Cir. 1994).

because of separation-of-powers concerns, the President almost certainly cannot sue Congress to force it to act: *i.e.*, to balance the budget.[120] Therefore, the potential litigants in a Balanced Budget Amendment case probably are taxpayer plaintiffs versus the President or another officer of the Executive Branch (in an unconstitutional spending case) and members of Congress versus the President (in an unlawful impoundment case, with the Balanced Budget Amendment raised as a constitutional defense).[121]

The existence of taxpayer standing in a Balanced Budget Amendment case is not a certainty, however. The case that recognized the standing of taxpayers to sue the federal government for unconstitutional spending, *Flast v. Cohen*,[122] elaborated a rather loose "nexus" test for standing: if the plaintiff could demonstrate a nexus between the challenged action and his or her taxes, then the plaintiff had standing. That holding was probably limited by a later decision, *Valley Forge Christian College v. Americans United for Separation of Church and State*.[123] In *Valley Forge*, the Court held that the taxpayer plaintiffs had no standing because only a *law* could be challenged by a taxpayer, not an unconstitutional executive action taken pursuant to an otherwise constitutional law.[124] Additionally, and, as the Court recognized, redundantly for this case, taxpayers could only challenge a spending law enacted pursuant to the Taxing and Spending Clause;[125] the act that the plaintiffs challenged was an exercise of Congressional power under the Property Clause.[126] The Court also reiterated the "actual injury" requirement of standing,[127] which did not apply in a general sense to all

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[120]Note, again, that these plaintiffs could statutorily be granted standing.

[121]*See supra* notes 112-17 and accompanying text.

[122]392 U.S. 83 (1976).

[123]454 U.S. 464 (1982).

[124]*Id.* at 479.

[125]*Id.* at 480.

[126]U.S. CONST. art. IV, § 3, cl. 2. Under the program challenged, the federal government donated real property to a religious college, but did not spend money.

[127]454 U.S. at 473, 476.

taxpayers; instead, the Court held that a taxpayer's nexus to the unconstitutional spending must be more direct.[128]

More recently, in *Lujan v. Defenders of Wildlife*,[129] the Supreme Court addressed the issue of standing to challenge environmental regulations.[130] The Court cited four cases where taxpayer standing was denied because there was no particular injury to the plaintiffs not shared with all members of the population.[131] The Court did not mention *Flast*, nor did it mention any other case where a taxpayer was held to have standing.[132] The implication of this omission could be that taxpayer standing is less favored than it once may have been; it might be erroneous to draw this conclusion, though, because *Defenders of Wildlife* did not concern taxpayer standing.[133] Therefore, a plausible statement of the status of taxpayer standing after *Valley Forge* and *Defenders of Wildlife* is that taxpayer plaintiffs must have an actual injury[134] that is not shared by all taxpayers in order to challenge an allegedly unconstitutional spending law. This would imply that there still would be some taxpayer plaintiffs to challenge an unbalanced-budget appropriation, but every taxpayer would not be a potential plaintiff.

Most commentators appear to support the viability of both the taxpayer and Congressional actions in some form. Gay Aynesworth Crosthwait argues that, in a taxpayer suit, "a litigant . . . could overcome the . . . hurdles with

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[128]*Id.* at 477-78 (citing Doremus v. Board of Educ. of Hawthorne, 342 U.S. 429 (1952); Frothingham v. Mellon, 262 U.S. 447 (1923)); *see also id.* at 485 ("Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error . . . ."). John Patrick Hagan construes *Valley Forge* to deny standing to taxpayer suits absent a showing of causation. Hagan, *supra* note 82, at 256-58.

[129]112 S. Ct. 2130 (1992).

[130]*See id.* at 2143-44 (citing United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); *Doremus*, 342 U.S. at 429; *Frothingham*, 262 U.S. at 447)).

[131]*Id.*

[132]*Id.*

[133]The decision in *Defenders of Wildlife* also did not affirmatively disfavor taxpayer standing, but such language would have been unnecessary dicta.

[134]*Defenders of Wildlife*, 112 S. Ct. at 2136 ("[T]he plaintiff must have suffered an 'injury in fact' — an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'"') (citations omitted).

relative ease."[135] Concurring in that view, Jack David of the New York City Bar Association asserts that since "the budget-balancing amendment would be adopted for the very purpose of restraining Congress . . . it is all but certain that at least some plaintiffs challenging congressional action on the basis of the amendment will be held to have standing."[136] Alan Morrison, head of litigation for Public Citizen, states that:

> [W]hile the President wouldn't have standing to litigate, he would as a practical matter have standing by refusing to comply with provisions he thought were violating the Constitution. That is, if he thought the budget was unbalanced, he would simply refuse to spend, and someone would have to sue him.
>
> I would also suppose that, depending on the particular issue, that someone whose taxes were increased under a method not authorized by the amendment — for instance, there was a dispute about the three-fifths vote — or whether an amendment was solely related to the budget which included a tax provision that a taxpayer might . . . have standing only because of the additional taxes, but not to have standing to go in and claim the taxpayers' money was being wasted.[137]

Responding to John Patrick Hagan's claim that standing would be denied to taxpayers as a result of the Supreme Court's decision in *Valley Forge*,[138] Kenneth Lehrman argues that:

> Hagan's conclusion seems premature in light of the court's unabashed excursion into the world of budgetary politics in *Bowsher v. Synar* . . . . [A]lmost unnoticed was the fact that lower federal courts, and ultimately the Supreme Court, had little difficulty finding sufficient injury to a federal employee to establish standing. *Bowsher* makes it evident that standing requirements are

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[135]Crosthwait, *supra* note 84, at 1079-80. However, Ms. Crosthwait acknowledges that, if the requirements that a taxpayer litigant show actual injury are increased, many plaintiffs will have trouble meeting that elevated requirement. *Id.* at 1081 (construing *Valley Forge*, 454 U.S. at 464).

[136]Letter from Jack David, *reprinted in* 128 CONG. REC. S9555 (daily ed. Aug. 2, 1982), *quoted in* Note, *Balanced Budget Amendment*, *supra* note 84, at 1614-15.

[137]2 *House Hearings*, *supra* note 7, at 433 (testimony of Alan Morrison).

[138]Hagan, *supra* note 82, at 255-58.

> not likely to pose [a] serious . . . obstacle to litigation of a balanced budget amendment dispute . . . .[139]

Even the Lincoln Legal Foundation, which wrote Congress in an attempt to allay the fears of litigation raised by opponents of the Balanced Budget Amendment, concedes that some taxpayers will probably be able to establish standing if they can demonstrate "concrete injuries" from a challenged Congressional action.[140] Therefore, it is certainly plausible that if the Balanced Budget Amendment were proposed and ratified, some group of litigants would be able to establish standing to enforce the provisions of the amendment in the federal courts, notwithstanding the absence of a statute expressly granting standing.

C. Political Questions

Unlike the standing doctrine, which is an interpretation of the "case and controversy" requirement of Article III, the political question doctrine is not founded in any textual provision of the Constitution. Instead, it can properly be characterized as a doctrine derived from the concept of separation of powers.[141] It is a prudential limitation on the power of judicial review that the courts employ when they are presented issues of constitutional law that are, in the courts' opinion, more effectively resolved by the political

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[139]Lehrman, *supra* note 83, at 13-14 (citing Bowsher v. Synar, 478 U.S. 714 (1985)). In *Bowsher*, one plaintiff nominally afforded standing was the National Treasury Employees' Union, whose members would lose cost-of-living increases under sequestration. *Id.* at 719.

[140]Lincoln Legal Foundation, *supra* note 82, at 4, *reprinted in* 2 *House Hearings*, *supra* note 7, at 505.

[141]*See* Baker v. Carr, 369 U.S. 186, 220 (1962) ("It is apparent that several formulations . . . may describe a political question, although each has one or more elements which identify it essentially as a function of the separation of powers."); *see also* Colegrove v. Green, 328 U.S. 549, 556 (1946) ("Courts ought not to enter this political thicket . . . . The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is . . . not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political . . . can never be made in this court."); 13A WRIGHT ET AL., *supra* note 109, at § 3534; Mulhern, *supra* note 80, at 166-67.

branches.[142] In American law, the political question doctrine was established in American law in the classic case entrenching the power of judicial review, *Marbury v. Madison*.[143] The doctrine is claimed, however, to have roots in antiquity.[144]

The political question doctrine is roundly criticized by academic commentators, chiefly because of its seeming arbitrariness. Robert Nagel writes that "the political question doctrine is largely incomprehensible to the Court and the academy."[145] Martin Redish observes that "[t]he doctrine has always proven to be an enigma to commentators . . . . At least part of the explanation for this confusion is the largely unpredictable method in which the Supreme Court has chosen to invoke the doctrine over the years."[146] J. Peter Mulhern agrees that "nothing in the Court's explanations helps distinguish cases in which judicial review is routinely available from cases that are immune from review because they present political questions."[147] Most commentators argue that the doctrine should be abolished for various reasons,[148] such as its undermining of the power

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[142]*See, e.g.*, Mulhern, *supra* note 80, at 99-101; Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1037 (1985). As with standing, political question problems could be preempted by an enforcement statute explicitly granting to the courts the power to resolve controversies. *See, e.g.*, 2 U.S.C.S. § 922 (Law. Co-Op. Supp. 1992).

[143]5 U.S. (1 Cranch) 137, 164 (1803).

[144]Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344-45 (1924), *cited in* Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643, 644 n.3 (1989), *and* Redish, *supra* note 142, at 1035 & n.30.

[145]Nagel, *supra* note 144, at 668.

[146]Redish, *supra* note 142, at 1031 (citing BICKEL, *supra* note 110, at 183-98; Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6-9 (1959)).

[147]Mulhern, *supra* note 80, at 101 (1988) (citing Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L.Q. 595, 614-26 (1987)); Redish, *supra* note 142, at 1034-35).

[148]*But see* Mulhern, *supra* note 80, at 162-63 ("Critics of the political question doctrine have failed to make out a case for abandoning the doctrine as inconsistent with the basic principles of our constitutional law. . . . [O]ur tradition does not mandate that courts resolve all constitutional issues[, n]or is . . . judicial resolution . . . always desirable.").

of judicial review[149] and its potential widening to allow many acts of government to go unchallenged.[150] Despite the inability of any observer to predict what the Supreme Court will consider to be a "political question" outside the province of the judiciary, it is generally acknowledged that the doctrine has continuing vitality.[151]

The most commonly cited modern statement of the doctrine comes from Justice William Brennan's opinion in *Baker v. Carr*:[152]

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of

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There also may be a political disagreement under the surface of this debate. Professor Mulhern notes also that "[m]uch of the scholarly hostility to the political question doctrine seems to spring from disappointment over the judiciary's refusal to support efforts to end" the Vietnam War and to declare unconstitutional American involvement in Central America, *id.* at 106-07 & nn.26-27, while Professor Nagel, *supra* note 144, at 655-59, points out that many of those who support eliminating the doctrine see it as constraining "progressive" judges who could otherwise rule on the constitutionality of any issue before them.

[149]Redish, *supra* note 142, at 1050 ("If the judiciary declines to resolve sensitive constitutional issues, the nation is effectively left in a constitutional state of nature, in which the constitutional position that prevails is the one that is the politically or physically most powerful.").

[150]Nagel, *supra* note 144, at 668-69. Professor Nagel actually goes further to argue, perhaps rhetorically, that since all law is now felt to be political in the post-Legal Realist era, there is potentially nothing to law that cannot fit within the "political question" category of unjusticiability. *Id.* This argument, carried to its conclusion, means that there ultimately is *no* "distinctively legal question" that courts are institutionally competent to solve.

[151]13 WRIGHT ET AL., *supra* note 109, at § 3534; Mulhern, *supra* note 80, at 162-76; Nagel, *supra* note 144, at 656-59; Redish, *supra* note 142, at 1033-35.

[152]369 U.S. 186, 217 (1962).

> embarrassment from multifarious pronouncements by various departments on one question.[153]

The vagueness and manipulability of this "lawless"[154] standard are obvious. Accordingly, most observers agree that it is no standard at all. In essence, when a court decides that it should not decide a "political" case, the political question doctrine provides a court the discretion to decide not to decide.[155]

Other academic commentators have considered the effect of the political question doctrine in the balanced budget context. Two authors find the doctrine to be no obstacle to judicial enforcement. Gay Ainesworth Crosthwait notes that Senate Joint Resolution 58,[156] a previous attempt at a balanced budget amendment, contains no textually demonstrable commitment to another branch of government,[157] is not "judicially unmanageable" merely because it requires quantitative analysis,[158] and provides no reason for a court to decline to hear a case on "prudential" grounds.[159] Therefore, this argument concludes, no political question bar exists to a court's hearing a case grounded in that amendment.[160] A Note

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[153]*Id.*

[154]Nagel, *supra* note 144, at 647.

[155]Deciding not to decide is, of course, functionally equivalent to the courts' deciding in favor of the solution reached by the political branches. *See* McCormack, *supra* note 147, at 626; *see also* Mulhern, *supra* note 80, at 115-16 & nn.75, 77 (citations omitted); *cf. id.* at 134-42 (discussing the insights of the Legal Realists).

[156]S.J. RES. 58, 97th Cong., 2d Sess., 128 CONG. REC. S9777-78 (daily ed. Aug. 4, 1982).

[157]Crosthwait, *supra* note 84, at 1084-85 (noting also that "[t]he taxing and spending power never has been interpreted as constitutionally delegated to another branch" (citing, *e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980))).

[158]*Id.* at 1085-88 (citing, *e.g.*, Baker v. Carr, 369 U.S. 186, 262-64 (1962) (Clark, J. concurring) (containing charts and apportionment formulae in the landmark opinion on political question doctrine)). Indeed, Ms. Crosthwait argues, "[t]he Court often sails through esoteric economic questions in tax and antitrust litigation." *Id.* at 1086 (citing Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)).

[159]*Id.* at 1088-89; Ms. Crosthwait states that, in her opinion, "prudential arguments against adjudication are unlikely to persuade a court even mildly inclined to reach the merits of a suit to enforce the Amendment." *Id.* at 1089.

[160]*Id.* at 1089-90.

in the Harvard Law Review follows this view.[161] Presumably, those arguments bear as much validity for Senate Joint Resolution 41 or for a future Balanced Budget Amendment as they did for Senate Joint Resolution 58.

Not all commentators agree, however, that the political question doctrine poses no problem for enforcement of the Balanced Budget Amendment. John Patrick Hagan sees the political question doctrine as being a fatal obstacle to judicial enforcement. While he concedes that "it is not certain that 'political question' considerations will inevitably block . . . suits" challenging unconstitutional budgets,[162] he argues that "[t]he critical component of 'political question' analysis in balanced budget disputes would appear to be the 'judicial competence' argument."[163] In essence, Mr. Hagan contends that courts cannot adequately resolve disputes that "depend primarily upon which sets of budget projections one chooses to adopt . . . ."[164] In support of this position, he claims that courts have difficulty assessing the validity of complex computer-driven analyses.[165] Because of this inability of judges to comprehend economic forecasts, "[j]udicial oversight of budget projection (as with other projections based upon advanced methodologies) will inevitably involve the substitution of a legalistic bias and perspective in a policy area where legal analysis will be of little or no help in addressing the basi[c] issues."[166]

A similar objection is raised by the Committee for Economic Development, which argues that "put[ting] the judiciary in ultimate charge

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[161]*See* Note, *Balanced Budget Amendment*, *supra* note 84, at 1615-19 (citing, *e.g.*, United States v. Nixon, 418 U.S. 683, 711-13 (1974) (holding that executive privilege could not nullify an otherwise valid subpoena); Powell v. McCormack, 395 U.S. 486, 550 (1969) (holding that the Court could rule on whether a member of Congress should be seated); Flast v. Cohen, 392 U.S. 83 (1968) (holding that political question doctrine does not bar cases of unconstitutional taxation, even though the power to tax is affirmatively granted to Congress)).

[162]Hagan, *supra* note 82, at 250.

[163]*Id.* at 253.

[164]*Id. Cf.* 2 *House Hearings*, *supra* note 7, at 234 (testimony of Rudolph Penner) ("A court would have to be willing to declare during a fiscal year that the forecast used by the Congress was wrong; something that cannot be proved beyond any doubt until after the fiscal year is over."). *But cf. id.* ("Whatever the final judgment of the Supreme Court, it would probably be possible to find a judge somewhere who would enjoin the Congress to do or not do something or other.").

[165]Hagan, *supra* note 82, at 253-54.

[166]*Id.* at 254.

of the budget" is unwise.[167] The basis for its objection stems from the judicial incompetence argument: the committee claims that "[t]he courts would, in effect, be determining tax and spending policies as they interpreted the application of the balanced-budget requirements — an extremely cumbersome and time-consuming procedure."[168] This is actually two formulations of the judicial incompetence argument: first, a normative claim that courts should not be allowed to determine tax and spending policies; and second, an empirical claim that the judicial process is too "cumbersome and time-consuming" to be used for decisions of national budget policy.[169]

One budget expert who joins the committee's first argument is James T. McIntyre, Jr., former director of the OMB.[170] Mr. McIntyre disagrees strongly with "put[ting] the judiciary in ultimate charge of the budget," in the exact words used by the committee. Again, this amounts to a normative claim that judges should not have the power to adjudicate taxation and spending in the macroeconomic context.

The core argument, then, that courts should abstain for political reasons from deciding budgetary issues essentially draws upon three objections to judicial involvement. All of these objections are different versions of the incompetence claim. They are: first, that courts cannot adequately analyze economic data and projections; second, that courts should not normatively be able to make budgetary decisions; and third, that the judicial process is empirically too slow to reach decisions to be used for budgetary matters.[171] Each of these objections is flawed, as will be described.

The objection that courts are institutionally incapable of analyzing economic data and projections is mistaken. As noted above, a court addressing the constitutionality of the federal budget is free to adopt the projections of the expert recognized by statute, who is presently the Director of OMB.[172] Alternatively, the court can appoint its own special master to

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[167]Committee for Economic Development, *supra* note 67, at 92.

[168]*Id.*

[169]McIntyre, *supra* note 7, at 60.

[170]*Id.* As he states the problem, "[i]t is not hard to imagine circumstances where the judiciary would be called upon to establish budget concepts in order to police the amendment. This, I submit, would make a farce of the budget process." *Id.*

[171]*See supra* notes 141-70 and accompanying text.

[172]Note that the court is able to adopt as fact the Director's findings introduced into evidence, even if it invalidates the statute under which the Director is appointed as the nation's "honest broker" and the Director's numbers accepted as the nation's facts. The

review the data[173] or can simply hear testimony from expert witnesses, as in an antitrust or another business tort case.[174] To the extent that it is necessary to define budget terms, a court is certainly capable of performing that function.[175]

The second argument — that courts, as a matter of policy, should not decide budget matters — is more difficult to counter because it is founded on political theory. Those who believe that the courts have no business dealing with taxation and spending (and they are many)[176] presumably founded that belief upon political notions of proper institutional roles. Unfortunately for them, their argument does not reflect contemporary American jurisprudence. First, courts do in fact often decide matters of taxation and spending.[177] Although allowing a court to review the entire federal budget would be quantitatively different from anything the courts have ever done, a court (and ultimately the Supreme Court) would probably

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Director may simply become a witness, and his or her testimony may be sufficient foundation for the introduction of the economic data and projections. *See* FED. R. EVID. 702; *see also* 2 U.S.C.S. § 622(h) (Law. Co-Op. Supp. 1992).

[173]*See* FED. R. CIV. P. 53; *cf.* Delaware v. New York, 113 S. Ct. 1550 (1993).

[174]*See supra* notes 100-03.

[175]*See supra* text accompanying notes 87-92.

[176]*See, e.g.*, 1 *House Hearings*, *supra* note 7, at 141 (testimony of Frank Guarini) ("[W]hat bothers me . . . is the fact that if there is a disagreement . . . we take the case to the Supreme Court . . . ."); *id.* at 195-97 (statement of Louis Fisher) (detailing the involvement of state courts in their states' budgets); *id.* at 213 (testimony of Norman Ornstein) (expressing concern that "[c]ourts are going to be in there" in the budget process); *id.* at 228 (testimony of Louis Fisher) (arguing that Congress could create an exception to the courts' jurisdiction over budget matters); 2 *id.* at 355 (testimony of Lowell Weicker) ("I don't want the courts figuring out the budget, Federal or State, I don't think that is their job and I think that is an impossible burden.").

[177]At the federal level, a tax court has explicit jurisdiction over taxation (this jurisdiction is concurrent, to some extent, with that of the district courts). The appellate courts, of course, also hear tax cases. *See, e.g.*, Bufferd v. Commissioner of Internal Revenue, 113 S. Ct. 927 (1993); United States v. Hill, 113 S. Ct. 941 (1993). Federal court supervision of federal spending is not uncommon. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714 (1985); Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981); Train v. New York, 420 U.S. 35 (1975). State courts also exercise varying degrees of jurisdiction over taxation and spending. *See, e.g.*, *In re* State Employees' Unions, 587 A.2d 919 (R.I. 1991); Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

not find it qualitatively different. The second problem with the argument that courts should not interpret the budget is the counterargument that courts *must* interpret the Constitution. Although this requirement has not been universally applied,[178] interpretation of the Constitution is almost universally accepted as the province of the judiciary.[179] If the people of the United States ratify the Balanced Budget Amendment, then the people have, in effect, made the normative decision that the judiciary *should* be involved in its implementation. The normative argument based on political theory is, at that point, moot.

Finally, the claim that the courts should not take cases applying the Balanced Budget Amendment because the cases present political questions that the judicial branch is too slow to resolve is extremely attenuated. First, as noted above,[180] the courts can move speedily when emergency situations demand rulings;[181] thus, any claim that the courts are too slow is not grounded in fact. Furthermore, the burden of proof for this claim should be on those making the argument: in order to claim that the judiciary is too slow and it should therefore avoid the "political question," the proponents must show that the political branches can move more quickly. It would be difficult to demonstrate empirically that Congress is any faster than the courts in resolving important matters in controversy. There is no conclusive evidence on that point one way or the other.

It is, of course, impossible to predict what the fact pattern or specific legal issues would be in a suit for enforcement of the Balanced Budget Amendment; therefore, its ultimate outcome with respect to the political question doctrine is uncertain. However, the commentators who argue that the courts would (or should) avoid a Balanced Budget Amendment case because it presents a political question fail to make persuasive arguments. The experience with *Bowsher v. Synar*,[182] *Train v. New York*,[183] and

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[178]*See* Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2143-45 (1992) (describing circumstances under which the courts will not review violations of the Constitution).

[179]Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *But see* Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 939 (1987) (arguing that all government officials have an independent duty to interpret the Constitution as they see fit, notwithstanding the Supreme Court's rulings).

[180]*See supra* text accompanying notes 105-06.

[181]*Cf.* FED. R. CIV. P. 65 (giving procedures for obtaining a temporary restraining order or preliminary injunction).

[182]478 U.S. 714 (1985).

other budget-related cases shows that the Court has only minimal reluctance to take these cases; certainly the universe of tax and spending cases demonstrates little, if any, willingness to leave this area of law to the executive and legislative branches alone. The possible interposition of issues of constitutional law into budget litigation militates even less for the application of the political question doctrine. Therefore, the political question doctrine probably will not prevent enforcement of the Balanced Budget Amendment in the courts.

D. The Problem of Remedies[184]

Some observers argue that the Balanced Budget Amendment could not be enforced because no remedy exists.[185] For example, one commentator argues that "[i]t is difficult . . . to imagine a sufficient judicial remedy for the expenditure of funds pursuant to an impermissibly balanced budget."[186] Gay Aynesworth Crosthwait, after a thorough analysis of the remedies available to a Balanced Budget litigant, concludes that "the remedy that [Balanced Budget] Amendment litigation requires exceeds the power of the federal courts under article III."[187] Because her analysis is the best available and raises almost every remedy-based objection to the Balanced Budget Amendment, it is an appropriate starting point for considering the problem of remedies.

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[183]420 U.S. 35 (1975).

[184]This section assumes that no statutory remedy exists, for the reasons outlined above at note 76. If a sufficient remedy were provided by an enforcement statute or some other statute like the Budget Enforcement Act and that statutory remedy were available to the litigant, then a parallel constitutional remedy would not be precluded, but might not be entertained by a court to the same degree as if it were the only remedy available.

[185]This problem affects standing doctrine as well. In *Defenders of Wildlife*, the Supreme Court reiterated that in order to have standing, a plaintiff must demonstrate that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992) (citations omitted). If there is no justiciable remedy, there is no standing.

[186]Note, *Balanced Budget Amendment*, *supra* note 84, at 1619.

[187]Crosthwait, *supra* note 84, at 1107.

Ms. Crosthwait first considers the possibility of a declaratory judgment brought under the Federal Declaratory Judgment Act.[188] She argues, distinguishing *Powell v. McCormack*,[189] that declaratory judgment should be available *only* when other relief would also be available, thus avoiding the Article III prohibition of advisory opinions.[190] The problem with this argument is that she is, in effect, stating that *Powell* was wrongly decided and that Congressman Powell either should not have been granted a declaratory judgment or he should have been granted both a declaratory judgment and an injunction. It is certainly possible to consider *Powell* distinguishable because of its extraordinary circumstances: after all, the defendant was Congress, which raised enormous separation-of-powers concerns. The issue, however, was one of interpretation of the Constitution, a subject traditionally within the province of the judiciary.[191] This situation is almost exactly congruent to a situation where Congress has passed an unconstitutionally unbalanced budget. Setting *Powell* apart from the ordinary suit against the government, then, makes it *more* likely that it would be applicable, not less. In a cause of action against Congress for its unconstitutional action, *Powell* stands for the proposition that the Supreme Court can interpose its interpretation of the Constitution in the form of a

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[188]28 U.S.C. §§ 2201-02 (1988). The statute reads, in pertinent part, "In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *Id.* § 2201. This statute has been interpreted to mean that there must be an actual case that could have been filed in the appropriate federal court by one of the parties, whether plaintiff or defendant. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673-74 (1950).

[189]395 U.S. 486 (1969). In *Powell*, the plaintiff, a member of Congress that Congress refused to seat, sought a declaratory judgment that he was entitled to his seat and an injunction forcing the Speaker of the House to seat him. *Id.* at 490-94. The Supreme Court held that it was unconstitutional to deny him his duly elected seat and granted a declaratory judgment to the plaintiff, but did not grant the injunction. *Id.* at 549-50.

[190]Crosthwait, *supra* note 84, at 1092-93 (citing Colegrove v. Green, 328 U.S. 549, 552 (1946)).

[191]*See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see also* 2 *House Hearings*, *supra* note 7, at 461 (questions, answers, and responses of Charles Stenholm) (quoting John C. Armor of the American Legislative Exchange Council as writing, "My view is the Court would probably use standard, Declaratory Judgment powers all federal courts now have, to state whether a budget is in excess. If so, it would strike it down, leaving the cure of the problem to Congress.").

declaratory judgment when it otherwise might abstain for prudential reasons.[192]

Ms. Crosthwait also offers the opinion that a declaratory judgment should not be granted because "a court's declaration that Congress acted unconstitutionally is essentially unhelpful . . . . [A] declaratory judgment by itself does little to rectify a violation of the Amendment."[193] On the contrary, a declaratory judgment by itself could be of great utility in allowing the President to impound, rescind, sequester, or defer funds appropriated unconstitutionally by Congress. It would be a finding of constitutional law and fact that would bind Congress in future litigation. A declaratory judgment would also be useful for purposes of collateral enforcement against government officials.[194] Therefore, far from being unhelpful, the declaratory judgment would be an item of great utility to those seeking to enforce the Balanced Budget Amendment.

In search of some other answer, Ms. Crosthwait then surveys the state courts' ability to enforce state balanced budget requirements. Reviewing decisions from Maryland, New York, New Jersey, and California, Ms. Crosthwait finds that state courts generally arrive at solutions that are "intrinsically deficient" and "cannot be assimilated to the federal system."[195] This conclusion may be too cursory. A better examination of the states' practices is provided by Stewart Sterk and Elizabeth Goldman.[196] In their article, Professor Sterk and Ms. Goldman survey the states that have enacted various forms of constitutional limitations on public

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[192]*See also* Michel v. Anderson, 817 F. Supp. 126, 138-40 (D.D.C. 1993) (analyzing prudential reasons for the courts not to be involved in internal Congressional administration and concluding that judicial interposition was not barred under the facts of the case because Constitutional issues were at stake), *aff'd*, 14 F.3d 625 (D.C. Cir. 1994).

[193]Crosthwait, *supra* note 84, at 1093.

[194]*See infra* at text accompanying note 225.

[195]Crosthwait, *supra* note 84, at 1094-96. Studying the state experience with judicial enforcement of balanced budget requirements, David Lubecky observes that state courts' involvement ranges from avoidance of the issue (citing New York and Maryland) to asserting a lack of authority (citing New Jersey and Maryland) to "the activist position" (citing New York and Michigan). Lubecky, *supra* note 12, at 572-79. Lubecky strongly supports keeping the courts out of the budgetary area. *Id.* at 582.

[196]Sterk & Goldman, *supra* note 72.

debt.[197] They conclude that while judicial involvement in enforcement of debt limitations has not been absolutely or rigidly supportive of state constitutional provisions, "[c]onstitutional debt limitations . . . have generally operated as a constraint on the power of the political branches . . . ."[198] This view is reinforced by testimony from Louis Fisher of the Congressional Research Service. In hearings on the Balanced Budget Amendment, Dr. Fisher cited decisions from a number of states.[199] Reviewing the evidence, he concluded that "the state courts do not hesitate to function as full participants" in many aspects of the budget process.[200]

A survey of state practice confirms Dr. Fisher's testimony.[201] For example, in West Virginia, where the State had been diverting funds appropriated for the retirement system to cover budget shortfalls, the State Supreme Court ordered an independent actuary hired to evaluate the system's requirements and ordered the legislature to develop within 180 days an

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[197]Total debt limitations are not exactly analogous to current budget deficit limitations, but the involvement of the courts should be very similar. *Cf.* S.J. RES. 41, 103d Cong. 1st Sess., 140 CONG. REC. S1917 (daily ed. Feb. 25, 1994) (limiting "the debt of the United States").

[198]*Id.* at 1365.

[199]1 *House Hearings*, *supra* note 7, at 195-97 (statement of Louis Fisher) (citing Chiles v. Children A, B, C, D, E, and F, 589 So.2d 260 (Fla. 1991); Dieck v. Unified School Dist. of Antigo, 477 N.W.2d 613 (Wis. 1991); Dadisman v. Moore, 384 S.E.2d 816 (W. Va. 1988); Bruneau v. Edwards, 517 So.2d 818 (La. 1987); Pennsylvania Social Serv. Union No. 668 v. Commonwealth, 530 A.2d 962 (Pa. 1987); Nations v. Downtown Dev. Auth., 345 S.E.2d 581 (Ga. 1986); Board of Educ. v. Crete-Monee Educ. Ass'n, 497 N.E.2d 1348 (Ill. 1986); Nations v. Downtown Dev. Auth., 338 S.E.2d 240 (Ga. 1985); Valdes v. Cory, 189 Cal. Rptr. 212 (Ct. App. 1983); South Bend Comm. School v. National Educ. Ass'n, 444 N.E.2d 348 (Ind. 1983); Board of Educ. v. Chicago Teachers, 430 N.E.2d 1111 (Ill. 1981); Wein v. State, 347 N.E.2d 586 (N.Y. Ct. App. 1976)).

[200]1 *House Hearings*, *supra* note 7, at 195-97 (statement of Louis Fisher).

[201]A survey of state and local litigation involving balanced budgets since 1985 disclosed forty-four reported cases that addressed budget-related remedies directly. All of the cases are not described in this section, but the survey material is on file with the author.

Two problems of selection occur with reliance on reported cases. First, there presumably exist many such cases that are resolved without an opinion being published or a final judgment issued. Second, most of the important political (and even legal) activity in relation to budgetary matters occur outside the courts, so any attempt to discern facts and context through reported opinions will necessarily be inadequate. However, as the subject of this Article is litigation involving balanced budgets, reference to other litigated balanced-budget cases is appropriate.

appropriation plan to cover the deficit in the system over six fiscal years.[202] In another example in California, the Court of Appeals held that the State could cut health benefits to balance the budget, but not wages.[203] Michigan's courts have upheld legislative creations of extraordinary bodies with the authority to impose budget cuts outside the normal budgetary process,[204] while Florida's courts have not.[205]

An interesting remedy for an unconstitutional budget that could be transferable to the federal government is provided by Texas. In nine years of litigation in Texas, the State courts examined in detail the budgets of school systems in the State.[206] The Texas Supreme Court eventually declared the education funding system unconstitutional and ordered the state legislature to find a solution, but stayed injunctive relief against the system while the Legislature worked to enact a funding mechanism.[207] In the Court's words:

> Although we have ruled the school financing system to be unconstitutional, we do not now instruct the legislature as to the specifics of the legislation it should enact; nor do we order it to raise taxes. The legislature has primary responsibility to decide how best to achieve an efficient system. We decide only the nature

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[202]*Dadisman*, 384 S.E.2d at 816. The actuary found the system to be sound, so the appropriation plan was never enacted. State *ex rel.* Dadisman v. Caperton, 413 S.E.2d 684 (W. Va. 1991).

[203]Department of Personnel Admin. v. Superior Court *ex rel.* Greene, 6 Cal. Rptr. 2d 714 (Ct. App. 1992), *review denied.*

[204]Dodak v. State Admin. Bd., 495 N.W.2d 539 (Mich. 1993).

[205]Chiles v. Children A, B, C, D, E, and F, 589 So.2d 260 (Fla. 1991).

[206]Edgewood Indep. Sch. Dist. v. Kirby, 771 S.W. 2d 391, 393 (Tex. 1989).

[207]Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 391 (Tex. 1989), *modified by* Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991), *modified by* Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489 (Tex. 1992); *see also* Smith v. Travis County Educ. Dist., 968 F.2d 453 (5th Cir. 1992) (holding that the Tax Injunction Act, 28 U.S.C. § 1341 (1988), prevents the federal courts from enjoining state taxation measures). As the legislature attempted constitutionally to meet the Texas Supreme Court's mandate, it received two extensions of the deadline. *Carrollton-Farmers Branch*, 826 S.W.2d at 489. The voters of Texas defeated an amendment to the state constitution that would have required redistribution of local property tax revenues among school districts. The system of funding devised by the Legislature for the 1993-94 school year is presently under challenge in the Texas courts as not complying with the *Edgewood* mandate.

> of the constitutional mandate and whether that mandate has been met . . . .
>
> However, let there be no misunderstanding. A remedy is long overdue. The legislature must take immediate action.[208]

The remedy, then, amounted to a declaratory judgment and an order to the legislature to tailor its own remedy, with the threat of the stayed injunction hanging over the legislators' heads.[209] It is not implausible that this same remedy could issue from the federal bench, with the threatened injunction being one of the three types described below.

Far from being unable to find remedies for unconstitutional spending, then, the courts of many states do indeed rule on the constitutionality of fiscal matters. While the state experience is not directly transferable to the federal judiciary, it may inform judicial interpretation of duties and powers. Therefore, Ms. Crosthwait's assertion that the state court experience with balanced budget requirements demonstrates that remedies would not exist for the Balanced Budget Amendment is not supported by the evidence.

The bulk of Ms. Crosthwait's discussion of remedies is devoted to injunctive relief. The author correctly concludes that an injunction probably cannot be sought against Congress as a body or its individual members.[210] The more probable cause of action for an injunction would be brought against, as named defendants, individual officers of the Executive Branch responsible for disbursement of funds.[211] Accepting this point, Ms. Crosthwait proceeds to describe three varieties of injunctive relief and why each is insufficient or unconstitutional. This inability to secure effective relief is important to the author's analysis, since it is the basis for her finding that efforts to balance the budget by constitutional amendment should be abandoned.[212] The three forms of injunction she describes are as follows: first, to stop the warranting process when expenditures exceed revenues; second, to apply an across-the-board reduction (a sequester); and third, to supervise actively program cuts in order to bring the budget into balance.

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[208]*Edgewood*, 777 S.W.2d at 399.

[209]*Id.*

[210]*See* Crosthwait, *supra* note 84, at 1096; *supra* text accompanying note 119 and cases cited therein.

[211]*Id.* at 1096-97.

[212]*Id.* at 1107.

The first alternative, an injunction ordering the Treasury not to issue warrants (authorizations to other government agencies to draw funds from the Treasury), would effectively shut down any governmental operations to the extent that expenditures exceed revenues. Ms. Crosthwait contends that this option would not work because: agencies would defy the Treasury and continue to write checks; the Treasury would be unable to distinguish between "good" and "bad" appropriations; and the remedy is "too crude."[213] Each of these suppositions is questionable. First, there is no reason to believe that any federal agency would intentionally continue to spend money in defiance of the Treasury; nonessential services could certainly be discontinued, while spending could probably continue for essential services.[214] As to the Treasury's ability to recognize warrants for outlays based on previous budget authority and allowable current budget authority, while distinguishing outlays based on excess budget authority, the answer lies in governmental accounting procedure: agencies drawing funds must identify by accounting code, or "fund cite," the budget authority for that warrant. It would be a relatively simple matter to designate certain accounting codes as non-allowable. Finally, as to the remedy being too crude, this judgment is an opinion based on a hypothetical situation. Perhaps in certain factual situations it would be an undesirable remedy for policy reasons.[215] Perhaps in others it would make good sense. One purpose of the adversary process is for the litigants to identify to the court when the remedy sought would not make sense, and then allow the court to use its equitable discretion to tailor the remedy to circumstances. Therefore, although the "too crude" argument may be correct in some cases, it will not

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[213]*Id.* at 1097-98.

[214]*See* Feld, *supra* note 42 (amplifying a 1981 Opinion of the Attorney General that supports the continuation of certain expenditures despite the lack of an appropriation). This opinion that "essential services" spending can continue in the absence of an appropriation is apparently held both by the General Accounting Office and by the Office of Management and Budget, but has two major problems. First, there is the definitional problem of deciding exactly what comprises an "essential service" of the federal government. Second, there is no explicit authority to engage in "essential service" spending. *See id.* at 980-88.

[215]However, certain essential spending probably can continue, at least temporarily, even without express appropriation. *See id.* If it appears that the excess spending is essential and must continue, then Congress may be forced to raise additional revenue or make program cuts in other areas. Alternatively, if Congress fails to act, then a court may be required to sequester funds or fashion some other remedy. The existence of this possible chain of events further undermines the "too crude" argument, because it demonstrates the ability of the courts to impose a firm baseline and then make incremental adjustments as needed.

necessarily be true in all cases. There is no reason to dismiss the availability of the injunction against issuance of warrants in every case.

The injunction that sequesters funds to balance the budget is indistinguishable in implementation from a Presidential sequestration order under the Budget Enforcement Act.[216] Ms. Crosthwait's objections to this remedy are that it is arbitrary and that it does not impair agency discretion to enter into contracts.[217] As she puts the first issue, an across-the-board injunction "eliminates all rational ordering in the allocation of federal funds."[218] Even assuming that this is true, it does not necessarily mean that it would not be an enforceable injunction — an unwise injunction maybe, but an injunction nevertheless. The contract issue is, of course, a *non sequitur*: there is no reason why an injunction could not also be written so as to prohibit contracting. Furthermore, that this remedy was the one negotiated by the other two branches indicates persuasively that if a court were to impose it, at least the court would be ordering the remedy that the other branches have chosen on their own initiative for dealing with the same situation.[219] Therefore, it is very likely that this remedy is available to a court that reaches a decision on the merits that the budget is unconstitutionally out of balance.

Ms. Crosthwait is probably correct that the third alternative, active judicial supervision of budget execution, is so intrusive that it violates the federal separation-of-powers principle in many cases.[220] Although there are numerous examples of federal courts becoming involved in details of program administration at a low level,[221] it is rare that the judiciary will intrude into the workings of the other branches at the level of national

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[216]*See* COLLENDER, *supra* note 28, at 67-82.

[217]Crosthwait, *supra* note 84, at 1098-99.

[218]*Id.* at 1098. I will refrain from commenting on the assumption that the allocation of funds was rationally ordered in the first place.

[219]The fact that it would have to be ordered by a court assumes necessarily that the Budget Enforcement Act or something similar is not invoked.

[220]Crosthwait, *supra* note 84, at 1099-1103.

[221]*See, e.g.*, Inmates of the Suffolk County Jail v. Rufo, 148 F.R.D. 14 (D. Mass. 1994), *enforcing* Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748 (1992) (deciding whether prisoners can be required to double-bunk in county jail). This action has been before the court since 1971. *See id.*

government.[222] Those who hold the view that it is inconceivable that a federal court could dictate the federal budget line-by-line are probably correct. It would be an extremely unusual situation, probably one of national crisis, when that approach would be necessary or even preferable over one of the other two alternatives, freeze or sequestration.[223]

This resurfacing of a form of "political question doctrine" at the consideration of remedies is ultimately an argument for original nonjusticiability. Essentially, it can be restated as an argument that because the only available remedy is one that could never be granted by the court, the court cannot hear the case. This is Ms. Crosthwait's final position; because she rejects the injunction against new spending and the injunction requiring across-the-board program reductions, all that is left is the overly intrusive injunction that examines programs line-by-line. Thus, she concludes, a court may not hear a Balanced Budget Amendment case because it is nonjusticiable.[224]

Because at least the other two remedies are available, however, the finding of nonjusticiability is not compelled. Therefore, the remedies she offers for enforcement of the Balanced Budget Amendment allow it to be enforced. The plaintiff who can prevail on the merits not only can obtain a declaratory judgment, he or she can also obtain an injunction.[225]

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[222]Note that, at the state level, some state judiciaries have not displayed nearly so much hesitation in tailoring remedies, *see supra* text accompanying notes 196-209 and cases cited therein, or in approving extraordinary procedures, *see supra* notes 202-05. The state courts' experience with remedies can probably be considered no more than instructive for the federal courts, but if a balanced-budget provision were implemented at the federal level as it is in most states, that "instructive" experience may become relevant. The temptation to create line-by-line remedies, however, would certainly be in opposition to the longstanding tradition of separation of powers. Therefore, the idea that a federal court would be willing to issue a line-by-line sequestration order to executive agencies, to the *exclusion* of the other two approaches, is implausible.

[223]One slight possibility where this type of injunction could become necessary would be the remote situation where it is the court's last resort. For example, if the court had frozen spending or it had sequestered funds, and a program area had an emergency need (or a very dire need) of funding that was not forthcoming from the political branches, then it is theoretically possible that an activist court might order spending in one or more of the frozen areas and proportionately greater cuts in all the others, or even specific cuts to pay for the released funds. It is a scenario difficult to imagine, but not impossible.

[224]*See* Crosthwait, *supra* note 84, at 1104-07.

[225]Also, because the plaintiff can obtain an injunction, the declaratory judgment action is not "advisory," and thus valid. This is also true for the declaratory judgment as it pertains to the other forms of relief mentioned *infra*.

There are other possibilities for relief that are so speculative that they are not supported by any case or statute on point, but they are not outside the range of possibilities. First, in a taxpayer suit, the taxpayer may seek money damages under a *Bivens*-type theory.[226] There are obvious problems with this approach in the balanced-budget context: first, the defendant's resources are collected from a large number of potential plaintiffs, all of whom could bring similar actions;[227] second, there is the possibility of class actions;[228] and third, the courts would probably require some showing of actual injury beyond the *Flast* nexus to recover money damages.[229]

Another possible form of relief would be to interpose the Balanced Budget Amendment as a defense by the President in a suit to force him to spend impounded funds.[230] This defense logically seems as if it would stand a reasonably good chance of being successful if supported by fact, but there is no federal case law that is even close to this situation.[231]

Finally, it might be possible to seek collateral remedies against the officers of the Executive Branch who are unconstitutionally spending money. One possibility could be impeachment. It is a very unlikely remedy, however, since the procedural mechanism through which impeachment works is Congress.[232]

The availability of these remedies for spending in violation of the Balanced Budget Amendment depends on the intentions of the courts. Despite arguments that an unbalanced budget could not be remedied even if

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[226]*See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (allowing money damages for violation of constitutional rights by the federal government).

[227]*See, e.g.*, Ohio Hosp. Ass'n v. Ohio Dep't of Human Servs., 1990 WL 85136 (Ohio App. June 21, 1990) (not reported) (mandating that the state pay Medicaid reimbursements it had cut to balance the state budget).

[228]*Id.*; *see also* Dadisman v. Moore, 384 S.E.2d 816 (W. Va. 1988).

[229]*See supra* text accompanying notes 129-34 (discussing the implications of Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992)).

[230]Again, it has never been settled that executive impoundment is unconstitutional, but almost all observers agree that it is. *See supra* text accompanying notes 50-57.

[231]At the state level, this situation has occurred recently. *See, e.g.*, Dodak v. State Admin. Bd., 495 N.W.2d 539 (Mich. 1993); State *ex rel.* Sikeston R-VI Sch. Dist. v. Ashcroft, 828 S.W.2d 372 (Mo. 1992); *In re* State Employees' Unions, 587 A.2d 919 (R.I. 1991); Benedict v. Polan, 413 S.E.2d 107 (W. Va. 1991).

[232]U.S. CONST. art. I, § 3, cl. 7; U.S. CONST. art. II, § 4.

a court did find it unconstitutional, the analysis presented above demonstrates that a court almost certainly could issue a declaratory judgment, could order a spending freeze, could order a sequester, or could even tailor a remedy in extraordinary circumstances. A court of law or equity, even when applying its rules of constitutional and prudential authority to limit grievances, still may redress violations of the Constitution when such action is warranted.

E. Overcoming the Obstacles

The Balanced Budget Amendment would not operate in a political vacuum. In the context in which a challenge to an allegedly unconstitutional budget would arise, the collective good faith of members of Congress, the Executive Branch, and the judiciary would certainly play a role in attaining a resolution of the situation that would be in the best interests of the nation. Conversely, political maneuvering and competition for actual or perceived advantage could lead to a national crisis. In that environment, it could become important that the courts not be completely precluded by their own doctrines from contributing to the solution of the paralysis that could ultimately result from the enactment of an unconstitutional budget.

Some commentators focusing on the Balanced Budget Amendment believe that it would be unenforceable in the courts because of the courts' institutional inability to assimilate and process complex economic data. Others believe that no potential litigant could present a case in controversy sufficient to overcome the standing barriers presented by Article III. Still a third problem is presented by the doctrine that the courts should avoid political questions under certain circumstances. Finally, even if all of these doubts are resolved, the courts must solve the puzzle of whether a remedy exists that would correct a violation of the Balanced Budget Amendment.

None of these conclusions is necessarily warranted. Courts analyze economic and other complex data frequently. Standing probably could be achieved at least by some taxpayers as plaintiffs and by the President or his or her Executive Branch officers as defendants. Questions of taxation and spending are resolved in the courts routinely and are not precluded by political question doctrine. Remedies in the form of declaratory judgments and injunctions to freeze or sequester spending probably exist, and other remedies may exist as well. The conclusion one must reach, therefore, is that the Balanced Budget Amendment can indeed be enforced in the courts by some plaintiffs in some factual situations.

The enforcement of the Balanced Budget Amendment through its implementing legislation is the preferable alternative. All of the problems discussed in this Article with the amendment's enforcement — problems such as definitions, estimation, standing, political questions, and remedies — are capable of being resolved through appropriately drafted implementing

legislation.[233] The framers of a constitutional amendment must use language that is open enough for permanent utility without being too vague for applicability. Without specific implementing legislation that resolves ambiguities and responsibilities, the task of interpretation is thrown upon the courts. This Article has demonstrated that, if necessary, the courts can perform that function in some cases. The Balanced Budget Amendment, therefore, can be self-enforcing.

IV. LOOKING TOWARD THE FUTURE: POLICY DECISIONS

Historically, in America there has been a general social consensus that the federal budget should be balanced. There has been a similar consensus that most people do not want their taxes raised or their spending programs cut. In the opinion of many observers, these fundamentally inconsistent positions cannot be held indefinitely; something is going to have to give.

Supporters of the Balanced Budget Amendment cite as one of its most attractive features the fact that it would force agreement on tough policy choices.[234] What they often fail to mention is that the nation has been down this road before in recent history. The same things were said about the original Gramm-Rudman-Hollings legislation;[235] almost as soon as that law was passed, the President and Congress began maneuvering around it with virtual impunity. Thus, the hope that many supporters place in the ability of the Balanced Budget Amendment unilaterally to cut deficits in the absence of political will seems either naive or cynical. The three-fifths vote that it takes to waive the amendment's provisions could become another *pro forma* exercise like the Gramm-Rudman-Hollings override.[236]

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[233]*See* 2 *House Hearings*, *supra* note 7, at 463-64 (questions, answers, and responses of Charles Stenholm) ("First, I want to emphasize — and I can't emphasize it strongly enough — when ratified, this Constitutional amendment will not be operating in a vacuum. There *will* be implementing and enforcing legislation . . . . We've spent 125 years writing implementing legislation for the 13th, 14th, and 15th Amendments . . . . We've spent 89 years writing implementing legislation for the 16th Amendment, authorizing a federal income tax, with no end in sight.") (emphasis in original).

[234]*See* 2 *id.* at 411-12 (testimony of J. Alex McMillan).

[235]*See Congress Enacts Strict Anti-Deficit Measure*, *in* 41 CONGRESSIONAL QUARTERLY ALMANAC: 1985 459, 459 (1986) ("Congress and the President took the historic step of binding themselves to five years of forced deficit reduction . . . .").

[236]*See* 2 *House Hearings*, *supra* note 7, at 467 (questions, answers, and responses of Charles Stenholm) ("My answer to that is simple: If the government habitually waives the amendment, then there really is no hope for our children's economic future.").

On the other hand, recent history makes it clear that the President and Congress cannot collectively, in the absence of an external requirement, muster the political willpower to make dramatic change in a budget year. For example, the Budget Enforcement Act of 1990 contained no real spending cuts for its early fiscal years, but set in place relatively tough deficit standards for the "out years" of Fiscal 1994 and 1995. The 1994 budget proposed by the Clinton Administration and passed largely intact by Congress, however, relaxed the Fiscal 1994 and 1995 deficit standards considerably, while claiming huge cuts in the deficits for the "out years" of Fiscal 1997 and 1998. A cynical observer would look for those deficit standards to be relaxed in budgets to come, while setting still greater cuts in future "out years."[237] Given all the pressures affecting elected officials, for them to procrastinate while claiming (with a wink and a nod) that the deficit is being dramatically cut appears to be their option of choice. It is not a foregone conclusion that a balanced budget is a good idea, but if the nation is certain that it wants balanced budgets, a constitutional amendment to require balanced budgets may be the only viable answer.

If there were such an amendment, it would signify that a supermajority of the nation was serious about deficit reduction. The most desirable state of affairs would be for new implementing legislation — in the fashion of the Budget Enforcement Act — to be available to cajole the budget process into working toward a zero-deficit target in a gradual, progressive manner and then staying there. As with most projects of great importance, to put up the finish line without having a meaningful plan for getting to it would surely be an invitation for disaster.

In the event that a new Budget Enforcement Act were not operative for some reason, however, enforcement of the Balanced Budget Amendment on its own terms might become a requirement. This Article has demonstrated that if that time should ever come, the amendment would be capable of judicial resolution and enforcement. As the amendment's supporters well know, sometimes a potential threat made credible can be a more valuable weapon than a weapon actually employed.

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[237] *Cf.* Mark Memmott, *Deficit Cuts are Finished — This Term*, HOU. POST, May 2, 1994, at A1 (quoting Treasury Secretary Lloyd Bentsen as stating that because the Clinton Administration had successfully "cut" the deficit, he could see no reason to act to cut the deficit further until "[s]econd term.").