A Symbolic Balanced Budget Amendment

Neal Devins
William & Mary Law School, nedevi@wm.edu

Repository Citation
https://scholarship.law.wm.edu/facpubs/428
A Symbolic Balanced Budget Amendment

Neal Devins*

Here we go again! Following budget summits in five of the past ten years (1982, 1984, 1985, 1987 and 1989), budget reform legislation in three of those years (1985, 1987 and 1990), and countless legislative proposals and presidential appeals, the deficit will reach $350 billion in fiscal year 1992—just enough to push the national debt over the $4 trillion mark. The gross interest on this debt ($315 billion in fiscal year 1993) has fast become the budget’s single greatest expenditure, and it now constitutes twenty percent of all federal spending. To put this imponderable figure into perspective, the National Taxpayer’s Union asks us to imagine a bake sale to pay off the debt by selling bread at $1 per loaf: “730 loaves would have to be sold to each of the world’s 5.2 billion people. This is so much bread that—if it were all eaten at once and converted to fat—everyone in the world would gain 145 pounds.”

With the deficit’s unrelenting, albeit predictable, growth, it seemed a safe bet that a balanced budget constitutional amend-

* Associate Professor of Law, Lecturer in Government, The College of William and Mary. Thanks to David Lee for research assistance.

4 See Simon, supra note 3.
ment would get the requisite two-thirds House and Senate support in June 1992. After all, the clamor for a budget amendment had become thunderous these past few years. Thirty-two states had called for a constitutional convention to consider such an amendment, and the 1986 and 1990 budget amendment proposals failed by a total of eight votes. Thanks, however, to a furious eleventh hour campaign by Congress’ Democratic leadership (resulting in twelve Democrat co-sponsors voting against the amendment), the 1992 amendment proposal failed by nine votes.

The amendment—perhaps without Bill Clinton’s support—will be back next year. So will the item veto, impoundment, and who knows how many other constitutional and statutory reform proposals. These proposals neither die nor fade away, although their titles and provisions do vary a bit from year to year. The budget debate is as repetitive as it is important. Indeed, the only thing that changes are the numbers. But the numbers are so staggering that it appears they do not change either. Over the past decade, this debate has acquired a timeless quality—much like Jerry Lewis’ annual Muscular Dystrophy telethon, although no one claims the participants in this epic battle as their kids.

Crocodile tears notwithstanding, the failure of the 1992 budget amendment is hardly cause for despair. Aside from creating havoc for a judiciary ill-suited to interpreting it, and perhaps shifting a modicum of budgetary power from the Congress to the White House, the amendment would have had little impact. It seemed more an invitation for smoke screens and mirrors to conceal deficit spending than a promising vehicle to solve our budget

---

9 Clinton’s economic proposal places little emphasis on reducing the deficit. Specifically, while proposing roughly $300 billion in spending cuts by 1996, Clinton would also increase spending on new public works programs by $220 billion. See Michael Wines, The 1992 Campaign: The Republicans; Bush Attacks Clinton Economic Plan as “Big Mistake,” N.Y. Times, July 21, 1992, at A14. Although economic growth may also reduce the deficit, Clinton’s plan estimates a $150 billion reduction in a $4 trillion deficit by 1998. See Id.
To balance the budget, the executive and legislative branches must take the heat for reducing expenditures and/or increasing revenues. Automatic mechanisms, especially those with a kick-out provision, cannot accomplish this objective.

That hard budgetary choices must be made does not make obsolete either a balanced budget amendment or structural changes in the budgetary process. A purely symbolic budget amendment might do some good and is unlikely to do much harm. More significantly, the statutorily-defined roles of Congress and the President are in need of adjustment. Specifically, the President should play the predominant role in defining budget aggregates, leaving Congress the task of establishing program priorities in conjunction with the White House.\(^\text{11}\) Make no mistake, these measures are no substitute for tax increases, program cuts and other traditional tools to attack the deficit. But these measures will make it easier for the elected branches to work together in solving the deficit crisis.

This essay makes the case for a hybrid constitutional-statutory approach to budget reform, combining a symbolic balanced budget amendment with statutory realignment of budgetary responsibilities. An examination of the correlation between legislative-executive budgetary roles and the growth of the deficit shows that the White House is better equipped than the Congress to determine budget aggregates. Moreover, a review of budget reform in the 1980s highlights both the allure and likely failure of automatic spending mechanisms. At the same time, an analysis of the recent balanced budget amendment proposal reveals that it suffers the same (and more) failures as the 1980s' automatic mechanisms. This essay proposes a hybrid approach to budget reform, with a symbolic balanced budget amendment as the necessary first step in solving the deficit mess.

I. THE BALANCE OF POWER IN BUDGETARY POLITICS

The Constitution places the power of the purse with Congress. The prohibition on drawing money from the Treasury "but in Consequence of Appropriations made by Law" reflects the framers' fear of the consequences of centralizing the powers of the purse and the sword. As James Madison wrote in The Federalist No. 58: "This power of the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people . . . ."

While the "legislative department alone has access to the pockets of the people," the President's budgetary role is far from de minimis. Through the qualified veto power and the power to recommend, Congress must pay attention to the budget sensibilities of the White House. Nonetheless, the President's budgetary role is clearly subordinate to that of Congress. Congress determines funding levels and establishes parameters for the expenditure of appropriated funds. Although the power to recommend, and especially the power to veto, enable the President to communicate vigorously his views to Congress and participate actively in the process, Congress makes the ultimate decision about whether and to what extent executive sentiments should prevail.

Through its control of budgetary decision-making, Congress is also empowered to create formal mechanisms of communication between the executive and the legislature on budgetary matters. Prior to 1921, the President had no statutory responsibilities for

---

12 Portions of the following section are borrowed from Neal Devins, Budget Reform and the Balance of Powers, 51 Wm. & Mary L. Rev. 993, 999-1004 (1990).


14 U.S. Const. art. I, § 9, cl. 7.

15 In the words of Montesquieu, who greatly influenced the framers: "Were the executive power to determine the raising of public money, otherwise than by giving its consent, liberty would be at an end; because it would become legislative in the most important point of legislation." Baron de Montesquieu, The Spirit of the Laws, Bk. XI, § 6 at 160 (Thomas Nugent ed., 1949).


submitting a budget.\textsuperscript{18} The President's formal role began with the Budget and Accounting Act of 1921 (1921 Act),\textsuperscript{19} which Congress enacted in response to the huge national debt accumulated during World War I. The 1921 Act required the President to construct and submit an annual budget, but it allowed Congress complete freedom to alter the budget.\textsuperscript{20} Congress was expected to coordinate its revenue and spending decisions with the President's budgetary recommendations. The President was supposed to be responsible for overall budget aggregates, with Congress retaining the right to set priorities within those aggregates.\textsuperscript{21}

Although the 1921 Act accorded greater budgetary responsibility to the President, it did not alter the fundamental balance of power between Congress and the President.\textsuperscript{22} The President's responsibility to establish budget aggregates was more than tempered by Congress' power to increase or decrease the President's budget by a simple majority vote. The 1921 Act thus respected two essential constitutional principles: the President's responsibility for his own proposals and Congress' ultimate responsibility for appropriations, subject only to the President's veto. Under the 1921 Act, Congress did not surrender or dilute its fiscal prerogatives, nor invade any executive prerogatives. In fact, the 1921 Act did not subordinate executive prerogatives.

Congress sought again to protect its budgetary prerogatives, and preserve the balance of power between the executive and itself, when it enacted the Congressional Budget and Impoundment Control Act of 1974 (Budget Act).\textsuperscript{23} Congress passed the Budget Act in response to the impoundment controversy of the early

\textsuperscript{18} See Louis Fisher, Presidential Spending Power 9-35 (1975) (discussing presidential duties in budget matters prior to the 1921 Budget and Accounting Act).
\textsuperscript{20} See Fisher, supra note 18, at 34.
\textsuperscript{21} See Louis Fisher, Constitutional Conflicts Between Congress and the President 226-27 (1985).
\textsuperscript{22} As stated in the House Report:

It will doubtless be claimed by some that this is an Executive budget and that the duty of making appropriations is a legislative rather than Executive prerogative. The plan outlined does provide for an Executive initiation of the budget, but the President's responsibility ends when he has prepared the budget and transmitted it to Congress.

1970s, in which President Nixon claimed that the executive could refuse to spend appropriated funds if he judged such refusal to be in the national interest. Presidential impoundments threatened the budgetary balance of power. By withholding appropriations, the President could control aggregates and priorities.

The Budget Act contained a number of provisions designed to strengthen congressional control over fiscal affairs. Under the Budget Act, presidential rescissions of appropriated funds required both Senate and House approval. The Budget Act also created budget committees in the House and Senate, established the Congressional Budget Office to supply technical support, and required the adoption of budget resolutions to set overall limits on budget aggregates (such as total outlays and revenues) and permit debate on spending priorities. In formulating its budget resolutions since 1974, Congress has often applied economic, technical and policy assumptions different from those presented in the executive budget.

The principal consequence of this transformation was fiscal irresponsibility. The Budget Act hinged on a centralized process, the budget resolution. Yet Congress, unlike the quintessentially cen-

---


29 Id., § 305, 88 Stat. at 310-12 (codified as amended at 31 U.S.C. § 1326). Through the use of a congressional budget adopted in concurrent resolutions, Congress sets "macro" policy and allocates the outlays and budget authority among a number of broad categories, such as national defense, health and agriculture. Congress is still supposed to formulate and fund specific programs through regular appropriation bills, but within the broad outlines of the budget resolution. Allen Schick, Legislation. Appropriations, and Budgets: The Development of Spending Decision-Making in Congress 41-43 (1984).

eralized executive, is strongly decentralized. Whereas the Office of Management and Budget must answer to the President, and therefore serves as the White House’s authoritative voice on budget matters, the Congressional Budget Office has less institutional clout because it is not answerable to any of the 535 members for which it speaks. These institutional differences have contributed to the budget deficit in two quite distinct ways. First, by devaluing the President’s budgetary role, Congress and the White House both pay more attention to program priorities than budget aggregates. Consequently, anticipated revenues have been overestimated in order to make way for greater spending. Congress accomplished this mischief by voting on generous ceilings in the budget resolution, while the President simply manipulated his aggregates to accommodate policy preferences. Second, by centralizing its budgetary decision-making through both the budget resolution and increased reliance on omnibus appropriations housed in a single continuing resolution (rather than thirteen separate appropriations bills), Congress became vulnerable to centralized but ill-conceived budget planning.

Witness the exponential growth of budget deficits since 1981. Prior to 1981, the accumulated national debt stood at roughly one trillion dollars. Although over-optimistic budget projections made deficits common (occurring in all but five years since 1950), deficit spending averaged only 5.1 percent of total outlays from 1950-1980. That all changed in 1981. Riding the wake of Ronald Reagan’s dramatic 1980 election victory, the Reagan administration successfully pushed through Congress a new vision of economic growth. Believing that a tax cut would spur more than enough economic growth to offset lost revenues, Congress slashed taxes by an estimated $150 billion annually, while reducing expenditures

31 For a related argument, see Fisher, supra note 11, at 696-97.
by less than $50 billion.\textsuperscript{35} Things did not work out as planned. Supply side economics could not turn around restrictive Federal Reserve Board action and a sluggish economy.\textsuperscript{36} As a result, the Reagan administration deficit estimate was off by over $100 billion.\textsuperscript{37}

The 1981 deficit debacle reveals the failings of the 1974 Act structure. With neither branch taking the heat for unrealistic budget aggregates, the likelihood of widely supported social policy objectives (such as increasing programmatic expenditures or decreasing taxes) controlling aggregate figures was greatly increased. Indeed, while 1981 was a watershed, a comparison of the five years before and the five years after the 1974 Act reveals that the annual deficit had already quadrupled.\textsuperscript{38} 1981 proved so extraordinary because the Reagan administration's economic assumptions were more daring and because Congress' endorsement of supply side economics in its budget resolution cabined alternative formulations. In other words, by avoiding the necessity of working separately on thirteen appropriations bills as well as tax reform (where the Reagan administration program "would have been chopped to bits by successive committee and subcommittee action"), "[t]he budget resolution gave [Reagan] the centralizing vehicle he needed."\textsuperscript{39}

However, 1981 did much more than produce a mammoth single-year deficit. Its unrealistic economic assumptions set in motion subsequent deficits. By 1985, budget deficits were so outrageous that Congress felt compelled to act. Its solution was the peculiar Gramm-Rudman-Hollings Deficit Control Act (Gramm-Rudman). Gramm-Rudman represents something of a hybrid. In enacting the bill, Congress proved it was no longer willing to trust either its own internal budgetary process or the President's.\textsuperscript{40} Consequently, in both Gramm-Rudman's original form and its 1987

\textsuperscript{35} Id. at 382 (citing Cong. Q. Almanac, vol. 37 at 98, 259 (1981)).
\textsuperscript{36} Id. at 382-84.
\textsuperscript{37} Id. at 384-85.
\textsuperscript{38} See John Crawford, Balanced Budget Amendment Suddenly Comes to Life, reprinted in 1992 Cong. Q. Wkly. 1234-35 (May 9, 1992) (National Taxpayers Union Chart).
\textsuperscript{39} Fisher, supra note 11, at 697.
\textsuperscript{40} Jack Brooks, Gramm-Rudman: Can Congress and the President Pass This Buck?, 64 Tex. L. Rev. 131, 131 (1985) (labeling Gramm-Rudman "a wholesale abdication of constitutional responsibility").
reincarnation, an automatic sequestration procedure ensures that the budget conforms to deficit reduction targets. Specifically, if the regular appropriations process does not produce a budget within Gramm-Rudman's prescribed deficit reduction target, the President's Office of Management and Budget prepares a sequestration order to be issued shortly after the start of the fiscal year. In order to limit executive control, Congress has specified mandatory formulas for allocating the spending cuts. The executive, therefore, cannot use the sequestration order as an opportunity to control budget priorities. As Senator Phil Gramm (R-Tex) explained:

Let me make note of . . . why this is significantly different than impoundment, and why it is significantly different than any line-item veto approach. We all know that the difficulties in those procedures is that Members of Congress are jealous of their powers, and they do not want to transfer power to the executive branch . . . . This bill does not create new powers.

Although Gramm-Rudman does not alter the fundamental budgetary balance of power, Congress' utilization of automatic mechanisms and reliance on entities outside its control paved the way for the further abdication of budgetary responsibility. As

---


44 For a description of this process, see Kate Stith, Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings, 76 Cal. L. Rev. 595, 630-33 (1988).

45 The White House, however, can reap benefits from the sequestration order. For example, President Bush threatened to veto the FY 1990 budget bill and consequently let the Gramm-Rudman sequestration take effect in order to further both his budget priorities and his bargaining position with Congress. See Jodie Allen, How the Administration is Beating Congress in the Budget Game, Wash. Post, Nov. 8, 1989, at B3; Tom Kenworthy & Helen Dewar, Bush Demands Hill Set New Budget Cuts, Wash. Post, Nov. 3, 1989, at A1. In other words, a President willing to let across-the-board budget cuts take hold can put pressure on Congress to draft a budget bill that matches presidential priorities. This proposition, of course, assumes that Congress would disfavor the Gramm-Rudman sequestration order more than the President. If the reverse were true, that is, the President disfavored across-the-board cuts more than Congress, Gramm-Rudman would enhance legislative bargaining power.

Congressman Jack Brooks (D-Tex) wrote in his lament of Gramm-Rudman: "Active efforts to cure a problem may be controversial and are seldom risk-free. It is tempting to believe that avoiding blame is a safer course." He added, "Gramm-Rudman demonstrates once again that political accountability is an extremely difficult problem for the American system of government." 47

Gramm-Rudman, in fact, exacerbated the failings of the 1974 Act. Rather than compelling realism, the Act spawned budget gimmickry. As former Congressional Budget Office head Rudolph Penner noted: "Gramm-Rudman produced forecasts that promised to achieve deficit goals when there was little hope of coming close to them. It spawned accounting gimmicks that seemed to make the deficit lower than it really was." 48 Examples of this include shifting costs away from the present year to an earlier year and raising revenue in the current year at the expense of future revenue. 50 Another tactic was for the Office of Management and Budget to limit program cuts by grossly overestimating revenues. 51 Senate Budget Committee Chair Jim Sasser, expressing frustration at this subterfuge, complained that "we have ended up with two sets of books... First, we keep a set for the Gramm-Rudman game—and this is a useful fiction manipulated to give the illusion of progress—and second, we keep a set of books that are the real books. This is the real deficit." 52

Gramm-Rudman also makes centralization in budgeting through the ongoing use of continuing resolutions a near certainty. 53 Appropriations subcommittees are unlikely to bring their bills forward because some cuts in a committee's appropriations may be necessitated as the committee struggles to meet deficit-reduction goals in subcommittees. In other words, a subcommittee that makes the requisite spending cuts may nonetheless have their bill...

47 Brooks, supra note 40, at 135.
48 Id. at 137.
50 Penner, for example, points to the government's willingness to forego future revenues by allowing borrowers to encourage early repayment of high interest government loans at lower rates to reduce short term deficits. Id. See also Fisher, supra note 11, at 698.
52 Budget Reform Proposals, Joint Hearing Before the Senate Comm. on Governmental Affairs and the Senate Comm. on the Budget, 101st Cong., 1st Sess. 2 (1989).
53 See Devins, supra note 33, at 395.
cut another time to make up for other subcommittees who do not meet their deficit-reduction goals. The current system, by encouraging last minute action, shifts control away from decentralized appropriation subcommittees to the more centralized Appropriations Committee, which hammers out the entire budget in the form of a continuing resolution.

Unrealistic budget projections and centralized budgeting are the hallmarks of Gramm-Rudman. This outcome should come as no surprise. From 1986-1991 (when deficit targets were in place), the nation’s deficit rose $1.2 trillion. During this period, the actual deficit exceeded deficit-reduction targets by more than $400 billion.

The failure of Gramm-Rudman prompted further reforms in 1990. The Budget Enforcement Act of 1990 substituted heretofore impossible-to-meet deficit-reduction goals with spending guidelines. These guidelines, by placing separate upper limits on de-

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Maximum Deficit Amount</th>
<th>Actual Deficit</th>
<th>Actual Deficit Over Target</th>
</tr>
</thead>
<tbody>
<tr>
<td>1986</td>
<td>171.9</td>
<td>221.2</td>
<td>949.3</td>
</tr>
<tr>
<td>1987</td>
<td>144</td>
<td>149.8</td>
<td>3.8</td>
</tr>
<tr>
<td>1988</td>
<td>144</td>
<td>155.2</td>
<td>11.2</td>
</tr>
<tr>
<td>1989</td>
<td>156</td>
<td>153.5</td>
<td>17.5</td>
</tr>
<tr>
<td>1990</td>
<td>100</td>
<td>220.5</td>
<td>10.5</td>
</tr>
<tr>
<td>1991</td>
<td>64</td>
<td>268.7</td>
<td>204.7</td>
</tr>
<tr>
<td>TOTAL</td>
<td>759.9</td>
<td>1,168.9</td>
<td>409</td>
</tr>
</tbody>
</table>

(in billions of dollars)


See Devins, supra note 33, at 396-400.

Congressional Research Service specialists Robert Keith and Edward Davis prepared the following table comparing actual deficits to deficit targets:

154 As David Obey, chairman of an appropriations subcommittee, explained on the House floor:

I warn you, even though people will give us these pious pronouncements now supporting 13 individual appropriations bills, so long as Gramm-Rudman is on the books there is an incentive for every committee around here not to bring their bill out to floor, because even if they cut their own bill and meet the spending limitations required under a budget resolution, that does not guarantee that every other committee will perform, and so they can wind up having their bill cut twice.

fense, domestic and international spending, were intended to keep expenditures stable. The problem is that the deficit once again exploded. The combination of a costly savings and loan bailout and a persistent recession that limited revenues resulted in a deficit estimated at more than $350 billion for fiscal year 1992, the Act's first year in operation. Moreover, with interest on the national debt well in excess of $200 billion and rising quickly, the Budget Enforcement Agreement (which ignores the problem on revenues altogether) cannot hope to tame the deficit.

What needs to occur is a return to the pre-1974 arrangement of presidential control over aggregates and legislative control over priorities. Automatic mechanisms like Gramm-Rudman invite abuse by deflecting institutional accountability. Moreover, as Louis Fisher and others have observed, "reforms have appealed to institutional weaknesses rather than to institutional strengths. By looking to Congress for comprehensive action, the unity and leadership that must come from the President have been unwittingly weakened."

Make no mistake about it. This re-transformation will not eliminate deficits. Prior to 1974, optimistic economic forecasts by the President typically resulted in modest deficits. That is not likely to change—especially with interest payments on the national debt in excess of $200 billion. Rather than a panacea, this re-transformation is a necessary first step on the path to fiscal salvation.

II. THE IMBALANCE OF A BALANCED BUDGET AMENDMENT

Budget reform is about more than deficits. It is also about the balance of power. Budgetary reform that enables the President's budget to assume a status superior to Congress' is contrary to the constitutional principle of checks and balances. The Budget and Accounting Act of 1921 and the Impoundment Control Act of 1974

60 See Hager, supra note 3, at 1145.
61 See Fisher, supra note 11, at 699.
62 See Peterson, supra note 54, at 367-70.
reinforce this principle. Gramm-Rudman, while limiting legislative discretion, is not contrary to this principle. Under our existing constitutional scheme, we should disfavor proposals that threaten to alter the balance of power. Recent proposals to constitutionally mandate a balanced budget, to grant the President power to veto (or reduce) any item in an appropriation, and to enhance the President's impoundment authority must be examined with reference, not just to these devices' budget savings potential, but also to the balance of power.

Proposals to grant the President power to disapprove or reduce any item of appropriation through an item veto or enhanced impoundment authority explicitly seek to restructure the balance of power on budgetary matters. Under these proposals, executive prerogatives trump legislative desires unless a two-thirds supermajority in Congress overrides the item veto or impoundment decision. These proposals should be disfavored for this reason alone. Worse yet, item veto and impoundment authority is likely to do little to solve the deficit problem. State experiences with these devices, even assuming that they are instructive in understanding the federal system, raise doubts about the deficit-reduction power of such structural change. Partisan politics, not fiscal restraint, seems to be the animating force of state experiences. State experiences also reveal an instrumental judicial role in establishing the scope of these budgetary powers, suggesting that the dimensions of presidential item veto and impoundment power...
would be decided in the courts. Moreover, there is little reason to think that the President would accomplish much in the way of budget savings with these powers. A 1992 Congressional Research Service analysis suggests a maximum savings of roughly $500 million a year. More strikingly, President Reagan's annual list of "wasteful, unnecessary, or low priority spending projects" totaled less than a billion dollars in savings. With annual deficits of $200 billion or more, these savings hardly warrant the substitution of presidential priorities and judicial edicts for legislative desires.

The balanced budget amendment is supposedly cut from a different cloth. The leading proposal, sponsored by Texas Democrat Charles Stenholm in the House and Illinois Democrat Paul Simon in the Senate, mandates a balanced budget without explicitly granting the President any new powers. Specifically, starting (depending on ratification) as soon as fiscal year 1995, "total outlays of the United States for any fiscal year shall not exceed total receipts to the United States for that year, unless Congress approves a specific excess of outlays over receipts by [a] three-fifths . . . vote." To ensure that balancing the budget "be a shared governmental responsibility," the proposed amendment requires the President to transmit a balanced budget to Congress prior to each fiscal year. According to a Senate Judiciary Committee report, this language will further collaboration between the branches in fiscal planning and "is not intended to grant the President additional formal authority or power over budget legislation or spending."

The question remains, however, whether this amendment will deliver what it promises, namely a balanced budget, without disrupting the balance of powers. The answer, unfortunately, is no.

---

68 See Fisher & Devins, supra note 64, at 168-76.
70 The Line Item Veto: Hearings on S.J. Res. 14, S.J. Res. 23 and S.J. Res. 31 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 101st Cong., 1st Sess. 294-95 (1989) (statement of Louis Fisher). It is possible that President Reagan would have been willing to cut more than a billion dollars had he been given a mandate to reduce the deficit through an item veto. Nonetheless, the gap between annual deficits and Reagan's proposal reveals the difficulty of aggressive presidential use of the item veto.
71 Senate Report, supra note 7, at 6.
72 Id. at 8.
73 Id.
74 Id.
The amendment will severely disadvantage the Congress vis-a-vis the White House in fiscal policy. Moreover, the amendment will thrust unelected judges into the midst of the budget thicket. Worse yet, the amendment is more likely to prompt Gramm-Rudman-type gimmickry and deception than the hard economic choices necessary to address the deficit.

A. Why the balance of powers will be disrupted.

Amendment sponsors make the straightforward claim that their proposal does not change the balance of powers because “[n]o branch of government is disadvantaged relative to the other.” The President is not given impoundment, item veto or item reduction power; the rights and responsibilities of Congress are unaffected, except in prohibiting deficits. The risk of overreaching court interpretations is likewise tossed aside because of the amendment’s clarity, Congress’ ability to legislatively respond to court decisions, and inherent standing and political question limits that will minimize the judiciary’s role. Moreover, the risk of putting taxing and spending in the hands of unelected judges “is a small risk compared to the certain danger of continuing on the current course.”

This analysis is too simplistic. Executive power may well be enhanced either by implementing legislation or executive claims of implicit grants of authority. Congressional power may be diminished by this provision and because the three-fifths override tends to favor presidential prerogatives. Finally, issues of court interpretation are troubling.

These conclusions are driven by a fundamental question: What happens if Congress doesn’t balance the budget either because it cannot or does not want to? The incentives to satisfy constituent and national interests through spending, the disincentives to raise tax rates, the willingness of elected government to make unrealistic

---

76 Id.
budget assumptions and a $4 trillion national debt all suggest the reasonableness of this question. Budget amendment proponents, however, do not like this question. The Senate Judiciary Committee Report claims that “[s]tatutory efforts are vulnerable to a change of heart or weakening of resolve” while a constitutional amendment commands respect and dutiful obedience because “[b]oth the President and Members of Congress swear an oath to uphold the Constitution.”\(^79\) Put another way: “[B]ecause we have not been successful in anything else, and because we have run out of other ideas, we should adopt the balanced budget amendment.”\(^80\) Nonetheless, this question demands an answer and the answer is disturbing.

Congress’ inability or unwillingness to comply with a budget amendment would mean that the executive and/or the judiciary will put the amendment into effect. Executive power might be increased in one of four ways. First, Congress might statutorily grant impoundment, item veto, taxing or other budget-making powers to the President. As the Senate Judiciary Committee recognized when it reported on a budget amendment proposal in 1984: “This provision ... does not invest in the President any new authority to impound appropriated funds; Congress, however, may choose to amend existing impoundment statutes (consistent with the Constitution) and establish greater authority in the President to carry out his Section 1 obligations by impounding funds.”\(^81\) Second, absent an explicit grant of power, the President may nonetheless argue in court that only through the elimination or reduction of items in an appropriation can he comply with his constitutional obligation to balance the budget.\(^82\) Otherwise, so the argument goes, Congress’ violation of its balanced budget obligations will compel the President to breach his constitutional responsibilities. Third, whenever the President disagrees with the balanced budget submitted by Congress, he can place the Congress in a difficult position (unless two-thirds of Congress overrides his veto). Take Louis Fisher’s example of the President and Congress

---

\(^79\) Senate Report, supra note 7, at 5.  
\(^81\) Id. at 195 (Vol. I) (statement of Louis Fisher).  
disagreeing about the amount of money needed to maintain governmental programs—with the President insisting that less money is necessary to maintain existing governmental operations: “Congress will be at a political disadvantage. Either it will go on record as wanting higher taxes than the President or it will have to bear the burden of cutting social programs. The President escapes both chores.”[^83] Congress’ only way out of this dilemma is to succumb to the President’s budget figures. Fourth, the requirement that a three-fifths majority approve deficit spending also improves the President’s bargaining position. To the extent that the President is the head of his political party, presidential support will become a key ingredient in amassing a three-fifths majority.[^84]

Minority factions in Congress would likewise benefit by the three-fifths requirement. Since two-fifths of either house could block deficit spending, accommodations to at least some minority interests will often be a prerequisite to securing supermajority support. The outcome of this anti-majoritarian device would be neutralizing the gap of power between the majority Democratic and minority Republican parties. Democratic Congressman Jack Brooks put it bluntly: “They [the Republicans] could extract any demand they wish to in order to permit vital legislation to go forward. Is it any wonder that all but a handful of the minority party in this House should embrace such a scheme?”[^85] Brooks’ concern is certainly rooted in partisan interests but it is more than that. It is about restructuring internal congressional operations by “enshrin[ing] the principle of minority rule on the most important issues [Congress] deals with; namely, economic issues.”[^86]

The budget amendment implicates more than executive- legislative relations and internal congressional operations. It also sets the stage for complex and divisive budget issues to be resolved by unelected judges. To start, amendment sponsors recognize that “the

[^84]: In the words of Rep. David Obey (D-Wisc.), this demand for supermajority support “simply increases what you are going to have to pay out in order to buy off enough people to impose any budget and economic policy.” Id. at 7 (Vol. II) (testimony of Rep. David Obey). Minority factions may demand reductions on majority-favored expenditures and/or increases in minority-favored expenditures.
[^86]: Id. at H4500 (statement of Rep. David Obey).
courts [might] be required to step in" and that "the final arbiter will be, as in all constitutional matters, the Supreme Court." 87 Indeed, were the courts to invoke justiciability barriers to stay out of this thicket, the budget amendment would become an unenforceable albatross—a visible and embarrassing showcase of the federal government's inability to deal with the national debt. 88 Judicial involvement seems likely, however. Standing and the political question doctrine will not foreclose judicial review, especially since congressional sponsors recognize the possible need for judicial enforcement. 89 Correlatively, state experiences, to the extent that they are relevant, suggest active and far-ranging court involvement.90

What that means is ceaseless, nightmarish litigation. In the words of Robert Bork (commenting on an earlier amendment proposal):

The language and the subject matter [of the amendment] are technical, so that almost endless opportunities for litigation, and hence for judicial dominance in the budget process, exist. Terms must be defined under endlessly varying circumstances; conventions about statistics, accounting, budget making, and other arcane matters must be probed and specified. The prospect may be for nightmare litigation that would be damaging both to the judiciary and to the budgetary process. 91

Judge Bork is correct. Interpretation problems are as plentiful as are lawyers willing to file suit. Several witnesses in recent balanced budget hearings pointed to the following (and many more)

88 Id. at 420-23 (Vol. II) (statement of Alan Morrison, Director of Public Citizens Litigation Group).
interpretation problems: 92 Are there any limits on the projected rule of economic growth in crafting a balanced budget? Could the President’s budget proposal rely upon savings from programs that Congress clearly favors? Do federal outlays include expenditures on quasi-public entities like AMTRAK and the Postal Service? More generally, how does one define such terms of art as “outlays,” “receipts,” “fiscal year,” and “public debt?”

The risk of judicial involvement is much more than a problem of malleable language. That problem inheres in many constitutional provisions. The budget amendment raises fundamentally different concerns. Were the courts to mandate a balanced budget through tax increases and the like, the judiciary would assume the power of the purse. 93 This is directly contrary to the constitutional design that accords broad powers to the judiciary precisely because it “has no influence over either the sword or the purse.” 94 For this reason, Alan Morrison closed his congressional testimony on the budget amendment with the admonition that “if my testimony has frightened you, that was my intent in giving it. Each of you should ask yourselves whether you really want the federal courts to control the federal government.” 95

B. Why the budget deficit will remain

Amendment sponsors claim that the need to balance the budget outweighs the risks of disrupting the balance of powers. That might be true if the budget amendment were likely to accomplish its objective. State experiences with balanced budget amendments, however, call into question the power of this constitutional mandate. Moreover, the three-fifths supermajority requirement

92 See Hearings, supra note 11, at 415-68 (Vol. II) (statement, testimony and questioning of Alan Morrison); id. at 151-80 (Vol. I) (statement, testimony, and questioning of Robert Reischauer, Director of Congressional Budget Office; Hearings II, supra note 82, at 97-108 (statement of Prof. Henry P. Monaghan).


95 Hearings, supra note 11, at 492 (Vol. II) (statement of Alan Morrison). This contention is not far fetched. In Missouri v. Jenkins, the Supreme Court affirmed the power of the federal courts to impose tax levies to ensure state and local government compliance with court-ordered remedies. 495 U.S. 55 (1990).
for deficit spending will not stand as a bulwark against growing annual deficits. Instead, the moral command to comply with the budget amendment will likely be overwhelmed by incentives to maintain existing expenditures and disincentives to increase taxes.

Amendment boosters argue that state experiences support a federal budget amendment. George Bush, in a nationwide address on the eve of Congress' June 1992 budget amendment vote, emphasized that "forty-four of our states have some kind of a constitutional requirement for a balanced budget. It's time for the federal government to follow their lead." The Senate Judiciary Committee Report which accompanied this year's budget amendment likewise noted that state budget amendments are "workable" and that "[s]tate legislatures have learned to operate effectively within the external limitation of their constitutions."

This claim is overblown. While program cut-backs, salary freezes and tax increases typify state austerity programs, a great many states (especially large industrial states hard hit by the recession) have gone into debt. State long-term borrowing also has grown exponentially this past decade. To the extent that states rely on federal expenditures, a federal budget amendment will likely shift costs to the states and exacerbate problems that states now face in trying to balance their budgets. Moreover, the fact that state balanced budget amendment requirements are met is more a result of state accounting practices and gimmickry than a truly balanced budget. For example, state balanced budget amendments exempt capital spending for roads, education and urban renewal. Gimmickry too is widely used, "particularly borrowing from pools of money outside the general fund, deferring aid to local governments and other outlays, and asset sales."

State budgeting is different than federal budgeting for other reasons. States rely on their governors to balance their budget

97 Senate Report, supra note 7, at 5-5.
98 Hearings, supra note 11, at 202-10 (Vol. II) (statement of Steven Gold, Director of Center for the Study of States).
99 Id. at 190 (Vol. I) (citing General Accounting Office, Budget Issues: State Balanced Budget Requirements 42 (Dec. 1985)).
100 Id. at 204 (Vol. II) (statement of Steven Gold); Id. at 190 (Vol. I) (statement of Louis Fisher).
101 Id. at 202 (Vol. II) (statement of Steven Gold).
102 Id. at 202-10 (Vol. II). Fisher & Devins, supra note 64, at 162-65.
through item veto, impoundment and other powers. To truly follow the states model, a reworking of the federal balance of powers would also prove necessary.

That is not to say that the state system has failed. States are much better at balancing their budgets than the federal government. But the state experience sends a cautionary message. Deficits seem likely to remain, gimmicks seem likely to be used and power will likely shift from Congress to the President.

The requirement that deficits be approved by three-fifths of each House is intended to ensure that the amendment has bite as well as bark. The problem, as James Saturno of the Congressional Research Service observed, is that a simple majority could “evade the intent of the requirements for a supermajority vote” by changing the revenue estimate, changing the dates of the fiscal year or adjusting economic assumptions. Other methods (already used to circumvent Gramm-Rudman) that would not require three-fifths approval include: shifting pay dates between fiscal years, accelerating or delaying tax collections, delaying spending and selling government assets. Finally, terms of art such as “outlays” and “receipts” are also subject to interpretation, as is the question of whether the budget need be balanced throughout the fiscal year. Both the federal government’s experience with Gramm-Rudman and state balanced budget efforts speak of government’s proclivity for budget gimmickry.

The question remains whether the budget amendment will, in a way that Gramm-Rudman did not, spur Congress and the White House to increase revenues and reduce expenditures. Amendment sponsors say “yes,” both because a balanced budget, unlike deficit reduction targets, cannot be recalibrated and because the oath to uphold the Constitution, as opposed to statutory mandates, will be respected. The recalibration argument is not especially con-

105 Hearings, supra note 11, at 206-7 (Vol. II).
106 See generally Moore, supra note 66.
107 Cranford, supra note 59, at 1236.
108 Hearings, supra note 11, at 162-63 (Vol. I) (statement of Robert Reischauer, Director of Congressional Budget Office).
109 See Hearings II, supra note 82, at 105-07 (statement of Henry Monaghan).
110 See Senate Report, supra note 7, at 4-5. But see Hearings, supra note 11, at 202 (Vol. II) (statement of Steven Gold that statutory approaches are as effective as constitutional approaches).
vincing. The availability of a three-fifths override and the power of a simple majority over both outlay estimates and the accounting of expenditures indicates that a constitutional amendment is unlikely to make a balanced budget involatile.

The constitutional oath argument should not be discounted but it is also far from compelling. Congress’ past felicity to the oath is uneven. No doubt, Congress often takes this responsibility seriously, carefully scrutinizing the constitutionality and constitutional implications of its actions—including the enactment of legislation providing broader individual rights protections than the Supreme Court.\textsuperscript{109} On other occasions, however, Congress seems quite unaware of the constitutional oath.\textsuperscript{110} One such example is Gramm-Rudman I, where expediency ruled and constitutional concerns were pushed aside.\textsuperscript{111}

C. A balanced budget amendment?

Since there is nothing in the Constitution which prevents the enactment of a statute balancing the budget, the whole debate over the budget amendment seems a non sequitur. Humorist Dave Barry (in the most insightful and most enjoyable commentary on the budget amendment effort) put it this way:

Let’s play a little game: Let’s pretend that you readers are the Congress, and you wish to do something about the deficit. Bear in mind that:

1. You have the power to balance the budget.
2. You have ALWAYS had the power to balance the budget.
3. So any time you want, you can balance the budget.
4. Legally, nobody can stop you from balancing the budget.

Okay! So What would you do? Did you answer: “Balance the budget”? You did? Ha ha! This is why you are lowlife working scum, as opposed to a member of Congress.

What it is doing, amid much fanfare, is talking about passing a


\textsuperscript{111} See Fisher & Devins, supra note 109, at 142-60.
A Symbolic Balanced Budget Amendment

constitutional amendment requiring itself to balance the budget. Really. This amendment will become effective in a few years if three-fourths of the states ratify it. Meanwhile, this year Congress has produced the largest deficit ever.\textsuperscript{112}

That an unsuccessful balanced budget statute introduced in 1992 would not fully go into effect for six years (1998) also lends credence to this view of the current Congress passing off the deficit crisis to a future generation of elected officials.\textsuperscript{113} Robert Reischauer, director of the Congressional Budget Office, echoed this sentiment in dramatic testimony attacking the budget amendment and its sponsors: "In this election year, it would be a cruel hoax to suggest to the American public that one more procedural promise in the form of a constitutional amendment is going to get the job done."\textsuperscript{114} For Reischauer, Congress and the White House must make "painful decisions to cut specific programs and raise particular taxes."\textsuperscript{115}

Reischauer undoubtedly is correct. The budget, with or without a constitutional amendment, will not balance itself. Granted, as Walter Dellinger aptly commented, it would be wonderful if we could simply declare by constitutional amendment that the air would henceforth be clean, the streets would be free of drugs and the budget balanced forever. But saying those things in the Constitution does not make them happen."\textsuperscript{116} Hard choices must indeed be made.

Amendment sponsors recognize this. Why else put off the amendment's effective date for at least three years? Their claim simply is that a budget amendment compels the making of hard choices in a way that Gramm-Rudman and other statutory reforms do not.\textsuperscript{117} This contention should not be rejected out of hand. Constitutional amendments do create a sense of momentum and

\textsuperscript{114} Hearings, supra note 11, at 171 (Vol. I) (statement of Robert Reischauer).
\textsuperscript{115} Id.
\textsuperscript{116} Hearings II, supra note 82, at 112 (statement of Walter Dellinger).
\textsuperscript{117} Senate Report, supra note 7, at 4-5.
responsibility that no statute can equal. But are the tugs and pulls of the political process likely to yield the types of programmatic cuts and tax increases necessary to balance the budget? Probably not.

The costs of implementing the budget amendment proposal are staggering. For example, according to the President’s 1993 budget, the estimated fiscal year 1993 deficit ($350 billion) could not be balanced through the elimination of Social Security ($300 billion), Defense ($290 billion), or discretionary domestic programs and foreign aid ($245 billion). The Congressional Budget Office offers the following long-range projection: to eliminate the annual deficit through programmatic cuts would require an eleven percent reduction of all outlays; to eliminate the annual deficit by raising revenues would require a revenue increase (principally through new taxes) of about thirteen percent. Put another way: the elimination of the deficit requires fundamental changes in the operation of elected government.

These changes, today at least, seem unattainable. The vast majority of Americans, while supporting a budget amendment, are unwilling to pay the price for a balanced budget. In a recent survey, seventy-five percent answered “no” when asked whether “the government should raise taxes now as one means of dealing with the federal budget.” Instead, most prefer H. Ross Perot’s initial suggestion of eliminating, each year, roughly $180 billion of fraud, waste and abuse. Who wouldn’t? But, as Rep. David Obey (D-Wisc.) observed, “the last time I looked, there ain’t no line item in the budget for waste, fraud and abuse.”

Assuming (the unlikely) that some “waste, fraud and abuse” is found, it still will not approach the amount of the annual deficit. If taxes are not increased, programs must be cut. After the savings

---

120 A 1985 Gallup Poll of over 1000 adults found that 49% supported a balanced budget amendment, while only 27% were opposed. Search of WESTLAW, Poll Database (October 19, 1992).
122 See Hager, supra note 118, at 1144. Perot, of course, subsequently proposed to balance the budget through a combination of tax hikes and program expenditure cuts.
and loan bailout, the continuing extension of unemployment benefits, a proposed massive urban aid bill in the wake of the L.A. riots and increasing foreign aid to emerging democracies, the prospects of significant outlay reductions is daunting. Indeed, from 1981-1992, only two domestic programs of significance were terminated by the White House and Congress.\(^{124}\) While President Bush proposed termination of 246 programs in fiscal year 1993, only $5 billion of a $350 billion deficit would be reduced through these program cuts.\(^{125}\)

Elected government’s failure to either reduce expenditures or increase taxes is hardly a mystery. Elected officials have little incentive to balance the budget. Hearings are filled with witnesses who benefit from congressional spending. Since the costs of spending are typically spread throughout the nation, few witnesses oppose spending. A 1990 study by James Payne founded a 145 to 1 ratio of witnesses supporting proposed spending.\(^{126}\) When this finding was reported to Congressional staffers, their reaction was surprise that the gap was not larger.\(^{127}\) While the incentives for spending are strong, there is no incentive to finance increased spending through tax hikes. Elected officials (who want to stay elected), therefore, “‘enjoy’ appropriating money to benefit their constituents, but they do not ‘enjoy’ taxing them.”\(^{128}\) Former chair of the House Budget Committee James R. Jones (D-Okla.) summed it up this way: “There is a constituency for national defense. There is a constituency for every item of the domestic budget. There is a loud constituency for tax cuts. But there really is no constituency for a balanced budget.”\(^{129}\) That future generations will bear the brunt of this imbalance is a pill that most politicians are willing to swallow.\(^{130}\)


\(^{125}\) Id.


\(^{127}\) Id.

\(^{128}\) Elliot, supra note 6, at 1091 (citing James Buchanan & Robert Wagner, Democracy in Deficit: Political Legacy of Lord Keynes 85-94 (1977)).


\(^{130}\) See Elliot, supra note 6, at 1091-92 (discussing the works of public choice theorists James Buchanan and Richard Wagner); Note, supra note 89, at 1607 (discussing S. Rep. No. 151, 97th Cong., 1st Sess. 34 (1981)).
The balanced budget amendment assumes that elected government will change. While some change is possible, the cataclysmic change necessary to balance the budget seems a pipe dream. Rather than set into place a balanced budget, the amendment is more likely to spur on gimmickry, litigation and a shift in the balance of powers.

III. CONCLUSION: A SYMBOLIC BALANCED BUDGET AMENDMENT

Limitations on the proposed budget amendment do not foreclose constitutional tinkering in this area. Overwhelming incentives to spend and disincentives to tax will remain, however. Absent fundamental change affecting either the way we elect public officials or their terms of office,\(^{131}\) it is unlikely that elected officials will impose the costs of a balanced budget (through severe program cuts or tax increases) on the present generation.

Amendment opponents, stressing these realities, attack both the proponents’ motives and the propriety of constitutional reform. Pointing to elected government’s existing power to balance the budget, the amendment’s delayed effectuation date and the unwillingness of proponents to specify how the budget should be balanced, opponents perceive this reform effort as opportunistic at best and dishonest at worst. Rep. David Obey minced no words when, in addressing the House of Representatives, he claimed to “see as many people who remind me of Daffy Duck as I do Thomas Jefferson, and until I think the proportion gets a little better, I am a little reluctant to put the Constitution in the hands or at the mercy of modern-day founding fathers.”\(^{132}\)

Obey’s argument has substantial force but it goes too far. Admittedly, a budget amendment that does not alter the fabric of elected government cannot overcome a political system that rewards spending and punishes tax increases. Along the same lines, a budget amendment that sets specific policy objectives and then

---

\(^{131}\) E. Donald Elliot endorses the convening of a Constitutional Convention to examine such far reaching reform. Elliot, supra note 6, at 1066-1110.

leaves it to the three branches to put those objectives into place seems doomed. All the same, the symbolic importance of a budget amendment should not be discounted out of existence.

Conventional reform is more momentous than statutory change. Proponents of a balanced budget amendment seize on this fact to argue that a constitutional amendment demands greater fidelity than a statute. Opponents, in contrast, argue that constitutional change is so momentous that it should be disfavored unless essential. Pointing to weaknesses in the budget amendment, as well as the availability of statutory alternatives, opponents characterize the amendment as destructive. Their attacks on the specifics of past budget amendment proposals are well taken. But opponents of a balanced budget amendment are wrong to suggest that the Constitution is somehow trivialized by an amendment which encourages elected government to make use of its existing power. The Constitution is more than simply a set of rules governing the operation of government. It is also a metaphor for how we want to live. To say, as John Marshall did in Marbury v. Madison, that constitutional language must have meaning does not foreclose statements of aspiration in the Constitution.

What harm would come of a symbolic constitutional amendment stating that “The Congress and President shall seek to balance the federal budget?” This language, admittedly, is fluff. Furthermore, to the extent that the Congress and the President are presumed, “given adequate power, . . . [to] act responsibly for the public welfare,” the amendment is redundant. On the other hand, the constitutional oath could now be appealed to, and with some luck misdirected efforts at creating an enforceable budget amendment could be deflected. A symbolic amendment, moreover, does not trivialize the Constitution. It avoids the pitfalls of an unworkable amendment while recognizing that the national debt is one of those “great and extraordinary” matters that warrants constitutional change.

A symbolic constitutional amendment, by itself, is not enough. A statute reaffirming the pre-1974 arrangement of presidential

---

138 See Hearings II, supra note 82, at 98-103 (statement of Henry Monaghan).
134 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-80 (1803).
139 Hearings II, supra note 82, at 102 (statement of Henry Monaghan).
leadership in establishing budget aggregates would also help. In the end, however, elected government must make hard, painful choices. Programs must be cut and taxes may need to be raised.

Admittedly, there is good reason to doubt democratic accountability on budget matters. But "that is the system provided for in the Constitution." Unless we are willing to fundamentally change that system, we must rely on elected government to do the right thing. A symbolic budget amendment may assist in that effort. The fact that it is a constitutional placebo does not undercut its value.

137 See supra notes 13-62.